[Cite as *Hiram Twp. v. Carlton*, 2006-Ohio-5172.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

BOARD OF HIRAM TOWNSHIP TRUSTEES,	:	**O P I N I O N**
	:	
Plaintiff-Appellee,		**CASE NO. 2005-P-0029**
	:	
- vs -		
	:	**9/29/2006**
WENDY R. CARLTON,		
	:	
Defendant-Appellant.		

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 0717.

Judgment: Affirmed.

Douglas M. Kehres, 638 West Main Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Chad E. Murdock, P.O. Box 334, Rootstown, OH 44262 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.,

{¶1} Appellant, Wendy Carlton, appeals from the judgment of the Portage County Court of Common Pleas adopting the Magistrate's Decision granting appellee, the Board of Hiram Township Trustees ("board of trustees"), an injunction against her in a zoning dispute. We affirm.

{¶2} In August 2000, Ms. Carlton purchased a distressed six-acre farm property in Hiram Township. She commenced numerous improvements, including the replacement of part of the open fence surrounding the property with a white vinyl privacy fence. The Hiram Township zoning inspector determined that this fence

violated Hiram Zoning Resolution Section 203-5(F), regulating, in part, air through, light and height requirements for fences. The zoning inspector advised Ms. Carlton to seek a variance. The Hiram Township Board of Zoning Appeals declined her application. When she failed to dismantle the offending fence, the zoning inspector cited her and the board of township trustees brought a suit against her for an injunction to remove the fence.

{¶3} Ms. Carlton answered and counterclaimed. Cross motions for summary judgment were filed. Ms. Carlton's summary judgment motion was denied. The board of trustees' motion for summary judgment on Ms. Carlton's counterclaim was granted. Following a bench trial, the magistrate issued his decision, filed February 17, 2005, granting the board of trustees its injunction. Ms. Carlton objected. The trial court adopted the magistrate's decision March 9, 2005. Ms. Carlton timely filed her appeal April 7, 2005, asserting two assignments of error:

{¶4} "[1.] The trial court erred to the prejudice of Carlton in finding that the Township zoning resolution §203-5(F), insofar as it regulates the structure of fences, is a valid exercise of authority under R.C. 519.02. T.d.26; 23.

{¶5} "[2.] The trial court erred to the prejudice of Carlton in finding that Township zoning resolution §203-5(F) is enforceable under R.C. 519.24. T.d.26; 23."

{¶6} A trial court's decision to adopt, reject, or modify a magistrate's decision is generally reviewed for abuse of discretion. *Wade v. Wade* (1996), 113 Ohio App.3d 414, 419. In this case, Ms. Carlton neither filed a transcript of the proceedings before the magistrate nor an acceptable alternative under App.R. 9. Thus, this Court is restricted to exploring those matters contained in the record before us. *Mix v. Mix*, 11th Dist. No. 2003-P-0124, 2005-Ohio-4207, at ¶25. A reviewing court may not reverse the

award of injunctive relieve absent a clear abuse of discretion. *Garono v. State* (1988), 37 Ohio St.3d 171, 173. An abuse of discretion is not a mere error of law or judgment but rather, suggests an unreasonable, arbitrary or unconscionable attitude on the part of the court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶7} We shall address appellant's two assigned errors together as they represent two facets of one determinative question, viz., is Section 203-5(F) of the Hiram Township Zoning Resolution a valid, substantive zoning provision? To this question, we respond in the affirmative.

{¶8} "The zoning authority possessed by townships in the state of Ohio is limited to that which is specifically conferred by the General Assembly." *Bd. Of Bainbridge Twp. Trustees v. Funtime, Inc.* (1990), 55 Ohio St.3d 106, at paragraph one of the syllabus. The General Assembly has conferred the power to adopt zoning regulations on townships through R.C. 519.02. Id. at 107. That section does not explicitly permit a township to regulate the implementation and/or use of fences. However, R.C. 519.02 gives townships the power to regulate "structures," the genus for which courts have held fences are a species. *State v. Zumpano* (1956), 76 Ohio Law Abs. 434; accord *W. Chester Twp. Zoning v. Fromm* (2001), 145 Ohio App.3d 172, 178; *Dsuban v. Union Twp. Bd. Of Zoning Appeals*, 12th Dist. Nos. CA 2002-09-232, CA 2002-10-260, 2003-Ohio-4612, at ¶9.

{¶9} Hiram's zoning resolution defines a "structure" as, "[a]nything constructed or erected that requires location on the grounds including signs, and billboards, *but not including fences or walls used as fences*." (Emphasis added.)

{¶10} Hiram Res., Section 203-5(F), titled "Fences, Walls, and Hedges[,]"provides, in relevant part:

{¶11} “Fences *** may be permitted in any required yard, or along the edge of any yard, provided that no fence *** along the sides or front edge of any front yard shall be over three (3) feet in height *** [and] shall be open to light and air; ***

{¶12} “Solid walls and fences shall conform to all required setback lines for yards.”

{¶13} Appellant points out that R.C. 519.02, the enabling statute from which the township derives its zoning authority, permits only the regulation of “structures.” However, the language of the ordinance operates to exclude fences, inter al., from the definition of “structure.” By excluding fences from this definition, appellant concludes the township explicitly relinquished its authority to regulate fences. We disagree.

{¶14} In *Emmons v. Keller* (1970), 21 Ohio St.2d 48, the Supreme Court of Ohio stated:

{¶15} “One part of a statute may be invalid for want of conformity to the Constitution without affecting the validity of the remainder of the statute, where the invalid part may be stricken and is not in its nature and connection so essential to the remainder of the statute or so related to the general purpose of its enactment as to warrant the conclusion that the General Assembly would have refused to adopt the statute with the invalid part thereof stricken therefrom.” Id. at paragraph three of the syllabus.

{¶16} Further, in *Lyman v. Bd. Of Trustees* (1980), 63 Ohio St.2d 208, the Ohio Supreme Court held that substantive provisions of a township zoning resolution could

be enforced under the authority of R.C. 519.24,[1] even if the enforcement procedures in the resolution were infirm. Id. at 211-212.

{¶17} In arriving at this conclusion, the court observed:

{¶18} "If a valid alternative procedure exists to enforce the substantive provisions of the zoning ordinance, then the general purpose of the ordinance, which is land use planning, can be carried out. Under the *Emmons* ruling, which would apply to ordinances as well as statutes, if such is the case, the substantive provisions would remain in effect with the invalid part stricken therefrom and the alternative enforcement procedures available for use against [the violating party.]" *Lyman* at 210.[2]

{¶19} In his decision, the magistrate relied upon the provisions of R.C. 519.24, as interpreted in *Lyman*, in finding that Section 203-5(F) was enforceable. The magistrate concluded that even if Section 203-5(F) was unenforceable under the Hiram Township Zoning Resolution (since fences are excluded from the resolution's operation), it was still enforceable as a substantive zoning regulation under R.C. 519.24 and *Lyman*. The magistrate did not act arbitrarily or unreasonably in so deciding.

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1. R.C. 519.24 provides, in pertinent part:

"[i]n case any building is or is proposed to be located, erected, constructed, reconstructed, enlarged, changed**,** maintained**,** or used or any land is or is proposed to be used in violation of section 519.01 to 519.99, inclusive *** or of any regulation or provision adopted by any board of township trustees under such sections *** [then the board, etc., may maintain an action to stop it] *** [.]"

Although the statute refers to "buildings" which violate a zoning code, "the intention of [the] statute clearly is to create a cause of action against people who use or propose to use their property in violation of R.C. 519.01 through 519.99, or in violation of a township zoning resolution." *Barbeck v. Twinsburg Township* (1990), 69 Ohio App.3d 837, 840.

2. We recognize that *Lyman* specifically dealt with an ordinance which, as a result of an internal infirmity in its procedure for issuing zoning certificates, was functionally or formally invalid. Here, our thematic differs from that of *Lyman,* viz., we are concerned with the enforcement of a substantive provision whose validity has been challenged. Despite the differences, we believe the rules announced in *Lyman* and *Emmons,* when read together, set forth a general formal principle of construction for regulations governed by R.C. Chapter 519; to wit, it is permissible to excise a conflicting portion of an ordinance where the remainder is unaffected and the purpose of the ordinance remains served.

{¶20} The definition of structure in the ordinance internally precludes the regulation of fences. However, Ohio law allows a township to enforce zoning ordinances which regulate structures as fences. As such, pursuant to *Emmons* and *Lyman*, the clause in the definition of "structure" which excludes fences can be excised from the ordinance in favor of the substantive provisions set forth in Section 203-5(F).

{¶21} For the foregoing reasons, we hold Section 203-5(F), the substantive provision of the Hiram zoning resolution governing fences, is valid and enforceable pursuant to *Lyman*, supra. The trial court did not abuse its discretion in so ruling and therefore, appellant's two assignments of error are without merit.

{¶22} As appellant's assignments of error are overruled, we hereby affirm judgment of the Portage County Court of Common Pleas.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

COLLEEN M. O'TOOLE, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶23} I concur in the decision to affirm the ruling of the Portage County Common Pleas Court, but for a different reason. Appellant's assignments of error are precluded by the doctrines of failure to exhaust administrative remedies and res judicata.

{¶24} Appellant applied for a variance regarding the fence at issue herein. The Hiram Township Board of Zoning Appeals denied that application. Appellant did ***not***

appeal that denial to the court of common pleas under R.C. Chapters 2505 and 2506. Appellant's failure to appeal the denial of her variance precluded future litigation of this issue. See, e.g., *Southridge Civil Assn. v. Parma*, 8th Dist. No. 80230, 2002-Ohio-2748, at ¶15, quoting *Schomaeker v. First Natl. Bank of Ottawa* (1981), 66 Ohio St.2d 304, at paragraph three of the syllabus ("A person entitled under R.C. Chapter 2506 to appeal the order of a planning commission granting a variance pursuant to a village ordinance is not entitled to a declaratory judgment where failure to exhaust administrative remedies is asserted and maintained.").

{¶25} Here, appellant was entitled to appeal the board of zoning appeals' decision denying her variance request. By failing to appeal that decision, appellant failed to exhaust her administrative remedies. Id. Appellees properly raised this issue in their answer.

{¶26} The doctrine of res judicata provides that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, at syllabus. "[A]n existing final judgment or decree between the parties to litigation is conclusive as to all claims which were ***or might have been*** litigated in a first lawsuit." Id., quoting *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69 (emphasis sic). The doctrine of res judicata applies to proceedings before a board of zoning appeals. *State ex rel. Casale v. McLean* (1991), 58 Ohio St.3d 163, 165 (citation omitted).

{¶27} Appellant's challenges to the township's zoning ordinance should have been raised in an administrative appeal to the court of common pleas pursuant to R.C. 2506.

{¶28} "Thus, the doctrine of res judicata applies to bar a constitutional challenge to a zoning ordinance in an injunction action if it was not raised in an [sic] R.C. 2506 appeal from a decision of the board of zoning appeals." *Prairie Twp. Bd. of Trustees v. Ross*, 10th Dist. No. 03AP-509, 2004-Ohio-838, at ¶15 (citation omitted) (applying res judicata to appellant's claim the township zoning ordinance violated R.C. 519.21); *American Outdoor Advertising Co., LLC v. Jerome Twp. Bd. of Trustees*, 3rd Dist. No. 14-03-06, 2004-Ohio-2058, at ¶12; *Clinton Twp. Bd. of Trustees v. Yackee*, 6th Dist. No. F-03-001, 2003-Ohio-5180, at ¶22.

{¶29} Accordingly, appellant's appeal is not well taken. The decision of the Portage County Court of Common Pleas should be affirmed.

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COLLEEN MARY O'TOOLE, J., dissents, with dissenting opinion.

{¶30} While agreeing with the question posed by the majority as determinative of this appeal, I disagree with the answer given. Section 203-5(F) of the Hiram Township Zoning Resolution is not a valid, substantive zoning provision. Consequently, I respectfully dissent.

{¶31} As the majority recognizes, township zoning authority is limited to that granted by the General Assembly, *Funtime* at paragraph one of the syllabus; and, Ohio

common law has long recognized that fences may be regulated as "structures" under the authority of R.C. 519.02. *Zumpano* at 436. However, Hiram Township's zoning resolution specifically excludes fences and walls used as fences from the definition of "structure." I believe that the Township's attempt to regulate fences under the authority of Section 203-5(F) of the resolution necessarily fails, since the Township has abdicated its only authority to do so.

{¶32} The majority's reliance on the decisions in *Emmons* and *Lyman* is misplaced. *Emmons* establishes that part of a statute may be found unconstitutional without affecting the remainder. Id. at paragraph three of the syllabus. This is unrelated to the issue on appeal, which is whether a township may regulate a matter which it has *voluntarily* excluded from the parameters of its zoning authority. *Lyman* merely recognizes the unremarkable proposition that a township may rely on the authority granted by the General Assembly at R.C. 519.24 in enforcing a valid, substantive zoning provision, if the particular enforcement procedures of the township's zoning resolution are infirm. Id. at 211-212. The question presented by this appeal is not ways and means of enforcement, but whether Section 203-5(F) is enforceable at all.

{¶33} Since Hiram Township chose to exclude fences from the definition of "structure" in its zoning resolution, it lacks the power to regulate them. Cf. *Funtime* at paragraph one of the syllabus. The decision of the Portage County Court of Common Pleas should be reversed and remanded.