

IN THE COURT OF COMMON PLEAS FOR MARION COUNTY, OHIO
GENERAL DIVISION

COMMON PLEAS COURT
MARION CO. OHIO

HENSEL READY MIX, INC.,

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Case No. 15CV0005 2015 AUG 26 AM 11:12

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Appellant,

JULIE M. KAGEL
CLERK OF COURTS

vs.

*

Judge William R. Finnegan

PLEASANT TOWNSHIP
BOARD OF ZONING APPEALS,

*

MEMORANUM OF OPINION

Appellee.

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This day this case came on before the Court upon the Appeal filed by the Appellant from the decision of the Pleasant Township Board of Zoning Appeals on December 17, 2014. The record filed in this case has been reviewed by the Court, along with the Brief filed by the Appellant, the Response Brief filed by the Appellee, and the Reply Brief of the Appellant.

This is an appeal from the decision of the Pleasant Township Board of Zoning Appeals denying a request for Conditional Permitted Use for mineral, sand and gravel extraction to operate a ready-mix concert plant which would be located at 4883 LaRue-Prospect Road South. The matter was heard by the Board of Zoning Appeals on December 17, 2014.

In filing this Appeal, the Appellant maintains that the decision of the Appellee was illegal, arbitrary, capricious, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

More specifically, the Appellant alleges that the hearing was not fair and impartial; that the Appellee conducted a public hearing and not the required evidentiary hearing; and that the citizen objections raised at the hearing were opinions without facts to support them, and therefore were not evidence to be considered by the Appellee.

In considering this appeal, the Court notes that when a zoning ordinance is enforced in an unreasonable and arbitrary manner, it is the responsibility of the trial court, reviewing the action pursuant to R.C. 2506, to reverse the findings of the board of zoning appeals. The scope of review by the trial court is set forth in R.C. 2506.04, which requires the Court to examine the substantial, reliable and probative evidence on the whole record. Although a hearing before the Court of Common Pleas pursuant to R.C. 2506.01 is not de novo, it often in fact resembles a de novo proceeding. Kisil v Sandusky, 12 Ohio St. 3d 30 (1984). The standard of review applied by the trial court is whether there is preponderance of reliable, probative and substantial evidence in the record

to support the administrative agency's decision. The trial court must give due deference to the agency's resolution of evidentiary conflicts, and the court may not substitute its judgment for that of the agency. Furthermore, the Court is bound by the nature of administrative proceedings to presume that the decision of administrative agency is reasonable and valid. Adelman Real Estate Co. v. Gabonic, 109 Ohio App. 3d 689 (Geauga App. 1996).

This Court will first consider whether the hearing held by the Appellee on December 17, 2014 was fair and impartial.

The Appellant has taken the position that it received an unfair hearing from the fact that one of the members of the Board of Zoning Appeals, Mark Freyhof, testified at the hearing in opposition to the Appellant's application. Appellant maintains that Mr. Freyhof had a duty not to testify, as well as not to vote on this matter, citing the case of Kiger v. Albon, 76 Ohio App. 3d 301 (Lucas Cty. 1991).

In the administrative hearing, Mr. Freyhof testified in opposition to the application of the Appellant. Mr. Freyhof testified as a neighbor to the property in question. Mr. Freyhof, although testifying in opposition to the Appellant's application, did not participate in the vote of the Board of Zoning Appeals.

Reviewing the record, the Court notes that Mr. Freyhof did not preside over the administrative hearing, but only served as a witness in this proceeding. The Appellant has not shown how Mr. Freyhof's testimony constituted a denial of due process to the Appellant.

Further, the fact that Freyhof did not participate in the vote on the application for conditional use further distinguishes the case at bar from the Kiger case.

This Court therefore finds that the fact that Mr. Freyhof testified does not constitute a basis for reversal of the decision of the Appellee.

The Appellant further maintains that the fact that Chairman Bowers had sua sponte submitted his own investigation report from an earlier application for conditional use permit in a 2011 proceeding denied the Appellant a fair and impartial hearing, as Appellant claims that Chairman Bowers acted in a dual capacity. In support of his claim, the Appellant cites the case of North Fork Properties v. Bath Township, 2007-Ohio-243 (Summit App.) which held that members of the zoning board are required to act as impartial quasi-judicial offices, and that neither the members nor the board can engage in a dual capacity as judge and litigant in matters before the Board of Zoning Appeals.

Upon consideration, the Court this argument of the Appellant to be correct, and that Chairman Bowers should not have added in information from his own reports from the 2011 conditional use application proceedings. However, the Court does note that the Appellant made no objection to Chairman Bowers admitting this additional information at the hearing, and, after reviewing the transcript of the proceedings, this Court finds that this additional information supplied by Chairman Bowers did not seriously affect the basic fairness, integrity, and reputation of the proceedings, particularly as Chairman Bowers pointed out factors both positive and negative concerning the Appellant in his report.

This Court finds that the additional information supplied by Chairman Bowers, though not proper, did not change the hearing from being fair and impartial overall.

Turning to the issue of the Appellant claiming that the hearing in question was conducted as a public hearing, rather than an evidentiary hearing, this Court agrees with the Appellant and the analysis given in the case of In re: Rocky Point Plaza Corp., 86 Ohio App. 3d 486 (Franklin Cty. 1993), where the Court stated:

there is no public hearing upon an application for a variance or an application for a conditional use permit but, instead, an adjudication hearing, which is open to the public. A public hearing is one where members of the general public may speak and express their views on the question of governmental, political and policy considerations as to whether certain legislation should be adopted. Adjudication hearings, however, are not subject to such public comment but, instead, involve the determination of rights of specific persons and whether such rights should be granted based upon evidence (not public opinion) presented at the hearing. [Emphasis added.]

" * * *

"Accordingly, in the limited weighing of the evidence to be undertaken by the common pleas court, consideration must be given to the nature of the evidence, including the question of whether it was given under oath and was subject to cross-examination." Id. at 491-493, 621 N.E.2d at 569-570.

The fact that adjudicatory hearings are to be open to the public does not result in their transformation into legislative public hearings with the corresponding right to receive input of public comment at that time. The ploy of swearing in the members of the public does not alter the fact that the bulk of these witnesses are merely offering their subjective and speculative comments and unsubstantiated opinions. Such testimony cannot [672 N.E.2d 1091] rise to the level of the reliable, probative, and substantial evidence required under Kisil and Dudukovich unless there are facts included as part of those opinions.

Further, cross-examination is intended to be a vital part of those adjudicatory hearings. It would appear that only appellants' witnesses were subjected to any type of cross-examination, and even that would be a rather loose use of the term because such questioning was not conducted by the prosecutor; instead it was done directly by the "witnesses" who were opposed to the request.

After reviewing the transcript, the Court notes that the witnesses in this case were sworn in before giving testimony, unlike the proceedings in the Rocky Point case. It does appear that the general procedure did not permit "cross questioning" in this Case; however, counsel for the Appellant did not object to this, and did not request the Board for permission to ask questions of the other witnesses. Furthermore, the record is clear that Chairman Bowers allowed everyone who wished to give testimony at the hearing, the opportunity to do so.

Although it would have been better procedure for the Board to allow cross examination of the witnesses giving testimony by the opposing side, this Court once again finds, given the lack of objection by counsel of the Appellant as to the procedure being used at the time of this hearing, the Court finds that the hearing administered on December 17, 2014 was fair and impartial.

Turning to the issue of whether there was a preponderance of the evidence to support the decision of the Appellee, the Appellant claims that the testimony from the various citizens at the hearing were merely opinions without facts to support said opinions, and therefore were not proper evidence to be considered; that increased traffic by itself is not sufficient to dispute an otherwise permitted use; and that the statements of the neighbors relating to increased traffic are speculative.

The Court has reviewed the transcript of the hearing, and finds that the testimony of the witnesses in opposition to the Application of the Appellant was properly considered by the Appellee. Witness Randall Hunt testified about accidents at the intersection of State Route 4 and State Route 203 from personal observations. Witness Matthew R. Dawson, a neighbor to the property in question, testified that you can hear the trucks from 6-10ths mile away from his personal observation of the actions of the truck drivers, based on personal observations. Mr. Dawson also testified that he had 26 years of experience in the concrete business. Mr. Dawson also testified about dust problems on State Route 4 from a nearby facility operated by the Appellant.

Witness Clifford Roush testified about the trucks not staying in their lane. Peggy Fragale testified that the area in question was mostly a residential area, with a dedicated park nearby. Ms. Fragale also testified as to problems with snow drifting on State Route 203, and lights that can be seen all night from the nearby cement plant operated by the Appellant.

Witness Rick Bayless predicted that traffic would be horrendous, and testified that he observed trucks lined up for loading at the Appellant's facility located on Highway 42.

Witness Matthew Dawson presented testimony contradictory to that of Appellant's attorney, as to the hours of operation, basing this on his personal observations of another facility of the Appellant.

In all these cases as well as some others not mentioned here, the witnesses gave adverse testimony to the Appellant's application, and in many of them, their statements were referenced based on observations they had seen relating to the operation of other facilities operated by the Appellant, and trucks which were presumably going to the other facilities of the Appellant.

Given the testimony adduced as to the nature of the neighborhood involved in this application, the allegations and observations of dust, noise, as well as traffic brought before the Appellee, this Court finds the denial of the Application for Conditional Use filed by the Appellant, to be supported by reliable, probative and substantial evidence.

For all of the above-stated reasons, this Court finds the Appellee's denial of the Conditional Use Application of the Appellant to be proper, and the decision of the Appellee should be affirmed.


JUDGE WILLIAM R. FINNEGAN

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