

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Babette A. Feibel et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 09AP-472
 : (C.P.C. No. 08CVH-04-5418)
 City of Columbus et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on December 22, 2009

David A. Goldstein Co., LPA, David A. Goldstein and Seth K. Kleinman, for appellants.

Richard C. Pfeiffer, Jr., City Attorney, and Joshua T. Cox, for appellee City of Columbus.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiffs-appellants, Babette A. Feibel and Oval D. Williams, appeal from a judgment of the Franklin County Court of Common Pleas granting the motion for summary judgment of defendants-appellees, City of Columbus ("city") and Columbus City Council ("council"), and denying plaintiffs' motion for summary judgment. Because the trial court did not err in concluding that (1) defendants properly passed Ordinance 0396-2008 pursuant to the power granted under Section 164 of the Columbus City Charter, (2) any

deficiencies in the petition were irrelevant, as defendants did not pass Ordinance 0396-2008 pursuant to Section 181-1 of the Columbus City Charter, and (3) plaintiffs suffered no adverse economic consequence, we affirm.

I. Procedural History

{¶2} The facts pertinent to plaintiffs' appeal largely are undisputed. On July 20, 2006, residents of the Laurel Canyon subdivision circulated a petition urging the city to install an ornamental lighting system within the subdivision. On November 9, 2006, council issued Resolution 0176X-2006, which not only authorized the Director of Public Utilities to "cause plans and specifications to be prepared for installing ornamental street lighting" but declared emergency action for timely implementing the services. While the resolution acknowledged the petition the property owners submitted, the resolution's purpose was to initiate the planning phase and estimate the cost of the endeavor.

{¶3} On July 7, 2007, council passed Resolution 0092X-2007. Acknowledging the petition that property owners in the subdivision submitted, Resolution 0092X-2007 authorized the Director of the Department of Public Utilities to "declare the necessity of installing ornamental street lighting with underground wiring for the Laurel Canyon area." While both Resolution 0176X-2006 and 0092X-2007 directed the installation of the ornamental street lighting system under the "assessment procedure," Resolution 0092X-2007 also determined the city would pay \$32,000 under that procedure.

{¶4} Council approved Ordinance 0396-2008 on April 7, 2008. The ordinance authorized the Columbus Department of Public Utilities to "proceed with the installation of a high pressure sodium street lighting system with ornamental poles and underground wiring" in the subdivision. The ordinance again referenced the petition the property

owners submitted, and it determined the city's share under the assessment procedure was \$60,000 rather than the \$32,000 reflected in Resolution 0092X-2007. According to the ordinance, the balance of the cost was covered through assessments against property owners in the subdivision, to be paid in 20 semi-annual installments plus interest with an option to pay early. Council finalized the action and issued the ordinance on April 10, 2008.

{¶5} Plaintiffs, who are residents of the subdivision and did not sign the petition, filed a complaint on April 10, 2008 challenging defendants' authority to pass the ordinance and claiming property owners who did not sign the petition were not subject to the assessment for the improvement. Defendants answered on May 9, 2008, asking the trial court to deny the relief plaintiffs sought and to dismiss the case. The parties subsequently filed cross-motions for summary judgment, defendants on December 2, 2008 and plaintiffs on January 26, 2009. The trial court on April 14, 2009 entered a final judgment granting defendants' summary judgment motion and denying plaintiffs' summary judgment motion.

II. Assignments of Error

{¶6} Plaintiffs appeal, assigning three errors:

1. The Trial Court erred in finding Appellees properly passed Ordinance 0396-08 pursuant to the power granted under Section 164 of the Columbus City Charter.
2. The Trial Court erred in failing to find that Appellees improperly passed Ordinance 0396-2008 pursuant to Section 181-1 of the Columbus City Charter.
3. The Trial Court erred in holding Appellants suffered no adverse economic consequence.

III. First Assignment of Error – Section 164 of Columbus City Charter

{¶7} Plaintiffs' first assignment of error asserts the trial court erred in concluding Ordinance 0396-2008 properly was passed pursuant to the power granted under Section 164 of the Columbus City Charter. Plaintiffs further contend that, because authority for the ordinance necessarily was derived from Section 181-1, factual issues regarding the validity of the petition circulated pursuant to Section 181-1 made summary judgment inappropriate.

{¶8} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶9} As a preliminary matter, we note council arguably is not a proper party to this action. "A city council is not *sui juris* and therefore cannot sue or be sued in its own right, absent statutory authority." *City of Cuyahoga Falls v. Robart* (1991), 58 Ohio St.3d 1, 6, citing *State ex rel. Cleveland Municipal Court v. Cleveland City Council* (1973), 34 Ohio St.2d 120, 122; *Council of Whitehall v. Rogers* (1980), 69 Ohio App.2d 124. The proper party in an action against a city council generally is the city itself, or the existing council members. *Cleveland Municipal Court* at 122. Here, however, plaintiffs sued both

the city and council, so whether council is a proper defendant does not change our analysis.

{¶10} Article XVIII of the Ohio Constitution, commonly referred to as the Home-Rule Amendment, grants municipalities the 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." *City of Columbus v. Barr* (1953), 160 Ohio St. 209, 212, citing Ohio Const. art. XVIII, sec. 3. The city of Columbus adopted its charter in 1914. *Id.* at 213. Section 164 of the Columbus City Charter deals with local improvements and states that council shall have power under ordinance (1) "to provide for the construction, reconstruction, repair and maintenance by contract or directly by the employment of labor, of all local improvements," and (2) "to provide for the payment of any part of any such improvement by levying and collecting special assessments upon abutting, adjacent and contiguous or other specially benefited property." According to Section 164, "[t]he amount assessed against any property shall not exceed the amount of benefits accruing to such property." *Id.*

{¶11} Sections 165 through 173 of the Columbus City Charter set forth the methods and procedures by which council may exercise and implement its Section 164 authority. For example, Section 166 authorizes a resolution of necessity, Section 167 provides for plans and specifications, Section 168 authorizes estimated assessments, Section 170 provides for notice to property owners to be assessed, and Sections 171 and 172 grant the opportunity for property owners to object and be heard before a board of revision, which "report[s] to council its findings." Section 173, Columbus City Charter. The Columbus City Charter then provides in Section 173 that "[u]pon the filing of such report

of the board of revision, or in the case no objections have been filed, then upon the expiration of the time for filling the same, council," if it decides to proceed with the improvement, "shall * * * so declare by ordinance, which ordinance shall require for its passage, the votes of at least five members of council." Id. The noted sections, all part of the original Columbus City Charter adopted in 1914, remain a part of the Columbus City Charter today and vest council with the authority to ordain local improvements.

{¶12} Plaintiffs argue that, under Section 181-1, council's authority to provide for improvement construction by assessment is conditioned on the benefitting property owners' submitting a valid petition. Enacted in 1963, Section 181-1 states that when "the owners of sixty per cent of the front footage of property abutting upon a street, alley, easement, or other public improvement, or the owners of seventy-five per cent of the area to be assessed for such improvement," subscribe a petition that is "regularly presented" to council, "the total cost of such improvement * * * may be assessed and collected in equal annual installments, proportioned to the whole assessment, in a manner which may be fixed by city council." The section notes that "[w]hen the lot or land of one who did not subscribe to the petition is assessed," the "assessment shall not exceed thirty-three and one-third per cent of the actual value including improvements" on it, "as enhanced by the improvement for which the assessment is levied, such value to be determined as of the date of the assessing ordinance." Section 181-1, Columbus City Charter.

{¶13} Section 181-1 is the only Columbus City Charter section addressing petitions in the context of improvements and assessments. Under the unambiguous language of the section, its purpose is to allow council to assess the entire cost of an improvement against the petitioners, while capping the assessment against those who did

not sign the petition at one-third the value of the property as improved. *Id.* Nothing in Section 181-1 restricts or preempts council's authority under pre-existing Section 164 to provide by ordinance for constructing an improvement paid for by special assessment.

{¶14} Section 181-1 thus does not interfere with council's authority under Section 164, but is an element in the larger picture that is comprised of the Columbus City Charter provisions about improvements. Section 180, part of the original Columbus City Charter, places limitations on the assessment procedure and provides no assessments may be made, within a five-year period, in excess of one-third of the actual value of the property as improved. Adopted in 1963, Sections 181 and 181-1 also deal with the allocation of the cost of improvements. Section 181 requires that the city pay at least one-fiftieth of the entire cost of the improvement and permits council to "provide for the payment of the city's portion of all such improvements by the issuance of bonds or notes." *Id.* Section 181-1, on the other hand, operates as an exception to the more general cost allocation rules of Sections 180 and 181. Rather than restrict council's authority to improve by assessment, Section 181-1 broadens that authority by allowing council to vary from the cost and assessment limitations that Sections 180 and 181 impose if property owners meet the petition requirements.

{¶15} As a result, Section 181-1, both by its express terms and in context with Sections 180 and 181, does not affect council's authority to enact an ordinance authorizing an improvement. An invalid petition under Section 181-1 cannot and does not divest council of its authority under Section 164 to ordain an improvement by assessment. Here, council passed Ordinance 0396-2008 in accordance with the authority Section 164 gives it. Council first issued Resolution 0176X-2006 to cause plans for the

proposed improvement and then passed Resolution 0092X-2007 to declare the necessity of installing the ornamental lighting system in the subdivision. Additionally, council heard objections to the proposed plan and approved the estimated cost for the improvement.

{¶16} Because both resolutions specifically referenced the petition that residents of the subdivision circulated and submitted, plaintiffs argue council acted pursuant to the petition rather than the authority in Section 164. Even if it were a Section 181-1 petition that brought to council's attention the need for ornamental street lighting in the subdivision, the petition does not affect council's authority to act under Section 164. Indeed, the language of the ordinance passed, Ordinance 0396-2008, states council exercised its legislative discretion to enact the ordinance "as if this improvement was initiated by Council * * * and notwithstanding any alleged deficiencies in the petition initially proposing the improvement." (Ordinance 0396-2008.) Council thus passed Ordinance 0396-2008 as if the petition did not exist, and nothing in the language of the Charter conditions council's authority under Section 164 on a validly circulated petition.

{¶17} Reasonable minds could come to but one conclusion: council acted pursuant to the express authority Section 164 of the Columbus City Charter conferred on it, and the trial court did not err in so concluding. We therefore overrule plaintiffs' first assignment of error.

IV. Second Assignment of Error – Section 181-1 of the Columbus City Charter

{¶18} In their second assignment of error, plaintiffs argue the trial court should have concluded defendants improperly passed Ordinance 0396-2008 pursuant to Section 181-1 of the Columbus City Charter, because the petition that formed the basis of

council's action on the ornamental street lighting system was defective under the terms of Section 181-1.

{¶19} Plaintiffs' argument confuses enactment authority with assessment allocation. Section 181-1 does not divest council of the authority granted to it in Section 164. Plaintiffs nonetheless expend much effort explaining the ways the petition fails to meet the 60 percent signature requirement of Section 181-1. We need not address the merits of plaintiffs' arguments, for even if the petition failed to meet the specified requirements, it is neither the petition itself, nor Section 181-1, which confers upon council the authority to ordain an improvement by necessity. Section 181-1 does not affect the passage of the ordinance but rather the source of the funding for the improvement.

{¶20} As pertinent here, the sole legal effect of the petition's allegedly failing to meet, for any reason, the signature percentage threshold in Section 181-1 is to prevent council from allocating the entire cost of the improvement on the petitioners and other benefiting property owners. Here, council did not allocate the entire cost of the improvement to petitioners; rather, the city assumed \$60,000 of the estimated \$378,667.53 total cost of construction, thus providing approximately 15.8 percent of the total estimated cost and far exceeding the two percent requirement of Section 181. See Section 181 (requiring the city to provide at least one-fiftieth of the total cost of the improvement absent a valid Section 181-1 petition). Thus, the various ways in which plaintiffs allege the petition is deficient do not affect the validity of council's action in passing Ordinance 0396-2008 pursuant to Section 164. Indeed, the language of the ordinance itself expressly declares council proceeded despite any alleged deficiencies in the petition.

{¶21} Because council did not act pursuant to Section 181-1, any deficiencies in the petition are immaterial. The trial court thus did not err in failing to conclude the ordinance was improper under Section 181-1. We therefore overrule plaintiffs' second assignment of error.

V. Third Assignment of Error – Adverse Economic Consequences

{¶22} Plaintiffs' third assignment of error asserts the trial court erred in holding plaintiffs suffered no adverse economic consequences as a result of defendants' actions. Because Ordinance 0396-2008 levies an assessment against all property owners in the subdivision, plaintiffs argue that paying the assessment is necessarily an adverse economic consequence.

{¶23} While we acknowledge Ordinance 0396-2008 results in an assessment against plaintiffs, the trial court stated no adverse economic consequence was "caused by Council *acting pursuant to Section 164.*" (Emphasis added.) (Decision & Entry, 9.) In the context of the decision, the trial court's statement refers to its conclusion that council acted pursuant to Section 164 rather than Section 181-1. Because council did not assess the entire cost of the improvement against the property owners in the subdivision as it could have under Section 181-1, plaintiffs suffered no adverse economic consequence as a result of council's acting under Section 164 and agreeing to pay a portion of the cost.

{¶24} Additionally, plaintiffs argue installing the ornamental street lighting system "may" constitute an unconstitutional taking of their property. (Plaintiffs' brief, 10-12.) Plaintiffs, however, did not raise the argument in the trial court, and their failure to do so waives the argument for purposes of appeal. *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus (stating the general rule is that "an appellate court will not

consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court"); *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus (holding failure to raise at the trial court level a constitutional issue apparent at the time of trial waives such issue and need not be heard for the first time on appeal). Even if we were to address plaintiffs' argument, the record contains no evidence to support it. Moreover, plaintiffs' argument contradicts plaintiffs' statement of the factual premise for their action, asserting the installation of the ornamental street lighting system is to occur within the public right-of-way.

{¶25} Accordingly, we overrule plaintiffs' third assignment of error.

VI. Disposition

{¶26} The trial court did not err in granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment. Reasonable minds could come to but one conclusion: defendants enacted Ordinance 0396-2008 pursuant to Section 164 of the Columbus City Charter, and its action was not improper under Section 181-1 of the Columbus City Charter. Having overruled plaintiffs' three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
