[Cite as *Clark v. Genoa Twp. Bd. of Trustees*, 2009-Ohio-3159.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KEVIN C. CLARK

Appellant

-vs-

GENOA TOWNSHIP BOARD OF TRUSTEES, et al.

Appellees

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 08 CAH 08 0048

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 07 CVF 05 566
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 29, 2009

APPEARANCES:

For Appellant

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For Appellees

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Wise, J.

{¶1} Appellant Kevin Clark appeals the decision of the Court of Common Pleas, Delaware County, which affirmed the decision of the Genoa Township Board of Zoning Appeals ("BZA"), denying appellant's application for a permit to build a garage on his property. The relevant facts leading to this appeal are as follows.

{¶2} Appellant owns a parcel of land in Genoa Township, Delaware County, Ohio. The property is 1.04 acres in size and has a 2,725 foot home in which appellant and his family reside. The property is zoned as "SR, suburban residential."

{¶3} Appellant collects automobiles, and at the time of the hearing owned ten. BZA Tr. at 17, 20. In 2007, appellant requested a zoning permit to build a detached garage at his home for parking and storing his automobiles. The proposed garage is 2,329 square feet gross, but under a zoning code formula for computing square footage, as discussed infra, it is slightly less than 1,200 square feet. The garage was intended to store six to ten automobiles and utilize two or three car lifts.

{¶4} The Zoning Inspector refused to issue the permit, finding the square footage of the proposed garage would be greater than the zoning code allows. Appellant appealed the decision to the Board of Zoning Appeals. The Board found the square footage of the proposed structure did not exceed the maximum allowed by the zoning code, but it was not an accessory building as defined in the code.

{¶5} Appellant then filed an administrative appeal with the Licking County Court of Common Pleas. The common pleas court affirmed the BZA decision, concluding in pertinent part: " *** [T]he total 'area' of the garage is less than 1200 square feet, which is incidental and subordinate to the 2725 square foot residence. The extent or surface

covered by the structure, 2329 square feet, while subordinate in total square footage, is not necessarily customarily incidental to the single family residence. Furthermore, the purpose, a six to ten car garage, is certainly not customarily incidental or subordinate in nature to a single family residence." Judgment Entry, July 9, 2008, at 8.

{¶6} On August 7, 2008, appellant filed a notice of appeal of the decision of the common pleas court. He herein raises the following two Assignments of Error:

{¶7} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN AFFIRMING THE DECISION OF THE GENOA TOWNSHIP BZA BY FINDING APPELLANT'S PROPOSED GARAGE VIOLATED THE GENOA TOWNSHIP ZONING CODE SECTION DEFINING AN ACCESSORY USE.

{¶8} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE GENOA TOWNSHIP BZA."

I., II.

{¶9} In his First and Second Assignments of Error, appellant contends the trial court erred and improperly substituted its judgment in affirming the BZA decision that his proposed garage violated the township zoning code defining an "accessory use." We disagree.

{¶10} R.C. 2506.04 sets forth the applicable standard of review for a court of common pleas in an administrative appeal. It provides as follows:

{¶11} "*** [T]he 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."

{¶12} In reviewing an appeal of an administrative decision, a court of common pleas begins with the presumption that the board's determination is valid, and the appealing party bears the burden of showing otherwise. See *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 302. The Ohio Supreme Court further stated as follows in *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, 735 N.E.2d 433:

{¶13} "[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 * * *."

{¶14} 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. Nonetheless, zoning regulations are in derogation of common law and must be strictly construed and not extended by implication. See, e.g., *Likins v. Dayton Motorcycle Club* (1972), 33 Ohio App. 2d 269, 294 N.E. 2d 227.

{¶15} Turning to the specifics of the case sub judice, Section 203.01 of the Genoa Township Zoning Code defines "Accessory Use or Structure" as follows:

{¶16} "Any purpose for which a building, structure, or a tract of land may be designed, arranged, intended, maintained or occupied which:

{¶17} "(a) Is customarily incidental and subordinate in area, extent or purpose to the principal building, structure or use which it serves; and

{¶18} "(b) Is located on the same zoning lot as the principle building, structure or use."

{¶19} Section 209.01 of said Code defines a "Garage, Private" as:

{¶20} "A detached accessory building or a portion of a main building, intended for the parking or storage of automobiles, motorized recreational vehicles or boats owned by the occupants of the premises."

{¶21} Furthermore, Section 505.04, addressing "Accessory Structures," provides:

{¶22} "On a parcel of one acre or more but less than three (3) acres, the number of accessory structures, excluding gazebos, or picnic shelters shall be limited to two structures. The maximum floor area of any single accessory building and the maximum of all accessory structures combined shall not exceed twelve hundred (1200) square feet."

{¶23} Finally, Section 208.09 defines "Floor Area" as:

{¶24} "The sum of the gross horizontal area of all the floors of the building measured from the exterior faces of the exterior walls or from the centerline of walls separating two (2) buildings. In calculating floor area, the following shall not be included:

{¶25} ***

{¶26} (d) Automobile parking space in a basement or garage."

{¶27} Thus, under Section 208.09, the area for parking a vehicle is excluded in computing the square footage of a garage. In the case sub judice, the trial court drew a distinction between the area used to "store" a vehicle as opposed to the area used to "park" a vehicle, and found storage area should be included when computing square footage. Nevertheless, the trial court found appellant's proposed garage does not exceed 1,200 square feet. The court, however, applied Section 203.01, supra, and

found the manner in which appellant intended to use the garage was not a customary use, and also found the garage was larger than the customary size. The trial court thus found that neither the size nor the intended use of the structure is customarily incidental and subordinate to the single family residence. The court found, based on the BZA record, that although the structure, at 2,329 square feet, is less than the 2,725 square foot residence, the customary size of garages for a single family residence is a two- or three-bay garage of between 1,000 and 1,100 square feet. The court also noted the BZA testimony that an application for an accessory structure of this size and nature was unprecedented.

{¶28} We find, as a matter of law, that the aforecited Section 203.01 (Accessory Use or Structure), Section 209.01 (Private Garage), Section 505.04 (Accessory Structures), and 208.09 (Floor Area) must be read in the conjunctive. The Trustees of Genoa Township, via Section 203.01, have set forth a somewhat broad definition of the term accessory use or structure, providing the fact finder with room to interpret the phrase "customarily incidental and subordinate in area, extent *or* purpose" under community standards. (Emphasis added.) We herein reject the proposal that the general definition of accessory use or structure contained in 203.01 does not apply to garages that meet the definition of private garage and conform to the size requirements.

{¶29} Accordingly, pursuant to the Genoa Township requirement that any accessory structure must be "customarily incidental and subordinate" to appellant's residence under Section 203.01, supra, and based on our more limited standard of review as an appellate court in this type of case, we find no reversible error in the trial

court's affirmance of the decision of the BZA and its finding that the garage would not comply with the zoning regulations.

{¶30} Appellant's First and Second Assignments of Error are overruled.

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

By: Wise, J.

Delaney, J. concurs.

Gwin, P. J., dissents.

/S/ JOHN W. WISE_____

/S/ PATRICIA A. DELANEY_____

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JUDGES

JWW/d 616

Gwin, P.J., dissenting.

{¶32} I do not agree with the majority's disposition of assignment of error I.

{¶33} Section 203.01 gives a general definition of the term accessory use or structure. However, Section 201.09 specifically defines a private garage as a detached accessory building intended for parking or storage of automobiles or other vehicles owned by the occupant of the premises. I would not, as the majority suggests, find the two ordinances must be read conjunctively, but rather, I would find the specific controls over the general. Thus, I conclude the zoning code provides that if a building is intended for parking or storage of automobiles or other vehicles owned by the occupant of the premises, then it is per se an accessory building.

{¶34} The zoning code does not exclude detached garages from Section 208.09, so the area for the parking of vehicles is excluded in computing the square footage of a garage. The zoning code does not limit the number of parking stalls a garage may have, but only limits the square footage, excluding the parking area.

{¶35} Neither the Board nor the court made a finding the proposed structure does not qualify as a private garage, and the court found appellant will use the garage to park and store vehicles he owns. The court found the garage is within the size limits.

{¶36} Having found the proposed structure met all the specific requirements of the zoning code, the trial court should have stopped there and ruled in appellant's favor. Instead, the court also applied the requirements of the general ordinance, Section 203.01, and found the manner in which appellant intended to use the garage was not a customary use. The court also found the garage was larger than the customary size. I find that to be error. I find the general definition of accessory use or structure contained

in 203.01 does not apply to structures that meet the specific definition of private garage and conform to the size requirements.

{¶37} As the majority correctly states, zoning regulations are in derogation of common law, and must be strictly construed and not extended by implication. *Likins*, supra. Construing the zoning code strictly in favor of the owner of the property, I find the proposed garage is an accessory structure intended for a permitted use, and therefore it is allowable under the zoning code.

{¶38} I would find the court erred in affirming the decision of the Board. I would sustain the first assignment of error.

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HON. W. SCOTT GWIN

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

KEVIN C. CLARK	:	
Appellant	:	
-vs-	:	JUDGMENT ENTRY
GENOA TOWNSHIP BOARD OF TRUSTEES, et al.	:	
Appellees	:	Case No. 08 CAH 08 0048

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

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ PATRICIA A. DELANEY_____

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JUDGES