[Cite as *Young v. Washington Twp. Bd. of Zoning Appeals*, 2017-Ohio-5503.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STEPHEN R. YOUNG, TRUSTEE	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 27298
	:	
v.	:	T.C. NO. 16-CV-2172
	:	
WASHINGTON TOWNSHIP	:	(Civil Appeal from
BOARD OF ZONING APPEALS	:	Common Pleas Court)
	:	
Defendant-Appellee	:	

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O P I N I O N

Rendered on the ___23rd___ day of _____June_____, 2017.

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FROELICH, J.

{¶ 1} Stephen Young appeals from a judgment of the Montgomery County Court of Common Pleas, which affirmed the decision of the Washington Township Board of Zoning Appeals (BZA) that there were two zoning violations on Young's property. For

the following reasons, the judgment of the trial court will be affirmed.

I. Facts and Procedural History

Background

{¶ 2} The property at 9530 Cylo Road in Washington Township is approximately two acres and is located in an agricultural district. Nursery and landscaping businesses have operated on the property for many years and have long been recognized by the Township as a legal, non-conforming use of the property.

{¶ 3} For more than 30 years, Schauer Landscaping operated at this location; Mary Lou and Jack Schauer were Young's mother and stepfather and the operators of the landscaping business. In 1981, Mary Lou Schauer filed an application for a zoning certificate to permit the construction of a 55 foot by 40 foot "storage building * * * for nursery stock" on the property, and the Township granted the certificate.

{¶ 4} In 2011, Jack Schauer asked the Township to provide written confirmation of the zoning of the property and information about whether a change in ownership would restrict the current use of the property. The zoning inspector responded that the use of the property as a nursery and landscaping business was a legal non-conforming use of the property, which was located in an agricultural district, and that a nursery and landscaping business could continue to operate on the property even if there were a change in ownership.

{¶ 5} Young acquired the property from the Schauers in 2012. He continued to operate a nursery and landscaping business on the property for several years until April 2015, when he leased the property to Merrick Patio and Landscape Company, which was also a nursery and landscaping business. Sharon Merrick had worked for Schauer

Landscaping for many years and formed her own landscaping company with encouragement from Young and others. Young then worked, at least to some extent, for Merrick, including doing bigger repairs on the company's equipment; it also appears that he continued to have unrestricted access to the property.

{¶ 6} After Young acquired the property, neighbors began to complain about changes in its use and about the activities on the property. These complaints intensified in 2014, when Richard and Doris Davis, whose residential property abutted Young's property, began to make a log and take pictures of their observations on the property; these observations included vehicles bearing the logo of Speedway Wrecker Company, which the Davises claimed was a wrecking company owned by Young with locations in Columbus and Indianapolis. This documentation was eventually submitted to the Township.

{¶ 7} In November 2014, the zoning inspector sent a letter to Young, which acknowledged that the operation of a nursery and landscaping business at the Clyo Road property was a legal, non-conforming use and a "conditional" use in an agricultural district. However, the letter informed Young that "[u]ses other than a landscaping business, agricultural, or single family residences are not permitted on the property without approval of the Zoning Commission. Specifically, any use related to trucking, towing, wrecking, trailering or vehicle repair is not permitted and, if ongoing, must cease."

{¶ 8} The neighbors continued to complain about Young's use of the property for storage and repair of vehicles that did not appear to them to be related to landscaping or that were conducted outside of the business hours of the landscaping company. At some point, Township employees visited the property and made their own observations

of the premises.

{¶ 9} In November 2015, the Washington Township Zoning Inspector issued a Notice of Zoning Violations to Young. The notice specified two violations:

1) an addition to the north side of the storage building, which was not approved by the Township and which violated the required setback. This violation was based on Article I, Section 6 of the Washington Township Zoning Resolution, which states that "[n]o person shall locate, erect, construct, reconstruct, enlarge, or structurally alter any building or structure * * * without a zoning certificate."

2) the prohibited expansion of the property's non-conforming use beyond a nursery and landscaping business, particularly the use of the storage structure for the repair of vehicles and the storage of vehicles on the property that were not related to the landscaping business. This violation was based on Article I, Section 9 of the Washington Township Zoning Resolution, which states: "[n]o land, building, structure or premises shall hereafter be used, and no building or part thereof or other structure shall be located, erected, constructed, maintained, used, moved, reconstructed, extended, enlarged or altered except in conformity with the regulations herein specified for the district in which it is located and in conformity with all other regulations therein."

{¶ 10} The zoning inspector informed Young that, in order to bring his property into compliance, the storage building would have to be used "as it was originally approved," and specifically, that vehicle repair operations must cease and that the automobile lift and all vehicles must be removed from the storage structure. With respect to the illegal addition to the storage structure, the inspector stated that it must be removed

or a variance must be sought to allow it to remain.[1]

{¶ 11} Young appealed these violations to the Washington Township BZA. The appeal was heard at a hearing on March 28, 2016.[2]

Evidence Offered at the Hearing

{¶ 12} It is undisputed that Young's property is zoned for agricultural use, but that operation of a nursery and landscape business on the property had predated this zoning classification and was permitted by Washington Township as a "legally non-conforming land use."

{¶ 13} At the hearing before the BZA, Zoning Manager Ryan Lee stated that Township staff had been contacted by neighboring property owners, who expressed concern about the use of Young's property. Lee described the complaint as intensified use of the storage building for automobile repair and maintenance, particularly since Young took over the property in 2012. Township staff visited the property to discuss the neighbors' claims, and they observed a "vehicle lift" within the storage structure, which apparently suggested to them usage outside typical storage of landscape goods and materials for which the building had been approved. The staff also discovered that an "illegal addition" had been made to the rear of the storage building, which had not been approved.

{¶ 14} Lee testified that the original structure on the property had been approved in 1981 as a "storage building 55' x 40' for nursery stock"; since that time, no additional

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[1] The addition was approximately 420 square feet.

[2] Some information about the violations on Young's property had also been presented to the BZA at its February 22, 2016 meeting, but testimony was heard and the issue was discussed at the March meeting.

use permissions had been granted which would permit vehicle service and repair in the building. Lee stated that the addition was not only unapproved, but was also within the setback required by zoning ordinances, meaning that it was too close to the property line. According to Lee, zoning for an agricultural district requires a 100-foot set-back of landscaping and lawn care structures from adjacent properties, and the illegal addition did not comply with this requirement. (It was 24.5 feet from the property line.) Thus, citations were issued for illegal use of a storage structure and for a "non-compliant addition."

{¶ 15} Lee also stated that a letter was sent to Young in 2014 from the zoning inspector, pointing out that "any use relating to trucking, towing, wrecking, trailering, or vehicle repair is not permitted and, if ongoing, must cease." Lee did not say what prompted the issuance of this letter.

{¶ 16} Young's attorney, Hans Soltau, testified at the hearing that they (he and Young) had "no clue" why Young's mother had written on the 1981 zoning application for the storage building that the building would be used "as a storage building for nursery stock." He stated that the building was "a barn basically," was not suitable for the storage of nursery stock because it did not have lighting, irrigation or ventilation, and was used for a "full service landscaping business." Soltau stated that the building consisted of an office, a bathroom, and a "repair area for landscaping equipment."

{¶ 17} Soltau noted that, in 2011, in reply to the owner's request for the Township to provide a written zoning confirmation for the property, a zoning inspector sent a letter noting that the "full-service nursery and landscaping business" on the property was a legal, non-conforming use that had been grandfathered into subsequent changes in

zoning regulations. The letter further stated that, according to Washington Township records, business operations at the property have "included the following goods/services and activities":

> Landscaping design; grass seed / sod installation; flower bed preparation & installation; lawn mowing and bush hogging; lawn applications; spring mulching; edging, weeding & trimming; tree trimming & removal; landscaping services for township properties; planting of trees; lot grading; sale of & installation of hardscape; nursery – wholesale; temporary green house.

{¶ 18} Based on this letter, Soltau asserted that the Township had been "fully aware of how the property was being utilized." Soltau also asserted that the storage building had never been used exclusively for "nursery stock" and denied that it was currently being used "for some commercial purpose in terms of maintenance on unrelated vehicles or equipment." He said that the storage unit was used to store things like grass seed and various tools, but not live plants.

{¶ 19} Soltau suggested that the 1981 zoning ordinances might not have required permission for an addition to a structure; however, he did not argue or offer any evidence that the addition would have been permitted without the BZA's approval at the time it was constructed. Soltau also asserted at the hearing that Young knew of the prior use of the property when he purchased it from his stepfather in 2012, including the presence of the hydraulic lift in the storage unit "where repairs were being done the same as they always had been."

{¶ 20} David Douglas, the former zoning inspector who had written the 2011 letter

of zoning confirmation, prepared an affidavit which was presented to the BZA. In this affidavit, Douglas stated that Schauer Landscaping had used the storage structure to repair vehicles and equipment, and that he had observed equipment related to such repairs when he had been a zoning inspector. He also stated his belief that the Township Trustees had had knowledge of this use of the structure.

{¶ 21} Young testified that, since the time his mother and stepfather had owned the landscaping business, they always maintained their own equipment, such as tractors and trucks, on rainy days or whenever something broke down. He acknowledged that employees work on their own cars in addition to landscape vehicles in the storage building, for projects such as "a brake repair or tire change." Young stated, however, that the business does not "do any outside repair work" and that he does not charge anyone to repair a vehicle there; "[w]e have a lot of employees [and] if they need to do something to their car we allow them." Young stated that the landscaping business had 6 trucks, 6-8 trailers, a farm tractor, and a Bobcat skid loader, which they serviced on site to the extent that they were able to do so.

{¶ 22} Young testified that the addition to the storage unit was made about 4 years earlier and that he had not sought a building permit or otherwise communicated with the Township about the addition at that time. Young also stated that the nearest property line was 24.5 feet from the addition.

{¶ 23} Sharon Merrick, the owner of the landscaping and nursery business that operated on the Young property at the time of the hearing, testified about the types of landscape and hardscape projects that her business does. She also stated that the business's employees do most of the repairs to their power tools and vehicles, that they

do not pay a mechanic to come to the property to work on vehicles, and that the only time a mechanic might come to the property is if a vehicle had a tire problem and could not be moved.

{¶ 24} James Hall, a diesel mechanic, stated that he had been "volunteering" for many years to help repair vehicles for Young and Young's parents. He stated that nursery employees do "light repair," but that he comes when needed to work on "clutches or brakes or engine repair."

{¶ 25} Richard and Doris Davis live in a single-family residential district, and their property abuts Young's property. Richard Davis testified at the hearing that, from 1987 until 2012, the nursery caused "no disturbances to the residential tranquility" of his neighborhood. However, since February 2012, when Young purchased the property, Davis reported an increase in non-landscaping equipment on the property, including trailers with the Speedway Wrecker Company logo (a company owned by Young). According to Davis, these vehicles were worked on in the storage facility on evenings, weekends, and holidays.

{¶ 26} Doris Davis stated that, in order to make room in the storage building for maintenance equipment and private vehicles, the Merrick Landscaping vehicles are now parked along the property line with the Davises' property, and are often left idling while being loaded and unloaded, creating excessive noise and air pollution on their property. She believed that the property was being used as a "satellite" extension of Young's wrecking business – for trucking, trailering, refurbishing, and selling – rather than as a landscape business.

{¶ 27} Another neighbor, Robert Stone, testified that he hears air wrenches and

other noises coming from the Young property, and that in July 2015, there was a "horrible smell * * * like a petroleum or paint thinner" coming from the "garage" on Young's property. Two other neighbors testified that they had had no issue with the landscaping business and nursery owned by Young's parents for many years, but that there had been a "material shift in total activity" from nursery to equipment repair, maintenance, and storage since that time.

BZA Findings and Procedural History

{¶ 28} After considering the witnesses' testimony and related documentary evidence, the BZA affirmed the zoning inspector's finding of an illegal addition (including the improper setback) to the storage building on Young's property. It also concluded that the type of large vehicles and equipment seen on the property did not seem to be consistent with landscaping activities, and that the building was approved for storage and not for vehicle maintenance, even of employees' vehicles. On this basis, the BZA also affirmed the zoning inspector's finding that Young had engaged in illegal use of a storage structure.

{¶ 29} On April 26, 2016, Young filed an appeal in the Montgomery County Court of Common Pleas pursuant to R.C. 2506.01 et seq. On June 3, 2016, the BZA issued findings of fact and conclusions of law in support of its decision. The parties filed briefs with the trial court, but no additional evidence was presented. On September 16, 2016, the trial court overruled Young's appeal and affirmed the decision of the BZA.

{¶ 30} Young appeals to this court, raising two assignments of error. The assignments argue that the trial court's decisions affirming the respective zoning violations were not supported by reliable, probative and substantial evidence and were

not in accordance with the law.

II. Standard of Review on Appeal

{¶ 31} In an administrative appeal pursuant to R.C. Chapter 2506, the common pleas court considers the whole record, including any new or additional evidence admitted under R.C. 2506.03, and determines 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, 147-148, 735 N.E.2d 433 (2000); *Mordick v. Dayton,* 2d Dist. Montgomery No. 24663, 2012-Ohio-289, ¶ 14.

{¶ 32} The Ohio Supreme Court has distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. R.C. 2506.04 "grants a more limited power to the court of appeals to review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh 'the preponderance of substantial, reliable, and probative evidence.' " *Henley* at 147. On factual issues, this court is to determine only whether the common pleas court abused its discretion in finding there was reliable, probative, and substantial evidence to support the administrative order. *Boggs v. Ohio Real Estate Comm*., 186 Ohio App.3d 96, 2009-Ohio-6325, 926 N.E.2d 663, ¶ 13 (10th Dist.); *Burchett v. E. Liverpool Dodge Chrysler Plymouth, Jeep*, 7th Dist. Columbiana No. 2001 CO 16, 2002-Ohio-3045, ¶ 9. *See also Key Ads, Inc. v. Dayton Bd. of Zoning Appeals*, 2014-Ohio-4961, 23 N.E.3d 266, ¶ 13 (2d Dist.).

{¶ 33} "The fact that the court of appeals * * * might have arrived at a different conclusion than the administrative agency is immaterial." *Henley* at 147, citing *Lorain*

City School Dist. Bd. of Edn. v. State Emp. Relations Bd., 40 Ohio St.3d 257, 261, 533 N.E.2d 264 (1988). *See also Cox v. Miami Cty. Bd. of Zoning Appeals,* 2d Dist. Miami No. 2010-CA-29, 2011-Ohio-2820, ¶ 5-6.

III. The Trial Court's Judgment

{¶ 34} The trial court reviewed all of the evidence presented at the hearing before the BZA and the relevant Washington Township zoning resolutions. The court found that the nursery and landscaping business was a legal, non-conforming use of the property and that it had been operating as such for more than 30 years. However, the court concluded that it was "undisputed" that the addition to the storage unit had not been approved by the Township. The court also found that the 55' x 40' building on the property had been approved for storage of nursery stock "and did not allow for any additional uses associated with the structure that would allow vehicle service and repair." Although an affidavit was presented from a prior zoning inspector, who stated that he and the Township Trustees knew of the "maintenance, repair and service activities within the structure" during his tenure, the trial court found that the BZA could nonetheless have reasonably concluded, based on the evidence presented, that a zoning violation related to the storage and repair of vehicles existed on the premises.

IV. Analysis

{¶ 35} Based on our review of the evidence and of the law, we find no basis to conclude that the trial court erred as a matter of law or abused its discretion in affirming the zoning violations.

{¶ 36} Young argued before the trial court and in this appeal that Article 6, Section 2, of the Washington Township Zoning Resolution, which relates to agricultural districts,

permits the construction of the addition without a zoning certificate, and that Article 13, Section 14(A)(3) permits a storage shed as an accessory use as long as it is not within five feet of the property line. Although the trial court did not expressly address this issue, it did cite another provision, Article 13, Section 2, that relates to the continuance of non-conforming uses. This section provides that "[t]he use of any non-conforming structure may be continued as it existed at the time it became non-conforming. Any such use may be extended through any part of a building or structure which was arranged or designed for such use at the time it became nonconforming." The prior zoning inspector's letter – the one which confirmed the legality of the non-conforming use and advised Jack Schauer that a change of ownership would not impair this classification -- also cited this section.

{¶ 37} There was no question that Young's property was located in an agricultural district and that the landscaping businesses that had operated on the property did not qualify as agricultural uses; rather, they constituted non-conforming uses. As such, the trial court reasonably concluded that the BZA did not act illegally, unreasonably, or arbitrarily in applying the rules for non-conforming uses, rather than the rules for agricultural uses, to Young's property, and in concluding that the addition to the storage unit had not been permitted.

{¶ 38} As for the alleged improper use of the structure on the property, the evidence showed that the construction of the structure was approved in 1981 for the "storage of nursery stock," because that was the intended use stated in the zoning certificate application. Young acknowledged that a vehicle hydraulic lift was installed in the building at some point, that landscape vehicles were serviced in the building, and that

he permitted employees to do other kinds of repairs on their personal vehicles in the building as needed. This evidence supported the BZA's finding that Young used the building for vehicle repairs, when the building had not been approved for such use.

{¶ 39} Young emphasizes the "full service" nature of the businesses operated on the property, as if to suggest that a "full service nursery and landscaping business" necessarily encompasses the repair of the businesses' vehicles; the evidence did not compel this conclusion, nor would this assertion change the fact that the building was approved for storage rather than vehicle repair. Moreover, Young admitted that additional vehicles that did not belong to the business were also serviced on the property. The fact that Young may not have charged or been paid by his employees to use the storage building in this manner is not relevant to the question of how the building was being used.

{¶ 40} The trial court did not err in concluding that the BZA's finding of an improper use of the storage building on Young's property was lawful and was supported by the preponderance of substantial, reliable, and probative evidence.

{¶ 41} Young's assignments of error are overruled.

{¶ 42} The judgment of the trial court will be affirmed.

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HALL, P.J. and WELBAUM, J., concur.

Copies mailed to:

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