[Cite as *Columbiana v. Simpson*, 2019-Ohio-4086.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

CITY OF COLUMBIANA,

Plaintiff-Appellee,

v.

RICHARD G. SIMPSON, SR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0003

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2018-CV-125

BEFORE:
David A. D'Apolito, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor,105 South Market Street, Lisbon, Ohio 44432, and *Atty. Mark Huston,* 33 Pittsburgh Street, Columbiana, Ohio 44408, for Plaintiff-Appellee and

Atty. Jan Mostov, 1108 Ravine Drive, Youngstown, Ohio 44505, for Defendant-Appellant.

Dated: September 30, 2019

D'APOLITO, J.

{¶1} Appellant Richard G. Simpson, Sr. appeals the entry of summary judgment in favor of Appellee, City of Columbiana ("Appellee" or "City"), as well as the denial of his cross-motion for summary judgment, in this action by the City for declaratory judgment and for preliminary and permanent injunction to require Appellant to comply with City Ordinance Nos. 1260.05,1260.35, 1268.02, and 1270.02.

{¶2} Appellant challenged both the applicability and constitutionality of the ordinances, which, when read in concert, prohibit the keeping of chickens, a coop, and an enclosure in a residential district. The trial court concluded that the keeping of chickens is prohibited in a residential district, and that the ordinances are valid on their face, were not arbitrarily or capriciously applied, and bear a rational relationship to the health, safety, morals, and general welfare of city residents. For the following reasons, the entry of summary judgment in favor of the City is affirmed.

THE CITY ORDINANCES

{¶3} Keeping chickens in residential districts is not explicitly prohibited in the City of Columbiana. The City argues, however, that the prohibition can be inferred from four municipal ordinances read in concert.

{¶4} Zoning is the subject of Title Six of the City of Columbiana Code of Ordinances ("Code"). Section 1260.02 establishes twelve zoning districts, including three residential districts divided based on density – low ("R-1"), medium ("R-2"), and high (R-3), and one agricultural-open space-conservation district ("agricultural district").

{¶5} Section 1270.02 governs permitted land use in the City's R-1 districts, and provides that land within an R-1 district may be used for "[s]ingle-family dwellings, accessory buildings incidental to the principal use which do not include any activity conducted as a business, and signs, as regulated by Chapter 1294." In addition, section 1270.02 provides for other specially allowed or "conditionally permitted uses," but only after application to and receipt of a "conditional zoning certificate" issued by the Planning Commission.

{¶6} Section 1268.02 governs the permitted land use in agricultural districts, and includes single-family dwellings, "[a]gricultural uses and buildings, provided that agricultural buildings used to house farm animals shall be located not less than 200 feet from all property lines," accessory buildings clearly related to the principal use, which do not include any activity conducted as a business, except one roadside stand offering for sale only agricultural products, wildlife and game preserves, and signs as regulated by Chapter 1294.

{¶7} Section 1260 of the Code, captioned "General Provisions and Definitions," defines "agriculture" in section 1260.35, in pertinent part, as:

> [T]he use of land for farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture and animal and poultry husbandry and the necessary accessory uses for packing, treating or storing the produce, provided, however, that:
>
> A. The operation of any such accessory use shall be secondary to that of normal agricultural activities.
>
> B. The above uses shall not include the feeding or sheltering of animals or poultry in penned enclosures within 100 feet of any residential zoning district.

{¶8} The Code does not define "husbandry." However, section 618 of the Code, which governs cruelty to animals and companion animals, defines the term "livestock" as, among other things, poultry and "any other animal that is raised or maintained domestically for food or fiber." Section 618.05(d)(1)(G).

{¶9} The Ohio Supreme Court has defined the term "animal husbandry" as "[t]he branch of agriculture which is concerned with farm animals, especially as regards breeding, judging, care and production, and animal husbandry as one who keeps or tends livestock." *Harris v. Rootstown Tp. Zoning Bd. of Appeals*, 44 Ohio St.2d 144, 149, 338 N.E.2d 763, 766 (1975), citing *Mentor Lagoons v. Boards*, 168 Ohio St. 113, 119, 338 N.E.2d 763 (1958)(interpreting the term in R.C. 519.01, captioned "Townships"). The term "husbandry" is defined generally in the Merriam-Webster Dictionary as "the

cultivation of production of plants or animals: AGRICULTURE." https://www.merriam-webster.com/dictionary/husbandry. Dictionary.com defines the term as "the science of breeding, feeding, and tending domestic animals, especially farm animals." https://www.dictionary.com/browse/animal-husbandry?s=t

{¶10} Finally, section 1260.05 of the Code is captioned "Permitted Uses; Certificates of Occupancy Required," and provides that "[u]ses which are omitted from this Zoning Code which are not specifically permitted shall be considered prohibited until deemed otherwise by the Planning Commission or until, by amendment, such uses are written into this Zoning Code."

FACTS AND PROCEDURAL HISTORY

{¶11} Appellant resides with his wife and mother at 705 S. Main Street, Columbiana, Ohio. Appellant's property is situated in a R-1 district within the City. According to his affidavit, dated June 5, 2018, Appellant has kept eight hens, a chicken coop, and an enclosure on his property for approximately seven years. He considers the hens to be pets, just like his cats.

{¶12} Appellant began keeping chickens in order to feed his family. He and his wife first attempted to grow vegetables, but discovered that the soil on the property was too acidic. As a consequence, Appellant read about raising chickens and rabbits for protein. He chose chickens because eggs do not require the processing that the butchering of rabbits requires. Further, when hens become too old to produce eggs, they can be eaten.

{¶13} Appellant, who is a former Mayor, former member of City Council, and former member of the Planning Committee for over twenty years, believed that there were no restrictions on keeping chickens in residential districts. He reviewed Chapter 618 of the Code captioned, "Animals," and concluded that there was no prohibition against the keeping of chickens, because the only prohibition in that chapter pertains to dangerous, wild or undomesticated animals. *See* Section 618.17.

{¶14} Appellant consulted a well-recognized book on the subject of keeping chickens, where he learned about their care and maintenance, then purchased ten chicks from a local hatchery. Roughly six months later, the hens began producing eggs. Faced

with an overabundance of eggs, Appellant began sharing them with neighbors and friends, including City Manager, Lance Willard.

{¶15} In July of 2016, Appellant was summoned to Willard's office and informed that keeping chickens in an R-1 district was a zoning violation. Appellant explained that he could find no prohibition in the Code regarding the keeping of chickens in a residential district.

{¶16} Willard cited Section 1260.05 for the proposition that uses which are omitted from the Code are considered prohibited until deemed otherwise by the Planning Commission or until, by amendment, such uses are written into the Code. Appellant countered that a strict reading of section 1260.05 would prohibit cats, dogs, and gardens in residential districts, because they are only specifically permitted in agricultural districts (animal husbandry, floriculture, and horticulture). He argued in the alternative that the term "husbandry" contemplates commercial sale.

{¶17} The City sent violation notices dated November 17, 2016 to Appellant and two other individuals in the City's residential districts that were keeping chickens. The notice instructed the parties to remove the chickens from their property on or before February 1, 2017. Appellant appealed the violation to the Planning Committee, which stayed the violation pending further consideration by City Council.

{¶18} According to Willard's affidavit, he began receiving complaints from residents regarding the keeping of chickens in residential districts in the latter part of 2015. During the first six months of 2017, the subject of keeping chickens was an ongoing topic of discussion of both the Planning Commission and City Council. During a Council meeting on April 18, 2017, Rebecca McMurray, a City resident, appeared and provided to Council a collection of written information describing numerous health risks associated with handling and raising chickens.

{¶19} According to Appellant, the Mayor and two Council members were the driving force behind the violation notice. During the debate in Council Chambers, the Council members raised concerns about the alleged smell, noise, dirt, running at large, and health hazards of chickens. The Mayor invited a Youngstown news station to report the story on television. Appellant attributes the objections to the keeping of chickens of

the Mayor and one member of the Planning Committee to their personal animus against Appellant.

{¶20} On June 20, 2017, the City Council voted to place Resolution 17-R-505 before the voters, which would authorize the keeping of chickens in residential districts in the City. The ballot issue failed at the general election held on November 7, 2017. The other two residents voluntarily removed the chickens from their property following the defeat of the resolution at the polls.

{¶21} Willard sent a second notice to Appellant, dated November 20, 2017, informing Appellant of the relevant ordinances and instructing him to remove the chickens from his property on or before December 31, 2017. Because Appellant refused to remove the hens, coop, and enclosure from his property, the City instituted this action for declaratory judgment and injunctive relief on March 13, 2018.

{¶22} On August 14, 2018, Appellant filed a 50-page motion to dismiss. Attached to the motion are the affidavits of Appellant and two of his neighbors, who attest that they have experienced no noise or odors emanating from the enclosure. Also attached are copies of the resolution and ballot, as well as section 18.10 of the treatise "American Law of Zoning," which addressed the keeping of chickens in residential districts. The section discusses the growing popularity of backyard chickens, and explains that cities in both North Carolina and Michigan have enacted ordinances that permit the keeping of chickens in residential districts.

{¶23} Because there was no evidence that the hens caused a nuisance, Appellant argued that the ordinances were arbitrarily and capriciously applied. Appellant further argued, without any support in the record, that the ordinances were selectively enforced based on personal animosity against him harbored by the Mayor and members of City Council and the Planning Commission. Next, Appellant argued that each of the ordinances, read independently of the others, were either irrelevant, immaterial, or contrary to law.

{¶24} Specifically, with respect to section 1270.02, permitted uses in R-1 districts, Appellant argued that no nuisance had been established. He further argued that keeping chickens is neither "agriculture" nor "poultry husbandry," which, according to his brief,

requires a commercial element. Finally, Appellant argued that the hens, coop, and enclosure are legally conforming uses.

{¶25} In their opposition brief, filed on September 4, 2018, the City argued that it had the authority to prohibit the keeping of chickens in residential districts, and that the prohibition was reasonably related to the City's interest in protecting its citizens. Attached to the opposition brief were the affidavits of Willard, McMurray, and Charles E. Longbottom, who was also an outspoken critic of chickens in residential districts. In his November 20, 2018 affidavit, Willard described the complaints he received regarding the keeping of chickens in residential districts. He also authenticated correspondence from two veterinarians to the Planning Commission, which were attached to his affidavit and describe the health concerns presented by the keeping of chickens in residential areas. Although one letter speaks specifically to free range chickens, the concerns raised in the letter apply with equal force to penned chickens.

{¶26} Appellant filed his reply brief on September 11, 2018. On September 19, 2018, the trial court denied the motion to dismiss finding that Appellant failed to show that there were no facts on which the City could rely to establish its enforcement authority.

{¶27} On November 5, 2018, the parties filed a joint motion waiving a hearing, as well as stipulations designed to govern the filing of cross-motions for summary judgment. The parties agreed that the attachments to the motion to dismiss and the opposition brief would be considered for summary judgment purposes.

{¶28} In the cross-motions for summary judgment, both parties restated the arguments advanced in their earlier motion practice. On December 28, 2018, the trial court concluded that the keeping of chickens is prohibited in the City's residential districts, and that the ordinances are valid on their face and were not arbitrarily or capriciously applied, because there is no outright prohibition on keeping chickens in the City. Finally, the trial court found that the prohibition bears a rational relationship to the health, safety, morals, and general welfare of city residents. This timely appeal followed.

STANDARD OF REVIEW

{¶29} This appeal is from a trial court judgment resolving a motion for summary judgment. An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶30} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id*. at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Doe v. Skaggs*, 7th Dist. Belmont No. 18 BE 0005, 2018-Ohio-5402, ¶ 11.

{¶31} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT'S DECISION ADOPTING THE COMPLAINT'S ALLEGATION THAT MR. SIMPSON'S KEEPING OF CHICKENS WAS AN "AGRICULTURAL USE" WAS AGAINST THE MANIFIEST WEIGHT OF THE EVIDENCE.

{¶32} In his first assignment of error, Appellant challenges the trial court's conclusion that keeping hens, a coop, and an enclosure constitutes a violation of the ordinances. He argues that the hens are a hobby and do not constitute an "agricultural use", or "poultry husbandry."

{¶33} Municipalities have "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Constitution, Article XVIII, Section 3. "Zoning" has been defined by the Ohio Supreme Court as the use of the government's police power to regulate the character and intensity of real estate. *Apple Group, Ltd. v. Granger Twp. Bd. of Zoning Appeals*, 144 Ohio St.3d 188, 2015-Ohio-2343, 41 N.E.3d 1185, ¶ 6 (2015). We review the interpretation of an ordinance de novo. *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 9.

{¶34} In reviewing an ordinance, we must determine the legislative intent. *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21. "'[I]f such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged.'" *Id.*, citing *State ex rel. McGraw v. Gorman*, 17 Ohio St.3d 147, 149, 478 N.E.2d 770 (1985).

{¶35} We "must read words and phrases in context and construe them in accordance with rules of grammar and common usage." *W. Jefferson v. Cammelleri*, 12th Dist. Madison No. CA2014-04-012, 2015-Ohio-2463, 2015 WL 3824456, ¶14, citing *State ex rel. Choices for S.W. City Schools v. Anthony*, 108 Ohio St.3d 1, 2005-Ohio-5362, 840 N.E.2d 582, ¶ 40. Because zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled, such resolutions are ordinarily construed in favor of the property owner. *DeSarro v. E. Liverpool Bd. of Zoning Appeals*, 7th Dist. Columbiana No.

05-CO-12, 165 Ohio App.3d 732, 2006-Ohio-1290, 848 N.E.2d 544 ¶ 40, citing *Mishr v. Poland Bd. of Zoning Appeals*, 76 Ohio St.3d 238, 241, 667 N.E.2d 365 (1996).

{¶36} Statutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative. *Arcenio v. Youngstown State Univ.*, 7th Dist. Mahoning No. 14 MA 0163, 2016-Ohio-4812, 68 N.E.3d 157, ¶ 27, *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 256, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26.

{¶37} Having reviewed the ordinances, we find that the prohibition on agricultural uses within residential districts can be inferred from the inclusion of agricultural uses in the ordinance governing agricultural districts. This conclusion is bolstered by the fact that the feeding and sheltering of poultry in penned enclosures is prohibited in portions of agricultural districts that are within 100 feet of any residential district. Furthermore, section 1260.05 prohibits non-permitted uses until they are permitted by the Planning Commission or until, by amendment, said uses are written into the Code.

{¶38} Appellant argues that keeping chickens is a hobby and that his chickens are his pets. However, we find that the keeping of chickens falls within the unambiguous definition of "agriculture" in section 1260.35. Section 618.05(d)(1)(5) of the Code defines poultry as "livestock," which is further defined as "any other animal that is raised or maintained domestically for food or fiber." Appellant concedes that he acquired the chicks as a source of protein to feed his family.

{¶39} Finally, Appellant's argument that the term "husbandry" requires commercial sales is likewise unavailing. The use of the term in the Code, the definition of the Ohio Supreme Court, as well as its common meaning do not include a commercial element.

{¶40} Accordingly, we find that the trial court did not err as a matter of law when it concluded that Appellant is engaged in "poultry husbandry" in a residential district, in violation of Section 1270.02. Therefore, we find Appellant's first assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT MR. SIMPSON'S HENS, COOP, AND ENCLOSURE WERE NOT LEGALLY CONFORMING USES UNDER R.C. 713.15.

{¶41} Next, Appellant argues that "because [he] acquired [the hens, coop, and enclosure] prior to the first time that the City applied the legislative scheme against a City resident, said property is a legal non-conforming use under R.C. 713.15." (Appellant's Brf., p. 11). Appellant contends that the application of the four ordinances is "the functional equivalent of an amendment." (Appellant's Brf., p. 12). Appellant further argues that he was not on notice when he acquired the hens, coop, and enclosure that they were banned in residential districts, because "the zoning code contained no language that would place a reasonable City resident on Notice that such property was not permitted on his real property." (Appellant's Brf., p. 12).

{¶42} R.C. 713.15, captioned "Retroactive zoning ordinances prohibited," reads, in pertinent part:

> The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or an amendment to the ordinance, may be continued, although such use does not conform with the provisions of such ordinance or amendment * * *

{¶43} We find that the application of the four ordinances in this case is not the functional equivalent of an amendment. The keeping of chickens in a residential district is a violation of section 1270.02. The fact that the interpretation of section 1270.02 involved consideration of other ordinances does not constitute an amendment to section 1270.02. Accordingly, we find that the trial court did not err as a matter of law when it concluded that the keeping of chickens in a residential district is not a legally conforming use. Therefore, we find Appellant's second assignment of error is meritless.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT OVERRULED MR. SIMPSON'S MOTION TO DISMISS.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT GRANTED THE CITY'S MOTION FOR SUMMARY JUDGMENT AND WHEN IT OVERRULED MR. SIMPSON'S MOTION FOR SUMMARY JUDGMENT.

{¶44} Appellant argues in his third and fourth assignments of error that the trial court erred in denying various legal arguments raised in his motion to dismiss and his motion for summary judgment: First, he asserts that Section 1270.02 is arbitrary and unreasonable because his hens, coup, and enclosure are not a nuisance. Second, he contends that he is not engaged in an agricultural use. Third, he claims that husbandry requires a commercial element. Finally, because "husbandry" is not defined by the Code, Appellant asserts that the term should be interpreted in his favor.

{¶45} The power of a municipality to determine land-use policy is a legislative function, which will not be interfered with by the courts, unless such power is exercised "in such an arbitrary, confiscatory or unreasonable manner as to be in violation of constitutional guaranties." *Willott v. Beachwood*, 175 Ohio St. 557, 26, 197 N.E.2d 201, paragraph three of the syllabus (1964). The *Willott* Court recognized that municipal governing bodies are better qualified, because of their knowledge of the situation, to act upon these matters than are the courts. *Id.* at 560, 197 N.E.2d 201.

{¶46} Zoning ordinances enjoy a presumption of constitutionality. *Goldberg v. Richmond Hts.,* 81 Ohio St.3d 207, 209, 690 N.E.2d 510 (1998). Courts have an obligation to liberally construe statutes to avoid constitutional infirmities. *State ex rel. Taft v. Franklin Cty. Court of Common Pleas*, 81 Ohio St.3d 480, 481, 692 N.E.2d 560 (1998).

{¶47} A zoning ordinance may be challenged as unconstitutional on its face or as applied to a particular set of facts. *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio

St.3d 339, 341, 2006-Ohio-4, 839 N.E.2d 903, ¶ 11, citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944), paragraph four of the syllabus. When a zoning ordinance is challenged on its face, "the challenger alleges that the overall ordinance, on its face, has no rational relationship to a legitimate governmental purpose and it may not constitutionally be applied under any circumstances." *Jaylin Investments* at ¶ 11, citing *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 137, 729 N.E.2d 359 (2000). When a zoning ordinance is challenged as applied, the challenger is contesting the validity of the ordinance as it applies to a particular parcel of property. *Jaylin Investments* at ¶ 12, citing *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 14.

{¶48} "The party challenging the constitutionality of a zoning ordinance bears the burden of proof and must prove unconstitutionality beyond fair debate." *Goldberg, supra*, at 209. "[T]here is little difference between the 'beyond fair debate' standard and the 'beyond a reasonable doubt' standard." *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584, 653 N.E.2d 639 (1995). In other words, "the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable." *Id.*

{¶49} The object of scrutiny is the government's action, that is, the state or local law or regulation is the focal point of the analysis, not the property owner's proposed use. *Jaylin, supra,* ¶ 2. In an "as applied" challenge, the proposed use may be a relevant factor to be considered, however, the owner must also present evidence to overcome the presumption that the zoning is a valid exercise of the municipality's police powers, as it is applied to the property at issue. *Id.* In *Mobil Oil Corp. v. Rocky River*, 38 Ohio St.2d 23, 309 N.E.2d 900 (1974), the Ohio Supreme Court held that the issue should be "whether the ordinance, in proscribing a landowner's proposed use of his land, has any reasonable relationship to the legitimate exercise of police power by the municipality." *Id.* at syllabus.

{¶50} In summary, a zoning ordinance will only be struck down if a property owner challenging the ordinance proves, beyond fair debate, that the ordinance is "arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Goldberg, supra*, at 214. The challenge must focus on the constitutionality of the ordinance as applied to prohibit the proposed use, not the

reasonableness of the proposed use. *Jaylin,* supra, at ¶ 20. "In a constitutional analysis, courts must strive to balance the benefits to the public against the disadvantages to the private interests of the landowner." *Jaylin, supra,* at ¶ 14, citing *C. Miller Chevrolet, Inc. v. Willoughby Hills*, 38 Ohio St.2d 298, 303, 313 N.E.2d 400. Each case is judged on its own unique facts. *Id.*

{¶51} Appellant predicates the third and fourth assignments of error on three decisions – a decision from this Court, *City of Salem v. Fellows*, 7th Dist. Columbiana No. 1119, 1977 WL 199135; a common pleas court decision from Cuyahoga County, *Hahn v. City of Brooklyn*, No. 662398, 153 N.E.2d 359 (Ohio Com.Pl.1958); and an Illinois appellate court decision, *City of Sparta v. Page*, 2015 IL App (5th) 140463-U, 2015 WL 6440338.

{¶52} In *Fellows*, *supra,* the appellant owned five dogs and two cats and was convicted of a violation of Section 90.10 of the Codified Ordinances of the City of Salem, which read, in pertinent part, "No person owning or harboring more than 2 dogs or cats shall keep them within 150 feet of any residence other than the residence of the harborer or owner, anywhere in the city." *Id.* at ¶ 1. Fellows argued that the ordinance was unconstitutional and that the trial court's finding of guilt was contrary to law. Because there was not a complete prohibition on cats and dogs in the City of Salem, and the barking of the dogs constituted a nuisance to the neighboring property, we found that the restriction was neither arbitrary nor unreasonable.

{¶53} We cited with favor portions of the Cuyahoga County trial court's decision *Hahn*, *supra*. In that case, the challenged ordinance prohibited the keeping, maintaining, or harboring of pigeons within the city limits on a parcel containing less than 8,000 square feet, stating that it is detrimental to health and general welfare of the public. The Cuyahoga common pleas court recognized that city councils are presumed to have good reasons for passing an ordinance and a court is not authorized to subject its judgment for that of council so long as its ordinances are passed under a valid exercise of police power. The trial court further observed, however, that "to say that something is detrimental to health and general welfare of the public is not sufficient to make it so." *Hahn, supra,* at 361. Despite the common pleas court's acknowledgment of the deference accorded to

municipal legislation, the trial court concluded that the ordinance outlawing pigeons was arbitrary and capricious.

{¶54} Finally, in *Page, supra*, the appellant was charged with a zoning violation for conducting a prohibited agricultural use – the non-commercial keeping of three chickens in residential districts. The City of Sparta had previously adopted regulations that restricted agricultural uses to agricultural districts. Following a bench trial, the trial court found that Appellant's use was incidental to a permitted residential use of his property, much the same as having a vegetable garden. *Page,* 2015 WL 6440338, ¶ 6.

The Illinois appellate court recognized that home rule communities have broad discretion to determine what is in the interest of public welfare, and courts generally will not disturb an exercise of police power merely because there is a difference of opinion regarding the wisdom or necessity of an ordinance. *Id.* at ¶ 8. As a consequence, the appellate court found that the ordinance was an acceptable regulation for the good of the public. The court concluded nonetheless that the keeping of chickens was incidental to residential use, reasoning that Page's chickens were pets, in the same manner as dogs, vegetable gardens, and fruit trees. *Id.* at ¶ 9.

{¶55} Based on the holdings in *Fellows*, *Hahn*, and *Page*, *supra*, Appellant argues that section 1270.02 is arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community because there is no evidence that the hens, coup, and enclosure constitute a nuisance. However, a municipality is not required to show that the property owner's proposed use constitutes a nuisance in order to establish the constitutionality of the ordinance.

{¶56} In order to invalidate a municipality's land-use policy, Appellant must demonstrate that the challenged ordinance is arbitrary, confiscatory or unreasonable to be in violation of constitutional guaranties. We must presume that the ordinance is a valid exercise of the municipality's police powers, and the ordinance will pass constitutional muster if the municipality can demonstrate any reasonable relationship to its legitimate exercise of police power. We are prohibited from substituting our judgment for the legislative judgment in any case in which the issue or matter is "fairly debatable." *Cent. Motors Corp. v. Pepper Pike*, *supra*, at 584.

{¶57} Based on the presumptive validity of the ordinance, and the deference accorded to the legislative enactments of municipalities, we find that the ordinance prohibiting the keeping of chickens in residential districts is neither arbitrary nor unreasonable. The Code does not proscribe the keeping of chickens in the City in its entirety, but, instead, limits the practice to agricultural districts. The record reflects that the issue was the subject of considerable debate at meetings of the Planning Commission and City Council. The City Council recognized that the matter could not be resolved and placed a resolution on the ballot in order to allow the residents to decide the issue. There is no question that the keeping of chickens in residential districts is fairly debatable, as it has been fairly debated in the City of Columbiana.

{¶58} We further find that the ordinance bears a substantial relation to the public health, based on concerns and objections raised by city residents and local veterinarians regarding the potential threat to the health of City residents. Accordingly, we find that Section 1270.02 is a valid exercise of the City's police power. Therefore, Appellant's third and fourth assignment of error have no merit.

CONCLUSION

{¶59} In summary, we find that Section 1270.02 of the Code prohibits the keeping of chickens in residential districts. Although the prohibition in Section 1270.02 is inferred from reading the ordinance in concert with other Code sections, we do not agree that the interpretation constitutes the functional equivalent of an amendment subject to the prior use statute. Finally, we find that the ordinance in a valid exercise of the municipality's police power as Appellant has failed to meet his burden of proof to show unconstitutionality beyond fair debate. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.