

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD KENNEDY,
Plaintiff - Appellee

-vs-

CITY OF HEATH BOARD OF
ZONING APPEALS,
Defendant - Appellant

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JUDGES:
Hon. John W. Wise, P.J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 2023 CA 00030

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Licking County
Court of Common Pleas, Case No.
2022 CV 1166

JUDGMENT:

Vacated and Remanded

DATE OF JUDGMENT:

August 25, 2023

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Baldwin, J.

{¶1} The City of Heath Board of Zoning Appeals is appealing the decision of the Licking County Court of Common Pleas vacating its decision to deny appellee, Richard Kennedy's application for a permit to install a digital billboard.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On October 17, 2022, Kennedy filed a notice of appeal with the trial court explaining that he was appealing the decision of the Board to deny his application for a permit to install a digital billboard. (R.C. 2505.04, 2505.05). Kennedy attached a document to the notice of appeal that contains a header, "City of Heath, Division of Building and Zoning" the date of September 29, 2022 and is addressed to "Mr. Richard Kennedy." The text states:

"Your request re: **Case #8-2022** Richard Kennedy is requesting a variance due to the zoning code not properly being interpreted properly(sic). **1187.10h**—Property address 550 Hebron Rd. Heath, OH 43056. **Denied** at the board of Zoning and Building Appeals meeting on Tuesday, September 20, 2022. Sincerely, Tracy Dupps, Secretary Board of Zoning and Building Appeals."

{¶3} Kennedy also filed a praecipe requesting that the Board file the transcript of the proceedings before it with the trial court as required by R.C. 2505.08 and 2506.02. The Board was obligated to file that transcript within forty days of the Board's order. The trial court record does not contain any evidence that the Board filed or attempted to file a

record. Instead, on November 2, 2022, the Board moved for summary judgment asking that the Board's decision be affirmed.

{¶4} The Board attached an Exhibit A to its Motion for Summary Judgment, comprised of two documents both bearing the caption "Sign Permit Application." Both documents appear to be accompanied by attachments showing measurements of what may be a digital billboard with a digital screen and an aerial photograph, presumably of the area where the sign was to be installed. The photographs attached to the exhibit include printed captions. The documents attached to the second Sign Permit Application contains an additional photograph as well as additional captions.

{¶5} The Board also attached an Exhibit B to its motion captioned "Board of Zoning and Building Appeals Variance Request" and it appears to be a two page document. The first page is a fill-in-the-blank form and the second page is a typewritten narrative that includes what may be a signature of Kennedy and the date 7-15-22. Following the Request is five pages of typewritten text, purportedly the relevant sections of the Codified Ordinances of Heath, Ohio.

{¶6} Kennedy filed a pleading captioned "Memorandum Contra Appellee's Motion to Dismiss" and attached several documents. The first, marked Exhibit 1, is a document captioned "Sign Permit Application," that appears to be the second Sign Permit Application that is part of the Board's Exhibit A, though it does have illegible handwriting on the top of the first page that does not appear on the Board's exhibit. Kennedy also attached to his motion an Exhibit 2 that bears a hand-written caption that states "Email Conversation with Heath Zoning Inspector."

{¶7} The Board filed a document captioned Appellee's Reply to Appellant's Memorandum Contra without including any exhibits.

{¶8} The materials attached by the parties are not expressly mentioned in Civ.R. 56(C), they are not "incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E)," *Modon v. Cleveland* (Dec. 22, 1999), 9th Dist. No. 2945–M, at *2, citing *Bowmer v. Dettelbach* (1996), 109 Ohio App.3d 680, 684, 672 N.E.2d 1081 as quoted in *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3203, ¶ 30, and there is nothing within the trial court record that would allow us to conclude that they are a part of the record of the proceedings before the Board.

{¶9} The trial court issued a Judgment Entry on March 20, 2023 in which it acknowledges that the Board filed a motion for summary judgment and that Kennedy responded. The trial court chose to construe those pleadings as the parties' briefs in this matter and proceeded with its analysis.

{¶10} The trial court first concluded that because this appeal was a special statutory proceeding and because the court was acting as an appellate court, the Civil Rules were not applicable and "[t]his matter cannot be resolved via Civ.R. 56, and a ruling on the merits of a summary judgment motion would therefore be moot." (Judgment Entry, March 20, 2023, p. 5-6).

{¶11} The trial court next addressed the Board's allegation that Kennedy's appeal of the Zoning Inspector's decision was untimely. The trial court found that Kennedy's unchallenged assertion that the Board "finally denied Appellant's permit application on July 14, 2022" and the Board's admission that the appeal was filed with the Board on July 15, 2022 established that the appeal was timely filed.

{¶12} The trial court moved to analyze the merits of the case and found that “[i]t is apparent from the July 14, 2022 email correspondence that Appellant's application was denied specifically because Section 1187.10(h)(2) permits billboards only in M-2 Districts.” The trial court narrowed the question before it as whether the applicable ordinance was Section 1187.10(h) or 1187(b).

{¶13} Relying on the canon of statutory interpretation that “the specific statute governs the more general one”, the trial court found that Section 1187.10(b), captioned “Animated, mechanical, and digital signs and billboards” was controlling and that section contained no language limiting the construction of digital billboards to M-2 Districts. The trial court concluded that the Board’s decision to apply Section 1187.10(h) was error.

{¶14} The Board had offered an alternative argument in its Reply to Kennedy’s Memorandum Opposing the Motion to Dismiss, but the trial court was not persuaded. The Board argued that Kennedy’s digital billboard was prohibited due to its size exceeding the limitation contained in Section 1187.10(b)(2)(B)(2). The trial court rejected that argument, finding that the cited section, captioned “Time-and-temperature and digital signs” did not apply to digital billboards, which are separately addressed in Section 1187.10(b)(2)(B)(4), captioned “Size, height, style, brightness of digital billboards”.

{¶15} The trial court vacated the determination of the City of Heath's Board of Zoning Appeals and remanded the matter to the Board. The Board filed a timely notice of appeal and submitted one assignment of error:

{¶16} “I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY VACATING A ZONING BOARD'S DENIAL OF A SIGN PERMIT APPLICATION.”

HEARING OF APPEAL CONFINED TO TRANSCRIPT

{¶17} We have reviewed the record presented to us and determined that it does not contain the transcript of the hearing before the City of Heath Board of Zoning Appeals. While there are documents that are likely part of the record, others that may be in the record and some that are probably not in the record, the Board did not certify the transcript of the record of the hearing before it to the trial court and as a result, the trial court lacked authority to issue a decision. For that reason, we must vacate the trial court's order and remand this matter with instructions to the trial court to comply with the mandate of R.C. 2506.02 and 2506.03.

{¶18} Kennedy pursued an appeal of the decision of the City of Heath Board of Zoning Appeals and, because the Board is a political subdivision of the state of Ohio, *Wolf v. City of Columbus*, 98 Ohio App. 333, 333–34, 129 N.E.2d 309, 310 (2nd Dist.1954), this matter is subject to the requirements described in Chapters 2506 and 2505. The most relevant sections for the purposes of this case impose a requirement imposed upon the Board to file a transcript of the hearing before it (R.C. 2506.02) and limit the trial court's review to the content of that transcript, subject to exceptions that would address deficiencies in the record. (R.C. 2506.03).

{¶19} Revised Code 2506.02 required the Board, upon the filing of a praecipe by Kennedy, to "prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony, and evidence offered, heard, and taken into consideration in issuing the final order, adjudication, or decision, within forty days after the final order, adjudication or decision." Kennedy filed an original and an amended praecipe with the notice of appeal, satisfying that requirement of the statute. Assuming that the final order was the document attached to the notice of appeal, it was dated

September 29, 2022, so the Board was obligated to file the transcript on or before November 8, 2022.

{¶20} Revised Code 2506.02 is designed to serve R.C. 2506.03, the latter of which describes the parameters of the trial court's review in this administrative appeal. That section states that the hearing of the appeal "shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant" that one of several exceptions applies that would allow corrections to deficiencies in the transcript. *J.D. Partnership v. Berlin Tp. Bd. of Trustees*, 5th Dist. Delaware No. 01 CEA 06-018, 2002-Ohio-2539. No affidavit nor any transcript was filed with the trial court and the exceptions listed in R.C. 2506.03(A)(1)-(5) were not considered.

{¶21} Licking County Common Pleas Local Rule 34 contains procedural requirements for an administrative appeal and envisions that the next step after the filing of the transcript is the filing of appellant's brief, appellee's answer brief and appellant's reply brief and, finally, notice to the judge that the matter is ready for decision.

{¶22} The process described in the Revised Code and the Local Rules was abandoned when the Board moved for summary judgment and never filed the transcript of the record of the proceedings before it. We cannot determine from the record whether the trial court or the parties knew the transcript had not been filed as the focus was upon the Motion for Summary Judgment, a deviation from the statutory procedure for resolving an administrative appeal. We have reviewed the record and the docket and confirmed that the Board did not comply with R.C. 2506.02 by filing a transcript of the proceedings

before it. And, while Kennedy could have sought to compel the production of the record by requesting the assistance of the trial court under R.C. 2505.08 and R.C. 2505.44, there is nothing in the trial court record from which we can conclude that Kennedy and the Board had foreknowledge of the trial court's plan to reject the Motion for Summary Judgment and issue a decision on the merits after construing the parties' summary judgment pleadings as their briefs. Kennedy did not have the opportunity to seek production of the Board transcript when the trial court, apparently without notice to the parties, issued a decision on the merits based upon documents attached to the respective motions. While we may ultimately discover those documents were part of the transcript of the proceedings before the Board, as presented they do not comprise the record of the Board's actions. The trial court issued its decision in the absence of the transcript of the record of the proceedings before the Board, and, therefore has failed to comply with R.C. 2506.03.

{¶23} Revised Code 2506.03 mandates that the trial court “must decide the case on the merits on the basis of the transcript as submitted by the administrative agency” in the absence of certain deficiencies in that transcript. *Zurow v. Cleveland* (1978), 61 Ohio App.2d 14 as quoted in *Village of Batavia v. Bd. of Commrs. of Clermont Cnty.*, 12th Dist. Clermont No. CA86-11-081, 1987 WL 13051, *2. “The court of common pleas must receive a statutory transcript before addressing the merits of an administrative appeal.” *Zurow v. Cleveland* (1978), 61 Ohio App.2d 14, 21 as quoted by *Coyne v. City of Lakewood*, 8th Dist. Cuyahoga No. 66540, 1995 WL 23342, *1. The Board did not file a transcript in this case, so the trial court lacked authority to proceed. *Acacia Construction Co. v. City of Lorain*, Ohio, 9th Dist. Lorain No. 2505, 1977 WL 198961, *2. See also

Fresh v. Searcy, 11th Dist. Ashtabula No. 1172, 1985 WL 7842, *2. (“Without such a transcript [the court does not] have the authority to proceed with the appeal.”) If the trial court is unable to comply with the requirements of R.C. 2506.03, rendering a judgment is an action beyond its authority. *Reilly v. Sylvania Twp. Bd. of Trustees*, 66 Ohio App.3d 324, 325–26, 584 N.E.2d 30, (6th Dist.1990) quoting *Grant v. Washington Tp.*, 1 Ohio App.2d 84, 86, 203 N.E.2d 859, 861 (2nd Dist.1963). Unless and until the trial court has a complete transcript before it the court may not decide the case on the merits. R.C. 2506.02; R.C. 2506.03(A); R.C. 2506.04; See *Cincinnati v. Glendale* (1975), 42 Ohio St.2d 368, 370, 328 N.E.2d 808; *Sofer v. Housing Authority* (1973), 44 Ohio App.2d 113, 335 N.E.2d 872; *Beerman v. Kettering* (1965), 14 Ohio Misc. 149, 237 N.E.2d 644. *Zurow v. City of Cleveland*, 61 Ohio App.2d 14, 21, 399 N.E.2d 92, 97 (8th Dist.1978).¹

{¶24} The Seventh District Court of Appeals addressed a case where “[n]o record, no evidence and no original papers were filed with the common pleas court” and noted that it “attempted to clarify the record in this case. However, we must indulge too many presumptions. (sic) Perhaps the record can be put into order; if it can, it must be done in the trial court where it should have been done in the first place.” *Dismissal of Spence*, 7th Dist. Mahoning No. 82 C.A. 13, 1983 WL 6762, *1. The First District Court of Appeals in *Rice v. City of Montgomery*, 1st Dist. Hamilton No. C-900350, 1992 WL 9525, *2 found that the trial court “could not review the “transcript” from the Board of Tax Review to determine whether it should hear additional evidence pursuant to R.C. 2506.03 because

¹ We note that we have found that where “no sufficient transcript” of the administrative hearing exists, R.C. 2506.03 may support a de novo hearing before the trial court. *J.D. Partnership v. Berlin Tp. Bd. of Trustees*, 5th Dist. Delaware No. 01 CEA 06-018, 2002-Ohio-2539 *1.

no transcript of the hearing before the Board was filed in compliance with R.C. 2506.02.” That Court concluded that the trial court’s judgment must be reversed and the case remanded for a review in compliance with Chapter 2506.

{¶25} We find the circumstances of this case call for the same conclusion as described in *Grant, Spence* and *Rice, supra*. The decision of the trial court must be vacated as it had no authority to proceed without complying with R.C. 2506.03 and the matter must be remanded to the trial court so it may fulfill its mandate. *Chupka v. Saunders*, 28 Ohio St.3d 325, 328, 504 N.E.2d 9 (1986).

{¶26} The decision of the Licking County Court of Common Pleas is vacated and this matter is remanded to the trial court for further proceedings consistent with this opinion.

By: Baldwin, J.

Wise, John, P.J. and

Delaney, J. concur.