

NO. CV 07 5003302

ELISE PIQUET

VS.

TOWN OF CHESTER, ET AL.

SUPERIOR COURT

J.D. OF MIDDLESEX

AT MIDDLETOWN

SEPTEMBER 30, 2008

MEMORANDUM OF DECISION
RE' WHETHER PLAINTIFF CAN BURY
HER LATE HUSBAND IN BACK YARD

Factual Background

Plaintiff Elise Piquet filed the present action against the defendants, the town of Chester and the Planning and Zoning Commission of the town of Chester seeking a judgment declaring, inter alia, whether of not the Town Regulation that ostensibly disallows her burying her late husband in her back yard should be so interpreted. This action arises as a result of the defendants' refusal to give the plaintiff a permit to bury her late husband in the backyard of her property located at 28 South Wig Hill Road, in Chester, Connecticut. It should be noted that she buried his body in the backyard of the property located at 28 South Wig Hill Road on October 24, 2004. Thereafter, on June 8, 2005, the Planning and Zoning Commission, acting through its Zoning Compliance Officer, issued a Cease and Desist order with regards to the burial. The plaintiff filed an appeal to the Chester Zoning Board of Appeals for a variance from the alleged

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cease and desist order. The ground for the issuance of the cease and desist order is that the private burial is not a permitted use under the zoning regulations. The cease and desist order was allegedly removed on October 15, 2005, and the plaintiff alleges that the defendants' reliance on the regulations in issuing the cease and desist order in the first place was incorrect. an

The plaintiff alleges that she and her husband had agreed to be buried along side of each other, and since the Town of Chester has no cemetery burial plots, they decided to be buried in their back yard. The internment was done under the supervision of a licensed funeral director. It is the plaintiff's intension to be buried next to her late husband when she passes away.

Thus, the plaintiff seeks, among other things, a declaratory judgment declaring whether or not she has the right to use her private land for the burial of her late husband and upon her death for her burial. The defendants have filed a motion for summary judgment, together with a memorandum of law. In support of that motion, the defendants have submitted a certified copy of Chester's zoning regulations. The plaintiff has filed a memorandum in opposition.

The defendants predicate entitlement to summary judgment on the zoning regulations of the town of Chester which they argue do not permit a burial ground or cemetery on private, residential property, such as the land occupied by the plaintiff. The plaintiff, on the other hand, argues that there is a genuine issue of material fact as to whether the burial of the plaintiff's husband on her property constitutes an accessory use of the her lot. According to the plaintiff, accessory uses are not specifically set forth in the zoning regulations, but they are explicitly permitted as an undefined category of usage.

Standard for Summary Judgment

As a preliminary matter, "[p]ractice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Colangelo v. Heckelman*, 279 Conn. 177, 182, 900 A.2d 1266 (2006). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law." (Internal quotation marks omitted.) *Zielinski v. Kotsoris*, 279 Conn. 312, 318, 901 A.2d 1207 (2006).

The defendants argue in their brief that they are entitled to summary judgment pursuant to Section 40A and 60A.2(I) of Chester's zoning regulations. Section 40 is entitled "General Prohibitions" and Section 40A states "USE: Except as expressly and specifically permitted by these regulations, no land or improvement thereon within the Town shall be used for any purpose." Section 60 of the zoning regulations is entitled Residential Districts R-2, R-1 and R-1/2. The plaintiff's property falls within a residential R-2 zone, which characteristics are defined in Section 60B. Section 60A.2 states "Special Uses: The following principal uses and

buildings only when specifically authorized in the particular instance by a special exception granted by the Commission subject to the conditions prescribed in or pursuant to Section 130 . . . (l) [c]emetery of a church or of a cemetery association having its principal office in the Town of Chester." The defendants argue that this language clearly indicates that the regulations specifically deal with burial sites and based on the language, does not permit private burial grounds on parcels of residential property. Based on the language of the regulations, it is clear that burial grounds are permitted in residential zones provided that a special permit is obtained and that the applicant has some connection with a church or cemetery association. There is no evidence presented by either party that the plaintiff is associated with either a church or cemetery association. In fact, as admitted by the plaintiff in her complaint, she did not seek any sort of permission or permit from the town prior to burying her husband in the backyard, but rather, appealed for a variance of the zoning regulations after the town issued a cease and desist order for having buried her husband on her property.

The defendants further argue that where land regulations are permissive in nature, those matters not specifically permitted are prohibited, and cite to *Graff v. Zoning Board of Appeals*, 277 Conn. 645, 894 A.2d 285 (2006), as evidence of that fact. In *Graff*, the Supreme Court, in reviewing the town of Killingworth's zoning regulations, stated the following: "[w]e first note that the town regulations are permissive in nature, meaning that those matters not specifically permitted are prohibited. . . . Specifically, § 40A of the regulations provides: 'Except as expressly and specifically permitted by these regulations, no land or improvements thereon within the Town shall be used for any purpose.' As compared to prohibitive zoning ordinances,

where all uses are allowed except those expressly prohibited, permissive zoning regulations are the preference of the majority of the municipalities in Connecticut." (Citations omitted.) Id., 653-54.

Section 40A of Chester's zoning regulations is identical to § 40A of Killingworth's regulations as stated in Graff, and is, therefore, also permissive in nature. Chester's zoning regulations do not specifically allow burial grounds on residential property, but rather, only allows such use by way of a special permit, in connection with a church or cemetery association. Given the town's permissive zoning scheme, where all uses not specifically permitted are deemed prohibited, in order for the plaintiff to be entitled to bury her husband on her property at all, there must be some language in the regulations permitting that activity. See *Graff v. Zoning Board of Appeals*, supra, 277 Conn. 656. There is no such language in the regulations expressly permitting the plaintiff to bury her husband on her property.

The plaintiff argues that §60A.2(I) is not applicable to this case and that a genuine issue of material fact remains as to whether the burying of her husband in her backyard constitutes an accessory use of her R-2 zoned residential property. Section 60 of the regulations states that "[i]n any residential district designated R-2, R-1, or R-1/2, there shall be permitted . . . 60A.3. Accessory Uses: Any accessory use or improvement, subject to the following provisions" Section 20A, entitled Definitions, states that an accessory use is "[a]ny use which is attendant, subordinate and customarily incidental to the principal use of the same lot." The plaintiff argues that Section 60A.1 provides that the principal use of the plaintiff's property is in an R-2 residential zone with a "one family dwelling," pursuant to 60A.1 (A). Therefore, the plaintiff

argues, the defendants' reliance on Section 40A is misplaced, because that section is merely a general provision and does not overrule the express and specific statement in Section 60A.3, which allows the plaintiff's property to be used for any accessory use, that accessory use being the burial of her husband.

The plaintiff makes a point of saying in her brief that the defendants' motion for summary judgment is "premature," that discovery has not been conducted by the parties yet and the issue of whether the plaintiff's burying her husband constitutes an accessory use of her property is a "fact intensive question that goes far beyond the record that has been put before this Court."

Memorandum, p. 10. The plaintiff's statement in her brief is accurate. There is not sufficient evidence before the court to determine whether a genuine issue of material fact exists as to whether the plaintiff's use could be considered accessory. Although the plaintiff has submitted various pieces of evidence, none of it supports the contention that the plaintiff's burial of her husband on her property constitutes an accessory use. Further, "mere assertions of fact . . . are insufficient to establish the existence of a material fact." (Internal quotation marks omitted.) *Zielinski v. Kotsoris*, supra, 279 Conn. 318-19. Simply arguing that the burial of her husband is an accessory use, without evidence or any case law to support that fact, does not create a genuine issue of material fact sufficient to survive summary judgment

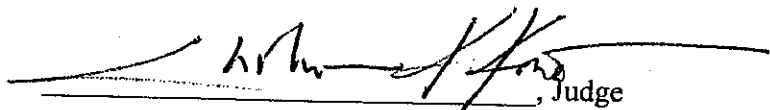
Even though the plaintiff has not submitted any evidence that supports her claim that the burial of her husband in her backyard should be considered an accessory use, and further discussion is not warranted, it is worth noting that "[a] local ordinance is a municipal legislative enactment and the same canons of construction which we use in interpreting statutes are

applicable to ordinances. . . . A court must interpret a statute as written . . . and it is to be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation." (Internal quotation marks omitted.) *Vivian v. Zoning Board of Appeals*, 77 Conn. App. 340, 345, 822, A.2d 374 (2003).

Furthermore, "[i]t is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. . . . The provisions of one statute which specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage." (Internal quotation marks omitted.) *Tappin v. Homecomings Financial Network Inc.*, 265 Conn. 741, 760, 830 A.2d 711 (2003). In this matter, therefore, the defendant's reliance on Section 40A and Section 60A.2.(I), which specifically deals with cemeteries, prevails over more general language regarding "accessory uses" found in Section 60A.3

Conclusion

For the foregoing reasons, the court finds that inasmuch as the burial in this case is not permitted by the Zoning Regulations of the Town of Chester, the defendants' Motion for Summary Judgment is granted.


_____, Judge

Clarence J. Jones