[Cite as *Ebner v. Sandusky*, 2013-Ohio-2475.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Douglas Ebner, Mark Ebner, Julia Ebner, Joseph Viviano, MEM Properties, Donald Epler, and Cynthia Epler	Court of Appeals No. E-12-057
Appellees	Trial Court No. 2012-CV-0029 2012-CV-0030 2012-CV-0031 2012-CV-0032 2012-CV-0040 2012-CV-0041 2012-CV-0042
v.	
City of Sandusky	
Appellant	**DECISION AND JUDGMENT**
	Decided: June 14, 2013

* * * * *

Marvin T. Galvin, Michael P. Gilbride and Brian D. Sullivan,
for appellees Douglas Ebner, Mark Ebner and Julia Ebner.

Barry W. Vermeeren, for appellee Joseph Viviano.

William P. Lang, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an administrative appeal from a judgment of the Erie County Court of Common Pleas, in which the trial court found that the term "non-transient," as used in

Sandusky Municipal Zoning Ordinance Section 1107(g)(2), is unconstitutionally vague. For the reasons that follow, we affirm the trial court's decision.

{¶ 2} The underlying facts in this case are not in dispute. Douglas, Julia and Mark Ebner, Joseph Viviano, MEM Properties, and Douglas and Cynthia Epler, all appellees in this consolidated appeal, are owners of single-family homes near Cedar Point Amusement Park, in an area known locally as the "Chaussee." On August 4, 2011, appellees were served with cease and desist orders in which they were told to stop renting their properties on the Chaussee, which is zoned R1-75, "on a transient basis," in violation of Sandusky Municipal Code ("SMC") 1129.03, which states that only "one-family dwellings" are allowed in areas zoned R1-75. Further, pursuant to SMC 1107.01(g)(2), a "dwelling" is defined as "a building designed or occupied exclusively for non-transient residential use, including one family, two family, or multi-family buildings." Appellees unsuccessfully appealed the notices to the Zoning Board of Appeals ("BZA").

{¶ 3} Appellees challenged the BZA's denials in the Erie County Court of Common Pleas, which consolidated all of the cases into one appeal. On August 21, 2012, after reviewing the entire administrative record, which included testimony made before the BZA on October 20, 2011, and December 15, 2011, the trial court issued a judgment entry in which it found that the term "non-transient," as used in SMC 1107.01(g)(2), is not sufficiently defined. Specifically, the trial court found that the language used in SMC 1107.10(g)(2) is unconstitutionally vague because it does not provide fair notice so that a

person of common intelligence could discern what period of time is necessary before a rental becomes "non-transient." In support of its finding, the trial court cited this court's decision in *Toledo v. Ross*, 6th Dist. Nos. L-00-1337, L-00-1338, L-00-1339, L-00-1340, L-00-1342, 2001 WL 1001257 (Aug. 31, 2001), in which we held that a similar Toledo ordinance was unconstitutionally vague because it did not define the term "transient."

{¶ 4} The trial court also found that the homes rented out by appellees were undisputedly designed as single-family dwellings, therefore, the use of the connector word "or" in SMC 1107.01(g)(2) rendered appellees in compliance with the municipal code. In addition, the trial court found that, even though SMC 1107.01(g)(2) does not deprive appellees of all economically viable use of their land, it nevertheless would constitute an impermissible regulatory taking of appellees' property were it not for the fact that the provision was unconstitutionally vague. Finally, the trial court found that appellees had not established a prima facie case for selective enforcement of the code provisions, and the city of Sandusky was not estopped from attempting to enforce its own zoning law simply because it was simultaneously approving appellees' applications to rent their properties. After making the above findings, the trial court concluded as follows:

> This Court is cognizant of the fact that the residents of the Chaussee do not want their neighbors to change on a weekly, bi-weekly, or monthly basis. The Sandusky Zoning Board is permitted to enact zoning ordinances that prevent short-term uses of the properties in particular zoning sections.

> However, the definition of a "Dwelling" in [SMC] 1107.01(g)(2) as one of the permitted uses in a R1-75 zone pursuant to [SMC] 1129.03 of the code does not sufficiently prescribe what conduct is allowed of the property owners in questions and therefore fails to provide fair notice. Even in indulging in every reasonable interpretation of the ordinance, the Court cannot find the Sandusky Municipal Zoning Ordinance in question to be constitutional. Pursuant to the foregoing analysis, and having considered the competent, credible evidence, the Court finds that the Sandusky Board of Zoning Appeals' decision [was] unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Specifically, the court finds [SMC] 1107.01(g)(2) void for vagueness and in violation of the Due Process Clauses of the United Stated States and Ohio Constitutions.

{¶ 5} Appellant, the city of Sandusky, filed an appeal in this court on September 18, 2012, in which it set forth the following three assignments of error:

> I. The trial court erred when it held that the definition of dwelling pursuant to 1107.01(g)(2) is unconstitutional under the void for vagueness doctrine for its inability to provide property owners fair notice of what uses are permitted in the R1075 district pursuant to 1129.03 of the code.
>
> II. The trial court erred in finding that the Sandusky Municipal Ordinance is a taking.

III. The trial court erred by blatantly substituting its judgment for the board's judgment when the trial court must give deference to the board unless the decision was unreasonable and unsupported by the evidence.

{¶ 6} We note initially that, pursuant to R.C. 2506.04, the standard of review in an administrative appeal differs for the court of common pleas and the court of appeals. *Hyde Park Neighborhood Council, Inc. v. Cincinnati*, 1st Dist. No. C-110579, 2012-Ohio-3331, ¶ 9, citing *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000). R.C. 2506.04 states that the standard for the court of common pleas is whether the administrative agency's decision is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." "In contrast, the review of the court of appeals is limited to questions of law." *Id.* As such, we may not substitute our judgment for that of the lower court, whose judgment may be reversed only upon a finding of abuse of discretion. *Id.*, citing *Platt v. Bd. of Bldg. Appeals of Cincinnati*, 1st Dist. No. C-100648, 2011-Ohio-2776, ¶ 8.

{¶ 7} The issue presented in appellant's first assignment of error, i.e., whether the term "non-transient," as used in SMC 1107.01(g)(2) is unconstitutionally vague, is purely a matter of law. This same issue was raised in *Ross*, in which we recognized that statutes generally must provide "fair notice" to the public as to "the standards of conduct specified therein." *Id.* Accordingly, "[t]he void-for-vagueness doctrine * * * ensures that individuals can ascertain what the law requires of them. *Id.* at fn. 7, citing *State v.*

Williams, 88 Ohio St.3d 513, 532, 728 N.E.2d 342 (2000). "Under the so-called 'vagueness doctrine,' statutes which do not fairly inform a person of what is prohibited will be found unconstitutional as violative of due process." *Baughman v. Ohio Dept. of Public Safety Motor Vehicle Salvage*, 118 Ohio App.3d 564, 574, 693 N.E.2d 851 (4th Dist.1997), citing *State v. Reeder*, 18 Ohio St.3d 25, 26, 479 N.E.2d 280 (1985).

{¶ 8} In *Ross*, we considered the issue of whether the term "transient," as used in Toledo Municipal Code ("TMC") Section 1167.01, was unconstitutionally vague. In our analysis, we looked to the dictionary definition of the term which is defined in Merriam-Webster's Collegiate Dictionary, as "1 a: passing esp. quickly into and out of existence * * * b: passing through or by a place with only a brief stay or sojourn * * *." *Id.* We subsequently determined that "[i]t would be impossible for a person of common intelligence to be able to determine what conduct is prohibited [by TMC 1167.01], insofar as every person's interpretation of the meaning of "transient * * *' could vary so greatly." *Id.* In addition, we found that the use of such a subjective term would allow "arbitrary and discriminatory application and enforcement" of the ordinance. Accordingly, we found that the law was unconstitutionally vague, violated both the United States Constitution and the Ohio Constitution and was, therefore, void. *Id.*

{¶ 9} In its first assignment of error, appellant asserts that our decision in *Ross*, although correct in that case, does not control the outcome in this instance. In support appellant argues that, while use of the statutorily undefined term "transient" may render an ordinance void for vagueness, use of the similarly undefined term "non-transient" in

SMC 1107.01(g)(2) does not have the same effect, because it commonly means "permanent." Appellant also argues that even an undisputedly vague term such as "transient" may have an antonym, i.e., "non-transient," that is not vague. Finally, appellant argues that the "minor mistake" of employing the connector "or" in SMC 1107.01(g)(2) should not render the ordinance void as to appellees. We disagree with appellant's analysis, for the following reasons.

{¶ 10} As to appellant's first argument, no authority is cited to support the assertion that "non-transient" always means "permanent." Appellant correctly states that true antonyms may have definable meanings that are independent of the terms which they oppose. One example of this would be the words "good" and "bad." However, in this case, the term "non-transient" was created by using a negative prefix, "non," to modify a descriptive word, "transient." As stated in *Ross*, the failure to statutorily define the term "transient" renders a city ordinance capable of being arbitrarily enforced and, therefore, it is void for vagueness. *Id.* It follows, then, that SMC 1107.01(g)(2) is also void for vagueness, since it relies on a term that is merely a modification of the undefined term "transient." Accordingly, the trial court did not err by finding that the issue of whether the term "non-transient" is unconstitutionally vague is controlled by our prior decision in *Ross*, and voiding the ordinance on that basis.

{¶ 11} As to appellant's second argument, SMC 1107.01(g)(2) defines a "dwelling" as "a building designed *or* occupied exclusively for non-transient residential use * * *." (Emphasis added.) Contrary to appellant's assertion, it is well-settled in Ohio

that the legislature's "use of the word 'or,' a disjunctive term, signifies the presence of alternatives." *Estate of Centorbi*, 129 Ohio St.3d 78, 2011-Ohio-2267, 950 N.E.2d 505 (2011), ¶ 18. Accordingly, the trial court did not err by finding that appellees' properties, which were undisputedly *designed* for single-family use, were not in violation of SMC 1107.01(g)(2).

{¶ 12} On consideration of the foregoing we find that, while appellant may have had the goal of providing a quiet, stable residential neighborhood on the Chaussee when it enacted SMC 1107.01(g)(2) and its companion ordinances, the fact remains that the trial court did not err as a matter of law when it found that the language employed in that effort is unconstitutionally vague and, therefore, void as to appellees. Appellant's first assignment of error is not well-taken.

{¶ 13} In its second assignment of error, appellant asserts that the trial court erred when it overturned the BZA's decision and found that the Sandusky Municipal Zoning Ordinance effects an unconstitutional taking. In support, appellant argues that the ordinance does not constitute a taking because: (1) it advances a legitimate interest "in protecting and preserving the permanency of residential neighborhoods, protecting property values, and ensuring comfort and safety for the residents" and (2) the BZA made a "reasonable decision" based on guidance provided by the ordinance as to "what conduct was prohibited, not what conduct was permitted." Accordingly, even though the ordinance is admittedly restrictive, it provides fair notice of the prohibited conduct and, therefore, is not unconstitutional.

{¶ 14} On consideration of our determination as to appellant's first assignment of error, we find that the issue of the whether the ordinance effects an unconstitutional taking of appellees' property has become moot. App.R. 12(A)(1)(c). Appellant's second assignment of error is, therefore, not well-taken.

{¶ 15} In its third assignment of error, appellant asserts that the trial court erred by "blatantly" and illegally substituting its own judgment in place of the BZA's judgment. In support, appellant argues that the BZA correctly distinguished the term "transient" from "non-transient" and thereafter disregarded the precedent of this court as set forth in *Ross, supra*.

{¶ 16} For the reasons set forth in our determination as to appellant's first assignment of error, we find that our decision in *Ross* establishes precedent that is directly applicable, and determinative of the outcome, in this case. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 17} The judgment of the Erie County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24, costs are assessed to appellant, the city of Sandusky.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE