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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.
CARMEL R. GRANATO, et al. Plaintiffs-Appellants
v.
CITY OF DAYTON BOARD OF ZONING APPEALS, et al. Defendants-Appellees
CASE NO. CA 7200.

August 27, 1981.

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THOMAS G. PETKEWITZ, City Attorney, By: THOMAS P. RANDOLPH, Deputy Director of Law, 101 West Third Street, P.O. Box 22, Dayton, Ohio 45401 Attorney for Defendants-Appellees.

OPINION

BROGAN, J.

*1 At some time prior to 1968, Carmel Granato and her brother, Lawrence, purchased a building located at 739 Steele Avenue, Dayton, Ohio. The building contained a tavern on the first floor and residential premises on the second floor.

The City of Dayton enacted R.C.G.O. Title 15 ("City of Dayton Zoning Code") on February 7, 1968. Pursuant to such enactment, the area in which the relevant property was located became an R-5 residential district. R.C.G.O. 150.120-.125. However, the tavern had been in operation prior to the adoption of the code. Therefore, such lawful use was permitted to continue as a "nonconforming use." R.C. 713.15; R.C.G.O. 150.03551, 150.414.

In August, 1975 the Granatos leased the building for a three year term to expire on August 31, 1978. The Lessees, however, abandoned the property in August, 1977.

It appears that the Granatos entered the building on or about December 5, 1977 for purposes of having the heat turned on (to avoid freezing of the plumbing fixtures). The lease had contained a right of re-entry clause. However, the Granatos asserted no right to possession except through the institution of judicial proceedings. Judicial recognition of such right occurred in March, 1978.

During the latter part of December, 1979 the Granatos contacted realtor Thomas Zimmerman and requested his assistance in securing a liquor license to enable them to operate the tavern themselves. Subsequently, Mr. Zimmerman filed an application in the appropriate office for a transfer of an existing license to the Grantos' tavern.

This application was forwarded to the City of Dayton's zoning administration to allow a determination as to whether the administration had any objection to the proposed transfer.

Initially, zoning plan examiner William Barnes, on behalf of zoning administrator John Gray, concluded that no objection appeared necessary. However, upon further investigation following an anonymous phone call, Mr. Barnes ascertained that the use of the first floor of the property as a tavern had been discontinued for a period in excess of two years.

Therefore, pursuant to R.C.G.O. 150.414 (G)(2), the nonconforming use of the structure no longer was permissible. The zoning administrator reversed his earlier decision not to object to the transfer. The Granatos were made aware of the administration's action through the issuance, on April 17, 1980, of a standard refusal form for applications for zoning certificates. On April 30, 1980 the Granatos applied for a variance from the residential zoning restrictions. This request apparently was refused as well.

The Granatos appealed the decision of the zoning administrator regarding the discontinuance of the nonconforming use to the Board of Zoning Appeals, pursuant to R.C.G.O. 150.427(A). The Board reviewed the zoning administrator's decision at a public hearing held on May 19, 1980.

The Board affirmed the decision via letter dated May 22, 1980.

On May 29, 1980, rather than file a notice of appeal from the Board's determination pursuant to R.C. 2506.01 and 2505.04, the Granatos filed a complaint (subsequently amended) in the court of common pleas. Mr. Gary, Mr. Barnes, the Board and the members of the Board, individually were named as defendants. Service of this complaint upon the defendants was accomplished on June 2, 1980.

*2 Plaintiffs contended that the zoning administration decision contravened R.C. 713.15. In addition, Mr. Barnes

had no authority to issue the refusal of April 17, 1980. Mr. Gray violated his duties under R.C.G.O. 150.422 and 150.424 by failing to act. Further, the Board's ratification of the decision as to discontinuance of the nonconforming use was unsupported by the facts as well as unreasonable, arbitrary and capricious. Plaintiffs also argued that the acts of the defendants constituted a taking of property without due process of law.

Plaintiffs claimed to have exhausted their administrative remedies and had no adequate remedy at law.

Plaintiffs sought, inter alia, an injunction against any acaction intended to terminate the occupancy and use of their property as a tavern and an order causing all relevant records to reflect a lawful nonconforming use of the property in issue.

The matter came before the court for trial on February 12, 1981. It appears that the primary issue for consideration concerned whether a voluntary discontinuance of a nonconforming use for a two year period had occurred.

Following the submission of several post-trial memoranda, the court entered a final judgment in favor of defendants.

Plaintiffs timely filed a Notice of Appeal and have asserted four assignments of error. However, prior to examining these assignmnents of error we must consider whether appellants were precluded from bringing this action given the availability of a direct appeal pursuant to R.C. Chapter 2506.

In Driscoll v. Austintown Assoc. (1975), 42 Ohio St. 2d 263, 328 N.E. 2d 395 a corporation had been denied rezoning of a tract of land. The corporation had available a variance procedure as well as a possibility of judicial review pursuant to R.C. 2506.01 if the variance request had been denied. However, the corporation filed a declaratory judgment action challenging the constitutionality of the applicable zoning restrictions. Subsequently, owners of contiguous property filed an injunction action asserting, inter alia, that the declaratory judgment was void.

The Supreme Court determined that,

> "The availability of a R.C. Chapter 2506 action to review the denial of a variance...does not preclude a declaratory judgment action which challenges the constitutionality of the zoning restrictions..."

Driscoll, supra, at syllabus paragraph two.

The court based its decision on Civ. R. 57 which provides, in part, that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." In view of the nonexclusivity of the R.C. Chapter 2506 remedy and the challenge to the constitutionality of the zoning restrictions involved, the court deemed declaratory relief "appropriate".

Regarding the variance procedures, the Court acknowledged that,

> "If a landowner has available to him an administrative remedy which can provide him with appropriate relief from a zoning restriction, and the administrative remedy is neither onerous nor unusually expensive, the landowner must exhaust that administrative remedy prior to instituting a declaratory judgment action challenging the constitutionality of the zoning restriction."

*3 Driscoll, supra, at syllabus paragraph four.

However, failure to exhaust administrative remedies is an affirmative defense which must be timely asserted or it is waived. Civ. R. 8(C) and 12(H). Such defense had been waived. See G.S.T. v. Avon Lake (1976), 48 Ohio St. 2d 63, 357 N.E. 2d 38; Gannon v. Rerk (1976), 46 Ohio St. 2d 301, 348 N.E. 2d 342; Gates Mills Investment Co. v. Pepper Pike (1975), 44 Ohio St. 2d 73, 337 N.E. 2d 777.

The present case, however, does not involve constitutional matters. Appellants seek relief essentially on the basis that the actions of the zoning administration officials were against the weight of the evidence and contrary to law.

Thus, the Supreme Court's decision in Schomaeker v. First National Bank of Ottawa (1981), 66 Ohio St. 2d 304, 421 N.E. 2d 530 becomes important. Therein, a property owner contesting the granting of a variance had exhausted all avenues of relief within the zoning administration. However, she had failed to perfect an appeal pursuant to R.C. Chapter 2506 before filing a declaratory judgment action. Further, she did not question the constitutionality of the applicable zoning ordinance.

The court reasoned that the failure to appeal constituted a failure to exhaust administrative remedies.

We must express our reservations regarding such classification. In Driscoll, supra, the Supreme Court considered the R.C. Chapter 2506 appeal as an exception within Civ. R. 57. The court examined the available administrative procedures separately.

Applying the rationale of Schomaeker to Driscoll, it appears that while the availability of a direct appeal would not preclude a declaratory judgment action challenging the constitutionality of an ordinance, the appeal would have to be exhausted, as an administrative remedy, prior to filing the declaratory judgment action. Such requirement does not appear to have been intended by the Court in Driscoll.

Thus, an appeal pursuant to R.C. Chapter 2506 should be considered as an adequate remedy at law. See State ex rel. Sibarco Co. v. Berea (1966), 7 Ohio St. 2d 85, 218 N.E. 2d 428, cert. denied 386 U.S. 957 (1967).

However, viewing the direct appeal in such a manner, it appears that the exception provided for in Civ. R. 57, relied upon in Driscoll, would not apply to a declaratory

judgment action which does not challenge the constitutionality of the relevant ordinance(s). Therefore, a defendant could assert the existence of another adequate remedy in an effort to avoid a declaratory judgment action not involving constitutional questions.

However, such assertion must be made in a timely fashion or will be considered waived. Civ. R. 8(C) and 12(H); see Nicholson v. Pim (1855), 5 Ohio St. 25; Culver v. Rodgers (1878), 33 Ohio St. 537.

Thus, under either the rationale of Schomaeker or that set forth above, the availability of a R.C. Chapter 2506 appeal must be timely interposed to preclude an action for a declaratory judgment.

In the present case, neither of these defenses was asserted. Therefore, the trial court properly could consider the merits of appellants' claims.

*4 In view of such fact, a consideration of appellants' assignments of error is essential. Initially, appellants essentially contend that,

> The trial court committed prejudicial error in failing to hold that the findings of the city administrative bodies were void due to the lack of authority of the zoning plan examiner to act in this matter.

R.C.G.O. 150.422 provides that,

> "The Zoning Administrator, or his duly designated and acting deputy, shall:
> (A) Enforce the provisions of this chapter.
> (B) Approve and issue all zoning and occupancy certificates and make and maintain records thereof.
> (C) Conduct inspections of buildings, structures, and uses of land to determine compliance with the terms of this chapter." (Emphasis added).

Appellant contends that Mr. Barnes was not shown to be the Zoning A ministrator's "duly designated and acting deputy". Therefore, Mr. Barnes had no authority to issue the "Refusal" of April 17, 1980.

However, it is clear that Mr. Barnes worked for the Zoning Administrator. Tr. 58. Further, the "Refusal" was issued with the knowledge of and upon the authority of the Zoning Administrator. Tr. 64.

Appellants' first assignment of error is denied.

As their second assignment of error, appellants contend that,

> "The Trial Court committed prejudicial error in entering Judgment for the Defendant-Appellees without finding any fact concerning the Board of Zoning Appeals Hearing which was conducted May 19, 1980."

While the trial court's findings of fact did not concern the propriety of the Board's decision the court concluded as a matter of law that such decision "was not contrary to law nor did such decision...constitute an abuse of discretion."

Civ. R. 52 provides, in part, as follows:

> When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing or orally in open court requests otherwise before the journal entry of a final order, judgment, or decree has been approved by the court in writing and filed with the clerk of the court for journalization, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later.

It does not appear that appellants requested any findings of fact in this matter. Therefore, the general nature of the court's judgment entry is not subject to question.

Appellants' second assignment of error is without merit.

Appellants' third and fourth assignments of error assert the same error and will be considered together. Appellants claim that,

> "The Trial Court committed prejudicial error in concluding that the Plaintiffs-Appellants had failed to establish that the 'operation of non-conforming use was not discontinued for a period of two (2) calendar years.'"

R.C. 713.15 establishes that,

> "The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or amendment thereto, may be continued, although such use does not conform with the provisions of such ordinance or amendment, but if any such non-conforming use is voluntarily discontinued for two years or more, any future use of such land shall be in conformity with sections 713.01 to 713.15, inclusive, of the Revised Code." (Emphasis added).

*5 Pursuant thereto, R.C.G.O. 150.414 (G)(2) provides that,

> "In the event that operation of a nonconforming use of all or part of a building or other structure is voluntarily discontinued for a period of 2 years, such nonconforming use shall not thereafter be reestablished, and any subsequent use or occupancy of such building or other structure shall conform to the regulations of the district in which it is located." (Emphasis added).

It is clear that the first floor of appellants' property has not been operated as a tavern since the lessees abandoned the premises in the fall of 1977. However, mere vacancy is insufficient to lose entitlement to a nonconforming use. Discontinuance must be voluntary.

Thus, the relevant statutory period will not begin to run until such time as the cessation of use has been acquiesced in by or becomes the responsibility of the owner of the

property.

In the present case, the voluntary discontinuance of the property cannot be said to have begun at the time the lessees abandoned the premises. Appellants had not acquiesced in such abandonment. The question, therefore, is when did the responsibility for cessation of use shift to appellants?

It is the opinion of this court that appellants became responsible for the discontinuance of the operation of the tavern as of the time their right to possession of the tavern was judicially recognized. There is nothing in the record to indicate that appellants asserted or should have asserted such right prior to that time. Entry onto the property on December 5, 1977 was merely to prevent the plumbing fixtures from leaking and not for purposes of asserting a right to control the premises.

However, appellants took steps to reopen the tavern, by attempting to secure a liquor license, within two years after judicial enforcement of their right to possession of the property. Therefore, appellants have not lost entitlement to the nonconforming use of the property as a tavern.

Appellants third and fourth assignments of error are sustained.

The judgment of the trial court is reversed and the cause is remanded for further proceedings in accordance with the law.

KERNS, P.J. and PHILLIPS, J., concur.

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