[Cite as *Capital Properties Mgmt., Ltd. v. Cleveland Dept. of Community Dev., Div. of Bldg. & Hous.*, 2004-Ohio-4493.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83739

CAPITAL PROPERTIES MANAGEMENT, LTD.	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
CITY OF CLEVELAND, DEPARTMENT OF COMMUNITY DEVELOPMENT, DIVISION OF BUILDING AND HOUSING	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT OF DECISION: August 26, 2004

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court Case No. CV-457337

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: _____

APPEARANCES:

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COLLEEN CONWAY COONEY, J.

{¶1} Plaintiff-appellant, Capital Properties Management, Ltd. ("Capital"), appeals the judgment of the Cuyahoga County Court of Common Pleas affirming the decision of the City of Cleveland's Board of Building Standards and Building Appeals and the Ohio Board of Building Appeals, finding that Capital violated Cleveland's housing ordinances. Finding no merit to the appeal, we affirm.

{¶2} In September 1999, Capital was cited by the City of Cleveland (the "City") regarding its property at 12931 Shaker Boulevard (the "Shaker House Apartments") for violations of the City's housing ordinances ("City Building Code"). The notice of violation required Capital to install a top-of-car operating device on both elevators inside the Shaker House Apartments.[1]

{¶3} The City of Cleveland's Board of Building Standards and Building Appeals, the Ohio Board of Building Appeals, and the Cuyahoga County Court of Common Pleas upheld the notice of violation.

[1]The top-of-car operating device allows an inspector or service personnel to control the elevator car while on top of it.

{¶4} In its sole assignment of error, Capital argues that the trial court erred when it affirmed the decision of the Ohio Board of Building Appeals.

{¶5} Capital brings the within appeal pursuant to R.C. Chapter 2506. The applicable standard of review is set forth in R.C. 2506.04, which provides in pertinent part:

{¶6} **"The court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision * * *. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code."**

{¶7} In *Henley v. Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433, the Ohio Supreme Court construed the above language and explained:

{¶8} **"We have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. The common pleas court considers the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. See *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 612, 1998 Ohio 340, 693 N.E.2d 219, * * *, citing *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 206-207, 389 N.E.2d 1113, * * *.**

{¶9} **Our standard of review to be applied in an R.C. 2506.04 appeal is 'more limited in scope.' *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 12 Ohio B. 26, 465 N.E.2d 848. 'This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on 'questions of law,' which 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.' Id. at fn. 4. 'It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court.* * * The fact that the court of appeals * * * might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.' *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264." Id. at 147.**

{¶10} It is with this limited scope of review that we address Capital's assignment of error.

{¶11} Capital argues that no statute, regulation, or ordinance exists which would mandate the installation of top-of-car controls on existing elevators. We disagree.

{¶12} This court recently decided this issue in an analogous case, *Shaker North, Ltd. v. City of Cleveland* (Nov. 29, 2001), Cuyahoga App. Nos. 78244-78246. In *Shaker North*, this court determined that top-of-car controls were mandated under the Cleveland Building Code by virtue of the Ohio Basic Building Code, the Ohio Elevator Code, and the Ohio Administrative Code ("OAC") adopting the standards set forth in the American Society of Mechanical Engineers Safety Code for Existing Elevators and Escalators ("ASME Code"). Id.

{¶13} Capital contends that the Ohio Elevator Code does not require compliance with the ASME Code. Instead, it claims that complying with the ASME Code is merely "prima facie evidence of conformity with ASME standards." However, Capital ignores OAC 3001.1 (4101:2-30-1), which provides:

{¶14} "* * *the provisions of this chapter shall control the design, construction, installation, maintenance and operation of all elevators * * * hereafter operated, installed, relocated or altered in all buildings and structures." OAC 3001.1 (4101:2-30-1).

{¶15} The subsequent provisions of this chapter, OAC 3001.2 (4101:2-30-1), set forth the referenced standards to be applied as "elevator code listed in 'Chapter 35, Referenced Standards.'" ASME 17.3 Section 1.2 provides that "existing installations, at a minimum, shall meet the requirements of this Code. If an existing installation does not meet the requirements * * * it shall be upgraded." Section 3.10 requires top-of-car operating devices.

{¶16} As this court previously determined in *Shaker North*, and we reaffirm, Chapter 35 indicates that ASME 17.3 is the governing standard for existing elevators. *Shaker North*, supra. Therefore, because compliance is mandated under the Ohio Administrative Code, specifically the Ohio Elevator Code, compliance is required under the Cleveland Building Code.

{¶17} Capital claims that, even assuming arguendo, top-of-car controls are mandated under law, the Cleveland Codified Ordinances ("C.C.O.") and the Ohio Revised Code would exempt its elevators from such requirement.

{¶18} C.C.O. 3111.02 provides:

{¶19} "The Ohio Basic Building Code as adopted herein applies to all buildings except as follows: * * * (3) Existing buildings where their location, parts, equipment and other items do not constitute a serious hazard * * *."

{¶20} A "serious hazard" is defined as:

{¶21} "A hazard of considerable consequence to safety or health through the design, location, construction, or equipment of a building, or the condition thereof, which hazard has been established through experience to be of certain or probable consequence, or which can be determined to be, or which is obviously such a hazard." OAC 4101:1-2-02.

{¶22} While Capital contends that its elevators have not caused any injury because of the lack of top-of-car controls, we find that the condition of the elevators without the controls represents a serious hazard to the safety of the inspectors. The City suggests instances when the inspectors, while on top of the elevators, could be thrown or crushed without such controls. We find this reasoning alone sufficiently compelling to declare that elevators without top-of-car controls are a serious hazard.

{¶23} Even if the Ohio Basic Building Code did not apply, the Ohio Elevator Code is still applicable. R.C. 4105.13 provides the following exemption to the elevator code:

{¶24} "Every elevator shall be * * * maintained * * * in accordance with state laws and rules as are authorized in respect thereto. Where reasonable safety is obtained without complying to the literal requirements of such rules as in cases of practical difficulty or unnecessary hardship, the literal requirements of such rules shall not be required."

{¶25} Capital does not argue that the installation of top-of-car controls cannot be complied with literally. However, it contends that installation would cause unnecessary hardship, and thus it claims it is exempt. The hardship that Capital claims is that it would cost $15,800 to install the controls on both elevators, and that its annual net income from the apartments is approximately $69,958. Thus, Capital claims the installation would cost almost 25% of one year's net income from the apartments. We do not find this argument compelling. The one-time cost of retrofitting the elevators is likely to be minimal compared to the long-term income from the Shaker House Apartments and thus it does not constitute an unnecessary hardship.[2]

{¶26} Capital also argues that the Ohio Supreme Court would forbid the enforcement of the top-of-car requirement where there has been no finding that the condition created a nuisance. In support of its argument, Capital cites *Gates Co. v. Housing Appeals Bd. of Columbus* (1967), 10 Ohio St.2d 48, 225 N.E.2d 222, which held:

{¶27} "In the absence of a determination that the continued use of improved real property without conforming to building standards subsequently adopted would constitute a nuisance, improvements necessary to comply with the new standards may not constitutionally be compelled by a public agency against the private owner of such property." Id. at syllabus.

{¶28} Capital claims that no evidence was presented to show that anyone was injured by its elevators or that the absence of the top-of-car controls interfered with any

[2]Furthermore, in *Shaker North* we found that it was the building owner's burden to produce evidence demonstrating the cost in proportion to the building's value. Id. at 9 and fn. 7. No evidence was presented to establish the value of the Shaker House Apartments.

public right or caused any annoyance or inconvenience to the public. Therefore, it contends that its elevators did not constitute a nuisance as a matter of law.

{¶29} We addressed the same argument in *Shaker North* and determined that it was without merit, reasoning as follows:

{¶30} "First, the police power of the city provides more than enough authority for the city to require a safety modification as long as it is not unreasonable: 'the constitutional right of the individual to use private property has always been subservient to the public welfare *[and] such use is subject to the legitimate exercise of local police power ***.' *Northern Ohio Sign v. Lakewood* (1987), 32 Ohio St.3d 316, 318, 513 N.E.2d 324.**

{¶31} Second, the lack of the elevator top operating device constitutes a nuisance per se. OAC 4101:5-3-01(B) adopts the ANSI/ASME A 17.3 1996 Safety Code for Existing Elevators and Escalators. The authority for formulating rules is given to the Board of Building Standards by R.C. 4105.011(A), which requires in part that the Board formulate and adopt rules governing the design, construction, repair, alteration, and maintenance of elevators. Such rules shall prescribe uniform minimum standards necessary for protection of the public health and safety * * *.'

{¶32} OAC 4101:5-1-05 requires the inspector to 'issue an adjudication order in accordance with section 4105.11 of the Revised Code.' R.C. 4105.11 states in pertinent part that the court '* * * shall not affirm the order of the agency [board of building appeals] unless the preponderance of the evidence before it supports the reasonableness and lawfulness of such order, and of any rules upon which the order of the agency is based in its application to the facts involved in the appeal. Failure to comply with the requirements of any order pursuant to this section * * * is hereby declared a public nuisance.'

{¶33} Thus our standard is whether there is a preponderance of evidence supporting the reasonableness and lawfulness of the order. If there is, then the noncompliant elevator is statutorily declared a nuisance.

{¶34} R.C. 3767.01 defines a nuisance in part as 'that which is defined and declared by statutes to be a nuisance * * *.' The elevator statute declares, 'failure to comply with the requirements of any order issued pursuant to this section * * * is hereby declared a public nuisance.' R.C. 4105.11. This rule is incorporated into the Ohio Basic Building Code and the Building Code of the City of Cleveland." *Shaker North*, supra.

{¶35} Thus, the burden rests with Capital to show that its elevators qualify for an exemption from the safety requirements. *Shaker North*, supra. Capital claimed, without documentation, that the absence of the top-of-car controls is not a serious hazard when one incident out of 150,000 inspections occurred in the City. Additionally, Capital states that it is exempt from the safety requirements because its elevators have not caused any injury as a result of the absence of the top-of-car controls. While this may be true, the City provided sufficient evidence to support the need to protect its elevator inspectors from harm with the installation of top-of-car controls. The City claimed that without the controls the inspectors who are working on top of the car are at the peril of someone pushing the elevator call button, which may override the stoppage of the elevator car. The City also stated that it had cited and received compliance from approximately 250 elevator units regarding the installation of top-of-car controls.

{¶36} Therefore, Capital has failed to prove that its elevators qualify for an exemption. We find no errors of law and, therefore, the sole assignment of error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

ANNE L. KILBANE, P.J. and

KENNETH A. ROCCO, J. CONCUR

JUDGE

COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).