STATE OF MICHIGAN

COURT OF APPEALS

ROBERT C. NOVOTNY and MARTHA E. NOVOTNY,

Plaintiffs-Appellants,

v

OTSEGO TOWNSHIP ZONING BOARD OF APPEALS and OTSEGO TOWNSHIP,

Defendants-Appellees.

UNPUBLISHED
September 20, 1996

No. 182934
LC No. 93-016392 CE

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the declaratory judgment in favor of defendants in which the trial court found that plaintiffs' proposed use of their property was not allowed under defendant Otsego Township's Zoning Ordinance. We affirm.

Plaintiffs' property is zoned AG, which is agricultural. Private parks may be built on AG zoned property. After receiving a building permit from the township, plaintiffs started constructing a building on the property along with other minor improvements.

During the construction, three neighbors filed a complaint with defendant Otsego Township Zoning Board of Appeals (ZBA). The neighbors were concerned with the noise and traffic associated with a reception hall. Plaintiffs asserted that they were building a private park. At a February 27, 1993, meeting of the ZBA, plaintiff Robert Novotny testified that he had spent $33,000 on the building. The ZBA passed a motion that found that the building was the primary use of the property, and would require a special use permit.

Following that meeting, plaintiffs spent an additional $20,000 to complete the building. On August 5, 1993, plaintiffs filed an application for a redetermination of the zoning ordinance with the ZBA. At a September 1, 1993, meeting, the ZBA rescinded the motion from the February 27, 1993, meeting because it was faulty. Nevertheless, the ZBA passed a motion stating that it did not consider plaintiffs' property as it existed on September 1, 1993, to be a private park. In addition, the ZBA

rescinded any "determinations, permits, certificates or occupancy permits" which were inconsistent with this determination.

The current case is not on direct appeal from the findings and decisions of the ZBA. Rather, plaintiffs filed this declaratory judgment action in the circuit court. After a two-day bench trial, the trial court found in favor of defendant on all counts. The trial court ruled that the building was a rental hall, and not a private park. Second, the court found that the property would not be a private park even if all of the improvements which plaintiffs proposed were made. Finally, the trial court ruled that Otsego Township was not estopped from enforcing its zoning ordinance against plaintiffs.

Plaintiffs' first argument states that they agree with the decision of the trial court to consider the evidence de novo for purposes of this declaratory judgment action. Because plaintiffs do not identify any error by the trial court, they have not shown that they are an aggrieved party as to this issue. See MCR 7.203(A). Although defendants argue that the trial court erred, they did not file a cross-appeal as required by MCR 7.207. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993). This Court does not have jurisdiction to consider this issue.

Plaintiffs argue that the trial court erred by concluding that the property did not constitute a private park as of September 1, 1993. We disagree. We review the record in a zoning case de novo. *Hecht v Niles Twp*, 173 Mich App 453, 464; 434 NW2d 156 (1988). We apply the rules of statutory construction when construing a zoning ordinance. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). When the language used in an ordinance is clear and unambiguous, we may not engage in judicial interpretation, and the ordinance must be enforced as written. *Id.*

Section 6.02(f) of Otsego Township's Zoning Ordinance states that land that is rated AG may be used for "[p]ublic or privately owned athletic grounds, golf courses and parks." The ordinance does not define a "park," but states that any term that is not defined "shall be considered to be defined in accordance with its common or standard definition." *Id.*, § 3.01(h). Black's Law Dictionary defines a "park" as: "[a]n enclosed pleasure-ground in or near a city, set apart for the recreation of the public." Black's Law Dictionary (5th ed), p 1005. Another dictionary defines "park" as:

> **1.** A tract of land set aside for public use, as: **a.** An expanse of enclosed grounds for recreational use within or adjoining a town. **b.** A landscaped city square. **c.** A tract of land kept in its natural state.
> **2.** A stadium or enclosed playing field: *ball park*.
> **3.** A country estate, esp. when including extensive gardens, woods, pastures, and game preserves.
> **4.** *Military*. **a.** An area where vehicles and artillery are stored and serviced. **b.** The materiel kept in such an area. [*American Heritage Dictionary of the English Language* (1973), p 953.]

At the time of trial, plaintiffs had finished the construction of the building. Additionally, plaintiffs had installed a horseshoe pit, and built a stone wall which was to frame a proposed gazebo. After

reviewing the record, we believe that the trial court did not err in determining that property which consists of a building, a stone wall, and a horseshoe pit did not constitute a "park" for purposes of Otsego Township's Zoning Ordinance.

Plaintiffs argue that the trial court erred in concluding that the property would not constitute a "park" even after several planned improvements were completed. In addition to the planned gazebo, plaintiffs testified that they planned to build an English garden, walkways, a foot bridge over a creek, picnic tables, and a volleyball court.

Assuming arguendo that the property minus the building would constitute a "park" after the planned improvements were made, the building itself would not qualify as a "park." Otsego Township's Zoning Ordinance allows for accessory uses, defining an accessory use in § 3.02 as a "use, building or structure on the same lot with, and of a nature customarily incidental and subordinate to, the principal use, building or structure." Here, after reviewing the record, we believe that rental use of the building in question for parties of up to 250 people would not have been subordinate to the principal use of the property as a park. Rather, the use of the park would have been subordinate to the use of the building. In addition, use of a rental hall is not customarily incidental to use of a park. See *Lerner v Bloomfield Twp*, 106 Mich App 809, 812; 308 NW2d 701 (1981). Because the primary use of the building would be as a rental hall, the trial court did not err in determining that use of the building as a rental hall would not be proper even if the proposed improvements were made to plaintiffs' property. *Id.*; see *Lerner*, *supra*.

Finally, plaintiffs argue that Otsego Township should be estopped from enforcing its zoning ordinance. We disagree. As a general rule, a city is not precluded by estoppel from enforcing its zoning code. *Fass v Highland Park*, 326 Mich 19, 28-29; 39 NW2d 336 (1949); *City of Holland v Manish Enterprises*, 174 Mich App 509, 514; 436 NW2d 398 (1988). However, exceptional circumstances can require an exception to this general rule. *Pittsfield Twp v Malcolm*, 375 Mich 135, 148; 134 NW2d 166 (1965).

This case is distinguishable from *Pittsfield*. It is true that plaintiffs received zoning verifications and a building permit. However, in contrast to *Pittsfield*, plaintiffs did not fully disclose their intended use of the property to the township officials. Robert Novotny himself testified that he told Richard Hutchins, the zoning administrator for Otsego Township, only that he was constructing a park. Novotny did not disclose that he planned to rent the building for gatherings of up to 250 people. Hutchins testified that he would not have written the zoning verification for plaintiffs if he had been told that they intended to rent the building. This lack of full disclosure extended to the community. Whereas the defendants in *Pittsfield* published notice of their request permit in the local newspaper, plaintiffs here told their neighbor that they would be using the building as a "pole barn," and implied by silence that it would be used for storage. In addition, whereas the building in *Pittsfield* was of doubtful utility except as a kennel, the building here can be used for other purposes. Finally, plaintiffs spent an additional $20,000 to complete the building after they were put on notice at the February 27, 1993, ZBA meeting that their intended use was not proper. This is in contrast to the facts in *Pittsfield*, *supra*, p 148, where the plaintiff waited for ten months after construction of the kennel to challenge the defendants' use of

that building. Under these facts, the township is not estopped from enforcing its zoning ordinance. *Fass*, *supra*, pp 28-29; *Holland*, *supra*, p 514; compare *Pittsfield*, *supra*.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski