IN THE SUPREME COURT OF OHIO

WILLOW GROVE, LTD.,	:	**SUPREME COURT OF OHIO CASE NO.: 2021-1087**
Appellant,	:	
v.	:	
OLMSTED TOWNSHIP BOARD OF ZONING APPEALS, *et al.*,	:	**ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT CASE NO. CA 19-109319**
Appellees.	:	

MEMORANDUM OF *AMICUS CURIAE* OHIO TOWNSHIP ASSOCIATION ON BEHALF OF APPELLEES OLMSTED TOWNSHIP BOARD OF ZONING APPEALS AND OLMSTED TOWNSHIP

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I. STATEMENT OF AMICUS INTEREST

Amicus Curiae Ohio Township Association ("OTA") respectfully requests this Court to affirm the decision of the Eighth District Court of Appeals that column headings should not be read substantively, but may be considered in resolving ambiguity, and R.C. Section 519.17 requires a zoning application to fully comply with applicable zoning regulations in order for a zoning certificate or permit to be issued.

OTA is a statewide professional organization dedicated to the promotion and preservation of township government in Ohio. OTA, founded in 1928, is organized in 87 Ohio counties and has over 5,200 active members comprised of elected township trustees and township fiscal officers and over 4,000 associate members from Ohio's 1,308 townships. OTA communicates to Ohio and federal policymakers on important issues and resolutions regarding township operations and develops quality training and education programs for members.

One of the forms of government closest to Ohioans, townships have police powers to regulate land use by and through the adoption of a zoning resolution. These restrictions are made in furtherance of a common plan for the community, and protecting and promoting the health, safety, and welfare of residents. Township officials who adopt zoning and land use restrictions are elected by the very property owners who are subject to those restrictions, and are charged with the application and enforcement of those restrictions. Because OTA is organized to serve a vast number of the townships throughout the state, and many of OTA's 1,308 township members adopt zoning resolutions and apply these land use restrictions, OTA has a real and direct interest in this matter.

This Court should affirm the decision of the Eighth District Court of Appeals.

II. STATEMENT OF THE CASE AND FACTS

OTA hereby adopts, in its entirety, and incorporates by reference the Procedural Background and Facts as set forth by Appellees Olmsted Township Board of Zoning Appeals and Olmsted Township, and incorporates the same by reference as if fully rewritten herein.

III. ARGUMENT

A. FIRST PROPOSITION OF LAW

It is proper to give effect to multiple levels of headings in order to avoid a patently absurd result.

Amicus Curiae OTA urges this Court to uphold the decision of the Eighth District Court of Appeals, as the lower court correctly rejected the arguments currently before this Court, and held that the Appellant's zoning application did not meet the parking-space requirements of the Olmsted Township Zoning Resolution ("OTZR"). First, the column headings for the table included in Section 310.04 of the OTZR are not substantive law. Rather, they provide a guidepost for application, and cannot be read in isolation of the OTZR as a whole, as desired by Applicant. Second, the application of the OTZR as requested by Appellant would cause nonsensical and improper results. For the reasons stated herein, *Amicus Curiae* OTA requests that the decision of the lower court remain undisturbed.

Table headings in a zoning resolution must be read together in context with the provisions of the sections to which the table applies.

First, the Eighth District Court of Appeals correctly interpreted the parking restrictions in the OTZR by using the title and headings in Section 310.04 of the OTZR as a "guidepost" for applying the zoning restrictions. *Willow Grove, Ltd., v. Olmsted Twp. Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 109319, 2021-Ohio-2510, ¶ 20. Both the General Assembly and this Court have made it clear that titles and headings are not included as part of substantive legislation. R.C. 1.01; *Viers v. Dunlap*, 1 Ohio St.3d 173, 175, 438 N.E.2d 881 (1982). That being said, titles and

headings may be used to assist with statutory construction when the language is not ambiguous. *Dade v. Bay Village,* 8th Dist. Cuyahoga No. 87728, 2006-Ohio-6416, ¶ 28, citing R.C. 1.01, *State ex rel. Murphy v. Athens Cty. Bd. of Elections,* 138 Ohio St. 432, 435, 35 N.E.2d 574 (1941).

For the situation at hand, the Eighth District correctly opined that the table heading of "Principal Building or Use" set forth in Section 310.04 is a "guidepost, but does not necessarily mean that the section applies only to principal building or principal uses of property." *Willow Grove, Ltd.* at ¶ 20. In its brief, Appellant makes significant effort to attempt to differentiate the heading of a table from another heading or title contained within the zoning resolution, in order to give the heading exclusionary and substantive meaning. Correctly applied, the table heading serves as a guide, as there is specific language within Section 310.02(a) of the OTZR that "mandates the inclusion of minimum parking spaces, [that] applies to any building or new use." *Id.* This Court's holding in *Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259, 421 N.E.2d 152 (1981) requires that this specific language be applied in furtherance of the Eighth District's interpretation. In sum, it would be incorrect to interpret the heading of the table in Section 310.04 as exclusionary to any other buildings or uses, as it would be contrary to specific requirements set forth within OTZR Section 310.02.

In reviewing the requirements of Section 310.02 in concert with Section 310.04, it is clear that the Eighth District correctly concluded that Appellant's application failed to meet the parking requirements set forth in the OTZR. The swimming pool and community center will serve the residents and guests for the entire 202-townhome community. The nature and function of the proposed swimming pool and community center will be more similar to a standalone community pool or recreation center, as opposed to an individual's private backyard swimming pool or other facility. As such, the parking requirements for the uses identified in Section 310.04(e)(10) and

(h)(2) of the OTZR are applicable in the review of Appellant's zoning application, and were not fulfilled as determined by the zoning inspector and affirmed by the Eighth District. The Eighth District Court of Appeals correctly interpreted these provisions, and this Court should uphold that decision.

Interpreting the provisions of the OTZR to require zero parking spaces for a standalone neighborhood swimming pool and community center is an absurd result.

Second, if the Court were to overturn the decision of the lower court, and rule in favor of Appellant's desired "heading" interpretation, it would have nonsensical results given the overall language of the OTZR. Zoning resolutions are to be "construed in favor of the property owner because they are in derogation of the common law and deprive the property owner of uses to which the owner would otherwise be entitled." *Cleveland Clinic Found. v. Bd. of Zoning Appeals of the City of Cleveland*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 34 (2014), citing *Univ. Circle, Inc. v. Cleveland*, 56 Ohio St.2d 180, 184, 383 N.E.2d 139 (1978). However, "when applying a zoning provision, a court must not view the provision in isolation"; rather, its "meaning should be derived from a reading of the provision taken in the context of the entire ordinance." *Id.* at ¶ 35. Additionally, this Court has long held that "[i]t is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences." *State ex rel. Dispatch Printing v. Wells*, 18 Ohio St.3d 382, 384, 481 N.E.2d 632 (1985); *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 92 N.E.2d 390 (1950).

Appellant's merit brief focuses on the derogation of property rights in arguing that the OTZR be construed as desired. However, Appellant's contorted attempt to interpret the heading, "Principal Building or Use," does not mean that the property owner is entitled to whatever interpretation so desired. Rather, the Appellant desires an application of those four words in

complete isolation from the context of the entire OTZR, which is in direct contradiction of how zoning restrictions are to be applied, and would result in absurd consequences. Specifically, under Appellant's desired interpretation, there would be no minimum required parking spaces for any accessory buildings or uses. This, in turn, would mean that the swimming pool and community center that will serve at least 202 owners, occupants, and guests, as well as cleaning staff, property managers, pool operators, and other vendors who will visit and service the swimming pool and community center, is required to have no parking spaces. This interpretation and requested application is not accurate with the parking restrictions that are clearly prescribed in OTZR 310.02 that specifically state that off-street parking must be provided before occupancy can occur for any new building or use. For these reasons, this Court must uphold the decision of the lower court.

B. SECOND PROPOSITION OF LAW

In accordance with the provisions of R.C. 519.17, plans submitted with an application for a zoning certificate must fully comply with the applicable zoning regulations in order for a permit to be issued.

It is well established that townships are creatures of statute and have only those powers conferred by the General Assembly or the powers necessarily implied therefrom. *Trustees of New London Twp. v. Miner*, 26 Ohio St. 452, 456 (1875); *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, ¶ 13. R.C. Chapter 519 provides the laws governing the zoning authority of Ohio townships. Specifically, R.C. 519.16 allows boards of township trustees to "provide for a system of zoning certificates," and R.C. 519.17 establishes the framework for the operation of that system:

> [n]o person shall locate, erect, construct, enlarge, or structurally alter any building or structure within the territory included in a zoning resolution without obtaining a zoning certificate, if required under section 519.16 of the Revised Code, and no such zoning certificate shall be issued unless the plans for the proposed building or structure fully comply with the zoning regulations then in effect.

To summarize the provisions of R.C. 519.17, in an area subject to township zoning, any necessary zoning certificate must be obtained before constructing a building, and the certificate will not be issued unless the plans "fully comply" with the applicable zoning regulations.

As previously discussed, it is uncontested that zoning regulations are in derogation of property rights, and that ambiguities in those regulations must be construed in favor of the free use of property. *Univ. Circle, Inc. v. Cleveland*, 56 Ohio St.2d 180, 185, 383 N.E.2d 139 (1978), citing 3 Anderson, American Law of Zoning (2d Ed. 1976), 4, Section 16.02, and *Pepper Pike v. Landskroner*, 53 Ohio App.2d 63, 76, 371 N.E.2d 579 (8th Dist.1977). Zoning regulations are important pieces of township legislation and, where they are clear and lawfully applied in a way that encourages knowledge of the law and the submission of complete and compliant applications, they must be allowed to stand.

First and foremost, the Eighth District Court of Appeals correctly applied R.C. 519.17 to require the Appellant's application materials to be complete and compliant before a zoning certificate could be issued. Furthermore, statutory construction and common sense dictate that, when an applicant submits an application seeking a zoning certificate for multiple buildings, all such buildings contained in the application must fully comply with the applicable zoning regulations. In its most basic sense, the Appellant contends that R.C. 519.17 compels Ohio townships not only to accept, but to approve, incomplete zoning certificate applications.

In all regulatory processes in which permission for a project must be obtained before moving forward, it is axiomatic that the person or entity pursuing the project must commit to its parameters when applying for such permission. Here, the Appellant would rather not commit. If, at the point of applying for a zoning certificate, the Appellant is not required to commit to a fully

compliant plan for all of its buildings and uses, it would retain immeasurable flexibility and freedom to change a design, a phase, or the entirety of the project at some later date. Instead, the application process for a zoning certificate or any kind of permit necessitates a trade-off. The applicant chooses one avenue to the exclusion of other avenues, and the reviewing jurisdiction considers that proposal and, if appropriate, issues a permit. This established give-and-take is foundational to our system of permits and certificates, and it only works when application materials are correct and complete.

The Appellant did not follow its own interpretation of R.C. 519.17 and *Saunders v. Clark County Zoning Department*, 66 Ohio St.2d 259, 421 N.E.2d 152 (1981). If it had, it should have submitted about 202 individual applications to Olmsted Township, one for each proposed building or structure. Without a doubt, that would have made a mockery of the zoning system and completely eliminated the ideals of clarity and efficiency that local governments endeavor to provide to their residents. The application of *Saunders* can easily be harmonized here: *Saunders* does not stand for the proposition that an application seeking approval of multiple buildings and uses must be approved in piecemeal fashion, building by building. The Appellant's submission of a single application for its overall development seems to indicate that both the language and spirit of R.C. 519.17 and *Saunders* were clear to the Appellant at the time it filed its application in this matter.

Second, there are any number of practical implications that would result from such a fundamental shift in Ohio zoning law as the one the Appellant asks this Court to adopt for the first time. As discussed, the ability to zone property detracts from a property owner's right to use their own property for the benefit of a community at large. In order for a local government to balance these interests, and lawfully adopt and enforce zoning restrictions, local governments must be able

to rely on clear guidance and instruction in Ohio law. To allow such a foundational change of those laws, arguably supported by an improper interpretation of a prior decision of this Court, would upend the daily operations of zoning departments across the State of Ohio, and ensure further litigation as a result of muddying the waters of statutory interpretation.

Clarity and finality are key with respect to zoning restrictions. Zoning inspectors are charged with being intimately familiar with their zoning codes. They serve as community liaisons in some respects, and answer questions from property owners and the community at large as to the substance of the zoning restrictions. Zoning inspectors also frequently meet with applicants prior to the submission of a zoning application to review and provide preliminary feedback, to help to ensure a smooth review process. Upon an applicant submitting a zoning application, the zoning inspector will review the plans for compliance with the zoning resolution. If the application and plans do not comply with the resolution, the zoning inspector will often work with the applicant to figure out what must be addressed, and the applicant's path forward. Depending on the particular characteristics at issue, those options often include submitting a plan that does meet the requirements of the zoning regulations or seeking a variance from the provisions that were not met.

At the end of the day, zoning inspectors are charged with upholding and applying the provisions of the zoning resolution. If zoning inspectors are now supposed to issue zoning certificates or permits for projects that do not fully comply with the zoning regulations, other pieces of the zoning process are sure to break down. Direction from zoning departments to applicants to include all necessary dimensions, designs, and other specifics in their zoning request will be toothless if the applicant can just write "as permitted" throughout the application and have their application approved. In many cases, zoning departments require documents such as site plans, as

well as landscaping, lighting, access, and signage plans so that they can be reviewed in order to issue zoning certificates. If the plans are not being held to the full compliance standard, though, it is reasonable to expect that they will fall far short of the accuracy and detail necessary to enforce them in the future. That, in turn, will make them hypothetical at best, and difficult, if not impossible, for zoning departments to require adherence to in the future.

Third, allowing a zoning project to proceed in the piecemeal fashion the Appellant would have this Court institute will have vast ramifications for the application of zoning regulations across Ohio. Such a holding could encourage and reward incomplete applications and plans; lead to increased takings claims over later-denied applications or portions of applications; and, ultimately, effectively nullify zoning regulations.

It is disingenuous for an applicant to omit information from applications on the basis that their plans are not firm or that they do not know what the zoning requirements are. Ohioans are on notice of the laws applicable to them. Lacking actual knowledge of the law is not an excuse for failing to comply with it. *State ex rel. Bd. of Edn. of N. Canton Exempted Village School Dist. v. Holt*, 174 Ohio St. 55, 57, 186 N.E.2d 862 (1962). Certainly, neither is partial compliance with the law a substitute for full compliance.

These tenets apply to zoning laws in the same way that they apply to speed limit laws, for example. Applicants like the Appellant are well-versed in the process of complying with various laws and regulations. In projects they pursue, they may need to familiarize themselves with laws and regulations governing stormwater drainage, sanitary sewer, roadways, and environmental conditions, to name only a few. After evaluating the requirements to which they will be subject, and determining to move forward with next steps in the approval process, they then need to hire experts and draw up plans meeting or exceeding those requirements. If there are applicable

requirements they cannot meet, they follow the process to seek a change of those requirements such as through a variance.

With respect to potential takings claims that could arise if the Appellant's proposition becomes the law of the land, "[i]n Ohio, it is well-established that a property owner's right to an existing zoning classification vests upon the submission of an application for a building or zoning certificate." *Wedgewood Ltd. Partnership I. v. Twp. of Liberty, Ohio*, 456 F.Supp.2d 904, 926 (S.D.Ohio 2020), citing *Gibson v. Oberlin,* 171 Ohio St. 1, 167 N.E.2d 651 (1960). So, for an applicant to avail themselves of certain zoning regulations, it need only submit an application noting "as permitted" for some or even all of the information. If this Court approves of the Appellant's desired interpretation, an applicant, years later, could submit revised information, maybe with some additional detail, and point to the prior application as the event that vested it with an interest in pursuing that project on that property. If the zoning inspector responded with anything other than an unmitigated approval, the applicant might choose to embroil the township in years of takings litigation. Even if the initial application contained some degree of detail, and the developer moved forward with the pieces of which it was certain, the property would become like a jigsaw puzzle. With each piece that was built or developed, the options would narrow exponentially for the open areas that remained. Despite having created their predicament, the applicant may then make an argument that no beneficial use of the property exists other than what they want to do or build, whether or not it complies with the zoning regulations. This is not the way zoning should operate, and certainly not the way the General Assembly intended.

Next, consider the following scenario: an applicant submits project plans that only partly comply with the applicable zoning requirements. Then, a zoning certificate is issued with respect to the compliant parts of the project, and the applicant starts the project based on the plans that

were approved. What happens when the project is 75% complete, but it is discovered that the remaining 25% cannot be completed in the way that was initially proposed? Will the board of zoning appeals then be stripped of its quasi-judicial reviewing authority and required to issue a variance, whether or not it meets the applicable variance standard? What weight should be given to the fact that the applicant created its own quandary? If plans need not fully comply with the provisions of the zoning resolution, what amount of violation must townships tolerate? 5%? 49%? Why have a zoning resolution if a property owner need only partly comply with it?

Projects like new residential developments have many "moving parts" from a zoning perspective, even where they are developed in a standard zoning district rather than a planned district. The failure to correctly identify and incorporate a required building setback from the beginning of the project could easily result in some lots that are too small, and which fail to meet zoning requirements governing minimum lot width and maximum lot coverage, for example. The issuance of piecemeal zoning certificates based on incomplete information can and likely will create widespread zoning violations across multiple lots in the development from the very start of the project. If those violations are uncorrected, they will be encumbrances on the property for future owners to try to understand and solve. If the violations are not discovered and resolved, when those owners seek to sell the property, they may find out the hard way that institutional mortgage lenders will not lend on property that is non-compliant with zoning regulations because it could hinder the lender's investment in the property. Scaling up the provisions of R.C. 519.17 at issue, an applicant's plan for an entire neighborhood community must fully comply in order for a certificate to be issued, and in order to avoid future zoning violations. It is *Amicus Curiae* OTA's perspective that zoning laws should be interpreted in a way that they can be clearly and consistently applied.

For all of these reasons, *Amicus Curiae* OTA asks this Court to uphold the Eighth District Court of Appeals' determination and clarify the application of *Saunders* to require zoning applicants to fully comply with the provisions of the zoning resolution in order to obtain permission in the form of a zoning certificate.

IV. CONCLUSION

For the reasons discussed above, *Amicus Curiae* OTA respectfully requests this Court to uphold the decision of the Eighth District Court of Appeals in this matter in its determination that denial of the Appellant's zoning application was appropriate because it failed to meet the necessary requirements of the OTZR.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of *Amicus Curiae* Ohio Township Association is being e-mailed to all parties entitled to service under Rule 5 of the Ohio Rules of Civil Procedure on this 17th day of March, 2022.

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