

[Cite as *Hensel v. Lake Twp. Bd. of Zoning Appeals*, 2001-Ohio-1377]

**COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT**

LYLE HENSEL, ET AL	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 2001-CA-00046
	:	
BOARD OF ZONING APPEALS LAKE TOWNSHIP, ET AL	:	
	:	
Defendant- Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Administrative appeal from the Stark County Court of Common Pleas, Case No. 2000CV02656

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 24, 2001

APPEARANCES:

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Gwin, P. J.,

This case presents the appeal and cross appeal from a judgment of the Court of Common Pleas of Stark County, Ohio, in an administrative appeal from Lake Township Board of Zoning Appeals. Appellants assign two errors to the trial court:

ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY INTERPRETING, INSTEAD OF MERELY APPLYING, THE LAKE TOWNSHIP ZONING RESOLUTION BECAUSE IT IS CLEAR AND UNAMBIGUOUS REGARDING PERMITTED USES IN A C-2 DISTRICT.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE LAKE TOWNSHIP BOARD OF ZONING APPEALS. THERE WAS SUBSTANTIAL, CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT AND UPHOLD THE PRESUMPTION THAT THE LTBZA'S DECISION WAS VALID.

In the cross appeal, appellees Lyle and Debra Hensel assign a single error:

THE TRIAL COURT, AFTER CORRECTLY REVERSING THE LAKE TOWNSHIP BOARD OF ZONING APPEALS AND CORRECTLY FINDING THAT THE BOARD OF ZONING APPEALS HAD ACTED UNREASONABLY AND ERRONEOUSLY IN ITS INTERPRETATION AND APPLICATION OF THE LAKE TOWNSHIP ZONING CODE, ERRED IN ISSUING AN OPEN ENDED REMAND OF THE CASE TO THE BOARD OF ZONING APPEALS FOR FURTHER PROCEEDINGS PERMITTING THE ZONING

BOARD TO RECONSIDER AND REDETERMINE ISSUES INCLUDING ISSUES WHICH HAD BEEN PREVIOUSLY REJECTED AND/OR NOT RELIED UPON BY THE ZONING BOARD IN REACHING ITS PREVIOUS ADMINISTRATIVE DECISION.

In its judgment entry of January 11, 2001, the trial court found Sumser Realty owns a 4.7 acre tract of land located on Cleveland Avenue in Lake Township, Stark County, Ohio. This tract of land is subdivided as two separate parcels. The first parcel, consisting of approximately 2.6 acres, is zoned C-2 under the Lake Township Zoning Resolution. This parcel contains a building presently used for commercial purposes. To the rear of the tract, an area of approximately 2.1 acres is zoned R-2 and contains no buildings at the current time. Sumser wishes to use a portion of the C-2 zoned area for multi-residential development. Sumser proposes seven buildings consisting of two units each, for a total of 14 condominium units. Sumser anticipates the commercial building will remain on the tract and continue to be used for commercial purposes.

Sumser had requested a lot split from the Stark County Regional Planning Commission on two different occasions, but both requests were denied. Then Sumser applied to the Lake Township Zoning Inspector, requesting a variance, or, in the alternative, a finding no variance was necessary because the township zoning resolution permits multiple buildings in the C-2 district on the same tract of land.

The parties sought a prosecutor's opinion concerning the requested relief, and the prosecutor's office issued two letters. The opinions of the prosecutor clearly indicated a variance would be necessary. In accord with the prosecutor's

opinion, the zoning inspector held a variance from the zoning resolution was required.

Sumser filed an appeal with the Lake Township Board of Zoning Appeals. The Board of Zoning Appeals held a hearing with evidence presented and presentations made by various parties. Sumser argued that the anticipated use of the property was permitted under a C-2 designation because this particular project constituted a commercial complex. Section 307.1 of the Zoning Resolutions permits only one building devoted to one primary use per parcel. Sumser argued a commercial complex would provide an exception to a provision which permits no more than one principle building.

The Board of Zoning Appeals found a variance is not required for the proposed building complex.

At the time of the action, the Zoning Inspector asked the Board for clarification as to whether the term commercial complex applied and, whether the term commercial complex permitted more than one structure on a particular parcel. The Board informed the Zoning Inspector it was not making such a finding.

Lyle and Debra Hensel, appellees/cross-appellants herein, are adjoining landowners to the property in question. The Hensels filed an administrative appeal to the Court of Common Pleas of Stark County pursuant to R.C. 2506.04. After a hearing on the appeal, the trial court ruled a variance was required for planned use, and remanded the issue to the Lake Township Board of Zoning Appeals on the issue of whether or not to grant a variance, and to determine any issues related to the term

commercial complex, as it appears in the zoning resolutions. From that judgment, Sumser appealed to this court.

The Lake Township Board of Zoning Appeals joins in Sumser's appeal.

Standard of Review

In an administrative appeal, the court of common pleas acts as an appellate court in reviewing administrative proceedings. The court should presume the Board's determination as valid, and the burden of showing invalidity rests on the appealing party, *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St. 2d 298. Pursuant to R.C. 2506.04, the court of common pleas may find the administrative order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of the evidence of the record. Thus, the court of common pleas' standard of review in an administrative appeal is to determine whether the decision of the administrative agency is supported by a preponderance of reliable, probative, and substantial evidence in the record, *Kisil v. Sandusky* (1984), 12 Ohio St. 3d 30.

When the case comes before us, our review is restricted to determine whether, as a matter of law, the decision of the trial court was supported by a preponderance of reliable, probative, and substantial evidence. Our review is restricted to questions of law, and we do not weigh the preponderance of the evidence. However, we can reverse for abuse of discretion, see *Dudukovich v. Lorain Metropolitan Housing Authority* (1979), 58 Ohio St. 2d 202.

We will address the assignments of error on appeal first.

I

Appellants first argue the trial court interpreted the zoning resolution rather than merely applying it. Appellants urge the resolution is clear and unambiguous, and contrary to the trial court's construction.

Section 411.1 of the Zoning Resolutions provides that a C-2 commercial district permits all buildings, structures, and uses permitted in areas zoned commercial district light, which is zoning classification C-1. Appellants argue within a C-1 commercial district, one of the permitted uses is all buildings, structures, and uses which are permitted in residential districts. Appellants conclude all structures, buildings, and uses permitted in R-1, R-2, R-3, R-4, R-5 and R-6 districts also permitted in a C-1 district, and therefore in a C-2 district, which is the classification of the Sumser property. Only in the classification of industrial districts are residential uses excluded under Sumser's reading of the Zoning Resolutions.

Appellants move from this interpretation to Zoning Resolution 307.1, which provides that not more than one principle building shall be permitted on any lot unless specifically permitted in the regulations. Appellants urge under Zoning Resolution 402.1, which defines the uses of the R-3 district, multiple family dwellings of up to a maximum 12 units per acre are permitted. Appellants argue because the permitted use of an R-3 district is incorporated into a C-2 classification, it follows Sumser is permitted to place multiple dwellings on a single parcel as long as it complies with the R-3 district regulations.

The trial court found this interpretation of Section 411.1 as permitting multiple

structures in a C-2 classification constitutes an interpretation contrary to the overall zoning resolutions, and is contrary to law. The trial court found this interpretation would permit multiple structures within any division of any zoning classification.

Appellees Lyle and Debra Hensel argue that upon its face, the Board of Zoning Appeals decision is illogical, arbitrary, and unreasonable. They cite us to the two letters from the Stark County Prosecutor's office, which advised that the proposed development of 7 duplexes and one retail commercial building on the parcel in question would require a lot split and/or variance from the requirement of the zoning code. This is because the code provides there shall be only one structure for one principle use located on a single parcel of land unless the zoning resolution makes specific provisions permitting more than one structure per parcel in the district in which the subject parcel is located.

The trial court found when the zoning resolutions list permitted uses with the word "One or more of the following uses," this does not mean the classifications may be disregarded to permit the mixing of multiple buildings for different use groups, residential and commercial, on one single lot. Rather, the introductory language reflects only that a lot may at the same time have a principle use and a conditional or accessory use. In context of the overall code, the Board of Zoning Appeals' decision effectively destroys the need for any classification other than commercial or industrial. Under this interpretation, there would never be an occasion where the owner of a single lot would have to split or subdivide the lot.

We find the trial court properly applied the Lake Township Zoning Resolution,

and did not abuse its discretion herein. Accordingly, the first assignment of error is overruled.

II

In their second assignment of error, appellant Sumser argued the trial court erred as a matter of law by substituting its own interpretation for that of the Lake Township Board of Zoning Appeals. Appellants urge the trial court did not properly defer to the Zoning Board even though the record provides substantial reliable and probative evidence to support the determination.

Our review of the record leads us to conclude the trial court did not err in its application of the zoning regulations. Accordingly, the second assignment of error is overruled.

We will now address appellees' cross-assignment of error.

In their cross-appeal, appellees argue that the trial court was correct in reversing the Lake Township Board of Zoning Appeals, but should not have remanded the matter back to the Zoning Board to consider whether to grant a variance to Sumser. Appellants argue this remand will require the Board of Zoning Appeals to consider issues different from the ones they considered in reaching their original decision. Appellees cite us to R.C. 2506.04, which provides the trial court may affirm, reverse, vacate, or modify the decision, or it may remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinions of the trial court. Appellees assert none of the above permits an open-ended remand such as the trial court made.

Cross-appellee Sumser argues although there appears to be a split of authority amongst the appellate courts of Ohio on this issue, *dicta* in the Supreme Court cases requires us to find the trial court may remand a case to an administrative agency for further proceedings, including re-hearings. In *Superior Metal Products, Inc. v. Administrator of the Ohio Bureau of Employment Services* (1975), 41 Ohio St. 2d 143, the Ohio Supreme Court found a trial court may remand a cause to a subordinate tribunal or administrative body in order that it may conduct further proceedings and render a new decision. Likewise, in *Chapman v. Ohio State Dental Board* (1986), 33 Ohio App. 3d 324, the Supreme Court found the trial court has the authority to remand the case for further proceedings and a new decision.

Sumser argues the trial court had before it only a single issue, whether a variance was required under the zoning regulations. The trial court could not take the next step, and decide whether to grant to deny a variance, because that issue had never been considered by the Lake Township Board of Zoning Appeals.

We find the trial court properly reviewed the matters before it, and had the authority to remand the matter back to the appropriate body, here, the Lake Township Board of Zoning Appeals, to continue its adjudication of the matter.

The cross-appeal is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By Gwin, P.J.,

judgment of Court of Common Pleas of Stark County, Ohio, is affirmed. Costs to be split between appellants and appellees.

JUDGES