

BEFORE THE ANDERSON TOWNSHIP BOARD OF ZONING APPEALS

SUPPLEMENTAL MEMORANDUM OF THE VILLAGE OF TERRACE PARK IN OPPOSITION TO THE APPLICATION OF MARTIN MARIETTA MATERIALS, INC. FOR A VARIANCE TO SECTION 116.8, ATZR IN CONNECTION WITH A REQUEST FOR A CONDITIONAL USE FOR AN UNDERGROUND LIMESTONE MINE

- 1. The Supreme Court of Ohio has explicitly ruled that a Township Board of Zoning Appeals may not grant a variance from the requirements of a conditional use permit. A Township Board of Zoning Appeals is without authority to do so.**

Under Ohio law, variances are distinct, are not the same and do not overlap conditional uses. As noted by the Ohio Supreme Court in *Set Products, Inc. v. Bainbridge Twp. Bd. Of Zoning Appeals* (1987), 31 Ohio St.3d 260, 510 N.E.2d 373, “Variances and special permits (which are evidenced by conditional zoning certificates) are distinct concepts, entailing wholly separate considerations and standards, and must be kept discrete.”

In *Gerzeny v. Richfield Township et al.*, 62 Ohio St.2d 339; 405 N.E.2d 1034 (1980), the Ohio Supreme Court made it clear that variances from the requirements of conditional uses are not within the powers of a township board of zoning appeals.

In *Gerzeny*, the property owner had a 28-acre tract which was located in an “R-1 Rural Residential” zoning district. He sought a conditional use permit to use his property as a “privately owned park with related facilities.” His request was denied because the township zoning resolution required a 100-acre minimum.

In addition to several enumerated “Permitted Uses” of property in an R-1 Rural Residential District,” the Richfield Township Zoning Resolution set forth a list of “Conditionally Permitted Uses.” Use of R-1 property for private parks and playgrounds did not constitute a permitted use under the resolution. The resolution did, however, authorize the board to issue conditional zoning certificates - permitting use of R-1 property for private parks where at least 100 acres can be dedicated to such use, and where certain other standards could be met by the applicant for such a permit.

The issue before the Ohio Supreme Court was: if a zoning board is authorized to issue special permits for a named use, could it issue a permit if a specific requirement of the zoning ordinance would be violated thereby? That is, could the BZA grant a variance from the strict terms of the required condition? The Supreme Court ruled that the zoning board could not do so.

In so ruling, the Supreme Court noted that the inclusion of conditional use provisions in zoning legislation is based on a legislative recognition that although certain uses are not necessarily inconsistent with the zoning objectives of a district, their nature is such that their compatibility in any particular area depends upon surrounding circumstances. Thus, a legislative body provides for their inclusion in a district only upon administrative approval granted in accordance with legislatively prescribed standards and conditions. The statute (i.e. Chapter 519 of the Ohio Revised Code) does not vest township boards with power to grant conditional zoning certificates independent of the zoning resolution. Rather, the board’s power to issue such a certificate is no greater than that vested in it by the township zoning resolution.

The Supreme Court reiterated that R.C. §519.14(C) authorizes, but does not require, township zoning resolutions to place various types of uses in the special permit category. That

decision according to the Court is made in the ordinance, not the statute, and so the board's power derives from the same source. The Court found that, by providing that only 100-acre private parks qualify for conditional zoning certificates, the legislative zoning authority i.e. the Richfield Township Board of Trustees had left smaller private parks with the status of mere non-permitted uses. The Court ruled: "For a court to determine that the minimum acreage requirement is arbitrary or unreasonable will not transform smaller private parks into permitted uses." The Court further added that: "****[Because a] special exception use was intentionally not made a permitted use *per se* but only conditionally, *** if the conditions are invalid , it [the use] should not be permitted until the legislature [not the BZA] creates valid standards."

The Supreme Court concluded and ruled that the property owners proposed use does not qualify for a conditional zoning certificate because he cannot meet the specific legislatively determined 100-acre requirement for such a certificate. Where a zoning board is empowered to issue special permits for a named use, it may not issue such a permit if a specific requirement of the zoning ordinance will be violated thereby. Thus, a BZA is without authority to grant a variance to the minimum 100 acres required as a condition. Similarly, Anderson Township BZA cannot grant a variance from the stated requirement for a conditional use permit.

The Supreme Court's opinion did not end there. It went a step further and specifically held that because the property owner was unable to meet the requirements of the conditional use permit, the proposed use was, therefore, neither a permitted use nor a conditionally permitted use. It ruled that the property owner's proposed use was simply a non-permitted use. Therefore, the Court concluded in dicta that if the property owner wanted to use his property as proposed, he would have to file for a variance for the non-permitted proposed use from the zoning resolution (not for a variance from the requirements of the conditional use permit). Of course, in Anderson, such a change of use would be the equivalent of requesting a zoning change.

A similar conclusion was reached in *Christopher Norris v. Chester Township Board of Trustees*, 1991 Ohio App. LEXIS 3885 (8th Dist. 1991). In that case, a prospective buyer applied for a conditional use permit for a home occupation. The township zoning inspector denied the application on the ground that the requested use did not comply with the requirements of a home occupation because such home-based business had to employ no more than one non-resident and not occupy more than 250 square feet of the residence. The prospective buyer wanted to operate a photography studio out of his home that was to employ four non-residents and occupy 4,000 square feet of a 16,000 square foot residence. The Board of Zoning Appeals upheld the denial of the request for a variance. The trial court and the appellate court both upheld this denial. Among other issues, the appellate court in its opinion relied on *Gerzeny*, and made a finding that the conditional use permit was properly denied because the township board lacked the authority to expand the scope of conditional use permits and the prospective buyer had failed to meet the criteria for a home occupation set forth in the Chester Township resolution.

Martin Marietta has requested, among other things, a variance from the Vibration Performance Standard as part of its application for a conditional use permit. Even if such a request for variance is reasonable, Ohio law is clear that the Anderson Township BZA is simply without authority to grant such a variance. If Martin Marietta is unable to meet the requirements for a conditional use permit, this board is obligated to deny Martin Marietta request for a conditional use permit.

2. The Auditor of the State of Ohio has also stated that a Township Board of Zoning Appeal is without authority to substitute for, to change, or even vary what the township zoning resolution has said shall constitute a conditional use.

The Auditor of the State of Ohio in the Ohio Township Handbook (March 2005), Land Use Control, page B-9 states as follows: "O.R.C. §519(C) authorize[s] the board of zoning appeals on appeal to grant conditional zoning certificates 'if such certificates for specific uses are provided for in the zoning resolution.' It remains for the board of zoning appeals to determine that such specified facts, circumstances and conditions exist. The board has no authority to substitute for, nor to change, nor even vary what the resolution has said shall constitute a conditional use." The Auditor's statements are in sync with the ruling of the Ohio Supreme Court in *Gerzeny*.

Conclusion

Ohio law is unequivocal regarding the authority of a board of zoning appeals. For the convenience of the Anderson Township Board of Zoning Appeals, a flow chart showing the decision analysis is attached.

If the use contemplated by an applicant is a "permitted" use, and if the zoning resolution states a particular requirement e.g. 100 acres minimum, the BZA may consider and grant a variance to that applicant after applying the appropriate standard i.e. "practical difficulties" for the above example, or "unnecessary hardship" for a request for a use variance.

On the other hand, if the use contemplated by an applicant is a "conditionally permitted" use, the analysis is completely different. The conditions or standards set forth in the zoning resolution are the essential and minimal (not exhaustive) benchmarks that must be satisfied in order to be eligible for a conditional use permit. Even if an applicant meets the requirements set forth in the zoning resolution, the BZA may impose additional conditions. For example, the ATZR states that "[i]n authorizing such Conditional Uses, the Board of Zoning Appeals shall employ the performance of standards described in Sec. 116 et seq. and shall also consider the compatibility of such uses with surrounding uses and the effect of such uses upon the health, safety, and morals of the community." Thus, additional conditions may be imposed to protect the health, safety, and morals of the community. But the BZA is not authorized to ignore, amend or vary the conditions specified in the ATZR. That can only be done by the prescribed legislative process i.e. an amendment to the zoning resolution.

In conclusion, in light of the *Gerzeny* and *Christopher Norris* cases and the Auditor's clarification, it is incumbent upon the Anderson Township Board of Zoning Appeals to deny Martin Marietta's request for a conditional permit if it is unable to meet the requirements for such a permit. As I had stated in my memorandum to the Board of Zoning Appeals, by making an application for a variance from the Vibration Performance Standard, Martin Marietta has implicitly admitted that it cannot meet the requirements for a conditional use permit. Therefore, the Village of Terrace Park respectfully demands this Board deny Martin Marietta's request for a variance from the Vibration Performance Standard.

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum has been served upon the attorneys listed below as well as to the Anderson Township Board of Zoning Appeals by e-mail, fax or hand delivery on or before the 18th day of November, 2008.

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DECISION ANALYSIS CHART FOR BOARD OF ZONING APPEALS

