[Cite as *Genoa Twp. Bd. of Trustees v. Martindale*, 2010-Ohio-2984.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GENOA TOWNSHIP BOARD OF TRUSTEES, ET AL. Plaintiffs-Appellees -vs- RANDY L. MARTINDALE, ET AL. Defendants-Appellants	JUDGES: Hon. Julie A. Edwards, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 09CAH070071 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 08CVH040573
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 28, 2010

APPEARANCES:

For Plaintiffs-Appellees	For Defendants-Appellees
WILLIAM J. OWEN 140 North Sandusky Street Third Floor Delaware, OH 43015	MICHAEL R. SHADE 41 North Sandusky Street P.O. Box 438 Delaware, OH 43015

Farmer, J.

{¶1} On May 31, 2006, appellants, Randy and Sheri Martindale, purchased property in Genoa Township, Ohio, from Robert Kline, for the light manufacturing use of fabricating countertops. Their business was known as Top Surface, Inc., also an appellant herein. Mr. Kline, as well as his father before him, operated a business known as Kline Manufacturing at the property, a light manufacturing company. In 1951, Genoa Township enacted a zoning resolution and placed the property in a residential zone. Because the Kline business had commenced in 1948, the property became a legal nonconforming use.

{¶2} Following numerous complaints of excessive noise, appellees, Genoa Township Board of Trustees and Genoa Township Zoning Inspector Joe Clase, filed a complaint for preliminary and permanent injunction against appellants. See, Complaint filed April 21, 2008. Appellees sought to enjoin appellants from using their property for business purposes and violating the noise resolutions.

{¶3} A bench trial before a magistrate was held on January 16, and February 6, 2009. By decision filed May 5, 2009, the magistrate recommended that the requested injunctions be granted. Appellants filed objections. By Judgment Entry Overruling in Part, and Sustaining in Part, the Defendants' Objections to the Magistrate's Decision and Judgment Entry Adopting the Magistrate's Decision filed July 2, 2009, the trial court sustained four objections, but approved and adopted the magistrate's decision.

{¶4} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED BY ADOPTING THE DECISION OF THE MAGISTRATE EVEN AFTER SUSTAINING SEVERAL OF THE OBJECTIONS OF THE DEFENDANT/APPELLANTS."

II

{¶6} "THE TRIAL COURT ERRED BY FAILING TO DETERMINE WHETHER OR NOT THE USE OF THE APPELLANTS IS A LEGAL NONCONFORMING USE."

III

{¶7} "THE TRIAL COURT ERRED BY FAILING TO DETERMINE THAT THE APPELLANTS' USE OF THE PROPERTY IS A CONTINUATION OF A LEGAL NONCONFORMING USE."

IV

{¶8} "THE TRIAL COURT ERRED IN RULING THAT THE USE OF THE APPELLANTS EXPIRED AFTER ONE YEAR."

V

{¶9} "THE TRIAL COURT ERRED IN RULING THAT THE GENOA TOWNSHIP BOARD OF ZONING APPEALS HAS AUTHORITY TO HEAR AN APPLICATION OF A CONTINUATION OF A NONCONFORMING USE UNDER THE TERMS OF THE GENOA TOWNSHIP ZONING RESOLUTION AND THE OHIO REVISED CODE."

VI

{¶10} "THE TRIAL COURT ERRED IN RULING THAT THE THEORY OF EXHAUSTION APPLIES TO THE APPELLANTS."

VII

{¶11} "THE TRIAL COURT ERRED IN RULING THAT THE APPELLANTS ARE NOT EXEMPTED FROM THE GENOA TOWNSHIP NOISE RESOLUTION."

VIII

{¶12} "THE TRIAL COURT ERRED IN ITS FINDING OF FACT THAT A NOISE VIOLATION OCCURRED, AS SUCH FINDING IS AGAINST THE MANIFEST WEIGHT OF EVIDENCE."

IX

{¶13} "THE TRIAL COURT ERRED IN RULING THAT THERE HAD BEEN A SUBSTANTIAL INCREASE IN NOISE AT THE PROPERTY SINCE 1999."

X

{¶14} "THE TRIAL COURT ERRED IN RULING THAT THE GENOA TOWNSHIP NOISE RESOLUTION IS CONSTITUTIONAL."

I, II

{¶15} Appellants claim the trial court erred in adopting the magistrate's decision after it sustained four of their objections. We disagree.

{¶16} Civ.R. 53 governs magistrates. Subsection (D)(4)(d) states the following:

{¶17} "If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the

objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate."

{¶18} On May 19, 2009, appellants filed objections to the magistrate's report. The trial court sustained four of appellants' objections, Nos. 2, 9, 12, and 13. No. 2 concerned a matter of law, as the magistrate incorrectly listed subsection (B) of R.C. 519.14 as opposed to subsection (A) as set forth in the trial court's ruling on objection No. 1. Nos. 9 and 12 concerned the interpretation or content of Mr. Kline's testimony. Mr. Kline was the former owner of the subject property who engaged in light manufacturing as a nonconforming use. Appellants objected to the interpretation that Mr. Kline's use was different than appellants' use, and his assertion that he did not receive any noise complaints while he operated his business on the premises. No. 13 concerned the interpretation of the testimony of their witness, Diana Riley.

{¶19} Upon review of Mr. Kline's testimony, the trial court found the magistrate's generalizations to be in error:

{¶20} "The Defendants' ninth objection is to the Magistrate's finding of fact that 'Mr. Kline also characterized the Defendants' business as a different type of use of the building than his business.' The Defendants argue that Mr. Kline at all times during his testimony stated that both his business and the business of the Defendants was a light manufacturing business. Here again, the Magistrate summarized the testimony of the witness, Mr. Kline.

{¶21} "A review of the transcript of Mr. Kline's testimony shows that Mr. Kline did not testify to the exact wording of the Magistrate's finding of fact. Mr. Kline did testify: 'We were not a fabricating shop. We were purely manufacturing.' (Kline Tr. 6:20-21.)

However, the Court determines that this testimony of Mr. Kline does not indicate that he is differentiating between his business and the Defendants' business. Therefore, the Court determines that the Magistrate's finding of fact makes an assumption that is not supported by the transcript. Accordingly, the Court hereby SUSTAINS the Defendants' ninth objection.

{¶22} "***

{¶23} "In the twelfth objection, the Defendants object to the Magistrate's finding of fact that 'Mr. Kline did not recall receiving complaints from the neighbors regarding the noise generated from his business.' The Defendants submit that Mr. Kline testified that he did recall one instance where a neighbor complained about noise from his property.

{¶24} "A review of the transcript of Mr. Kline's testimony shows that Mr. Kline testified that one time he left the garage door open and Mrs. Evenson, a neighbor, came over and told Mr. Kline that the noise was too much. (Kline Tr. 20:5-25.) Mr. Kline's testimony does not speak to any formal complaints being filed with the Genoa Township Zoning Office. Thus, based on the transcript of Mr. Kline's testimony, the Court hereby SUSTAINS the Defendants' twelfth objection." Judgment Entry Overruling in Part, and Sustaining in Part, the Defendants' Objections to the Magistrate's Decision and Judgment Entry Adopting the Magistrate's Decision filed July 2, 2009.

{¶25} As to the testimony of Ms. Riley, the trial court found the following:

{¶26} "In the thirteenth and final objection, the Defendants object to the Magistrate's finding of fact that 'Ms. Riley acknowledged that she does not live on the property near 5064 Red Bank Road. Rather, Ms. Riley testified that her son lives on the

property.' While the Defendants admit that these statements are true, the Defendants submit that Ms. Riley also testified that she spent a considerable amount of time at the property.

{¶27} "A review of the transcript of Ms. Riley's testimony shows that Ms. Riley testified that at one point she was at the property located near 5064 Red Bank Road on a regular basis 'painting and cleaning' (Riley Tr. 3:20-24.) Later in response to questions by Plaintiff's counsel regarding when she moved into the property, Ms. Riley testified 'we've been working on it quite a bit outside' and 'I've been there quite a bit.' (Riley Tr. 6:1-12.) Based on the transcript of Ms. Riley's testimony, the Court hereby SUSTAINS the Defendants' thirteen (sic) objection for clarification purposes only." Judgment Entry Overruling in Part, and Sustaining in Part, the Defendants' Objections to the Magistrate's Decision and Judgment Entry Adopting the Magistrate's Decision filed July 2, 2009.

{¶28} Appellant argues these factual differences warrant a reversal. We conclude that they do not. The magistrate's decision, as adopted by the trial court, made no definite statement as to whether appellants' use was a continuation of Mr. Kline's nonconforming use:

{¶29} "Therefore, the Magistrate recommends that the Court enter a permanent order enjoining the Defendants from continuing any use of the subject property which violates the Genoa Township Zoning Resolution unless and until the Genoa Township Board of Zoning Appeals issues a final determination authorizing such use. In addition, the Magistrate recommends that the Court enter a permanent order enjoining the Defendants from continuing any use of the subject property which violates the Genoa

Township Resolutions regulating noise, numbered 04-17, 06-05, and 07-26. The Magistrate also recommends assessing court costs in this case to the Defendants. Since the Plaintiffs failed to present any evidence of attorneys' fees at the trial, the Magistrate recommends denying the Plaintiffs request for attorneys' fees." Magistrate's Decision filed May 5, 2009.

{¶30} In adopting the magistrate's decision, the trial court specifically found the following:

{¶31} "In the first objection, the Defendants object to the Magistrate's conclusion of law that the Defendants' use is not a continuation of a prior legal nonconforming use. While the Defendants acknowledge that the Magistrate did not explicitly make this conclusion, they argue that the conclusion is apparent from the Magistrate's decision. In reviewing the Magistrate's decision, the Court finds that the Magistrate made no finding of fact or conclusion of law regarding whether the Defendants' use of the subject property is a continuation of a prior legal nonconforming use. Therefore, this portion of the objection is overruled." Judgment Entry Overruling in Part, and Sustaining in Part, the Defendants' Objections to the Magistrate's Decision and Judgment Entry Adopting the Magistrate's Decision filed July 2, 2009.

{¶32} Based upon our review, we find the trial court's rulings on objection Nos. 9, 12, and 13 were irrelevant to the magistrate's final recommendations and did not warrant a denial of the magistrate's decision.

{¶33} Assignments of Error I and II are denied.

V, VI

{¶34} These assignments address the authority of the Board of Zoning Appeals to hear the issue of a continued nonconforming use, and whether appellants failed to exhaust their administrative remedies.

{¶35} Nonconforming uses are defined and limited by R.C. 519.19 which states the following:

{¶36} "The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of said land shall be in conformity with sections 519.02 to 519.25, inclusive, of the Revised Code. The board of township trustees shall provide in any zoning resolution for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning resolution."

{¶37} Pursuant to R.C. 519.19, a zoning resolution must provide a method of extension of a nonconforming use.

{¶38} Boards of Zoning Appeals may hear issues as defined by statute:

{¶39} "Hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25 of the Revised Code, or of any resolution adopted pursuant thereto." R.C. 519.14(A).

{¶40} Within the zoning resolution for the Board of Appeals are the following provisions for nonconforming uses:

{¶41} "[Article VIII] Section 805 Substitutions of Nonconforming Uses

{¶42} "So long as no structural alterations are made, except as required by enforcement of other codes or ordinances, any nonconforming use may, upon appeal to and approval by the Board of Zoning Appeals, be changed to another nonconforming use of the same classification or of a less intensive classification, or the Board shall find that the use proposed for substitution is equally appropriate to the district than the existing nonconforming use. In permitting such change, the Board may require that additional conditions and safeguards be met, which requirements shall pertain as stipulated conditions shall be considered a punishable violation of this Ordinance. Whenever a nonconforming use has been changed to a less intensive use or becomes a conforming use, such use shall thereafter be changed to a more intensive use.

{¶43} "[Article VIII] Section 806 Certificates For Nonconforming Uses

{¶44} "The Zoning Administrator may upon his initiative, or shall upon the request of the owner, issue a certificate for any lot, structure, use of land, use of structure, or use of land and structure in combination, that certifies that the lot, structure, or use is a valid nonconforming use. The certificate shall specify the reason why the use is a nonconforming use, including a description of the extent and kind of use made of the property in question, the portion of the structure or land used for the nonconforming use, and the extent that the dimensional requirements are nonconforming. The purpose of this section is to protect the owners of lands or structures that are or become nonconforming. No fee shall be charged for this

certificate. One copy of the certificate shall be returned to the owner and one copy shall be retained by the Zoning Administrator, who shall maintain as a public record a file of all such certificates.

{¶45} "[Article IV] 401.05 Prohibited Uses

{¶46} "a) All uses not specifically authorized as a permitted or conditionally permitted use by the express terms of this Section of the Zoning Resolution are hereby prohibited unless it is specifically determined by the Board of Zoning Appeals that the proposed use is similar to and compatible with other uses permitted within the District.

{¶47} "g) Any commercial or business use of a parcel in this district shall be prohibited unless it complies with Section 517, Home Occupations, of this code. This shall include but is not limited to parking of vehicles or equipment used in a business or the operation of a service type business where no work actually takes place on the site such as roofing, excavating or lawn maintenance, plumbing and other similar type operations."

{¶48} We find the Ohio Revised Code's statutory scheme as followed by the Board of Zoning Appeals provides for the substitution of nonconforming uses through the Board of Zoning Appeals.

{¶49} By their own admission, appellants did not apply to the Board of Zoning Appeals pursuant to Section 805; therefore a Section 806 permit was neither granted nor denied.

{¶50} Appellees argue appellants failed to fulfill the requirements of the zoning resolution to ensure the continuation of the property's nonconforming use. It is

appellants' position that exhaustion of administrative remedies does not apply sub judice. We disagree.

{¶51} Appellants never formally approached the Board of Zoning Appeals for a continuation of the nonconforming use after being requested to do so by appellee Clase. T. at 116-117; Exhibits 16 and 19.

{¶52} "It is a well-established principle of Ohio law that a party seeking relief from an administrative decision must pursue available administrative remedies before pursuing action in a court. *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 29, 17 O.O.3d 16, 406 N.E.2d 1095, citing *State ex rel. Lieux v. Westlake* (1951), 154 Ohio St. 412, 43 O.O. 343, 96 N.E.2d 414. We have stated, ' "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi* (1975), 422 U.S. 749, 765, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522. The purpose of the doctrine "***is to permit an administrative agency to apply its special expertise***in developing a factual record without premature judicial intervention." *Southern Ohio Coal Co. v. Donovan* (C.A.6, 1985), 774 F.2d 693, 702. The judicial deference afforded administrative agencies is to "***'prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court***.' " *Ricci v. Chicago Mercantile Exchange* (1973), 409 U.S. 289, 306, 93 S.Ct. 573, 582, 34 L.Ed.2d 525.' *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111-112, 564 N.E.2d 477." *Dworning v. Euclid,* 119 Ohio St.3d 83, 85-86, 2008-Ohio-3318, ¶9.

{¶53} Appellants' failure to exhaust their administrative remedies leaves the issue of the injunctive relief requested uncontested.

{¶54} Assignments of Error V and VI are denied.

III, IV, VII, VIII, IX

{¶55} Based upon our decision in Assignments of Error I, II, V, and VI, these assignments are rendered moot.

X

{¶56} Under this assignment, appellants assert a constitutional challenge to the Genoa Township Noise Resolution. Because "[c]ourts decide constitutional issues only when absolutely necessary," *State ex rel. DeBrosse v. Cool* (1999), 87 Ohio St.3d 1, 7, we find addressing the constitutional challenge to be unnecessary.

{¶57} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ Patricia A. Delaney_____

JUDGES

SGF/sg 0511

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

GENOA TOWNSHIP BOARD OF TRUSTEES, ET AL.	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
RANDY L. MARTINDALE, ET AL.	:	
Defendants-Appellants	:	CASE NO. 09CAH070071

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. Costs to appellants.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ Patricia A. Delaney_____

JUDGES