

No. 3--05--0659

Appellees, Larry and Pam Nelson, filed an application for a conditional use permit and variance with appellants, Township Board of Northville Township and Zoning Board of Appeals of Northville Township. Following two hearings before the Zoning Board of Appeals, the Zoning Board denied the Nelsons' application. The Nelsons appealed. The trial court found, in part, that the Zoning Board's denial of the Nelsons' application for a conditional use permit was against the manifest weight of the evidence, and reversed on that issue. The Township Board and Zoning Board appeal. This matter also involves a cross appeal.

FACTS

On February 2, 2004, Larry and Pam Nelson filed an application with the appellants, Township Board and Zoning Board of Northville Township (Boards), seeking a conditional use permit and variance to construct a transmission/receiver site for an AM radio station on a ten-acre site. The application sought permission to construct a maximum of five towers, each tower approximately 18'' to 20'' on each face and between 150 to 195 feet tall. The base of each tower would be surrounded with a six-foot tall fence, with a locked gate and proper signage. In addition, a transmission/receiver building, not to exceed 30' by 30', would be constructed toward the front of the property in compliance with the Northville Township Zoning Ordinance (Ordinance) setback requirements. The application stated that the building and towers would take up approximately 7,000 square feet of the ten acres, and the remainder of the property would be used for agricultural purposes.

The ten-acre property site at issue is zoned "A-1," or an exclusive agricultural district under the Ordinance. The Ordinance contains two procedures for either requesting a variance or a conditional use permit. Pursuant to section 8.1 of the Ordinance, a conditional use permit may be issued upon satisfaction of the requirements listed therein. Section 8.3 enumerates fourteen factors for the Zoning Board to consider prior to granting a conditional use permit, the factors applicable to the subject property in the instant case being as follows:

- "(g) Appearance, how will the area look?
- (h) Compatibility with existing or proposed uses in the area
- (i) Relation to any existing land use plan

(k) Immediate and long-range tax base

(m) Relation to existing or proposed recreation resources

(n) Relation to the public interest, the purpose and intent of this Ordinance, and substantial justice to all concerned parties.”

Two hearings were held before the Zoning Board on the Nelsons’ application on March 29, 2004, and April 5, 2004. At the March 29, 2004, hearing, the Nelsons presented testimony from seven witnesses. The first witness, Jay M. Heap, testified regarding what effect, if any, the proposed AM radio towers would have on surrounding property values. Heap is an expert with regards to appraisal and valuation of property. In forming his opinion in this matter, he studied existing tower sites in the area and found that continued growth and housing development in the direct vicinity of similar towers showed that there was no impact on property values. Chairman Swenson of the Zoning Board asked Heap whether his studies were applicable to agricultural areas in particular. Heap stated that he believed his studies were relevant because the tower sites he studied had originally been in agricultural areas, and residential developments occurred subsequent to construction of those towers.

Mike Hoffman, a community planning consultant, testified that the proposed towers were an appropriate conditional use for the property. Hoffman noted that less than 2% of the property would be removed from agricultural use. In reviewing the Ordinance’s factors for a conditional use permit, Hoffman found that the environmental impacts on the site would be minimal, the tower would generate minimal traffic, the impact on public facilities would be minimal, and that the towers would be compatible with the current agricultural plans for the area. Hoffman additionally testified that

there would be no negative impact on the community, but rather believed this use would aid in meeting the Ordinance's goals by leaving more land for agricultural use.

The Nelsons then presented testimony from two residents of Northville Township, Dave Jensen and Becky Morphey, who lived between one to two miles from the proposed tower site. Both residents testified that they had no objection to the towers and did not feel the towers would be a detriment to the area. Morphey further testified that she felt the proposed use would benefit the community by providing another radio station in a fast-growing area.

Don Bark, Alderman for the City of Sandwich, testified next. He stated that he believed the proposed towers were a needed venture in the area. He noted that having an AM station in addition to the FM station would benefit the community, particularly the area businesses, by covering more listeners.

Larry Nelson testified last at the March 29, 2004, hearing. He stated that he and his wife, Pam, own and operate WSPY and some other commercial radio stations. He testified that the site of the towers is dictated by the coverage area for the AM station, the directional pattern of the station during both day and night, and the spacing requirements for the towers issued by the Federal Communications Commission (FCC). Nelson testified that the radio towers would not interfere with satellite dishes, cellular phones, or garage door openers in the area, and that the towers would have appropriate lightening equipment on them. Nelson stated that whether the towers had to be lit would depend on the Federal Aviation Administration (FAA), and if the area is found to be within a flight plan. Nelson also stated that the towers would generate more taxes for the property than farming, but he did not know by how much.

With regards to radiation concerns, Nelson testified that the FCC has conducted studies on radiation from AM towers and has concluded that AM radio stations of similar size and frequency require a restricted area of 3½ feet, or one meter, from the base of each tower. Nelson pointed out that this study involved antennas with one kilowatt of power, and the towers in the instant case would not even collectively use that much power. Nelson stated that around the base of each tower, from approximately eight to ten feet out, a locked fence would be erected. This fence would prevent most people from getting anywhere near the one-meter perimeter that is considered the restricted area for more powerful towers.

Both the March 29, 2004, and April 5, 2004, Zoning Board hearings were attended by members of the public, some of whom participated in questioning or otherwise voiced their concerns. William Davis, resident of Northville Township within 500 feet of the subject property, cross-examined Heap, Hoffman, and Nelson. Davis also presented a petition, signed by approximately 20 residents of the local community, opposing the grant of the conditional use permit and/or variance. At the April hearing, Davis appeared represented by counsel, who presented argument before the Zoning Board and requested a continuance to obtain additional witnesses, which the Zoning Board denied.

The questions and comments from other members of the public concerned the appearance of the towers, the effects of radiation, possible interference with electronic devices, safety concerns regarding aerolite users, and the effects on property values.

The Zoning Board ultimately voted, 5 to 0, to deny the Nelsons' request for a variance on the ten-acre site. Larry Nelson then asked the Zoning Board to consider the request for a conditional use permit. The Board did so and voted, 4 to 1, to deny a conditional use permit. The Nelsons'

requested an appeal of the Zoning Board's decision, which was denied by the Township Board. The Nelsons then filed a complaint with the trial court, seeking review of the Zoning Board's decision.

The Boards filed a motion to dismiss the Nelsons' complaint for failure to join necessary parties. The Boards argued, in pertinent part, that William Davis was a party of record and was therefore a necessary party to the action. The trial court denied the Boards' motion to dismiss, concluding that no statutory authority or case precedent holds that either participants or legal objectors in a zoning hearing must be made necessary parties to an administrative review of the zoning decision.

At the hearing on the Nelsons' complaint, the trial court declined to reverse the Zoning Board's findings with regards to the Nelsons' application for a variance. The court did, however, find that the Nelsons' request for a conditional use permit met the standards of the Ordinance and reversed the Zoning Board's denial as being against the manifest weight of the evidence.

Following issuance of the trial court's order, cross-appellant William Davis filed a petition to intervene in the instant litigation and a petition to inform the court as to mootness. Following a hearing, the trial court denied Davis' petition to intervene as untimely.

Both the Boards and Davis appeal the trial court's respective rulings.

ANALYSIS

Davis claims the trial court erred in denying his petition to intervene, and that this matter is moot. The Boards claim the trial court erred in denying their motion to dismiss the complaint for failure to name a necessary party (Davis), and in reversing the denial of a conditional use permit.

We first address cross-appellant Davis' argument that the trial court erred in denying his petition to intervene in the instant litigation. Whether the intervention sought is permissive or as of

right, the application to intervene must be made in a timely manner, and the trial court's judgment on timeliness will not be reversed on appeal absent an abuse of discretion. Freesen, Inc. v. County of McLean, 277 Ill. App. 3d 68 (1995). Generally, if a party seeks to intervene after judgment has been entered and does not satisfactorily explain its failure to seek intervention prior to judgment, that party has failed to demonstrate due diligence and the petition to intervene may be denied as untimely. Schwechter v. Schwechter, 138 Ill. App. 3d 602 (1985).

In the instant case, Davis did not file his petition to intervene until after the trial court rendered its judgment. Davis offered no satisfactory justification for the untimeliness of his petition to intervene and petition to inform the court as to mootness. The record reveals that both Davis and the Zoning Board were aware of the possible mootness issue as early as the April 5, 2004, hearing. Because Davis could have filed his petitions at the onset of litigation, but chose not to, we find that the trial court did not abuse its discretion in denying his petition to intervene.

The Nelsons counter Davis' mootness claim by arguing that he lacks standing to make that claim. In response, Davis argues that his status as an adjoining landowner affords him standing. As discussed below, Davis was not a party of record in the administrative proceedings. This fact has bearing on his standing to bring a claim of mootness. Standing exists for parties to the administrative proceeding who show that their rights, privileges, or duties were adversely affected by the administrative decision. Dyer v. Zoning Board of Appeals of Arlington Heights, 179 Ill. App. 3d 294 (1989). Our review of the record shows that these conditions are not satisfied in regards to Davis. Accordingly, the Nelsons are correct in arguing that he lacks standing to raise a mootness claim.

We next consider whether the trial court erred in denying the Boards' motion to dismiss the Nelsons' complaint for failure to name all necessary parties, specifically William Davis. Section 3-107

of the Administrative Review Act (Act) (735 ILCS 5/3-107(a) (West 2004)) requires that “all persons, other than the plaintiff, who were parties of record to the proceedings before the administrative agency shall be made defendants.” The requirement to name all parties of record as defendants is both mandatory and jurisdictional. Lewis v. Trainor, 51 Ill. App. 3d 180 (1977), citing Winston v. Zoning Board of Appeals, 407 Ill. 588 (1951); see O’Hare International Bank v. Zoning Board of Appeals, 8 Ill. App. 3d 764 (1972). Whether the trial court had jurisdiction is a question of law that we review *de novo*. Barry v. Retirement Board of Firemen’s Annuity and Benefit Fund of Chicago, 357 Ill. App. 3d 749 (2005).

We first note that the Boards’ reliance on O’Hare International Bank is unpersuasive. In that case, the residents who were found to be “necessary parties” on appeal had already “appeared and became parties of record in the [administrative] proceedings.” (Emphasis added.) O’Hare International Bank, 8 Ill. App. 3d at 766. In the instant case, however, we must first determine whether Davis was, in fact, a party of record to the administrative proceedings. We find that he was not.

The question of whether Davis was a party of record is to be determined on the basis of the record of the administrative agency. Pisano v. Giordano, 106 Ill. App. 3d 138 (1982). In the instant case, Davis is a landowner who resides within 500 feet from the subject property. Davis was present at both the March and April hearings before the Zoning Board and was an active participant at both hearings. He cross-examined many of the Nelsons’ witnesses and obtained an attorney for purposes of argument at the April hearing. Davis, along with 22 other individuals, was listed in the Zoning Board’s final order as present and testifying. The final order does not list Davis as a party of record.

Davis was certainly an active participant during the underlying hearings, as were many other

members of the community whose appearances were documented. However, there is no authority that supports that Boards' position that a resident's vocal participation, without more, during an administrative hearing causes that resident to become a party of record. The Boards assert that Davis, as a nearby resident, had a substantial interest in the outcome of the hearing and is thus a necessary party here. We decline to accept this assertion. By this reasoning, all property owners within 500 feet of the subject property who made an appearance at the hearings would have been parties of record, and therefore necessary parties on appeal. We conclude that Davis was not a party of record, and therefore find that the trial court did not err in denying the Boards' motion to dismiss.

We now address the Boards' claim that the trial court erred in reversing the Zoning Board's denial of a conditional use permit as against the manifest weight of the evidence. After carefully reviewing the record, we conclude that the court did not err.

The administrative agency, as the finder of fact, has the responsibility to hear the testimony of the witnesses, determine their credibility, weigh the testimony of each witness, and then draw reasonable inferences from all the evidence. Lapp v. Village of Winnetka, 359 Ill. App. 3d 152 (2005). In an administrative review proceeding, the circuit court and the appellate court are to consider the record and determine whether the decision of the administrative agency is against the manifest weight of the evidence. Lapp, 359 Ill. App. 3d 152. A decision is against the manifest weight of the evidence if the opposite conclusion is clearly evidenced in the record. Board of Education of the City of Chicago v. Van Kast, 253 Ill. App. 3d 295 (1993).

The Nelsons presented evidence that existing towers in the Northville Township area range in height from 200 feet to 499 feet and vary in base width from 40 inches to 30 feet. The proposed towers, on the other hand, would be less than 200 feet high and have a base width of just 18 inches.

Their non-lattice design would allow them to be narrow and blend in better with the surrounding area. There is no credible evidence that the proposed towers would have any aesthetic impact different from that of the existing towers. They would actually have less negative impact. Moreover, the Nelsons' tower plan comports with all standards promulgated by the FAA and the FCC, as well as the structural code of the Electronic Industries Alliance.

Those persons who objected to the proposed towers did so primarily based on concerns about radiation. However, the Nelsons presented evidence that the towers would comply with FCC radio frequency radiation requirements, including standards established by the Occupational Safety and Health Administration. The evidence tended to show that, in regards to radiation emission, the area of concern would be just one meter immediately surrounding each tower. To prevent anyone from encountering that small area, a fence would be built around the tower approximately 10 feet from its base. A gate in the fence would be locked.

Jay Heap, an appraiser, testified that the Nelsons' tower plan would not adversely affect property values in the area. His opinion was supported by evidence of land sales adjacent to a site containing existing towers (the tallest of which was 499 feet).

Mike Hoffman, a community planning consultant, testified that he knew the standards of the Northville Township Zoning Ordinance for granting conditional uses, and that the proposed towers were an appropriate conditional use for the property. He pointed out that less than 2% of the property would be removed from its present agricultural use. He also observed that the tower project would cause minimal environmental impact, minimal impact on public facilities, generate minimal traffic, and coincide with current agricultural plans for the area. In Hoffman's overall assessment, the tower project would have no negative impact on the surrounding community.

Dave Jensen, a nearby resident, testified that he had no objection to the proposed towers, and that the towers would not be a detriment to the community. Becky Morphey, another nearby resident, agreed and added that the towers would benefit the community by providing another radio station in a fast-growing area.

Don Bark, an Alderman for the City of Sandwich, testified that the towers were a needed venture in the area. He said having an AM station in addition to the FM station would benefit the community--particularly businesses--by covering more listeners.

In light of these considerable facts, we conclude that the trial court was correct in reversing the denial of a conditional use permit as against the manifest weight of the evidence.

As a final matter, the Boards claim the trial court erred in directing them to issue a conditional use permit if the Nelsons did not require a variance. In light of the foregoing discussion, this issue no longer requires resolution.

CONCLUSION

For the above-stated reasons, the judgment of the La Salle County circuit court is affirmed.

Affirmed.

HOLDRIDGE, J., with SCHMIDT, P. J., and BARRY, J., concurring.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 8th day of August in the year of our Lord two thousand six.



Clerk of the Appellate Court

STATE OF ILLINOIS

3-05-0659

Nelson vs. Township Board of
Northville Township, et al.

APPELLATE COURT

THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the year of our Lord
Two thousand six, within and for the Third District of
Illinois:

Present -

HONORABLE DANIEL L. SCHMIDT, Presiding Justice X

HONORABLE TOM M. LYTTON, Justice

HONORABLE MARY W. McDADE, Justice

HONORABLE MARY K. O'BRIEN, Justice

HONORABLE WILLIAM E. HOLDRIDGE, Justice X

HONORABLE KENT SLATER, Justice

HONORABLE TOBIAS G. BARRY, Justice X

GIST FLESHMAN, Clerk

BE IT REMEMBERED, that afterwards on

August 8, 2006 the order of the Court was filed
in the Clerk's Office of said Court, in the words and figures
following viz: