[Cite as *OC Lorain Fulton, L.P. v. Cleveland Bd. of Zoning Appeals*, 2017-Ohio-971.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104561

OC LORAIN FULTON, L.P., ET AL.

PLAINTIFFS-APPELLEES

vs.

BOARD OF ZONING APPEALS OF THE CITY OF CLEVELAND, OHIO

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-822128

BEFORE: Stewart, J., E.A. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: March 9, 2017

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MELODY J. STEWART, J.:

{¶1} OC Lorain Fulton L.P. owned a parcel of property in the city of Cleveland that it wished to develop as a fast food restaurant with drive-thru service. Within two months of submitting its proposed use to the city's planning commission, the city enacted emergency legislation (Cleveland Codified Ordinances 343.23) to designate the area around the property as a "pedestrian retail overlay" district. The city claimed that the ordinance would preserve the pedestrian-oriented character of the neighborhood by minimizing conflict between vehicles and pedestrians in neighborhood shopping districts, but the practical effect of the designation was that the city had discretion to ban fast food restaurants. OC Lorain Fulton asked the planning commission to approve its plan as a conditional use under a provision of the ordinance for proposed uses with more than 40 feet of frontage. The city denied that request on grounds that a drive-thru restaurant would have an adverse affect on the functioning of nearby pedestrian-oriented retail uses. The board of zoning appeals affirmed the planning commission.

{¶2} Hearing the matter on appeal from the board of zoning appeals, the court of common pleas reversed. It found that the board acted arbitrarily and capriciously by refusing to allow a conditional use under the 40-foot-frontage provision of the ordinance. The court found that the city not only lacked evidence that the proposed use would impact the functioning of nearby pedestrian-oriented retail uses, but that it ignored contrary evidence from its own traffic engineer. In addition, the court found that the city acted arbitrarily because it failed to take steps to stop the expansion of a nearby brewery whose proposed use the court characterized as "politically popular." The court also found that the city's 40-foot limitation on building frontage was unconstitutional because it was "incapable of rational application and bears no rational basis to the stated purpose" of the pedestrian retail overlay. It found that had the proposed use had a frontage of 40 feet or less, or been sited differently on the property, the application would have been approved because, in the words of the board, "there would be nothing for the planning commission to rule on." The court stated it was "simply at a loss to understand how a 40-foot limitation on building frontage is capable of rational application to deny an otherwise permitted use or how it advances the interest of maintaining economic viability and minimizing conflicts between pedestrians and vehicles."

{¶3} In our introductory paragraph, we used the past-tense of the verb "own" to describe OC Lorain Fulton's interest in the property — the property has been sold to a hospital while this appeal has been pending and will not be developed as envisioned in the application to the planning commission.

{¶4} With the parcel no longer being developed in a manner that would invoke Ordinance 343.23, we have to consider whether this appeal is moot. An action is moot when there is no "live" controversy: "'The distinguishing characteristic of such issues is that they involve no actual genuine, live controversy, the decision of which can definitely affect existing legal relations.'" *State ex rel. Cincinnati Enquirer v. Hunter*, 141 Ohio St.3d 419, 2014-Ohio-5457, 24 N.E.3d 1170, ¶ 4, quoting *In re L.J.*, 168 Ohio App.3d 613, 2006-Ohio-644, 861 N.E.2d 546, ¶ 11 (10th Dist.).

{¶5} By all appearances, the court's ruling that the board of zoning appeals erred by denying OC Lorain Fulton's application for a conditional use permit is moot. With a fast food restaurant no longer to be built on the parcel, nothing we say will have any bearing on the issue of whether the court erred by finding that the board of zoning appeals' decision to deny the conditional use permit was arbitrary and capricious and not supported by a preponderance of the evidence in the record. *Singh v. Holfinger*, 10th Dist. Franklin No. 91AP-1271, 1992 Ohio App. LEXIS 2282, at *8 (Apr. 28, 1992) ("The matter should have been sua sponte dismissed by the trial court on the basis of mootness at the earliest juncture that the trial court became aware that appellants no longer owned the property for which they sought a building permit."). The aspect of the appeal that challenges the substantive application of the ordinance to the parcel in question — that the board of zoning appeals acted arbitrarily by denying the conditional use permit — is therefore moot.

{¶6} The city asserts, however, that this court should address the aspect of the trial court's ruling that found the ordinance to be unconstitutional because the ruling is "incapable of rational application and bears no rational basis to the stated purpose" of the ordinance.

{¶7} The court did not specify whether it considered OC Lorain Fulton to be making a facial challenge or an as-applied challenge to the ordinance. Cleveland insists in its second assignment of error that the court erred by finding the ordinance to be facially unconstitutional because a facial challenge cannot be brought in an administrative appeal under R.C. Chapter 2506. OC Lorain Fulton, in an appellate brief filed before it sold the parcel, argued that the court viewed OC Lorain Fulton as making an as-applied challenge to the ordinance because it did not strike the ordinance, but remanded the case to the board of zoning appeals for "proceedings consistent with this opinion." Judgment entry at 7.

{¶8} The type of challenge being made by OC Lorain Fulton is important because it is well-established that only as-applied challenges can be raised in administrative appeals:

> A facial constitutional challenge to a zoning ordinance is improper in the context of an administrative appeal. *Martin v. Independence Bd. of Zoning Appeals*, Cuyahoga App. No. 81340, 2003 Ohio 2736, at ¶ 8; *Grossman v. Cleveland Heights* (1997), 120 Ohio App.3d 435, 698 N.E.2d 76. Considerations of judicial economy allow the common pleas court in an administrative appeal to address the constitutionality of a zoning ordinance as applied to the particular property at issue, even though constitutionality was not an issue which the administrative agency could have addressed. *SMC, Inc. v. Laudi* (1975), 44 Ohio App.2d 325, 328-29, 338 N.E.2d 547. However, the proper vehicle for challenging the constitutionality of an ordinance on its face is a declaratory judgment action. *Martin*, at ¶ 8; *Grossman*, 120 Ohio App.3d at 441.

Cappas & Karas Invest., Inc. v. City of Cleveland, Bd. of Zoning Appeals, 8th Dist. Cuyahoga No. 85124, 2005-Ohio-2735, ¶ 12.

{¶9} If the court found the ordinance facially unconstitutional, it would have exceeded its authority in a R.C. Chapter 2506 administrative appeal; if it found the ordinance unconstitutional as applied, that ruling would be moot because an as-applied challenge is specific to the property before the court and does not bar continued enforcement of the ordinance in different circumstances where it is not unconstitutional. *Oliver v. Feldner*, 149 Ohio App.3d 114, 2002-Ohio-3209, 776 N.E.2d 499, ¶ 38 (7th Dist.).

{¶10} The lack of clarity notwithstanding, the court should not have reached the constitutional question entirely. "Constitutional questions will not be decided until the necessity for a decision arises on the record before the court." *State ex rel. Herbert v. Ferguson*, 142 Ohio St. 496, 52 N.E.2d 980 (1944), paragraph two of the syllabus. Although the doctrine of constitutional avoidance tends to apply most often in the context of appeals, the doctrine applies equally to the trial courts. *See, e.g.*, *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 29 (noting that trial court properly avoided reaching constitutional issue when it decided matter based on statutory-interpretation principles).[1]

{¶11} The court found that the board of zoning appeals acted arbitrarily by denying the use permit: it concluded that the board of zoning appeals not only disregarded a traffic study it commissioned that found the proposed use would not impact pedestrian traffic, but that it approved a different project that had similar issues without making that project go through the city planning commission. That finding was enough to reverse the board of zoning appeals' decision. The court's consideration of the constitutional questions was unnecessary.

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[1] The doctrine of constitutional avoidance is not affected by concerns over piecemeal litigation: in *Risner*, the Supreme Court reversed the nonconstitutional basis for the trial court's ruling and stated that "we should provide the trial court with the opportunity to examine the constitutional issues that Risner has properly raised and that were not previously considered." *Id.* at ¶ 29. *See also Schulte v. Beavercreek*, 2d Dist. Greene No. 98 CA 2, 1998 Ohio App. LEXIS 5048, *16 (Oct. 30, 1998).

{¶12} As previously stated, the property at issue in this case was sold pending appeal. Consequently, the development envisioned in the application to the planning commission, and thus the conflict regarding it, no longer exists. This appeal is therefore moot.

{¶13} Appeal dismissed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR