IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

MAHONING TOWNSHIP,	:	
Original Appellant	:	
	:	
vs.	:	**No. 21-2904**
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ZONING HEARING BOARD OF MAHONING TOWNSHIP,	:	
Appellee	:	
	:	
vs.	:	
	:	
MAHONING DRIVE-IN THEATER, LLC	:	
Intervenor/Appellant	:	

Thomas Nanovic, Esquire — Counsel for Original Appellant
Matthew G. Schnell, Esquire — Counsel for Appellee
Zachary J. Cohen, Esquire — Counsel for Intervenor/Appellant

MEMORANDUM OPINION

Matika, J. - March 23, 2023

This Opinion is provided to the Commonwealth Court in response to the Appeal filed on January 27, 2023 by the Intervenor/ Appellant, the Mahoning Drive-In Theater, LLC (hereinafter "the Drive-In Theater"). For the reasons stated herein, this Court requests the Commonwealth Court to deny the Appeal and allow the matter to be remanded back to the Mahoning Township Zoning Hearing Board in accordance with our January 27, 2023 Order.

FACTUAL AND PROCEDURAL BACKGROUND

On or about June 27, 2021, Carl E. Faust, Zoning Officer for Mahoning Township, (hereinafter "the Township") issued an

Enforcement Notice (Notice of Violation of Zoning Ordinance) to Joseph Farrugio a/k/a Joseph Farruggio, (hereinafter "Farrugio"), owner of property located at 229 Seneca Road, Lehighton, Pennsylvania. This Notice of Enforcement alleged that the use of the above addressed property "as a campground" violated §116-40 (permitted uses within the planned commercial [C-1] Zoning District of the Township) of the Township's Zoning Ordinance.

As a result of receiving that notice, Farrugio and the Drive-In Theater[1] filed an Application for Hearing for a proceeding before the Mahoning Township Zoning Hearing Board (hereinafter "ZHB"). In that application, Farrugio and the Drive-In Theater requested a hearing for two reasons[2]: 1) to seek a variance from the requirements of §116-40 of the Zoning Ordinance; and 2)for a ruling on the decision of the Zoning Officer as set forth in the June 27, 2021 Notice of Enforcement.

Thereafter, on October 5, 2021, the ZHB convened a hearing on that application. By a majority vote of the ZHB, they found that the Township did not establish that Farrugio and the Drive-In Theater were operating a campground. Further, the ZHB found that

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[1] According to this application, the Drive-In Theater leases the property from Farrugio.

[2] As the basis for that Application, Farrugio and the Drive-In Theater, in paragraph 9 therein, also sought "a favorable interpretation that the alleged violation is permitted as a customary accessory use per sec. 116-400."

the request for the variance was deemed moot by that decision.[3] The written decision was rendered on October 19, 2021.

On December 17, 2021, the Township filed an appeal from the decision of the ZHB. In that appeal, it claimed that the ZHB abused its discretion and committed an error of law by finding that the Township failed to establish a violation of the Zoning Ordinance and further that the premises were not being used as a campground. On January 12, 2022, the Drive-In Theater intervened in the underlying appeal.[4]

On January 20, 2022, argument was held on that appeal. By Order of Court dated December 30, 2022, this Court granted the Township's appeal. In doing so, this Court found that the ZHB abused its discretion and committed an error or law in claiming that the Township did not establish that the property in question was being used as a campground. In that December 30, 2022 Order, this Court not only found that this "other" use was in fact a campground, this Court also ruled that it cannot be considered an "accessory use" to that of a Drive-In Theater. In light of this ruling and the issue deemed moot by the Zoning Hearing Board, i.e., a variance request, this Court remanded this matter back to the

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[3] Also not addressed in this decision was the request of Farrugio and the Drive-In Theater for a favorable interpretation that this use was customary to that of a drive-in theater. In light of the majority decision, that too should have been deemed moot, however in light of our decision, we addressed it.

[4] It should be noted that Farrugio did not intervene in this case.

ZHB for that latter purpose.

It was then on January 27, 2023, that the Drive-In Theater filed this instant appeal to Commonwealth Court. Pursuant to Pa.R.A.P. 1925(b) this Court directed the Drive-In Theater to file a Concise Statement of Errors Complained of on Appeal. On February 21, 2023, the Drive-In Theater filed that statement. In there, it claimed eleven perceived errors as follows:

1. The Honorable Trial Court erred by failing to give the Zoning Hearing Board's interpretation of its own ordinance the great weight and deference to which that interpretation was entitled;
2. The Honorable Trial Court erred by holding the Zoning Hearing Board abused its discretion;
3. The Honorable Trial Court erred by rejecting the Zoning Hearing Board's decision even though that decision was supported by substantial evidence;
4. The Township failed to meet its burden of proving by a preponderance of the evidence that the overnight movie/weekend pass program constitutes a campground;
5. The Honorable Trial Court impermissibly failed to strictly construe the ordinance;
6. The Honorable Trial Court impermissibly failed to construe the ordinance in a manner designed to allow the landowner the broadest possible use and enjoyment of its land;

7. The Honorable Court incorrectly rejected the overnight movie/weekend pass program as a permissible accessory use to the operation of a drive-in theater;
8. The Honorable Trial Court erred by failing to interpret the ordinance expansively in light of the ordinance's failure to define a "campground";
9. The Honorable Trial Court incorrectly applied the definition of "Theater, Outdoor Drive-In" in Section 116-8 of the ordinance, which defines a drive-in as "[a]n open lot or part thereof, with its appurtenant facilities, devoted primarily to the showing of moving pictures or theatrical productions, on a paid-admission basis, to patrons seated in automobiles or on outdoor seats, not to include an adult mini motion-picture theater";
10. The Honorable Trial Court erred by ruling the Intervenor is operating a campground rather than a drive-in theater as defined in Section 116-8 of the ordinance; and
11. The Honorable Trial Court erred by not upholding the findings of the Zoning Hearing Board in light of the mandate in Section 116-5 of the ordinance that the Board has the authority to permit a use that is neither specifically permitted nor denied in the ordinance.

While this Court believes it has addressed these issues in the footnote to our December 30, 2022 Order, we will seek to elaborate

and further explain seriatim.

1. DEFERENCE TO ZHB'S INTERPRETATION

A zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference "unless shown to be clearly erroneous." *McIntyre v. Bd of Supervisors on Shohola Twp.*, 614 A.2d 335, 337 (Pa. Cmwlth. Ct. 1992). When a term in the ordinance is not defined, it must be construed in accordance with its common and approved usage. 1 Pa.C.S. §103 (Statutory Construction Act); see also *Adams Outdoor Adver. L.P. v. Zoning Hearing Board of Smithfield Township*, 909 A.2d 469 (Pa. Cmwlth. Ct. 2006). To determine and provide a natural construction of language and phrases, there is sometimes the need to consult dictionaries. *Kohl v. Sewickley Twp Zoning Hearing Bd*, 108 A.3d 961, 968 (Pa. Cmwlth. Ct. 2015) (citations omitted)

In this instance, the Township's Zoning Hearing Officer testified that the Mahoning Township Zoning ordinance does not have a definition for campground, thus he obtained a definition for campground from Webster's 9th New Collegiate Dictionary. Unfortunately, in the Notes of Testimony from the proceeding before the ZHB, the Zoning Officer does not recite either the definition of camp nor campground nor is the exhibit, referenced as "T-4," a copy of those definitions, attached to the certified record[5] of

[5] "T-4" is marked as a picture taken of the premises.

the proceedings before the ZHB. We have, however, identified these terms from Merriam - Webster.com. 1) Campground - the area or place (such as a field or grove) used for a camp; and 2) Camp - A place usually away from urban areas where tents or simple buildings . . . are erected for shelter or for temporary residence.

Assuming these or similar definitions were available to the ZHB, its interpretation of the exact nature of the use of the property beyond that of a Drive-In Theater that it was not camping, is clearly erroneous. Even the Drive-In Theater's own witness, Virgil Cardamone, acknowledges in some respects what patrons are doing is "camping[6]," perhaps just not in the "traditional" sense. Whether it is traditional camping or non-traditional camping, it meets the definition proffered by the Township. To interpret these activities any other way is incorrect.

2. NOT AN ABUSE OF DISCRETION

The Drive-In Theater next argues that the Court erred by finding that the ZHB abused its discretion in finding this activity not to be a campground and thus not a violation of the zoning ordinance.

An abuse of discretion will be found where a Zoning Hearing Board's findings are not supported by substantive evidence in the record. *Kightlinger v. Bradford Township Zoning Hearing Board*, 872

[6] Cardamone referred again to the use being that of a "Campground" when he said "we do a sweep of the campground . . ." (notes of testimony, ZHB meeting 10/5/21, pg. 50).

A.2d 234, 237 n.3 (Pa. Cmwlth. Ct. 2005). Substantial evidence is that evidence in which a reasonable person might accept as supporting a conclusion. *Doris Terry Revocable Living Trust v. Zoning Hearing Board of City of Pittsburgh*, 873 A.2d 57, 61 n.11 (Pa. Cmwlth. Ct. 2005). While questions of credibility and weight of the evidence are within the province of the Zoning Hearing Board (*see Broussard v. Zoning Board of Adjustment of City of Pittsburgh*, 831 A.2d 764, 772 (Pa. Cmwlth. Ct. 2003) which is free to accept or reject any of that testimony, in the case *sub judice*, credibility does not appear to be at issue as it seems that the parties agree as to the nature of the use of the premises beyond that of a Drive-In Theater. They presumably just do not agree on what to call that use. Thus, armed with consistent testimony and evidence of the pitching of tents on the Drive-In Theater property as the "overnight pass program," and armed with the only definition available to it, the ZHB abused its discretion in finding that a campground was not being operated in violation of the zoning ordinance. There is uncontroverted evidence in the record to support that campground use.

3. ZHB SUPPORTED BY SUBSTANTIAL EVIDENCE

As this Court noted above, there was substantial evidence in the record not to affirm the ZHB's decision but to show that a campground was not being operated.

4. THE TOWNSHIP FAILED TO MEET IT'S BURDEN

The burden of proof in an action seeking to prove a violation of the zoning ordinance rests with the municipality, *Hartner v. Zoning Hearing Board of Upper St. Clair Township*, 840 A.2d 1069 (Pa. Cmwlth. Ct. 2004) and that proof must be by a preponderance of the evidence.

The evidence presented by the Township included that the present use, a use that predates the enactment of the Zoning Ordinance is that of a Drive-In Theater. The Township also presented evidence, uncontroverted and in fact confirmed by the Drive-In Theater, that patrons of the Drive-In could for an extra price, purchase overnight passes to pitch tents to stay on the premises either one, two or three nights. The quantitative nature and presence of all of these overnight patrons clearly constitutes a campground, thus the Township has proven by a preponderance of that evidence that a violation is occurring with respect to this additional use of the Drive-In Theater property.

5. STRICT CONSTRUCTION OF THE ORDINANCE

Next, the Drive-In Theater claims that the Court "impermissibly failed to strictly construe the ordinance." While this Court is not entirely sure what the Drive-in Theater means by this claim, it will assume it is in the context of an interpretation of the ordinance. If that is in fact the claim, this Court simply would state that the zoning ordinance, for a C-

1 Zoning District, does restrict the use of these lands simply by not allowing a campground to operate simultaneously on the same parcel of land as the Drive-In, however this Court also notes that the ordinance does permit this use elsewhere in the Township. Thus, our strict construal only follows the parameters of the ordinance and is not an impermissible failure as suggested.

6. STRICT CONSTRUAL LIMITS BROADEST USE OF LAND

As we noted above, the subject premises is already used as a Drive-In Theater. Zoning ordinances are written in such a way as to permit or restrict uses in different areas of the municipality in which it applies. "The requirements that Court strictly construe a zoning ordinance does not mean that they must ignore uses that clearly fall outside those that are permitted by the ordinance." *Slice of Life, LLC v. Hamilton Township Zoning Hearing Board*, 207 A.3d 886 (Pa. 2019). On this appeal, this Court was tasked with deciding whether the ZHB erred as a matter of law or abused its discretion in basically finding that a campground is not being operated in violation of the Zoning Ordinance. As an alternative in its Appeal to the ZHB, the Drive-In Theater requested an interpretation that whatever this "other" use is, it is an accessory use to the permitted principal use, that of a Drive-In Theater. While this Court is not closing the door on the Drive-In Theater suggesting an appropriate accessory use "to allow the landowner the broadest possible use and enjoyment of its land," a

campground is not the appropriate one (for the reasons stated below). The restrictions imposed on a campground being an accessory use as that term is defined in the ordinance does not unduly restrict the Drive-In Theater's use of its land.

7. REJECTION OF OVERNIGHT MOVIE/WEEKEND PASS PROGRAM AS ACCESSORY USE

The Drive-In Theater next argues that the Court erred by rejecting the Weekend Pass Program, otherwise defined by the Court as a campground, as an accessory use to the Drive-In Theater.

Under §116-8, Accessory Use is defined as "a use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building."

Without rehashing our explanation as to why the ZHB impliedly found a campground to be an accessory use to a Drive-In Theater, this Court would simply point the Appellate Court to Section IV Subsection B of the footnote to its December 30, 2022 order, attached hereto for convenience.

8. FAILED TO INTERPRET THE ORDINANCE "EXPANSIVELY"

As this Court previously stated, in citing to *Slice of Life, supra*, strict construal does not require a court to say "well, it does not say it is prohibited, so we should just permit it", especially in a case where the subject property is already being utilized, as in this case, as a Drive-In Theater. This Court is unaware of any cases that would suggest that an ordinance, which

allows one principal use on a property, albeit a non-conforming one[7], to expand that use to include yet another use not otherwise permitted in the particular zoning district[8] in question. Notwithstanding whether what the Drive-In Theater's pitching of tents is called i.e., campground, weekend pass program or something else, it is not a permitted use nor as we said earlier an accessory use. This Court refused to expand the Ordinance's intent to include this additional use as permitted in any fashion.

9. INCORRECT APPLICATION OF "THEATER - OUTDOOR DRIVE-IN"

The Drive-In Theater next suggests that the Court erred in applying the definition of "Theater - Outdoor Drive-In" during its decision of the underlying land use appeal. Once again, this Court is unsure exactly what the Drive-In Theater means by this and how it incorrectly applied the definition of "Theater - Outdoor Drive-In" to the facts of this case. This definition as set forth in §116-8 of the Ordinance reads, "An open lot or part thereof, with its appurtenant facilities, devoted primarily to the showing of moving pictures or theatrical productions, on a paid-admission basis, to patrons seated in automobiles or on outdoor seats, not to include an adult mini motion-picture theater."

This Court did not see anywhere where any party, especially

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[7] The Mahoning Township Zoning Ordinance was adopted in 2000. The use on this property of a Drive-In Theater occurred as far back as 1947, thus it is non-conforming as defined in §116-8.

[8] This parcel is in a "C-1 Planned Commercial District."

the Drive-In Theater, claimed that a "Theater - Outdoor Drive-In" was not what they have been operating on that property since 1947. In fact, it was admitted and acknowledged by the Appellant many times. For it to now argue that the Court incorrectly applied this definition to the facts to which they admitted is not only meritless but offensive.

10. OPERATION OF A CAMPGROUND AND NOT A DRIVE-IN THEATER

This assertion by the Drive-In Theater is a misinterpretation and misunderstanding of our ruling of the Township's Appeal. Under Section IV Subsection A, in the last paragraph we wrote, "we find that Mahoning Drive-In is operating a campground and therefore, the Appeal is SUSTAINED." For clarification, we found a campground to be the second use, or the use which prompted the Notice of Violation, on a property which already had a principal use, a drive-in theater. Nowhere did we say, imply or suggest that a drive-in theater was not being operated on the property.

11. ERROR TO NOT UPHOLD THE ZHB DECISION

Lastly, the Drive-In Theater alleges that the Court erred in not giving deference to and upholding the decision of the ZHB in light of §116-5 which reads as follows:

> "Whenever, in any district established under this chapter, a use is neither specifically permitted or denied and any application is made by a property owner to the Zoning Officer for such use, the Zoning Officer shall refer the application to the Zoning Hearing Board which shall have the authority to permit the use or deny the use. The use may be permitted if it is similar to

and compatible with permitted uses in the district and in no way is in conflict with the general purpose and intent of this chapter."

This Court first notes that the current situation is not one where the use suggested by the Drive-in Theater is "similar to or compatible with permitted uses in the District."[9] Not only is a campground (as the Court has found this use to be defined as) not a permitted use, the ZHB did not define this activity, nor make any comparison to the permitted uses in a C-1 zoning district.

Additionally, as this Court stated at the onset of this opinion, a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference "unless shown to be clearly erroneous." *McIntyre, supra.* As this Court also stated earlier, we found that the ZHB abused its discretion and its decision was clearly erroneous despite the deference given to its decision in accordance with §116-05.

CONCLUSION

For the foregoing reasons, this Court asks the Commonwealth Court to affirm our ruling.

BY THE COURT:

Joseph J. Matika, J.

[9] Article VIII, §116-40 sets for the "permitted uses" in the Zoning District in question.