

89-LW-3248 (3rd)

Robert BOEHM, Plaintiff-Appellant,

v.

Elmer WALTZ, Defendant-Appellee.

No. 6-87-10.

3rd District Court of Appeals of Ohio, Hardin County.

Decided on September 27, 1989.

Civil appeal from Common Pleas Court.

Tudor & Lange, Steven D. Christopher, Kenton, for appellant.

Anthony J. Celebrezze, Jr., Attorney General, Patrick A. Devine, Columbus, for appellee.

OPINION

JOHN W. KEEFE, Judge.

On September 24, 1986, a building inspector for the Division of Factory and Building Inspection of the Ohio Department of Industrial Relations inspected a building in Hardin County, Ohio, owned by Robert Boehm, now deceased, and known as the Old Dola School Building or Old Dola Schoolhouse (sometimes referenced herein as "Old Dola").

On October 17, 1986, the Division of Factory and Building Inspection (Division) mailed adjudication order number 681-86 to Robert Boehm citing R.C. 3781.11 inter alia as its authority for doing so. Robert Boehm (sometimes simply "Boehm") filed a timely appeal with the Board of Building Appeals which after a hearing on December 15, 1986, affirmed the adjudication order in a decision handed down on December 19, 1986 and mailed to Boehm on January 8, 1987. On January 21, 1987, Boehm filed his notice of appeal to the Court of Common Pleas of Hardin County, and on July 29, 1987 the matter came before the court below for a hearing on the appeal. The parties stipulated the record from the administrative proceedings and the appellee requested additional evidence; the appellee did in fact present additional evidence. The trial court ultimately affirmed the decision of the Board of Building Appeals holding as follows:

"The Court, upon consideration of the record before the Board and the additional evidence before the Court, finds that the order below is supported by reliable, probative and substantial evidence and the same is affirmed."

This appeal ensued. At the time of the Common Pleas hearing, Boehm had owned the Old Dola School Building for approximately twenty (20) years and had used it for grain storage since he purchased it. The following explanation appears in appellant's brief:

"Approximately fifteen (15) years ago Mr. Boehm tore out a second floor in part of the building to allow him to have larger storage space for his grain. The Boehms (this is a family farming operation) currently use the facility strictly for storage of grain * * * and it is in no way connected with any retail operation or non-agricultural use."

There is a grain mixing operation in connection with the Old Dola School Building.

The grain mixer, apparently also know as a silage mixer, is attached to "Old Dola." Whatever the mixer's function, it is part of "Old Dola." The grain mixing operation is not housed in an independent building. In July 1987, at the time of the common pleas hearing, there were houses around "Old Dola." Moreover, there is evidence that a post office was approximately fifty yards away, but definitely not in excess of seventy-five yards away. Judging from one of the exhibits, the proximity of the post office to "Old Dola" appears considerably closer than fifty yards.

The appellant presents four assignments of error, the first of which contends:

"The trial court erred in that it applied the wrong standard in determining the appeal before it."

The appellant attempts to make much of language in the judgment entry of the court below in which the court explains that it could not substitute its judgment for that of the Board of Building Appeals. The appellant accordingly alleges that the court erroneously believed that it could not consider additional evidence offered during the course of the July 29, 1987 hearing. The non-substitution disclaimer, if it may be so referenced, included in the judgment entry, seems a legally proper statement in the abstract. Whether, under the circumstances here present, such an abstract disclaimer was relevant is questionable. Regardless, the significance of the non-substitution statement in the entry is subsumed in the following dogmatic portion of the entry:

"The Court, upon consideration of the record before the Board and the additional evidence before the Court, finds that the order below is supported by reliable, probative and substantial evidence and the same is AFFIRMED (sic)." [Emphasis supplied].

Clearly the trial court scrutinized not only the whole record from the Board of Building Appeals, but also considered the de novo evidence later adduced. The trial court therefore did not apply a wrong standard of review in evaluating the lawfulness of the decision of the Board of Building Appeals. R.C. 119.12.

Resultantly, assignment of error number one is without merit and we overrule it.

Assignment of error number two is:

"The trial court erred in not exempting the building in controversy under the agricultural use exemption of R.C. 3781.06."

R.C. 3781.06 provides for an "agricultural use" exemption, stating in pertinent part as follows:

"Sections 3781.06 to 3781.18 and 3791.04 of the Revised Code shall not apply to buildings, or structures which are incident to the use for agricultural purposes of the land on which such buildings or structures are located, provided such buildings or structures are not used in the business of retail trade.

" * * *

"As used in these sections:

"(A) "Agricultural purposes' include agriculture, farming, dairying, pasturage, apiculture,

horticulture, floriculture, viticulture, ornamental horticulture, olericulture, pomiculture, and animal and poultry husbandry;

" * * * "

According to the record, Boehm, while alive, owned a farm located approximately 2 1/2 to 3 miles away from "Old Dola." "Old Dola" is on a lot approximately 500 feet by 500 feet in size surrounded by buildings, houses and a post office serving the particular community. "Old Dola" is within the Village of Dola. It is not isolated in the countryside and it is not located on a farm.

The common pleas court correctly rejected the appellant's argument with respect to the agricultural use exemption, which if applicable, would have divested the Division of Factory and Building inspection of jurisdiction. Judge Faulkner's rationale is spelled out in his judgment entry, quod vide. In our opinion, in selecting the language in R.C. 3781.06, supra, the legislature could only have intended to grant an exemption from inspection to buildings or structures on land which is used for agricultural purposes as defined in R.C. 3781.06(A), supra. "Old Dola's" use may be said to be agricultural, but the same cannot be said of the land on which "Old Dola" is located. Both the letter and spirit of the provisions of R.C. 3781.06 militate against the exemption solicited by appellant.®1

The common pleas court decided this issue correctly. We overrule the second assignment of error.

The penultimate assignment of error, number three, claims that:

"The trial court erred in concluding the building in controversy was a "serious hazard".

" "Serious hazard' means a hazard of considerable consequence to safety or health through the design, location, construction, or equipment of a building or the condition thereof which hazard has been established through experience to be of certain or probable consequence, or which can be determined to be or which is obviously such a hazard." (Ohio Adm.Code 4101:2-1-02).

The record is replete with testimony concerning the hazardous nature of "Old Dola," particularly that of Tom Guy, inspector employed by the Ohio Division of Factory and Building Inspection. Guy opined for instance that in his view, given certain potentially foreseeable developments, the subject building "will probably collapse." (T. 14.)

In concluding that "Old Dola" constituted a "serious hazard", the court of common pleas judged correctly. The third assignment of error is feckless. It is overruled.

This then leaves the fourth and final assignment of error which protests as follows:

"The trial court erred in affirming the order of the Board of Building Appeals in that it did not address the issue raised by the appellant whether or not the Board of Building Appeals and Division of Factory and Inspection had jurisdiction and authority to issue a stopwork order to the appellant."

Evaluating this assignment literally, it is meritless. The trial court did in fact address the issue referenced in the assignment. The following is what the court stated:

"While it may well be that the issuance of a "stop work' order in this instance would not be appropriate, the substance of the document in question does not order work to be stopped. It order [sic]

the building to be razed."

Then the query becomes: did the court below decide correctly in finding that the adjudication order issued by the Division was not a stop work order, but an order to raze the building? A reasonable and common sense reading of adjudication order number 681-86, mandates an affirmative answer. Since the lower court correctly found that the adjudication order was not a stop work order, the court had no obligation to detail the authority of the Division to issue stop work orders.

The adjudication order sent to Boehm contained the word "stopwork" and also the phrase "unsafe building." Examination of the body of the order makes it clear that it is an unsafe building adjudication and not a stop work order. In the order it is stated that an inspection of "Old Dola" "reveals that this structure does not appear to be structurally sound and should be razed." @2

The record of the Board's hearing of December 15, 1986, demonstrates unequivocally that Mr. Boehm and his attorney fully recognized that the adjudication order which they opposed alleged that "Old Dola" was an unsafe building which should be razed (hearing transcript p. 25) and was not a stop work order.

The appellant does not gainsay the authority of the chief of the division to inspect buildings and declare them hazards in proper cases as conferred by R.C. Chapter 3781 and provisions of the Ohio Administrative Code, particularly 4101:2-1-39 cited (albeit imprecisely), in the adjudication order sub judice.

The fourth assignment of error fails.

Resultantly, all assignments of error herein are unavailing. The common pleas court's decision is correct finding that the order of the Board is supported by reliable, probative and substantial evidence. We affirm.

Judgment affirmed.

SHAW and BRYANT, JJ., concur.

JOHN W. KEEFE, J., retired, of the First Appellate District, was assigned to active duty pursuant to Section 6(C), Article IV, Constitution.

Footnote 1 .In appellee's brief, he cites Ohio Adm.Code 4101:2-1-09(E) in support of his argument that the land upon which "Old Dola" stands must constitute an agricultural purpose to qualify for an exemption.

Footnote 2 .The Ohio Administrative Code (Ohio Basic Building Code) prefers two words for "stop work." In usage, understandably the two words sometimes are merged.

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