[Cite as *Pataskala Banking Co. v. Etna Twp. Bd. of Zoning Appeals* , 2009-Ohio-3108.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE PATASKALA BANKING COMPANY

Appellant

-vs-

ETNA TOWNSHIP BOARD OF ZONING APPEALS, et al.

Appellees

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case Nos. 08 CA 128, 129 and 130

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case Nos. 06 CV 1870, 1871 & 1872

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 25, 2009

APPEARANCES:

For Appellant

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Wise, J.

{¶1} Appellant Pataskala Banking Company appeals the decision of the Court of Common Pleas, Licking County, which affirmed the decisions of Appellee Etna Township Board of Zoning Appeals ("BZA") concerning an access driveway in appellant's bank branch construction project. The relevant facts leading to this appeal are as follows.

{¶2} On September 26, 2005, Appellant Bank purchased a parcel of land in Etna Township along State Route 310, which runs north/south in that area. The main bank property is located immediately to the west of S.R. 310 and just to the north of a residential entryway street called Trail East Road, which is roughly perpendicular to S.R. 310. A strip of open space reserve in the adjoining Cumberland Trail Subdivision, a golf course community, separated the southern edge of the main bank property from Trail East Road. The open space strip, part of the entryway area into the subdivision, was owned by a third party when appellant first obtained its main property.

{¶3} Appellant applied for and obtained a zoning permit from the Etna Township Zoning Inspector to construct a bank building on the main property. Appellant further submitted its plans to the Licking County Planning Commission ("LCPC") for major development approval. The project plans originally sought two full left/right private access drives from the bank parking lot onto State Route 310. However, concerns arose regarding the proximity of one of the access drives to the intersection of S.R. 310 and Trail East Road.

{¶4} Accordingly, LCPC, under its access management regulations, requested that appellant submit an alternative plan. Accordingly, appellant submitted a variance

request to LCPC on March 13, 2006, which indicated the bank's willingness to buy the open space strip in order to access Trial East Road. Appellant, however, did not apply for a zoning permit from the township zoning inspector with respect to the changes. LCPC thereafter granted the requested variance and sent a letter to appellant evidencing the same.

{¶5} As per its plan set forth in the LCPC variance application, appellant, on July 26, 2006, purchased and obtained title to the Open Space strip. On September 6, 2006, LCPC approved appellant's development plan and issued a major development permit. Thereafter, appellant commenced construction of its bank branch.

{¶6} On September 21, 2006, the township zoning inspector issued a stop work order, indicating the access drive being constructed on the Open Space was a violation of the Etna Township Zoning Regulations. The zoning inspector therein concluded that the strip of property over which the driveways were to be installed was "open space" as defined by the Etna Township Zoning Resolutions. The zoning inspector subsequently issued a Notice of Violation, indicating appellant's zoning permit did not allow the construction of a private drive across the Open Space.

{¶7} Appellant appealed the zoning inspector's determinations to the BZA. Alternatively, appellant submitted an application for a variance. The BZA conducted a hearing on October 24, 2006, after which it denied appellant's appeals on the stop work order and Notice of Violation, and denied appellant's variance request.

{¶8} Appellant thereupon filed three appeals in the Licking County Court of Common Pleas. The trial court consolidated the appeals and granted appellant's request to supplement the record on appeal. Via an entry filed April 4, 2007, the trial

court accepted additional documents as evidence. The parties also briefed their respective positions.

{¶9} Via a judgment entry filed August 20, 2007, the trial court affirmed the decisions of the BZA, finding the BZA did not act arbitrarily, capriciously, unreasonably, or unconstitutionally. Appellant filed a timely request for Findings of Fact and Conclusions of Law.

{¶10} Appellant thereafter appealed to this Court. As its first assigned error in that appeal, appellant argued that the trial court erred in failing to issue Findings of Fact and Conclusions of Law pursuant to Civ.R. 52. We sustained the first assigned error, found the remainder of the arguments premature, and remanded the matter to the Licking County Court of Common Pleas for further proceedings. See *Pataskala Banking Co. v. Etna Tp. Bd. of Zoning Appeals*, Licking App.Nos. 07-CA-116, 07-CA-117, 07-CA-118, 2008-Ohio-2770.

{¶11} Upon remand, the trial court issued a new decision, essentially incorporating appellees' proposed findings of fact and conclusions of law. See Judgment Entry, Sept. 15, 2008. The trial court again affirmed the decision of the BZA.

{¶12} On Oct. 13, 2008, appellant filed a notice of appeal. It herein raises the following three Assignments of Error:

{¶13} "THE LOWER COURT ERRED WHEN IT FAILED TO FIND APPELLEES' DETERMINATIONS WERE BARRED BY ADMINISTRATIVE RES JUDICATA.

{¶14} "THE LOWER COURT ERRED IN FINDING THAT THE ETNA TOWNSHIP BOARD OF ZONING APPEALS DID NOT ACT ARBITRARILY, CAPRICIOUSLY, OR UNREASONABLY.

{¶15} "THE LOWER COURT ERRED IN FINDING THAT THE ETNA TOWNSHIP BOARD OF ZONING APPEALS DID NOT ACT UNCONSTITUTIONALLY."

I.

{¶16} In its First Assignment of Error, appellant contends the trial court erred in declining to apply res judicata against the township's determination that the bank driveway violated zoning regulations. We disagree.

{¶17} The applicability of res judicata is a question of law, which an appellate court reviews de novo. *EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 249, 841 N.E.2d 855, 2005-Ohio-5799. "Res judicata, whether issue preclusion or claim preclusion, applies to those administrative proceedings which are 'of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceedings.' " *Banner v. Fresh Mark, Inc.*, Stark App.No. 2006CA00055, 2007-Ohio-3359, ¶23, quoting *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260, 263, 510 N.E.2d 373.

{¶18} Assuming, arguendo, the LCPC proceedings in the case sub judice were judicial in nature, our present task is to analyze exactly what fact or point was established before the LCPC, and whether the township must be bound thereby.

{¶19} R.C. 711.10(C) states in pertinent part: " *** A county or regional planning commission shall adopt general rules, of uniform application, governing plats and subdivisions of land falling within its jurisdiction, to secure and provide for the proper arrangement of streets or other highways in relation to existing or planned streets or highways or to the county or regional plan, for adequate and convenient open spaces

for traffic, utilities, access of firefighting apparatus, recreation, light, and air, and for the avoidance of congestion of population. ***."

{¶20} LCPC's regulations regarding subdivisions, land, and thoroughfares include the following:

{¶21} "Whenever the requirements of any other lawfully adopted rules, regulations, ordinances, or resolutions conflict with these regulations, the most restrictive or the one imposing the higher standard(s) shall govern. Whenever a township, or part thereof, has adopted a zoning resolution under the provisions of Section 519, of the Ohio Revised Code, all proposed subdivisions shall meet the requirements of said zoning resolution, as well as provisions of these regulations." Id. at Sec. 15.00

{¶22} In turn, the Etna Township Zoning Resolution defines "structure" as "[a]nything constructed or erected, the use of which requires location on the ground ***," and the regulations further subject "structures" to zoning approval: "No building, fence, or other structure shall be erected, moved, added to, structurally altered, nor shall any building, fence, structure, or land be established or changed in use without a permit therefore (sic), issued by the zoning inspector." Id. at Art. 2; Sec. 300.

{¶23} Upon review, we find the LCPC variance approval of the bank driveway plan in this case focused on the issues of traffic safety and road congestion on S.R. 310, while the township's zoning restriction against the bank's plan was intended to regulate the implementation of driveway structures over open space in or adjoining a residential subdivision. Thus, we hold the township was not attempting to "relitigate" an

issue already decided by the LCPC under these circumstances. As such, we find no error by the trial court in declining to invoke the doctrine of res judicata.

{¶24} Appellant's First Assignment of Error is therefore overruled.

II.

{¶25} In its Second Assignment of Error, appellant contends the trial court erred in finding that the Etna Township BZA did not act arbitrarily, capriciously, or unreasonably. We disagree.

{¶26} R.C. 2506.04, which sets forth the applicable standard of review for a court of common pleas, provides as follows:

{¶27} "The court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code."

{¶28} In *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, 735 N.E.2d 433, the Ohio Supreme Court stated as follows:

{¶29} "[W]e have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. The common pleas court considers the 'whole record,' including any new or additional

evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. See *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 612, 693 N.E.2d 219, * * * citing *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 206-207, 12 O.O.3d 198, 389 N.E.2d 1113 * * *."

{¶30} As an appellate court, however, our standard of review to be applied in an R.C. 2506.04 appeal is "more limited in scope." *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 12 OBR 26, 465 N.E.2d 848. "This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh 'the preponderance of substantial, reliable and probative evidence,' as is granted to the common pleas court." Id. at f.n. 4. See, also, *Health Management, Inc. v. Union Twp. Bd. of Zoning Appeals* (1997), 118 Ohio App.3d 281, 285. "It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court." *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264. Ultimately, the standard of review for appellate courts in a 2506 appeal is "whether the common pleas court abused its discretion in finding that the administrative order was or was not supported by reliable, probative and substantial evidence." See *Weber v. Troy Twp. Bd. of Zoning Appeals*, Delaware App.No. 07 CAH 04 0017, 2008-Ohio-1163, ¶ 13, citing *City of Ashland v. Gene's Citgo, Inc.* (2000), Franklin App. No. 99AP-938.

{¶31} In its administrative appeal to the common pleas court, appellant argued that because it had obtained a zoning permit from the township for the overall bank

construction project, an additional permit regarding the open space strip was not required. The trial court rejected that argument because the original zoning permit did not address any "structures," i.e., driveways, on the open space. Judgment Entry at 7. Appellant also contended that no similar permit had been required in a separate project at the Longwood Crossing Subdivision; however, the court distinguished that situation as one involving an access for emergency vehicles only. Judgment Entry at 8. Finally, appellant maintained before the trial court that because it had obtained a variance from LCPC, a township zoning permit was not necessary. The trial court, upon review of the pertinent statutes and regulations, concluded the LCPC variance did not alter the township zoning requirements pertaining to the construction of an access driveway. Id.

{¶32} The essence of appellant's present argument is that Etna Township lacks a zoning provision to prohibit the bank access drive at issue, and that even if there was such a provision, the trial court should have concluded that the BZA decision denying a zoning variance was arbitrary, capricious, and unreasonable.

{¶33} In support of the first portion of said argument, appellant presents a profuse analysis of the emergence of the Cumberland Trail PUD, going back to its initial stages in early 1998, ultimately urging that a final development plan was never approved, particularly as to the pertinent open spaces. However, in light of *State ex rel. Comm. for the Referendum of Ordinance No. 3844-02 v. Norris*, 99 Ohio St.3d 336, 2003-Ohio-3887, ¶33-¶35 (addressing the legal effect of a city council's approval of a PUD preliminary development plan), we find the trial court acted within its discretion in concluding that the township's acceptance of the Cumberland Trail preliminary plan made the open space parcel at issue an enforceable area of the PUD.

{¶34} The second portion of appellant's argument in this regard goes to the denial of a zoning variance. The Etna Township Zoning Resolution, Art. 2, clearly sets forth that "establishment or expansion of a use otherwise prohibited shall not be allowed by a variance." The trial court, in part applying our decision in *Welling v. Perry Twp. Borad of Zoning Appeals*, Stark App.No. 2003CA00303, 2004-Ohio-1289, ¶26, concluded that a variance under the circumstances of this case, whether an "area" variance or "use" variance, was properly denied by the BZA under the Zoning Resolution. Based on our limited standard of review, we find no reversible error in the trial court's conclusion that the BZA decisions were reasonable and supported by a preponderance of substantial, reliable, and probative evidence.

{¶35} Appellant's Second Assignment of Error is therefore overruled.

III.

{¶36} In its Third Assignment of Error, appellant contends the trial court erred in finding that the Etna Township BZA did not act unconstitutionally. We disagree.

Due Process and "Void for Vagueness" Issues

{¶37} In considering a challenge to an ordinance or statute as void for vagueness, a court is required to determine whether the enactment "(1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement." *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 84. A statute is not void for vagueness simply because it could have been worded more precisely or with additional certainty. Rather, the "critical question in all cases is whether the law affords a reasonable individual of ordinary intelligence fair

notice and sufficient definition and guidance to enable him to conform his conduct to the law." Id. at ¶ 86.

{¶38} Appellant herein contends the township has failed to articulate the zoning regulation being enforced, and that the record shows the trustees merely passed a general resolution rezoning the Cumberland Trail Subdivision as a PUD, which lacked a final development plan. However, the wording of the requirement of a zoning permit (§300, supra), is unambiguous, and it is undisputed that appellant failed to obtain a permit from the township regarding the open space strip after acquiring same for the planned bank driveway. Moreover, despite concerns about the final development plan, the preliminary plan sufficiently established the open space area of the Cumberland Trail Subdivision.

Equal Protection Issue

{¶39} The constitutional guarantee of equal protection requires that laws operate equally upon persons who are alike in all relevant respects." *State v. Williams*, 179 Ohio App.3d 584, 598, 2008-Ohio-6245, citing *McCrone v. Bank One Corp.,* 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 20. "When suspect classes are not involved, the equal-protection clause permits class distinctions in legislation if the distinctions bear some rational relationship to a legitimate government objective." Id., citing *State ex rel. Vana v. Maple Hts. City Council* (1990), 54 Ohio St.3d 91, 92, 561 N.E.2d 909. Under the rational basis test, the legislation must be upheld unless the classification is totally unrelated or irrelevant to the state's goals or purpose for enacting the legislation. *Menefee v. Queen City Metro* (1990), 49 Ohio St .3d 27, 29, 550 N.E.2d 181.

{¶40} In essence, appellant maintains that the Cumberland Trail Subdivision has three "reserve" areas which might allow future vehicular access, whereas appellant's open space parcel is being treated differently by the township. However, as appellees note, these other reserve areas are not "similarly situated" according to the plat. Furthermore, the bank property, as a future high customer-volume business, is distinguishable from the residential and golf course area of the development, and we therefore hold the "similarly situated" component of the equal protection question is again lacking.

{¶41} We therefore find no merit in appellant's constitutional claims. Appellant's Third Assignment of Error is therefore overruled.

{¶42} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 521

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE PATASKALA BANKING COMPANY	:	
	:	
Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ETNA TOWNSHIP BOARD OF ZONING APPEALS, et al.	:	
	:	
	:	Case Nos. 08 CA 128, 129 and
Appellees	:	130

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES