

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of David A. Zerbe	:	
and Christine M. Zerbe, his wife,	:	
from the November 20, 2008	:	
Decision of the City of Pottsville	:	
Zoning Hearing Board	:	
	:	
David A. Zerbe and Christine	:	
M. Zerbe, his wife	:	
	:	
v.	:	
	:	
The City of Pottsville Zoning	:	
Hearing Board	:	
	:	
Appeal of: David A. Zerbe and	:	No. 305 C.D. 2010
Christine M. Zerbe	:	Argued: September 14, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: October 15, 2010

David A. Zerbe and Christine M. Zerbe (the Zerbés) appeal from the February 4, 2010 order of the Court of Common Pleas of Schuylkill County (trial court) denying their appeal. There is one issue before the Court: whether an exterior, wood-fired boiler is an accessory use customarily appurtenant to a permitted use. For reasons that follow, we affirm the trial court.

Charles and Alicia Smith (the Smiths), husband and wife, own the property located at 2161 Mahantongo Street, in Pottsville, Schuylkill County,

Pennsylvania. The property is located in an R-1 zoning district. The Zerbes live next door to the Smiths. On August 4, 2008, the Smiths filed an application for a zoning permit to install and operate a wood-fired, exterior boiler in their back yard. On August 15, 2008, the Zoning Officer issued the permit. On September 8, 2008, the Zerbes became aware of the permit and shortly thereafter, the Smiths began installing their boiler. On September 24, 2008, the Zerbes filed an appeal to the Board challenging the issuance of the permit.

A hearing was held on November 20, 2008, and the Board denied the Zerbes' appeal and affirmed the issuance of the permit. The Zerbes appealed to the trial court, and on February 3, 2010, the trial court denied the Zerbes' appeal. The Zerbes appealed to this Court.¹

The Zerbes argue that for an accessory use to be considered "customarily appurtenant" it has to be a use secondary to the principal use and a use usually found with the principal use, and that the Smiths' boiler is neither. The Zerbes further argue that Section 220-2(a) of the Pottsville Zoning Ordinance (Ordinance) provides that its purpose is to promote the health, safety, morals, and general welfare of the community. Subsequent to the Smiths' permit being issued, Pottsville passed an ordinance banning exterior wood furnaces, and the purpose of the ordinance was to promote health and safety. Thus, issuing the permit was against the purpose of the zoning ordinance. We disagree.

This Court has stated that the issue of whether a proposed use falls within a given category of permitted uses in a zoning ordinance is a question of law subject to our review.

¹ Where no additional evidence is presented after the Board's decision, this Court's review is limited to determining whether the Board's decision is supported by substantial evidence and whether the Board committed an error of law. *Twp. of East Caln v. Zoning Hearing Bd. of East Caln Twp.*, 915 A.2d 1249 (Pa. Cmwlth. 2007).

However, it is noted that the ordinances are to be construed expansively, affording the landowner the broadest possible use and enjoyment of his land. In addition, to define an undefined term, one may consult the definitions found in statutes, regulations or the dictionary for assistance. Undefined terms are given their plain meaning and any doubt is resolved in favor of the landowner and the least restrictive use of the land. In addition, the governing body is entitled to considerable deference in interpreting its own ordinance and such interpretation is accorded great weight.

Tink-Wig Mountain Lake Forest Prop. Owners Ass'n v. Lackawaxen Twp. Zoning Hearing Bd., 986 A.2d 935, 941 (Pa. Cmwlth. 2009) (citations omitted).

Section 220-11(B) of the Ordinance provides that accessory uses are uses which are subordinate to the principal use of a building or property and shall not require any special action by Board or the Planning Commission (Commission) before a zoning permit is granted by the Zoning Officer. In addition, Section 220-12(b)(3) of the Ordinance provides that Use Class 15 consists of other accessory uses *customarily appurtenant* to permitted uses.

As the language *customarily appurtenant* is undefined by the ordinance, any doubt regarding its meaning should be resolved in favor of the landowner. Moreover, considerable deference should be given to the Board in interpreting its own ordinance. Here, the Zoning Hearing Officer issued the permit under Section 220-12(b)(3) of the Ordinance, and the Board found that the boiler is an accessory use and it is permitted under Use Class 15, Section 220-12(b)(3) as *customarily appurtenant* to a permitted use.

With respect to a similar phrase, “*customarily incidental*,” this Court has stated:

‘[c]ustomarily incidental’ is best understood as invoking an objective reasonable person standard. Under this standard, we may look not only at how frequently the proposed

accessory use is found in association with the primary use (if such evidence is available, it certainly is relevant) but also at the applicant's particular circumstances, the zoning ordinance and the indications therein as to the governing body's intent regarding the intensity of land use appropriate to the particular district, as well as the surrounding land conditions and any other relevant information, including general experience and common understanding, to reach a legal conclusion as to whether a reasonable person could consider the use in question to be customarily incidental. This approach respects the need for an understandable legal standard and the flexibility that is a necessary component of the analysis.

Hess v. Warwick Twp. Zoning Hearing Bd., 977 A.2d 1216, 1224 (Pa. Cmwlth. 2009) (footnote omitted). Here, whereas the boiler is being used to heat the Smiths' home, it is reasonable to consider this an accessory use customarily appurtenant to the permitted use. Thus, the Board did not err in concluding that the exterior, wood-fired boiler is an accessory use customarily appurtenant to a permitted use.

For all of the above reasons, the order of the trial court is affirmed.

JOHNNY J. BUTLER, Judge

Judge Pellegrini concurs in the result only.

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ORDER

AND NOW, this 15th day of October, 2010, the February 4, 2010 order of the Court of Common Pleas of Schuylkill County is affirmed.

JOHNNY J. BUTLER, Judge