

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard and Sandra Albright	:	
	:	
v.	:	No. 1310 C.D. 2012
	:	
Newton Township Zoning Hearing Board and Newton Township Board of Supervisors	:	Argued: December 12, 2012
	:	
Appeal of: Newton Township Board of Supervisors	:	
	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: January 10, 2013

The Newton Township Board of Supervisors (Township) appeals from the Order of the Court of Common Pleas of Lackawanna County (trial court), which granted the appeal of Richard Albright and Sandra Albright (Landowners) from the order of the Zoning Hearing Board of Newton Township (ZHB). The ZHB held that a tennis court that Landowners constructed on their property met the definition of “structure” found in the Newton Township Zoning Ordinance (Ordinance) and, therefore, was required to comply with setback and permitting requirements found in the Ordinance. The trial court, relying upon this Court’s decision in Klein v.

Township of Lower Macungie, 395 A.2d 609 (Pa. Cmwlth. 1978), concluded that a tennis court is not a structure. The Township argues that the language of its Ordinance is different from the language at issue in Klein and that the trial court failed to give deference to the ZHB's interpretation of the Ordinance.

Sometime prior to October 13, 2009, the Township's Code Enforcement Officer (Officer) visited Landowners' property in response to a complaint and found workers installing a tennis court with an appurtenant stone wall. The workers contacted Mr. Albright. Officer informed Mr. Albright that a building permit was required for this construction project, and that the tennis court and wall were subject to setbacks in accordance with the Ordinance. Landowners had not applied for a permit to construct the tennis court or wall. The tennis court was within ten feet of the rear property line. (ZHB Hr'g Tr. at 11-14, 29, R.R. at 11a-14a, 29a; ZHB Decision at 2; Letter from Township Solicitor to Landowners' Counsel (December 17, 2009) at 1 (Cease and Desist Letter), R.R. at 89a.) Counsel for Landowners subsequently sent a letter to Officer, dated October 13, 2009,¹ arguing, based on Klein, that the tennis court was not an accessory structure under the Ordinance and was not, therefore, subject to the Ordinance's permitting and setback provisions. The Township responded with the Cease and Desist Letter, dated December 17, 2009, stating that the language of the Ordinance differed from the language at issue in Klein and that Landowners must stop construction or use of the tennis court until they complied with the Ordinance's setback and permitting requirements, which the letter directed Landowners to do

¹ This letter does not appear in the record, but is referred to in Officer's testimony and in the Cease and Desist Letter.

within 30 days. (ZHB Hr’g Tr. at 15-16, R.R. at 15a-16a; Cease and Desist Letter at 1-2, R.R. at 89a-90a.) Counsel for Landowners responded by appealing to the ZHB, again arguing that, pursuant to Klein, the tennis court was not an accessory structure to which the Ordinance’s permitting and setback requirements applied. (Letter from Landowners’ Counsel to ZHB (December 22, 2009) at 1-2, R.R. at 87a-88a.)

The ZHB held a hearing on February 4, 2010. Landowners presented the testimony of Officer as if on cross-examination.² Officer testified regarding his contact with Mr. Albright and his visit to Landowners’ property. His testimony was not precise regarding the tennis court; however, he did testify that it was within 10 feet of Landowners’ property line. (ZHB Hr’g Tr. at 11-14, 29, R.R. at 11a-14a, 29a.) Landowners also presented the Cease and Desist Letter and their appeal to the ZHB. The parties introduced the Ordinance as a joint exhibit.

Following the hearing, the ZHB met again and announced its decision, as well as issuing a written decision on March 16, 2010. With regard to the facts of the case, the ZHB found that “the Board is unable to determine the role of the [stone] wall in regards to the tennis court.” (ZHB Decision at 9.) The ZHB based its decision only on the uncontested evidence that “the tennis court exists, that it is on the residential property, that it is made of macadam at least in part, and that part

² Much of the questioning of Officer and the parties centered around Officer’s understanding of Klein, the Ordinance’s definitions, and the process by which Officer determined that the tennis court was a structure required to comply with permitting and setback requirements. The parties elicited almost no factual detail regarding the tennis court itself. Despite an initial offer by Landowners to stipulate to the facts of the case, both parties refused to stipulate to the facts.

of it is 10 feet from the rear property line.” (ZHB Decision at 9.)³ The ZHB held that the outcome of the case was not controlled by Klein because the Ordinance’s definitions differed significantly from those at issue in Klein. (ZHB Decision at 10.) Interpreting the Ordinance, the ZHB held that the Ordinance’s definition of “structure” was broad enough to encompass a tennis court. (ZHB Decision at 12-13.) Therefore, the ZHB denied Landowners’ appeal from the Cease and Desist Letter. (ZHB Decision at 14.)

Landowners appealed to the trial court, which held argument. The trial court issued its Memorandum and Order on June 6, 2012. After noting that ambiguities in zoning ordinances are to be construed in favor of the broadest possible use of the land, the trial court concluded that the facts of the current case were similar to those of Klein, given that, as in Klein, the Ordinance does not provide specific requirements for tennis courts. (Trial Ct. Op. at 2-3.) The trial court concluded that Klein controlled and granted Landowners’ appeal. (Trial Ct. Op. at 4.) The Township now appeals to this Court.⁴

³ Landowners included, as part of the Reproduced Record, a transcript of a hearing before the ZHB on May 7, 2012, with regard to variances for which Landowners applied with respect to the tennis court on April 2, 2012 (subsequent to the ZHB’s decision in the current matter). This transcript includes pictures and maps of the property and surroundings. (R.R. at 273a-325a.) However, these documents are not part of the original record and may not be considered in this matter. See Smith v. Smith, 637 A.2d 622, 623-24 (Pa. Super. 1993) (It is well settled that an appellate court cannot consider anything which is not part of the certified record in a case.).

⁴ “Where the trial court receives no additional evidence, our standard of review is to determine whether the Board committed an abuse of discretion or an error of law.” Philadelphia Suburban Development Corp. v. Scranton Zoning Hearing Board, 41 A.3d 630, 633 n.8 (Pa. Cmwlth. 2012).

Before this Court, the Township argues that the language of the Ordinance is broad enough to encompass the tennis court as a structure, requiring the tennis court to comply with setback and permitting requirements. The Township argues that the definition of “structure” in the Ordinance is substantially different from, and broader than, the definitions at issue in Klein and that the courts should give deference to the ZHB’s interpretation of its own Ordinance.

In Klein, this Court adopted the trial court’s opinion which relied, in part, on an earlier case, Jones v. Zoning Hearing Board of Lower Merion Township, 298 A.2d 664, 667 (Pa. Cmwlth. 1972), which held that absent language to the contrary or evidence of specific legislative intent, tennis courts are not structures as that term was generally used in zoning legislation. In Klein, the trial court reviewed a zoning hearing board’s determination that, under its zoning ordinance, a tennis court was not a structure required to comply with setback requirements. Klein, 395 A.2d at 610. The trial court first considered whether a tennis court was required to comply with setback requirements as an accessory use. Id. at 611. The trial court noted that the zoning ordinance explicitly required certain accessory uses to comply with setback requirements; because a tennis court was not enumerated among these uses, the trial court concluded that this provision did not apply. Id. The trial court next determined whether a tennis court was a “structure” under the zoning ordinance. In looking at whether a tennis court was a structure, the trial court concluded that it was necessary to read the zoning ordinance definitions of “yard” and “structure” together, particularly with reference to a setback requirement.

In the instant ordinance the term “yard” is defined as “open space unobstructed from the ground up.” A “structure” is defined as

“[a] combination of materials assembled, constructed or erected at a fixed location including a building, the use of which requires location on the ground or attachment to something having location on the ground.”

Id. (internal citations omitted). The trial court concluded that “a structure consists of a combination of materials located upon or attached to the ground and which obstructs open space from the ground up.” Id. Importantly, Klein did not hold that tennis courts could not be subject to setback or other zoning regulations; rather, that the ordinance in question, as written, did not include tennis courts as structures that could impinge on a required setback. Id. at 609.

It is well settled that “a zoning hearing board’s interpretation of its own zoning ordinance is entitled to great weight and deference. Such deference is appropriate because a zoning hearing board, as the entity charged with administering a zoning ordinance, possesses knowledge and expertise in interpreting that ordinance.” Riskier v. Smith Township Zoning Hearing Board, 886 A.2d 727, 731 (Pa. Cmwlth. 2005) (internal citation omitted) (citing Smith v. Zoning Hearing Board of Huntingdon Borough, 734 A.2d 55, 57-58 (Pa. Cmwlth. 1999)). Here, the ZHB interpreted the Ordinance, which, as we will discuss, is significantly different from the ordinance at issue in Klein, and made an independent interpretation. We must give this interpretation its due weight and deference.

The Ordinance in this case includes a definition of the term “structure” that is different from the definition cited in Klein. Section 202 of the Ordinance defines a “structure” as “[a] combination of materials to form a construction for

use, occupancy, or ornamentation whether installed on, above, or below the surface of land or water.” (Ordinance § 202, R.R. at 143a.) Under the plain language of this definition, a tennis court is a combination of materials—macadam, foundation material, posts, and net—installed on the surface of the land for use. The conclusion that a tennis court is a structure under the Ordinance is bolstered if, as in Klein, we look to other provisions of the Ordinance to inform our interpretation of the term “structure.” Section 202 of the Ordinance defines “yard,” in relevant part, as “[a]n open unoccupied space which shall extend the full depth or width of a lot and which shall not be occupied by any building.” (Ordinance § 202, R.R. at 145a.) Section 310.1(A) of the Ordinance provides that “[a]ll *accessory structures* shall conform to the minimum yard regulations established for the District.” (Ordinance § 310.1(A), R.R. at 155a (emphasis added).)⁵ Unlike the definition of “yard” in Klein, this definition of “yard” does not require that, in order to intrude upon the yard setback, an occupation of land obstruct space from the ground up. Rather, reading these definitions together, a yard must be open, unoccupied space that is not occupied by a building or other accessory structure. Unlike Klein, these provisions, read together, do not mitigate against a determination that the tennis court falls within the plain meaning of the definition of “structure” found at Section 202 of the Ordinance.

Landowners argue that ambiguities in zoning ordinances must be drawn in favor of property owners. Risker, 886 A.2d at 731. However, a zoning ordinance is only ambiguous if it is susceptible to more than one reasonable interpretation.

⁵ The R-1 District in which the Property is located requires a 35-foot rear yard. (Ordinance § 401.4, R.R. at 216a.)

Adams Outdoor Advertising, L.P. v. Zoning Hearing Board of Smithfield Township, 909 A.2d 469, 483 (Pa. Cmwlth. 2006). In this case, we conclude that the language of the Ordinance’s definition of “structure” is clear and broad enough to encompass a tennis court. While one might read Klein and conclude that a tennis court may only be a structure if specifically designated as such by a zoning ordinance, this does not create an ambiguity in the Ordinance.

For these reasons, we hold that the trial court erred in declining to give deference to the ZHB and holding that Klein controlled. We, therefore, reverse the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, January 10, 2013, the Order of the Court of Common Pleas of Lackawanna County in the above-captioned matter is hereby **REVERSED**.

RENÉE COHN JUBELIRER, Judge