[Cite as *Pecchio v. Saum*, 2010-Ohio-5930.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ANDREW PECCHIO, ZONING INSPECTOR, JOHNSTON TWP., TRUMBULL COUNTY, OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0030**
- vs -	:	
TED E. SAUM, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 1909.

Judgment: Affirmed.

Mark S. Finamore, 258 Seneca Avenue, N.E., P.O. Box 1109, Warren, OH 44481 (For Plaintiff-Appellee).

George E. Gessner, Gessner & Platt Co., L.P.A., 212 West Main Street, Cortland, OH 44410 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Appellant, Ted E. Saum, appeals the judgment of the Trumbull County Court of Common Pleas, which awarded summary judgment to appellee, Mr. Andrew Pecchio, the zoning inspector for Johnston Township. The court agreed with Mr. Pecchio that the zoning code did not allow accessory uses, such as personal storage, on residentially zoned property without a primary permitted use already in place. We agree.

{¶2} **Substantive and Procedural Facts**

{¶3} Mr. Pecchio, as the zoning inspector for Johnston Township, filed a complaint for a preliminary and permanent injunction to enjoin Mr. Saum from storing various items of personal property including construction equipment, several motor vehicles, as well as miscellaneous building materials on Mr. Saum's property, allegedly in violation of the Johnston Township zoning resolution pertaining to residentially zoned property.

{¶4} The parties stipulated that no permanent residential dwelling has been constructed on the property, nor has an application for a building permit been filed. The parties also stipulated that the following items of personal property are located on the property: a box for electrical service, a mobile recreational camper that is occasionally inhabited by Mr. Saum and is sometimes taken off the property, a properly licensed commercial utility box truck and pickup truck, both used in Mr. Saum's business off-site, a boat and trailer with a cover, miscellaneous furniture, including a picnic table and an outdoor grill, as well as various building materials, including shingles, wood, and a TV antenna.

{¶5} Both parties filed motions for summary judgment and two stipulated legal issues were before the court. The first was whether the zoning code permitted such accessory storage when there was no primary permitted use of the property, i.e., a permanent residential dwelling or an application to construct a residence as defined by the Johnston Township zoning resolution. The second was if the residentially zoned district did indeed permit the accessory use of the property lot without the location and construction of a primary residential dwelling, which of the items that Mr. Saum admitted to storing were permitted.

{¶6} The trial court awarded summary judgment in favor of Mr. Pecchio, finding that the zoning resolution pertaining to the residential property requires some type of permitted structure to be placed on the property, and that the list of acceptable buildings or structures is broad, ranging from a single-family residence to a school, nursing home, or earthen dwelling.

{¶7} While the trial court was sympathetic with Mr. Saum's argument that if one of the applicable structures was located on the property, this case would not be before the court, the court did not find that the zoning resolution was arbitrary or unreasonable as the township had made the decision that real estate with buildings or other permitted uses was more desirable than vacant land used as a storage lot for personal property, and, further, that this does bear a substantial relationship to the health and safety of the township.

{¶8} Thus, the court found that Mr. Saum's storage of personal property was in violation of the zoning resolution, noting that Mr. Saum may be able to apply for a permit provided he can meet the requirements for his mobile home. In its award of summary judgment to Mr. Pecchio, the court granted the injunction and gave Mr. Saum 30 days to remove the items of personal property from his property.

{¶9} Mr. Saum now appeals, raising two assignments of error for our review:

{¶10} "[1.] The trial court erred in finding the defendant-appellant, Ted E. Saum, was violating the Johnston Township Zoning Resolution, Section 5, Classification of Uses, (5-1) "R" District (Residential) paragraph R-1 by having items of personal property on his real estate located in Johnston Township.

{¶11} "[2.] If the Johnston Township Zoning Resolution does prohibit the storage of personal property on vacant real estate, then such zoning resolution is unconstitutional, arbitrary, and an unreasonable restriction on the use of residential real estate."

{¶12} **Summary Judgment Standard of Review**

{¶13} This court reviews a trial court's order granting summary judgment de novo. *Kowach v. Ohio Presbyterian Retirement Services*, 11th Dist. No. 2010-T-0033, 2010-Ohio-4428, ¶13, citing *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id., quoting *Hapgood* at ¶13, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶14} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to

prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." Id. at ¶14, quoting *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶15} **Permitted Use in a Residentially Zoned District**

{¶16} Mr. Pecchio brought the instant action for injunctive relief against Mr. Saum pursuant to R.C. 519.24, which provides in relevant part:

{¶17} "In case any building *** or any land is or is proposed to be used in violation of sections 519.01 to 519.99 *** of the Revised Code, or of any regulation of provision adopted by any board of township trustees under such sections, such board, the prosecuting attorney of the county, the township zoning inspector, or any adjacent or neighboring property owner who would be especially damaged by such violation, *** may institute injunction *** or any other appropriate action or proceeding to prevent *** such unlawful *** use."

{¶18} Thus, R.C. 519.24 "creates a cause of action against a landowner who uses or proposes to use his land in violation of any of the provisions [of] R.C. Chapter 519 or

any township zoning resolution." *Ghindia v. Buckeye Land Development, LLC,* 11th Dist. No. 2006-T-0084, 2007-Ohio-779, ¶19, citing *Moskoff v. Bd. of Trustees of Deerfield Twp.* (Dec. 16, 1994), 11th Dist. No. 93-P-0103, 1994 Ohio App. LEXIS 5712, 5, citing *Barbeck v. Twinsburg Twp.* (1990), 69 Ohio App.3d 837, 840. "Under this code section, 'a board of township trustees, a county prosecuting attorney, or a township zoning inspector may file an action for injunction to prevent any unlawful use of buildings or land.'" Id., quoting *Baker v. Blevins*, 162 Ohio App.3d 258, 2005-Ohio-3664, ¶12. "Because the remedy is statutory, the petitioner need only show that a violation of the ordinance is occurring and is 'not required to plead or prove no irreparable injury or that there is no adequate remedy at law, as is required by Civ.R. 65.'" Id., quoting *Baker*, quoting *Union Twp. Bd. of Trustees v. Old 74 Corp.* (2000), 137 Ohio App.3d 289, 294. "Rather, the petitioner must prove, by clear and convincing evidence, that the property is being used in violation of the zoning ordinance." Id.

{¶19} "The trial court's decision to grant an injunction is reviewed under an abuse of discretion standard." Id. at ¶20, citing *Baker* at ¶17; *Perkins v. Quaker City* (1956), 165 Ohio St. 120, 125; *State ex rel. Miller v. Private Dancer* (1992), 83 Ohio App.3d 27, 32. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. "Absent a clear showing that the trial court abused its discretion in granting the injunction, an appellate court cannot reverse the judgment of the trial court." *Ghindia* at ¶20 (citation omitted).

{¶20} While Mr. Pecchio is correct that an injunction is reviewed for an abuse of discretion, we note that a de novo standard is to be applied as Mr. Saum appeals from

the award of summary judgment and only questions of law are presented. *Masek v. Warren Redevelopment and Planning Corp.*, 11th Dist. No. 2009-T-0059, 2010-Ohio-819, ¶14.

{¶21} Mr. Saum argues that the trial court erred in finding that the "R" (residential) zoning resolution prohibits the accessory use of property when there is no primary, permitted use of the property as outlined in the resolution. The resolution's meaning, however, is explicit in permitted uses.

{¶22} Thus, Section 5 of the Johnston Township Zoning resolution states:

{¶23} "For the purposes of this resolution, the various uses of buildings and premises shall be classified as follows: *** *The following uses, and no other*, shall be deemed Class "R" uses and permitted in all "R" Districts:

{¶24} "R-1.) Single and two family dwellings, and building accessory thereof ***

{¶25} "R-2.) There will be permitted one mobile home per lot for temporary housing with no minimum size required. The use of a mobile home will be allowed while construction or reconstruction of a home. The permit will have to be renewed annually.

{¶26} "R-3.) House trailers or mobile homes must be set so that any subsequent construction, if permanent residence will conform to Section 9 in the zoning ordinance. One (1) trailer permissible per lot. Lot must conform to minimum lot size as specified in zoning ordinance. The house trailer or mobile home is only required to have a minimum of nine hundred & thirty six (936) square feet of living space. The house trailer or mobile home must be set on a permanent type frost-free foundation in accordance with the Trumbull County building code ***.

{¶27} "R-4.) Church, school, college, university, public library, public museum, community center, fire station, police station, township hall, publicly-owned park, publicly-owned playgrounds, medical or professional building for physicians, dentists, optometrists or allied professions, and all generally related buildings.

{¶28} "R-5.) Rest homes and nursing homes ***.

{¶29} "R-6.) Earthen homes are permitted.

{¶30} "R-7.) Any person may maintain an office or may carry on a customary home occupation in the dwelling home used by him as his private residence, providing such use does not involve any extension or modification of said dwelling which will alter its appearance as a dwelling ****.

{¶31} "R-8.) Seasonal roadside stands are permitted.

{¶32} "R-9.) Planned Unit Development 'PUB.'" (Emphasis added.)

{¶33} Thus, on its face, the resolution is explicit in defining the permitted uses that are allowed. Both parties agree that none of these are on Mr. Saum's land.

{¶34} The second question that must be answered is whether the prohibited storage of miscellaneous property on otherwise vacant land is an unconstitutional, arbitrary, and unreasonable restriction on the use of residential real estate.

{¶35} We agree with the trial court that the township made a decision that "real estate with buildings, structures or other permitted uses is more desirable than vacant land used as a storage lot for personal property" and that this distinction does bear a substantial relationship to the health and safety of the township.

{¶36} "Unlike home rule municipalities, townships may only enact laws to the extent expressly permitted by the general assembly." *Atwater Twp. Trustees v. B.F.I.*

Willowcreek Landfill (1993), 67 Ohio St.3d 293, fn. 6, citing *Bd. of Bainbridge Twp. v. Funtime, Inc.* (1990), 55 Ohio St.3d 106, 108. "Townships have been given statutory authority to enact land use and zoning regulations by R.C. 519.02." Id., citing *Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio), Inc.* (1992), 62 Ohio St.3d 387, 390 ("R.C. 519.02 gives a local board of township trustees the authority to regulate land use within the township confines").

{¶37} R.C. 519.02 provides in pertinent part: "For the purpose of promoting the public health, safety, and morals, the board of township trustees may in accordance with a comprehensive plan regulate by resolution *** the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township ***."

{¶38} "This clear statutory authority has the same force and effect as the constitutional authority of home rule municipalities to regulate local land use." *Atwater* at fn. 6.

{¶39} Further, "zoning legislation may take into account aesthetics, because there is a legitimate governmental interest in maintaining the aesthetics of a community." *Girard v. Rodomsky* (Dec. 31, 1998), 11th Dist. No. 97-T-0107, 1998 Ohio App. LEXIS 6359, 9, citing *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, paragraph one of the syllabus.

{¶40} We also note, as did the trial court, that Mr. Saum may be able to apply for a permit pursuant to R-2 and R-3, provided the requirements can be met for his mobile home.

{¶41} As Mr. Saum's assignments of error are without merit, the judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.