

[Cite as *Belich v. Olmsted Falls*, 2005-Ohio-190.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

Nos. 84537 and 84807

MARTIN BELICH, ET AL.	:	
	:	JOURNAL ENTRY
Plaintiffs-Appellants	:	
	:	AND
vs.	:	
	:	OPINION
CITY OF OLMSTED FALLS, ET AL.	:	
	:	
Defendants-Appellees	:	
	:	
	:	
DATE OF ANNOUNCEMENT	:	
OF DECISION	:	<u>January 20, 2005</u>
	:	
CHARACTER OF PROCEEDINGS	:	Civil appeal from
	:	Common Pleas Court
	:	Case No. CV-496216
	:	
JUDGMENT	:	AFFIRMED IN PART, REVERSED
	:	IN PART, AND REMANDED.
	:	
DATE OF JOURNALIZATION	:	
	:	
APPEARANCES:		
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SEAN C. GALLAGHER, J.:

{¶ 1} This is a consolidated appeal in which appellants Martin Belich, Mark Belich, and Great Lakes Crushing, Ltd. (collectively referred to herein as "GLC") appeal the decision of the Cuyahoga County Court of Common Pleas that granted judgment in favor of appellees City of Olmsted Falls, City of Olmsted Falls City Council, and City of Olmsted Falls Planning Commission (collectively referred to herein as "the City"). The trial court upheld the decision of the City of Olmsted Falls City Council, which found GLC's use of its property as a commercial concrete crushing operation was not a permitted use and affirmed the decision of the City of Olmsted Falls Planning Commission to deny GLC's application for a conditional use permit. GLC also appeals the decision of the trial court that granted a permanent injunction to the City. For the reasons adduced below, we affirm in part, reverse in part, and remand.

{¶ 2} The following facts give rise to this appeal. GLC is a company engaged in a concrete crushing and processing business. There are two aspects to the business. One aspect is site construction work. The other is recycling construction materials. With respect to the recycling operations, GLC processes broken or

washout concrete¹ that has been dumped on its property and then sells it.

{¶ 3} In May of 1997, pursuant to a license agreement, GLC began operating at 25720 Sprague Road, Olmsted Falls, Ohio, which consists of permanent parcel nos. 291-04-001 and 291-04-003. GLC ultimately purchased the parcels by January 2001. No zoning certificate or permit was obtained by GLC for its operations.

{¶ 4} An adjacent property was owned by Westview Concrete Corporation ("Westview Concrete"), which engaged in the manufacture of concrete. Beginning in 1958, Westview Concrete had used GLC's property for a supply yard and for dumping excess concrete.

{¶ 5} When GLC commenced operations, it began crushing an existing pile of hardened concrete washout material that had been deposited upon its property by Westview Concrete. Thereafter, GLC continued concrete crushing and processing on its property.

{¶ 6} In 2002, the City cited GLC for violating its zoning ordinances. As part of a plea agreement, GLC submitted an application for a conditional use permit. Following a hearing before the City of Olmsted Falls Planning Commission, GLC's application was denied. GLC appealed the decision to the City of Olmsted Falls City Council. After a hearing, the appeal was denied.

¹ The record reflects that washout material is created when a mixer or cement truck returns from a job site with leftover concrete and water is added to the material which is then spilled out and left to dry.

{¶ 7} GLC then appealed the matter to the Cuyahoga County Court of Common Pleas by filing a complaint for temporary restraining order, preliminary injunction, and other relief. GLC alleged that (1) its use of the property as a concrete crushing and recycling business was a valid nonconforming use; (2) the City's denial of a conditional use permit was arbitrary, capricious and unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record; and (3) the relevant City ordinance is unconstitutional, and the City's actions in denying a conditional use permit were unconstitutional.

{¶ 8} Following a bench trial, judgment was entered in favor of the City. Thereafter, the City filed a motion for a permanent injunction to enjoin GLC's concrete crushing operations at the property in the absence of a valid permit. The trial court granted the motion.

{¶ 9} GLC brought this appeal from the trial court's decisions. Upon motions of GLC, this court has stayed execution of the trial court's rulings pending this appeal.

{¶ 10} GLC has raised three assignments of error for our review. GLC's first assignment of error provides:

{¶ 11} "I. The judgment of the trial court finding and concluding that appellants' use of the property was not a prior lawful nonconforming use was erroneous and against the manifest weight of the evidence and/or based upon flawed application of the law."

{¶ 12} In civil cases, judgments that are supported by some competent and credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. A reviewing court must give deference to the findings of the trial court. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Moreover, evaluating evidence and assessing credibility are primarily for the trier of fact. *Crull v. Maple Park Body Shop* (1987), 36 Ohio App.3d 153. A trial court's decision should be overturned only when there is no competent and credible evidence that supports the judgment. *Seasons Coal Co.*, 10 Ohio St.3d at 80.

{¶ 13} Under its first assignment of error, GLC argues that the trial court erred in finding that GLC's use of the property for a concrete crushing and recycling operation was not a prior, lawful nonconforming use.

{¶ 14} A nonconforming use of land is a use that was lawful prior to the enactment of a zoning ordinance and, even though that use is no longer valid under the current zoning scheme, may be lawfully continued. *C.D.S., Inc. v. Gates Mills* (1986), 26 Ohio St.3d 166, 168; R.C. 713.15. "The Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution recognize a right to continue a given use of real property if such use is already in existence at the time of the enactment of a land use regulation forbidding or restricting the

land use in question." *Dublin v. Finkes* (1992), 83 Ohio App.3d 687, 690, citing *Akron v. Chapman* (1953), 160 Ohio St. 382, paragraph two of the syllabus. Moreover, the Supreme Court of Ohio has held that there is a "* * * right to continue the use of one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established * * *." *Akron v. Chapman* (1953), 160 Ohio St. 382, paragraph two of the syllabus.

{¶ 15} Nonconforming uses are also recognized by state statutes and local ordinances. R.C. 713.15 provides that the "lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or an amendment to the ordinance, may be continued, although such use does not conform with the provisions of such ordinance or amendment * * *." Further, the City's zoning code provides for the continuance of nonconforming uses of land. See City of Olmsted Falls Ordinance Nos. 1280.01-1280.03.

{¶ 16} A landowner claiming a valid nonconforming use has the burden of proving two requirements. Initially, the use must have been in existence prior to the enactment of the prohibitory land use regulation. *Dublin*, 83 Ohio App.3d at 690. Further, the land use in question must have been lawful at the time the use was established. *Pschesang v. Terrace Park* (1983), 5 Ohio St.3d 47, syllabus. "Stated another way, the use in question must have been in full accordance with all applicable land use regulations in

effect when the activity was begun." *Dublin*, 83 Ohio App.3d at 690. A use that was not permitted by the applicable zoning ordinance at the time the use was established does not constitute a nonconforming use. *Pschesang*, 5 Ohio St.3d at syllabus.

{¶ 17} In this case, the record reflects that Westview Concrete initiated concrete operations around 1957. At that time, the effective zoning ordinance specifically prohibited the manufacture of cement, lime, plaster or other similar material. Village of Westview Ordinance No. 558, Section VIII(a)(III)(D) (1953).²

{¶ 18} Although there was evidence that a portion of GLC's property, which had been occupied by a company known as Westview Lumber, was rezoned industrial in 1957 by Village of Westview Ordinance No. 1957-3, this did not affect the ordinance that prohibited concrete operations. The effect of the rezoning was to allow Westview Lumber to operate a lumberyard, which was a permitted use. Village of Westview Ordinance No. 558, Section VIII(a)(II)(1953). Insofar as GLC attempts to argue that its concrete operations were an expansion of Westview Lumber's prior permitted use, there can be no expansion of a nonconforming use without the existence of a valid nonconforming use.

{¶ 19} Alan Martin, an employee of Westview Concrete from 1957 to 1998, testified that prior to his joining the company, the property had been used for manufacturing concrete for the Ohio

² The Village of Westview and the Village of Olmsted merged in 1971 to create the City of Olmsted Falls.

Turnpike. Martin stated that the plant was "put together in probably 1951 or '52 for that purpose." However, neither party has established the date upon which the property began being used for concrete operations. See *Petti v. Richmond Hts.* (1983), 5 Ohio St.3d 129, 131, fn. 1 (landowner must establish the use was legal at the time the use was established).

{¶ 20} The record reflects that in November 1953, a zoning ordinance was passed that relaxed the provisions of Ordinance No. 558 only for the limited purpose of allowing Westview Concrete's property to be used in connection with the turnpike construction, and only until the completion of the turnpike or May 15, 1956, whichever date was sooner. The manufacture of concrete was prohibited in all other respects under Ordinance No. 558.

{¶ 21} The record reflects that at no time since 1953 has GLC's use of the property been a lawfully permitted use. Accordingly, GLC failed to establish a prior, lawful nonconforming use of the property. Because the trial court's determination is supported by competent and credible evidence, we do not find its decision to be against the manifest weight of the evidence. GLC's first assignment of error is overruled.

{¶ 22} GLC's second assignment of error provides:

{¶ 23} "II. The judgment of the trial court finding and concluding that the ordinances were not unconstitutional as applied to appellants' property was erroneous and against the manifest weight of the evidence."

{¶ 24} GLC claims the current ordinance sections that the City claims prohibit GLC's operations are unconstitutional because they are void for vagueness. These sections provide:

"1258.10 PROHIBITED USES.

"The following uses are specifically prohibited in an 'I' district:

"(d) Junkyards. Junkyards, scrap yards or waste material processes of any type; and

"(e) Offensive Uses. Any use which is hazardous, noxious or offensive due to the admission of odor, dust, smoke, fumes, vibration, beat frequency, refuse matter, or water-carried waste, as determined by the Zoning Administrator."

{¶ 25} GLC argues the ordinance does not define the terms "scrap yard" and "waste material processor" and does not specifically define or prohibit "recycling." Further, GLC argues the ordinance provides the zoning administrator with discretionary authority to determine what constitutes an offensive use. Finally, GLC makes the conclusive assertion that the ordinance is unconstitutional as applied to GLC's property.

{¶ 26} The City argues that the broken and washout concrete are scrap materials that are processed by using a crushing machine to crush larger pieces into smaller pieces. The City claims that this activity is clearly prohibited by the ordinance. As testified by the City's building and zoning administrator: "The current zoning code makes a very specific prohibition in the industrial district on junk yards, scrap yards, and waste material processing equipment, I believe is the phrase. They are most certainly a scrap yard and they are most certainly a waste material processor."

{¶ 27} Matters of land use planning are primarily of local concern. Therefore, municipalities have broad discretion in classifying and regulating uses of land. When an appellate court analyzes the constitutionality of a zoning ordinance, it begins with a strong presumption that the ordinance is valid. *Central Motors v. Pepper Pike* (1995), 73 Ohio St.3d 581, 1995-Ohio-289.

{¶ 28} In this action, GLC first challenges the ordinance as unconstitutionally vague. Ohio courts have repeatedly held that such an argument is inherently deficient in a zoning case:

"[Z]oning provisions are entitled to a strong presumption of validity. See, e.g., *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 32, 30 Ohio B. 33, 505 N.E.2d 966. In addition, the Ohio Supreme Court stated in *Franchise Developers* that '*** the unconstitutionally vague argument is usually applicable only to criminal ordinances which fail to put persons on notice as to what conduct is prohibited. Such an argument is inherently deficient in a zoning case where the zoning resolution, by its very nature, puts a property owner on notice that use of the property is subject to regulation.' Id., citing *Rumpke Waste, Inc. v. Henderson* (S.D. Ohio 1984), 591 F. Supp. 521. Furthermore, a zoning regulation is presumed to be constitutional unless determined by a court to be clearly

arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community. *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 690 N.E.2d 510."

{¶ 29} *P & S Mgmt. Group v. Perry Twp.*, Stark App. No. 2001CA00403, 2002-Ohio-4386; see, also, *W. Chester Twp. Zoning v. Fromm* (2001), 145 Ohio App.3d 172; *Cleveland Indus. Square v. Cleveland Bd. of Zoning Appeals* (1992), 83 Ohio App.3d 301 (both recognizing same).

{¶ 30} Applying the foregoing, we reject the vagueness argument presented here. GLC was clearly on notice that the property was subject to use restrictions by application of the zoning ordinances. Further, the absence of definitions of "scrap yard" and "waste material processor" does not render the ordinance unconstitutionally vague. Undoubtedly, the zoning resolution could have been better drafted. However, a statute or ordinance is not considered void for vagueness merely because it could have been written more precisely. See *State v. Dorso* (1983), 4 Ohio St.3d 60, 61.

{¶ 31} Merriam Webster's Collegiate Dictionary defines "scrap" as "a: fragments of stock removed in manufacturing b: manufactured articles or parts rejected or discarded and useful only as material for reprocessing; especially: waste and discarded metal." The term "waste" is defined as "a: damaged, defective, or superfluous

material produced by a manufacturing process: as * * * (2): SCRAP (3): an unwanted by-product of a manufacturing process * * *." This case involves recycling or processing of discarded concrete and washout materials. GLC's use of the property is encompassed under a plain reading of the ordinance.

{¶ 32} We find the zoning ordinance is adequate to give landowners notice and guidance regarding land use restrictions and is not unconstitutionally vague.

{¶ 33} In considering whether the ordinance is unconstitutional as applied to GLC's property, GLC must establish beyond fair debate that the ordinance is "clearly arbitrary and unreasonable without substantial relation to the public health, safety, morals or general welfare of the community." *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 214, 1998-Ohio-456, quoting *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 395. GLC has failed to meet this standard, especially in light of testimony that residents complained of dust and noise created by GLC.

{¶ 34} Further, the discretionary authority provided to the zoning administrator to determine offensive uses as proscribed by ordinance section 1258.10(e), does not overcome the presumption that the ordinance is constitutional. A party "may not rely on mere allegations or conclusions of law that the ordinance is not based on health, safety, morals or general welfare, but must introduce competent and relevant evidence to support his position." *Pepper Pike v. Landskroner* (1977), 53 Ohio App.2d 63, 70.

{¶ 35} GLC's second assignment of error is overruled.

{¶ 36} GLC's third assignment of error provides:

{¶ 37} "III. The judgment of the trial court finding and concluding that the planning commission and city council did not abuse their discretion or act arbitrarily, or unreasonably was erroneous and against the manifest weight of the evidence."

{¶ 38} GLC raises two separate issues under this assignment of error. GLC claims that the planning commission's denial of a conditional use permit, and city council's affirmance of that decision, was arbitrary and unreasonable. GLC also argues that the City should be estopped from prohibiting GLC's use of the property. We shall address the estoppel argument first.

{¶ 39} In support of its estoppel argument, GLC refers to letters issued to GLC by the zoning administrator in the City's department of building and zoning. However, these letters provide no indication that a conditional use permit would be granted and specifically indicate that a conditional use permit must be approved for GLC's operations. Further, the zoning administrator was not vested with authority to grant a conditional use permit. The City's zoning ordinance provides authority to approve a conditional use to the planning commission. Where a government official has no authority to act, the element of justifiable reliance cannot be established. See *Krickler v. City of Brooklyn*, 149 Ohio App.3d 97, 101, 2002-Ohio-4278.

{¶ 40} GLC also claims that estoppel should be applied because the City failed to attempt to enjoin the use for over forty years.

Generally, the doctrines of laches and estoppel may not be applied to prevent local governments from enforcing a zoning regulation. *Hodgins v. North Perry Village* (June 25, 1999), Lake App. No. 98-L-072. This is because a government agency may not be estopped from its duty to protect the public, and to hold otherwise would grant a right to violate the law. See *Ohio Board of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 146. As a result, "a municipal corporation is not estopped from enforcing a zoning regulation due to a failure of a municipal officer to timely object to a violation of the zoning regulation." *Geist v. Xenia* (Aug. 7, 1991), Greene App. No. 90-CA-91. As this court has previously stated:

"The doctrines of laches and estoppel do not apply to block municipal corporations in the reasonable exercise of governmental functions. Nor can there be a balancing of hardships on a theory of equity based on long term illegal use. That would encourage violations of zoning ordinances by holding out the prospect of an equitable cure for deliberate but long undiscovered transgressions."

{¶ 41} *12701 Shaker Co. v. City of Cleveland* (1972), 31 Ohio App.2d 199, paragraph seven of the syllabus.

{¶ 42} In accordance with the foregoing authority, we reject GLC's estoppel argument. We next review the decision of the trial court to uphold the denial of a conditional use permit to GLC.

{¶ 43} R.C. 2506.04 sets forth the standard of review of a decision of an administrative agency. That statute grants us

limited powers to review the judgment of the court of common pleas only on "questions of law." *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34 fn. 4. It does not provide the same extensive power to weigh "the preponderance of substantial, reliable and probative evidence," as is granted to the common pleas court. *Id.* Included within the ambit of "questions of law" is whether the court of common pleas abused its discretion. *Id.* With this standard in mind, we review the decision of the trial court concerning the conditional use permit.

{¶ 44} Various sections of the City's ordinances require certain criteria to be considered in determining whether to issue a conditional use permit. Ordinance section 1232.06(a)(2) requires the planning commission to review the development plan for all conditional uses. Ordinance sections 1232.06(a)(h)&(i) set forth certain review criteria for site development plans. Ordinance section 1264.02 sets forth general review criteria for all conditional uses. These criteria include, but are not limited to, that the use will be harmonious with the zoning code, the district in which the use is located, and the character of the general vicinity, and that the use not be detrimental to or endanger the public health, safety, or general welfare. Ordinance sections 1264.04 and 1264.05(r) recognize the storage and mixing of materials for concrete for building construction components as a conditional use to which specific regulations are applied.

{¶ 45} Simply because a proposed use meets the required criteria does not necessarily mean that the use must be allowed. "[T]he inclusion of conditional use provisions in zoning legislation is based upon a legislative recognition that although certain uses are not necessarily inconsistent with the zoning objectives of a district, their nature is such that their compatibility in any particular area depends upon surrounding circumstances." *Gerzeny v. Richfield Twp.* (1980), 62 Ohio St.2d 339, 341. As Justice Resnick stated in *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals* (1993), 66 Ohio St.3d 452, 456, 1993-Ohio-115, meeting the requirements of a conditional use is "but one factor to be considered by appellee [the Board] in making its decision."

{¶ 46} In this case, GLC argues that the commission failed to make any inquiry as to the criteria set forth in the ordinances and, instead, denied GLC's application upon finding the proposed use was a prohibited use and was not a lawful prior nonconforming use. There was testimony before the trial court that the planning commission did not make any inquiry into the conditional use criteria once they determined that the use was prohibited. Further, the findings of fact of city council attached to GLC's complaint reflect that city council also did not consider the conditions and requirements set forth in the zoning ordinances and made their decision without the requirements in mind.

{¶ 47} Pursuant to the City's ordinances, in reviewing GLC's request for a conditional use permit, the planning commission had not only the right, but the duty, to look to the surrounding area and consider the impact of the conditional use on the area as a whole. See *Groff-Knight v. Bd. of Zoning Appeals* (June 14, 2004), Delaware App. No. 03CAH08042. In this case, the board did not properly consider the criteria for a conditional use permit or the surrounding circumstances, including whether the use would be harmonious with the character of the general vicinity, in deciding whether to authorize a conditional use permit for GLC.

{¶ 48} We recognize that the circumstances in this case include that the City has effectively acquiesced to the use of the property for concrete operations for many years. The adjacent property, owned by Westfield Concrete, also apparently continues to be used for concrete operations. The GLC property is also located near railroad tracks. Although the City is certainly allowed to enforce its own laws and is not estopped from doing so based on prior acquiescence, these are all surrounding circumstances that should be considered by the planning commission in deciding whether to issue a conditional use permit.

{¶ 49} The trial court in its decision did not recognize that the planning commission failed to consider the requirements for issuing a conditional use permit as required by the City's ordinances. Further, the trial court did not expressly determine whether the denial of a conditional use permit was supported by the

preponderance of substantial, reliable and probative evidence in the record. For these reasons, we find the trial court committed reversible error and sustain GLC's third assignment of error in part.

{¶ 50} Insofar as GLC is currently operating without a conditional use permit, we affirm the trial court's decision issuing an injunction, entered May 27, 2004.

{¶ 51} Because the trial court erred on questions of law in affirming the administrative appeal, we reverse the trial court's decision entered March 26, 2004, and remand for further proceedings. The trial court is ordered to vacate the February 11, 2003 ordinance and to remand the matter to the City of Olmsted Falls Planning Commission with instructions to review GLC's application for a conditional use permit consistent with this opinion.

Judgment affirmed in part, reversed in part, and remanded.

This cause is affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court

directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, A.J., AND

FRANK D. CELEBREZZE, JR., J., CONCUR.

SEAN C. GALLAGHER
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).