

COURT OF APPEALS  
MORROW COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

HIGHLANDERS ENTERPRISE, LLC

Plaintiff-Appellee

-vs-

CHESTER TOWNSHIP BOARD OF  
ZONING APPEALS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. John W. Wise, J.

Case No. 2009CA0001

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Morrow County Court of  
Common Pleas, Case No. 2008CV00106

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 8, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

BRIAN P. BARGER  
Brady, Coyle & Schmidt, Ltd.  
4052 Holland-Sylvania Road  
Toledo, Ohio 43623

CHARLES S. HOWLAND  
Morrow County Prosecuting Attorney  
60 East High Street  
Mt. Gilead, Ohio 43338

*Hoffman, J.*

{¶1} Appellant Chester Township Board of Zoning Appeals (hereinafter “BZA”) appeals the December 23, 2008 Judgment Entry of the Morrow County Court of Common Pleas in favor of Appellee Highlanders Enterprises, LLC

#### STATEMENT OF THE FACTS AND CASE

{¶2} On November 24, 2007, Highlanders Enterprises, LLC (hereinafter “Highlanders”) filed an application for a conditional use permit with BZA in order to conduct surface mining on 64.1 acres of land owned by Highlanders. Specifically, Highlanders desires to extract, process and sell sand and gravel. The Chester Township Zoning Resolution (hereinafter “CTZR”) permits gravel extraction and open pit mining in agricultural areas. Section 500.2 reads:

{¶3} “A use designated as a CONDITIONAL USE shall be allowed in a Zoning District when such CONDITIONAL USE, its location, extent and method of development will not substantially alter the character of the vicinity or unduly interfere with the use of the adjacent lots in the manner prescribed for the Zoning District. To this end the Zoning Board of Appeals shall, in addition to the Development Standards for the Zoning District, set forth such additional requirements as will, in its judgment render the CONDITIONAL USE compatible with the existing and future use of adjacent lots and the immediate surrounding area.”

{¶4} Highlanders’ application sets forth the 64.1 acre parcel will be utilized during normal business hours and its existing entrance on State Route 95 will be maintained along with two additional Ohio Department of Transportation approved sites for exits onto State Route 95. It is anticipated approximately 20 trucks would enter and

exit the property during an ordinary eight-hour work day. Public access to any private roads will be prohibited by means of locked chains or gates across the entrance.

{¶15} The December 17, 2007 hearing with regard to the application was tape recorded, but the recorder did not work. Accordingly, the parties agreed to rely on the written documentation and Stipulations of Fact.

{¶16} The Chester Township BZA denied Highlanders' application on January 17, 2008, and issued Findings of Fact and Conclusions of Law. Specifically, BZA found the operations would be adverse to public health, safety, comfort and general welfare. The BZA primarily cited the increase in traffic, dust and noise, and decrease in property values.

{¶17} On February 12, 2008, Highlanders filed an administrative appeal with the Morrow County Court of Common Pleas. Via Judgment Entry of December 23, 2008, the trial court reversed the decision of the BZA, and remanded the matter to BZA to grant the application.

{¶18} BZA now appeals, assigning as error:

{¶19} "I. THE CHESTER TOWNSHIP BOARD OF ZONING APPEALS WAS NOT OBLIGATED TO ISSUE A CONDITIONAL USE CERTIFICATE FOR SURFACE MINING, EVEN IF THE APPLICANT SATISFIED ALL REQUIREMENTS SET FORTH IN THE ZONING RESOLUTION; THE LANGUAGE OF THE RESOLUTION CLEARLY INDICATED THAT ISSUANCE OF A CONDITIONAL USE CERTIFICATE WAS DISCRETIONARY.

{¶10} "II. THE DECISION OF THE CHESTER TOWNSHIP BOARD OF ZONING APPEALS SHOULD HAVE BEEN UPHELD BY THE COMMON PLEAS COURT. THE

COURT SHIFTED THE BURDEN TO THE BOARD TO ESTABLISH CAUSE TO DENY THE APPLICATION. THE BURDEN WAS UPON THE APPLICANT TO SHOW COMPLIANCE WITH THE REQUIREMENTS OF THE CONDITIONAL USE LANGUAGE SET FORTH IN THE ZONING STATUTE.

{¶11} “III. THE APPELLEE HAS FAILED TO COMPLY WITH O.R.C. 519.141 OF THE OHIO REVISED CODE. THUS, THE APPELLEE’S REQUEST FOR A CONDITIONAL USE CERTIFICATE COULD NOT BE GRANTED BY THE CHESTER TOWNSHIP BOARD OF ZONING APPEALS. COMPLIANCE WITH O.R.C. 519.141 IS A PREREQUISITE FOR A SURFACE MINING CONDITIONAL USE PERMIT.”

I and II

{¶12} The first two assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶13} Ohio Revised Code Section 2506.01 provides a final order, adjudication, or decision of a board may be reviewed by the common pleas court of the county where the board’s principal office or political subdivision is located. Section 2506.04 provides,

{¶14} “If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The

judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.”

{¶15} This Court’s review of an appeal from the common pleas court’s disposition with respect to an administrative appeal is limited in scope. *Dudukovich v. Lorain Metro. Hous. Authority* (1979), 58 Ohio St.2d 202. In this regard, an appellate court may review the common pleas court judgment “only on questions of law,” which does not include the same extensive power to weigh the preponderance of substantial, reliable, and probative evidence as is granted to the common pleas court regarding administrative appeals. *Henely v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142. However, within the ambit of “questions of law” for appellate court review of a decision of the common pleas court with respect to an administrative review, the appellate court’s review includes a determination of whether the trial court abused its discretion. *BP Oil Co. v. Dayton Bd. of Zoning Appeals* (1996), 109 Ohio App.3d 423; *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30.

{¶16} An abuse of discretion is more than an error of judgment. To constitute an abuse of discretion, a common pleas court’s action must be unreasonable, arbitrary, or unconscionable. *State ex rel. The V. Cos. v. Marshall* (1988), 81 Ohio St.3d 467. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Reeman v. Crown City Mining, Inc.* (1993), 90 Ohio App.3d 546.

{¶17} A township’s authority to adopt zoning legislation is defined by the Ohio General Assembly. See *Bd of Twp. Trustees of Bainbridge Twp. v. Funtime, Inc.*

(1990), 55 Ohio St.3d 106. Ohio Revised Code Section 519.02 sets forth the enabling legislation for township zoning:

**{¶18}** “(A) Except as otherwise provided in this section, in the interest of the public health and safety, the board of township trustees may regulate by resolution, in accordance with a comprehensive plan, the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures, including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board by resolution, in accordance with a comprehensive plan, may regulate the location of, set back lines for, and the uses of buildings and other structures, including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township, and may establish reasonable landscaping standards and architectural standards excluding exterior building materials in the unincorporated territory of the township. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board may regulate by resolution, in accordance with a comprehensive plan, for nonresidential property only, the height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, sizes of yards, courts, and other open spaces, and the

density of population in the unincorporated territory of the township. For all these purposes, the board may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.

**{¶19}** “For any activities permitted and regulated under Chapter 1513. or 1514. of the Revised Code and any related processing activities, the board of township trustees may regulate under the authority conferred by this section only in the interest of public health or safety.” (Emphasis added.)

**{¶20}** Section 1513 governs coal mining, and section 1514 pertains to surface mining. Highlanders is a mining company regulated under R.C. 1514; therefore, the BZA could regulate only in the interest of public health and safety issues. Accordingly, BZA’s denial of the conditional use application citing the increase in traffic, dust and noise, and a decrease in property values does not meet the statutory criteria. The record is void of evidence demonstrating the adverse affect of the use on public health and safety. The surface mining for which Highlanders sought the conditional use permit is governed by both the Ohio Department of Natural Resources and the Ohio Environmental Protection Agency.

**{¶21}** Appellant’s first and second assignments of error are overruled.

### III.

**{¶22}** The third assignment of error argues Highlanders failed to comply with R.C. 519.141 of the Ohio Revised Code. Thus, the Apelles’s request for a conditional

use certificate could not be granted by BZA, as compliance with the R.C. 519.141 is a prerequisite for a surface mining conditional use permit. We disagree.

**{¶23}** R.C. 519.141 reads, in pertinent part:

**{¶24}** “(B)(1) Prior to the submission of an application for a conditional zoning certificate, an applicant, in accordance with division (B) of section 303.141 of the Revised Code, shall send written notice to the county engineer of the applicant's intent to apply for a conditional zoning certificate. The county engineer and the applicable board of county commissioners shall proceed in accordance with divisions (B)(1) to (3) of section 303.141 of the Revised Code. As provided in division (B)(3) of that section, the applicant or an affected board of township trustees may submit written notice of appeal regarding a decision of the board of county commissioners under division (B)(2) of that section.”

**{¶25}** Initially, we note this issue was not raised before the lower court. We hold Highlanders failure to send written notice to the county engineer’s office did not deprive BZA or the Morrow County Court of Common Pleas of subject matter jurisdiction. Although the failure to send the notice constituted a defect in Appellee’s application and the proceeding to determine the application without it was error, it did not deprive the BZA or common pleas court of subject matter jurisdiction. Therefore, the failure to raise the issue below amounts to waiver.

**{¶26}** The third assignment of error is overruled.

{¶27} Based upon the above, the judgment of the Morrow County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin  
HON. W. SCOTT GWIN

s/ John W. Wise  
HON. JOHN W. WISE

