

[Cite as *State v. ACV Realty*, 2016-Ohio-3247.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLANT,)	
)	CASE NO. 15 MA 0072
V.)	
)	OPINION
ACV REALTY,)	
)	
DEFENDANT-APPELLEE.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Youngstown
Municipal Court of Mahoning County,
Ohio
Case No. 15 CRB 145

JUDGMENT: Affirmed

APPEARANCES:
For Plaintiff-Appellant

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: May 26, 2016

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DONOFRIO, P.J.

{¶1} Plaintiff-appellant, City of Youngstown, appeals the April 8, 2015, decision of the Youngstown Municipal Court granting the motion of Defendant-appellee, ACV Realty, c/o Carl J. Vaccar, to dismiss the criminal complaint against it.

{¶2} This case involves the property formerly known as the Woodside Receiving Hospital located at 800 E. Indianola Avenue. At the time in question the property was undergoing demolition work.

{¶3} The complaint against Appellee states that on February 9, 2015, Appellee committed the offense of Failure to Comply with the Youngstown Property Maintenance Code in violation of YCO 546.04 which states no person shall fail to comply with, be in conflict with, or be in violation of any provision of the Youngstown Property Maintenance Code. The complaint further alleges that Appellee failed to comply with Youngstown Property Maintenance Code Section 302.1 Sanitation:

Failing to maintain the premises in a clean, safe, and sanitary condition by keeping it free of trash and debris.

The complaint indicates that the violation is a misdemeanor of the third degree.

{¶4} Involved in this case are a number of ordinances enacted by Appellant, to wit: the Codified Ordinances of the City of Youngstown, also known as Youngstown City Ordinances, (YCO); the Youngstown Property Maintenance Code (YPMC); and the International Property Maintenance Code (IPMC). The IPMC is apparently also referred to as the Youngstown Property Maintenance Code (YPMC).

{¶5} Part Five of the YCO is titled “General Offenses Code.” Chapter 546 is titled “Property Maintenance Code”.

{¶6} The YCO contains no Section 302.1, the section Appellee was charged with violating. In fact, Part 3 of the YCO is titled “Traffic Code”.

{¶7} YCO Section 546.13 is titled “International Property Maintenance Code” (IPMC). That section provides, in pertinent part:

Chapters Two through Eight of the 2003 International Property Maintenance Code are adopted by reference into this code by

Youngstown City Ordinance 03-220 as amended by Youngstown City Ordinance 11-106 and 11-344. They are incorporated as if fully rewritten herein. Copies are on file with the Clerk of Council.

{¶18} Appellant contends that these Chapters of the IPMC have been duly incorporated by reference into the YCO. But, none of the actual provisions of the IPMC are apparently contained in YCO 546 or any other provision of the YCO. The IPMC has seven chapters but only IPMC 302.1 is included in the trial court record, as part of Exhibit B to Appellant's response to Appellee's motion to dismiss.

{¶19} The omitted Chapter One of the IPMC is titled "Administration". IPMC 106 is titled "Violations" and IPMC 107 "Notices and Orders" while IPMC 111 provides for the "Means of Appeal." (Brief of Plaintiff-Appellant, Appendix C, IPMC 2003).

{¶110} IPMC 302.1 "Sanitation", the section Appellee was charged with violating, provides:

All exterior property and premises shall be maintained in a clean, safe and sanitary condition. The occupant shall keep that part of the exterior property which such occupant occupies or controls in a clean and sanitary condition.

The property was apparently unoccupied at the time in question and, as noted above, was in the process of being demolished.

{¶111} YCO 546.04 provides that no one shall fail to comply with any provision of "this code", apparently meaning YCO 546. YCO 546.05 titled "Notice of Violation" provides, *inter alia*, that notices of violations of the YCO "may" be given, that administrative remedies could be imposed, and that administrative fines would be imposed "only after notice and an order is provided." YCO 546.05(a),(b), and (c).

{¶112} YCO 546.06 sets forth both the fine structure for administrative penalties and provisions for criminal penalties. In addition to the administrative

penalties, it provides that a violation of any provision of “this code” is a misdemeanor of the third degree and that there is no requirement that any warning or notice be given prior to criminal prosecution or conviction. YCO 546.06(d). Apparently, this is intended to negate the notice requirements for administrative fines set forth in YCO 546.05. YCO 546.06(e) states that the “provisions of this code are specifically intended to impose strict liability.”

{¶13} On March 9, 2015, Appellee filed a motion to dismiss the complaint. Appellee claimed that this Court’s decision in *State v. Bielski*, 7th Dist. No. 12 MA 0217, 2013-Ohio-5771, determined that prosecutions for violations under YCO 546.04 were unconstitutional as the ordinance is, on its face, unconstitutionally vague. Although Appellee acknowledges that *Bielski* considered different sections of the IPMC, Appellee contends that the same logic should apply here.

{¶14} The trial court held a hearing on Appellee’s motion to dismiss on June 16, 2015. Both sides presented argument.

{¶15} Appellant noted that YCO 546.13 incorporating by reference the 2003 IPMC was enacted prior to the decision in *Bielski*. Appellant explained: “So the State is at a loss to explain the conflict there, the holding in *Bielski* saying there is no specific incorporation, which is the controlling law.” (Tr. 4). The trial court responded:

This case says that it [IPMC] isn’t. If it’s a mistake, it’s a mistake but it’s the law nonetheless.

(Tr. 5).

{¶16} Appellant also argued that since different provisions are involved here, a different analysis must be undertaken regarding the vagueness issue.

{¶17} The trial court orally granted the motion to dismiss the complaint and this appeal ensued.

{¶18} Appellant presents two assignments of error, which are addressed in reverse order. Appellant’s second assignment of error is:

THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS AS 302.1 OF THE INTERNATIONAL PROPERTY MAINTENANCE CODE IS NOT OVERLY VAGUE, AND IS THUS CONSTITUTIONAL.

{¶19} Both parties spend much time discussing this Court's decision in *Bielski*. The ordinance at issue in *Bielski* was held unconstitutional because the words "rubbish", "garbage", and "accumulation" were not clearly defined and were unconstitutionally vague, because the relationship between the YPMC and the IPMC was vague, and because the means of enforcing the provisions of the YCO, YPMC, and IPMC was arbitrary. This Court stated:

Based on the vagueness of IPMC Section 307.1, the vagueness of its relationship, if any, to the YPMC, and the arbitrary means of enforcing these provisions, we sustain Appellant's two assignments of error and declare IPMC Section 307.1 to be unconstitutionally vague and unenforceable, whether enforced directly or through Youngstown Municipal Ordinance Chapter 546.

Bielski ¶ 23. Other than the substitution of IPMC 307.1 for IPMC 302.1, the issues here are similar to those in *Bielski*.

1. Vagueness of IPMC [YPMC] 302.1

{¶20} In *Bielski*, this Court had to consider if the terms "accumulation", "rubbish", "garbage", "exterior", "structure" and "premises" were unconstitutionally vague. Here, the terms are "clean", "safe", and "sanitary".

{¶21} The vagueness doctrine is based upon the due process clause of the Fourteenth Amendment. The U.S. Supreme Court has explained:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on

their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). See also *Bielski* ¶ 10. In *Bielski*, this Court, quoting *State v. Brundage*, 7th Dist. No. 01 CA 07, 2002-Ohio-1541, ¶ 7, stated:

When [a] resolution is challenged as unconstitutionally vague, the reviewing court must determine whether the statute provides sufficient notice of its proscriptions and contains reasonably clear guidelines to prevent official arbitrariness or discrimination in its enforcement.

Bielski ¶ 10.

{¶22} Standards for vagueness require more precision in the criminal context than, for example, in the regulatory context. *Bielski* ¶ 11 citing *Salem v. Liquor Control Comm.*, 34 Ohio St.2d 244, 246, 298 N.E.2d 138 (1973).

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); Also, *Bielski* ¶ 12. This Court explained in *Bielski*:

A facial challenge requires that “the challenging party * * * show that the statute is vague ‘not in the sense that it requires a person to conform

his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.’ ”

Bielski ¶ 13 quoting *State v. Anderson*, 57 Ohio St.3d 168, 171, 566 N.E.2d 1224 (1991), quoting *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971).

{¶23} Appellant argues that, unlike *Bielski*, which considered IPMC 307.1 rather than 302.1, there are clear definitions here. Appellant cites definitions for the terms “exterior”, “property”, “owner”, and “premises”. But, Appellant admits that the terms “clean”, “safe”, and “sanitary” are not defined. Instead, Appellant suggests these words be given their ordinary meaning. Appellant then offers dictionary definitions for these terms. Appellant admits that “clean” has a myriad of definitions but urges what it calls the most simplistic definition, i.e., “free from dirt or pollution.” Appellant claims that safe should mean “free from harm or risk” and “sanitary” should mean “of or relating to health” and “characterized by or readily kept in cleanliness.” These terms are vague and people of common intelligence are probably left to guess as to what precisely will be considered a criminal act.

{¶24} Appellant apparently concedes that in *Bielski* it was unclear as to whom the responsible party was, the tenant or the owner. Citing IPMC 301.2, Appellant argues that here it is the owner of the premises who “shall maintain the structures and exterior property in compliance with these requirements, except as provided for in this code.” But, Appellee was charged with a violation of IPMC 302.1, not 301.2. After the initial sentence of the section, IPMC 302.1 places obligations on the “occupants” with no reference as to who might otherwise be responsible pursuant to IPMC 301.2. (Appellant argued to the trial court that it was the occupant who was the responsible party under this section, not the owner. See State’s Response to Motion to Dismiss, p. 5. It is assumed this was in error since there was no occupant, but, the error tends to support an argument that, as in *Bielski*, it may be unclear to people of common intelligence whether IPMC 302.1 is intended to be enforced against the owner or occupant).

{¶25} It is our opinion that this ordinance is unconstitutionally vague.

2. Vagueness of relationship to YPMC

{¶26} The relationship of these ordinances and codes to each other is, as in *Bielski*, vague and confusing.

{¶27} Part Five of the YCO is titled “General Offenses Code”. Chapter 546 is titled “Property Maintenance Code”. Appellee was charged with a violation of YCO 546.04, which states in part: “No person, corporation, firm or other entity shall fail to comply with, be in conflict with, or be in violation of any provision of this code***” The complaint then asserts that Appellee failed to comply with Youngstown Property Maintenance Code Section 302.1 Sanitation. But, there is no Section 302.1 in the YCO. Part Three is the Traffic Code. Unless one knew from some other source (here, Appellant attached the IPMC to its Brief), it is difficult to find the section allegedly violated. One needs to review YCO 546.13 titled “Property Maintenance Code” which states that part of the IPMC has been incorporated into the YCO. Even if one gets this far, the IPMC is nonetheless found nowhere within or attached to the YCO. Indeed, YPMC 546.13 instructs that copies of the IPMC are on file with the Clerk of Council.

{¶28} In *Bielski*, this Court stated:

Through this circuitous route, a person of ordinary intelligence is supposed to glean what "YPMC 307.1" means and what it requires. It is apparent, however, that no person of ordinary intelligence could possibly understand how all these documents and references are related, much less know what they require.

Bielski ¶ 14. Thus, the same circuitous route exists here and is as unacceptable here as it was in *Bielski*.

3. Arbitrary means of enforcing the provision

{¶29} Section 546.05, a part of the YPMC, is titled “Notice of Violations”. Subsection (a) provides that whenever a code official determines that there has been a violation of any provision of the code, the official “may” give notice. Subsection (b) indicates that when there is a violation, the official “shall have the authority to impose an administrative penalty.” Subsection (c) provides that an administrative fine “shall be accomplished **only** after a notice and order is provided.* * *” [Emphasis added].

{¶30} It is difficult to reconcile Section 546.05 “Notice of Violations” with Section 546.06 titled “Penalty”. Section 546.06(a) provides:

In addition to any criminal penalties that may be imposed, any person, or entity who violates or fails to comply with any of the provisions of this code shall be subject to the following administrative penalties.

{¶31} Paragraph (d) then states:

In addition to any administrative penalties that may be imposed, any person or entity who violates or fails to comply with any provision of this code shall be guilty of a misdemeanor of the third degree. A prior warning or notice is not a prerequisite for prosecution or conviction for violation of any provision of this code.

{¶32} Paragraph (e) then declares that the provisions of “this code are specifically intended to impose strict liability.”

{¶33} It appears that an administrative fine cannot be imposed without a notice and order, but a criminal penalty with potential time in jail can be imposed with no notice or warning.

{¶34} The testimony of a Deputy was discussed in *Bielski* regarding how a determination was made whether to issue a notice or a criminal complaint under

these sections. When questioned as to how the Deputy determined whether a warning or notice should be issued rather than a criminal citation, the Deputy explained that it depended on how badly the property needed to be cleaned up. This Court explained that the lack of a well-defined system which could be relied upon to prevent arbitrary decisions by the officers charged with issuing citations was unacceptable. This Court stated:

In the present matter, it is apparent that there is no standard in the ordinance with which to determine when a person who violates the ordinance is to be given a warning rather than a criminal citation. This appeal presents a rather stark example of the unbridled discretion of government officials in interpreting a criminal law.

Bielski ¶ 21. The same problem exists here.

{¶35} In *Bielski*, this Court concluded that YPMC and/or IPMC 307.1 was unconstitutional because the language in that provision was undefined and vague, and that the other discussed parts of the YPMC/IPMC were unconstitutional because of the vagueness of the relationship between the YPMC and the IPMC, and because of the arbitrary means of enforcement. Here, the vagueness of the relationship between the YPMC and the IPMC are exactly the same as in *Bielski* and are unconstitutional for the same reasons. The same arbitrary means of enforcement exists here. Also, the words at issue here, “clean”, “safe”, and “sanitary”, are not defined by either the YPMC or the IPMC and fail to put a person of normal intelligence on notice as to what constitutes criminal conduct. So, as in *Bielski*, IPMC 302.1 is unconstitutionally vague.

{¶36} Appellant’s second assignment of error is without merit and is overruled.

{¶37} Appellant’s first assignment of error states:

THE TRIAL COURT ERRED IN GRANTING APPELLEE’S MOTION TO

DISMISS AS THE INTERNATIONAL PROPERTY MAINTENANCE CODE IS PROPERLY INCORPORATED INTO THE CODIFIED ORDINANCES OF THE CITY OF YOUNGSTOWN.

{¶38} Since we have determined that the ordinance under which Appellee was charged is unconstitutional for the above stated reasons, there is no need to address this assignment of error as it is moot.

{¶39} The decision of the trial court dismissing the complaint against Appellee is affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.