

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leonard R. Sabatine, :  
Appellant :  
v. : No. 1495 C.D. 2007  
Lower Mt. Bethel Township Zoning : Argued: March 10, 2008  
Hearing Board and Lower Mt. Bethel :  
Township :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE FRIEDMAN

FILED: April 9, 2008

Leonard R. Sabatine (Sabatine) appeals from the July 10, 2007, order of the Court of Common Pleas of Northampton County (trial court) affirming the February 20, 2007, decision of the Lower Mt. Bethel Township Zoning Hearing Board (ZHB). In its decision, the ZHB determined that a six-foot-high, twenty-five-foot-long, grass-covered earthen embankment with concrete blocks at each end constitutes a “wall” within the meaning of Lower Mt. Bethel Township Ordinance No. 92-2 (Ordinance). We affirm.

Sabatine owns property at 5238 South Delaware Drive in Easton, Lower Mt. Bethel Township (Township), Northampton County. The property is situated in an Agricultural District and is used for a commercial auto service

business. The main building, made of concrete block, houses an auto shop; there are two apartments above the auto shop and three mobile home spaces at the rear of the building. (R.R. at 50.) Aerial photos from a Northampton County website reflect that the property is approximately six-hundred feet from the shore of the Delaware River. (R.R. at 77-78.) To keep flood water from the Delaware River off his property, Sabatine built a structure made of earth and clay.

On October 26, 2006, the Township zoning officer issued an Enforcement Notice informing Sabatine that: (1) Sabatine's construction of the wall without a permit violated section 2 of the Ordinance; (2) the wall exceeded the height regulations under section 4A of the Ordinance; (3) the wall alters the natural flow of surface storm water runoff, in violation of section 5B of the Ordinance; and (4) the wall is not compatible with the surrounding properties, as required by section 6E of the Ordinance. (R.R. at 57-58, 71-72.)

Thereafter, Sabatine filed a permit application, seeking permission for his construction of a "flood control clay earthen levee [with] 2 removable flood gates." The work was described as "placement of clay berms ... 25'[wide] x 72" [high] in concert [with] concrete key block for gate (2) suppt." (Exhibit T5, R.R. at 73-74.) By letter dated November 21, 2006, the Township zoning officer informed Sabatine that the permit application was denied because the gates exceeded the height permitted in an Agricultural District and because the application did not include a plot plan, plans for Uniform Construction Code and floodplain review and a grading plan. (Exhibit T6, R.R. at 75-76.)

Sabatine did not appeal the denial of his permit application but filed an appeal from the Enforcement Notice, (R.R. at 49-56), asserting in part that no permit was needed because “vegetated earthen berms” do not constitute a fence, wall or hedge as contemplated by the Ordinance. (R.R. at 55.) The Ordinance does not define the term “wall.”

At a hearing before the ZHB on January 17, 2007, the zoning officer testified that she issued the Enforcement Notice due to Sabatine’s construction of a dirt wall, measuring about five to six feet in height, with concrete gates. (R.R. at 7-8.) The zoning officer stated that the wall violated the Ordinance because it was constructed without a permit and exceeded the Ordinance’s height limitation. (R.R. at 8.)

Sabatine testified that when the Delaware River flooded in April 2005 and June 2006, his property was covered with 36-to-45 inches of water. (R.R. at 28.) He stated that he put dirt on the property to keep back future flood water, and he explained that the purpose of the concrete blocks is to provide overlap in order to help accomplish this. (R.R. at 19-20.) Sabatine acknowledged that he did not apply for a permit initially, explaining that nothing on the permit application applies to the particular work he wanted to do. Sabatine also admitted that he continued construction of the “wall” even after he received the Enforcement Notice. (R.R. at 27-28, 33.) However, Sabatine argued that the structure, which he described as an earthen berm supported by concrete blocks on either end, does not comport with the definition of a “wall” as asserted by the zoning officer. As support for this argument, Sabatine submitted a number of dictionary definitions of

“wall” for the ZHB to consider. He argued that just because a structure can control the encroachment of water does not mean that the structure is a “wall” as that word is commonly understood. Sabatine also submitted documents reflecting that his neighbors do not object to the appearance of the structure.

By decision dated February 20, 2007, the ZHB upheld the Enforcement Notice insofar as it alleged violations of section 2 of the Ordinance, which provides that anyone wishing to erect a “fence, wall or hedge governed by this Ordinance” must apply for a building permit, and section 5B of the Ordinance, which states that fences, walls and hedges shall not affect the flow of surface storm water runoff.<sup>1</sup> (R.R. at 64-65.)

Sabatine appealed to the trial court, which determined that Sabatine built an upright structure of dirt and earthen material that was five to six feet high and supported by concrete blocks on the ends and that admittedly was intended to divert water flow from his property. The trial court observed that the ZHB’s interpretation of its own municipality’s zoning ordinance is entitled to great weight because it reflects the construction of a statute by an agency charged with its execution and application. *Adams Outdoor Advertising, LP v. Zoning Hearing Board of Smithfield Township*, 909 A.2d 469 (Pa. Cmwlth. 2006), *appeal denied*,

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<sup>1</sup> The ZHB concluded that section 4A of the Ordinance, pertaining to maximum heights, is not applicable in an Agricultural District. With regard to section 6E of the Ordinance, the ZHB concluded that the construction was not incompatible with the neighborhood. Accordingly, the only remaining defect in Sabatine’s permit application concerns insufficient documentation.

592 Pa. 768, 923 A.2d 1175 (2007). The trial court held that Sabatine built a flood wall in violation of the Ordinance and upheld the ZHB's decision.

On appeal to this court,<sup>2</sup> Sabatine continues to argue that the structure on his property is not a "wall" as contemplated by the Ordinance.<sup>3</sup> In considering this issue, we must be mindful that ordinances are to be construed expansively, affording the landowner the broadest possible use and enjoyment of his land. *H.E. Rohrer, Inc. v. Zoning Hearing Board of Jackson Township*, 808 A.2d 1014 (Pa. Cmwlth. 2002). 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. *Id.*; *Kissell v. Ferguson Township Zoning Hearing Board*, 729 A.2d 194 (Pa. Cmwlth. 1999). In construing a term undefined by an ordinance, the court generally will consult a dictionary to determine the common and approved usage of the term. *Id.* In addition, zoning ordinances are to be construed in a sensible manner to preserve their validity. *Council of Middletown Township v. Benham*, 514 Pa. 176, 523 A.2d 311 (1987).

Webster's Third New International Dictionary (1993) 2572 defines "wall," *inter alia*, as follows:

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<sup>2</sup> Where, as here, the trial court receives no additional evidence on appeal from a decision of a zoning hearing board, our scope of is limited to determining whether the zoning hearing board committed an error of law or abused its discretion. *Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board*, 590 A.2d 65 (Pa. Cmwlth. 1991).

<sup>3</sup> Photographs in the reproduced record reflect the "wall" from various perspectives. (R.R. at 58-62, 68-70, 79-80.) In some, the "wall" appears to be a grass-covered mound of earth; in others, the structure appears to be more like a "wall" as that term is commonly understood.

- (1) A high thick masonry structure forming an enclosure chiefly for defense against invasion.
- (2) A masonry fence around a garden, park or estate.
- (3) A structure that serves to hold back pressure (as of water or sliding earth).
- (4) A vertical architectural member used to define and divide space.
- (5) Something resembling a wall in appearance.
- (6) Something that resembles a wall in function esp. by establishing limits or providing defense.

The structure in this case falls within the third of these definitions.

Relying on a number of different dictionary definitions, (see Appellant's brief at 11-12), Sabatine argues that a wall is commonly understood to be an upright structure of masonry, wood, plaster or other *building material*. Sabatine further asserts that the Ordinance *recognizes* that walls are made of such building materials, specifically in section 6 of the Ordinance (Construction), which states in relevant part as follows:

A. Barbed wire shall not be used for fences, walls or hedges....

\* \* \* \*

C. Fences shall be constructed of durable fencing material. Waste material such as discarded vehicles, appliances, assembled or partially assembled materials or raw materials are expressly prohibited.

\* \* \* \*

E. The fence, wall or hedge shall be compatible with the neighborhood and be maintained in such a manner as not to constitute a safety hazard.

F. If the fence, wall or hedge is wood cover or wood-frame, the framework must face onto the interior of the lot....

G. If the fence, wall or hedge is open [metal] mesh, supported by posts and frames of either pipe or wood....

H. If the fence, wall or hedge is of masonry construction, a finished side must be provided to the exterior side.

(R.R. at 66.) According to Sabatine, it is clear from the above quoted language that the Ordinance considers walls to be upright structures made of wood, metal or masonry, but *not* earthen berms. Alternatively, Sabatine reminds us that, to the extent there is any doubt, interpretation of an undefined ordinance term must be resolved in favor of the landowner and the least restrictive use of the land. *Kissell*.

However, we recognize that Sabatine’s argument can be applied to *any* vertical structure that is constructed of non-traditional building materials but functions as a wall in the traditional sense, i.e., to enclose, divide, protect or hold back water. In this regard, Sabatine overlooks the fact that zoning ordinances should be construed in a sensible manner, *Council of Middletown Township; Kissell*, and it is not sensible to interpret the Township’s failure to identify every possible material that can be used to construct a wall to mean that the Township intended to regulate only those structures that are composed of the materials set forth in the Ordinance. In fact, it is clear from section 6C of the Ordinance that the Township anticipated landowners would use various materials and that the Township desired to regulate all walls, regardless of their composition.<sup>4</sup>

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<sup>4</sup> The numerous dictionary definitions provided by Sabatine fully support the conclusion that it is the *function*, rather than *composition*, of a structure that define it as a wall. Typical of such definitions are those found in Webster’s New World College Dictionary 135 (4th ed. 2000), which defines “wall” as follows:

**(Footnote continued on next page...)**

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Judge

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**(continued...)**

1-an upright structure of wood, stone, brick, etc., serving to enclose, divide, support or protect; specifically a) such a structure forming a side or inner partition of a building b) such a continuous structure serving to enclose an area, to separate fields, etc. c) such a structure used as a military defense; fortification d) such a structure used to hold back water; levee; dike.

2-something resembling a wall in appearance or function, as the side or inside surface of a container or body cavity.

3-something suggestive of a wall in that it holds back, divides, hides, etc [a wall of secrecy].



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ORDER

AND NOW, this 9th day of April, 2008, the order of the Court of Common Pleas of Northampton County, dated July 10, 2007, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Judge