

STATE OF MAINE
CUMBERLAND, SS

SUPERIOR COURT
CIVIL ACTION
Docket No. AP-05-011

DOMENICO MATTOZZI and
BONNIE MATTOZZI,

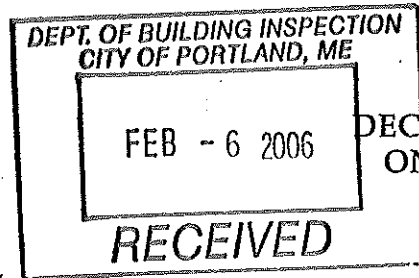
44-D-9

Plaintiffs

vs.

CITY OF PORTLAND,

Defendant



DECISION AND JUDGMENT
ON APPEAL (M.R.Civ.P. 80B)

STATE OF MAINE
Cumberland, ss, Clerk's Office
SUPERIOR COURT

FEB 01 2006

RECEIVED

I. BEFORE THE COURT

Before the court is plaintiffs Domenico and Bonnie Mattozzi's ("plaintiffs") appeal, pursuant to M.R.Civ.P. 80B, of defendant City of Portland's ("City") zoning board of appeal's ("ZBA") decision. This decision upheld the City zoning administrator's ("administrator") determination that the basketball court at Tate-Tyng Park ("Park") on the Portland peninsular is not in violation of the City's land use ordinance ("ordinance.")

II. BACKGROUND

Plaintiffs purchased property abutting the Park's basketball court in the winter of 2000 at a time when the court was not in use. This court, constructed in its present form in 1984,¹ consists of a tarred court surface and two poles with backboards and basketball hoops. The court is surrounded on all sides by a fifteen-foot high chain-link fence, and, on the side of the court abutting plaintiffs' property,

¹ The parties dispute whether an affidavit, produced by the City for the ZBA hearing but not for the Administrator, is properly before the court. This affidavit states that a basketball court existed in the current location from as early as the 1960s.

2/6-11

there is also a concrete retaining wall. The court, retaining wall, and fencing are built up to the property line of the Park abutting Plaintiffs' property.

In 2002, the City obtained federal funds to renovate the Park. Part of the proposal for which funds were granted was to remove the basketball court and replace it with a water feature. This proposal, however, was rejected by the neighborhood, which on the whole desired to keep the basketball court. As the funds were earmarked for the project that was rejected by the neighborhood, the City was no longer able to accept the grant, and the basketball court remains at the Park.

The plaintiffs have experienced adverse impact from the court and associated activity, including noise, lack of privacy, and property damage from fugitive basketballs and other objects. They subsequently petitioned the administrator, and asked her to declare that the basketball court is in violation of the ordinance because it is not set back at least 10 feet from the Park's property line. Plaintiffs' property, as well as the Park, are in the City's R-6 high-density residential zoning area. § 14-139 of the ordinance states that in the R-6 zone, "principal and attached accessory structures with ground coverage greater than one hundred (100) square feet" between 1 and 3 stories high, must be set back from the property line at least 10 feet. Upon reviewing plaintiffs' petition, the Administrator found that the court is not a "structure" under the ordinance, and thus, the City is not in violation of the ordinance for maintaining the court on the Park's property line.² On January 20,

² The Administrator's opinion, written on November 29, 2004, states in part:

This office [the Zoning Division of the City's Department of Planning and Development] does not and has never regulated playground or recreational equipment on private property or public property. This office has never regulated flag poles, swing sets, lamp posts, sand boxes, basketball hoops, telephone poles, street lights or the like. Recreational equipment is not considered to be a structure, is not permanently fixed on the ground, and does not have to meet setback requirements.
Record, Tab 3, pg. 1.

2006, the ZBA issued a written decision upholding this determination.³ Plaintiffs timely appealed to this court.

III. STANDARD OF REVIEW

Interpretation of a zoning ordinance is a question of law that the court reviews de novo. The terms or expressions in an ordinance are to be construed reasonably with regard to both the objectives sought to be obtained and the general structure of the ordinance as a whole. *Peregrine Developers, LLC v. Town of Orono*, 2004 ME 95, ¶ 9 (quoting *Priestly v. Town of Hermon*, 2003 ME 9, ¶ 7, 814 A.2d 995, 997.)

III. DISCUSSION

This case turns on a determination of whether the basketball court is a “structure” under the ordinance. “Structure” is defined under the ordinance as: “Anything constructed or erected of more than one (1) member which requires a fixed location on the ground or attached to something having a fixed location on the ground.” Ordinance § 14-47. Interpretation of this definition appears to be a matter of first impression before this court, if not before the ZBA.⁴

Plaintiffs assert, first, that under the common meaning of the words, the court was either “constructed” or “erected.” They then assert that the blacktop surface, poles, backboards, and hoops, retaining wall, and fence surrounding the court all

³ The ZBA’s decision, written on February 3, 2006, states in part:

The Board concludes that the basketball court is not a “structure” under Portland City Code § 14-47. It does so by interpreting the undefined term “member” contained in that definition in its common and ordinary meaning and in the context of the ordinance to mean ‘a support member’ supporting the structure. While the basketball court at issue here contains more than one basketball hoop and each basketball hoop is supported by a post or pole affixed to the ground, the two posts or poles do not support an overall structure, and so the basketball court accordingly is not a ‘structure’ for purposes of the Portland City Code.

Record, Tab 11, pg. 3.

⁴ A November 21, 1996 ZBA opinion found, in a 4-2 vote, that a 180’ monopole (to be used as a communication tower) proposed to be erected in the City’s I-2 industrial zone was not a “structure” under the Ordinance.

require a fixed location on the ground. Finally, plaintiffs claim that these elements of the court constitute “members” because the common meaning of the term “member” is “a distinct part of a whole.”

This breakdown of the language in the ordinance is logical and a technical fit with the City’s definition of “structure.” It is a mystery why the City chose to adopt this definition of structure, which on its face may encompass any number of objects, including the communication tower excluded from the category by the ZBA in a prior decision. Other statutes, for example the criminal code, 17-A M.R.S.A. § 2,⁵ and the land use code governing unorganized lands within the state, 12 M.R.S.A. § 682,⁶ provide definitions of “structure” capable of meaningful application.

Notwithstanding the ordinance’s poor definition, primary consideration is given to the objectives sought to be obtained by the ordinance. This leads us to the conclusion that plaintiff’s interpretation of the definition of “structure” cannot be adopted. The setback requirements for the R-6 residential zone are intended to control the scale of development in this high-density residential area and to preserve some open space. *See* Ordinance §§ 14-135 and 14-139. Setbacks are thus meant to apply only to the sheltered spaces in the zone, those that consist of more than one member, i.e. a wall or pole with a roof on top. *See id.* These sheltered spaces are, primarily buildings, but also “accessory structures,” such as garages, sheds, or perhaps gazebos. *See* Ordinance § 14-139. Thus, under the ordinance, a carport

⁵ 17-A M.R.S.A. § 2(24) states:

“Structure” means a building or other place designed to provide protection for persons or property against weather or intrusion, but does not include vehicles and other conveyances whose primary purpose is transportation of persons or property unless such vehicle or conveyance, or a section thereof, is also a dwelling place.

⁶ 12 M.R.S.A. § 682(4) states:

Structure shall mean anything constructed or erected with a fixed location on or in the ground, or attached to something having a fixed location on or in the ground, including, but not limited to, buildings, mobile homes, walls, fences, billboards, signs, piers, and floats. It shall not include a wharf, fish weir or trap that may be licensed under Title 38, Chapter 9.

consisting of poles supporting a roof would be a "structure," but a park, consisting of a paved walkway and lampposts, would not.

The commonly understood meaning of "member" within the definition of structure in the Ordinance is that of a constituent part of a sheltering entity is reinforced by the obviously erroneous outcome if plaintiffs' definition were adopted. For example, under plaintiffs' definition, all the homes surrounding the Park would be "members" because they are parts of a whole, i.e. the neighborhood. And, the neighborhood would be a "structure" because its "members"—the houses—are all "constructed" and are all affixed to the ground. Yet clearly the neighborhood cannot be a "structure" under the ordinance, nor is it a structure under the appropriate definition of "member" as either the support element or the roof of a sheltering structure.

The fence, retaining wall, blacktop surface, poles, backboards and hoops do form a basketball court, but this open space is simply another part of the Park, along with the playground, benches, walkways and lampposts. None of these constituent parts are "members" of a "structure" under the ordinance because they do not form a sheltering whole. Accordingly, the basketball court is not subject to the Ordinance's 10-foot side yard setback.

Because the basketball court is not in violation of the ordinance, plaintiffs' subsequent argument that the court is not grandfathered in its current location is not reached.

The clerk will make the following entry as the Decision and Judgment of the court:

- The decision of the Portland Zoning Board of Appeals is affirmed.

SO ORDERED.

Dated: February 1, 2006


Thomas E. Delahanty II
Justice, Superior Court



9T Ave = 44-D-9
219 York
(Playground) = 44-D-1

CITY OF PORTLAND, MAINE

Board of Appeals

INTERPRETATION APPEAL

DECISION

Name and address of appellants: Domenico and Bonnie Mattozzi, 9 Tate Street, Portland, ME 04102

Location of property under appeal: City-owned park and playground ("Tate Tyng Park") at 205-219 York Street, Tax Map #044, block D, Lot-001 →

For the Record

Names and addresses of witnesses and representatives (proponents, opponents and others):

1. Peggy L. McGehee, Esq., Perkins, Thompson, Hinckley & Keddy, Portland, ME 04101 (representing the Appellants)
2. Sandra Moppin, Perkins, Thompson, Hinckley & Keddy, Portland, ME 04101 (representing the Appellants)
3. Penny Littell, Associate Corporation Counsel (representing the City of Portland)

Exhibits admitted (e.g., renderings, reports, etc.):

1. Interpretation Appeal Application of Domenico and Bonnie Mattozzi, December 29, 2004.
2. Letter from Peggy L. McGehee, Esq., Perkins, Thompson, Hinckley & Keddy to Portland Zoning Board of Appeals dated December 29, 2004, along with: Petition to Bring Tate-Tyng Park into Compliance with the City of Portland Land Use Ordinance; City of Portland Zoning Administrator Marge Schmuckal's November 29, 2004 reply to Atty. McGehee's complaint regarding the property; a copy of the Suffolk County Appeals Court of Massachusetts' opinion in *Chwaliszewski v. Board of Appeals of Lynnfield*, 29 Mass. App. Ct. 247, 559 N.E. 2d 627 (1990); excerpts from various City of Portland Code of Ordinances provisions; a copy of Tax Map 44; and a plot plan for the Tate Tyng Park.
3. Letter from Daniel Marlowe, 13 Tate Street, Portland, ME 04102 to Zoning Board of Appeals, dated January 18, 2005
4. Letter from Penny Littell, Associate Corporation Counsel to Portland Zoning Board of Appeals dated January 20, 2005, along with: City of Portland's return on taking of land for playground purposes dated August 16, 1957; a copy of Tax Map 44; Affidavit of Henry

Fontaine; copy of assessment card for Appellants' property; color photographs of the park and Mattozzi properties; copy of a letter from David Littell, Esq. to the Zoning Board of Appeals dated November 6, 1996 regarding an interpretation appeal from Sprint Spectrum and a copy of the Board's November 21, 1996 decision on that appeal; a copy of the Appellants' April 30, 2001 building permit application for a shed on their lot; and a copy of the assessment cards for Appellants' property.

Findings of Fact

The Board finds as follows:

A. Appellant's property and the adjoining Tate Tyng Park are located in the R-6 Residential Zone, as described in Portland City Code §§ 14-135 *et seq.*

B. Under Portland City Code § 14-139(1)(d)3.a., "Principal and attached accessory structures with ground coverage greater than one hundred (100) square feet" must have a minimum ten foot side yard, which represents a minimum setback of structures from property lines. Also, under Portland City Code § 14-139(1)(d)4., "Principal or accessory structures" require a ten-foot side yard on side streets. Appellants state that the City of Portland amended the Portland City Code to provide for a ten-foot side yard setback for structures located in the R-6 Zone; the City's Zoning Administrator stated that the City's Zoning Ordinance has contained a ten-foot side yard setback for structure in the R-6 Zone since the original enactment of the zoning ordinance in 1957.

C. The City of Portland took the property now occupied by the Tate Tyng Park in 1957.

D. Relying upon the Affidavit of Henry Fontaine, the Board finds that in the 1960s, the Tate Tyng Park contained a basketball court in the general area in which it is located today, that it had a basketball hoop and a tarred surface, and that the basketball court has been in use in its present location for at least the last thirty three years.

E. The basketball court in the Tate Tyng Park currently is located in the so-called "upper portion" of the park, adjacent to the Mattozzi property. The basketball court consists of a tarred court and two posts with hoops. A fence approximately 15 feet in height surrounds the court, and a retaining wall is located under the fence that borders the Mattozzi property.

F. In December 2000, the Mattozzis purchased their property that adjoins the basketball court in the Tate Tyng Park.

G. In 2002, the City of Portland proposed to renovate the Tate Tyng Park using funds it received from a federal grant; among the proposed renovations was elimination of the basketball court and its replacement by a "water feature." While the Mattozzis supported this proposal, the neighborhood wished to keep the basketball court, and so the City declined the federal grant funds, leaving the basketball court in place. At that time, the Mattozzis first requested buffering between their lot and the basketball court.

H. On or about August 31, 2004, the Mattozzis petitioned the City's Zoning Administrator to enforce Portland City Code § 14-139 against the City of Portland to require the basketball court to be set back ten feet from the property line.

I. By letter dated November 29, 2004, the City's Zoning Administrator denied that petition, stating in relevant part that:

This office does not and has never regulated playground or recreational equipment on public property or private property. This office has never regulated flag poles, swing sets, lamp posts, sand boxes, telephone poles, street lights or the like. Recreational equipment is not considered to be a structure, is not permanently fixed on the ground, and does not have to meet setback requirements.

Retaining walls are not considered to be structures. They are considered landscaping and are usually located at or near property lines. Retaining walls are not required to meet setback requirements.

Fences are not considered to be structures under the zoning ordinance.

This appeal followed.

Conclusions of Law.

The essential issue here is whether a basketball court is a "structure" for purposes of the Portland City Code and thereby must meet the side yard setback in Portland City Code § 14-139 (which requires all structures with ground coverage greater than one hundred square feet in the R-6 Residential Zone to be set back a minimum of ten feet from side or rear property lines). Portland City Code § 14-47 defines the term "structure" to mean:

Anything constructed or erected of more than one (1) member which requires a fixed location on the ground or attached to something having a fixed location on the ground.

Appellants argue that under this definition, the basketball court, which, according to them, "consists of two hoops set in a fixed location, 2,100 square feet of impervious surface, and an affixed chain link fence," is a structure because it is of more than one member and has a fixed location on the ground.

However, the Board concludes that the basketball court is not a "structure" under Portland City Code § 14-47. It does so by interpreting the undefined term "member" contained in that definition in its common and ordinary meaning and in the context of the ordinance to mean "a support member" supporting the structure. While the basketball court at issue here contains more than one basketball hoop and each basketball hoop is supported by a post or pole affixed to the ground, the two posts or poles do not support an overall structure, and so the basketball court accordingly is not a "structure" for purposes of the Portland City Code.

Appellants' argument that "related standards" of the Portland City Code "can assist with the proper interpretation of Section 14-139" must fail. The sections referred to by Appellants are not "related standards" but instead are separate standards that govern active recreational open space (including basketball courts) when this open space is reviewed in the context of site plan review of high density planned residential unit development in the R-3, R-5 or R-5A Zones under § 14-526, or is located in the Recreation and Open Space Zone under § 14-158 -- entirely different zoning districts than the R-6 Zone in which Appellants' property is located. Moreover, those

provisions require screening or buffering from neighboring properties, and do not require specific setbacks -- the relief Appellants request.

Appellants' argument that the Suffolk County Appeals Court of Massachusetts' opinion in *Chwaliszewski v. Board of Appeals of Lynnfield*, 29 Mass. App. Ct. 247, 559 N.E. 2d 627 (1990) controls the interpretation of the term "structure" in the Portland City Code also must fail. Interpretation of an ordinance is specific to the language of that ordinance -- whether a basketball court is a "structure" under some other ordinance whose language is significantly different from the language in the Portland City Code is irrelevant to the matter before this Board. Further, in *Chwaliszewski*, the Court of Appeals was examining whether a basketball court was an "other structure," under a zoning provision that imposed setbacks on "building[s], swimming pool[s], tennis court(s) or other structure[s]." Thus, the question in *Chwaliszewski* was not the question that is before this Board -- whether a basketball court is a "structure" under an ordinance's definition of that term -- but was whether a basketball court was similar to the enumerated items and so had to meet the setback requirement under the Lynnfield ordinance.

Conclusion

After public hearing on January 20, 2005, for the reasons above-stated, the Board's motion to approve the appeal failed by a vote of 1 (Santerre) to 3 (Hall, Thornton and Alexander); therefore, the interpretation appeal from the decision of the City's Zoning Administrator is deemed denied.

Dated: _____

William Hall
Chairman