[Cite as *Southside Environmental Group, L.LC. v. Weathersfield Twp. Bd. of Trustees,* 2016-Ohio-4739.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

SOUTHSIDE ENVIRONMENTAL GROUP, LLC,	:	**O P I N I O N**
Appellant,	:	**CASE NO. 2015-T-0083**
- vs -	:	
BOARD OF TOWNSHIP TRUSTEES, WEATHERSFIELD TOWNSHIP, OHIO, et al.,	:	
Appellees.	:	

Administrative Appeal from the Trumbull County Court of Common Pleas, Case No. 2014 CV 02241.

Judgment: Affirmed.

Thomas C. Nader, Nader & Nader, 5000 East Market Street, #33, Warren, OH 44484 (For Appellant).

Cherry Lynne Poteet, Daniel Daniluk, LLC, 1129 Niles-Cortland Road, S.E., Warren, OH 44484 (For Appellees).

COLLEEN MARY O'TOOLE, J.

{¶1} Southside Environmental Group, LLC, appeals from the judgment of the Trumbull County Court of Common Pleas, affirming the decision of the Weathersfield Board of Zoning Appeals (BZA) that Southside was in violation of several of the township zoning regulations. Finding no error, we affirm.

{¶2} Southside owns some 12 acres of land located at 1780 and 1806 Niles-Warren River Road in Weathersfield Township, Trumbull County, Ohio. The area is zoned Industrial B. As of 2011, Southside had an occupancy permit for landscape materials, and operated a landscape material business at the site.

{¶3} June 14, 2012, Southside and Kurtz Brothers, Inc. filed a joint application for a conditional use permit to permit them to operate a "Class IV Composting Facility and Construction and Demolition Debris Recycling Facility" on the site. The BZA approved the conditional use permit at a meeting that same day, with nine specified conditions.

{¶4} The joint venture between Southside and Kurtz never materialized, even though Kurtz obtained a permit from the Ohio EPA to operate a Class IV composting facility. Southside operated the facility on its own, evidently under the authority of the Kurtz permit. Further, Southside never applied to the Ohio EPA for the permit required to install a Construction and Demolition Debris Facility.

{¶5} Of moment to this appeal is Section 503 of the township zoning regulation, which provides, "A conditional use approval shall be deemed to authorize only one particular conditional use and said approval shall become void if, the use is not implemented within two (2) years from the date of the approval by the Board of Zoning Appeals." August 4, 2014, more than two years after the conditional use permit was approved by the BZA, Southside was informed it was void due to failure to implement the uses approved. October 27, 2014, the Weathersfield Zoning Inspector issued a notice of violation to Southside. Southside appealed to the BZA, which affirmed the decision of the zoning inspector following hearing on December 11, 2014. Southside

appealed to the trial court, which, in turn, affirmed the decision of the BZA. This appeal timely ensued.

{¶6} "When a trial court reviews the decision of a board of zoning appeals, the court 'may reverse the board if it finds that the board's decision is not supported by a preponderance of reliable, probative and substantial evidence. An appeal to the court of appeals, pursuant to R.C. 2506.04, is more limited in scope and requires that 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. Sandusky* (1984), 12 Ohio St.3d 30, 34 * * *. 'While the court of common pleas has the power to weigh the evidence, an appellate court is limited to reviewing the judgment of the common pleas court strictly on questions of law.' *Akwen, Ltd. v. Ravenna Zoning Bd. of Appeals*, 11th Dist. No. 2001-P-0029, 2002-Ohio-1475, at ¶17 (citation omitted)." (Parallel citation omitted.) *Carrolls Corp. v. Willoughby Bd. of Zoning Appeals*, 11th Dist. Lake No. 2005-L-110, 2006-Ohio-3411, ¶10.

{¶7} Southside assigns two errors on appeal:

{¶8} "[1.] The Trial Court Erred in concluding that the conditional use permit issued to appellant on July 12, 2012 had expired."

{¶9} "[2.] The Trial Court Erred in concluding that the conditional use permit issued to Appellant on July 12, 2012 had expired."

{¶10} The assignments of error being identical, we review them together.

{¶11} First, Southside argues it had implemented the conditional use permit, pursuant to zoning Section 503, since it was actually operating a Class IV composting

facility at the site. The BZA responds that Section 503 only permits a single conditional use, and the one approved June 12, 2012, included operation of both the composting facility, and the construction and demolition debris facility. Nothing in the township zoning regulation prohibits a single conditional use from covering several activities. As the BZA points out, by June 13, 2014, Southside had done nothing to implement the latter operation, thus voiding the conditional use permit. This is a logical reading of the zoning provision in question. Further, as the BZA points out, the conditional use permit demanded that Southside meet certain conditions. These included the construction of a berm with trees to screen the operations on site; and that operations were to be conducted at a minimum set back. The trial court found Southside had not complied with these particular conditions. It seems to us that compliance with any conditions specified in the conditional use permit is a prerequisite for finding the permit had been implemented.

{¶12} Southside also argues it never received the actual certificate for the conditional use. The record does not support this contention. The zoning inspector at the time of hearing before the BZA testified he did not have a copy of the certificate in his records. He was not zoning inspector at the time the conditional use was granted. Further, Mr. Rob Fagnano, the site operator at the time the conditional use was approved, testified at the hearing. He was asked: "Did you become aware afterwards [i.e., after the hearing before the BZA] what was granted in the Conditional Use Permit?" Mr. Fagnano answered: "I received a copy of the paperwork."

{¶13} Further, the Board of Trustees directs our attention to R.C. 519.122, which provides, in relevant part: "No action alleging procedural error in the actions of a

township board of zoning appeals in the granting of a * * * conditional use certificate * * * shall be brought more than two years after the * * * certificate was granted." If it did not receive a copy of the conditional use certificate, Southside should have brought an action within two years of the granting of the conditional use. It did not.

{¶14} The zoning inspector had further found Southside was creating a nuisance, which finding was affirmed by both the BZA and the trial court. Southside argues that a conditional use is a permitted use, and cannot, as a matter of law, be a nuisance. This presumes the validity of the conditional use in question. As the conditional use permit in this case had expired, Southside's operations could be found to constitute a nuisance.

{¶15} The assignments of error lack merit. The judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J., concurs,

TIMOTHY P. CANNON, J., concurs in judgment only with a Concurring Opinion.

TIMOTHY P. CANNON, J., concurring in judgment only.

{¶16} I concur with the judgment of the majority to affirm the decision of the trial court in upholding the decision of the BZA.

{¶17} I write separately because I am concerned about the lack of attention by the township in failing to issue the approved permit, with specifically enumerated conditions, as required by its own township zoning resolution. The township's

suggestion that it was somehow appellant's duty to complain about this is misguided. The township zoning resolution places the burden on the township to issue this permit, and it never did. I agree, however, with the trial court's reasoning that appellant's duty to comply with the conditions imposed began to run on the date the BZA approved the permit.

{¶18} The question thus becomes whether appellant was properly put on notice of the nine conditions placed upon it by the BZA at the meeting where the conditional permit was approved. Appellant has not argued any misunderstanding as to those conditions and, in fact, has acknowledged that some of those conditions were not met within the two-year period.

{¶19} In addition to the nine conditions imposed by the BZA, appellant was required to obtain the proper EPA permit to operate the approved facility. This was never done. An intended partner, Kurtz Brothers, apparently obtained an EPA permit to operate a composting facility, but this entity was not operating anything there. Nevertheless, in order for appellant to operate a facility that was approved under the conditional use permit, it needed a permit to install, and an operating permit for, a Construction and Demolition Debris Facility.

{¶20} This leads to appellant's next contention, that it did not have to operate all of the uses approved by the BZA and that it only needed a permit for the use they were going to implement. The township points to Section 503, which states that a conditional use approval "shall be deemed to authorize only one particular conditional use." The township argues that appellant cannot implement only a portion of an approved conditional use. The township cites to no authority for this proposition.

{¶21} To the contrary, the original application for conditional use referred to a variety of uses, including composting, construction debris disposal, and recycling. The minutes reflect that the conditional use was approved, and the nine additional conditions were listed. There was no restriction imposed that *all* requested uses had to be commenced within the two years or none would be approved. The result was approval of a variety of conditionally *permitted* uses, not a variety of *required* uses.

{¶22} However, there does not seem to be any claim that appellant materially or substantially complied with all the required conditions. In fact, it seems that failure to construct the berms and vegetation and the placement of material well within the 800-foot setback from Warren Road contributed to the filing of the nuisance complaint.

{¶23} I would affirm the judgment of the trial court, primarily due to appellant's failure to comply with the reasonable and unchallenged conditions that were initially imposed by the BZA in 2012.