

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

TIMOTHY HUTCHINSON, et al., :
 :
 Plaintiffs-Appellants, : CASE NO. CA2011-02-024
 :
 - vs - : OPINION
 : 10/31/2011
 :
 WAYNE TOWNSHIP BOARD OF ZONING :
 APPEALS, :
 :
 Defendant-Appellee. :
 :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-04-1867

Scott D. Phillips, Benjamin J. Yoder, 9277 Centre Pointe Drive, Suite 300, West Chester, Ohio 45069, for plaintiffs-appellants

Michael T. Gmoser, Butler County Prosecuting Attorney, Roger S. Gates, P.O. Box 515, Hamilton, Ohio 45012-0515, for defendant-appellee

HENDRICKSON, J.

{¶1} Plaintiffs-appellants, Jana Hutchinson and Timothy Hutchinson, mother and son, appeal the decision of the Butler County Court of Common Pleas affirming the decision of appellee, the Wayne Township Board of Zoning Appeals ("BZA"), to deny appellants' application for a conditional use permit. For the reasons discussed below, we reverse the decision of the lower court and remand for further proceedings.

{¶2} Appellants filed an application with the BZA requesting a conditional use permit to operate a seasonal, Halloween themed nature walk on a portion of Jana Hutchinson's 134-acre farm located at 5537 Wayne-Madison Road. After conducting two hearings on the application, the BZA voted unanimously to deny the conditional use permit. Appellants appealed the BZA's decision to the Butler County Court of Common Pleas. The common pleas court ultimately held that the BZA's decision to deny appellants' application for a conditional use permit was unconstitutional as the BZA failed to comply with Wayne Township Zoning Resolutions. The court remanded the case back to the BZA to issue a decision in compliance with Wayne Township Zoning Resolutions. See *Hutchinson v. Wayne Tp. Bd. of Zoning Appeals* (Nov. 16, 2009), Butler C.P. No. CV2009 01 0040.

{¶3} On March 31, 2010, the BZA issued a written decision denying appellants' request for a conditional use permit. Thereafter appellants filed a second appeal with the Butler County Court of Common Pleas. *Hutchinson v. Wayne Tp. Bd. of Zoning Appeals* (Apr. 28, 2010), Butler C.P. No. CV 2010 04 1867. The parties filed a joint stipulation with the common pleas court to have the transcripts, filings, and merit briefs from the first appeal, Case No. CV2009 01 0040, incorporated into the second appeal. The parties waived briefing and oral argument and requested the common pleas court adjudicate the merits of the second appeal on the basis of the merit briefs previously filed in the first appeal. Accordingly, appellants sought to have the BZA's decision overruled on the basis that the board failed to properly apply the conditional use standards set forth in the Wayne Township Zoning Resolutions and on the basis that the BZA violated appellants' due process rights by permitting Carleen Yeager, a board member, to impermissibly conduct an independent, extra-judicial investigation pertaining to the proposed use of the property while simultaneously participating as a voting member of the presiding quasi-judicial body.

{¶4} On January 10, 2011, the common pleas court issued a decision affirming the

BZA's decision to deny the conditional use permit. The common pleas court held that the BZA's decision was supported by a preponderance of substantial, reliable and probative evidence. The common pleas court further held that appellants' desired use of the property is a "significant commercial enterprise which is not a rural recreation area or facility which is appropriate for the A-1 Agricultural District." The common pleas court did not address appellants' due process argument.

{¶15} Appellants timely appeal the common pleas court's decision, raising a sole assignment of error.

{¶16} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS BY AFFIRMING THE BZA'S DECISION."

{¶17} Within their sole assignment of error, appellants raise two issues. First, whether the common pleas court and the BZA failed to properly apply the standards for a conditional use permit in light of the evidence presented to the BZA. Second, whether the BZA violated appellants' due process rights by conducting an impermissible, extra-judicial investigation into the proposed use of the property.

{¶18} "Appeals of administrative agency decisions are governed by R.C. Chapter 2506. The standard of review in R.C. Chapter 2506 administrative appeals imposed upon a common pleas court varies distinctly from the standard of review imposed upon an appellate court. A common pleas court reviewing an administrative appeal pursuant to R.C. 2506.04 weighs the evidence in the whole record and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of the substantial, reliable, and probative evidence." *Key-Ads, Inc. v. Bd. of Cty. Commrs.*, Warren App. No. CA2007-06-085, 2008-Ohio-1474, ¶17.

{¶19} "An appellate court's review of such an administrative appeal, however, is more limited in scope. * * * Unlike the common pleas court, the appellate court does not weigh the

evidence or determine questions of fact. * * * Rather, the appellate court must affirm the common pleas court's decision unless it finds, as a matter of law, that the decision is not supported by a preponderance of reliable, probative, and substantial evidence." (Internal citations omitted.) *Shamrock Materials, Inc. v. Butler Cty. Bd. of Zoning*, Butler App. No. CA2007-07-172, 2008-Ohio-2906, ¶10.

{¶10} In the present case, the common pleas court upheld the BZA's decision to deny appellants' application for a conditional use permit on the ground that the board's decision was supported by substantial, reliable and probative evidence. In reaching this decision, the common pleas court neglected to address appellants' claim of a due process violation. We find such an omission to be an error.

{¶11} "The essence of due process dictates, at the very least, that an individual have an opportunity to be heard and to defend, enforce and protect his rights before an administrative body in an orderly proceeding." *Gibraltar Mausoleum Corp. v. Cincinnati* (1981), 1 Ohio App.3d 107, 109-110. Accordingly, "due process includes the right to a hearing before an unbiased and fair and impartial tribunal." *Frost v. Wilmington* (Jan. 31, 1986), Clinton App. No. CA85-08-014, at 7. "[T]here is a presumption of honesty and integrity on the part of an administrative body unless there is a showing to the contrary." *Ohio State Bd. of Pharmacy v. Poppe* (1988), 48 Ohio App.3d 222, 229. "[T]he party alleging a disqualifying interest bears the burden of demonstrating that interest to a reviewing court." *Id.*

{¶12} Appellants presented an argument and evidence to the common pleas court that their due process rights were violated by the BZA when a voting member of the board conducted an extra-judicial investigation into appellants' proposed use of the property. Specifically, appellants presented evidence that board member Yeager had placed telephone calls to similar Halloween themed attractions as a means of investigating the volume of traffic

that could be expected at appellants' proposed attraction. After describing the results of her investigation to her fellow board members, Yeager proceeded to vote on appellants' application for a conditional use permit. Because Yeager acted both as an investigator and trier of fact, appellants maintain that the BZA was not an impartial tribunal.

{¶13} Although presumed to function honestly and objectively, there are instances where an administrative board does not function fairly when acting "in its quasi-judicial capacity as the trier of fact while simultaneously being prosecutor, investigator, witness and trier of fact." *Hiatt v. Goshen Tp. Bd. of Trustees* (July 30, 1984), Clermont App. No. CA83-04-033, at 8. Whether Yeager's dual roles as investigator and trier of fact created a biased or prejudicial forum is a question that the common pleas court, as the initial reviewing court, should have determined. Its failure to do so results in reversible error.

{¶14} Appellants' remaining issue, whether the common pleas court and BZA failed to properly apply the conditional use standards set forth in the Wayne Township Zoning Resolutions, is rendered moot.

{¶15} Judgment reversed and cause remanded.

POWELL, P.J., and RINGLAND, J., concur