

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

EAST MAIN STREET LOFTS,	:	<b>O P I N I O N</b>
Appellee,	:	
- vs -	:	<b>CASE NO. 2018-P-0004</b>
THE CITY OF KENT PLANNING COMMISSION,	:	
Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2017 CV 0297.

Judgment: Affirmed in part and reversed in part; remanded.

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*Eric R. Fink*, Assistant Law Director, 319 South Water Street, Kent, OH 44240 (For Appellant).

TIMOTHY P. CANNON, J.

{¶1} The City of Kent Planning Commission (“Commission”) appeals from the December 21, 2017 judgment entry of the Portage County Court of Common Pleas, reversing the Commission’s denial of a conditional zoning permit to construct the East Main Street Lofts (“EMSL”). For the following reasons, the trial court’s judgment is affirmed in part and reversed in part, and the case is remanded.

{¶2} On August 19, 2015, Hallmark Campus Communities (“Developer”), a real estate development company in Columbus, Ohio, applied for a site plan review and conditional zoning permit to construct the EMSL, a multi-family residential complex, in the city of Kent, Ohio. The development’s parking lot was to be constructed in neighboring Franklin Township. After Franklin Township denied the parking plan, the Developer submitted a revised application on August 26, 2016. The new plan placed the entire proposed development, which consists of two 4-story residential buildings, a parking lot, and a green area, in Kent. The size was reduced from 98 units of one- and two-bedroom apartments with a total of 362 beds to 94 units of one- and two-bedroom apartments with a total of 184 beds.

{¶3} The proposed development is primarily located in Kent’s “Commercial High Density Multifamily Residential” (“C-R”) district. Under Kent City Codified Ordinances (“KCO”) Section 1145.02(b)(3), multifamily dwellings are conditionally permitted in the C-R district subject to the requirements set out in KCO Section 1171.01(a)(5), (9), (11), (22), (37), and (38).

{¶4} The following zoning districts border the proposed development: Kent’s C-R district to the north and northwest; Kent’s “Multifamily Residential” (“R-4”) district to the south and southwest; and Franklin Township’s “General Commercial” (“C-1”) district to the east.

{¶5} Holly Drive extends into the development from Horning Road. This access point is located in Kent’s R-4 district. Horning Road continues East into Franklin Township’s “Single Family Residential” (“R-1”) district. Franklin Township’s C-1 district

sits between the development and the R-1 district. Several single-family homes are located along Horning Road.

{¶6} At the request of the Commission, the Developer hired “EMH&T” to generate a Traffic Impact Study. The Developer presented its proposal to the Commission on October 4, 2016. In February 2017, Kent’s city staff found the proposed development either met the requirements for a conditionally permitted use under KCO Section 1171.01 or was granted a variance by the Board of Zoning Appeals.

{¶7} The Developer again presented its case to the Commission on February 21, 2017. Prior to any discussion, an oath was administered to those members of the audience who wished to be heard. Thereafter, Ryan Pearson, a representative of the Developer, reviewed the site plan and proposal for EMSL. He answered questions from the commissioners about changes that were made to the plan pursuant to the Traffic Impact Study. He explained the city’s traffic engineer and the Developer’s traffic engineer were both involved in making the changes.

{¶8} Doug Bender, Senior Traffic Engineer with EMH&T, discussed the Traffic Impact Study on behalf of the Developer. Mr. Bender explained the Traffic Impact Study considered five intersections in the area and that changes were made to the site plan based on the recommendations of the study. The Traffic Impact Study states: “All study area intersections are predicted to operate acceptably with existing conditions for vehicular traffic in the 2018 Build condition. Consequently, no off-site improvements are recommended at this time. A site-related improvement at the site entrance of Holly Drive is recommended to consist of:

- Install pedestrian crosswalks on all three approaches to the Horning Road/Holly Drive intersection and a stop bar on the Holly Drive approach.
- Construct pedestrian landings at each crosswalk location.
- Improve the sidewalk along the west side of Holly Drive to provide an eight-foot wide path
- Improve the site connection for pedestrians/bikes to the adjacent Holly Park apartments

No other site-related improvements are warranted or recommended.

{¶9} Following Mr. Bender’s discussion, several residents of Horning Road and owners of property on Horning Road, from both Kent and Franklin Township, provided comment. They expressed concerns regarding how the development would affect their neighborhood. One resident indicated the development would be “significantly overbearing to the existing R-1 neighborhood.” The residents explained that increased population density resulting from the development would change the character of the neighborhood and contribute to traffic congestion, increased crime rates, blight, invasion of privacy, and pollution. In support, several neighbors referred to a “Comprehensive Community Housing Study and Needs Analysis” (“Housing Study”) published in 2016, which, in part, analyzed housing supply and demand in the city of Kent.

{¶10} The residents also expressed doubt over the findings of the Traffic Impact Study. One resident indicated he thought the study was biased, and several residents contested the study’s findings. In response to the concerns, Mr. Bender explained he had worked with the city staff to set up the parameters for the study. He further explained the procedures used in conducting the study and stated that pedestrian volumes were included in the study. Mr. Pearson also addressed the concerns,

explaining the Developer was not trying to address all the community's issues with traffic but would make improvements to address certain pedestrian and bike connections.

{¶11} After the public comment, Jennifer Barone, development engineer from the city of Kent, addressed the Commission and reviewed the proposed plan. She explained that the Traffic Impact Study was reviewed by the city's traffic engineer and the city engineer, who found the information in the study was acceptable. She further explained the city had plans to address traffic issues in the area. She stated the city staff found the Developer met the requirements of "the zoning code \* \* \* with the changes and the variances that were granted."

{¶12} The commissioners engaged in discussion and directed questions to Mr. Pearson. Following the discussion, they unanimously voted to deny the Developer's conditional zoning permit and site plan to construct EMSL.

{¶13} Although no written decision was issued by the Commission, the verbatim transcript of the meeting includes the following discussion from each commissioner regarding his or her reasons for denying the permit.

**Ms. Daniels:** \* \* \* I have a couple of issues here. Number one \* \* \* what's happening here is Kent State University which is creating half of the problem and what's happening here is \* \* \* I would say the law enforcement, the Police Department. They are having so many problems and issues. \* \* \* [T]he biggest problem I'm having with this \* \* \* is \* \* \* on this drawing here there's \* \* \* 10 developments in there and we haven't done a housing study since 11-13-05. I can bring that in the housing study where \* \* \* it just feels to me \* \* \* I'm for business. I'm for development. I'm for all that but I'm just feeling that this little area is overdone. You know. The other thing I'm having here is Kent, Ravenna, and Franklin Township whatever is still the city. I mean we still need to be compassionate with the people. And my issue should not be \* \* \* disturbing to existing or future neighborhood use and shall not be

detrimental to property in the immediate vicinity or the community as a whole. We already know there's going to be some issues here. So that's my two cents. And I don't have anything more to say.

\* \* \*

**Mr. Clapper:** [L]ike Ms. Daniels said, my biggest concern is the impact on the neighborhood and the properties surrounding it \* \* \* how it's going to affect the long term citizens of Kent and the property of the people who live around there.

\* \* \*

**Ms. Edwards:** \* \* \* So some of the things I looked at is \* \* \* they just published in 2017 enrollment status for Kent State and the freshman, sophomore and junior classes \* \* \* have all decreased by 5.47% \* \* \* so going back to the housing study, and knowing that there's going to be less students from the feeder schools and that there are on-line courses now \* \* \* My question now is that enrollment is going to continue to trend down? That is \* \* \* a big concern for me. And then I also think about the residential houses there and are the people going to want to live there? Are those going to turn into rental properties? So you start to think about \* \* \* the whole neighborhood \* \* \* dynamics changing \* \* \* so with that being said, I also have a concern with the buildings \* \* \* the size of them and being that they are on the R-4 side of the property. \* \* \* [A]nd its detrimental to the R-4 properties that are there and so I have a hard time with it being harmonious with the existing \* \* \* surroundings as well.

\* \* \*

The Kent R-4 properties \* \* \* So those are some of \* \* \* my thoughts on that. Anybody else from the Planning Commission have any further comments or questions?

**Mr. Paino:** Yeah \* \* \* When I looked at the drawings over the weekend \* \* \* I said these are nice looking buildings \* \* \* They're actually very nice looking buildings and I don't necessarily object to the overall site plan but I do object to where the buildings are located. I think they should be away from the residential area. I also think that the vehicular traffic should go to East Main Street \* \* \* I think that Franklin Township should work with these developers in order to make that a reality because the reality is with the

number of Franklin Township people in here and it's Franklin Township's problem \* \* \* to update their roads so.

\* \* \*

**Mr. Gargan:** I felt that it would be detrimental to the surrounding area. I also considered the housing study the City of Kent did. And I think we over built a number of multifamily or student housing at the current rate.

\* \* \*

And I think they underestimated the impact of the traffic because I know the \* \* \* Loop-Horning Road intersection is the worse intersection of Kent. I think that was totally downplayed by the Traffic Study.

**Ms. Daniels:** \* \* \* They're building nice buildings, but \* \* \* just the impact to the neighborhood. I mean I wouldn't like to have a building looking down on me and I have small children[.]

{¶14} On March 23, 2017, the Developer filed in the Portage County Court of Common Pleas a notice of administrative appeal from the Commission's decision.

{¶15} On October 24, 2017, the Developer filed a "Motion to Supplement the Record" pursuant to R.C. 2506.03 on the grounds that the transcript did not contain all the evidence. The motion was granted, and both parties subsequently filed briefs.

{¶16} On December 21, 2017, the trial court entered a "Judgment Entry on Administrative Appeal pursuant to R.C. 2506." The court stated it had "reviewed the pleadings, the record, and the supplemented evidence to the record." The trial court stated the Commission "denied the application and site plan alleging it violated" KCO Section 1107.05(a)(2), (3), (4), and (6). The trial court's judgment entry further states:

The Court finds that the City of Kent Planning Commission's reasons for denying the site plan for violations of KCO 1107.05(A)(3)(4) and (6) were not supported by competent and credible evidence due to its reliance on unsubstantiated and

speculative public comments over expert evidence and the features of the site plan.

The Court further finds that the City of Kent Planning Commission's reasons for denying the site plan for violations of KCO 1107.05(A)(2)(3)(4) was arbitrary due to reliance on the public comments of a minority of surrounding property owners and non-residents to the detriment of the majority of surrounding property owners and residents.

The Court further finds that the City of Kent Planning Commission's reason for denying the site plan for violations of KCO 1107.05(A)(4) was illegal due to reliance on the economic conclusions of a housing market study rather than consider health, safety, welfare and morals as required by zoning law.

{¶17} The trial court ordered that "Appellee's denial of the Appellant's site plan on February 21, 2017, is set aside and held for naught." The trial court further ordered that the site plan be approved by the Commission.

{¶18} On January 4, 2018, the Commission filed a "Motion to Reconsider Based Upon New Case Law." The Developer filed a response. The trial court did not rule on the motion.

{¶19} The Commission noticed a timely appeal from the trial court's December 21, 2017 judgment entry. The Commission raises four assignments of error, which we address out of order.

{¶20} The Commission's second assignment of error states:

{¶21} "The trial court abused its discretion as a matter of law and committed prejudicial error by not giving due deference to the evidentiary determinations made by the Planning Commission."

{¶22} The Commission argues the trial court ascribed reasons for denying the conditional zoning permit and site plan that were not stated by the commissioners in the transcript.

{¶23} When reviewing an administrative decision under R.C. 2506.01, the common pleas court must consider the entire record and determine “whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.” *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000) (citations omitted). “In undertaking this review, the common pleas court, acting as an appellate court, must give due deference to the administrative agency’s determination of evidentiary conflicts.” *Green Vision Materials, Inc. v. Newbury Twp. Bd. of Zoning Appeals*, 11th Dist. Geauga No. 2013-G-3136, 2014-Ohio-4290, ¶50, citing *Battaglia v. Newbury Twp. Bd. of Zoning Appeals*, 11th Dist. Geauga No. 99-G-2256, 2000 WL 1804344, \*6 (Dec. 8, 2000). The common pleas court “is bound by the nature of administrative proceedings to presume that the decision of the administrative agency is reasonable and valid[,]’ and the burden of demonstrating the invalidity of the agency’s decision rests with the contesting party.” *Battaglia, supra*, at \*3, quoting *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St.3d 452, 456 (1993). “A court of common pleas should not substitute its judgment for that of an administrative board, such as the board of zoning appeals, unless the court finds that there is not a preponderance of reliable, probative and substantial evidence to support the board’s decision.” *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984).

{¶24} “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.” *Id.* “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 WL 480041, \*3 (Mar. 29, 2002). “Within the ambit of ‘questions of law’ for appellate court review” is whether the court of common pleas abused its discretion. *Kisil, supra*, at 34, fn. 4. An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black’s Law Dictionary* 11 (8th Ed.2004).

{¶25} Pursuant to KCO Section 1107.04, the Commission “shall hold a public hearing to review the proposed development as presented on the submitted application, plans and specifications in accordance with the standards established in this Zoning Ordinance.” In its evaluation of the project, the Commission may consider “comments from the administration or the general public[.]” *Id.* The Commission “may instruct the applicant or the administration to conduct additional studies, or seek expert advice.” KCO Section 1107.04(a). Further, “[w]henver it feels necessary, the Commission may attach conditions to the approval \* \* \* in order to insure the health, safety or welfare of the public as well as the integrity of an existing neighborhood in proximity to the development.” KCO Section 1107.04.

{¶26} KCO Section 1107.05 provides that an applicant for a conditional zoning permit must “establish by clear and convincing evidence that the general standards of this Zoning Ordinance, this Chapter and the specific standards pertinent to each proposed use shall be met throughout the period of the proposed use.” KCO Section 1107.05 further provides, in pertinent part:

The Planning Commission shall determine compliance or non compliance and shall insure that the general standards, the specific standards and other terms of this Ordinance pertinent to the proposed use shall be satisfied by the completion and operation of the proposed development.

(a) General Standards: The Planning Commission shall review the particular facts and circumstances of each proposed use in terms of the following standards and shall find that such use of the proposed location:

(1) Shall be harmonious with and in accordance with the general objectives or with any specific objective of the Land Use and Thoroughfare Plan (Comprehensive Development Plan) of current adoption;

(2) Shall be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use shall not change the essential character of the same area;

(3) Shall not be hazardous or disturbing to existing or future neighboring uses;

(4) Shall not be detrimental to property in the immediate vicinity or to the community as a whole;

(5) Shall be served adequately by essential public facilities and services such as highways, streets, police and fire protection, drainage structures; or that the persons or agencies responsible for the establishment of such use shall be able to provide adequately any such service including refuse disposal; and

(6) Shall have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public streets or roads.

{¶27} The trial court did not abuse its discretion when it determined the Commission denied the site plan for the Developer's failure to meet the standards of KCO Sections 1107.05(a)(2), (3), (4), and (6). The parties do not dispute that the Developer was required to satisfy each of the standards set forth in KCO Sections 1107.05(a)(1) through (6) to obtain a conditional zoning permit. The Commission maintains that the only standards the commissioners unanimously agreed the Developer failed to meet were those set forth in KCO Sections 1107.05(a)(3) & (4). The Commission, however, did not provide written findings of fact, and the trial court had only the verbatim transcript of the February 21, 2017 meeting to determine the Commission's reasons for denying the permit. During these discussions, each commissioner stated reasons for denying the permit. The discussions indicate the commissioners expressed concerns related to KCO Sections 1107.05(a)(2), (3), (4), and (6), although the commissioners did not agree unanimously on each reason. The Commission has failed to establish the zoning ordinance requires that the commissioners reach a consensus on the particular standards the Developer failed to meet.

{¶28} The Commission's second assignment of error is without merit.

{¶29} The Commission's third assignment of error states:

{¶30} "The trial court abused its discretion as a matter of law and committed prejudicial error when, rather than accept the reasons provided by the Planning Commissioners in the verbatim transcript, the trial court ascribed incorrect justifications for the Planning Commission's decision to deny the Developer's site plan."

{¶31} Under this assignment of error, the Commission presents three issues for our review:

[1.] Did the trial court err when the trial court concluded that the Planning Commission's decision to deny the Developer's conditional use certificate and site plan was allegedly due to the Planning Commission's reliance upon unsubstantiated and speculative public comments over expert evidence and the features of the site plan?

[2.] Did the trial court err when the trial court concluded that the Planning Commission's decision to deny the Developer's site plan was arbitrary and capricious due to reliance on the public comments of a minority of surrounding property owners and residents?

[3.] Did the trial court err when the trial court concluded that the Planning Commission's decision to deny the site plan was illegal due to allegedly relying upon the economic conclusions of housing market study rather than considering the health, safety, welfare and morals as required by local zoning law?

{¶32} Under its first issue, the Commission maintains its findings that the development would be "hazardous or disturbing to existing or future neighboring uses," pursuant to KCO Section 1107.05(a)(3), and "detrimental to property in the immediate vicinity or to the community as a whole," pursuant to KCO Section 1107.05(a)(4), are supported by competent, credible evidence because these are "the natural and logical conclusions anyone would draw when shoehorning 184 beds onto a street dominated by single-family housing" and are supported by the public comment.

{¶33} "[T]he authority to examine the effects of a proposed use on its surroundings does not imply unlimited discretion on the part of the decision-making body, and a decision concerning the effects of a particular use on adjacent uses and structures and uses must be based on substantial, reliable, and credible evidence." *Adelman Real Estate Co. v. Gabanic*, 109 Ohio App.3d 689, 695 (11th Dist.1996),

quoting *Tempo Holding Co. v. Oxford City Council*, 78 Ohio App.3d 1, 9 (12th Dist.1992). Public comment at an adjudicatory hearing does not rise to the level of “reliable, probative, and substantial evidence” unless “there are facts included as part of those opinions.” *Id.* at 694, citing *Kisil, supra*, at 34 and *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979). “This court has held that the objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a zoning permit.” *Rickard v. Trumbull Twp. Zoning Bd. of Appeals*, 11th Dist. Ashtabula Nos. 2008-A-0024, *et seq.*, 2009-Ohio-2619, ¶51, citing *Pinnacle Woods Survival Game, Inc. v. Hambden Twp. Zoning Inspector*, 33 Ohio App.3d 139, 140 (11th Dist.1986).

{¶34} The commissioners shared the concerns of the Horning Road residents regarding the effect the development would have on the neighboring community. However, the residents’ comments were speculative, anecdotal, and not supported by specific facts. Several residents speculated the increased population from the development would lead to crime and trespassing in the area. Residents also indicated the size of the apartment buildings and proximity to their homes would make them feel overshadowed by the buildings. One resident explained the development would be situated so close to her yard that it “would overlook on my children running in the backyard which will no longer be quiet[.]” She stated the following regarding the trees in the site plan: “My children who are 13 and 6 will be \* \* \* nearly 50 by the time they can no longer see the development behind us[.]” These concerns and opinions were not supported by specific facts. We do not determine that the public comment rose to the level of competent, credible evidence.

{¶35} The concerns regarding privacy and the proximity of the development to the Horning Road homes were addressed by the Developer. Mr. Pearson explained:

[B]uilding number one is placed on the west side of the site which is on an existing parking lot. We've tried to be sensitive to the neighbors as much as we could with what we're working with. The building on the east has been oriented in a north south direction \* \* \* therefore the shortest side of the building \* \* \* not the broad side of the building \* \* \* will be the piece facing the neighbors to the south \* \* \* Just so everybody knows \* \* \* Franklin Township and the City of Kent jurisdictional line is right along the east side \* \* \* half of our site[.]

This testimony is consistent with the maps of the development. The development is surrounded by a 6-foot perimeter fence and trees. Although single-family homes are located near the development, its 10-foot setback does not abut any property zoned for single-family residential use. The broad side of "Building 1," which faces south, directly abuts an existing parking lot in Kent's R-4 district. The Horning Road houses in Kent are also in the R-4 district and are situated southeast of the parking lot. The short side of "Building 2," which faces south, directly abuts an undeveloped portion of Franklin Township's C-1 zoning district. The Horning Road houses in Franklin Township are located south of that portion of the C-1 district. Furthermore, the development is surrounded by similar multi-residential apartment complexes, stores, and fast-food restaurants: directly north of the development are the Holly Park Apartments and the Celeron Suites; to the northwest are an Arby's restaurant, an AutoZone, and an apartment complex; to the southwest is the University Oaks apartments; and to the east is undeveloped land and a department store.

{¶36} The Commission next argues the trial court was required to accept the Commission's finding that the Traffic Impact Study and Mr. Bender's testimony were not

credible. The Commission maintains that the commissioners “articulated [their] disbelief” of Mr. Bender’s testimony and expressed “concerns for when the traffic study was conducted and the failure to consider the impact of pedestrian traffic.” Although the commissioners asked questions and expressed opinions about the Traffic Impact Study, there is no indication they found that the Traffic Impact Study or Mr. Bender’s testimony were not credible. During the public comment, several residents criticized the study as being biased. However, these concerns were addressed by Mr. Bender and Mr. Pearson. The Commission’s argument is not well taken.

{¶37} The Commission further argues it had justifiable reason to reject the Traffic Impact Study and Mr. Bender’s testimony. In support, the Commission relies on this court’s opinion in *Shelly Materials, Inc. v. Streetsboro Planning & Zoning Comm.*, 11th Dist. Portage No. 2017-P-0025, 2017-Ohio-9342. In that case, we reversed the trial court’s decision to reject the city of Streetsboro Planning Commission’s factual findings and overrule the Commission’s denial of Shelly Materials’ application for a conditional zoning permit. *Id.* at ¶1. We determined the Commission had justifiable reason to reject the expert testimony presented by Shelly Materials because the testimony itself revealed that it was “predicated on an invalid comparison.” *Id.* at ¶32. We further recognized that the Commission was not required to produce a conflicting expert because it was the applicant’s burden to prove it met the city’s general criteria for a conditional zoning permit. *Id.* at ¶37.

{¶38} Here, the commissioners stated their opinions that, contrary to the site plan, “the vehicular traffic should go to East Main Street” and that the Traffic Impact Study “underestimated the impact of traffic” at a certain intersection. The Commission

fails to direct us to any evidence supporting those opinions. The Commission also contends that Mr. Bender stated “the level of service at a nearby intersection would drop from an A (which is fantastic) to a C (which is not good).” The record, however, does not reflect that Mr. Bender provided any such testimony. Instead, Ms. Daniels stated: “So originally that intersection had a Level of Service A which is fantastic and now it may be at a Level of Service C which is still acceptable or B which is still acceptable; I don’t have the traffic study with me to see what it actually was[.]” This statement does not contradict the Traffic Impact Study or Mr. Bender’s testimony. Moreover, the record does not support that a “C” is an unacceptable level of service.

{¶39} Kent’s own city engineer and traffic engineer reviewed the Traffic Impact Study and found the findings acceptable. The Developer worked with the city’s engineer to implement the recommendations from the study, and the record reflects the city has plans to tackle public concerns by implementing some of its own traffic interventions. The Commission has failed to demonstrate the commissioners had justifiable reason to reject the Traffic Impact Study and Mr. Bender’s testimony.

{¶40} The trial court did not abuse its discretion when it determined the Commission’s reasons for denying the conditional use permit due to the Developer’s failure to meet the standards in KCO Sections 1107.05(a)(3), (4), and (6) were not supported by competent, credible evidence because the Commission relied on public comment rather than expert testimony and the features of the site plan.

{¶41} Under its second issue, the Commission contends the trial court abused its discretion when it found the Commission’s reasons for denying the permit for the Developer’s failure to meet the standards in KCO Sections 1107.05(a)(2), (3), and (4)

were “arbitrary due to reliance on the public comments of a minority of surrounding property owners and non-residents to the detriment of the majority of surrounding property owners and residents.” The Commission maintains the “sheer volume of public comment opposing the proposed development could be construed as evidence that the Developer’s site plan is injurious to the neighborhood.”

{¶42} We cannot determine that the Commission’s decision was arbitrary for the reasons stated by the trial court. At the February 21, 2017 meeting the majority of public comment was provided by Horning Road residents of Kent and Franklin Township who opposed the development. One resident of Kent, a property owner who was selling her property to the Developer, testified in favor of the development. There was no other testimony provided in favor of the development. It is unclear how the trial court came to the conclusion that reliance on this testimony would be “to the detriment” of the majority of surrounding property owners because there is nothing in the record that supports this conclusion. Accordingly, the trial court abused its discretion when it found the Commission’s decision was arbitrary.

{¶43} Because it is unclear what evidence the trial court considered in determining the Commission’s decision was arbitrary, we remand this matter for the trial court to clarify its ruling.

{¶44} Under its third issue, the Commission argues that the trial court abused its discretion when it determined the Commission’s reasons for denying the site plan pursuant to KCO Section 1107.05(a)(4) were “illegal” because the commissioners considered the “economic conclusions” of the Housing Study.

{¶45} The Developer argues the Commission could not rely on economic supply and demand when considering whether to grant the conditional zoning permit. The Developer maintains that whether a proposed use is necessary to serve community needs has no reasonable relationship to public health, safety, and morals, and the Commission incorrectly considered the need for multi-family residential units in the area. In support of its argument, the Developer cites to *Automotive Supermarkets, Inc. v. City of Willoughby*, 27 Ohio App.3d 238 (11th Dist.1986) and *Henle v. City of Euclid*, 97 Ohio App. 258 (8th Dist.1954). In both cases, there was a challenge to the validity of the zoning ordinance in question. In *Automotive Supermarkets*, this court held that a “need” for a business is not a proper subject for zoning decisions. *Automotive Supermarkets, supra*, at 240. In *Henle*, the Eight District Court of Appeals held the city could not “freeze” the use of property because of the possibility of a freeway coming through that property, and zoning ordinances should not be concerned with issues regarding supply and demand. *Henle, supra*, at 263-264. However, the validity of the city of Kent’s zoning ordinance is not at issue in the present case. And nothing suggests the city could not take into account the impact the proposed use would have on the community. The Developer’s argument is not well taken.

{¶46} The Housing Study was conducted completely separate from the Developer’s application for a conditional zoning permit. The objectives as stated in the study are as follows:

- Provide data that can guide public policy decisions in the area of housing and identify proposed action items that can be implemented to promote the appropriate blend of housing opportunities throughout the city.

- Provide a measured assessment of housing supply, present and future, unmet housing demand across various demographic categories and provide a comprehensive understanding of short-to-longer term housing supply and demand.
- Provide community specific housing priorities, policy alternatives and intervention strategies.

Because the Housing Study provides information related to whether the development could “be detrimental to property in the immediate vicinity or to the community as a whole,” pursuant to KCO Section 1107.05(a)(4), the trial court abused its discretion in determining it was “illegal” or that it was in any way improper for the Commission to consider it. Therefore, on remand, the trial court is to consider the Housing Study and determine whether the findings in the study support the Commission’s reasons for denying the permit pursuant to KCO Section 1107.05(a)(4).

{¶47} The Commission’s third assignment of error has merit to the extent discussed.

{¶48} The Commission’s first assignment of error states:

{¶49} “The trial court abused its discretion as a matter of law and committed prejudicial error by reversing the Planning Commission’s decision to deny the Developer its site plan.”

{¶50} The Commission argues its denial of the conditional zoning permit for the Developer’s failure to meet the standards in KCO Section 1107.05(a)(3) and (4) is supported by competent, credible evidence. This issue was addressed and is resolved consistent with our holding herein as it relates to the Commission’s third assignment of error.

{¶51} The Commission’s fourth assignment of error states:

{¶52} “The trial court abused its discretion as a matter of law and committed prejudicial error when it failed to consider the binding precedent established by the Eleventh District Court of Appeals and reaffirmed in *Shelly Materials, Inc.*”

{¶53} The Commission argues that because *Shelly Materials* is similar to the present case, the trial court should have likewise ruled in favor of the Commission. The Commission relies generally on *Shelly Materials* but has failed to direct our attention under this assignment to a specific error in the trial court’s judgment to which that case is applicable. Accordingly, we decline to consider appellant’s fourth assignment of error. App.R. 12(A)(2) (“[t]he court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based”); App.R. 16(A)(7); see *Hutchins v. Fedex Ground Package Sys., Inc.*, 9th Dist. Summit No. 22852, 2006-Ohio-253.

{¶54} The Commission’s fourth assignment of error is without merit.

{¶55} As noted above, our standard of review of the trial court’s decision is limited. The trial court, pursuant to R.C. 2506.04, is to determine whether “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.”

{¶56} Because the trial court improperly applied the law in determining whether the decision of the Commission was supported by the record, we must remand for the trial court to properly take into account the public comments and Housing Study.

{¶57} R.C. 2506.04 establishes the trial court’s options regarding disposition of the Commission’s decision. It states:

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.

{¶58} However, we note again the provision of KCO Section 1107.04, which states: “[w]henever it feels necessary, the Commission may attach conditions to the approval \* \* \* in order to insure the health, safety or welfare of the public as well as the integrity of an existing neighborhood in proximity to the development.” Therefore, if the trial court determines that the conditional use permit should have been granted, it must still afford the Commission the opportunity to add conditions.

{¶59} For the foregoing reasons the judgment of the Portage County Court of Common Pleas is affirmed in part and reversed in part. This matter is remanded for proceedings consistent with this opinion.

THOMAS R. WRIGHT, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.