

TO: Mayor and Members of Troy City Council
Members of Board of Zoning Appeals
FROM: Lori Grigg Bluhm, City Attorney
Allan T. Motzny, Assistant City Attorney
DATE: January 26, 2006
SUBJECT: Paul and Louise Piscopo v. Troy, *et al*

On January 20, 2006, Oakland County Circuit Court Judge Michael Warren issued his Opinion and Order, reversing the decision of Troy's Board of Zoning Appeals (BZA) concerning the garage at 3129 Alpine (property owned by Paul and Louise Piscopo). According to the Court, Mr. and Mrs. Piscopo were entitled to build their enormous garage under Troy's then existing ordinances, and therefore the building permit was properly issued. The Court opinion is attached.

In January 2005, Piscopo neighbors George & Betty Reed and Thomas Krent filed an appeal with the Troy Board of Zoning Appeals (BZA), arguing that the Building Director erred in issuing a building permit for the Piscopo garage. They argued that Chapter 39, Section 40.57.02 of the Troy zoning ordinance required an accessory building (such as a garage) to have a smaller footprint than the main structure. After a public hearing that continued through two meetings, the BZA agreed with the interpretation espoused by the neighbors, and determined the permit was issued in error.

The garage on Alpine exceeded the ground floor area of the residence, and therefore a notice was sent to Mr. and Mrs. Piscopo, notifying them of the BZA's decision and the need to conform to this interpretation of the zoning ordinance. Mr. and Mrs. Piscopo then opted to file a lawsuit/ appeal in Oakland County Circuit Court, seeking a reversal of the BZA decision. This filing is permitted as of right under Michigan's City and Village Zoning Act. The lawsuit was filed against co- Defendants City of Troy, the Troy BZA, George & Betty Reed and Thomas Krent.

The parties all filed extensive briefs, and argued their positions before the Court on January 18, 2006. Both Troy and also the neighbors argued that the BZA decision should be affirmed, since it was reasonable and supported by competent, material, and substantial evidence on the record, and was not an abuse of the BZA's discretion. On the other hand, the Piscopos argued that under Troy's then existing zoning ordinances, a garage that is attached to a house is subject only to the zoning regulations for the house, and not the accessory building regulations. The Court agreed with the Piscopo position, and reversed the BZA.

As a result of the Court's decision, Mr. And Mrs. Piscopo are now entitled to a certificate of occupancy, assuming there is compliance with all other regulations unrelated to the size of the structure. Although any of the parties can file an application for leave to appeal the Court's decision, the filing of an application would not automatically stay the issuance of a certificate of occupancy. Any such application for leave to appeal must be filed within 21 days of the Court's decision, or February 10, 2006.

Please let us know if you have any questions regarding this matter.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAN 24 2006 PM 2:02

PAUL PISCOPO and LOUISE PISCOPO,

Petitioners,

v

Case No. 05-066788-AA
Hon. Michael Warren

CITY OF TROY, CITY OF TROY BOARD OF
ZONING APPEALS, GEORGE REED,
BETTY REED and THOMAS KRENT

Respondents.

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OPINION AND ORDER

At a session of said Court held in the
Courthouse, City of Pontiac, Oakland County,
Michigan on January 20, 2006

PRESENT: THE HONORABLE MICHAEL WARREN, Circuit Judge

OPINION

This matter is before the Court on appeal from a decision of the City of Troy Board of Zoning Appeals ("ZBA") that refused to issue a certificate of occupancy to the Appellants, Paul and Louise Piscopo, for a newly constructed garage attached to their home.¹ Extensive oral argument regarding the Appeal was conducted on January 18, 2006.

I

The dispositive issue in this Appeal is whether the clear and unambiguous language of an ordinance (Section 40.57.02) governing accessory buildings structurally attached to a main building (i.e., a garage attached to a home) prohibits the garage in question. This question is of considerable moment to the Appellants since the garage has already been constructed based upon a building permit previously issued by the City's Building Department in 2003. The permit was issued after the Building Department reviewed the ordinance at issue, as well as the Appellants' application which included the plans for the 6,000 square foot structure. The first formal challenge to the validity of the garage arose in 2005, after multiple inspections and approvals during the building process and before the final occupancy inspection, when neighbors - Appellees George Reed, Betty Reed, and Thomas Krent - became upset over the size of the garage and filed an application for a hearing with the ZBA. Ultimately, in a 4-3 vote, the ZBA adopted a motion finding that the garage was in conflict with Sections 04.20.01 and 10.10.00 of the zoning ordinances. The Appellants appeal from this decision.

¹ The Appellants originally filed a three-count Petition for Review -- Count One, raised the appeal; Count Two alleged equitable estoppel; and Count Three demanded declaratory relief. On August 16, 2005, this Court dismissed counts Two and Three. Thus, the only remaining issue before the Court is Count One,

II

A

This Court reviews the record and decision of the ZBA to ensure that the decision:

- (a) Complies with the constitution and laws of this state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the board of appeals. [MCL 125.585(11); *Macenas v Village of Michiana*, 433 Mich 380, 396; 446 NW2d 102 (1989).]

Thus, the role of this Court is not to act as a super-zoning board, to second guess the zoning board, or to evaluate whether the zoning permitted is attractive or pleasant. Furthermore, this Court is not to correct, revise, amend, or modify what some might perceive as defects in a zoning ordinance – such is for the legislative body at issue.

B

Michigan jurisprudence has long held that the general rules of statutory construction apply to zoning ordinances. See, e.g., *Kalinoff v Columbus Township*, 214 Mich App 7, 10 (1995). “[W]hen the language used in an ordinance is clear and unambiguous, . . . [the court] may not engage in judicial interpretation, and the ordinance must be enforced as written.” *Id.* In such circumstances, judicial (or ZBA) construction is neither necessary nor permitted. *Easton Farm Bureau v Eaton Twp*, 221

which invokes this Court’s appellate jurisdiction. Accordingly, this Opinion and Order addresses only Count One and, therefore, limits its review to the decision and record of the ZBA.

Mich App 663 (1997); *Wessley v Carrolton School Dist*, 139 Mich App 439 (1984); *Olepa v Olepa*, 151 Mich App 690 (1986). In construing an ordinance, words are to be given their common and generally accepted meaning, and the word "shall" is generally used to designate a mandatory provision. *Macomb County Rd Comm'n v Fisher*, 170 Mich App 698, 700 (1988). Ordinances are to be interpreted as a whole and construed so as to give effect to each provision, and one part must not be construed to nullify another part. *Commarito v Detroit Golf Club*, 210 Mich App 287 (1995). If an ordinance provision is special and particular and certainly includes the matter in question, it prevails over a general provision which, if standing alone, would include the same matter in conflict with the other provision. *Ex parte Landaal*, 273 Mich 248, 252-253 (1935); *People v Seeley*, 24 Mich App 539 (1970), *aff'd* 384 Mich 584 (1971). See also *Michigan Basic Property Insurance Assn v Ware*, 230 Mich App 44, 49 (1998) ("Where a specific statutory provision differs from a related general provision, the specific one controls"). One is not permitted to interlope language from other clearly independent ordinance provisions except when the ordinance expressly refers to the other ordinances. *Regents of the University of Michigan v Washtenaw County Coalition Against Apartheid*, 97 Mich App 532 (1980).

Furthermore, where a municipality's officer or agency, charged with the administration of the zoning ordinance, has applied a particular construction of a zoning ordinance over an extended period, that construction is to be accorded "great weight." *Macenas v Village of Michiana*, 433 Mich 380, 398 (1989). Nevertheless, the Court's deference to the administrative office or agency cannot be used to overcome an ordinance's plain and unambiguous meaning. *ACCO Industries, Inc v Dept of Treasury*, 134 Mich App 316, 322 (1984); *Weemer v Nat'l Broach and Machine Co*, 89 Mich App 312 (1979).

III

As noted *supra*, the issue before the Court is whether the applicable ordinance prohibits the garage. Unlike many of the cases relied upon by the Appellees, this Appeal does not involve an application for a variance or an alleged improper “use” of property, and those cases are simply unpersuasive in light of the facts, applicable law, and circumstances of this case.²

A

There is no factual dispute that Section 40.57.02, as written in 2003, applied to and governed the Appellants’ application and the resulting building permit issued by the City regarding the structurally attached garage in question. That Section provides:

Where the accessory building or structure is structurally attached to a main building, it shall be subject to, and must conform to, all regulations of this chapter applicable to a main building. [Troy Zoning Ordinance, Chapter 39, Section 40.57.02.]

There also is no dispute that the regulations in Chapter 39 applicable to a main building require that each dwelling have a minimum of 1,400 square feet, but buildings may not cover more than 30% of the lot. § 30.10.02. Section 40.56.00 of the ordinance clearly and unambiguously defines a garage as an “accessory building[] or structure[].” § 40.56.00 (“the various types of accessory buildings and structures shall be defined as follows . . . GARAGES [emphasis in original]).

² Further, there is no “harmony” requirement contained in any of the ordinances at issue - a further distinction from certain legal authority cited by the Appellees.

Furthermore, as the Appellees conceded at oral argument, no ordinance articulates a maximum size limit regarding garages.³ This is especially significant because, as the Appellees acknowledge, the ordinance takes special care to articulate maximum size limits for many other types of “accessory buildings and structures.” Indeed, the ordinance addresses such diverse accessory buildings and structures as cabanas (a building of not more than 100 square feet); dog houses (a building of not more than 36 square feet); gazebos (a structure of not more than 179 square feet in area); and sheds (a building not more than 179 square feet).⁴ See also Section 30.10.02 (limiting the maximum percentage of the lot buildings may cover to 30%).

Simply put, Section 40.57.02 clearly and unambiguously provides that once the garage is attached to the house, the zoning regulations for the house (i.e., the main building) “shall” and “must” apply. Section 30.10.02 sets forth the maximum size that the garage and house, together, can occupy on a lot. There is no dispute that the Appellants’ attached garage, the size of which was disclosed in the plans submitted with the building permit application and which were reviewed and approved by the City’s Building Department in 2003, complies with the 1,400 square foot minimum and that there is no specific maximum requirement on the size of the garage. There is also no dispute that the subject garage and house conform to the only applicable maximum requirement, i.e., the 30% maximum requirement of the ordinance.⁵

Thus, the ZBA was not permitted to circumvent the clear and unambiguous specific provisions of the ordinance by attempting to extrapolate the definition of “accessory building or structure” contained in Section 40.57.02 from the broader Section

³ The ordinance further defines “GARAGES” as “[a] building of not less than one hundred eighty (180) square feet designed and intended to be used for the periodic parking or storage of one or more private motor vehicles, yard maintenance equipment or recreational vehicles such as, but not limited to, boats, trailers, all-terrain vehicles and snowmobiles.”

⁴ Section 40.56.00.

of 04.20.01 generally defining "accessory building."⁶ To do so would render nugatory the specific language of Section 40.57.02 in favor of dubious statutory construction.⁷

Furthermore, the ZBA's heavy reliance upon Section 10.10.00 is unpersuasive. Michigan law is well settled that a specific provision regarding a subject matter prevails over a generally worded provision, and where a law contains general words that follow a designation of particular subjects those general words are presumed to include only things of the same kind, class, character or nature as the subjects enumerated. *Michigan Basic, supra*. Cf. *Benedict v Dept of Treasury*, 236 Mich App 559 (1999) (while a preamble is useful for interpreting an ordinance's purpose, it is not to be considered authority for construing an otherwise clear and unambiguous act). Section 10.10.00 is a general expression of the City's general intent regarding One Family Residential Districts; it does not contain specific provisions regulating the size or design of an attached garage.⁸

⁵ Thus, Section 40.57.02 requires no construction by resort to the broader sections of 04.20.01 and 10.10.00. As noted *supra*, "shall" is a clear, unambiguous and mandatory provision. *Macomb County Rd Comm'n, supra* at 700.

⁶ This is especially true where, as here, the version of 04.20.01 relied upon by the Appellees deleted the phrase "or portion of the main building" which was contained in its precursor. The prior definition (found in the 1955 Troy Zoning Ordinance) had defined an accessory building as: "A supplemental building or portion of the main building on the same lot, the use of which is purely incidental to that of the main building." The 1956 definition, however, deleted the phrase "or portion of the main building." The 1956 version is identical to the current language, which defines an accessory building as: "a subordinate building, the use of which is clearly incidental to that of the main building or to the use of the land."

⁷ In any event, contrary to the ZBA's assertion, that an accessory building is "subordinate" or "incidental" to the main building does not mean that the accessory building is required to be smaller than the main building. The plain meaning of "subordinate" is "[b]elonging to a class or rank lower than another" or "[s]ubject to the control or authority of another." Webster's II, New Riverside University Dictionary. Similarly, "incidental" means "[o]f a minor, casual, or subordinate nature." *Id.* Thus, the use of these terms in the ordinance is simply to describe what constitutes an accessory building; those terms in no manner set forth an independent restriction on the size of such structures. The size restrictions the City decided to address are set forth in other sections of the ordinance addressed *supra*. Moreover, apparently ignored by the ZBA is that in the ordinance scheme, as set forth in Section 40.56.00, there is no doubt that a garage is an accessory building - its size is of no moment.

⁸ Section 10.10.00 provides:

The R-1A through R-1E One Family Residential Districts are designed to be the most restrictive of the residential Districts as to use. The intent is to provide for environmentally sound areas of predominantly low-density, single family detached dwellings, through the varying of lot sizes and the development options which will

To the contrary, those specific provisions regulating the size, design, use, set backs, and other restrictions are set out in separate sections of Article X. Section 40.57.02 specifically regulates the Appellants' attached garage. The Appellants' garage does not violate Section 40.57.02 or any other city ordinance specifically pertaining to size or design. In fact, the Appellants' garage complies with the minimum square foot requirement and the maximum lot area coverage. In short, Section 40.57.02 is a specific provision that differs from the general provision set forth in Section 10.10.00. *Michigan Basic, supra*. Accordingly, the ZBA improperly applied Section 10.10.00 to the Appellants' garage.

In short, the ZBA the ignored the plain and unambiguous provisions set forth in the zoning ordinance at issue, and its decision must be reversed.

B

Even if Section 40.57.02 were ambiguous (which it is not), the ZBA failed to accord the "great weight" it must to the interpretation accorded by its own Building Director - in fact, the ZBA improperly gave the Building Director's interpretation no weight whatsoever. *Macenas, supra*. The Building Director has been responsible for administering the City's ordinance for 24 years; the City Council previously adopted his recommendation in granting the building permit in the first instance;⁹ and the Director

accommodate a broad spectrum of house sizes and designs appealing to the widest spectrum of the population. [Troy Zoning Ordinance, Chapter 39, Section 10.10.00.]

⁹ The Building Director reasoned that when the phrase "or portion of the main building" was deleted from the general definition of "accessory building" as articulated in Section 04.20.01, the City Council intended that an attached garage would be considered part of the main building. (Appellants' Ex M.) This interpretation, i.e., that the definition contained in 04.20.01 applies only to a building that is separate from and not attached to the main building, is in keeping with the rules of statutory construction. *Michigan Basic, supra* at 50. In addition, the Building Director also reasoned that such an interpretation prevents a conflict with Section 40.57.03, which provides: "[a]ccessory buildings or structures shall not be erected in any yard, except a rear yard." If an attached garage were considered an accessory building, then garages could only be located in the rear yard. Normally, "where a construction has been applied over an extended period by the officer or agency charged with its administration, that construction should be accorded great weight in determining the meaning of the ordinance." *Macenas, supra* at 398.

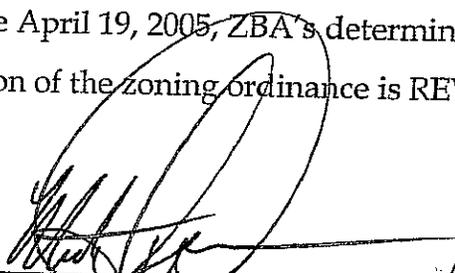
testified at the April 19, 2005 meeting that many attached garages previously approved and issued building permits pursuant to Section 40.57.02 and the Director's interpretation of it would violate the interpretation ultimately adopted by the ZBA (Appellants' Ex L). This provides an additional basis for reversing the ZBA's decision. *Macenas, supra.*

IV

Because the Court has disposed of the Appellants' arguments on other grounds, the Court will not reach the constitutional questions raised. *Pythagorean, Inc v Grand Rapids Township*, 253 Mich App 525, 527 (2003). Moreover, the Court need not address the other issues of alleged error raised by the Appellants as they have been rendered moot.

ORDER

Based on the foregoing Opinion, the April 19, 2005, ZBA's determination that the Appellants' attached garage was in violation of the zoning ordinance is REVERSED.



MICHAEL WARREN,
CIRCUIT COURT

TRUE COPY
RUTH JOHNSON
Oakland County Clerk - Register of Deeds
By: *Ruth Johnson*
Deputy

Because the Building Director has applied the attached garage interpretation over an extended period of time, the Court will accord that interpretation great weight. Accordingly, the Court finds that the City Counsel intended for attached garages to be considered part of the main building, and the ZBA incorrectly applied the definition of "accessory building" to the Appellants' garage.