IN THE LICKING COUNTY COMMON PLEAS COURT

Leatrice Guttentag,	:	
Appellant,	:	
-vs-	:	Case No. 2021 CV 189
City of Pataskala,	:	
Appellee.	:	Judge W. David Branstool

DECISION AND ORDER REVERSING THE CITY OF PATASKALA BOARD OF ZONING APPEALS' DECISION AND REMANDING FOR FURTHER ACTION

This matter is before the Court on appeal pursuant to R.C. 2506.01, *et seq.*, from a decision of the City of Pataskala Board of Zoning Appeals denying the Appellant Leatrice Guttentag's appeal of the City Planning Director's decision that recreational, outdoor, volleyball games are not a "use" subject to the City of Pataskala Zoning Code. For the reasons that follow, Guttentag's appeal is sustained, the Board's decision that volleyball games are not a "use" under the Zoning Code is reversed and the matter is remanded with orders to investigate the alleged violations of the Zoning Code and to enforce the Zoning Code regulations.

I. Background

Appellant Leatrice Guttentag owns approximately 5 acres of land at the end of Charles Road SW in Pataskala, Ohio. Charles Road is a residential street. In May 2019, Intra-National Home Care LLC ("INHC") purchased approximately 22.5 acres of land abutting Guttentag's property. INHC's property is zoned General Business (GB).

Starting in May 2020, 15-25 men began gathering at INHC's property to play volleyball games. A volleyball court was constructed on the property by clearing out the grass and crops, pounding two 6x6 posts into the ground, and attaching a net. The

games occurred approximately five days a week and would last from 5:30 PM to 9:00 PM, or until it got dark. During the volleyball games, loud music and other loud noises emanated from the property. Also, 10-20 vehicles would drive across the field and park on the property during the games.

Initially, Guttentag and other neighbors phoned the Pataskala Police to complain about the noise coming from the games. The police stated that the noise and parking issues were zoning matters, not enforcement matters. After this, on September 18, 2020, Guttentag filed a zoning complaint claiming the property was in violation of the City of Pataskala Zoning Code, specifically Section 1287.05 (noise exceeding 60 dBA) and Section 1249.05(E) (parking and loading requirements for GB District). The complaint requested that the Pataskala Zoning Inspector investigate and take action as provided by the Zoning Code.

The Pataskala City Planning Director, Scott Fulton, responded to Guttentag's complaint with a letter dated September 25, 2020. Fulton concluded that "this is not a zoning matter" because "A pick-up game of volleyball does not constitute a 'use' of the property under the Zoning Code. To put it another way, the Zoning Code does not allow or prevent a volleyball game from taking place on any parcel." Guttentag filed an appeal of Fulton's decision to the City of Pataskala Board of Zoning Appeals. The Board held a hearing on December 8, 2020. INHC was sent notice of the hearing and failed to appear. Those proceedings were stayed. Another hearing was commenced on January 12, 2021, at which the Board affirmed Fulton's decision that the volleyball games were not a "use" of the property and the Zoning Code regulations did not apply.

On March 5, 2021, Guttentag filed this administrative appeal. She argues that the Board's decision was arbitrary, capricious, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence because the volleyball games qualify as a "use" under the Zoning Code, making them subject to the Zoning Code regulations. The Board filed its brief on June 18, 2021, arguing both that the issue is moot because the volleyball games stopped at the end of summer 2020 and that the volleyball games do not qualify as a "use" and are not regulated by the Zoning Code. Guttentag filed a reply brief on July 9, 2021.

II. Standard of Review

This Court has appellate jurisdiction over appeals of final decisions by Ohio administrative agencies, including local zoning boards pursuant to R.C. 2506.01(A). By statute, this review considers whether the "decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. "The presence of any one of [these] six grounds ... by itself [justifies] a court of common pleas' reversal of an administrative order." *Shelly Materials, Inc. v. City of Streetsboro Planning & Zoning Comm'n*, 2019-Ohio-4499, ¶ 12 (2019).

On the other hand, a court may not "blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise." *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St. 2d 202, 207 (1979). Courts generally defer to public agencies, and for good reason. Agencies work in highly specialized fields, and we assume their officers act in good faith and perform their duties properly. So courts will not disturb a

decision unless the record indicates it fails to find support by the preponderance of substantial evidence, or if it is arbitrary, capricious, or contrary to law.

III. Analysis

A. The mootness doctrine does not apply.

"A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844, ¶¶ 10-11. However when "the challenged action is too short in its duration to be fully litigated before its cessation * * * , and * * * there is a reasonable expectation that the same complaining party will be subject to the same action again" the controversy is not moot. *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 2000-Ohio-142.

In this case, the issues remain "live" because the games restarted in the summer of 2021, per Guttentag's affidavit. The games are also too short in duration to be fully litigated before they stop once summer ends. Further, there is a reasonable expectation that Guttentag will be subject to the same action again because INHC has not used its property for any other purpose than hosting the outdoor volleyball games, so it is reasonable to believe that once summer begins again, the games will begin once more. The matter is not moot.

B. The volleyball games are a "use" subject to the Zoning Code.

Guttentag argues that the Board's decision that the volleyball games on INHC's property are not a "use" and cannot be regulated by the Zoning Code is arbitrary, capricious, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence. She argues that the volleyball games clearly fit into the Zoning Code's definition of a "use" and are therefore subject to the Zoning Code's

regulations. The City argues that the Board's decision is reasonable and supported by the Zoning Code because a pick-up game of volleyball is not a use of the property.

Section 1203.03 of the Zoning Code defines "use" as "[t]he specific purposes of which land or a building is designated, arranged, intended, or for which it is or may be occupied or maintained." There is no other language or context within the Zoning Code clearly indicating limitations to this expansive definition of a "use."

In this case, the outdoor volleyball games neatly fit into the definition of a "use." For the past two summers, INHC's property has been occupied approximately 5 days a week from 5:30 PM to 9:00 PM for the specific purpose of playing outdoor volleyball games. Further, the land is being maintained for the specific purpose of playing outdoor volleyball games because INHC has erected two outdoor volleyball courts on the property. There is no evidence that the land is being used or developed for any other reason than for these volleyball games. Because the property is being occupied and maintained for the specific purpose of these volleyball games, under the Zoning Code, the volleyball games qualify as a "use" of the property.

The Board provided three arguments for why the volleyball games do not qualify as a "use" under the Zoning Code. None of these arguments are persuasive because they are contradictory to the text of the Zoning Code and would lead to absurd results.

First, the Board analyzed the permitted uses and conditionally permitted uses in the GB District and compared those uses to the volleyball games. The Board reasoned that because a recreational pickup game of volleyball is neither listed as a permitted use, nor as a conditionally permitted use in the GB District, it cannot be a "use" of the property. This constricted method of determining what is and is not a "use" is not

supported by the Zoning Code and would lead to absurd results rendering the Zoning Code regulations useless against any landowner using their land in a way not specifically permitted for the district their property is zoned.

The Zoning Code provides an expansive definition of "use." The Code does not limit this definition to those uses which are permitted or conditionally permitted in any specific district. Further, the Zoning Code provides definitions for "conditional use" and "permitted use." Conditional use is defined as "[a]n uncommon or infrequent use permitted within a zoning district other than a principally permitted use, subject to compliance with certain standards or explicit conditions, following guidelines established by the Commission." And permitted use is defined as, "[a]ny use allowed in a zoning district and subject to the restrictions applicable to that zoning district." The fact that "conditional use," "permitted use," and "use" are all separately defined indicates that the word "use" was meant to contemplate uses beyond just those that are listed as conditional uses and permitted uses in a specific zoning district.

Other sections of the Zoning Code also support this construction. Section 1221.02 provides, in pertinent part, that "[u]ses not specifically defined or stated which cannot reasonably be interpreted by the Zoning Inspector or Board of Zoning Appeals as permitted or conditionally permitted in a district shall be referred to the Planning and Zoning commission for determination, pursuant to Section 1213.01 (Similar Uses). Thus, the word "use" is used in the Zoning Code in a manner that contemplates activities beyond just those uses listed as permitted or conditionally permitted uses.

Further, the Board's logic necessarily implies that whether an activity qualifies as a "use" under the Zoning Code is dependent on what district the subject property is

zoned. In other words, a specific activity may qualify as a use in one district but not in another. For example, agriculture is a commonly listed permitted or conditionally permitted use in other Pataskala zoning districts, such as the Rural Residential District (RR). But agriculture is not a permitted or conditionally permitted use in the GB District. Following the Board's logic, if INHC began farming its GB zoned property, it would not be a use because agriculture is not listed as a permitted or conditionally permitted use in the GB District. However, if a landowner with property zoned RR began farming, it would be a use because agriculture is listed as a permitted use in the RR District. Nothing in the Code's definition of "use" suggests that the word has variable meanings based on where an activity is taking place and that location's zoning district.

Finally, applying the Board's reasoning to a more extreme example demonstrates the absurd results that come from the Board's cramped interpretation of the word "use." For instance, imagine if instead of constructing dirt volleyball courts, INHC set up a makeshift motocross course by clearing the grass and crops on the property to create a dirt course. INHC then began letting its employees race motorcycles on the dirt course. Because motocross racing is not listed as a permitted or conditionally permitted use, following the Board's logic, it is not a "use." INHC constructing a motocross course and holding motocross races on its GB zoned property would not be a zoning matter, and the Zoning Code would not apply and could not be used to prohibit such activity. As such, the City Planning Director could wipe his hands clean of the matter and direct complaining neighbors to the police. Of course, that would be a ridiculous result. The legislature certainly intended for the Zoning Code to apply to such a use of the property, even though it is not listed as a permitted or conditionally permitted use on the property.

Similarly, even though a recreational game of volleyball is not listed as a permitted or conditionally permitted use in the GB District, the legislature's broad definition of "use" certainly includes the volleyball games.

In sum, just because an activity does not fall into one of the categories of permitted or conditionally permitted uses for a specific district does not mean it is not a "use" subject to the Zoning Code. Rather, it simply means that specific use of the property is not a use permitted in that zoning district. And pursuant to Section 1221.02 the use shall be referred to the Planning and Zoning Commission to determine if the use is a similar use, or if it is prohibited in that zoning district.

The Board also argues that because a zoning permit is not required and/or issued for a game of volleyball on an unimproved parcel, it is not a use. The Board fails to explain why an activity must require a zoning permit or have a zoning permit that may be issued for it to be considered a "use." Maybe because such an interpretation cannot be explained by the Zoning Code. To the contrary, the Zoning Code's definition of "use" does not include a requirement that a permit be required or issued for an activity to be a "use." If the legislature understood the definition of "use" to be so limited it could have easily included language such as, "the specific purpose for which land is occupied or maintained and that requires a zoning permit." But as it stands, the legislature did not include such limiting language to the definition of "use." Therefore, the answer to the question of whether an activity requires a permit should not be considered as a reason for deciding that an activity is not a "use" subject to the Zoning Code.

Even assuming arguendo that the answer to that question was relevant, the Board's decision would still be unreasonable because the Zoning Code actually does

issue permits for activities such as outdoor volleyball games. Section 1298 of the Zoning Code provides zoning regulations for temporary activities and "allows short term and minor deviations from the requirements of the Zoning Code for uses which are truly temporary in nature." This section details what temporary activities are allowed for certain zoning districts and provides the following:

> 1298.03B. Commercial and Manufacturing (PRO, LB, DB, GB, M-1, and PM) zones. The regulations for temporary uses in the commercial and manufacturing zones are as follows:
>
> * * *
>
> 7. Seasonal outdoor activities: Seasonal outdoor activities are allowed for up to three months, no more than three times per calendar year. Seasonal outdoor activity permits shall only be allowed for public, nonprofit, and religious organizations that are educational, charitable, cultural or recreational in their functions. A seasonal outdoor activity permit may be obtained and will be permitted to occur at multiple locations, so long as all locations are indicated on the submitted application.

The Zoning Code does not define the phrase "seasonal outdoor activities." Therefore, pursuant to Section 1203.02, the words "seasonal outdoor activities" "carry their normal dictionary meanings." Merriam-Webster defines "seasonal" as "of, relating to, or varying in occurrence according to the season." It defines "outdoors" as "outside of a building." And it defines "activity" as "something that is done for pleasure and that usually involves a group of people."

The summertime volleyball games fit into the common dictionary definition of the phrase "seasonal outdoor activities." The games vary in occurrence based on the season, they are played outside of a building, and they are something that is done for pleasure and usually involve a group of people. Thus, contrary to the Board's decision, the Zoning Code does issue permits under Section 1298.02 for seasonal outdoor activities, such as outdoor, summertime volleyball games played by a group of men on

property zoned GB. Therefore, even following the Board's flawed logic, the volleyball games are a "use" subject to the Zoning Code.

The Board's final argument for why the volleyball games are not a "use" is that "[a] recreational game of volleyball on an unimproved parcel zoned General Business cannot be characterized as the purpose for which the land is designated." The Board goes on to state that "[t]he specific purpose for which the Property is designated, arranged, intended, or for which it is or may be occupied or maintained, cannot be affected by volleyball."

The Board's argument seems to imply that how property is designated, arranged, intended, or for which it is occupied or maintained is dependent on the purpose of the district it is zoned. But this argument is not supported by the Zoning Code. The definition of "use" does not require that the specific purpose for which the Property is occupied or maintained be in conformance with the purpose of the zoning district the property is located in.

Further, using this reasoning in a different but comparable situation, once again reveals the absurd results of the Board's logic. For example, imagine a landowner who owns property zoned Agricultural (AG). Instead of living and farming on the land, the landowner builds a medical clinic on the property. Medical clinics are not permitted or conditionally permitted uses in the AG District. Further, Section 1225.01 of the Zoning Code states that the purpose of the AG District is "to preserve and protect the decreasing amount of prime agricultural land, preserve and protect open space, wildlife habitat, forestry, water resources and rural lifestyle." Following, the Board's logic, the medical clinic would not be a "use" subject to the zoning code because the property is

zoned agricultural and was not designated, arranged, or intended to be used for medical clinic. Under this reasoning, the Zoning Code and its regulations would be useless against the landowner using its AG zoned property for a medical clinic.

Instead, the reasonable interpretation of the "use" definition, one that does not lead to absurd results, asks what a landowner is actually doing with his property and for what specific purpose the landowner occupies or maintains his property. This is so because landowners do not always heed the zoning regulations and may use their property in ways that do not conform with the purpose of the zoning district their property is in.

Applying this construction of the "use" definition to the example above, the medical clinic would be considered a "use" subject to the Zoning Code because it is the specific purpose for which the landowner has arranged, designated, intended, occupied and maintained his property. Because the medical clinic would be a "use," the Zoning Inspector could enforce the Zoning Code regulations and stop the landowner from using his land in a way not permitted in the AG district.

Similarly, in this case, the volleyball games are a "use" subject to the Zoning Code because INHC's property is being occupied and maintained for the specific purpose of playing volleyball games. And while it is true that INHC's land is zoned GB, which stated purpose is to "encourage the establishment of areas for general business uses which meet the needs of a regional market area" that is irrelevant to how INHC is actually using its land.

The volleyball games are a "use" subject to the Zoning Code regulations. The games squarely fit into the Zoning Code's broad definition of "use." The Board's

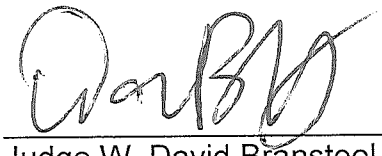
arguments for why the games are not a "use" go against the clear text of the Zoning Code and lead to absurd results that would render the Zoning Code useless in any situation where a landowner is using their property in nonconformance with the zoning district's stated purposes and permitted uses. Accordingly, the Board's decision that the volleyball games are not a "use" and that the Zoning Code regulations do not apply to them is arbitrary, capricious, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence.

The volleyball games are a "use" under the Zoning Code. The Zoning Code regulations apply to the volleyball games. Accordingly, the Board's decision that the volleyball games are not a "use" is REVERSED.

The cause is REMANDED to the Board with instructions to order the Zoning Inspector to investigate whether INHC using its land to play volleyball games violates the Zoning Code regulations for GB zoned property and to enforce the Zoning Code if violations are discovered.

It is so ordered.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.



Judge W. David Branstool

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