

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

City of Columbus, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-943
 : (M.C. No. 2008 EVH 60357)
 :
 Abe Bahgat et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellants. :

D E C I S I O N

Rendered on June 30, 2011

Richard C. Pfeiffer, Jr., City Attorney, and *Jaiza N. Page* and *Jody M. Spurlock*, for appellee.

Bahgat Law, LLC, and *Joseph A. Bahgat*, for appellants.

APPEAL from the Franklin County Municipal Court,
Environmental Division

KLATT, J.

{¶1} Defendants-appellants, Abe Bahgat and the real property located at 117-121 E. Livingston Avenue, appeal from a judgment of the Franklin County Municipal Court, Environmental Division, in favor of plaintiff-appellee, the City of Columbus ("City"). For the following reasons, we affirm the trial court's judgment.

{¶2} Bahgat owns the multi-dwelling building located at 117-121 E. Livingston Avenue in the German Village historic district of Columbus. In the summer of 2006, one

of Bahgat's colleagues observed a man carrying copper pipe climb out of one of the basement windows of the building. All of the basement windows of 117-121 E. Livingston are approximately two-feet high by two-feet wide and sit level with the street. At the time of the burglary, each basement window consisted of two panes of glass, separated by a vertical muntin located in the middle of the window.¹ All the muntins and sashes were made of wood.

{¶3} Soon after the burglary, Bahgat replaced the basement windows with glass block. Bahgat neglected to secure the approval of the German Village Commission ("Commission") prior to replacing the windows. On September 1, 2006, City Code Enforcement Officer Louann Irwin inspected 117-121 E. Livingston and issued Bahgat a code violation notice. The notice indicated that Bahgat had made "[a]lterations to [the] exterior [of 117-121 E. Livingston] without first obtaining the required Certificate of Appropriateness from the German Village Commission" in violation of Columbus City Code 3119.47. That code section prohibits owners of property in the German Village historic district from "construct[ing], reconstruct[ing], alter[ing], chang[ing] the exterior color of or demolish[ing] any structure or architectural feature now or hereafter in [the German Village historic district] without first applying for a certificate of appropriateness therefor and obtaining either such a certificate of appropriateness or a certificate that no architectural feature is involved." The code violation notice informed Bahgat that he had to correct the alleged violation within 30 days of service of the notice.

{¶4} Bahgat then sought and received a certificate of appropriateness from the Commission. The certificate, issued August 14, 2007, permitted Bahgat to:

¹ A muntin is a short bar that divides and holds panes of glass in a window.

Remove divided light wood frame window from all basement window openings. Install new divided light wood frame windows in all basement window openings to match the original windows, like-for-like. Window to match the original in material, dimension, trim, profile, and location in the window opening.

{¶5} The certificate of appropriateness expired one year after the Commission issued it. Code Enforcement Officer Irwin re-inspected 117-121 E. Livingston on August 18, 2008 and found the glass block still in place.

{¶6} On December 1, 2008, the City filed a verified complaint against defendants. In its complaint, the City requested: (1) a declaratory judgment stating that 117-121 E. Livingston constituted a public nuisance and violated Columbus City Code 3119.47, and (2) a preliminary and permanent injunction requiring Bahgat to bring 117-121 E. Livingston into compliance with the Columbus City Code.

{¶7} After defendants filed an answer, litigation of the case stalled. No meaningful action occurred until March 1, 2010 when the City filed an amended complaint.² Although similar to the original complaint in most respects, the amended complaint additionally alleged that Bahgat had not complied with the certificate of appropriateness issued by the Commission. The amended complaint sought an order declaring 117-121 E. Livingston a public nuisance and in violation of Columbus City Code Chapters 3116 and 3119 (collectively the "historic preservation code"), as well as the certificate of appropriateness. Also, the City requested a preliminary and permanent injunction requiring Bahgat to bring 117-121 E. Livingston into compliance with the historic preservation code and the certificate of appropriateness.

{¶8} In an entry filed June 29, 2010, the trial court ordered the parties to file cross motions for summary judgment by August 2, 2010. Only defendants complied with this entry. The City filed neither a motion for summary judgment nor a memorandum in opposition to defendants' motion for summary judgment. Nevertheless, on October 15, 2010, the trial court entered summary judgment in the City's favor. The trial court declared 117-121 E. Livingston a public nuisance, enjoined Bahgat from continuing to maintain the property in its current state, and required Bahgat to comply with the certificate of appropriateness within 90 days of the date of the final order.

{¶9} Defendants now appeal from the final order and assign the following errors:

[1.] THE TRIAL COURT ERRED AS A MATTER OF LAW BY SUA SPONTE ENTERING SUMMARY JUDGMENT IN FAVOR OF THE NONMOVING PARTY WHEN THAT NONMOVING PARTY DID NOT FILE ANY AFFIDAVIT OR MEMORANDUM OPPOSING APPELLANTS' SUMMARY JUDGMENT MOTION.

[2.] THE TRIAL COURT ABUSED ITS DISCRETION BY RENDERING A DECISION BASED ON ALLEGATIONS THAT PLAINTIFF DID NOT PROVIDE IN THE PLEADINGS AND BASED ON FACTS NOT IN EVIDENCE.

[3.] AS A MATTER OF LAW THE TRIAL COURT ABUSED ITS DISCRETION BY DECLARING THAT THE REAL PROPERTY IN QUESTION IS A NUISANCE AFTER THE CITY WITHDREW THAT ALLEGATION FROM THE COMPLAINT.

{¶10} By defendants' first assignment of error, they argue that the trial court erred in entering summary judgment for the City when the City did not move for summary judgment or file a memorandum in opposition to defendants' motion for summary judgment. By defendants' second assignment of error, they argue that the record does

² The trial court granted the City leave to file the amended complaint in its February 19, 2010 entry.

not contain sufficient evidence to support an award of summary judgment to the City. Because the arguments underlying these two assignments of error intertwine, we will consider the assignments of error together.

{¶11} As a general matter, Civ.R. 56 does not authorize trial courts to enter summary judgment in favor of a non-moving party. *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, ¶15 (quoting *Marshall v. Aaron* (1984), 15 Ohio St.3d 48, syllabus). However, there is an exception to this general prohibition. *Id.* at ¶16. Once a party files a motion for summary judgment, a trial court may grant summary judgment for a non-moving party, despite that party's failure to file its own motion for summary judgment, if: (1) all relevant evidence is before the trial court, (2) no genuine issue of material fact exists, and (3) the non-moving party is entitled to judgment as a matter of law. *Id.* at ¶16-17. See also *State ex rel. J.J. Detweiler Enterprises, Inc. v. Warner*, 103 Ohio St.3d 99, 2004-Ohio-4659, ¶13; *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bur. of Workers' Comp.* (1986), 27 Ohio St.3d 25, 28; *Byers v. Robinson*, 10th Dist. No. 08AP-204, 2008-Ohio-4833, ¶36; *Charvat v. Dish TV Now, Inc.*, 10th Dist. No. 07AP-759, 2008-Ohio-2019, ¶13. Entry of summary judgment in such circumstances does not infringe on the parties' due process rights because the parties have notice that the court is considering summary judgment and the parties have had an opportunity to submit evidence and argument to the court. *Todd* at ¶17. Nevertheless, because a grant of summary judgment to a non-moving party deviates from ordinary Civ.R. 56 procedure, courts should rarely resort to it. *Byers* at ¶36.

{¶12} The question before this court is whether the case at bar is one of those rare cases where summary judgment in favor of a non-moving party is appropriate. In

answering this question, we apply the de novo standard of review. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607.

{¶13} In the amended complaint, the City alleged that: (1) Bahgat failed to secure a certificate of appropriateness before altering the exterior of 117-121 E. Livingston, and (2) Bahgat did not follow the dictates of the certificate of appropriateness that he ultimately attained.³ Columbus City Code 3119.47 prohibits an owner from altering any architectural feature of a building in the German Village historic district without first applying for and obtaining a certificate of appropriateness. Columbus City Code 3116.18(C) states that "[a]ny construction, alteration, work, [or] action * * * not in compliance with, or contrary to that specifically approved in the certificate of appropriateness * * * shall be a violation of this planning and platting code." Finally, Columbus City Code 3306.16 defines "public nuisance" as "any structure or real property which is not in compliance with any building, housing, [or] zoning * * * ordinance of the Columbus City Code." Therefore, the appropriateness of the grant of summary judgment to the City turns on whether the record contains sufficient uncontroverted evidence to establish that Bahgat violated the Columbus City Code.

{¶14} Civ.R. 56(C) limits the type of evidentiary materials that a trial court can consider when ruling on summary judgment to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written

³ Defendants contend that the amended complaint only included the first allegation. We direct defendants to paragraphs 11, 12, and 14, where the City alleges that 117-121 E. Livingston does not comply with the approved specifications contained in the certificate of appropriateness. Defendants also argue that these allegations fail to state a claim, and the trial court should have dismissed the amended complaint on that basis. For such a dismissal to be appropriate, a defendant must demonstrate that it is "beyond doubt that plaintiff can prove no set of facts entitling [it] to relief." *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶12. Based on the allegations in the amended complaint and the applicable law, we find that the City set forth sufficient facts to state a claim against defendants.

stipulations of fact, if any, [that are] timely filed in the action." *Id.* See also *Giffin v. Crestview Cadillac*, 10th Dist. No. 09AP-278, 2009-Ohio-6569, ¶38; *Polivka v. Cox*, 10th Dist. No. 02AP-1364, 2003-Ohio-4371, ¶18; *Knox v. Travelers Ins. Co.*, 10th Dist. No. 02AP-28, 2002-Ohio-6958, ¶12, fn.1. If a party wishes to introduce a document that Civ.R. 56(C) does not list, it must incorporate that document into an affidavit that meets the requirements of Civ.R. 56(E). *Giffin* at ¶38; *Polivka* at ¶18; *Knox* at ¶12, fn. 1.

{¶15} In the case at bar, the record essentially contains two sources of evidence: the verified complaint and the documents referred to in defendants' motion for summary judgment. Sworn pleadings constitute Civ.R. 56(C) evidence. *State ex rel. Spencer v. E. Liverpool Planning Comm.*, 80 Ohio St.3d 287, 298, 1997-Ohio-77. Consequently, a trial court can accept factual averments in a verified complaint as evidence, but only to the extent that those averments are within the personal knowledge of the affiant who verified the complaint. *Brunner Firm Co., L.P.A. v. Bussard*, 10th Dist. No. 07AP-867, 2008-Ohio-4684, ¶13-14; *PEACE-U.S.A. v. Abbott* (June 7, 1990), 10th Dist. No. 89AP-1334. Here, Code Enforcement Officer Irwin signed the affidavit that verified the complaint. Irwin testified that she had personal knowledge of the facts contained in the verified complaint and that those facts were true. Therefore, the trial court could consider all the factual averments in the verified complaint when deciding whether to grant summary judgment.

{¶16} Unlike the verified complaint, the documents referred to in defendants' motion for summary judgment do not constitute Civ.R. 56(C) evidence. Moreover, no accompanying affidavit authenticated the documents. Nevertheless, the trial court could consider the documents when granting summary judgment because no party objected to them. *State ex rel. Gilmour Realty, Inc. v. Mayfield Heights*, 122 Ohio St.3d 260, 2009-

Ohio-2871, ¶17. Absent an objection, a trial court has the discretion to consider unauthenticated documents when rendering summary judgment. *New Falls Corp. v. Russell-Seitz*, 10th Dist. No. 08AP-397, 2008-Ohio-6514, ¶12; *Otto v. Country Mut. Ins. Co.*, 10th Dist. No. 07AP-227, 2008-Ohio-1514, ¶12.

{¶17} Between the averments in the verified complaint and the documents referred to in defendants' motion for summary judgment, the evidence in the record establishes the following facts. First, Bahgat altered the exterior of 117-121 E. Livingston without first obtaining a certificate of appropriateness from the Commission. A comparison of the photographs attached to defendants' motion for summary judgment reveals that the alteration at issue was the replacement of the basement windows with glass block. A photograph of one of the original windows depicts a two-paned window with a vertical muntin, while a later photograph shows the glass-block replacement windows.⁴ Second, on August 14, 2007, the Commission issued Bahgat a certificate of appropriateness that approved the installation of new divided-light, wood-frame windows.⁵ However, when Code Enforcement Officer Irwin re-inspected 117-121 E. Livingston on August 18, 2008, the glass-block windows still remained.

{¶18} Based on these uncontroverted facts, we conclude that the trial court did not err in entering summary judgment in the City's favor. Bahgat violated Columbus City Code 3119.47 when he failed to obtain a certificate of appropriateness before he replaced

⁴ We recognize that in the photograph of the individual original window, a screen partially obscures the window. However, the viewer can still discern the physical characteristics of the window.

⁵ In the parlance of the window industry, a light is a pane of glass. A divided-light window consists of multiple individual panes of glass separated and held in place by a muntin.

the basement windows. Because installation of glass-block windows was contrary to the specifications approved in the certificate of appropriateness, Bahgat also ran afoul of Columbus City Code 3116.18(C). Finally, Bahgat's violation of both Columbus City Code 3119.47 and 3116.18(C) serves as a basis for the trial court to find that 117-121 E. Livingston constitutes a public nuisance under Columbus City Code 3306.16.

{¶19} In arguing against this conclusion, defendants challenge the meaning and constitutionality of the certificate of appropriateness, as well as the constitutionality of the historic preservation code. First, defendants argue that the certificate of appropriateness permitted the installation of glass-block windows. According to the certificate, the replacement windows had to "match the original windows, like-for-like." Because the windows were glass block when the Commission issued the certificate, defendants assert that the phrase "original windows" refers to the glass-block windows. Thus, defendants argue that the Commission approved the use of glass block. Defendants' argument depends on this court reading the phrase "original windows" in isolation from the remainder of the specification. In its entirety, the specification mandated the removal of the "divided light wood frame window[s]" and the installation of "new divided light wood frame windows * * * to match the original windows, like-for-like." The Commission, therefore, required Bahgat to replace the basement windows with divided-light, wood-frame windows, not glass block.

{¶20} Next, defendants argue that the certificate of appropriateness is unconstitutionally vague. The vagueness doctrine is an outgrowth of the Due Process Clause of the Fifth Amendment. *U.S. v. Williams* (2008), 553 U.S. 285, 304, 128 S.Ct. 1830, 1845. Due process demands that the law give sufficient warning of what conduct is

proscribed so that people may conduct themselves so as to avoid that which is forbidden. *Rose v. Locke* (1975), 423 U.S. 48, 50, 96 S.Ct. 243, 244. Consequently, a legislative enactment is void for vagueness if it fails to provide sufficient definition and guidance to enable a person of ordinary intelligence to conform his or her conduct to the law. *Hill v. Colorado* (2000), 530 U.S. 703, 732, 120 S.Ct. 2480, 2498; *Kolender v. Lawson* (1983), 461 U.S. 352, 357, 103 S.Ct. 1855, 1858; *Grayned v. City of Rockford* (1972), 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99.

{¶21} Here, defendants point out that a violation of any provision of Title 31 of the Columbus City Code is a third-degree misdemeanor, which may be punishable by a \$500 fine and 60 days imprisonment. Columbus City Code 3101.99. As work that does not comply with a certificate of appropriateness violates Columbus City Code 3116.18(C), defendants argue that to avoid criminal liability they must be able to understand exactly what the certificate of appropriateness requires. Defendants claim that the certificate's mandate that the replacement windows "match the original windows, like-for-like" is ambiguous and defies explanation, and thus the certificate is void for vagueness.

{¶22} We reject defendants' argument. In the circumstances presented here, the requirement that the replacement windows "match the original windows, like-for-like" would not confuse a person of ordinary intelligence. Photographs of the original windows exist, so a person would only have to refer to those to determine what the replacement windows must look like. Moreover, the certificate further describes the approved windows as "divided light wood frame windows." When read in its entirety, the certificate provides sufficient direction regarding the characteristics needed in the replacement windows to

allow a person of ordinary intelligence to comply. Accordingly, we conclude that the certificate is not impermissibly vague.

{¶23} Finally, defendants argue that the historic preservation code, as applied to 117-121 E. Livingston, constitutes an unconstitutional exercise of the City's police powers. We disagree.

{¶24} The Home Rule Provision, Section 3, Article XVIII of the Ohio Constitution, grants local police powers to municipalities. As part of these police powers, a municipality may adopt zoning regulations governing the construction, modification, and demolition of buildings within the municipality. *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, ¶10; *Sherman v. Dayton Bd. of Zoning Appeals* (1992), 84 Ohio App.3d 223, 225. "A zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Goldberg Cos. v. Council of the City of Richmond Heights*, 81 Ohio St.3d 207, 1998-Ohio-207, syllabus. A party challenging a zoning regulation bears the burden of proving "beyond fair debate" that the zoning regulation is unconstitutional. *Id.* at 209.

{¶25} A court's authority in determining the validity of a zoning regulation is limited because the judiciary cannot usurp the legislative function by substituting its judgment for that of the municipality's council. *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 227, 1994-Ohio-432, modified in part, *Goldberg Cos.* at syllabus. " 'Municipal governing bodies are better qualified, because of their knowledge of the situation, to act upon [zoning] matters than are the courts.' " *Jaylin Investments, Inc.* at ¶21 (quoting *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560).

{¶26} Regulation designed to protect and preserve the character of a neighborhood bears a substantial relationship to the general welfare of the public. *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 33; *Toledo v. Finn* (Jan. 29, 1993), 6th Dist. No. L-92-168. "[T]here is a legitimate governmental interest in maintaining the aesthetics of the community and [], as such, aesthetic considerations may be taken into account by the legislative body in enacting zoning legislation." *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 73.

{¶27} Here, the City enacted the historic preservation code to:

A. Preserve, stabilize and improve the compact and unique historic architectural review districts of the city;

B. Promote the importance of historic preservation; [and]

* * *

E. Protect the unique historic and architectural character of these designated districts for the enjoyment of city residents and visitors alike[.]

Columbus City Code 3119.01. The City considers the historic preservation code "critical to the preservation and redevelopment process and to the protection of the beauty and identity of these unique districts." *Id.* As the historic preservation code serves to protect and preserve the beauty and character of a unique historical area of the City, it advances a legitimate state interest, i.e., protection of the general welfare of the public. Consequently, the historic preservation code bears a substantial relationship to one of the purposes of the local police power.

{¶28} Defendants do not challenge the substantial relationship between the historic preservation code and the general welfare of the public. Instead, they argue that glass-block windows meet the legitimate interest underlying the historic preservation

code, so the Commission cannot prohibit their installation. Defendants point out that glass-block windows originated in Germany around 1907. Due to this historical pedigree, defendants claim that glass-block windows would contribute to the preservation and protection of the unique character of the German Village historic district. As the glass-block windows would serve the purpose behind the historic preservation code, defendants assert that the Commission acted unconstitutionally when it refused to approve their installation.

{¶29} Defendants' reasoning was explicitly rejected in *Jaylin Investments, Inc.* In a constitutional analysis, the object of scrutiny is the legislative action. *Id.* at ¶18. Thus, a court's analysis must focus on the legislative judgment underlying the enactment, not the municipality's failure to approve the particular alteration the owner wishes to make. *Id.* at ¶18, 20. Consequently, the constitutionality of the historic preservation code does not turn upon whether *glass-block windows* would advance the City's interest in preserving the character of German Village. Rather, the constitutional analysis requires this court to determine, as we did above, whether the *historic preservation code* advances the City's interest in preserving the character of German Village.

{¶30} Defendants also argue that the historic preservation code is arbitrary and unreasonable as applied to 117-121 E. Livingston. Defendants point out that nearby buildings have glass-block basement windows, and they argue that the Commission's refusal to permit the installation of glass block at 117-121 E. Livingston proves that the historic preservation code is arbitrary and unreasonable. Essentially, defendants assert that the historic preservation code is not constitutional unless every building in the German Village historic district is forced to comply with the same architectural standard.

{¶31} Although the historic preservation code seeks to ensure that all alterations to German Village buildings follow the same guidelines, the code also recognizes certain instances—such as "unusual and compelling circumstances" and "substantial economic hardship"—that justify deviation from those guidelines. Columbus City Code 3116.09(B). Given the exceptions included in the historic preservation code, application of the code may render different results, e.g., the approval of glass-block windows for one building, but not another. However, the existence of different results does not make the historic preservation code arbitrary or unreasonable. Rather, it demonstrates that the City recognizes that certain exigencies preclude strict architectural uniformity. Based on our above analysis, we conclude that defendants cannot overcome the presumption of constitutionality afforded the historical preservation code.

{¶32} In sum, we reject defendants' attack on the certificate of appropriateness and the historic preservation code. Because the trial court had before it all relevant evidence, no genuine issue of material fact existed, and the City was entitled to judgment as a matter of law, the trial court did not err in granting the City summary judgment. Accordingly, we overrule defendants' first and second assignments of error.

{¶33} By defendants' third assignment of error, they argue that the trial court erred by declaring 117-121 E. Livingston a public nuisance when the City withdrew that allegation from the amended complaint. After reviewing the amended complaint, we conclude that defendants must have misread it because it contains the public-nuisance allegation. Accordingly, we overrule defendants' third assignment of error.

{¶34} For the foregoing reasons, we overrule defendants' first, second, and third assignments of error, and we affirm the judgment of the Franklin County Municipal Court, Environmental Division.

Judgment affirmed.

BRYANT, P.J., and SADLER, J., concur.
