[Cite as *Meeker v. Akron Health Dept.*, 2009-Ohio-3560.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

ROBERT C. MEEKER	C.A. No. 24539
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
AKRON HEALTH DEPARTMENT	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2007 07 4957

DECISION AND JOURNAL ENTRY

Dated: July 22, 2009

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, Robert C. Meeker, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} Meeker's residence on Merriman Road was built in 1926, one year after the City of Akron ("the City") installed a sewer line along Merriman Road. Despite the presence of the sewer line, Meeker's residence was equipped with a septic system, which has continually serviced the residence. On November 15, 1984, the City's Department of Public Health sent the residence's former owners, Mr. and Mrs. Hathaway, Jr. (collectively "the Hathaways"), a notification ordering them to connect their residence to the City's sewer system within thirty days or to seek an extension. Subsequently, the City provided the Hathaways a temporary waiver from its order, and the Hathaways permitted the City to inspect their septic system and

property regarding a potential connection to the City's sewer line. On June 14, 1985, the City's Department of Public Health issued the Hathaways a letter, which provided, in relevant part:

> "After three attempts by the Sewer Engineering Division and with your cooperation it still can not be determined whether your property is connected to the existing sewer lateral system on your property.
>
> "We feel at this time it is not necessary to continue checking for the lateral connection since the existing septic system on your property is operable and not causing a heath hazard.
>
> "However, should a problem develop with your septic system you will be required to connect to the City Sanitary sewer."

Subsequently, the Hathaways sold their residence to Meeker.

{¶3} On February 2, 2007, Meeker received an order from the City's Health Department, ordering him to abandon his septic system and connect to the City's sewer system pursuant to Akron Codified Ordinance ("ACO") 50.02.[1] Meeker requested an administrative hearing to appeal the order of the City. The hearing was held on June 12, 2007. On June 21, 2007, Meeker's administrative appeal was denied. On July 16, 2007, Meeker appealed to the Summit County Court of Common Pleas. On November 14, 2008, the trial court issued its decision, ruling in favor of the City.

{¶4} Meeker now appeals from the trial court's decision and raises three assignments of error for our review.

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[1] Meeker received a similar order to comply on July 30, 2002 and, on November 5, 2002, was ordered to appear at an administrative hearing for failing to comply with the order. It is unclear from the record what came of the City's 2002 order. Because both parties focus on the 2007 order, we need not address the 2002 order.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE CITY WAS NOT ESTOPPED FROM ORDERING MR. MEEKER TO ABANDON HIS SEPTIC SYSTEM, AFTER THE CITY HAD EARLIER STATED THAT ABANDONMENT OF THE SEPTIC SYSTEM WAS UNNECESSARY."

{¶5} In his first assignment of error, Meeker argues that the trial court erred in finding that the City was not estopped from ordering him to abandon his septic system. Specifically, Meeker argues that: (1) the City's maintenance, operation, and upkeep of the sewer system is a proprietary function, not a governmental function that would bar an estoppel argument; (2) the City is bound by a 1985 letter from one of its sanitarians, representing that the septic system could remain in place until a problem with its operation arose; and (3) he relied to his detriment upon the City's representation when he purchased his property.

{¶6} R.C. 2506.04 governs administrative appeals. Appellate review of a trial court decision under R.C. 2506.04 "is more limited in scope and requires the court to affirm the common pleas court, unless the court of appeals finds, as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence." *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 613, quoting *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. An appellate court's review "does not include the same extensive power to weigh the preponderance of substantial, reliable and probative evidence, as is granted to the common pleas court. *** Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." (Internal quotations omitted.) *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*

(1988), 40 Ohio St.3d 257, 261. Accordingly, an appellate court's review examines whether the trial court abused its discretion. *Smith Family Trust v. Hudson Bd. of Zoning & Bldg. Appeals*, 9th Dist. No. 24471, 2009-Ohio-2557, at ¶31. An abuse of discretion is more than a mere error of law or judgment, but "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶7} While the construction and institution of a sewer system is a governmental function, the maintenance, upkeep, and repair of a sewer system is a proprietary function. *Hack v. Salem* (1963), 174 Ohio St. 383, 395; *Hutchinson v. Lakewood* (1932), 125 Ohio St. 100, 108 ("[T]he construction and institution of a sewer system is a governmental matter."); *Portsmouth v. Mitchell Mfg. Co.* (1925), 113 Ohio St. 250, 258 ("[T]he maintenance and upkeep of sewers is proprietary and not governmental[.]"). See, also, R.C. 2744.01(C)(2)(l) and (G)(2)(d) (defining governmental and proprietary functions for sewer systems under the Political Subdivision Tort Liability Act). In rejecting Meeker's estoppel argument, the trial court relied upon *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, and held that the City was not estopped from ordering Meeker to abandon his septic system because "estoppel does not apply against a state or its agencies in the exercise of a governmental function." Meeker acknowledges that *Hortman* applies when a governmental function is at issue, but argues that *Hortman* does not apply in this instance because the City was engaged in a proprietary function.

{¶8} Meeker relies upon the following three cases to argue that "the City's maintenance, operation and upkeep of a sewer system is a proprietary function": *Ball v. Reynoldsburg* (1963), 175 Ohio St. 128; *Sparks v. Erie County Bd. of County Com'rs.* (Jan. 16, 1998), 6th Dist. No. E-97-007; and *Lancione v. Dublin* (Sept. 29, 1992), 10th Dist. No. 92AP-244. Each of the foregoing cases, however, involved a negligence action for damages against a

political subdivision based on each subdivision's failure to maintain the functionality of its sewer line once it permitted an excessive number of residences or businesses to tap into the sewer line. See *Ball*, 175 Ohio St. at 129 (noting that "[w]e are not here concerned with the adoption of a plan for a sanitary sewer or for the construction or maintenance of *** sewers, but with the negligence of the defendant in permitting two taps *** and the [defendant's] failure *** to remedy the situation"); *Sparks*, at *6 (concluding that "to the extent that appellants' damages were caused by appellees' performance of a governmental function, i.e., the planning, design or construction of the sewer system, appellees are immune from suit," but "to the extent that appellee acted negligently with regard to the alleged improper tapping of additional sewer lines into the existing sewer system, it may be liable for negligence in performance of that proprietary function"); *Lancione*, at *3 (declining to decide immunity, but noting that pursuant to *Ball* "improper tapping of additional sewer lines into the existing system arguably constitutes maintenance or operation of a sewer system; *** a proprietary function"). The circumstances at issue here differ from the circumstances presented in each of the foregoing cases.

{¶9} This is not an action for damages arising from the City's negligent operation or maintenance of its lines. Here, the City ordered Meeker to abandon his septic system and tap into the City's sewer line pursuant to ACO 50.02 (prohibiting homes for which "proper sewage accommodations" are available from relying upon septic systems). Meeker has failed to point to any law in support of his argument that the City, by ordering him to connect with its sewer line in accordance with its ordinance, was engaged in the maintenance, operation, or repair of its line. See *Salem*, 174 Ohio St. at 395. Contrary to Meeker's assertion, the case law that he cites does not show that "the City's attempt to order connection to the City sewer is a proprietary function" because none of the cited cases involved an order to connect. Once again, "[a]ppellate courts

must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." *Henley*, 90 Ohio St.3d at 147. Because Meeker has not provided this Court with any authority for departing from the trial court's decision, this Court cannot conclude that the trial court abused its discretion in refusing to apply the doctrine of estoppel. Further, because estoppel is inapplicable, we need not consider Meeker's additional arguments with regard to the City's representations and his reasonable reliance. Meeker's first assignment of error is overruled.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT APPLICATION OF THE LAW REQUIRING MR. MEEKER TO 'TIE INTO' THE SEWER SYSTEM DID NOT AMOUNT TO AN IMPERMISSIBLE RETROACTIVE APPLICATION OF THE LAW."

{¶10} In his second assignment of error, Meeker argues that the trial court erred as a matter of law in retroactively applying ACO 50.02 to this matter. Specifically, Meeker argues that his septic tank was installed prior to the enactment of the ordinance, which only applies prospectively.

{¶11} This Court applies a de novo standard of review to an appeal from a trial court's interpretation and application of an ordinance. *Red Ferris Chevrolet, Inc. v. Aylsworth*, 9th Dist. No. 07CA0072, 2008-Ohio-4950, at ¶4. "A de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination." *State v. Consilio*, 9th Dist. No. 22761, 2006-Ohio-649, at ¶4.

{¶12} Section 28, Article II of the Ohio Constitution restricts the ability of the legislature to enact retroactive laws. In addition, R.C. 1.48 provides that in construing legislation, "[a] statute is presumed to be prospective in its operation unless expressly made retroactive." This Court applies a two-step analysis to determine whether legislation is

unconstitutionally retroactive. *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, at ¶6, citing *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, at ¶8. In the first step, we consider whether the legislature has expressed the intention that the statute apply retroactively. *Hyle* at ¶8. If it has not done so, our inquiry ends. Id. at ¶9. If it has, then we consider whether the statute is substantive or remedial in nature. Id. at ¶8. "The first part of the test determines whether the General Assembly 'expressly made [the statute] retroactive,' as required by R.C. 1.48; the second part determines whether it was empowered to do so." Id., quoting *Van Fossen v. Babcock Wilcox Co.* (1988), 36 Ohio St.3d 100, 106. A retroactive statute that attempts to impair a vested right is unconstitutional. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, at ¶9. A retroactive statute will not violate the Retroactivity Clause, however, if it is "merely remedial in nature." *Hyle* at ¶7, citing *Consilio* at ¶9. The law pertaining to the elimination of the unconstitutional provisions of statutes also applies to municipal ordinances. *Frecker v. Dayton* (1950), 153 Ohio St. 14, 26.

{¶13} ACO 50.02 provides as follows:

> "No house sewer, drain, or water pipe from any building or premises shall be discharged into any cesspool or other like receptacle where such building or premises are provided with proper sewerage accommodations with which the same can be connected. If at any future time such premises are provided with proper sewerage accommodations, the future use of such cesspool or other receptacle shall be discontinued and the proper sewer and drains constructed whenever the Director of Public Health so orders."

Meeker points to ACO 50.02's second sentence as evidence that the ordinance only applies prospectively. Meeker argues that ACO 50.02's plain language indicates that it only applies in instances where a home was constructed with a septic system before a city sewer system was available, and the city sewer system later became available. Because his home was constructed after the City's sewer line was available and the City still permitted the septic system on his

property to be installed, Meeker argues, forcing him to comply with ACO 50.02 would amount to "an impermissible, retroactive application of the law."

{¶14} Meeker's argument ignores the first sentence of ACO 50.02. ACO 50.02's first sentence clearly prohibits a residence from relying upon a "cesspool or other like receptacle" when "proper sewage accommodations" are available. This portion of the ordinance does not contain any time limitation. It merely indicates that if a sewer line is currently available an alternative receptacle cannot be used. If a sewer line is not currently available, but later becomes available, the second sentence of ACO 50.02 then goes into effect and indicates that the cesspool or alternative receptacle must be abandoned at that later time. We do not consider Meeker's argument, that ACO's use of the phrase "[i]f at any future time" makes the ordinance prospective, to be persuasive. Nor has Meeker cited to any law in support of his argument. See App.R. 16(A)(7). As the City pointed out, ACO 50.02's exact language has existed in the City's various ordinances since 1898. Accordingly, even beyond ACO 50.02's plain language, the City clearly intended for the foregoing ordinance to become and remain a part of its legislative scheme from 1898 until now. There is no evidence that ACO 50.02 was intended to apply only prospectively. See *Hyle* at ¶10.

{¶15} Generally, the next step in this Court's analysis would be to determine whether ACO 50.02 is substantive or remedial in nature. Id. at ¶8. Yet, Meeker has not presented any argument with regard to the substantive or remedial nature of the ordinance. Because he has failed to do so, this Court need not address the second step of its two-step analysis. App.R. 16(A)(7). Meeker has not demonstrated that ACO 50.02's application to him amounted to "an impermissible, retroactive application of the law." Consequently, his second assignment of error is overruled.

Assignment of Error Number Three

"THE TRIAL COURT ERRED IN HOLDING THAT THE STATUTORY EXEMPTION PROVIDED BY R.C. 6117.51(C) DOES NOT APPLY HERE."

{¶16} In his third assignment of error, Meeker argues that the trial court erred in concluding that the statutory exemption in R.C. 6117.51(C) does not apply to his septic system. We disagree.

{¶17} Once again, this Court applies a de novo standard of review to an appeal from a trial court's interpretation and application of a statute. *Red Ferris Chevrolet, Inc.* at ¶4. "A de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination." *Consilio* at ¶4.

{¶18} R.C. 6117.51 provides, in relevant part, as follows:

> "If the board of health of the health district within which a new public sewer construction project is proposed or located passes a resolution stating that the reason for the project is to reduce or eliminate an existing health problem or a hazard of water pollution, *the board of county commissioners of the county*, by resolution, may order the owner of any premises located in a sewer district in the county *** to connect the premises to the sewer for the purpose of discharging sewage or other waste that the board determines is originating on the premises, to make use of the connection, and to cease the discharge of the sewage or other waste into a cesspool, ditch, private sewer, privy, septic tank, semipublic disposal ***, or other outlet if the board finds that the sewer is available for use and is accessible to the premises following a determination and certification to the board by a registered professional engineer designated by it as to the availability and accessibility of the sewer. This section does not apply to any of the following:
>
> "***
>
> "(C) Any premises that are not served by a common sewage collection system when the foundation wall of the structure from which sewage or other waste originates is more than two hundred feet from the nearest boundary of the right-of-way within which the sewer is located[.]" (Emphasis added.)

Meeker argues that he meets subsection (C)'s exemption because the distance between the sewer right of way and his foundation wall is greater than two hundred feet. Meeker acknowledges that R.C. 6117.51 only applies to county commissioners and county boards of health, but argues,

without support, that this Court should consider the exception anyway. We decline to extend R.C. 6117.51 past its plain language. *Bankers Trust Co. of California, N.A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, at ¶12 ("[T]he court cannot ignore the plain language of the statute, nor can it insert operative provisions that are not there."). Meeker's third assignment of error is overruled.

III

{¶19} Meeker's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS, SAYING:

{¶20} Like a moth to flame, this Court can't resist the draw of the abuse of discretion standard. We want to insert it in every opinion. And the majority has incorrectly inserted it into the discussion of Mr. Meeker's first assignment of error.

{¶21} Under Section 2506.04 of the Ohio Revised Code, our review of a trial court's decision in an administrative proceeding is limited to "questions of law." *Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St. 3d 142, 147 (2000). This Court correctly acknowledged that limitation in *County of Summit v. Stoll*, 9th Dist. 23465, 2007-Ohio-2887, at ¶10.

{¶22} The question presented by Mr. Meeker's first assignment of error is whether the trial court correctly decided that, under Ohio law, a City is performing a governmental function when it orders a property owner to connect to a sewer line. Because that is a "question of law," Section 2506.04 allows us to review it. When we do, as with any question of law, we must consider it de novo, not for an abuse of discretion. As should be obvious, a trial court does not have discretion to misapply the law. "When [the argument is that] a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *Med. Mut. of Ohio v. Schlotterer*, ___ Ohio St. 3d ___, 2009-Ohio-2496, at ¶13.

{¶23} Regardless of the majority's incorrect reference to an incorrect standard of review, it has correctly determined that the trial court correctly applied the law in this case. Accordingly, I concur in the overruling of Mr. Meeker's first assignment of error and in the remainder of the majority's opinion.

BELFANCE, J.
CONCURS, SAYING:

{¶24} I concur. I write to point out that the attempt to classify the Akron Health Department's act of ordering Mr. Meeker to connect to its sewer system in conformance with Akron's ordinance as either "governmental" or "proprietary" is unsuitable for a proper analysis of this matter, and in the context of this case, does not fit neatly into either the governmental or proprietary mold. The governmental/proprietary dichotomy has "caused much difficulty, and in fact the law in this area is a tangle of disagreement and confusion." *Hack v. Salem* (1963), 174 Ohio St. 383, 391 (Gibson, J., concurring) (tracing the development of the governmental versus proprietary doctrine, id. at 392-395, and noting that courts have frequently reversed positions as to whether a particular act is governmental or proprietary: "Proof that the classification of particular functions of municipalities has been difficult and frequently leads to absurd and unjust consequences could fill many pages." Id. at 394.); see, also, Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test (1984), 53 U.Cin.L.Rev. 469. Nonetheless, I concur because given our deferential standard of review in this matter, I do not find that the trial court committed reversible error.

APPEARANCES:

ROBERT C. MEEKER, and MATTHEW L. RIZZI, JR., Attorneys at Law, for Appellant.

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