[Cite as *Canton v. Koury*, 2005-Ohio-3193.]

[PLEASE SEE CORRECTED OPINION AT 2005-OHIO-6189.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITY OF CANTON, ET AL.

Plaintiffs-Appellees

-vs-

JACK KOURY, ET AL.

Defendants-Appellants

JUDGES:
Hon. John F. Boggins, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 2004CA00043

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, 2003CV00485

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 20, 2005

APPEARANCES:

For Plaintiffs-Appellees

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For Defendants-Appellants

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Hoffman, J.

{¶1} Defendants-appellants Jack Koury, et al. appeal the January 14, 2004 Judgment Entry (Nunc Pro Tunc of 1/12/04) entered by the Stark County Court of Common Pleas, which granted plaintiff-appellee City of Canton's motion for summary judgment, and denied appellants' motion for partial summary judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} In November, 1994, the Canton City Council adopted Codified Ordinance Section 1130.09 ("the 1994 Ordinance"), which regulated public bench signs in the City of Canton. Appellants Jeff Koury and Don Campbell were partners in a business known as Bench Signs Unlimited. On or about January 18, 1995, the City of Canton Zoning Inspector issued permit # 95-14 to appellants. This permit allowed appellants to place approximately 400 bench signs at Stark Area Regional Transit Authority ("SARTA") bus stop locations. Appellant Koury signed the permit, which indicated Bench Signs Unlimited agreed to comply with city zoning regulations, and, in addition, only place bench signs at bus stop locations which had bus stop signs.

{¶3} On February 6, 1997, and March 20, 1998, the City sent letters to appellants, advising appellants of certain bench signs which were alleged not to be in compliance with the 1994 Ordinance. The February 6, 1997 letter identified 54 bench signs in noncompliance; the March 20, 1998 letter identified approximately 16 bench signs in noncompliance.

{¶4} On October 13, 2000, the City of Canton and the city's zoning inspector filed a Complaint in Stark County Court of Common Pleas Case No. 2000CV02581, seeking injunctive relief as well as money damages. The Complaint alleged appellants had failed to

comply with the 1994 Ordinance and had breached the parties' agreement to limit bench signs to bus stop locations with bus stop signs. The trial court conducted an evidentiary hearing. Via Judgment Entry filed June 14, 2001, the trial court found the City's revocation of permit # 95-14 was valid and effective. Appellants appealed to this Court. We reversed and remanded. *City of Canton v. Campbell*, Stark App. No.2001CA00205, 2002-Ohio-1856. Upon remand, the trial court ordered the parties to brief their respective positions on the remand issues. Via Judgment Entry filed January 12, 2004, the trial court found the City had provided appellants with written notice of noncompliance and an opportunity to cure with respect to 66 bench signs, and the City had demonstrated appellants failed to cure these specific violations within a reasonable period of time. Via Judgment Entry filed March 31, 2004, the trial court found the City was entitled to $1,375 as damages for the removal of the bench signs still in existence, and found appellants responsible for the cost of the action. The trial court found an award of attorney's fees unwarranted in the situation. Appellants appealed to this Court. This Court affirmed. *City of Canton v. Campbell*, Stark App. No. 2004CA00132, 2005-Ohio-1064.

{¶5} On February 10, 2003, while Case No. 2000CV02581 was pending, the City of Canton filed a Complaint for Declaratory Judgment in Stark County Court of Common Pleas Case No. 2003CV00485, seeking a declaration Ordinance No. 110-2202 ("the 2002 Ordinance"), which amended the 1994 Ordinance and which was passed on July 15, 2002, was valid and constitutional on its face and as applied to appellants. Appellants filed a counterclaim, asserting the 2002 Ordinance was not applicable to appellants, but, if applicable, such application would constitute a governmental taking for which the City must compensate appellants.

{¶6} The parties filed respective motions for summary judgment. The trial court conducted a hearing on the motions. At the hearing, appellants stipulated the 2002 Ordinance was constitutional on its face, and the trial court granted summary judgment in the City's favor on that issue. The remaining issues before the trial court were: 1)whether the 2002 Ordinance was constitutional as applied to appellants; and 2) if it was, whether the application of the 2002 Ordinance to appellants constituted a governmental taking for which appellants much be compensated.

{¶7} Via Judgment Entry filed January 12, 2004, the trial court granted summary judgment in favor of the City. The trial court found the 2002 Ordinance was constitutional as applied to appellants, and, as applied to appellants, did not amount to a taking; therefore, the City was not required to compensate appellants. The trial court issued a Nunc Pro Tunc entry on January 14, 2004.

{¶8} It is from this Judgment Entry appellants appeal, raising the following assignments of error:

{¶9} "I. THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT IN FINDING, AS A MATTER OF LAW, THAT APPELLANTS DO NOT HAVE PROPERTY RIGHTS IN THE PERMITS ISSUED BY APPELLEE CITY.

{¶10} "II. THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT IN FINDING, AS A MATTER OF LAW, THAT APPELLANTS' BENCHES CONSTITUTE A PUBLIC NUISANCE, WHERE MATERIAL QUESTIONS OF FACT REMAIN TO BE DETERMINED.

{¶11} "III. THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT AND FINDING, AS A MATTER OF LAW, THAT APPELLEES' CLAIMS WERE NOT BARRED BY THE DOCTRINE OF RES JUDICATA.

{¶12} "IV. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, BECAUSE ORDINANCE SECTION 1130.09, AS AMENDED BY ORDINANCE NO. 110-2002, IS A RETROACTIVE ZONING ORDINANCE WHICH DOES NOT PERMIT PREEXISTING USES TO CONTINUE AS NON-CONFORMING USES."

I, II, III

{¶13} We have reviewed the motions for summary judgment along with the entire record below. After consideration, we hereby adopt the well-reasoned and well-written opinion of the trial court which is attached hereto and incorporate by reference herein. For the reasons advanced in that opinion, appellants' first, second, and third assignments of error are overruled.

IV

{¶14} In their final assignment of error, appellants maintain the trial court erred in denying their motion for partial summary judgment as the 2002 Ordinance was a retroactive zoning ordinance which does not permit preexisting uses to continue as non-conforming uses.

{¶15} R.C. 713.15 prohibits retroactive zoning ordinances in certain circumstances and provides for the continuation of non-conforming uses. The purpose of R.C. 713.15 is to permit a preexisting use to continue as a non-conforming use so as not to deprive an

owner of a "vested right." *Akron v. Chapman* (1953), 160 Ohio St. 382, para. 2 of the syllabus.

{¶16} Having found supra, appellants have no vested right in the permits, we find the statute inapplicable to appellants.

{¶17} Appellants' fourth assignment of error is overruled.

{¶18} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Boggins, P.J. and

Gwin, J. concur

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JUDGES

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITY OF CANTON, ET AL.	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
JACK KOURY, ET AL.	:	
Defendants-Appellants	:	Case No. 2004CA00043

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellants.

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JUDGES