

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

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| TIMOTHY HUTCHINSON, et al., | : | CASE NO. CA2012-02-032 |
| Plaintiffs-Appellants, | : | |
| | : | <u>OPINION</u> |
| - vs - | : | 9/10/2012 |
| | : | |
| WAYNE TOWNSHIP BOARD OF ZONING APPEALS, | : | |
| | : | |
| Defendant-Appellee. | : | |

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

Frost Brown Todd LLC, Scott D. Phillips and Benjamin J. Yoder, 9277 Centre Point Drive, West Chester, Ohio 45069, for plaintiffs-appellants

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POWELL, P.J.

{¶ 1} Plaintiffs-appellants, Jana and Timothy Hutchinson, mother and son, appeal the decision of the Butler County Court of Common Pleas affirming the decision of defendant-appellee, the Wayne Township Board of Zoning Appeals ("BZA"), denying an application for

a conditional use permit. We affirm.¹

{¶ 2} Tim Hutchinson filed an application with the BZA requesting a conditional use permit to operate a seasonal, Halloween-themed nature walk ("Nature Walk") on a portion of Jana Hutchinson's 134-acre farm located off Wayne-Madison Road in Butler County, Ohio (the "Property"). The Property is designated as an A-1 Agricultural District and "basically rural in character."

{¶ 3} On July 15, 2008, the BZA held a hearing on Tim Hutchinson's application. Testimony and evidence revealed that the Nature Walk would be open for six to eight weekends per year, weather dependent, during the Halloween season. The hours of the Nature Walk would run from approximately 5 p.m. to 12 a.m. Traffic would enter and exit the Property directly from Wayne-Madison Road using two existing unpaved driveways. Parking for 202 vehicles would be available in an open field, with another field accessible for overflow.

{¶ 4} Evidence also showed that Wayne-Madison Road is a narrow, two-lane, dead-end roadway with a narrow to nonexistent berm which slopes, sometimes steeply, into drainage ditches on both sides of the road. Tim Hutchinson presented expert testimony from a traffic engineer that Wayne-Madison Road would be able to successfully handle the additional traffic caused by the Nature Walk. Evidence was also provided by the Butler County Engineer's Office that, although Wayne-Madison Road is narrow and has no lighting, the roadway would be able to handle the additional traffic.

{¶ 5} At the conclusion of Tim Hutchinson's presentation, the BZA also heard complaints from area residents concerning the proposed Natural Walk. The complaints addressed safety issues relating to the use of Wayne-Madison Road by drivers with limited to

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

no experience driving the road and the likelihood for increased accidents. Complaints were also made that the serenity of the area would be interrupted by the increased traffic and that the area residents' sense of security would be affected.

{¶ 6} Having concerns that Tim Hutchinson, as a tenant and not the landowner, was not a proper applicant, and desiring additional information about the Nature Walk, the BZA adjourned the hearing in progress. Jana Hutchinson, owner of the Property, was then joined as an applicant for the conditional use permit and Jana and Tim Hutchinson (together, "appellants") provided the BZA with additional information relating to security, traffic, road maintenance, erosion and runoff, and insurance for the Nature Walk.

{¶ 7} On December 11, 2008, the hearing on appellants' application was reconvened. At one point, BZA Member Carleen Yeager questioned Tim Hutchinson regarding the amount of traffic he expected each night of the Nature Walk. Tim Hutchinson testified that approximately 500 cars would be expected at the Nature Walk each evening. However, Yeager stated that she had researched traffic at other Halloween themed events and believed that 500 cars would be a "light night" and that, in actuality, as many as 1,500 cars would be traversing Wayne-Madison Road on a "good night." Tim Hutchinson stated that 500 cars was his estimation, as the Nature Walk would be new and that he was "starting off small."

{¶ 8} Following the presentation of evidence and the closure of public comment, BZA Member Jerry Gerber orally moved to deny appellants' application "[b]ecause of all the opposition." The five BZA members then unanimously voted to deny the application. Appellants appealed the BZA's oral denial of the application to the Butler County Court of Common Pleas and the case was remanded to the BZA for the issuance of a written decision. *Hutchinson v. Wayne Twp. Bd. of Zoning Appeals*, Butler C.P. No. CV2009 01 0040 (Nov. 16, 2009).

{¶ 9} On March 31, 2010, the BZA issued its written decision denying appellants' application for a conditional use permit. The BZA found that the proposed Nature Walk was not compatible with the surrounding neighborhood and would significantly increase traffic flow by hundreds of cars on a rural, two-lane roadway with narrow lanes, a narrow to non-existent berm, and steep drainage ditches. The BZA concluded that the proposed Nature Walk would be inconsistent and incompatible with the current uses of the surrounding area and would adversely impact the comfort and general welfare of the surrounding area's residents.

{¶ 10} Appellants, again, appealed to the common pleas court, arguing, in part, that the BZA's decision was a violation of appellants' due process rights as a result of the extra-judicial research performed by Yeager. *Hutchinson v. Wayne Twp. Bd. of Zoning Appeals*, Butler C.P. No. CV 2010 04 1867 (Apr. 28, 2010). The common pleas court affirmed the BZA's decision but failed to address appellants' due process argument. Thus, on appeal before this court, we reversed the decision of the common pleas court and remanded the case for a determination on appellants' due process argument. *Hutchinson v. Wayne Twp. Bd. of Zoning Appeals*, 12th Dist. No. CA2011-02-024, 2011-Ohio-5590.

{¶ 11} On January 25, 2012, the common pleas court issued a decision affirming the BZA's denial of appellants' conditional use application. The common pleas court found that the predominate uses for the area surrounding the Property are agricultural or residential in nature and that the Wayne-Madison roadway is typical of a rural road with narrow lanes and drainage ditches. Due to this general setting surrounding the Property, the common pleas court found that the BZA's denial of appellants' application was supported by the preponderance of substantial, reliable, and probative evidence and that a Halloween-themed Nature Walk would not be appropriate. The common pleas court additionally found Yeager's extra-judicial research did not indicate a bias or prejudice on her part and that appellants should have objected to her statements at the time they were made.

{¶ 12} From this latest decision of the common pleas court, appellants timely appeal, raising a sole assignment of error:

{¶ 13} THE [COMMON PLEAS] COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS BY AFFIRMING THE BZA'S DECISION.

{¶ 14} R.C. Chapter 2506 governs the standards applied to appeals of administrative agency decisions. *Key-Ads, Inc. v. Bd. of Cty. Commrs.*, 12th Dist. No. CA2007-06-085, 2008-Ohio-1474, ¶ 7. In such cases, the standard of review "imposed upon a common pleas court varies distinctly from the standard of review imposed upon an appellate court." *Id.* "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." *Id.*, citing *Shields v. Englewood*, 172 Ohio App.3d 620, 2007-Ohio-3165, ¶ 28 (2nd Dist.).

{¶ 15} "An appellate court's review of such an administrative appeal, however, is more limited in scope." *Shamrock Materials, Inc. v. Butler Cty. Bd. of Zoning*, 12th Dist. No. CA2007-07-172, 2008-Ohio-2906, ¶ 10. "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 quotations omitted.) *Id.*, citing *Mills v. Union Twp. Bd. of Zoning Appeals*, 12th Dist. No. CA2005-02-013, 2005-Ohio-6273, ¶ 6.

{¶ 16} In this case, appellants raise two arguments for review: (1) whether the trial court erred in affirming the BZA's denial of the application when appellants had satisfied all of the requirements of the applicable zoning resolution; and (2) whether the trial court erred in finding that appellants' due process rights were not violated by the extra-judicial investigation

performed by Yeager.

Satisfaction of the Zoning Resolution

{¶ 17} Appellants first argue that the common pleas court erred in affirming the BZA's decision even though appellants satisfied each factor of the Wayne Township Butler County, Ohio Zoning Resolution (the "Zoning Resolution").

{¶ 18} Zoning Resolution Section 25.053 provides that "[a]ll uses designated as conditional uses shall meet the following requirements:

(1) Uses shall be located in districts where they are designated as conditional uses by these regulations.

(2) Uses shall not adversely impact the health, safety, comfort and general welfare of the surrounding area. In determining this, the Board shall consider the following:

(a) The compatibility with the surrounding uses and compatibility with the surrounding neighborhood, including, but not limited to, consideration whether adjacent property values will be adversely affected.

(b) The comparative size, floor area and mass of the proposed structure(s) in relationship to adjacent structures and buildings in the surrounding properties and neighborhood.

(c) The frequency and duration of various indoor and outdoor activities and special events and the impact of these activities on the surrounding area.

(d) The number of transient movements generated by the proposed use and relationship to the amount of traffic on abutting streets in the surrounding neighborhood, not in terms of the streets capacity to absorb the additional traffic, but rather in terms of any significant increase in hourly or daily traffic levels.

(e) The added noise level created by activities associated with the proposed use and the impact of the ambient noise level on the surrounding area and neighborhood.

(f) The general appearance of the neighborhood will not be adversely affected by the location of the proposed use on the parcel.

(g) The impact of night lighting in terms of intensity and duration and frequency of use as it impacts adjacent properties and in terms of presence in the neighborhood.

(h) The impact of significant amount of hard-surfaced area for building, sidewalks, drives and parking areas in terms of water runoff.

(i) The potential for the proposed use to remain in existence for a reasonable period of time and not become vacant or unused.

(j) Any other physical or operational feature or characteristic that may affect the public health, safety and welfare.

(k) The presence of any potential or real fire or other hazards created by the proposed use which are in excess of the individual demand of adjacent land use in the terms of emergency service protection.²

{¶ 19} Satisfaction of these factors "does not make the approval of a conditional use permit automatic." *Community Concerned Citizens, Inc. v. Union Township Bd. of Zoning Appeals*, 66 Ohio St.3d 452, 456 (1993). The BZA is further required to "give due regard to the nature and condition of all adjacent uses and structures" surrounding the proposed conditional use. Zoning Resolution Section 25.041.

{¶ 20} A review of the record reveals that appellants failed to satisfy all of the specific factors for a conditional use permit set forth in Section 25.053. Pursuant to Section 25.053(d), the BZA must determine if the proposed conditional use will affect the "number of transient movements generated by the proposed use and relationship to the amount of traffic on abutting streets in the surrounding neighborhood, not in terms of the streets capacity to absorb the additional traffic, but rather in terms of any significant increase in hourly or daily traffic levels."

{¶ 21} Here, appellants presented expert testimony that Wayne-Madison Road would

2. The parties have used different section numbers and letters to define this list, but each use identical language in making their arguments. For consistency, we have chosen this format to address Section 25 of the Zoning Resolution.

be able to absorb the additional traffic without incident. However, testimony by Tim Hutchinson indicated that traffic would significantly increase by hundreds of cars during the evening hours of weekends in September and October. In addition, evidence was presented that Wayne-Madison Road is narrow, with limited to nonexistent berms, sloping drainage ditches, and no lighting. Thus, the BZA found that the increase in traffic during evening hours on such a road is incompatible with the health, safety, comfort, and general welfare of the surrounding area. Furthermore, the BZA applied Section 25.041 and found that the use of the Property as a Nature Walk, in an area of Wayne Township primarily reserved for agriculture, was not a type of recreational activity compatible with the surrounding area.

{¶ 22} Based upon this evidence, we cannot say that the determinations of the BZA and common pleas court were, as a matter of law, not supported by a "preponderance of reliable, probative, and substantial evidence." Therefore, we find that the trial court did not err in affirming the decision of the BZA denying appellants' application for a conditional use permit.

Due Process Violation

{¶ 23} In their second argument, appellants contend that the trial court erred when it found that appellants' due process rights were not violated by Yeager when she performed an independent, extra-judicial investigation regarding the number of cars which typically travel to a Halloween-themed event.

{¶ 24} As we previously stated in our first *Hutchinson* decision:

"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, 439 N.E.2d 922. 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, 549 N.E.2d 541. "[T]he party alleging a disqualifying interest bears the burden of demonstrating that interest to a reviewing court." *Id.*

Hutchinson, 2011-Ohio-5590, at ¶ 11.

{¶ 25} In this case, Yeager admitted to making "some calls" regarding whether 500 was a reasonable estimate for the number of cars that would be driving to and from the Nature Walk each night. Appellants argue that this statement tainted their ability to obtain a fair hearing, as they were unable to cross-examine whomever Yeager spoke with, and were "placed in the awkward position" of deciding whether to cross-examine Yeager and possibly risk losing her vote. The BZA argues, on the other hand, that appellants waived the right to such an argument by failing to object to Yeager's statements during the hearing. We find that, regardless of whether appellants should have objected at the hearing, they were not unfairly prejudiced by Yeager's statements and, consequently, their due process rights were not violated.

{¶ 26} "The combination of investigative, executive and adjudicative functions does not necessarily create a risk of bias or unfairness in an administrative adjudication." *Hiatt v. Goshen Twp. Bd. of Trustees*, 12th Dist. No. CA83-04-033, unreported, 1984 WL 3391, *4, citing *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456 (1975), and *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972). Here, Yeager performed an extra-judicial investigation into the number of cars that would be traveling Wayne-Madison Road in order to attend the Nature Walk. Even if we interpret her investigation and her statements at the hearing as evidence of bias and prejudice towards the Nature Walk, we cannot say that this bias and prejudice prevented appellants from receiving a fair and impartial hearing.

{¶ 27} The BZA's decision states, in part, that it is denying appellants' application because the Nature Walk "would significantly increase traffic flow[,] according to the

applicant's testimony[,] by hundreds of cars each evening." From this statement, it is clear that the BZA did not rely on Yeager's view that as many as 1,500 cars would be traveling Wayne-Madison Road, but only that 500 cars would be on the road, as indicated by Tim Hutchinson.

{¶ 28} Further, the BZA unanimously denied appellants' application for a conditional use permit. Thus, even if Yeager's statements demonstrated bias and prejudice toward the Nature Walk, the exclusion of her vote would not have altered the finding of the BZA, as the remaining four members also voted to deny the application. Consequently, we cannot say that appellants' due process rights were violated by the statements of Yeager.

{¶ 29} Appellants received a fair and impartial review of their application and the denial of that application was supported by a preponderance of reliable, probative, and substantial evidence. Accordingly, appellants' sole assignment of error is overruled.

{¶ 30} Judgment affirmed.

HENDRICKSON, J., concurs.

RINGLAND, J., concurs separately.

RINGLAND, J. concurring separately.

{¶ 31} I concur separately to emphasize that the holding in this matter does not give license to the actions of the errant board member, Yeager. Such member, in verbalizing her ex parte discussion with unknown individuals on the issues before the board, violated due process in denying appellant cross-examination of these unknown individuals. Further, the ex parte investigation in and of itself was a violation of appellant's substantial right. An essential element of due process in BZA hearings is to permit each party an opportunity to present facts at a public hearing upon which the open-minded Board bases its decision. As

such, no party gains an advantage based on private discussions. *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir.1992); *see also United States v. Earley*, 746 F.2d 412, 416 (8th Cir.1984) (suggesting that ex parte communications should be strongly discouraged because allowing them creates concerns about impartiality). The actions of panel member Yeager attempt to make a sham of those expectations and hearing. These actions cast doubt on the credibility of the procedure in general and the Board in particular.

{¶ 32} However, I agree with the conclusions of the majority that the actions by Yeager were, in this case, not determinative of the resulting decision of the Board. No evidence exists showing that Yeager's "testimony" was given any weight by the other members of the Board. In fact, reliable probative evidence exists to support the Board's decision as well as this court's review.

{¶ 33} Although not directly discussed by the majority, I find that the lack of an objection to a violation of a fundamental right to an unbiased fact-finder is not a flaw but rather lends itself to civil plain error analysis.³ *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997) (limiting the civil plain error doctrine to instances where an error "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself"). However, appellant cannot show that the results would have been different if the objection was made, granted, and Yeager was not permitted to further participate.

{¶ 34} Hopefully the Board as a whole will not participate in such errant behavior as well as discourage its individual members from committing such violations in the future. Failure to do so could result in this court voiding its decisions as well as subjecting it and its

3. Courts in other jurisdictions have alluded to violations of civil due process as being considered more than plain error, i.e., structural error, even though this is a criminal remedy. *See KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F.Supp.2d 637, 660 (N.D. Ohio 2010); *Judith P. v. Superior Court*, 102 Cal.App.4th 535 (2002).

supervisory governmental entities to civil damages. *Schiazza v. Zoning Hearing Bd.*, 168 F.Supp.2d 361, 372 (M.D.Pa.2001); See generally *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986).