

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

JOSEPH B. MANSOUR,	:	
	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-03-073
	:	
- vs -	:	<u>OPINION</u>
	:	10/26/2009
	:	
WEST CHESTER TOWNSHIP BOARD	:	
OF ZONING APPEALS, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-07-3061

Joseph B. Mansour, 7248 Basswood Drive, West Chester, Ohio 45069, plaintiff-appellant,
pro se

Gary E. Powell, Suite 1919, 1014 Vine Street, Cincinnati, Ohio 45202, for defendant-appellee

RINGLAND, J.

{¶1} Appellant, Joseph Mansour, is the owner of property located at 7248 Basswood Drive in West Chester. In 1991, he installed an above-ground pool on his property with a width of 33 feet and a depth of 52 inches. He twice replaced the pool; first, in 2001 with a pool of the same dimensions, and again, in 2007 with a pool of the same width but two inches taller.

{¶2} On February 18, 2008, the West Chester Community Development Department received a complaint regarding old furniture and other debris located outside appellant's residence. When investigating the complaint, the code enforcement officer observed that no fence was built on appellant's property to enclose the pool as required by the township's zoning resolution. Appellant was notified of the violation both orally and in writing by the community development department. A final violation was issued on March 7, 2008. Appellant appealed the violation to the township zoning commission. Following a hearing, the commission denied the appeal and instructed appellant to build a conforming fence around the pool.

{¶3} Appellant appealed to the Butler County Court of Common Pleas, arguing that the pool was not subject to the zoning restrictions because it did not meet the zoning code's definition of "swimming pool." The common pleas court overruled appellant's argument and affirmed the decision of the zoning commission. Appellant timely appeals, raising one assignment of error:

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT MANSOUR BY ISSUEING [sic] ITS OWN DEFINITION OF PERMANENT CONTRARY TO THIS COURT'S DEFINITION OF PERMANENT; MEANING ATTACHED TO THE GROUND, WHEN THERE IS NO DEFINITION OF PERMANENT IN THE ZONING RESOLUTIONS UNDER ARTICLE 9."

{¶5} In the interest of the public health and safety, a township may enact a zoning resolution to regulate buildings and structures within the township in accordance with the township's comprehensive plan. R.C. 519.02. However, since "zoning resolutions 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," they must be ordinarily construed in favor of the property owner. *Saunders v. Clark Cty. Zoning Dept.* (1981), 66 Ohio St.2d 259, 261; *In*

re Univ. Circle, Inc. (1978), 56 Ohio St.2d 180, 184.

{¶6} Appeals of administrative agency decisions are governed by R.C. Chapter 2506. A common pleas court's standard of review for administrative appeals varies distinctly from the standard of review imposed upon an appellate court. A common pleas court reviewing an administrative appeal weighs the evidence in the whole record and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. *Shields v. Englewood*, 172 Ohio App.3d 620, 2007-Ohio-3165, ¶28.

{¶7} An appellate court's review of such an administrative appeal is more limited in scope. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, quoting *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. Unlike a common pleas court, the appellate court does not weigh the evidence or determine questions of fact. *Henley* at 147. Rather, the appellate court must affirm the common pleas court's decision unless it finds, as a matter of law, that the decision is not supported by a preponderance of reliable, probative, and substantial evidence. *Mills v. Union Twp. Bd. of Zoning Appeals*, Clermont App. No. CA2005-02-013, 2005-Ohio-6273, ¶6.

{¶8} The West Chester Zoning Code provides, in pertinent part, "[s]wimming pools are permitted as accessory uses in all residential districts * * *. Such pools or the entire property on which they are located, must be enclosed completely by a fence or wall of at least four (4) feet in height above the elevation of the ground before completion of the pool. All gates in said fence or wall shall be self latching. * * * Both above ground pools and in-ground pools shall be subject to this provision." Section 10.27.

{¶9} Appellant's argument concerns the zoning code definition of "swimming pool." The township zoning code defines "swimming pool" as a "permanent, open tank or other structure not located within a completely enclosed building so as to contain at least three feet

of water at any point." Section 9.9912.

{¶10} There is no dispute regarding the capacity of the pool or whether it is an "open tank." Rather, the sole focus of appellant's argument is that the above-ground pool is not "permanent" and, therefore, does not fall within the code definition of "swimming pool." As a result, appellant argues his pool is not subject to regulation by the West Chester Zoning Ordinance and the common pleas court erred by requiring him to build a fence on his property around the pool.

{¶11} The West Chester zoning code fails to provide a definition for "permanent." Accordingly, as primary authority, appellant cites this court's decision in *Elsaesser v. Hamilton Bd. of Zoning Appeals* (1990), 61 Ohio App.3d 641. In *Elsaesser*, a homeowner erected three crosses with a height up to 12 feet along the front of his property in Hamilton. *Id.* at 644. After receiving a complaint, the Hamilton Building and Zoning Administrator determined that the crosses, which were placed approximately six feet from the road, violated the city's 30-foot setback requirement for residential lots. *Id.* The homeowner argued that the crosses were not "permanent" structures and, like the zoning code in this case, "permanent" was undefined. *Id.* at 647. Citing a dictionary definition, this court defined "permanent" as "continuing or enduring (as in the same state, status, place) without fundamental or marked change * * * fixed or intended to be fixed * * *." *Id.*

{¶12} In finding that the crosses were "permanent," this court reasoned that the "evidence shows that the crosses were buried in the ground with the intention that they would withstand the elements and remain a monument to Christ for an indefinite period. They were not placed on the ground, but were buried in the ground to a sufficient depth to support their considerable height. It is clear that appellant and her husband intended the crosses to be an enduring monument and that they were fixed in place." *Id.*

{¶13} Appellant urges that *Elsaesser* requires a structure to be "buried in the ground

and not just sitting above the ground" to be "permanent" and, since his pool is neither buried in nor attached to the ground, appellant claims it is not permanent.

{¶14} Appellant's interpretation of *Elsaesser* is incorrect. *Elsaesser* established the definition of "permanent" when no such definition is provided. Thereafter, like the *Elsaesser* court, a court must review the facts of the case to determine whether the structure is permanent. Nowhere did the *Elsaesser* court conclude that a structure is required to be buried in the ground or attached to the ground to be considered permanent. Rather, the court found that the placement of crosses in the ground was indicia of their permanency.

{¶15} The West Chester zoning code's definition for "structure" similarly notes that a structure is not required to be buried or attached to the ground in order for it to be considered permanent. The code defines "structure" as "[a]nything constructed, excluding pavement, the use of which requires the permanent location on the ground, or attachment to something having permanent location on the ground." Under the code, such structures are subject to regulation merely if they have a permanent location on the ground.

{¶16} Although the statutory definition of "swimming pool" in the township's zoning code is poorly written,¹ and even construing the definition in appellant's favor, appellant's above-ground pool falls within the code definition of "swimming pool." Specifically, the definition of "permanent" adopted in *Elsaesser* supports a finding that appellant's above-ground pool is a "swimming pool" subject to the zoning code regulations. Like *Elsaesser*, indicia of permanency are clearly present in this case. Appellant has continually had an above-ground pool fixed in the same location on his property for 18 years. Despite appellant's claims that the pool can be easily disassembled, it has never been taken down,

1. The placement of the comma between "permanent" and "open" creates significant ambiguity. Based upon rules of statutory construction, it is unclear which exact words or phrase "permanent" is intended to modify. Is "permanent" intended to modify "tank" or "structure" or both? Despite this flaw, the definition is not so ambiguous as to render it unenforceable in this case. Regardless of which interpretation we assign, appellant's above-ground pool falls within the definition because the pool is clearly intended to be permanent.

even through the winter months, except on the two occasions to be replaced. The record clearly establishes that appellant's above-ground pool is intended to be a "permanent" fixture on his property. Accordingly, the common pleas court did not err by requiring him to erect a fence around the pool.

{¶17} Appellant's sole assignment of error is overruled.

{¶18} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

[Cite as *Mansour v. W. Chester Twp. Bd. of Zoning Appeals*, 2009-Ohio-5641.]