[Cite as *Mackay v. Romanini*, 2016-Ohio-5251.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103876

GRANT MACKAY, ET AL.

PLAINTIFFS-APPELLANTS

vs.

JEFF ROMANINI, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Administrative Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-835789

BEFORE: S. Gallagher, J., E.A. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: August 4, 2016

ATTORNEY FOR APPELLANTS

Michael P. Harvey
311 Northcliff Drive
Rocky River, Ohio 44116

ATTORNEYS FOR APPELLEES

For Jeff Romanini, et al.

Joseph Cavasinni
Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115

For the city of Highland Heights

Timothy J. Paluf
Director of Law
City of Highland Heights
5827 Highland Road
Cleveland, Ohio 44143

SEAN C. GALLAGHER, J.:

{¶1} This administrative appeal involves a building permit issued by the city of Highland Heights ("the City") to appellees Jeff and Mary Lou Romanini ("the Romaninis") for a swimming pool deck. Upon review, we affirm the decision of the Cuyahoga County Court of Common Pleas, which affirmed the decision of the Highland Heights Board of Building and Zoning Appeals ("the BZA") to uphold the issuance of the permit.

BACKGROUND

{¶2} In July 2013, the Romaninis applied for and were issued a building permit to install a pool in the rear yard of their property in Highland Heights, Ohio. Thereafter, the pool was installed. In May 2014, the Romaninis began to construct a pool deck. After construction was under way, the City's building commissioner advised the Romaninis that a separate permit was required for the deck. Mr. Romanini then submitted a separate permit application for the pool deck.

{¶3} On May 9, 2014, the City issued a building permit for the pool deck. Following issuance of the permit, a letter was written to Mr. Romanini by the building commissioner, which referenced a conversation informing Mr. Romanini that the deck was in violation of Highland Heights Codified Ordinance ("HHCO") 1123.18(c) and which stated the letter was "to confirm that you have agreed to remove the deck." The record reflects that the City never specifically mandated that the deck be torn down, and

there was evidence that after the letter was issued, the Romaninis were advised that construction of the deck could proceed. The City never revoked or rescinded the permit, and construction of the pool deck was completed.[1] The pool deck is beyond the ten-foot setback requirement of HHCO 1319.05, which pertains to swimming pools.

{¶4} Appellants,[2] who are residents in the neighboring area, appealed the issuance of the building permit for the pool deck. Appellants maintained that the deck was not in compliance with HHCO 1123.18(c), which imposes a minimum rear setback of 40 feet for certain ground features, including a "platform" or a "deck."

{¶5} A public hearing was held on August 25, 2014. The Highland Heights Planning and Zoning Commission denied appellants' appeal and upheld the issuance of the permit. The record reflects that the Commissioners were polled, and

> [t]he consensus of the Commission for re-affirming the issuance of the building permit for the pool deck is that Chapter 1319 of HHCO allows for access decks to pools and is the appropriate section of Code to govern pools and decks; HHCO 1123.18(c) is more intended for sportcourts; and this decision is consistent with all other above-ground pools in the City.

Appellants appealed the decision.

{¶6} The BZA heard the matter on October 15, 2014. The BZA denied the appeal and reaffirmed the issuance of the permit. When polled, the BZA members voting in the

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[1] We are cognizant that in the permit application, Mr. Romanini had identified "self" as the builder of the deck, which was being constructed by a contractor. Additionally, the completed deck was larger than the dimensions depicted in the permit application drawing. Nevertheless, the City took no action and never revoked or rescinded the permit.

[2] Appellants include Grant Mackay, David and Karen Clark, and Robert and Diana Boyda.

majority expressed that the deck and pool are one structure and that the ten-foot setback requirement of HHCO 1319.05 applied and was met.

{¶7} Appellants filed an appeal in the Cuyahoga County Court of Common Pleas. The court allowed the parties to supplement the record. After reviewing the briefs and records submitted in the matter, the court found "[the BZA's] decision * * * was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by reliable, probative, and substantial evidence and therefore is affirmed."

{¶8} The matter is now before us on appeal.

HIGHLAND HEIGHTS CODIFIED ORDINANCES

{¶9} The applicable Highland Heights Codified Ordinances read as follows:

> 1123.18 PROJECTIONS INTO YARDS.
> (c) Ground Features. * * * No open porch, sportcourt, platform or deck in a U-1 or U-2 Residential District shall be closer than forty feet to the rear lot line.
>
> 1319.01 DEFINITION.
> Whenever used in this chapter, "swimming pool" means an excavation, or depression below grade level, as well as on grade surface, designed or constructed to hold or retain water and being over eighteen inches deep at any point. For purposes of this chapter hot tubs shall not be considered swimming pools.
>
> 1319.02 PERMIT REQUIRED.
> No swimming pool which is constructed either wholly or in part by excavation or depression below grade level, as well as on grade surface, shall be erected, installed or used within the Municipality without the owner of the property upon which the swimming pool is to be installed or created, or his agent, first obtaining a permit therefor from the Building Commissioner. No swimming pool permit shall be issued unless a fence permit for that property has already been issued.
>
> 1319.03 FENCE REQUIRED.

> Every swimming pool which is constructed either partially or wholly by means of an excavation or depression below grade, as well as on grade surface, shall be enclosed by a fence at least forty eight inches in height above the ground and shall be constructed so as to prevent access to such swimming pool by small children; except that any swimming pool constructed partially or completely below grade which has a self-contained fence or siding with a removable access does not require a fence. In no instance shall a pool be filled with water prior to an approved fence being constructed on said property. This section shall not apply to an on grade surface swimming pool if any of the following requirements are met:
> (a) Its access ladder can be removed when not in use; or
> (b) Its access ladder can be locked in an upright position when not in use; or
> (c) When a pool is enclosed by a deck and the ladder and/or stairs can block any access to the deck/pool area when not in use.
>
> 1319.05 POOL LOCATION.
> No pool shall be constructed in any front or side yard, nor shall it occupy an area greater than ten percent of the lot area, nor be closer than ten feet to any lot, side line or the rear line.

STANDARD OF REVIEW

{¶10} Under R.C. 2506.04, the common pleas courts and the courts of appeals apply different standards of review for administrative appeals. When a party appeals an administrative agency's decision to the common pleas court, the court "considers the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433.

{¶11} In contrast, the standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is narrower, more limited in scope, and more deferential to the lower

court's decision. *Cleveland Clinic Found. v. Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 25. A review by the court of appeals is limited to questions of law and does not include the same power to weigh the evidence. *Id*. "The standard of review for the court of appeals in an administrative appeal is designed to strongly favor affirmance. It permits reversal only when the common pleas court errs in its application or interpretation of the law or its decision is unsupported by a preponderance of the evidence as a matter of law." *Id*. at ¶ 30.

{¶12} The application of a statute or ordinance to the facts is a question of law. *Id*. at ¶ 25. When a statute or an ordinance is unambiguous, a court owes no duty of deference to an administrative interpretation, as the court, as well as an agency, must give effect to the unambiguously expressed intent of the legislature. *Id*. at ¶ 29, citing *Lang v. Ohio Dept. of Job & Family Servs*., 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶ 12.

ASSIGNMENT OF ERROR

{¶13} Appellants' sole assignment of error is as follows:

> The Trial Court committed reversible error in finding that the [BZA] did not act unconstitutionally, illegally, arbitrarily, capriciously and/or unreasonably when it affirmed the August 25, 2014 decision of the City's Planning and Zoning Commission, which rejected the Appellants' appeal and upheld the validity of [the permit].

Appellants raise a number of arguments relating to this assignment of error.

LAW AND ANALYSIS

{¶14} In construing the ordinances at issue, we must adhere to the rules of statutory construction. *See Bosher v. Euclid Income Tax Bd. of Rev.*, 99 Ohio St.3d 330, 2003-Ohio-3886, 792 N.E.2d 181, ¶ 14. When the language of an ordinance is unambiguous, we apply the clear meaning of the words used. *See id*. Also, provisions relating to the same general subject matter must be read in pari materia. *Bosher* at ¶ 14. Finally, it is a well-established rule of construction that specific provisions shall prevail over general provisions. *Village Condominiums Owners Assn. v. Montgomery Cty. Bd. of Revision*, 106 Ohio St.3d 223, 2005-Ohio-4631, 833 N.E.2d 1230, ¶ 10.

{¶15} Chapter 1319 of the Highland Heights Codified Ordinances pertains to swimming pools. HHCO 1319.01 defines a "swimming pool" to include those constructed below grade level as well as on grade surface. HHCO 1319.02 requires the property owner to obtain a permit for a swimming pool from the building commissioner, and refers to a separate requirement that a fence permit also be obtained. Although HHCO 1319.03 requires that a swimming pool shall be enclosed by a fence, so as to prevent access to such swimming pool by small children, exceptions are provided, including when "a pool is enclosed by a deck and the ladder and/or stairs can block any access to the deck/pool area when not in use." HHCO 1319.03(c). HHCO 1319.05 imposes a rear setback requirement of ten feet for a swimming pool.

{¶16} Because the language of the ordinances is unambiguous, we must apply the clear meaning of the words used. When read as a whole and construed together, the swimming pool ordinances allow for a pool deck, which provides safe access, as part of a

swimming pool subject to the ten-foot setback of HHCO 1319.05. Indeed, the deck would not exist without the pool, and it would be illogical to read the ordinances as allowing a pool to be ten feet from the rear property line, while requiring an incidental deck providing safe access to a pool to be a minimum of 40 feet from the rear property line. The City's planning and zoning commission recognized the consistent application of this ordinance with all other above-ground pools in the City.

{¶17} Appellants advocate for applying HHCO 1123.18, which has a 40-foot setback requirement for certain ground features including "open porch, sportcourt, platform or deck[.]" Accepting appellants' position, no deck could ever be built for a pool unless it was placed 40 feet from a neighbor's yard. This matter pertains to a swimming pool deck. We find the specific provisions pertaining to swimming pools, which encompass a pool deck, govern the subject matter in this case. Further, HHCO 1103.06, which requires higher standards to prevail where a conflict exists, is inapplicable because HHCO 1123.18 does not govern the subject matter involved.

{¶18} Appellants raise additional challenges to the application of the City's ordinances and claim that the lower court's decision is unsupported by the preponderance of substantial, reliable, and probative evidence. Appellants argue that the Romaninis failed to comply with a tear-down order, relying upon the letter written by the building commissioner. Appellants also argue that the permit was issued after construction was substantially completed and without an inspection, and that the size of the deck was larger than that submitted on the permit application. They further contend that the submission

of false data to the city amounted to a misdemeanor under HHCO 1105.99(a). These and the other arguments raised were all considered and rejected by the lower court. The trial court applied the proper review standard under R.C. 2506.04 and found the BZA's decision "was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by reliable, probative, and substantial evidence." Upon our review of the record, we cannot say the lower court erred in its application or interpretation of the law or that its decision is unsupported by the preponderance of substantial, reliable, and probative evidence as a matter of law.

{¶19} Finally, appellants argue that the court of common pleas erred when it denied appellants' request for findings of fact and conclusions of law. We recognize there is some authority for the proposition that a litigant may request findings when the administrative record has been supplemented with additional evidence. *Pataskala Banking Co. v. Etna Twp. Bd. of Zoning Appeals*, 5th Dist. Licking Nos. 07-CA-116, 07-CA-117, and 07-CA-118, 2008-Ohio-2770, ¶ 21; *Jandecka v. Petre*, 8th Dist. Cuyahoga No. 46623, 1983 Ohio App. LEXIS 12844 (Oct. 27, 1983). Assuming the court should have stated its findings of fact and conclusions of law, we find this omission amounted to harmless error because the record before us provides an adequate basis for our review.

{¶20} Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR