

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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RICHARD SCHMUCKAL, WILLIAM F. CLOUS,  
TONI L. CLOUS, JAMES SCHMUCKAL, PETER  
NEWELL and CONSTANCE NEWELL,

Plaintiffs,

v

File No. 99-19155-AA  
HON. PHILIP E. RODGERS, JR.

BLAIR TOWNSHIP,

Defendant.

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Patrick E. Heintz (P31443)  
Steven R. Fox (P52390)  
Attorneys for Plaintiffs

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David A. Bieganowski (P55622)  
Attorneys for Defendant

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DECISION AND ORDER ON CLAIM OF APPEAL FROM MAY 11, 1999  
DECISION OF THE BLAIR TOWNSHIP BOARD OF TRUSTEES

On February 10, 1998, the Blair Township Board of Trustees (the "Board") granted Rick Zenner ("Zenner") a special land use permit for the purposes of operating a moto-cross facility on his property which is zoned agricultural. The permit contained several conditions. The conditions limited the decibel readings, number of races, hours of practices and races, noise levels, overnight camping and parking, road maintenance, and trespass on adjacent property. One of the conditions specifically stated: "the Special Use shall be for One (1) year with the use to be reviewed by the Zoning Administrator during and after every race."

After the first year of operation, Zenner petitioned the Board to revise the conditions.<sup>1</sup> He also requested that he be permitted to add snowmobile racing. The Board referred the request to add

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<sup>1</sup>The requested modifications included: (1) changing the running time of the permit from May through September to April through September; (2) changing the practice days and times to all Wednesdays from 1:00 p.m. until 9:00 p.m. and all Saturdays from 11:00 a.m. until 9:00 p.m.; (3) changing the number of riders on the track during practice from 5 to 20 at a time; (4) changing the decibel level from 75 to 100dv; (5) permitting overnight parking for Friday, Saturday and Sunday; (6) permitting race days to begin at 9:00 a.m. and not limit how long the races can run; (7) allowing the public address system speakers to be point in any direction necessary for riders to hear announcements; and (8) permitting construction of bleachers.

snowmobile racing to the Planning Commission. On February 9, 1999, the Board also referred some of Zenner's requests to the Planning Commission and revised and approved other proposed modifications.<sup>2</sup>

The Appellants filed an Ex Parte Motion for Temporary Restraining Order and to Show Cause and a Verified Complaint complaining that the modifications made to the special land use were so significant that they were tantamount to issuing a new special use permit and the Board had not complied with the requirements of the Blair Township Zoning Ordinance for approval of a special land use permit.

On April 15, 1999, this Court found that the modifications in the land use permit constituted "material changes" necessitating a hearing pursuant to MCL 125.286(B)(3), issued a Preliminary Injunction and remanded the case to the Township Board. On May 11, 1999, after holding a public hearing, the Township Board again approved the requested modifications precisely as it had previously.

The Appellants brought this appeal. They claim that the Board's decision was contrary to law and was not based "upon competent, material and substantial evidence on the whole record."

#### I.

#### STANDARD OF REVIEW

This Court must follow the review methods prescribed in MCLA Const. Art 6, § 28 which provides in pertinent part:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and,

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<sup>2</sup>The Board referred the requests regarding overnight camping, the public address system and the bleachers to the Planning Commission and approved the following: (1) races between the hours of 10:00 a.m. and 6:00 p.m.; (2) a variable decibel level from 75 to 92dv; (3) over-night parking the day before a race no earlier than 4:00 p.m.; (4) extending practice times from 4-7:00 p.m. to 4-9:00 p.m.; (5) increasing the number of bikes racing at any one time from 5 to 10; (6) increasing the number of practice Wednesdays from 10 to 20. The total number of days that Zenner may operate this track is limited to 153 days per year.

in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

All final decisions of administrative officers shall be subject to direct review by courts and this review shall include, at a minimum, the determination of whether such final decisions are authorized by law and, in cases in which hearing is required, whether the same are supported by competent and substantial evidence on the whole record. *Carleton Sportsman's Club v Exeter Township*, 217 Mich App 195, 199; 550 NW2d 867 (1996).

Generally, administrative decisions are to be affirmed if supported by material, competent, and substantial evidence on the record as a whole. *Nationwide Mut Ins Co v Commissioner of Ins* 129 Mich App 610; 341 NW2d 841, (1983); *Ron's Last Chance, Inc v Liquor Control Comm* 124 Mich App 179; 333 NW2d 502 (1983); *Sponick v City of Detroit Police Dept*, 49 Mich App 162; 211 NW2d 674 (1973); *Application of First Michigan Bank & Trust Co, Zeeland*, 44 Mich App 83; 205 NW2d 54 (1972); *King v Calumet & Hecla Corp*, 204 Mich App 319; 43 NW2d 286 (1972); *Fisher-New Center Co v Michigan State Tax Commission*, 381 Mich 713; 167 NW2d 263 (1969).

## II.

The Appellants did not challenge the original grant of the special use permit in February of 1998. They challenge only the Board's approval of modifications in the conditions attached to that permit.

Article XXII of the Zoning Ordinance sets forth the procedure and standards by which the Planning Commission and the Board consider applications for special land use permits. MCL 125.286d(3); MSA 5.2963(16b)(3) and the Blair Township Zoning Ordinance, Section 22.05 of Article XXII govern the power of the Board to amend or change the conditions imposed on a special land use permit. Both provide that any imposed conditions "shall remain unchanged except upon the mutual consent of the approving authority [Township Board] and the landowner."

In an abundance of caution, this Court remanded this matter to the Board and required a public hearing, not for the purposes of reopening the debate regarding the granting of the initial special use permit, but solely so the Board could determine whether the modifications would, in any way, alter their opinion that the modified special use satisfied Section 22.04 of the Blair Township

Zoning Ordinance. In other words, the Board was not ordered to redetermine the suitability of motocross as a special land use for the property. The Board was required to determine whether the modifications would change the character of the use such that it no longer satisfied Section 22.04.

The Board, after affording all interested parties a full and fair opportunity to be heard, expressed its opinion that the modifications did not alter the character of the use that they had already approved. Although the Board did not make specific factual findings on each proposed modification, the Board approved the modifications after “having from time to time since the issuance of the Special Use Permit visited the site and having taken into consideration the Standards for Approval set forth in Section 22.04 of the Blair Township Zoning Ordinance.” The record reflects that the Board considered information received from the Planning Commission members, the Zoning Administrator, and the Township attorney. All of these people made site visits during races and practices and informally interviewed citizens at the track. Information presented by the Zoning Administrator and Township attorney concerned decibel levels for various activities and decibel levels allowable under Michigan law. The zoning administrator also prepared a written report addressing each of the requested modifications which was reviewed by each Board member.

The Appellants were represented at the public hearing and other meetings of the Township Board. They wrote numerous letters to the Board. They and their attorneys were provided ample opportunity to speak and submit information.

This Court does not sit as a superzoning commission, and will not substitute its judgment for that of the Township Board. *Spanich v Livonia*, 355 Mich 252; 94 NW2d 62 (1959). In *Lamb v City of Monroe*, 358 Mich 136; 99 NW2d 566 (1959), a unanimous Supreme Court adopted the following language from *Brae Burn, Inc v City of Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957):

It is not the function of this Court, or of any court, to approve or disapprove zoning ordinances as to wisdom or desirability. An appeal lies, it is true, from the legislative determination, but it is to the ballot box, not to the courts. If the legislative body has authority to act in the premises, and the requirements of administrative due process have been observed with respect to the adoption, interpretation, and administration of the ordinance, we will not disturb the legislative judgment or the executive action. In other words, if there is a debatable question, that debate is not for us. But if there is whimsical action, or an arbitrary ipse dixit, a legislative judgment has not, in the legal sense, been exercised at all, and we will protect against the arbitrary action.

## CONCLUSION

Many, if not all, of the Appellants attended the public hearing that was held before Zenner's original special land use permit was approved in February of 1998. They spoke in opposition. The Planning Commission recommended approval of the permit, and the Board followed that recommendation. The Appellants did not appeal that decision.

The Appellants are appealing the Township Board's May 11, 1999 decision to modify the conditions attached to Zenner's special land use permit. Those modifications increase the use of the moto-cross track by increasing the hours of operation and the number of bikes that can race at the same time and allowing overnight parking the day before a race.

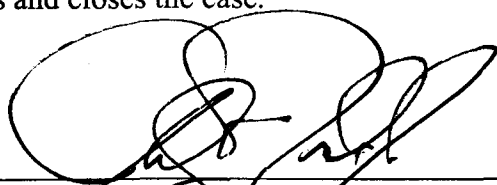
The Appellants claim that the modifications are so significant that they are essentially the issuance of a new permit, contrary to law and unsupported by competent material and substantial evidence. Both the Township Rural Zoning Act and the Blair Township Zoning Ordinance provide for modification of conditions on a special land use permit by consent of the Board and the landowner. Therefore, the validity of the original permit is not in issue and the decision whether to modify the attached conditions is discretionary with the Board.

In an abundance of caution, this Court ordered the Board to conduct a public hearing. Procedural due process was provided, and the hearing held. After the hearing, the Board found that the modifications did not change the character of the use. That finding will not be disturbed by this Court.

The decision of the Township Board approving the requested modifications to the special land use permit issued to Zenner, is affirmed.

IT IS SO ORDERED.

This order resolves all pending claims and closes the case.

  
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HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge  
Dated: 3/03/00