STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PENINSULA BARNS, L.L.C.,

Plaintiff/Appellant,

v

File No. 99-19243-AV
HON. PHILIP E. RODGERS, JR.

PENINSULA TOWNSHIP,

Defendant/Appellee.

_______________________________________/

W. Peter Doren (P23637)
Attorney for Plaintiff/Appellant

Richard W. Ford (P13569)
Attorney for Defendant/Appellee

DECISION AND ORDER ON APPEAL

INTRODUCTION

This is an appeal by Peninsula Barns, L.L.C., owners of land in Defendant Peninsula Township, from a decision of the Township Board of Trustees denying their special land use permit ("SLUP") application. This appeal is authorized by MCL 125.585(1).

FACTUAL BACKGROUND

On October 8, 1998, Peninsula Barns applied for a SLUP for a warehouse facility on its 5.8 acre parcel located at the intersection of Center Road and Cherry Hill Road in Peninsula Township. This area is zoned agricultural. At first, the Township Planner refused to process the application and Peninsula Barns appealed. The Board of Zoning Appeals affirmed. Peninsula Barns appealed to this Court. After hearing the appeal on January 11, 1999, this Court peremptorily reversed the Board of Zoning Appeals "without making any comment as to the merits of the application." (Transcript of Hearing on Motion at p 16.)

Peninsula Barns' SLUP application was for a warehousing facility with totally enclosed storage. On July 13, 1999, the Township Board denied the SLUP. The Peninsula Township Zoning Ordinance ("PTZO") does not provide for review of this decision by the Board of Zoning Appeals. Thus, Peninsula Barns once again appealed to this Court.

STANDARD OF REVIEW

Decisions of a zoning board of appeals are largely discretionary. *Szluha v Avon Charter Twp*, 128 Mich App 402, 410; 340 NW2d 105 (1983). Appellate review by the circuit court must follow methods prescribed by the State Constitution. Our Constitutional standard provides that all final decisions of an administrative officer shall be subject to direct review by the courts and this review shall include, as a minimum, the determination of whether such final decisions are authorized by law and, in cases in which a hearing is required, whether the same are supported by competent and substantial evidence on the whole record. Const1963, Art 6, § 28; *Carleton Sportsman's Club v Exeter Twp,* 217 Mich App 195, 200; 550 NW2d 867 (1996).

MCL § 125.293a; MSA § 5.2963(23a), provides:

> (1) . . . Upon appeal the circuit court shall review the record and decision of the board of appeals to insure that the decision:
> (a) Complies with the constitution and law of the state.
> (b) Is based upon proper procedure.
> (c) Is supported by competent, material, and substantial evidence on the record.
> (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.
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> (2) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that there is additional evidence which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions which the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings, or may affirm its original decision. The supplementary record and decision shall be filed with the court.
>
> (3) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

Id at 198-199.

A reviewing court must consider all the evidence on the record, not just that supporting the agency's decision. *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc,* 393 Mich 116, 124; 223 NW2d 283 (1974). In addition, as the Court of Appeals said in *Davenport v City of Grosse Point Farms Board of Zoning Appeals*, 210 Mich App 400, 406; 534 NW2d 143 (1995):

> . . .a reviewing court 'must give due deference to the agency's regulatory expertise and may not 'invade the province of exclusive administrative fact finding by displacing an agency's choice between two reasonably differing views.' *Gordon v Bloomfield Hills*, 207 Mich App 231, 232; 523 NW2d 806 (1994), quoting *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc,* 393 Mich 116, 124; 223 NW2d 283 (1974).

SPECIAL LAND USE PERMIT

A special land use does not vary the zoning ordinance. It does not contemplate a use otherwise proscribed by the ordinance. Rather, it permits certain uses authorized under stated conditions in the ordinance. *Room & Board Homes v Detroit Mayor*, 67 Mich App 381, 385; 241 NW2d 216 (1976).[1]

Section 8.1.3. of the PTZO contains general standards for all SLUPs. Section 8.1.3(3) contains specific requirements for all SLUP site plans. Section 8.7.3 of the PTZO contains specific standards for a warehouse or light industrial SLUP in an agricultural zone. Section 8.1.3(3) of the PTZO also contains requirements for reviewing an impact assessment and site plan.

Pursuant to Section 8.1.3, the Town Board must determine that all of the general standards, as well as the specific standards, are satisfied before approving a SLUP. It is incumbent upon the proponent of a SLUP to furnish adequate evidence in support of his application. PTZO § 8.7.3(7)(e).

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[1]Counsel for Plaintiff cites the *Room & Board* case for the court's ruling that "once the conditions set forth in the ordinance have been met, the board, merely an administrative body, is compelled to give its unconditional approval." This was not the court's ruling. This was the plaintiff-appellant's position. The *Room & Board* case involved the issuance of a special land use permit with a time limitation. The court's actual ruling was that "once the Board has determined that a use qualifies under the ordinance as a 'special exception' and conditions related to the use of the land are imposed, that use cannot be subject to a time limitation."

In the instant case, the Township Board listed general standards (a), (b) and (c) to justify its denial. PTZO 8.1.3.(1). General standard (a) requires that the proposed use "be harmonious and appropriate in appearance with surrounding land." General standard (b) requires that the proposed use "not be hazardous or disturbing to existing or future uses in the same general vicinity and a substantial improvement." General Standard (c) requires that the proposed use "be served adequately by public facilities." In addition, the Township Board listed specific standard (5) to justify its denial. PTZO 8.7.3(d). Specific standard (5) requires that the proposed use "shall be compatible with and in the best interest of farming uses either in general or on specific contiguous lands."

The Plaintiff-Appellant contends that it presented evidence on the record satisfying each of these standards and that there was no competent, material or substantial evidence to indicate otherwise.

The Defendant-Appellee, on the other hand, claims that it relied upon Township's Agricultural Committee review of the application, the Planning Commission recommendation that the application be denied because "it was too commercially intense, not compatible with agriculture, not in the best interest of farming, and did not meet the standards of the Township Ordinance," the input at the public hearings, letters from citizens either supporting or opposing the proposal, its site visit, and the opinion of Horticulturist James E. Nugent regarding the effect of the project on air flow and possible frost damage to neighboring farmland, and their own collective experience in denying the Plaintiff-Appellant's application for a SLUP.

ISSUE

The issue presented by this appeal is whether the Township Board's decision denying Plaintiff-Appellant's application for a special land use permit was supported by competent, material and substantial evidence on the whole record.

ANALYSIS

Having reviewed the whole record, this Court finds that the Township Board considered several issues regarding the proposed land use, including air drainage, storm water drainage,

pesticide spray drift, farm preservation, intensity, percentage of land coverage, increase in traffic flow, and trespass onto adjacent orchards. These concerns all related to the impact of the proposed mini-warehouse facilities on the surrounding active farmlands.

It is undisputed that the property in question is located in an agricultural area and surrounded by active farmlands. It is also undisputed that the proposed use of the land for mini-warehouses would occupy 45 percent of the land's 5.8 acres and that the project would increase traffic congestion.

The Plaintiff-Appellant was willing to modify its proposed plan to try to accommodate some of the Township Board's concerns. For example, the Plaintiff-Appellant agreed to have all of the storage units open away from the orchards in order to reduce the effect of pesticide spray drift and trespass by its users on adjacent orchards. In addition, the Plaintiff-Appellant agreed to increase its storm water retention system to accommodate a 100-year flood plain rather than the more limited 25-year flood plain. For economic reasons, the Plaintiff-Appellant was unwilling, however, to reduce the size of the project.

Some of the Township Board's concerns simply could not be adequately addressed. Horticulturist James Nugent could not, for example, conclusively state that the proposed use would not have a detrimental impact on the adjacent farm orchards because of its impact on air drainage. His conclusion was that the proposed use would have a detrimental impact on adjacent orchards, but the degree of impact could not be ascertained. In his opinion, it may be minimal. The adjacent farmers, however, did not want to risk even a minimal loss of production.

The Plaintiff-Appellant failed to satisfy certain general standards. It failed to provide adequate evidence that the proposed mini-warehouses would "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 a use will not change the essential character of the area." PTZO § 8.1.3.(1)(a). Likewise, the Plaintiff-Appellant failed to provide adequate evidence that the proposed mini-warehouses would "not be hazardous or disturbing to existing or future uses in the same general vicinity and will be a substantial improvement to property in the immediate vicinity and to the community as a whole." PTZO § 8.1.3(1)(b).

The Plaintiff-Appellant's site plan failed to satisfy the specific requirement that the proposed use "will not disrupt air drainage systems necessary for agricultural uses." PTZO §8.1.3.(3)(l). The Plaintiff-Appellant also failed to provide adequate evidence that the proposed use of its land for mini-warehouses would be "compatible with and in the best interest of farming uses either in general or on specific contiguous lands." PTZO § 8.7.3.(d)(5).

Thus, this Court concludes that the Township Board's decision to deny the Plaintiff-Appellant's application for a special land use permit was supported by substantial, material and competent evidence on the whole record.

This Court further finds that the harmony principle, as applied in *Davenport v City of Grosse Point Farms Board of Zoning Appeals*, 210 Mich App 400; 534 NW2d 143 (1995), is applicable to the instant case. In *Davenport,* the plaintiff property owners sought a variance to enlarge their residence to better accommodate their daughter who had cerebral palsy. Several neighbors spoke out against the addition, essentially saying that it was not harmonious with the surrounding homes. The evidence in support of defendant's decision to deny the plaintiff's variance was weak. However, the defendant was quite familiar with the neighborhood and its members inspected the area in person after receiving the proposed plans. Although the defendant did not rely on measurements of surrounding homes for the purpose of comparison, the plans and drawings made clear to defendant the divergent picture that would have been created by plaintiffs' proposed addition. The Court of Appeals upheld the denial of the variance noting that "harmony" means more than mere technical compliance with zoning requirements. *Id* at 233. See also, *Gordon v Bloomfield Hills*, 207 Mich App 231; 523 NW2d 806 (1994) in which a City Commission decision denying property owners permission to split their residential lots to create a third residential lot was upheld because it was based on a finding that the split would create disharmony in the neighborhood.

In the instant case, the Plaintiff-Appellant agreed to keep and improve the existing hay barns and outbuildings and to similarly design any new structures. However, instead of open fields, orchards and a few scattered structures, approximately 45 percent of the Plaintiff-Appellant's land would be covered by structures. This is not harmonious with the existing or intended character of the vicinity. Thus, this Court is further compelled by the harmony principle to affirm the Township Board's denial of the Plaintiff-Appellant's application for a special land use permit.

CONCLUSION

Given the record in this case, this Court finds that the Township Board's decision was supported by competent, material and substantial evidence. Further, this Court finds that the Plaintiff-Appellant's proposed use is not harmonious with the surrounding agricultural land. The Township Board's decision to deny the Plaintiff-Appellant Peninsula Barns' application for a special land use permit for mini-warehouse facilities is affirmed.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 5/04/00