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LUCAS COUNTY

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COMMON PLEAS COURT
BERNIE QUILTER
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THIS IS A FINAL APPEALABLE ORDER

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Wheeler Family Investments, L.P., et al.,

* Case No. CI201505126

Appellants,

* Judge Ruth Ann Franks

-vs-

*

* OPINION AND JUDGMENT ENTRY

Waterville Township Board of Trustees,
et al.,

*

*

Appellees.

*

This matter initially came before the Court on Wheeler Family Investments, LP, et al.'s Request for an Evidentiary Hearing of their Administrative Appeal from the Waterville Township Board of Trustees' November 24, 2015 decision to revoke Appellants' Special Use Permit.

By Opinion and Judgment Entry dated March 30, 2016, the Court determined that Appellee failed to file conclusions of fact, which rendered the record deficient pursuant to R.C. 2506.03(A)(5), and necessitated an evidentiary hearing. Notwithstanding said finding, the Court also acknowledged that Appellants' challenge to the constitutionality and legality of the

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revocation of the Special Use Permit ("SUP") constituted a threshold question of law amenable to immediate non-oral hearing. Accordingly, the parties were granted additional time to file further written arguments and authority specifically addressing whether Ohio law and the Waterville Township Zoning Resolution provided authority for Appellee's revocation of Appellants' SUP and, if so, what due process was required for such action.¹ The parties' written arguments are now before the Court.

Appellants were granted a SUP in April 2014, which Appellee later revoked in November 2015. On appeal of said revocation, Appellants assert that Appellee's "conditioning" of the SUP and its revocation were unconstitutional, illegal, and inconsistent with applicable portions of the Ohio Revised Code, its interpretive case law, and portions of the Waterville Township Zoning Resolution ("Resolution").

Appellee responds that its issuance of SUPs is discretionary under the Resolution and, despite the Resolution's lack of express authority for attaching conditions to SUPs, the establishment of conditions is "inherent" to the issuance process and a "reasonable method to track, monitor, and react to Appellants' escalating commercial use of their property." Appellee first asserts that authority from the Sixth District Court of Appeals recognizes, expressly and/or impliedly, the practice of conditioning SUPs. Appellee otherwise asserts that the lack of binding precedent relieves this Court from a strict application of the applicable law; that the statutory

¹ See, Opinion and Judgment Entry dated March 30, 2016. Any remaining factual issues, including those associated with due process considerations, were to be determined at the subsequent evidentiary hearing, if necessary.

Within said Opinion and Judgment Entry, the Court noted Appellants' alternative references to Appellee's action as a "revocation" or "termination" of the SUP. The Court avoided any initial presumptions as to whether these terms were analogous, and instead elected to use the term "revocation" for clarity and ease of discussion. However, the parties' present arguments raise no material distinction between these terms and uniformly refer to Appellee's action as a revocation. Accordingly, the Court does the same herein.

provision addressing the revocation of SUPs is "open to interpretation;" and that revocation of Appellants' SUP is not unfairly prejudicial to Appellants.²

Upon careful review of the parties' arguments and applicable law, the Court finds Appellee's revocation of Appellants' SUP was contrary to law for the reasons that follow.

Scope of Review

R.C. 2506.04 provides, in pertinent part:

If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court.

For purposes of clarity, the Court observes that Appellants are challenging the legality of Appellee's revocation of their SUP, but are not otherwise facially challenging Appellee's Zoning Resolution. Accordingly, the following findings are limited only to matters within the proper scope of an administrative review brought pursuant to R.C. Chapter 2506. See, e.g., Cnty. Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals, 66 Ohio St.3d 452, 453-454, 1993-Ohio-115, 613 N.E.2d 580 (An administrative appeal may challenge the constitutionality of an ordinance as applied to the specific proposed use; however, in order to request a declaratory

² Appellee repetitively asserts within its memorandum that it is important for the Court "to understand the logic of [its] process and the lack of malice towards Appellants when attempting to establish reasonable conditions upon the [SUP]." Accordingly, the memorandum relies, almost exclusively, upon the underlying factual matters reflected in the administrative Transcript.

judgment, a separate R.C. Chapter 2721 action must be filed. A request for declaratory judgment cannot be combined with the administrative appeal.)³

Appellee's Authority to Regulate and Restrict the Use of Property is Purely Statutory

Ohio law is clear that "the only power a township has to regulate and restrict the use of property by zoning regulation is limited to that conferred upon it by R.C. 519.01 et seq." Burger v. Bd. of Trs., 58 Ohio Misc. 21, 30, 389 N.E.2d 866 (C.P.1978). "[T]ownships of Ohio have no inherent or constitutionally granted police power, the power upon which zoning legislation is based." Jeffrey Mann Fine Jewelers, Inc. v. Sylvania Twp. Bd. of Zoning Appeals, 6th Dist. Lucas No. L-08-1013, 2008-Ohio-3503. "Whatever police or zoning power townships of Ohio have is that delegated by the General Assembly, and it follows that such power is limited to that which is expressly delegated to them by statute." Id. (citations omitted); and Willow Grove, Ltd. v. Olmsted Twp., 2015-Ohio-2702, 38 N.E.3d 1133 (8th Dist.) (townships are strictly statutory creatures, created under R.C. Chapter 503, whose powers are not derived from the Constitution as are counties and municipalities).

Thus, any regulation contained within a township zoning resolution which fails to comply with the provisions of R.C. 519.01 et seq., strictly construed, is in conflict therewith and void. Burger v. Bd. of Trs. The test to determine whether a conflict exists between a township's zoning resolution and a general law of the state is 'whether the ordinance permits or license that which

³ After filing the instant Administrative Appeal, Appellants filed a Verified Complaint against Appellee Board of Trustees; Trustees Karen Schneider, Les Disher, and Kyle Hertzfeld; the Waterville Township Zoning Commission; and Waterville Township Zoning Inspector Eric Gay. Said Complaint, seeking declaratory judgment and a temporary restraining order, was not consolidated with the instant Administrative Appeal, but rather designated as a companion case. Matters within the Verified Complaint are not presently before the Court.

the statute forbids or prohibits, or vice versa.' Osborne v. Leroy Twp., 11th Dist. Lake No. 2014-L-008, 2014-Ohio-5774, citing Fondessy Enterprises, Inc. v. Oregon, 23 Ohio St.3d 213, 492 N.E.2d 797 (1986). The issue of whether a township zoning law conflicts with a general state statute raises a question of law. Osborne v. Leroy Twp., 11th Dist. Lake No. 2014-L-008, 2014-Ohio-5774.

Appellee's Revocation of Appellants' SUP was Contrary to Law

The Revised Code expressly grants authority for a township to revoke a conditional (or special) use permit only under circumstances that are inapplicable subjudice. Specifically, R.C. 519.14(D) expressly allows a township board of zoning appeals to revoke an authorized variance or conditional zoning certificate granted for the extraction of minerals, if any condition of the variance or certificate is violated. No additional powers of revocation are expressly permitted or suggested by the statute. Thus, "[b]y its express language, the General Assembly made it clear that a board of zoning appeals has 'no revocation authority other than that specifically stated'." Kearns v. Monroe Twp. Bd. of Zoning Appeals, 196 Ohio App.3d 127, 2011-Ohio-1138, 962 N.E.2d 808, ¶ 12 (4th Dist.)(citations omitted).⁴

In Kearns, the landowner was granted a conditional use permit for a bed and breakfast on his property in 2007. In 2009, a neighbor complained to the township's board of zoning appeals

⁴ The cardinal rule of statutory construction is that courts apply unambiguous statutes as they are written, and the plain language of the statute makes it clear that an administrative revocation only applies to conditional permits involving the extraction of minerals. Kearns. Moreover, it is well-established that the legislative expression of one item manifests an intention to exclude all other items from the scope of the provision. See, e.g., Solid Rock Ministries Int'l v. Bd. of Zoning Appeals, 138 Ohio App.3d 46, 740 N.E.2d 320 (12th Dist.2000). "Expressio unius est exclusio alterius," or "[t]he expression of one is the exclusion of all others." Id. "Whatever police or zoning power townships of Ohio have is that delegated by the General Assembly, and it follows that such power is limited to that which is expressly delegated to them by statute." Jeffrey Mann Fine Jewelers, Inc. v. Sylvania Twp. Bd. of Zoning Appeals.

that the landowner was operating the bed and breakfast in violation of the use permit. Consequently, the board scheduled a public meeting to discuss the bed and breakfast and consider revoking the conditional use permit. The landowner did not appear for the meeting, and the board voted unanimously to revoke the permit. On the landowner's appeal, the trial court upheld the revocation.

However, the appellate court reversed the matter upon its consideration of the identical question presented subjudice: whether the board had authority to revoke the conditional use permit. The Kearns court considered the express, unambiguous language of R.C. 519.14(D) and observed:

... [W]e agree that the Board lacked jurisdiction to revoke the conditional use permit for the bed and breakfast. It may seem odd that the General Assembly would restrict a Board's ability to insure compliance with the explicit restrictions found in the permit. However, R.C. Chapter 519 provides enforcement mechanisms to achieve the same ends, e.g., R.C. 519.24 authorizes civil actions by township officials and others to enjoin or abate violations of zoning regulations. And R.C. 519.23 criminalizes the use of a building or land in violation of a township zoning resolution. In any event, we are restricted to applying the unambiguous terms of R.C. 519.14(D). Accordingly, we conclude the Board had no statutory authority to revoke the permit. Kearns at ¶13.⁵

The Kearns court also disagreed that the revocation of the landowner's SUP was authorized by the township zoning board of appeals' own rule providing for the expiration and revocation of zoning certificates issued under the conditional use provisions. The court

⁵ Notwithstanding the inapplicability subjudice, this Court recognizes interpretive case law holding that R.C. 519.14(D)'s limited applicability to variances or conditional zoning certificates for the extraction of minerals, does not otherwise act as a limitation of the board of zoning appeals' inherent authority to reconsider the granting of a variance prior to the institution of an appeal or the expiration of time for appeal. See, Baker v. Mad River Twp. Bd. of Zoning Appeals, 2nd Dist. Champaign No. 2008 CA 16, 2009-Ohio-3121, citing State ex rel. Borsuk v. Cleveland, 28 Ohio St.2d 224, 227, 277 N.E.2d 419 (1972) (absent specific statutory authority or rule, official boards or administrative agencies have jurisdiction to reconsider decisions only until the actual institution of a court appeal therefrom or until expiration of the time for appeal). However, such considerations are not applicable subjudice.

explained:

Regardless of whether the Board followed their own rules, a board of zoning appeals has no authority to create rules that add substantive powers to its statutory authority. This rule effectively creates authority where none exists by statute, i.e. it is ultra vires. Therefore, the Board could not revoke the permit by application of its own rules. Id. at ¶16.

Subjudice, Appellee does not argue that any provision of the Resolution allows the revocation of Appellants' SUP, nor does Appellee offer case law supporting its position. Instead, Appellee points to Appellants' failure to cite any instance of the Sixth District Appellate Court's strict construction of R.C. 519.14. According to Appellee, such failure on Appellant's part allows this Court to weigh the instant facts and engage in its own analysis of Appellee's revocation powers.

However, the Court finds Appellee's untenable suggestion to be contrary to established law and wholly without merit. "[The Ohio Supreme Court has] long held that restrictions imposed on the use of private property via ordinance, resolution, or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed." Cleveland Clinic Found. v. Bd. of Zoning Appeals, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161 at ¶ 34 (internal citations omitted). "In other words, [the Ohio Supreme Court does not] permit zoning limitations by implication." Id. "A court, as well as an agency, must give effect to the unambiguously expressed intent of [the legislature]," and "[a] court owes no duty of deference to an administrative interpretation unless it finds the ordinance

ambiguous." Id.⁶

Aside from the inapplicability of R.C. 519.14(D) subjudice, the sole revocation power allowed therein is expressly reserved for township boards of zoning appeals. There is no dispute that the body that revoked Appellants' SUP subjudice was the Waterville Township Board of Trustees. Pursuant to R.C. 505, et seq., a township board of trustees is vested with governance and legislative powers to prepare and implement a comprehensive zoning resolution for the township. See, e.g., Willow Grove, Ltd. v. Olmsted Twp., 2015-Ohio-2702, 38 N.E.3d 1133 (8th Dist.)(noting the absence of evidence that the township was a limited home rule township under R.C. 504). A township's authority to regulate zoning as well as the implementation process is set forth in R.C. 519.02. Id. However, township boards of zoning appeals, boards of trustees, and zoning inspectors are separate entities with separate statutory rights and responsibilities. Rauch v. Jefferson Twp. Bd. of Zoning Appeals, 2nd Dist. Montgomery No. 26941, 2016-Ohio-967. They are not equivalent as a matter of fact, nor should they be allowed to be treated as such as a matter

⁶ Significantly, there is an instance in which the Sixth District upheld the revocation of a special use permit by a township. Appellee subjudice cites Superior 24hr Towing & Rd. Serv., LLC v. Springfield Twp., 6th Dist. Lucas Nos. L-10-1049, L-10-1050, 2010-Ohio-5895, albeit in a cursory manner, absent analysis, and only as suggested authority for a township's ability to attach conditions to special use permits. Despite Appellee's lack of reliance on Superior 24hr Towing as a township's authority for *revoking* a SUP, the Court finds it necessary to address and distinguish the "revocation" at issue in Superior 24hr Towing from the instant matters.

In Superior 24hr Towing, the township trustees decided to revoke an existing SUP after considering how the appellant's use of the property affected neighboring properties. The Court affirmed the township's decision, finding that the board acted in conformity with the township zoning resolution in determining the appropriate responsive action to the appellant's proven violation. The zoning resolution identified the factors to be considered in determining whether to grant a SUP and expressly authorized revocation of a special use permit for "violation of any condition of approval."

Notwithstanding its facts, Superior 24hr Towing does not support Appellee's legal authority to revoke Appellants' SUP subjudice. Notably, the appellant in Superior 24hr Towing only complained that the revocation of his SUP was pretextual and that the trial court erred in its interpretation of the township's zoning resolution. The appellant did not expressly challenge the township's legal authority or lack thereof to revoke his SUP under R.C. 519.14, nor did the Court consider the legality of the provision authorizing revocation within the township's zoning resolution. To be clear, Appellee subjudice has pointed to no such express revocation authority within the Waterville Township Zoning Resolution. The question of law reviewed and discussed by the Sixth District in Superior 24hr Towing was limited to the interpretation of the township's zoning resolution. The Court expressly noted, in its conclusion, that the appellant had argued no error on any independent ground with respect to the court of common pleas' judgment affirming the township's decision.

of law. Id. (citing R.C. 519.13 and R.C. 519.14 relative to boards of zoning appeals; R.C. 505.01 et seq. relative to boards of township trustees; and R.C. 519.16 relative to township zoning inspectors).⁷

For these reasons, Appellee's revocation of Appellants' SUP subjudice was contrary to law. Actions by townships that exceed zoning authority granted under R.C. Chapter 519 are deemed invalid and unenforceable. Jeffrey Mann Fine Jewelers, Inc. v. Sylvania Twp. Bd. of Zoning Appeals; and Bd. of Twp. Trs. v. Davisson, 3d Dist. Union Nos. 14-06-49, 14-06-50, 2007-Ohio-5491.

The "Conditioning" of Appellants' SUP does not Present a Ripe Issue

Appellants additionally argue that Appellee's attachment of "conditions" to their SUP was unconstitutional and illegal. In response, Appellees argue that the attachment of conditions to the SUP, including periodic review of the permit, did not exceed Appellee's authority.

The Court observes that Appellants' Notice of Appeal specifically complains that Appellants' SUP was conditioned upon a "one year review at the township level." However, the "one year review" condition purportedly attached to Appellants' SUP would appear to be a moot issue. The reasons underlying Appellee's decision to revoke Appellants' SUP are irrelevant because Appellee lacked any such revocation authority.

Appellants also complain of the Township Zoning Commission's July 20, 2015 decision to review Appellants' SUP a second time. Appellants complain that since that time, the Commission and Appellee held numerous meetings and have attempted to coerce Appellants to

⁷ A person may not serve simultaneously as a township trustee and member of a township zoning commission or township board of zoning appeals within the same township. 2006 Ohio Op. Att'y Gen. No. 015 (2006).

fulfill additional conditions, not originally attached to the SUP, under threat of terminating the SUP. In response, Appellee defends the propriety of continuing and regular reviews of Appellants' SUP as "a reasonable method to track, monitor, and react to Appellants' escalating commercial use of the property." Appellee concedes the lack of express authority within the Resolution for the imposition of conditions upon SUPs. Appellee otherwise fails to point to any authority within R.C. Chapter 519 allowing township trustees or township zoning commissions to add conditions to an existing SUP.⁸

Notwithstanding the parties' lengthy arguments regarding the subsequent additional conditions Appellee and/or the Zoning Commission purportedly attached to Appellants' SUP, the propriety of such actions does not present a ripe issue within the context of Appellants' present Appeal. Appellee's alleged "threats" regarding Appellants' compliance with subsequently imposed conditions do not constitute a "final order, adjudication, or decision" as contemplated by R.C. 2506.01.⁹

⁸ Appellee concedes that Section 7.2 of the Zoning Resolution does not expressly allow for the imposition of conditions, but argues that this fact should not be determinative of the issue because the Resolution "expressly allows for the discretionary issuance of special permits which inherently involves the establishment of conditions." Appellee's argument fails to appreciate the Ohio Supreme Court's directive that "zoning limitations by implication" is not permitted. See, Cleveland Clinic Found. v. Bd. of Zoning Appeals, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161. Similarly without merit is Appellee's general representation that the placement of conditions upon a SUP "is clearly an accepted practice within [the Sixth] Appellate District." Five of the six cases to which Appellee points are readily distinguishable and without instructive value because they involve regulatory actions by cities, whose regulatory powers are not subject to R.C. Chapter 519. See, Triomphe Investors v. City of Northwood, 6th Dist. Wood No. 90WD095, 1992 Ohio App. LEXIS 1051 (Mar. 13, 1992); Glass City Acad., Inc. v. City of Toledo, 179 Ohio App.3d 796, 2008-Ohio-6391, 903 N.E.2d 1236 (6th Dist.); Gibraltar Mausoleum Corp. v. City of Toledo, 106 Ohio App.3d 80, 83, 665 N.E.2d 273 (6th Dist.1995); Women of the Old W. End v. City of Toledo, 6th Dist. Lucas Court of Appeals No. L-97-1204, 1998 Ohio App. LEXIS 2394 (June 5, 1998), and Gorney v. Toledo, 6th Dist. Lucas C. A. No. L-87-120, 1988 Ohio App. LEXIS 1440 (Apr. 22, 1988). The other case to which Appellee points is likewise without value because the authority of the township to condition the landowner's SUP was not at issue or otherwise challenged. See, Superior 24hr Towing & Rd. Serv., LLC v. Springfield Twp., 6th Dist. Lucas Nos. L-10-1049, L-10-1050, 2010-Ohio-5895.

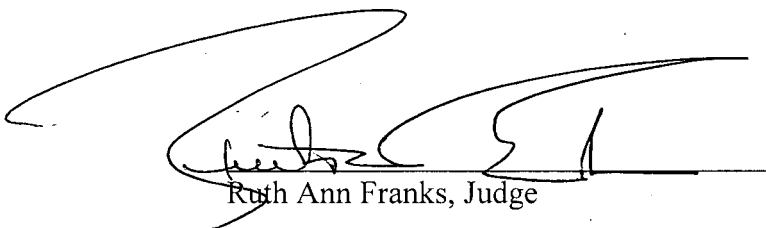
⁹ Quite clearly, this action has not been brought pursuant to R.C. 519.24 for the enforcement of Appellee's zoning regulations and/or to prevent Appellants from violating the same.

JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED, and DECREED that the Waterville Township Board of Trustees' November 24, 2015 decision to Revoke Appellants' Special Use Permit is invalid and unenforceable, and hereby vacated.

It is further ORDERED, ADJUDGED, and DECREED that Appellees are ORDERED to pay the costs of this proceeding.

July 20, 2016



Ruth Ann Franks, Judge

cc: Matthew D. Harper, Esq.
Jonnie M. Hodges, Esq.
Robert C. Battin, Esq.
Larry P. Meyer, Esq.
Dawn Sanderson, Esq.