[Cite as *Garringer v. New Jasper Twp. Bd. of Zoning Appeals*, 2010-Ohio-6223.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

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KEVAN GARRINGER Plaintiff-Appellee	:	C.A. CASE NOS. 2009-CA-50, 59
vs.	:	T.C. CASE NO. 2009-CV-563
	:	(Civil Appeal from
NEW JASPER TOWNSHIP BOARD OF ZONING APPEALS, et al. Defendants-Appellants	:	Common Pleas Court)

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O P I N I O N

Rendered on the 17th day of December, 2010.

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GRADY, J.:

{¶ 1} New Jasper Township Board of Zoning Appeals ("the Board"), Jean Stuck-Monger, and Barry Bahns appeal from an order

requiring the Board to grant a zoning variance to Kevan Garringer.

{¶ 2} In 2006, Kevan and Julie Ann Garringer purchased 55 acres of real property ("the Garringer Property") in central New Jasper Township in Greene County. The property is located approximately three-fifths of a mile south of the intersection of Long and Jasper Roads. The Garringer Property is located in an "A-2 Agricultural District." The Garringers have used the property primarily for raising cattle and baling hay.

{¶ 3} The Garringer Property is landlocked and does not have any frontage on Long or Jasper roads. Therefore, the Garringer Property is accessible only by way of a narrow, unpaved right-of-way or easement connecting it with Long Road, across property owned by adjacent landowners, Appellants Jean Stuck-Monger and Barry Bahns.

{¶ 4} There is a small, dilapidated house on the Garringer Property. Apparently, the Garringers never resided in or intended to reside in the house. However, according to Garringer, at the time he purchased the property he received confirmation from the zoning inspector that he could build a new house on the property.

{¶ 5} In February 2008, Garringer filed an application with the New Jasper Board of Zoning Appeals ("the Board") for a 100% variance from the 300 feet "Minimum Lot Frontage" requirement in § 414 of the New Jasper Township Zoning Resolution, which would

allow him to tear down the dilapidated house and build a new house on the property. The Board held hearings on Garringer's application for a variance. Garringer testified that he originally intended to build a house on his property but subsequently decided to sell the property to an interested buyer, who had conditioned his offer to purchase the property on Garringer obtaining permission from the Township to build a house on the property.

{¶ 6} The Board denied the variance request, finding Garringer "did not meet his burden of establishing an unnecessary hardship or practical difficulty."[1] Kevan Garringer filed a notice of appeal from the Board's denial in the court of common pleas pursuant to R.C. Chapter 2506. On July 14, 2009, the court found that the Board's decision was unreasonable and unsupported by a preponderance of substantial, reliable, and probative evidence. The trial court ordered the Board to grant Garringer the requested variance. Appellants filed timely notices of appeal from this order and raised five assignments of error.

FIRST ASSIGNMENT OF ERROR OF THE BOARD

[1] The Board considered whether Garringer established a "practical difficulty" based on the factors set forth in *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, and considered whether Garringer established an "unnecessary hardship" based on the four requirements in New Jasper Township Zoning Resolution, § 1003.4(d)(1)-(4).

{¶ 7} "A TRIAL COURT ABUSES ITS DISCRETION IN REVERSING THE DECISION OF A BOARD OF ZONING APPEALS WHEN IT SUBSTITUTES ITS DISCRETION FOR THAT OF THE BZA."

FIRST ASSIGNMENT OF ERROR OF STUCK-MONGER AND BAHNS

{¶ 8} "THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE TOWNSHIP ZONING RESOLUTION WITH RESPECT TO NONCONFORMING LOTS AND IN RAISING THE ISSUE SUA SPONTE."

{¶ 9} The Supreme Court has distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. "The common pleas 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 the substantial, reliable, and probative evidence." *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147.

{¶ 10} As an appellate court, however, our standard of review to be applied in an R.C. 2506.04 appeal is "more limited in scope." *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. "This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh 'the preponderance of substantial, reliable, and probative evidence,'

as is granted to the common pleas court." Id. at n.4.

{¶ 11} Further, in reviewing the trial court's decision in a zoning case, we must keep in mind that "zoning regulations are in derogation of common law and must be strictly construed and not extended by implication." *Hollinger v. Pike Township Board of Zoning Appeals*, Stark App. No. 2009CA00275, 2010-Ohio-5097, at ¶18 (citation omitted).

{¶ 12} The Garringer Property is located in the "A-2 Agricultural District" pursuant to the New Jasper Township Zoning Resolution. The "intent and purpose" of the Agricultural District "is to recognize the long-range physical, social, and economic needs of the agricultural community within New Jasper Township *. Rural farm dwellings are permitted to locate within the Agricultural District at a maximum density of one dwelling unit per two acres. ***." New Jasper Township Zoning Resolution, § 403.1.**

{¶ 13} "Permitted Principal Uses," which are "[t]he main use[s] to which the premises are devoted and the main purpose for which the premises exist," allowed in an A-2 Agricultural District include "[o]ne single-family dwelling." New Jasper Township Zoning Resolution, § 202.090, §403.2.

{¶ 14} Section 414 of the Zoning Resolution authorizes single family dwellings on lots in A-2 Agricultural Districts, subject

to a two acre "Minimum Lot Area" limitation. Section 414 also sets out "Minimum Yard Requirements" of from 20 to 50 feet, a "Maximum Height" limitation of 35 feet, a "Maximum Lot Coverage" limitation of 10%, and a "Minimum Lot Frontage" of 300 feet. Lots that do not meet these minimums or maximums are considered "non-conforming lots." It is undisputed that the Garringer Property does not meet the "Minimum Lot Frontage" of 300 feet and is therefore a non-conforming lot.

{¶ 15} Section 802.1 of the Zoning Resolution addresses "Single Non-Conforming Lots" and provides, in pertinent part:

{¶ 16} "In any district in which single-family dwellings are permitted, a single-family dwelling may be erected on any single lot of record at the effective date of adoption of this amendment, not withstanding [sic] limitations imposed by other provisions of this Resolution. * * * This provision shall apply even though such lot fails to meet the requirements for area or width, or both, that are generally applicable in the district. Yard dimensions and requirements other than those applying to area or width, or both, of the lot shall conform to the regulations for the district in which such lot is located. Variances of yard requirements from the required standards shall be obtained only through the action of the Board of Zoning Appeals." (Emphasis added.)

{¶ 17} Based on these provisions of the Zoning Resolution, the

trial court found, in part:

{¶ 18} "Garringer's nonconforming lot is within a district that allows residences. He is entitled to have a house on his property. The house is not a nonconforming use that is to be phased out. The fact the current dwelling has not been used recently is not relevant. Even if there was not currently a house on the property, Garringer would be entitled to build one based on the zoning code's own language." Dkt. 15, at ¶88.

{¶ 19} The trial court found that the Zoning Resolution entitles Garringer to build a single home on his property. The trial court also found that even if the Zoning Resolution did not allow for a home on his property, Garringer would be entitled to a variance to allow him to build a house on the property because he had met the four-part variance test pursuant to the Zoning Resolution. Therefore, the trial court ordered the Board to grant Garringer's request for a zoning variance.

{¶ 20} We agree with the trial court that the Zoning Resolution allows a house to be built on the Garringer Property. Although the Garringer Property does not meet the 300 feet frontage requirement in § 414 of the Zoning Resolution, the property does qualify for the exemption from this frontage requirement set forth in Section 802.1 of the Zoning Resolution, which provides that a single-family dwelling may be built "even though such lot fails

to meet the requirements for area or width, or both, that are generally applicable in the district." We believe "frontage" necessarily falls within the definition of "width."

{¶ 21} We acknowledge that the 300 feet frontage requirement in § 414 of the Zoning Resolution is not one of those which is classified as a "Minimum Lot Area" limitation by § 414, and that section establishes no classification concerning requirements or restrictions expressly identified as pertaining to a lot's "width." However, the 300 feet minimum frontage requirement necessarily refers to the width of a lot where it abuts the public roadway. Being a "width" requirement, the 300 feet frontage requirement in § 414 is subject to the exemption that § 802.1 creates for a lot of at least two acres. Therefore, the Garringer Property is exempted from the minimum frontage requirement in § 414 and the trial court correctly found that Garringer is entitled to build a house on his property.

{¶ 22} The Board concedes that "width" has not been defined in the Zoning Resolution, but argues that width "has been interpreted to mean the width of the side yard and setback requirements under [Zoning Resolution] § 202.124 and § 414. *** Therefore, the Zoning Inspector *** has determined that frontage is a 'yard dimension or requirement other than those applying to area or width.'" The Board's Brief, p. 7. But the Board does not

cite to evidence in the record that "width" has been defined in such a way in prior, similar situations or that homeowners have had any notice of such an interpretation. Rather, we believe the plain definition of width encompasses frontage. However, even if we were to find that the term "width" was ambiguous, we must construe this ambiguity in favor of the property owner. *Hollinger v. Pike Township Board of Zoning Appeals*, Stark App. No. 2009CA00275, 2010-Ohio-5097, at ¶18.

{¶ 23} In short, Garringer's property is a nonconforming lot pursuant to § 414 of the New Jasper Township Zoning Resolution, but the exemption created in Section 801.2 of that Resolution relating to "width" requirements allows for a house to be built on the Garringer Property, thus alleviating any need for a requested variance. The trial court correctly found that the Zoning Resolution allowed Garringer to build a house on his property despite the lack of 300 feet of frontage. However, we believe the trial court did not need to order the Board to grant a variance, as one was not needed under the plain terms of the Zoning Resolution. Therefore, we will reverse the relief the trial court ordered and remand the case solely for the trial court to order the Board to grant a building permit to construct a single family dwelling upon the application of Garringer or his successor.

{¶ 24} Appellants Stuck-Monger and Bahns argue that the

doctrine of res judicata precludes a finding that § 801.2 provides an exemption from the minimum frontage requirements of § 414, because Garringer filed an application for a zoning certificate with New Jasper Township's Zoning Inspector, the application was denied by the Zoning Inspector, and Garringer did not appeal the decision to the Board. Stuck-Monger and Bahns cite *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 1995-Ohio-331, in support of their argument.

{¶ 25} "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." Id. at paragraph one of the syllabus. According to Stuck-Monger and Bahns, the denial by the zoning inspector would constitute the "valid, final judgment rendered upon the merits." We rejected a similar argument in *Lamar Outdoor Advertising v. City of Dayton Board of Zoning Appeals*, Montgomery App. No. 18902, 2002-Ohio-3159, at ¶18:

{¶ 26} "The res judicata bar cannot operate to preclude a determination of fact or law by the Landmarks Commission relevant to Lamar's application by reason of the prior determination the Zoning Inspector made in his notice of violation. The notice was not issued in a judicial proceeding, or even a quasi-judicial administrative proceeding. It was a purely administrative

determination, made by an administrative officer ex parte. Therefore, it lacks the elements that the res judicata bar requires."

{¶ 27} The determinations of the zoning inspector in the present case were administrative decisions, not judicial or quasi-judicial decisions. They create no basis for a res judicata bar.

{¶ 28} These two assignments of error are overruled.

SECOND ASSIGNMENT OF ERROR OF THE BOARD

{¶ 29} "THE TRIAL COURT ERRED IN REVERSING THE DECISION OF THE BZA, AS IT DID NOT FIND THAT MR. GARRINGER DEMONSTRATED UNNECESSARY HARDSHIP BY A PREPONDERANCE OF RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE."

THIRD ASSIGNMENT OF ERROR OF THE BOARD

{¶ 30} "THE BOARD'S DECISION TO DENY MR. GARRINGER'S APPLICATION SHOULD BE AFFIRMED BECAUSE MR. GARRINGER FAILED TO DEMONSTRATE PRACTICAL DIFFICULTIES BY A PREPONDERANCE OF RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE."

SECOND ASSIGNMENT OF ERROR OF STUCK-MONGER AND BAHNS

{¶ 31} "THE TRIAL COURT ERRED IN FINDING THE BZA'S DECISION WAS UNREASONABLE AND UNSUPPORTED BY A PREPONDERANCE OF SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE."

{¶ 32} These three assignments of error relate to whether the trial court erred by finding that Garringer was entitled to a

variance based on the "practical difficulty" or "unnecessary hardship" standards. Based on our disposition of the previous two assignments of error, we need not address the merits of these three assignments of error. Therefore, these three assignments of error are overruled as moot. App.R. 12(A)(1)(c).

{¶ 33} The assignments of error are overruled. The judgment of the trial court will be affirmed and the case is remanded solely for the trial court to order the Board to grant a zoning certificate to Garringer or his successor to construct a single family house on the Garringer Property.

DONOVAN, P.J. and BROGAN, J. concur.

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