[Cite as *Steiner v. Morrison*, 2016-Ohio-4798.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JAMES STEINER, JR. PLAINTIFF-APPELLEE	)	CASE NO. 14 MA 0114
VS.	)	OPINION
DAVID MORRISON, CANFIELD TOWNSHIP ZONING INSPECTOR, et al., DEFENDANTS-APPELLANTS	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13 CV 1041

JUDGMENT: Reversed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Michael P. Ciccone
5208 Mahoning Ave., Suite 234
P.O. Box 4865
Youngstown, Ohio 44515

For Defendants-Appellants:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Donald A. Duda
Assistant Prosecuting Attorney
761 Industrial Road
Youngstown, Ohio 44509

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: June 29, 2016

[Cite as *Steiner v. Morrison*, 2016-Ohio-4798.]
WAITE, J.

{¶1} David Morrison, Canfield Township Zoning Inspector and Canfield Township Board of Zoning Appeals ("Appellants") appeal a July 30, 2014 Mahoning County Common Pleas Court judgment entry which held certain zoning ordinances unconstitutional. In so doing, the trial court reversed the magistrate's decision, ruling instead in favor of James Steiner, Jr. ("Appellee").

{¶2} Appellants argue that the trial court erroneously ruled on Appellee's constitutional challenges as they were not properly before the court. Additionally, Appellants argue that the trial court erroneously found that the Canfield Township Board of Zoning Appeals' ("BZA") decision on the nonconstitutional claim was arbitrary, unreasonable, and capricious as Appellee clearly violated the ordinance. For the reasons provided, Appellants' arguments have merit and the judgment of the trial court is reversed.

Factual and Procedural History

{¶3} The property at issue is located in Canfield Township and is zoned for agricultural use. The property was initially purchased by Appellee's girlfriend. In August of 2011, Appellee purchased asphalt road grindings. In December of 2011, the girlfriend transferred title to Appellee. After the transfer, Appellee began storing the asphalt road grindings on the property.

{¶4} In September of 2011, David Morrison, the Canfield Township Zoning Inspector, called Appellee's girlfriend to inquire about the asphalt road grindings and allegedly assured her that storage of the grindings did not constitute a zoning violation. A month later, the Canfield Township Administrator filed a complaint with

the Mahoning County Department of Health ("health department") alleging that the property constituted a health hazard. The health department determined that the grindings could be considered "clean fill" and did not create a health hazard.

{¶5} Approximately one month later, Morrison sent a letter to Appellee which stated that storage of the grindings on the property was a violation of Sections 403 and 513 of the Canfield Township Zoning Ordinance ("ordinance"). In March of 2013, Appellee appealed the letter of violation to the BZA. After a hearing, the BZA ruled in favor of Appellants and upheld the violation. Appellee appealed the BZA's decision to the trial court pursuant to R.C. 2506.01. The magistrate affirmed the BZA's decision. Appellee filed an objection to the magistrate's decision. The trial court determined that the ordinance was unconstitutionally vague and reversed the magistrate's decision. This timely appeal followed.

Assignment of Error

DID THE TRIAL COURT ERR IN OVERRULING THE DECISION OF THE MAGISTRATE AND APPLY THE INCORECT [SIC] STANDARD OF REVIEW?

{¶6} Appellee's BZA appeal is rooted in both constitutional challenges and nonconstitutional challenges. Regarding his constitutional challenges he contends that: (1) the ordinance is unconstitutional as it fails to adequately define which activities are permitted and which are not; and (2) the notice of violation letter is unconstitutional as it fails to adequately notify Appellee which aspect of the ordinance he violated. As to his nonconstitutional claim, he contends that storage of the asphalt

grindings does not violate the ordinance as written. As these two different claims involve different analysis, they will be discussed separately.

Constitutional Claims

{¶7} Appellants argue that the constitutional claims were improperly before the trial court as they were filed pursuant to R.C. 2506 in an administrative appeal. Instead, Appellants contend Appellee was required to bring these claims in a declaratory judgment action, which is the proper mechanism. Appellants point to the language of R.C. 2506.01 which limits a trial court's review to a "final order, adjudication, or decision." In further support of their argument, Appellants cite to *Martin v. Independence Bd. of Zoning Appeals,* 8th Dist. No. 81340, 2003-Ohio-2736 and *Grossman v. Cleveland Hts.,* 120 Ohio App.3d 435, 698 N.E.2d 76 (8th Dist.1997), which held that the correct method to challenge the constitutionality of an ordinance is by means of a declaratory judgment action. Appellee does not directly respond to this argument but asserts that he has standing to challenge the constitutionality of the ordinance.

{¶8} "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.

{¶9} The crux of this matter is whether Appellee's constitutional claim is made "as applied" to his property, or he challenges the ordinance on its face. The distinction is important, because an "as applied" challenge can be properly raised on appeal through R.C. 2506, whereas a facial challenge can only be brought through a separate declaratory judgment action.

{¶10} In Ohio, " '[a] constitutional facial challenge to a zoning ordinance is improper in the context of an administrative appeal.' " *Ziss Bros. Constr. Co., Inc. v. Independence Planning Comm.,* 8th Dist. No. 90993, 2008-Ohio-6850, ¶ 34, citing *Cappas v. Karas Invest., Inc. v. Cleveland Bd. of Zoning Appeals,* 8th Dist. No. 85124, 2005-Ohio-2735. " '[T]he proper vehicle for challenging the constitutionality of an ordinance on its face is a declaratory judgment action.' " *Id.* at ¶ 35, citing *Cappas.* On the other hand, if an ordinance is challenged as applied to a particular property, "considerations of judicial economy allow the common pleas court in an administrative appeal to address the constitutionality of a zoning ordinance." *Id.,* citing *Cappas.* See *Smith v. Richfield Twp. Bd. of Zoning Appeals,* 9th Dist. No.

25575, 2012-Ohio-1175; *Boice v. Ottawa Hills,* 6th Dist. No. L-06-1208, 2007-Ohio-4471.

{¶11} It is apparent from this record that Appellee's constitutional claims challenge the ordinance on its face. This is evident from Appellee's arguments throughout which center on his claim that the ordinance fails to place a *reasonable person* on notice of which activities are permitted and which are not. Appellee also argues that the ordinance cannot be constitutionally applied to *any situation*. Thus, Appellee raises a facial challenge to the ordinance and this challenge may only be properly brought in a declaratory judgment action. As Appellee filed his claims pursuant to an administrative appeal by means of R.C. 2506 instead of in a declaratory judgment action, they were not properly before the trial court. Thus, the trial court erred in ruling on his constitutional claims. Accordingly, Appellants' arguments in this regard have merit and are sustained.

Nonconstitutional Claims

{¶12} The standard of review for interpretation of an ordinance is *de novo. State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, ¶ 9. In reviewing an ordinance, a court must determine the legislative intent. *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 21.

{¶13} "Zoning is a valid legislative function of a municipality's police powers." *Arendas v. Coitsville Twp. Bd. of Trustees*, 7th Dist. No. 07-MA-129, 2008-Ohio-6599, ¶ 9, quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Section 19, Article I, Ohio Constitution. "Pursuant to R.C. 2506.04, the

trial court's standard of review of the Board's order is whether the decision 'is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.' " *Premier Dev., Ltd. v. Poland Twp. Bd. of Zoning Appeals*, 7th Dist. No. 14 MA 91, 2015-Ohio-2025, ¶ 47. As earlier stated, a challenge to the constitutionality of the Board's decision is limited to an "as applied" situation.

{¶14} Although Appellee was not permitted to challenge the constitutionality of the ordinance on its face in his administrative appeal, he properly raised a nonconstitutional claim. He asserted that storage of the asphalt road grindings on property zoned for agricultural use does not violate the ordinance as written. The BZA disagreed with Appellee and upheld the violation. The magistrate found that Appellee had not met his burden of proving that the BZA's decision was arbitrary, capricious, or unreasonable and, consequently, upheld the BZA's decision. The trial court reversed the magistrate's decision, but as earlier discussed, erroneously based his decision solely on the facial constitutional challenge.

{¶15} At the heart of this appeal is Section 403 of the Canfield Township Zoning Ordinance ("Section 403"). Section 403 provides a grid where several activities are listed next to a chart which includes an "X" next to a particular zone if the activity is not permitted, "P" if the activity is prohibited, "S" for special uses, and "C" for conditional uses. In agricultural areas, the ordinance prohibits "[c]ommercial warehouses, lumber and coal yards and *building material storage yards*, loading and transfer stations and truck terminals, which are screened from adjoining properties

according to the regulations in Section 513." (Emphasis added) (Canfield Twp. Zoning Ordinance, p. 8.) The grid unqualifiedly allows the above activities in only industrial zones. These activities are also permitted for conditional use in business zones, but are completely prohibited in all other zones, including agricultural.

{¶16} Appellants state that Section 403 clearly prohibits the storage of building materials on property zoned for agricultural use. As Appellee's property is zoned for agricultural use and Appellee is storing asphalt road grindings, which are building materials that are not being used for agricultural use, Appellee is in violation of Section 403.

{¶17} In response, Appellee argues that Section 403 is vague and fails to place an ordinary person on notice as to which activities are permitted and which are not. Appellee also argues that the ordinance prohibits only the commercial storage of building materials. As he is not storing the grindings for commercial use, he argues that Section 403 is inapplicable, here.

{¶18} The relevant question is what constitutes "building materials". As Appellee notes, the term is not defined within the ordinance. Appellants argue that the asphalt grindings are building materials. Appellee disagrees and calls the grindings "clean fill." This Court has generally defined "building materials" as items that could be used in the construction business. *P & S Inv. Co. v. Brown*, 40 Ohio App.2d 535, 540-541, 320 N.E.2d 675 (7th Dist.1974). Asphalt road grindings, which consist of asphalt that is ground and later recycled into new asphalt, are used in the construction business. Hence, these would be defined as a "building material."

{¶19} Additionally, according to Ohio Adm.Code 3745-400-05, clean fill material must either be: (1) recycled in a usable form as *construction material*; (2) disposed of in *construction and demolition* waste facilities; or (3) used in fill operations for *construction purposes*. Based on this language, also, it appears that "clean fill" is a type of construction material and would be defined as a building material.

{¶20} Appellee advances the argument that the ordinance applies only to commercial construction materials. As he is not storing the materials for commercial purposes, he argues that he has not violated the ordinance. Appellee's argument stems from the language of Section 403, which forbids: *"[c]ommerci*al warehouses, lumber and coal yards and building material storage yards, loading and transfer stations and truck terminals, which are screened from adjoining properties according to the regulations in Section 513." (Emphasis added.) (Canfield Twp. Zoning Ordinance, p. 8.)

{¶21} As previously stated, when interpreting an ordinance, a reviewing court must determine the legislative intent. *Morrissey, supra.* " '[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 (1985).

{¶22} A court "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. No. CA2014-04-012, 2015-Ohio-2463, ¶ 14, citing *State ex rel. Choices for*

S.W. City Schools v. Anthony, 108 Ohio St.3d 1, 2005-Ohio-5362, ¶ 40. "According to ordinary grammar rules, items in a series are normally separated by commas." *W. Jefferson* at ¶ 15*,* citing *Chicago Manual of Style* 312 (16th Ed.2010). When a comma separates phrases, the words within the commas are one item. *Id.*

{¶23} Section 403 prohibits "[c]ommercial warehouses, lumber and coal yards and building material storage yards, loading and transfer stations and truck terminals, which are screened from adjoining properties according to the regulations in Section 513." (Canfield Twp. Zoning Ordinance, p. 8.) According to grammar rules, "commercial warehouse" is one item and "lumber and coal yards and building material storage yards" is a separate item. As the word "commercial" is separated from the remaining clauses by commas, it does not appear that the drafters intended it to apply to the entire section. Accordingly, Appellee's argument is not well taken.

{¶24} Based on the plain language of Section 403, we find that the asphalt road grindings are building materials and that it is irrelevant whether they are being stored for commercial purposes. These materials may not be stored on agricultural property. The trial court erred. Appellants' argument has merit and is sustained.

Conclusion

{¶25} Appellants contend that the trial court erroneously found that the ordinance was unconstitutionally vague, thus the BZA's decision was not arbitrary, unreasonable, and capricious. Appellee improperly challenged the constitutionality of the ordinance through a R.C. 2506.01 administrative appeal, thus the trial court erred in finding the ordinance unconstitutional on its face. The record demonstrates that

the BZA's decision was not arbitrary, unreasonable, or capricious. Appellants are entitled to judgment. The judgment of the trial court is reversed and judgment entered for Appellants.

Donofrio, P.J., concurs.

Robb, J., concurs.