IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cross-Up, Inc., Appellant	:	
v.	:	
The Zoning Hearing Board of Porter Township and Township of Porter	:	No. 918 C.D. 2010
	:	Argued: December 7, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: January 4, 2011

Cross-Up, Inc. (Cross-Up) appeals the April 7, 2010 order of the Court of Common Pleas of Clinton County (trial court) affirming the decision of the Zoning Hearing Board of Porter Township (Board) denying Cross-Up's application to use a portion of its property as a private motorcross riding track. The Township of Porter (Township) has filed a brief as an intervenor. The issues in this case are: 1) whether the trial court erred in affirming the Board's decision that the proposed use was not permitted as "outdoor-recreation, public or private"; 2) whether the trial court erred in affirming the action of the Board under a provision of the Porter Township Zoning Ordinance of 1998 (Ordinance) addressing "Uses Not Provided For"; and 3) whether the trial court erred in upholding the validity of the Ordinance when the Ordinance prohibits all uses of property except for those uses specifically permitted. For the reasons that follow, we affirm the order of the trial court.

Cross-Up is the owner of the subject 6.28-acre property, located at the Lamar Interchange of Interstate 80 and State Route 64 in a Commercial-Industrial zoning district in Porter Township, Clinton County, Pennsylvania. Chris Lykens is the president and owner of Cross-Up. Uses of properties surrounding the subject property include: a Comfort Inn, the Browns Hill Tavern/Hotel, farmland used for crops, a local restaurant, a McDonald's restaurant, four truck stops, an automobile repair garage, and other commercial uses.

The Board previously approved the use of Cross-Up's property for an automotive and tire repair garage, car wash facility, and six self-storage buildings. The garage and car wash are currently in operation, and one self-storage building has been constructed. Lykens is a professional motorcross rider. In violation of the Ordinance, he constructed a motorcross riding area on the unoccupied portion of the subject property without filing an application to change the land development plan or to obtain a permit. Following a visit from the Zoning Officer, Daniel Eckley, prompted by a complaint, Cross-Up applied for permission to use a portion of the subject property for a motorcross track.

While the Zoning Officer determined that Cross-Up's desired use was not a use permitted within the zoning district, he determined that it could be a Use Not Provided For pursuant to Section 1.01(6)(D) of the Ordinance, but informed Cross-Up that the Board would need to make a determination on the application. A hearing was held on December 10, 2009 at which the Zoning Officer, Lykens and several interested parties testified and presented evidence. The Board, by a unanimous vote, denied Cross-Up's application for permission to use his property for a motorcross track, either as a permitted use and or a Use Not Provided For. Cross-

Up appealed to the trial court which affirmed the Board's decision. Cross-Up appealed to this Court.[1]

Cross-Up argues that the Board erred by inserting a restriction against motorized activities into the definition of "outdoor Recreation, Public or Private," making it an invalid interpretation of the Ordinance. We disagree.

Section 7.02(1) of the Ordinance provides: "A building may be erected, altered or used and a lot may be used or occupied for any of the following purposes, and no other, as a permitted use. . . . Outdoor recreation, public or private." Reproduced Record (R.R.) at 296a. Section 1.03 of the Ordinance defines "outdoor recreation, public or private" as:

> A park or park-type facility providing outdoor recreational enjoyment or activities, either for free or on a fee basis. Such facilities may include, but need not be limited to, tennis or basketball courts, baseball or other athletic fields, swimming, hiking or picnic areas, and playgrounds. Such facilities may also include buildings and accessory structures.

R.R. at 261a. Also, Section 8.08 of the Ordinance provides that types of recreational uses permitted in recreational development areas are: boating and fishing; golf courses; hiking and horseback riding; parks and arboretums; play fields; playgrounds;

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[1] In zoning hearing cases where the trial court does not take additional evidence,

> this Court's scope of review is limited to determining whether the zoning hearing board committed an error of law or manifestly abused its discretion. An abuse of discretion occurs when the board's findings are not supported by substantial evidence in the record. Substantial evidence is that relevant evidence which a reasonable mind would accept as adequate to support the conclusion reached.

Greth Dev. Grp., Inc. v. Zoning Hearing Bd. of Lower Heidelberg Twp., 918 A.2d 181, 186 n.4 (Pa. Cmwlth. 2007) (citations omitted).

picnic areas; skating rinks; swimming pool; tennis courts; woodlands; and lakes. R.R. at 310a.

Section 603.1 of the Pennsylvania Municipalities Planning Code (MPC),[2] provides:

> In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

However, "[a zoning hearing board's] interpretation of its own zoning ordinance is entitled to great deference and weight." *Hafner v. Zoning Hearing Bd. of Allen Twp.*, 974 A.2d 1204, 1210 (Pa. Cmwlth. 2009). In the present case, the Zoning Officer determined that a motorcross riding area did not fall within the definition of "outdoor recreation public or private" because there are no provisions in the Ordinance for the use of motorized vehicles as recreation. R.R. at 192a. The Board accepted the Zoning Officer's determination, and concluded that a motorcross track was not included as a permitted use pursuant to Section 8.08 of the Ordinance concerning recreational development regulations.

The Township cites *Neshannock Township v. Musguire*, 484 A.2d 839 (Pa. Cmwlth. 1984), in support of its argument that the Ordinance defines "outdoor recreation, public or private" as a park or park-type area, and therefore, a motorcross track is not a permitted use. In *Neshannock*, the landowner wished to build a commercial motorcross track on land zoned residential. The residential zoning district permitted use of land as "public and private parks and recreation grounds,"

[2] Act of July 31, 1968, P.L. 805, *as amended*, added by Section 48 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10603.1.

but did not define "recreation grounds." This Court opined: "In the context of the ordinance, 'recreation grounds' appears to be synonymous with 'park.'" *Neshannock Twp.*, 484 A.2d at 841. The same can be said in the present case. The Ordinance defines "outdoor recreation, public or private" as "a park or park-type facility" and further provides examples. R.R. at 261a. In the context of the Porter Township Ordinance, a motorcross track, regardless of whether it is meant for commercial or private use, is not "outdoor recreation, public or private." Therefore, the Board did not abuse its discretion or err as a matter of law in denying the application.

Next, Cross-Up argues that in an attempt to avoid the exclusionary nature of the zoning scheme, the Ordinance includes a provision addressing "Uses Not Provided For," while, determining which uses may be permitted in the Township under that heading is essentially a legislative function, and the Board cannot engage in creating legislation. We disagree.

> Section 1.01(6)(D) of the Ordinance provides:
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> > In interpreting and applying the provisions of this Chapter, they shall be held to be the minimum requirements for the promotion of the health, safety and general welfare of the residents of the Township.
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> > . . . .
> >
> > D. Uses Not Provided For. Whenever, in any District established under Chapter 27, a use is neither specifically permitted nor denied and an application is made by a property owner to the Zoning Officer for such use, the Zoning Officer shall refer the application to the Zoning Hearing Board. The Board has the authority to permit or deny the use. However, the use shall be permitted if it is similar to and compatible with permitted uses in the District and in no way is in conflict with the general purpose and intent of this Chapter.

The purpose of the General Provisions section of the Ordinance, under which Section 1.01 falls, is stated as follows.

> This Chapter is enacted to promote, protect and facilitate the public health, safety, morals, general welfare, coordinated and practical community development, proper density of population, the provision of adequate light and air, police protection, vehicle parking and loading space, transportation, water, sewage, schools, public grounds and other public requirements, as well as to prevent overcrowding of land, blight, danger, and congestion in travel and transportation, loss of health, life or property from fire, flood, panic or other dangers. This Chapter is enacted in accordance with an overall program, and with consideration for the character of the Township, its various parts and the suitability of the various parts for particular uses and structures.

The intent of the Commercial-Industrial District is stated as follows.

> The combination of a commercial and industrial district is established as a response to the requirement for highway services and the improved accessibility of the areas surrounding the interchange between Pennsylvania Route 64 and Interstate 80. The mix of uses is appropriate when accompanied by stringent requirements for off-street parking, adequate building setbacks and landscaping of sites. Public water and sewer services are anticipated in this area.

Zoning hearing boards generally do take on quasi-legislative functions when they grant variances. The power to grant a variance is a legislative power, but "[b]ecause it is a legislative power, zoning ordinances must contain standards to control its exercise by administrative boards . . . in order not to illegally delegate legislative power." *H. A. Steen Indus., Inc. v. Cavanaugh*, 430 Pa. 10, 17, 241 A.2d 771, 775 n.3 (1968).

In the present case, the Board has the power to permit or deny a use, and shall permit it, "if it is similar to and compatible with permitted uses in the District and in no way is in conflict with the general purpose and intent of this Chapter." Section 1.01(6)(D) of the Ordinance. The permitted uses and intent of each District are clearly outlined in the Ordinance. The Board's only function then is to determine whether the applied for use is similar to and compatible with the permitted uses and intent. The Board determined that a motorcross riding track was not similar to or compatible with the surrounding permitted uses which included, among other things, hotels, restaurants and truck stops. It also concluded that a motorcross riding track bears no relationship with the highway services provided for in the Commercial-Industrial District. Therefore, the Board did not err as a matter of law or abuse its discretion in denying Lykens the use of his property for a motorcross riding track.

Finally, Cross-Up argues that the Ordinance is drafted to allow only specifically listed uses of property, and if a use is not listed, it is deemed prohibited, which runs afoul of the principle that landowners have a constitutionally protected right to enjoy their property subject only to reasonable regulation. In addition, Cross-Up contends that the Ordinance excludes all uses except those that are specifically listed, thereby making the Ordinance *de jure* exclusionary. We disagree.

> Zoning ordinances that exclude uses fall into one of two categories - *de jure* or *de facto.* In a *de jure* exclusion case, the challenger alleges that an ordinance on its face totally excludes a use. In a *de facto* exclusion case, the challenger alleges that an ordinance appears to permit a use, but under such conditions that the use cannot in fact be accomplished.

Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp., 599 Pa. 568, 579, 962 A.2d 653, 659 (2009) (citations omitted). Because the Ordinance provides for "Uses Not Provided For," the Ordinance is not exclusionary. Even though a motorcross riding

track is not specifically listed, Section 1.01(6)(D) allows the Board to permit a use in an area. Further, the Board's denial of a particular use in one type of zoning district does not automatically mean that it is not permitted in any other district. In fact, the Board specifically concluded: "a motorcross track as a Use Not Provided For in the Ordinance would be more appropriately located in other zoning districts of the Township . . . such as in the Agricultural Zoning District or the Conservation Zoning District of the Township." Therefore, the Ordinance is not exclusionary.

For the reasons stated above, the order of the trial court is affirmed.

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JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 4th day of January, 2011, the April 7, 2010 order of the Court of Common Pleas of Clinton County is affirmed.

JOHNNY J. BUTLER, Judge