[Cite as *James v. Austintown Twp. Zoning Appeals Bd.*, 2015-Ohio-2330.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

J. DALE JAMES, et al. PLAINTIFFS-APPELLANTS VS. AUSTINTOWN TOWNSHIP ZONING APPEALS BOARD, DEFENDANT-APPELLEE	)	CASE NO. 13 MA 179 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 12 CV 2570

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiffs-Appellants:

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Youngstown, Ohio 44514

For Defendant-Appellee:

Atty. Donald A. Duda
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 10, 2015

[Cite as *James v. Austintown Twp. Zoning Appeals Bd.*, 2015-Ohio-2330.]
WAITE, J.

{¶1} Appellants J. Dale James and Ruth E. Roth appeal an October 29, 2013 Mahoning County Common Pleas Court judgment affirming this tear-down order by the Austintown Township Zoning Board Appeals' ("Austintown"). Appellants contend that the canvas tent ordered to be removed is not attached to their detached garage. As the two structures are separate and distinct, Appellants argue that it is improper to aggregate their square footage when determining whether they comply with Article VI, §604 of the Austintown Zoning Ordinance ("Section 604"). Even so, Appellants argue that the tent was erected before Section 604 was amended to preclude such structures.

{¶2} Austintown responds by arguing that the tent is affixed to the garage via the downspout, thus the structures are not separate and distinct. Austintown contends that as the tent did not lawfully exist before Section 604 was amended, the tent cannot be exempt from the structures of the amendment. Austintown also argues that the trial court was correct when it found that a preponderance of reliable, probative, and substantial evidence supports the decision to order the tent's removal.

{¶3} Contrary to Appellants' arguments, the record shows Appellants' tent is affixed to the detached garage. As the combined square footage of both structures exceeds the maximum allotment, it violates both the original and amended version of Section 604. The decision of the trial court is affirmed.

Factual and Procedural History

{¶4} In 2001, Appellants sought a variance of the zoning laws for purposes of expanding their detached garage beyond the size permitted by Section 604.

Austintown granted a modified version of the request permitting Appellants to expand the garage, but not to the extent they requested. After receiving the variance, Appellants expanded the garage itself to the permitted size, but added an additional 12-foot porch extension that was not included within the variance. When notified of this extension, a zoning inspector for Austintown contacted Appellants about the violation and instructed them to remove the porch.

{¶5} Appellants appealed the removal order to the Austintown Appeals Board which affirmed the Austintown Zoning Board's decision. Appellants then removed the porch but left the cement slab on which it rested in place. Sometime after removing the structure, Appellants constructed a 400-square foot canvas tent on the cement slab where the porch was previously located. Again, the zoning inspector notified Appellants the structure was in violation and ordered them to remove the tent. Instead, Appellants appealed to the Austintown Appeals Board, which again affirmed the Zoning Board's decision. At no time did Appellants request a second variance.

{¶6} Appellants filed an administrative appeal of Austintown's decision to the common pleas court. The common pleas magistrate recommended the decision be affirmed. The trial court overruled Appellants' objections to the magistrate's decision and adopted the magistrate's decision in full. Appellants then filed this timely appeal. The trial court granted a stay of the judgment pending the outcome of this appeal.

First Assignment of Error

PLAINTIFFS SUBMIT THAT THE TENT STRUCTURE ON THE PLAINTIFFS PROPERTY DID NOT CONSTITUTE AN "ATTACHED

ADDITION" WHICH WAS THE SUBJECT OF THE ZONING ADJUDICATION IN 2008 (Appeal Case 2006-09-a).

{¶7} Austintown Township Zoning Ordinance, Article IV, §604 provides:

> No detached garage or other outbuilding (including a portable canvas-garage) shall be placed nearer to a side or rear property line than five (5) feet * * * no detached garage or outbuilding shall exceed a maximum area of six hundred seventy-two (672) square feet. * * * An outbuilding shall be no larger than 240 square feet.

{¶8} Appellants contend that the tent is separate and distinct from the detached garage, thus is not an "attachment." As the structures are not attached and neither structure by itself violates Section 604, Appellants urge that they should not be forced to remove the tent. Appellants emphasize that the tent was constructed on a pre-existing concrete slab which apparently does not violate any zoning ordinance.

{¶9} Austintown disputes Appellants' characterization of the tent as a detached structure and says the tent is clearly an attachment to the garage. Austintown explains that the tent was built onto the same cement foundation as the garage and is affixed to at least the garage's downspout. As the tent is attached to the garage and the aggregate square footage of the entire structure exceeds the maximum allowance, Austintown contends that the addition of the tent puts the structure in violation of Section 604.

{¶10} On review of the record and the exhibits, and contrary to Appellants' arguments, the tent abuts and is attached to the garage and receives both structural

and foundational support from the garage in order to stand. Photographs admitted into evidence clearly illustrate that the tent is affixed to the downspouts of the garage. The photographs also show that the tent's concrete foundation is essentially an extension of the garage's foundation. Based on these facts, we can come to only one conclusion: the tent is attached to the garage. There is no dispute as to the fact that the two structures together exceed the maximum square footage allowed by Section 604. As the structures are attached and exceed the maximum size permitted, the tent was constructed in violation of Section 604. Appellants' first assignment of error is without merit and is overruled.

Second Assignment of Error

> THE CANVAS TENT IN ISSUE WAS ERECTED BY PROPERTY OWNERS AFTER THE 2008 ZONING ADJUDICATION AND *PRIOR TO* THE JANUARY 23, 2012 AMENDMENT TO THE ORDINANCE TO INCLUDE SAME AS A PART THEREOF.

{¶11} Austintown Township Zoning Ordinance, Article IV, §604 provides:

> No detached garage or other outbuilding (including a portable canvas garage) shall be placed nearer to a side or rear property line than five (5) feet * * * no detached garage or outbuilding shall exceed a maximum area of six hundred seventy-two (672) square feet. * * * An outbuilding shall be no larger than 240 square feet.

{¶12} R.C. 519.19 states in relevant part:

> The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with such resolution or amendment * * *.

{¶13} Appellants claim that their tent was constructed prior to the January 23, 2012 amendment to Section 604. Although the amendment specifically addresses tents, Appellants contend that because their tent was erected before the enactment of the amendment, this change is inapplicable to their structure. In the alternative, Appellants posit that R.C. 519.19 provides that structures lawfully in existence at the time of an amendment may be continued. As they contend that their tent did not violate the original version of Section 604, Appellants claim that R.C. 519.19 protects them from the ordered removal.

{¶14} Austintown correctly states that Appellants failed to produce documentation, receipts, or other proof to verify the date of the tent's construction. Without this evidence, Austintown argues that Appellants cannot show that the structure was pre-existing. Regardless, R.C. 519.19 applies only to structures "existing and lawful at the time of enactment." Austintown points out that because of their size restrictions, the tent was not lawfully erected at the time of enactment. Thus, even if R.C. 519.19 applied, Appellants do not meet its requirements.

{¶15} We agree with Austintown. The question of whether the tent was erected before or after the amendment is immaterial, as erection of this tent violated both the original and amended version of Section 604. The original version prohibited detached garages in excess of 672 square feet. Appellants obtained a

variance to build a larger structure, but were not allowed to build to the size they sought. Hence, they admit that they erected this tent. We have determined that the tent is attached to the garage and the combined square footage of both structures as a whole is well in excess of the parameters set out within both Section 604 and the previous variance granted to Appellants.

{¶16} While Section 604 as amended added language specifically addressing portable tents, it has no effect on the removal order. Whether their tent was erected before the specific prohibition or not, it was erected as an oversized addition to their existing garage in violation of either version of the ordinance. As Appellants are in violation of both versions of Section 604, Appellants' argument is without merit and is overruled.

Third Assignment of Error

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ISSUING A DECISION VAGUE AND AMBIGUOUS AS TO THE EVIDENCE RELIED UPON TO AFFIRM SAME AS SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE AND SUBSTANTIVE EVIDENCE.

{¶17} Appellants inartfully contend that the test to be used when evaluating a variance request depends on whether the request involves an area variance or a use variance. Appellants assert that the tent would fall within an area variance, thus the test is whether Section 604 created a practical difficulty with respect to use of their property. To determine whether an ordinance creates a practical difficulty, Appellants

cite to the Ohio Supreme Court's seven factors as laid out in *Duncan v. Middlefield,* 23 Ohio St.3d 83, 491 N.E.2d 692 (1986).

{¶18} Appellants admit that Austintown's decision should be affirmed if it is supported by a preponderance of reliable, probative, and substantial evidence found within the record. However, Appellants urge that, applying the *Duncan* factors to the instant facts, there is no such support for the decision. Thus, Appellants contend that the trial court erred in affirming this decision.

{¶19} Austintown disagrees with Appellants' contention and argues that application of the *Duncan* factors to the instant case weighs in its favor. Austintown also notes that Appellants were fully aware of the structures contained in Section 603 and certainly knew how the variance process works, since they once used the same process successfully. Despite this, Appellants chose to later ignore the ordinance and construct the tent without requesting a variance.

{¶20} In *Duncan,* the Ohio Supreme Court clarified the term "practical difficulties" to mean that those situations where an area zoning requirement unreasonably deprives a property owner of a permitted use of their property. *Id.* at 86. The Court set forth seven factors to use in determining whether an ordinance presents practical difficulties for a homeowner. The non-exclusive factors are as follows: (1) whether there is a beneficial use of the property without a variance; (2) the variance is substantial; (3) the variance will substantially alter the neighborhood's character; (4) the variance will adversely affect the delivery of government services; (5) the property owner purchased the property with knowledge of the restriction; (6) the owner can alleviate the problem without a variance; and, (7) the spirit and intent

behind the restriction are observed and substantial justice is done by granting the variance. *Id.*

{¶21} Appellants' first problem with this argument is that they never sought a variance for the tent. They did obtain an area variance at the time the garage was constructed, but they were only partially successful. Thereafter, they erected the disputed tent without seeking a variance. Hence, we question *Duncan's* application to this matter at all, since *Duncan* and its factors are used to determine whether granting a variance request is appropriate. As Appellants never sought a variance and we have determined that the tent violates the ordinance, the removal order was proper on that basis. However, for the sake of argument, we will briefly address Appellants' argument. We also note preliminarily that there was little evidence presented on certain of these factors, but the evidence of record clearly supports Austintown's decision even if variance had been properly requested.

{¶22} In regard to the first factor, and assuming *Duncan* has application, Appellants can certainly use their property without the canvas structure. This is residential property. In fact, Appellants likely have less beneficial use of the land with the unlawful addition, as an aerial photograph shows that tent takes up almost the entire remaining backyard.

{¶23} As regards the second factor, there is no question that the size of the addition to the structure is substantial. Section 604 allows a detached garage of up to 672 square feet. After the original variance was granted in this case, the garage was expanded to 960 square feet. The construction of the tent added an additional 400 square feet to the already oversized garage. In total, the garage and the

attached tent accounts for 1,360 square feet, more than double the permitted size. For comparison purposes, the record reveals that the size of Appellants' house is 1,612 square feet.

{¶24} Turning to the fifth and sixth factors, which are intertwined, the record does not clearly establish whether Appellants purchased the house with knowledge of the restriction. However, the record does reflect that Appellants requested and were granted a variance for the oversized garage on July 12, 2001. Further, when Appellants added their twelve-foot porch they were informed that this addition beyond the approved variance violated the ordinance. Thus, Appellants were on notice of the restriction before constructing the tent and were also on notice that another variance would be needed to alleviate their problem.

{¶25} Finally, there is evidence as to the seventh factor that Appellants' motive in constructing the tent without a variance appears combative. Appellant J. Dale James stated at the hearing that he constructed the tent without requesting a variance because "I was super mad when I was there, and I was told to take that garage down, which I did; and I said -- well, then I'll just put up some tents." (Appeal Hearing Tr., p. 28.) Thus, we find that allowing the structure would not promote the spirit and intent of the ordinance; rather, allowing the tent to remain would reward Appellants for knowingly violating the ordinance.

{¶26} As no variance was appropriately sought and, regardless, all relevant factors weigh in Austintown's favor, the decision is supported by a preponderance of reliable, probative, and substantial evidence. Accordingly, Appellants' argument is without merit and their third assignment of error is overruled.

Conclusion

{¶27} As the canvas tent is attached both to the garage and to its foundation, the tent is an addition or attachment to the garage. Since the square footage of the garage and attached tent exceeds both the maximum square footage permitted by Section 604 and by the variance Appellants obtained for the structure, the tent addition violates both the original and amended versions of the ordinance. The record contains more than a preponderance of reliable, probative and substantial evidence to support the Austintown's actions and the common pleas court's decision. Accordingly, the judgment of the common pleas court is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.