[Cite as *Concerned Richfield Homeowners v. Richfield Planning & Zoning Comm.* , 2010-Ohio-4095.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CONCERNED RICHFIELD HOMEOWNERS, et al.	C. A. No. 25033
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008-06-4340
PLANNING AND ZONING COMMISSION, et al.	
Appellees	

DECISION AND JOURNAL ENTRY

Dated: September 1, 2010

MOORE, Judge.

{¶1} Appellants, the Concerned Richfield Homeowners, et al., appeal from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On December 12, 2007, the Homeowners filed their administrative appeal pursuant to R.C. 2506.01, from the decision of the Appellee, Richfield Planning and Zoning Commission ("the Commission"), granting preliminary approval of the Appellee's, Sree Venkateswara Temple, plan for a new temple to be located on a piece of property in Richfield, Ohio, located in Summit County. The Homeowners filed a request for a restraining order seeking to enjoin the Commission from granting any further permits to the Temple. The trial court determined that the Commission could proceed up to the point of granting a conditional zoning permit to the Temple for the Richfield property. Eventually, the Temple sought to intervene in the proceedings, which the trial court granted. On April 18, 2008, the parties

stipulated to place the case on the trial court's inactive docket, to be returned to the active docket upon any motion from the parties. During this time, the Commission could consider the Temple's development plan and choose to issue a conditional zoning permit. In that instance, the Homeowners could file an amended administrative appeal with the trial court.

{¶3} On May 27, 2008, the Commission voted to approve the Temple's conditional zoning permit. Therefore, on January 20, 2009, the Homeowners sought to return the case to the trial court's active docket and to present additional evidence pursuant to R.C. 2506.03. Thus, the case was returned to the active docket, and on February 29, 2009, the trial court held a hearing on the Homeowners' request to present additional evidence. On March 26, 2009, the trial court denied the Homeowners' request. The parties filed their briefs, and on September 18, 2009, the trial court overruled the Homeowners' assignment of error and determined that the Commission's decision granting the Temple the conditional use certificate with conditions was "not unconstitutional, illegal, arbitrary, capricious or unreasonable and [was] supported by a preponderance of substantial, reliable and probative evidence on the whole record." Accordingly, the trial court affirmed the Commission's decision. The Homeowners timely appealed from this decision, and have raised three assignments of error for our review. We have combined some assigned errors for ease of review.

II.

ASSIGNMENT OF ERROR I

> "THE LOWER COURT ABUSED ITS DISCRETION WHEN IT DENIED CONCERNED RICHFIELD HOMEOWNERS A HEARING WHICH SHALL PROCEED AS A TRIAL OF A CIVIL ACTION WHEN IT APPEARS ON THE FACE OF THAT TRANSCRIPT AND BY AFFIDAVITS FILED BY THE APPELLANT THAT UNDER [R.C. 2506.03(A)(3) & (5)], THE TESTIMONY ADDUCED WAS NOT GIVEN UNDER OATH NOR WERE THERE ANY CONCLUSIONS OF FACTS FILED WITH TRANSCRIPT."

ASSIGNMENT OF ERROR II

> "THE LOWER COURT ABUSED ITS DISCRETION WHEN IT HELD THAT MINUTES OF THE MEETING AS SUBMITTED HEREIN MEET THE STANDARDS AS SET FORTH IN R.C. 2506.03(A)(5) AND PRESENT LEGALLY SUFFICIENT CONCLUSIONS OF FACT WHICH PROVIDE THE COURT THE BASIS ON WHICH THIS COURT CAN CONDUCT A MEANINGFUL REVIEW. WHEN THE LANGUAGE OF THE STATUTE IS CLEAR AND MANDATORY, AND DOES NOT GRANT TO THE LOWER COURT SUCH AN OPTION, THE COURT IS MANDATED TO HAVE A HEARING UPON THE TRANSCRIPT AND HAVE SUCH ADDITIONAL EVIDENCE AS MAY BE INTRODUCED BY ANY PARTY, AND AT THE HEARING, ANY PARTY MAY CALL AS IF ON CROSS-EXAMINATION ANY WITNESS WHO GAVE TESTIMONY ON OPPOSITION TO SAID PARTY."

{¶4} In their first and second assignments of error, the Homeowners contend that the trial court abused its discretion when it denied their motion to supplement the administrative record because the testimony adduced was not under oath and the Commission failed to file with the transcript conclusions of fact supporting the decision. We do not agree.

{¶5} At the outset, we note that the Homeowners have failed to cite this Court to the record to support their assignments of error. App.R. 16(A)(7). This is particularly egregious in a case that originally proceeded under one case number in the trial court, was then transferred to the inactive docket, then later transferred back to the active docket and given a new case number. Essentially, this Court has before it two trial court dockets, each containing substantially similar filings. Although the Homeowners append a few documents to their brief, purported to be their request for additional evidence, it is only upon a review of the record of both lower court case numbers that this Court can fully determine whether the issues were properly raised below. Only after having undertaken such a task, have we been able to determine that the Homeowners have preserved the issue for appeal.

{¶6} In the instant case, the Homeowners requested the trial court to allow the presentation of additional evidence, in pertinent part, pursuant to R.C. 2506.03(A)(3) and (5). This section states that

> "(A) The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:
>
> "***
>
> "(3) The testimony adduced was not given under oath.
>
> "***
>
> "(5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.
>
> "(B) If any circumstance described in divisions (A)(1) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party."

{¶7} Thus, absent a specifically enumerated exception, the trial court's review is confined to the transcript. We review the trial court's application and interpretation of this statute de novo. *Akron v. Frazier* (2001), 142 Ohio App.3d 718, 721.

Testimony Under Oath

{¶8} The Homeowners contend that the evidence adduced before the Commission was not given under oath. Again, the Homeowners fail to point this Court to the particular evidence that they allege was not given under oath. A review of the transcript of the May 27, 2008 hearing before the Commission, however, reveals that the Homeowners' counsel was present, and although the transcript does not reveal that an oath was administered, the Homeowners failed to object to this issue. "[T]here is no indication that appellants ever objected to this procedure or

requested that these witnesses be sworn. The failure to make a timely objection [forfeits] the error complained of." *Concerned Taxpayers of Stow v. City of Stow* (Jan. 27, 1982), 9th Dist. No. 10285, at *2, citing *Zurow v. Cleveland* (1978), 61 Ohio App.2d 14. The Ohio Supreme Court has explained that "[h]ad [appellant] objected to the unsworn testimony during the hearing, there is little doubt that the chairman would have sworn the witness. By failing to bring the matter to the attention of the board, [appellant] effectively waived the right to appeal upon that ground." *Stores Realty Co. v. City of Cleveland, Bd. of Bldg. Appeals Standards and Bldg.* (1975), 41 Ohio St.2d 41, 43. See, also *Zurow v. City of Cleveland* (1978), 61 Ohio App.2d 14, 24; *Neague v. Worthington City School Dist.* (1997), 122 Ohio App.3d 433, 441-42; *Alltel Communications v. Mingo Junction*, 7th Dist. No 05 JE 20, 2006-Ohio-1054, ¶29-30; *Shields v. Englewood*, 2d Dist. No. 21733, 2007-Ohio-3165, at ¶16. The record does not reveal that the Homeowners objected to any failure to swear in the witnesses. Further, the Homeowners fail to cite this Court to any place in the record where such an objection was made. Accordingly, the trial court did not err when it denied a hearing pursuant to R.C. 2506.03(A)(3).

Conclusions of Fact

{¶9} The Homeowners contend that the Commission failed to file conclusions of fact, and therefore, pursuant to R.C. 2506.03(A)(5), the trial court erred in not holding a hearing. We do not agree.

{¶10} R.C. 2506.03(A)(5) required the Commission "to file with the transcript conclusions of fact supporting the final order, adjudication, or decision." This section does not require the conclusions of fact to take any specific form. Thus, the statute does not require the Commission to file a separate document entitled "Conclusions of Fact." Instead, the trial court

was required to look at the "face of that transcript" to determine if the Commission failed to include its reasons in support of its final decision. R.C. 2506.03(A).

{¶11} The transcript reveals that, as the trial court properly concluded, the Commission stated, on the record, the reasons for its decision. "Obviously, parties should be informed of the reasons for decisions, and courts should have something to review." *Shelly Materials, Inc. v. Daniels*, 2d Dist. No. 2002-CA-13, 2003-Ohio-51, at ¶23. On appeal, the Homeowners repeatedly refer to this Court's decision in *T.O.P. 1 Partners v. Stow* (1991), 73 Ohio App.3d 24 for the proposition that if the Commission failed to file conclusions of fact with the transcript, then the trial court is statutorily mandated to hold a hearing. While this is a correct statement of R.C. 2506.03, in *T.O.P.* we did not determine what constituted "conclusions of fact." Instead, the facts in *T.O.P.* indicate that the trial court, when faced with a transcript that did not include conclusions of fact, simply allowed the City Council to file conclusions of facts in its answer to *T.O.P.'s* notice of appeal. This Court held that this supplementation did not satisfy the mandate of R.C. 2506.03(A)(5). Thus, *T.O.P.* did not address the question in this case, i.e., what constitutes a "conclusion of fact" for purposes of R.C. 2506.03(A)(5).

{¶12} The trial court concluded that the meeting minutes from the May 27, 2008 hearing before the Commission "meet the standards as set forth in R.C. 2506.03(A)(5) and present legally sufficient conclusions of fact which provide this Court the basis on which this Court can conduct a meaningful review." Consequently, the trial court denied the Homeowners' motion. While the Homeowners present this Court with several cases that reiterate the need for the Commission to file conclusions of fact and the statutory mandate to the trial court to hold a hearing in the absence of such conclusions, they do not explain *why* the May 27 meeting minutes

did not inform them of the reasons for the Commission's decision and provide the trial court with something to review, thus not constituting conclusions of fact. *Shelly Materials*, supra.

{¶13} In *Ziss Bros. Constr. Co., Inc. v. Independence Planning Comm.*, 8th Dist. No. 90993, 2008-Ohio-6850, our sister district concluded that meeting minutes in which each of the Planning Commission members expressed their reasoning for denying an application constituted findings of fact, thus satisfying the mandate of R.C. 2506.03(A)(5). The *Ziss* court distinguished a previous case in which it had determined that meeting minutes did not satisfy R.C. 2506.03(A)(5), explaining that, unlike the facts before it in *Ziss*, the meeting minutes in the previous case merely stated that after a presentation a discussion was had and a vote was taken. *Ziss*, at ¶26, distinguishing *Felder v. City Planning Comm. of Pepper Pike* (Apr. 26, 1979), 8th Dist. No. 38663. Much like in *Ziss*, the May 27 meeting minutes in the present case contained, as the trial court noted "a detailed expression of each Planning Commission member's reasoning for approving or denying the variance request." Accordingly, we conclude that the trial court did not err when it determined that the May 27 meeting minutes satisfied the mandate of R.C. 2506.03(A)(5). The court properly denied the Homeowners' motion to present additional evidence.

{¶14} The Homeowners' first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

"THE LOWER COURT ABUSED ITS DISCRETION WHEN IT AFFIRMED THE CONDITIONAL ZONING PERMIT TO THE SREE TEMPLE, WHICH WAS ISSUED BY THE RICHFIELD PLANNING AND ZONING COMMISSION TO THE SREE TEMPLE AN R-2 SINGLE-FAMILY RESIDENTIAL DISTRICT. THE PLANNING AND ZONING COMMISSION MEMBERS VIOLATED THEIR OATH AND UNDER THE AUTHORITY OF THE VILLAGE OF RICHFIELD DENIED CONCERNED RICHFIELD HOMEOWNERS THEIR DUE PROCESS PROPERTY RIGHTS BY ISSUING CONDITIONAL USE PERMIT TO THE SREE TEMPLE FOR THE AVOWED PURPOSE TO PREVENT FUTURE SINGLE-FAMILY DEVELOPMENT IN

> THIS AREA THEREBY DENYING APPELLANT[S] THEIR DUE PROCESS PROPERTY RIGHTS."

{¶15} With respect to the review of administrative appeals such as this one, the Supreme Court of Ohio has held that when

> "[c]onstruing the language of R.C. 2506.04, we have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. The common pleas court considers the whole record, including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." (Internal quotations and citations omitted.) *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147.

{¶16} On the other hand, this Court's review "is more limited in scope and requires [this] court to affirm the common pleas court, unless the court of appeals finds, as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence." *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34. Thus, our review is limited to questions of law "which does not include the same extensive power to weigh the preponderance of substantial, reliable and probative evidence, as is granted to the common pleas court. An abuse of discretion by the common pleas court is "[w]ithin the ambit of 'questions of law' for appellate court review." *Kisil*, supra, at 34 n. 4, quoting R.C. 2506.04; see, also *Smith Family Trust v. Hudson Bd. of Zoning & Bldg. Appeals*, 9th Dist. No. 24471, 2009-Ohio-2557, at ¶31. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court." *Henley*, 90 Ohio St.3d at 147. Whether we may have reached a different conclusion than the Commission is not of consequence. Id. "Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." Id.

{¶17} The Homeowners do not present an argument that the trial court's decision was not supported by a preponderance of reliable, probative, and substantial evidence. Instead, they argue that the Commission "violated their oath and *** denied [the Homeowners] their due process property rights." They do not support this with an analysis or citation to the record. App.R. 16(A)(7). Accordingly, we decline to address this assignment of error. App.R. 12(A)(2).

{¶18} The Homeowners' third assignment of error is overruled.

III.

{¶19} The Homeowners' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

CARLA MOORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

LELAND D. COLE, Attorney at Law, for Appellants.

CHARLES T. RIEHL, and AIMEE W. LANE, Attorneys at Law, for Appellee.

JAY P. PORTER, and JOHN W. SOLOMON, Attorneys at Law, for Appellee.