[Cite as *Kruppa v. Warren*, 2009-Ohio-4927.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

WILLIAM KRUPPA,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-T-0017**
- vs -	:	
CITY OF WARREN, OHIO, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2008 CV 01447.

Judgment: Affirmed.

Thomas C. Nader, Nader & Nader, 5000 East Market Street, #33, Warren, OH 44484 (For Appellant).

Gregory V. Hicks, Warren City Law Director, and *David D. Daugherty*, Assistant Warren City Law Director, 391 Mahoning Avenue, N.W., Warren, OH 44483 (For Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, William Kruppa, appeals the summary judgment of the Trumbull County Court of Common Pleas in favor of appellee, the city of Warren, Ohio, on his complaint for declaratory judgment. At issue is whether appellant has standing to challenge as unconstitutional Warren's permit procedure for non-owner occupied dwelling units. Because we hold he lacks standing, we affirm.

{¶2} For twenty years, Warren City Ordinance Sec. 1367.10 has required owners of non-owner occupied dwelling units in the city to obtain dwelling permits for such units before they can be rented. There are currently some 5,900 registered non-owner occupied dwellings in the city. Warren City Council has determined that such dwellings contribute to deterioration and blight in the city. In 2008 Council determined that the regulation and inspection of non-owner occupied dwellings promotes (1) the health, safety, and welfare of their residents; and (2) the best interests of the city as such regulation and inspection protect the integrity, habitability, and safety of the city's housing stock. Council enacted Sec. 1367.10 to require the city's non-owner occupied dwellings be inspected on an annual basis.

{¶3} Pursuant to Sec. 1367.10(a), in order for an owner of a non-owner occupied dwelling unit to rent such unit, he must first obtain a "residential non-owner occupied dwelling unit permit" for that dwelling unit from the health officer. Such permit can only be issued after the building inspector inspects the dwelling unit and certifies it complies with the applicable provisions of the city's housing code, building code, zoning code, applicable fire codes and laws, and all other applicable codes, ordinances, and laws.

{¶4} Under Sec. 1367.10(c), the owner of each such dwelling is also required to renew the dwelling unit's permit annually. A dwelling unit whose permit is renewed must be reinspected for compliance by the health officer each year of renewal. If inspection of the dwelling unit reveals compliance with the mentioned codes, a permit or renewal permit shall issue to the owner of the property.

{¶5} Appellant commenced this action by filing a complaint for declaratory judgment, alleging Sec. 1367.10 violates the United States and Ohio Constitutions in that it is vague and "denies the owners of residential rental property" equal protection and due process. The city filed an answer denying the material allegations of the complaint and asserting its defenses, including appellant's lack of standing.

{¶6} Appellant subsequently filed a motion for summary judgment and the city filed its brief in opposition. The trial court construed the city's brief as a motion for summary judgment, denied appellant's motion, and granted the city's motion. Appellant asserts three assignments of error, which, for clarity of analysis, we will consider out of order. For his first assigned error, appellant alleges:

{¶7} "[THE] TRIAL COURT ERRED IN CONCLUDING THAT THE ENFORCEMENT CRITERIA CONTAINED WITHIN WARREN CITY ORDINANCE 1367.10 ARE NOT UNCONSTITUTIONALLY VAGUE[.]"

{¶8} Appellant argues that Sec. 1367.10 is unconstitutionally vague because it fails to give the property owner notice of the requirements he must meet before obtaining a permit and allows arbitrary enforcement by the building inspector. Appellant does not claim the ordinance is invalid as applied to him; rather, he presents a facial challenge.

{¶9} A trial court's decision to grant a motion for summary judgment is reviewed by an appellate court under a de novo standard of review. *Duncan v. Hallrich*, *Inc.,* 11th Dist. No. 2006-G-2703, 2007-Ohio-3021, at ¶10, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶10} This court has held that "there is a strong presumption that all legislative enactments are constitutional." *State v. Ferraiolo* (2000), 140 Ohio App.3d 585, 586, citing *State v. Collier* (1991), 62 Ohio St.3d 267, 269. Before a court may declare a legislative enactment unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, at paragraph one of the syllabus. "That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the constitution." *Xenia v. Schmidt* (1920), 101 Ohio St. 437, at paragraph two of the syllabus; *State ex rel. Durbin v. Smith* (1921) 102 Ohio St. 591, 600-601; *Dickman*, supra, at 147. Moreover, the party alleging that a legislative enactment is unconstitutional must prove this assertion beyond a reasonable doubt in order to prevail. *Collier*, supra. Accordingly, we begin our analysis with the strong presumption that Sec. 1367.10 is constitutional.

{¶11} The void-for-vagueness doctrine is a component of due process, and ensures that individuals can ascertain what the law requires of them. *State v. Williams*, 88 Ohio St.3d 513, 532, 2000-Ohio-428; *State v. Anderson* (1991), 57 Ohio St.3d 168, 171. In order to survive a void-for-vagueness challenge, the legislative enactment must be written so that a person of common intelligence is able to determine what is required under the law, and it must provide sufficient standards to prevent arbitrary and discriminatory enforcement. *Chicago v. Morales* (1999), 527 U.S. 41, 56-57; see, also, *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals* (1992), 63 Ohio St.3d

354, 358. A statute will not be declared void, however, merely because it could have been worded more precisely. *Roth v. United States* (1957), 354 U.S. 476, 491.

{¶12} As noted supra, appellant presents a facial, rather than an "as applied" challenge to the ordinance. An as applied challenge asserts that a statute is unconstitutional as applied to the challenger's particular conduct. *Columbus v. Meyer* (2003), 152 Ohio App.3d 46, 53, 2003-Ohio-1270. In contrast, a facial-vagueness challenge asserts the statute is vague in all of its applications. *Anderson*, supra, at 173, fn. 2, citing *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.* (1982), 455 U.S. 489, 494-495. This means the legislation does not provide a definitive standard by which to determine what is required under the law. *Williams*, supra. A facial-vagueness challenge asserts that a law is unconstitutional as applied to the hypothetical conduct of a third party and without regard to the challenger's specific conduct. *Columbus*, supra, citing *Forsyth County, Georgia v. The Nationalist Movement* (1992), 505 U.S. 123, 129.

{¶13} In order for a defendant to obtain judicial review of a challenge to the constitutionality of a statute, he must first demonstrate he has standing. *Sierra Club v. Morton* (1972), 405 U.S. 727, 731. The question of standing depends on whether the party has alleged such a personal stake in the outcome of the controversy that the dispute sought to be adjudicated will be presented in an adversarial context and in a form historically viewed as capable of judicial resolution. *Baker v. Carr* (1962), 369 U.S. 186, 204; *Flast v. Cohen* (1968), 392 U.S. 83, 101. Standing to sue is a threshold jurisdictional question. *Steel Company v. Citizens for a Better Environment* (1998), 523 U.S. 83, 102.

{¶14} In *Hoffman Estates*, supra, the United States Supreme Court set forth the test by which a court is to determine the merits of a facial void-for-vagueness challenge:

{¶15} "[T]he court should *** examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. *** *A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.*" (Emphasis added and footnote omitted.) Id. at 494-95.

{¶16} The Court in *Hoffman Estates* further held: "'[Vagueness] challenges to statutes which do not involve First Amendment freedoms must be examined in *** light of the facts of the case at hand.'" Id. at 495, fn.7, quoting *United States v. Mazurie* (1975), 419 U.S. 544, 550. Moreover, the *Hoffman Estates* Court held: "'One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.'" (Internal citation omitted.) Id.

{¶17} "*** [A] complainant may not successfully show that a statute has no valid application whatsoever without proving its application is not valid to his *** case." *State v. Echols* (Mar. 15, 1995), 2d Dist. Nos. 14457, 14460, 14373, 14679, 14637, 14639, 1995 Ohio App. LEXIS 991, *9.

{¶18} Thus, unless the challenged legislation implicates First Amendment rights, a party cannot assert a facial void-for-vagueness challenge unless he first demonstrates the legislation is invalid as applied to him. It is undisputed that Sec. 1367.10 does not

implicate the First Amendment. As a result, before appellant can maintain a facial challenge to Sec. 1367.10, he must first prove the ordinance is vague as applied to him.

{¶19} The problem here is that appellant failed to allege or prove that this ordinance is vague as applied to him. "A party may not bring an 'as applied' challenge to a licensing or permitting scheme unless the party has applied for and been denied a license or permit under the scheme at issue." *Columbus*, supra, at 54, citing *Union Twp. Bd. Of Trustees v. Old 74 Corp.* (2000), 137 Ohio App.3d 289, 295. Appellant has not alleged that he applied for and was denied a dwelling permit under Sec. 1367.10. He therefore lacks standing to challenge Sec. 1367.10 as facially void. Further, without a factual predicate, we may not address the merits of his facial challenge. As a result, appellant's facial challenge is overruled. However, even if appellant's facial vagueness challenge was properly before us, it would lack merit.

{¶20} As noted supra, Sec. 1367.10 provides that a dwelling permit will issue "after inspection of the dwelling unit by the Building Inspector *** and *** after endorsement thereof by the Building Inspector certifying that the dwelling unit complies with the applicable provisions of this Housing Code, the Building Code, the Zoning Code, applicable fire codes and laws, and all other applicable codes, ordinances and laws."

{¶21} Appellant concedes that the phrase "Housing Code, the Building Code and the Zoning Code" refers to ordinances previously enacted by the city. However, he contends the attached general phrase "and all other applicable fire codes and laws, and all other applicable codes, ordinances and laws" is unconstitutionally vague in that it fails to put a property owner on notice as to the requirements he must meet in order to

obtain a dwelling permit. He argues that because this phrase does not specifically identify the other codes, ordinances and laws with which property owners must comply, they could conceivably include state and federal laws. Appellant argues that without clarification as to what laws must be satisfied, the building inspector is given unfettered discretion in determining what legal requirements are to be enforced. We do not agree.

{¶22} First, we observe that the reference to the other codes, ordinances, and laws with which the property owner must comply is limited to those which, according to Sec. 1367.10, are "applicable." Therefore, this provision does nothing more than require the property owner to comply with the legal requirements that are already applicable to him.

{¶23} Next, we note that the phrase to which appellant objects is a general one and follows a series of specific items. Thus, the rule of ejusdem generis applies to interpret the meaning of this general phrase. In *State v. Aspell* (1967), 10 Ohio St.2d 1, the Supreme Court of Ohio held:

{¶24} "Under the rule of ejusdem generis, where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms." Id. at paragraph two of the syllabus. See, also, *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 68.

{¶25} Pursuant to this rule of statutory construction, since the specific items listed in Sec. 1367.10 are codes, ordinances, and laws enacted by the city, the more

general phrase that follows in this ordinance refers to other codes, ordinances and laws previously enacted by the city.

{¶26} As a result, pursuant to Sec. 1367.10, in order for a non-occupant owner of residential property to be entitled to a dwelling permit, he must demonstrate compliance with the city's housing code, building code, zoning code, fire code, and other codes previously enacted by the city that are applicable to non-owner occupied rental properties. These codes provide a definitive standard that allows a person of common intelligence to understand what is required by Sec. 1367.10.

{¶27} We observe that other Ohio Appellate Districts have overruled vagueness challenges to similar ordinances. See *Mariemont Apartment Association v. Village of Mariemont, Ohio,* 1st Dist. No. C-050986, 2007-Ohio-173 (ordinance requiring landlords to obtain rental permits required compliance with "all applicable zoning and building codes").

{¶28} Thus, even if the issue was properly before us, appellant has not proven beyond a reasonable doubt that Sec. 1367.10 is unconstitutionally vague in all its applications since this section provides a standard that would allow an ordinary person to understand what legal requirements must be met for a permit to issue, and does not give the building inspector unfettered discretion in the enforcement of the ordinance.

{¶29} Appellant's first assignment of error lacks merit.

{¶30} For his third assignment of error, appellant contends:

{¶31} "[THE] TRIAL COURT ERRED IN FINDING THAT WARREN ORDINANCE 1367.10 DOES NOT DENY EQUAL PROTECTION TO LANDOWNERS WHO ARE SIMILARLY SITUATED[.]"

{¶32} Appellant argues that Sec. 1367.10 violates equal protection because it distinguishes between landowners who rent their single family residences to tenants and landowners who do not.

{¶33} Initially, we note that in his complaint appellant does not allege that he has been injured by Warren's ordinance. Nor does he allege he applied for and was denied a permit. He therefore lacks standing to assert his equal protection argument, *Sierra Club*, supra, and it is therefore overruled. However, even if appellant had standing, his assigned error would lack merit.

{¶34} The Fourteenth Amendment to the United States Constitution provides that "[no] State shall *** deny to any person within its jurisdiction the equal protection of the laws."

{¶35} "The limitations placed upon governmental action by the Equal Protection Clauses of the Ohio and United States Constitutions are essentially identical." *Kinney v. Kaiser Aluminum & Chem. Corp.* (1975), 41 Ohio St.2d 120, 123, citing *Porter v. Oberlin* (1965), 1 Ohio St.2d 143. When the government treats similarly situated individuals differently, such action implicates equal protection. *Cleburne v. Cleburne Living Ctr., Inc.* (1985), 473 U.S. 432, 439.

{¶36} It is fundamental that legislation cannot be attacked merely because it creates distinctions and thereby classifies the subjects of a law because legislation, by its very nature, treats people by groups and classes and must, of necessity, draw its lines based upon "amalgamations of factors." *Vance v. Bradley* (1979), 440 U.S. 93, 109.

{¶37} Further, in the absence of a fundamental right or suspect class, a legislative classification will be upheld if it is rational. Id.; *Williamson v. Lee Optical of Oklahoma, Inc.* (1955), 348 U.S. 483. Because no fundamental right or suspect class is involved here, the rational basis test is applicable to determine whether Sec. 1367.10 violates equal protection. Pursuant to this test, an ordinance will be held to be constitutional if it is rationally related to any legitimate governmental interest. *Cleburne*, supra, at 440. Enactments of the legislature are valid if "they bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable. *** The federal test is similar. To determine whether such statutes are constitutional under federal scrutiny, we must decide if there is a rational relationship between the statute and its purpose." (Internal citations omitted.) *State v. Thompkins*, 75 Ohio St.3d 558, 560, 1996-Ohio-264. In *Police Department of the City of Chicago v. Mosley* (1972), 408 U.S. 92, the Supreme Court held: "As in all equal protection cases, *** the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." Id. at 95.

{¶38} In applying the rational basis test, a court will not overturn a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of a legitimate governmental purpose that the court can only conclude the legislature's actions were irrational. *Vance*, supra, at 97.

{¶39} As the trial court found, the purpose of Sec. 1367.10 is to protect the integrity, habitability, and safety of Warren's housing stock.

{¶40} In *Kramer v. City of Niles Hous. Maint. Bd*., 11th Dist. No. 2008-T-0004, 2008-Ohio-4978, this court held that "[b]uilding codes are recognized as valid exercises of the police power." Id. at ¶19. R.C. 715.26 gives to municipal corporations the power to "[p]rovide for the inspection of buildings or other structures and for the removal and repair of insecure, unsafe, or structurally defective buildings or other structures ***."

{¶41} The regulation of rental property and the promotion of safe and habitable housing are proper subjects of the city's police power in that they promote the health, safety, or general welfare of the public. *Mariemont Apartment Association*, supra, at ¶29.

{¶42} Sec. 1367.10 is rationally related to advancing these objectives. Despite appellant's argument to the contrary, there are significant differences between owner-occupied and non-owner occupied properties. The owners of these different types of property are therefore not similarly situated. As the court in *Mariemont Apartment Association* held:

{¶43} "[P]roperty owners who rent their property and those who occupy their property are not similarly situated. Residential rental properties require greater health and safety regulation than other types of property. *** The governmental interest in protecting the community from unsafe housing is more critical with rental property, which has numerous residents, common areas, and greater access by the general public. *** Further, the renting of residential property is a business. It is reasonable to require landlords to offset the costs of regulating that business. ***" (Internal citations omitted.) Id. at ¶31.

{¶44} Thus, the distinction drawn between owners who rent their properties and owners who occupy their properties is rationally related to the legitimate governmental objectives sought to be achieved in Sec. 1367.10.

{¶45} We note that in *Mariemont Apartment Association*, the First District considered an equal protection challenge to an ordinance that required landlords to obtain rental permits and to have their rental properties inspected for compliance with the city's building code. The plaintiff-landlord argued the ordinance improperly distinguished between owners who rent their properties and those who do not. The First District held the ordinance does not deny owners of rental properties equal protection because it is rationally related to achieving the legitimate governmental interest in regulating rental property and protecting safe housing. *Mariemont*, supra.

{¶46} Appellant's third assignment of error lacks merit.

{¶47} For his second assignment of error, appellant contends:

{¶48} "TRIAL COURT ERRED IN CONCLUDING THAT WARREN CITY ORDINANCE 1367.10 PROVIDES THE RIGHT TO APPEAL DENIAL OF DWELLING PERMITS THAT FULFILL REQUIREMENTS OF DUE PROCESS[.]"

{¶49} Appellant argues that R.C. 1367.10 violates procedural due process in that it does not provide for an appeal from a denial by the health officer of a request for a dwelling permit. Issuance of the permit by the health officer is conditioned on inspection of the dwelling unit by the building inspector and his certification that the unit complies with the applicable city codes.

{¶50} As noted supra, appellant does not claim he has been denied a dwelling permit, nor does he allege he has been injured by the ordinance. Based on the

authority outlined above, appellant lacks standing to assert his procedural due process claim and it is therefore overruled. See, also, *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. Of Shelby, Michigan* (C.A. 6, 2006), 470 F.3d 286, in which the Sixth Circuit held that in order to assert a claim alleging a procedural due process violation, the plaintiff must allege that he has sustained a cognizable injury-in-fact or an economic injury. Id. at 294.

{¶51} In light of appellant's lack of standing, his second assignment of error lacks merit.

{¶52} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.