[Cite as *State ex rel. Bailey v. Madison*, 2012-Ohio-4950.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Joe Bailey, Zoning Enforcement Officer, Franklin County Economic Development and Planning Department,	:	
Plaintiff-Appellee,	:	12AP-284
	:	(M.C. No. 2010 EVH 60345)
v.	:	(REGULAR CALENDAR)
Carline Madison et al.,	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on October 25, 2012

Ron O'Brien, Prosecuting Attorney, and *Adria L. Fields*, for appellee.

Ronald B. Noga, for appellants.

APPEAL from the Franklin County Municipal Court, Environmental Division.

BROWN, P.J.

{¶ 1} Carline Madison ("appellant") and the real property located at 2390 Innis Road, in Mifflin Township, Franklin County, Ohio, Parcel Number 190-000110, defendants-appellants (referred to singularly as "appellant"), have filed an appeal from the March 2, 2012 judgment of the Franklin County Municipal Court, Environmental Division.

{¶ 2} Appellant owns real property at 2390 Innis Road in the unincorporated area of Franklin County, Ohio, in Mifflin Township. On this property, appellant's husband parks construction vehicles and equipment he uses in his demolition business, the offices

of which are not on the subject property. The property is zoned Community Service ("CS") pursuant to the Zoning Resolution of Franklin County, Ohio ("zoning resolution"), which was enacted in 1996 and amended the original zoning resolution of 1948.

{¶ 3} On August 25, 2010, Joe Bailey, Zoning Enforcement Officer in the Franklin County Economic Development and Planning Department, plaintiff-appellee, filed a complaint and request for injunctive relief against appellant after receiving a complaint regarding appellant's property. In appellee's complaint, appellee alleged that appellant was in violation of the zoning resolution by storing commercial vehicles and storing industrial waste without a certificate of zoning compliance on a property zoned CS. Appellant filed an answer. A hearing was held on the matter on October 13, 2011.

{¶ 4} On March 2, 2012, the trial court issued an entry, in which the court found that appellant was in violation of the zoning resolution by parking commercial vehicles on the premises, but it did not find any violation related to the storage of industrial waste. The court permanently enjoined appellant from continuing to violate the zoning resolution. Appellant appeals the decision of the municipal court, asserting the following three assignments of error:

> [I.] The Trial Court erred as a matter of law in finding that the overnight parking of commercial vehicles in a commercial zoning district violated the Franklin County Zoning Ordinance when there is no express restriction on such parking and the business the vehicles are used in is not operated out of that location.
>
> [II.] The Trial Court erred in failing to find the parking of commercial vehicles on Appellants' property was a lawful non-conforming use.
>
> [III.] The Trial Court erred in holding the Appellants, Landowners, had the burden of proving the property was a lawful non-conforming use.

{¶ 5} In her first assignment of error, appellant argues that the trial court erred as a matter of law in finding that the parking of commercial vehicles in a commercial zoning district violated the zoning resolution when there is no express restriction on such parking, and the business the vehicles are used in is not operated out of that location.

{¶ 6} Parties seeking a permanent injunction "must demonstrate by clear and convincing evidence that they are entitled to relief under applicable statutory law, that an

injunction is necessary to prevent irreparable harm, and that no adequate remedy at law exists." *Acacia on the Green Condominium Assn., Inc. v. Gottlieb*, 8th Dist. No. 92145, 2009-Ohio-4878, ¶ 18, citing *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 268 (1st Dist.2000). A trial court's decision whether to grant or deny an injunction is a matter solely within the discretion of the trial court and a reviewing court will not disturb the judgment of the trial court in the absence of a clear abuse of discretion. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590 (1995), paragraph three of the syllabus.

{¶ 7} The interpretation of a zoning ordinance presents a question of law that appellate courts review de novo. *See Miamisburg v. Wood*, 137 Ohio App.3d 623, 625 (2d Dist.2000). A court should give the words in a zoning regulation the meaning commonly attributed to them unless a contrary intention appears in the regulation. *Akwen, Ltd. v. Ravenna Zoning Bd. of Appeals*, 11th Dist. No. 2001-P-0029 (Mar. 29, 2002). The meaning of the relevant provision of the code must be derived from the context of the entire ordinance. *State ex rel. Scadden v. Willhite*, 10th Dist. No. 01AP-800 2002-Ohio-1352, citing *In re Univ. Circle, Inc.*, 56 Ohio St.2d 180, 184 (1978). Nevertheless, where there is ambiguity, courts must strictly construe restrictions on the use of real property in favor of the property owner. *Allen v. Cty. Bd. of Zoning Appeals*, 186 Ohio App.3d 196, 2010-Ohio-377, ¶ 16 (2d Dist.), citing *BP Oil Co. v. Dayton Bd. of Zoning Appeals*, 109 Ohio App.3d 423, 432 (2d Dist.1996). This is because such restrictions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. *Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259, 261 (1981).

{¶ 8} However, when an ordinance is unambiguous and conveys a clear meaning, a court must only read and follow the words of the ordinance. *See State v. Waddell*, 71 Ohio St.3d 630, 631 (1995); *Fairborn v. DeDomenico*, 114 Ohio App.3d 590, 593 (2d Dist.1996). In such a case, there is no need to apply the rules of construction. *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96 (1991). An ordinance is ambiguous when it is subject to various interpretations. *Id*. Specifically, an ambiguity exists if a reasonable person can find different meanings in the ordinance and if good arguments can be made for either of two contrary positions. *Id*. We may not extend the scope of restrictions to include limitations not clearly proscribed. *Gennari v. Andres-Tucker Funeral Home, Inc.*,

21 Ohio St.3d 102, 104 (1986). Further, when terms are not defined in a zoning regulation, a court should consider the common and ordinary meaning of those terms. *In re Appropriation for Hwy. Purposes of Land of Seas*, 18 Ohio St.2d 214 (1969), paragraph one of the syllabus.

{¶ 9} In the present case, the zoning resolution provides, in pertinent part:

> 300.022 - PERMITTED USES
>
> Only a use designated as a Permitted Use shall be allowed as matter of right in a Zoning District and any use not so designated shall be prohibited except, when in character with the Zoning District, such additional use may be added to the Permitted Uses of the Zoning District by amendment of this Resolution.
>
> 300.023 - CONDITIONAL USES
>
> A use designated as a Conditional Use shall be allowed in a Zoning District when such specific conditions as are stipulated in Section 815 of this ordinance are found to be met by the Board of Zoning Appeals.
>
> 705.02 - CERTIFICATE OF ZONING COMPLIANCE – No occupied or vacant land shall hereafter be changed in its use in whole or part until the Certificate of Zoning Compliance has been issued by the Administrative Officer. No activity resulting in a disturbance equal to or greater than 1 acre of occupied or vacant land shall hereafter be permitted until the Certificate of Zoning Compliance has been issued by the Administrative Officer. No existing or new building shall hereafter be changed in its use in whole or in part until the Certificate of Zoning Compliance shall have been issued by the Administrative Officer. This section shall in no case be construed as requiring a Certificate of Zoning Compliance in the event of a change in ownership or tenancy only, without a change in use or intended use, provided that no major repairs, alterations, or additions are proposed for such building.

{¶ 10} Appellant first argues that her use of the property is primarily for parking of her husband's commercial vehicles when the vehicles are not left at the jobsite, and there is no specific prohibition in the zoning resolution for this activity. In support, appellant relies upon the type of language used in *Gennari*, as referenced above, that the restrictions in a zoning ordinance must be clearly proscribed. However, the zoning

resolution at issue in the present case is plainly permissive in nature. Section 300.022 specifically provides that "[o]nly a use designated as a Permitted Use shall be allowed as matter of right in a Zoning District and any use not so designated shall be prohibited." A permissive code lists all the uses that are permitted within a given district, and prohibits anything not specifically listed. *See, e.g., Samsa v. Heck*, 13 Ohio App.2d 94, 96-97 (9th Dist.1967) (zoning ordinance was worded in the affirmative as to uses permitted; thus, uses not expressly permitted were prohibited, and such ordinance was proper under police power); *Campbell v. Smith*, 3d Dist. No. 1-10-79, 2011-Ohio-3002, ¶ 17-18 (ordinance prohibited all land uses not expressly authorized); *Neura's Top Soil v. Brunswick*, 9th Dist. No. 2947-M (Jan. 12, 2000); *Cleveland v. Walters*, 8th Dist. No. 39302 (Feb. 15, 1979), citing *Williams v. Bloomington*, 108 Ill.App.2d 307 (4th Dist.1969) (concerning an ordinance specifically limiting a zoning classification to certain uses by implication prohibits all others), and *State v. Farmland-Fair Lawn Dairies, Inc.*, 70 N.J.Super. 19 (1961) (the New Jersey Supreme Court held that a zoning ordinance that lists the permitted uses prohibits all other uses). Thus, because the zoning resolution here was permissive in nature, it did not need to specifically prohibit the parking and storage of commercial vehicles in CS districts.

{¶ 11} Appellant also asserts that the permitted uses in Section 332.02 of the zoning resolution contemplate the parking of commercial vehicles. In addition to a list of permitted uses within CS districts, Section 332.02 also permits in a CS district all permitted uses allowed in a Suburban Office and Industrial District, Neighborhood Commercial District, and Community Commercial District ("CC"). Appellant points out that the following uses are permitted in these four districts: retail sales of automobiles, boats, and motorcycles (CS); gasoline service station (CC); taxicabs (CC); air/land courier services (CC); building material/garden supplies (CC); and automotive services (CC). Appellant contends the overnight parking of commercial vehicles is obviously implied under these permitted uses, and it would be nonsensical to find that one property owner is permitted under these sections to park a semi-truck that he is servicing at his automotive business or that he uses to transport building and material supplies, while appellant cannot park the identical vehicles on her property.

{¶ 12} However, while the permitted uses appellant cites above may involve the parking of vehicles, these permitted uses involve the parking of vehicles as part of

permitted retail or service businesses. Although appellant may find it "nonsensical" that the zoning resolution permits the parking of vehicles on the properties of businesses operating pursuant to a permitted use while not allowing the parking of vehicles on her property, appellant cites no authority for the proposition that the zoning resolution is improper or otherwise illegal for doing so. Appellant also does not raise a constitutional argument that the zoning resolution is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. *See Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St.3d 207, 213 (1998), citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Therefore, appellant's failure to cite any authority for the proposition that the zoning resolution improperly distinguishes between the uses permitted and the use appellant desires, we must reject the argument. For these reasons, appellant's first assignment of error is overruled.

{¶ 13} We address appellant's second and third assignments of error together. Appellant argues in her second assignment of error that the trial court erred when it failed to find the parking of commercial vehicles on her property was a lawful non-conforming use. Appellant argues in her third assignment of error that the trial court erred when it held appellant had the burden of proving the property was a lawful non-conforming use.

{¶ 14} A non-conforming use of land is a use that was lawful before the enactment of a zoning amendment, but one which, although no longer valid under the current zoning rules, may be lawfully continued. *Wooster v. Entertainment One, Inc.*, 158 Ohio App.3d 161, 2004-Ohio-3846, ¶ 45 (9th Dist.), citing *C.D.S., Inc. v. Gates Mills*, 26 Ohio St.3d 166, 168 (1986). "The Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution recognize a right to continue a given use of real property if such use is already in existence at the time of the enactment of a land use regulation forbidding or restricting the land use in question." *Id*., citing *Dublin v. Finkes*, 83 Ohio App.3d 687, 690 (10th Dist.1992), citing *Akron v. Chapman*, 160 Ohio St. 382 (1953), paragraph two of the syllabus.

{¶ 15} The burden of proof to establish a non-conforming use is on the landowner. *State v. Teachout*, 11th Dist. No. 2004-T-0129, 2005-Ohio-5119, ¶ 13, citing *State v. Echols*, 11th Dist. No. 89-G-1544 (Dec. 10, 1993). The landowner claiming a valid non-conforming use has the burden of proving two requirements. *Barnes v. Koon*, 5th Dist. No. 08-CA-14, 2009-Ohio-277, ¶ 17. Initially, the landowner must prove the use was in

existence prior to the enactment of the prohibitory land use regulation. *Id.*, citing *Dublin at* 690; *Cleveland v. Abrams*, 8th Dist. No. 89904, 2008-Ohio-4589. Further, the landowner must show the land use in question was lawful at the time the use was established. *Barnes* citing *Pschesang v. Terrace Park*, 5 Ohio St.3d 47 (1983), syllabus; *Abrams*. "Stated another way, the use in question must have been in full conformance with all applicable land use regulations in effect when the activity was begun." *Dublin* at 690. A use which was not permitted by the applicable zoning ordinance at the time the use was established does not constitute a non-conforming use. *Pschesang* at syllabus.

{¶ 16} With regard to her second assignment of error, appellant contends that, even if her use is not a permitted use under the zoning resolution, the use of the lot for the parking of commercial vehicles has been uninterrupted since the "early" 1990s, which predates the creation of the CS district via the 1996 zoning resolution. Initially, we note that, despite appellant's representations, appellant's husband never testified that he was aware that the previous property owner had been parking commercial vehicles on the property since the "early" 1990s. Although appellant's husband testified that he was familiar with this property "into the '90s[,]" it is unclear whether he meant going back into the late 1990s or going forward into the early 1990s, but the record suggests he meant going back into the late 1990s. Appellant's husband testified that he became familiar with the property while helping the prior landowner clean it after that landowner was commanded by court order to stop using the property as a waste transfer station in a prior zoning violation case, *State ex rel. O'Brien v. Wachtman*, Franklin M.C. No. M 9606-EVH-71889 (May 12, 1997). The action in *Wachtman* commenced in 1996 and the order issued on May 12, 1997 in that case indicated that the trash and waste material had been removed as of that date. Thus, the record suggests that appellant's husband became familiar with the property in 1996 or 1997.

{¶ 17} Notwithstanding, appellant argues that the court order in *Wachtman* indicated that the landowner was currently in compliance with the zoning resolution and never mentioned that the prior landowner's parking of commercial vehicles on the property was a violation of the zoning resolution. Therefore, appellant contends, the uninterrupted use of the subject property to park demolition vehicles since the "early" 1990s, prior to the enactment of the zoning resolution in 1996, creates a non-conforming use.

{¶ 18} The trial court addressed appellant's non-conforming use argument. The court explained that the current zoning resolution, including the section regarding CS districts, was passed in 1996, and it amended the original 1948 zoning resolution. The trial court found the original 1948 zoning resolution permitted the storage of commercial vehicles in the Light Manufacturing District but not in the General Commercial District, which is the equivalent of the current CS. Thus, the trial court concluded, commercial vehicle storage was not a permitted use on this property prior to the 1996 amendments. The trial court also found that there was no evidence submitted as to what the property was used for prior to 1948.

{¶ 19} We agree with the trial court that appellant has failed to meet her burden of proof. The only evidence that the land was being used to store commercial vehicles prior to 1996 was the testimony of appellant's husband, and, as explained above, that testimony was unclear as to precisely when the commercial vehicles had been stored on the property. Also, as the trial court explained and as outlined above, appellant failed to show that the storage of commercial vehicles was lawful in the applicable zoning district prior to 1996. Furthermore, the storage of commercial vehicles was not at issue in the *Wachtman* case—only the impermissible use of the property as a transfer station was at issue—so that case does not aid appellant's argument, as it did not address the use of the property in dispute here. Finally, despite appellant's argument to the contrary in her third assignment of error, it is the landowner claiming a valid non-conforming use who has the burden of proof, as already indicated above. *See Teachout* at ¶ 13. For these reasons, appellant's second and third assignments of error are overruled.

{¶ 20} Accordingly, appellant's three assignments of error are overruled, and the judgment of the Franklin County Municipal Court, Environmental Division, is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.

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