

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

John Cavileer, et al.

Court of Appeals No. OT-08-058

Appellees

Trial Court No. 07-CV-686F

v.

Danbury Township, et al.

DECISION AND JUDGMENT

Appellants

Decided: October 23, 2009

* * * * *

Irving Sugerman, for appellees.

John Coppeler, for appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas. On October 18, 2007, the Board of Zoning Appeals granted an initial zoning variance requested by appellees. On May 10, 2007, the board's inspector discovered discrepancies between the approved zoning variance and the work actually performed on

the premises. The Board of Zoning Appeals held a hearing concerning this discrepancy, during which it denied an additional zoning variance requested by appellees.

{¶ 2} On December 21, 2007, appellees appealed the decision of the Board of Zoning Appeals arguing its denial of the requested variance was arbitrary, unreasonable, and capricious. On October 24, 2008, the trial court held that the Board of Zoning Appeals arbitrarily and capriciously denied the zoning variance requested by appellees.

{¶ 3} On appeal, appellants set forth the following sole assignment of error.

{¶ 4} "ASSIGNMENT OF ERROR

{¶ 5} "The Trial Court erred in reversing the decision of the Danbury Township Board of Zoning Appeals to deny the variance sought by plaintiffs-appellees for expansion of a non-conforming structure beyond the percentage allowed under the zoning resolution."

{¶ 6} The Supreme Court of Ohio has determined that "[t]he standard of review to be applied by the court of appeals in a R.C. 2506.04 appeal is '*more limited in scope.*'" *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147; quoting *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. (Emphasis sic.) Accordingly, "R.C. 2506.04 grants [appellate courts] limited powers to review the judgment of the court of common pleas only on questions of law." *Rickard v. Knopsnider* (2001), 142 Ohio App.3d 235, 240; quoting *Kisil*, supra. (Internal quotations omitted.) "Within the ambit of 'questions of law' [is] whether the court of common pleas abused its discretion." *Id.* Under Ohio law, it is well-settled that an abuse of discretion "implies that the court's

attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 7} The following undisputed facts are relevant to this appeal. Appellees, John and Kathy Cavileer, are the owners of real property located in Lakeside, Danbury Township, Ottawa County, Ohio. On July 7, 2006, appellees purchased this property, located at 548 Walnut Street, by quitclaim deed.

{¶ 8} Subsequently, on October 12, 2007, appellees filed an application with the Danbury Township Board of Zoning Appeals, requesting a variance from the Danbury Township's Zoning Resolution. Specifically, this variance proposed an enlargement to a nonconforming property of approximately 68 feet for the purposes of enhancing the function of the property, as well as creating more space. On October 18, 2007, the Board of Zoning Appeals granted appellees a zoning permit allowing the addition of a two-story screen porch and a change to the pitch of the roof on the one-story portion at the rear of the house.

{¶ 9} On May 10, 2007, the Danbury Township Zoning Inspector discovered deviations from the work that had previously been approved by the zoning board. Specifically, the inspector determined that appellees had increased the floor area of the premises by greater than 20 percent of the original floor area that had existed at the time the zoning regulations went into effect. On November 27, 2007, the Board of Zoning Appeals held a hearing concerning this discrepancy. At this hearing, the board, after denying their request for a continuance, denied appellees' request for a zoning variance.

On December 21, 2007, appellees appealed the decision of the Board of Zoning Appeals asserting that its decision was arbitrary, unreasonable, and capricious.

{¶ 10} On October 16, 2008, the trial court held a hearing at which the parties set forth their oral arguments. On October 24, 2008, the trial court held that the Board of Zoning Appeals arbitrarily and capriciously denied the zoning variance requested by appellees. In so holding, the trial court determined that the Danbury Zoning Regulations are ambiguous because of the failure to define the term "porch". Additionally, the trial court stated that ambiguities in zoning regulations shall be resolved in favor of the property owner. It is from this judgment that appellants now appeal.

{¶ 11} Under Ohio law, it is axiomatic that "[s]tatutes or ordinances * * * which impose restrictions upon the use, management, control, or alienation of private property, will be strictly construed, and their scope cannot be extended to include limitations not therein clearly prescribed * * *." *State ex rel. Moore Oil Co. v. Dauben* (1919), 99 Ohio St. 406, paragraph one of the syllabus. Furthermore, "[i]t is well-settled that as zoning regulations deprive the owners of real property of certain uses thereof, and are in derogation of the common law, they must be strictly construed and not extended by implication." *Sammons v. Village of Batavia* (1988), 53 Ohio App.3d 87, 89-90; quoting *Van Camp v. Riley* (1984), 16 Ohio App.3d 457, 460. (Internal quotations omitted.) As a result, "in determining a permitted use of property under zoning classifications in which terms and language therein are not otherwise defined * * * the terms and language should

be * * * construed in favor of the * * * use proposed by the property owner so as not to extend the restrictions to any limitation of use not clearly prescribed therein." Id.

{¶ 12} In appellants' sole assignment of error, they assert that the trial court erred in reversing the decision of the Zoning Board of Appeals denying the variance requested by appellees. In particular, appellants argue that the trial court arbitrarily determined that the undefined term "porch" was ambiguous and thus erred in resolving the uncertainty in appellees' favor.

{¶ 13} This court has carefully reviewed the record. The record clearly indicates that the term "porch" is not defined in the zoning resolution. As a result, the trial court determined, after careful consideration of the full record, briefs and oral arguments of counsel, that the zoning regulations are ambiguous.

{¶ 14} In conjunction with the above stated facts and legal principles, "[z]oning ordinances * * * deprive a property owner of uses of his land to which he would otherwise be entitled and, therefore, when interpretation is necessary, such enactments are * * * construed in favor of the property owner." *City of Westerville v. Kuehnert* (1988), 50 Ohio App.3d 77, 80. As a result, "[t]erms not defined are to be given their ordinary and common meaning liberally construing them in favor of the permitted use so as not to extend restrictions in the ordinance to any limitation not clearly prescribed." Id. at 82.

{¶ 15} The record in this case demonstrates that it is undisputed that the term "porch" is undefined in the Danbury Zoning Regulations. Accordingly, in conjunction

with the above stated legal principles, this court finds that this ambiguity must be resolved in favor of the property owners, appellees. Therefore, this court finds that, in remanding to the Board of Zoning Appeals with instructions to grant the requested variance, the trial court did not act arbitrarily, unreasonably, or unconscionably. On the contrary, the trial court acted pursuant to clear legal authority. Appellants' assignment of error is found not well-taken.

{¶ 16} On consideration whereof, the judgment of the Common Pleas Court of Ottawa County is affirmed. Appellants are ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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