[Cite as *All Erection & Crane Rental Corp. v. Newbury Twp*, 2009-Ohio-6705.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

ALL ERECTION AND CRANE RENTAL CORPORATION,	:	**O P I N I O N**
Plaintiff-Appellant/ Cross-Appellee,	:	**CASE NO. 2008-G-2862**
- vs -	:	
THE TOWNSHIP OF NEWBURY, et al.,	:	
Defendants-Appellees/ Cross-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 05 M 000010.

Judgment: Affirmed.

Leonard F. Carr and *L. Bryan Carr*, Carr, Feneli & Carbone Co., L.P.A., 1392 S.O.M. Center Road, Mayfield Heights, OH 44124 (For Plaintiff-Appellant/Cross-Appellee).

Abraham Cantor, Johnnycake Commons, 9930 Johnnycake Ridge Road, Suite 4-F, Concord, OH 44060 (For Defendants-Appellees/Cross-Appellants).

TIMOTHY P. CANNON, J.

{¶1} Appellant/cross-appellee, All Erection and Crane Rental Corporation ("All Crane"), appeal from a common pleas court order affirming an order of the appellees/cross-appellants, the Township of Newbury, oThe Township of Newbury Board of Zoning Appeals, and the Township of Newbury Board of Trustees (collectively

referred to as “Newbury”), denying All Crane’s application for a use variance that would permit the subject premises to be used for light industrial purposes.

{¶2} All Crane owns approximately six acres of real property in Newbury Township, Geauga County, Ohio. This property is located within the Professional Office (“P-O”) Zoning District. A building of 18,424 square feet, which was constructed in 1986 by All Crane’s predecessor in title, occupies this property. This property was once zoned Commercial/Business (“B-1”); however, in 1991, Newbury enacted a zoning amendment reclassifying the property to P-O. In 1992, All Crane took title to the property.

{¶3} The subject property is located on Route 87, a major thoroughfare within Newbury Township. On its northern border lies an area of single-family residential homes. Commercial zoning is located on the south side of Route 87. In 2003, All Crane applied to the Newbury Township Board of Zoning Appeals (“BZA”) for a variance that would permit use of the property for light industrial purposes.

{¶4} The BZA held hearings on the use variance request on August 12 and September 23, 2003. At the conclusion of the September 23, 2003 hearing, the BZA issued a verbal decision denying the variance. The BZA issued its findings of fact on December 9, 2003. The findings of fact indicated the board unanimously voted to deny All Crane’s use variance. The decision of the BZA was journalized on December 14, 2003.

{¶5} Prior to the BZA journalizing its decision, All Crane filed a complaint in the United States District Court, Northern District of Ohio, Eastern Division, on December 4, 2003. All Crane alleged deprivations of the right to equal protection, the right to due

process of law, and the right to protect one's property. All Crane also alleged conspiracy pursuant to Sections 1985(3) and 1986, Title 42, U.S.Code, unlawful taking of property, tortious interference with property rights, negligence, violation of the Ohio Open Meetings Act, and sought a declaratory judgment. Summary judgment was granted in favor of Newbury on the federal claims. The state claims were dismissed without prejudice.

{¶6} Thereafter, on January 5, 2005, All Crane filed a complaint in the Geauga County Court of Common Pleas alleging a due process violation, a tortious interference with property rights, negligence, a taking, and a violation of the Ohio Open Meetings Act. In addition, All Crane sought a declaratory judgment and asserted a R.C. Chapter 2506 appeal.

{¶7} Subsequent to the filing of its complaint, All Crane filed a notice of partial voluntary dismissal without prejudice, dismissing the claims for a due process violation, taking, tortious interference with property rights, negligence, and violation of the Ohio Open Meetings Act. All Crane's declaratory judgment action, seeking a declaration that the current P-O zoning of All Crane's real property is unconstitutional as applied, remained pending before the trial court. The trial court also considered All Crane's request for an order directing Newbury to rezone the subject property to a classification of Industrial and the R.C. Chapter 2506 appeal.

{¶8} A trial was held in May 2007. The trial court issued a judgment entry dated September 9, 2008, finding in favor of Newbury and against All Crane, upon All Crane's complaint for declaratory judgment. In addition, the trial court determined that All Crane failed to perfect an administrative appeal and, therefore, it dismissed the R.C.

Chapter 2506 appeal. The trial court also held that All Crane failed to present evidence sufficient to satisfy its burden of proof to declare the existing zoning classification unconstitutional as applied to All Crane. It is from that judgment that All Crane filed the instant appeal, asserting the following assignments of error for our review:

{¶9} "[1.] The trial court erred in finding the professional office zoning of the appellant's property constitutional.

{¶10} "[2.] The trial court erred in dismissing the appellant's [R.C. Chapter] 2506 appeal."

{¶11} On cross-appeal, Newbury asserts the following assignment of error:

{¶12} "The failure to appeal the administrative decision extinguishes appellant's applied constitutional challenges through claim preclusion."

{¶13} For ease of discussion, we first address whether the trial court erred in dismissing All Crane's R.C. Chapter 2506 appeal.

{¶14} A review of the record reveals an absence of evidence that All Crane served the BZA with a copy of a notice of appeal. In fact, in its judgment entry, the trial court observed that "the record of proceedings before this Court does not contain a Notice of Appeal filed with the Newbury Township Board of Zoning Appeals or any other official of Newbury Township." Furthermore, the trial court noted that All Crane does not contend that it did, in fact, file a written notice of appeal. Instead, the trial court noted that All Crane argued that "the [BZA] illegally delayed entering a written decision[,] thereby denying [All Crane] the right and opportunity to appeal the Board's decision in a timely manner."

{¶15} It is well-settled that in order to vest the court of common pleas with jurisdiction over an appeal from a board of zoning appeals, a notice of appeal must be filed with the zoning board itself. *Guysinger v. Chillicothe Bd. of Zoning Appeals* (1990), 66 Ohio App.3d 353, 356.

{¶16} R.C. 2506.01(A) provides that a decision such as the one rendered by the BZA may be appealed to a court of common pleas "as provided in Chapter 2505 of the Revised Code." R.C. 2505.04, provides, in pertinent part:

{¶17} "An appeal is perfected *when a written notice of appeal is filed*, *** in the case of an administrative-related appeal, *with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved*. *** After being perfected, an appeal shall not be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional." (Emphasis added.)

{¶18} According to R.C. 2505.04, the failure to file a copy of the notice of administrative appeal to the BZA results in a failure to perfect the appeal and is grounds for dismissal. See *Weatherholt v. Hamilton*, 12th Dist. No. CA2007-04-098, 2008-Ohio-1355, at ¶6-7. In discussing whether compliance with the requirements of a statute is necessary to invoke the trial court's jurisdiction, the Supreme Court of Ohio has held:

{¶19} "It is elementary that an appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute. The exercise of the right of appeal conferred is conditioned upon compliance with the accompanying mandatory requirements. ***. No one would contend that a notice of appeal need not be filed within the time fixed by statute. Compliance with a requirement that a notice of appeal

shall be filed within the time specified, in order to invoke jurisdiction, *is no more essential than that the notice be filed at the place designated* and that it be such in content as the statute requires. ***." *Zier v. Bureau of Unemp. Comp*. (1949), 151 Ohio St. 123, 125. (Internal citations omitted and emphasis added.)

{¶20} In the case sub judice, All Crane failed to employ the proper procedural channels to perfect its appeal, as outlined in R.C. 2505.04. All Crane had a statutory duty to file the notice of appeal with both the administrative body and the common pleas court. All Crane, however, chose to file a complaint in the court of common pleas without first following the requirements necessary to perfect an administrative appeal. Based on the foregoing, the trial court did not err in dismissing All Crane's R.C. Chapter 2506 appeal, as we find the BZA was never properly served with All Crane's notice of the administrative appeal. As a result, the trial court lacked jurisdiction to hear the administrative appeal.

{¶21} All Crane's second assignment of error is without merit.

{¶22} Our analysis of All Crane's first assignment of error is potentially dependent upon our disposition of Newbury's assignment of error on cross-appeal.

{¶23} Before we address the merits of All Crane's first assignment of error, we must resolve Newbury's argument on cross-appeal that All Crane's as-applied constitutional challenge is barred by the doctrine of res judicata. To support this argument, Newbury maintains that All Crane could have raised this issue in its administrative appeal. We disagree.

{¶24} We recognize that a declaratory judgment action is the proper vehicle for challenging the constitutionality of an ordinance on its face. *Martin v. Independence Bd.*

of Zoning Appeals, 8th Dist. No. 81340, 2003-Ohio-2736, at ¶8. (Citations omitted.) However, "[c]onsiderations of judicial economy allow the common pleas court in an administrative appeal to address the constitutionality of a zoning ordinance as applied to the particular property at issue, even though constitutionality was not an issue which the administrative agency could have addressed." *Cappas & Karas Invest., Inc. v. Cleveland Bd. of Zoning Appeals*, 8th Dist. No. 85124, 2005-Ohio-2735, at ¶12. (Citation omitted.) While a trial court may entertain an as-applied constitutional claim in an administrative appeal, we find no case law *requiring* a constitutional challenge to a zoning ordinance as applied to a particular property to be brought within an administrative appeal.

{¶25} Newbury cites *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, in support of its contention that failure to perfect the administrative appeal invokes the doctrine of res judicata. However, we do not interpret the syllabus in that case so narrowly. In an as-applied challenge, the Supreme Court of Ohio held: "[t]he constitutionality of a zoning ordinance may be attacked in two ways. An appeal from an administrative zoning decision can be taken pursuant to R.C. Chapter 2506. In addition, or in the alternative, a declaratory judgment pursuant to R.C. Chapter 2721 can be pursued." Id. at paragraph one of the syllabus. There is nothing in this language that prohibits pursuing both remedies.

{¶26} If the landowner is entitled to pursue one remedy or the other, reason does not dictate that abandonment of one cause in favor of the other would result in application of res judicata. As stated by the Supreme Court of Ohio in *Karches*:

{¶27} "Although both an R.C. Chapter 2506 action and an R.C. Chapter 2721 declaratory judgment action seek the same result – elimination of an existing zoning regulation which precludes a proposed use of the property – any similarity between the two actions ends there." Id. at 15-16. (Citation omitted.) As recognized by the *Karches* Court, "[t]he declaratory judgment action is independent from the administrative proceedings and it is not a review of a final administrative order." Id. at 16. In *Karches*, supra, at 15, and *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263, 268-269, the Supreme Court of Ohio reasoned that R.C. Chapter 2506 is not the exclusive remedy for a landowner, and a R.C. Chapter 2721 declaratory judgment action is available as an alternative remedy when challenging the constitutionality of a zoning ordinance. The Court based its reasoning on Civ.R. 57, which provides, in pertinent part, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

{¶28} Whether an administrative appeal from denial of a use variance has merit may be totally independent of a determination of whether there has been a constitutional taking. Newbury is essentially requesting a finding that if a landowner initially seeks both an administrative appeal and a declaratory judgment, and the administrative appeal is not properly perfected and pursued, a landowner is barred from any further constitutional challenge by declaratory action or mandamus. We do not believe such a challenge should be dependent upon pursuit of an administrative appeal that may, in fact, have no merit. See *Karches*, supra, at 17. For example, it may be entirely possible for the BZA to deny a use variance based on the proper standard of review for a use variance request, but at the same time have a trial court declare in a

separate challenge that the zoning has constitutional infirmities as applied to the same parcel of land. Therefore, Newbury's assignment of error on cross-appeal is without merit.

{¶29} With regard to All Crane's first assignment of error, we note that zoning ordinances are presumed to be constitutional. *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 209. In order to invalidate a zoning ordinance, the challenging party must demonstrate, beyond fair debate, that the zoning classification is "'arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" Id. at 210. (Citation omitted.) The "beyond fair debate" standard is similar to the "beyond a reasonable doubt" standard used in the context of a criminal trial. *Heritage Dev. Co., LLC v. Willoughby Hills*, 11th Dist. No. 2001-L-221, 2002-Ohio-7269, at ¶17. (Citation omitted.)

{¶30} In the context of this case, there are two types of challenges to zoning ordinances, a facial challenge and an as-applied challenge. The Supreme Court of Ohio has stated:

{¶31} "In a facial challenge to a zoning ordinance, the challenger alleges that the overall ordinance, on its face, has no rational relationship to a legitimate governmental purpose and it may not constitutionally be applied under any circumstances. ***

{¶32} "In an 'as applied' challenge to a zoning ordinance, the landowner questions the validity of the ordinance only as it applies to a particular parcel of property. If the ordinance is unconstitutional as applied under those limited circumstances, it nevertheless will continue to be enforced in all other instances. *** A landowner may also allege that the ordinance so interferes with the use of the property

that, in effect, it constitutes a taking of the property. ***." *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, at ¶11-12. (Internal citations omitted.)

{¶33} In the case sub judice, All Crane does not allege Newbury's zoning affects a taking of its property, nor does All Crane claim the ordinance is invalid on its face; rather, All Crane presents an as-applied challenge.

{¶34} In *Jaylin*, the Supreme Court of Ohio reiterated the appropriate analysis to employ when considering whether a zoning ordinance is constitutional, as applied to a property owner.

{¶35} "In a constitutional analysis, the object of scrutiny is the legislative action. The zoning ordinance is the focal point of the analysis, not the property owner's proposed use, and the analysis begins with a presumption that the ordinance is constitutional. The analysis focuses on the legislative judgment underlying the enactment, as it is applied to the particular property, not the municipality's failure to approve what the owner suggests may be a better use of the property. If application of the zoning ordinance prevents an owner from using the property in a particular way, the proposed use is relevant but only as one factor to be considered in analyzing the zoning ordinance's application to the particular property at issue." *Jaylin*, 107 Ohio St.3d 339, at ¶18.

{¶36} The *Jaylin* Court then noted the appropriate test to employ when a landowner asserts a constitutional challenge but does not allege a taking. The *Jaylin* Court stated:

{¶37} "In [*Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207] we reaffirmed the standard in *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365 as the appropriate test in a constitutional challenge to zoning regulation in Ohio when the landowner does not allege a taking. *Goldberg* at 210, ***. *Goldberg* held that '[a] zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community.' Id. at syllabus. 'The burden of proof remains with the party challenging an ordinance's constitutionality, and the standard of proof remains "beyond fair debate."' Id., 81 Ohio St.3d at 214, ***. See *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 10 ***; *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d 581, 584 ***." Id. at ¶13. (Parallel citations omitted.)

{¶38} All Crane's case focuses upon the trial court's alleged error in finding that All Crane had not met its burden of showing beyond fair debate that the Newbury Township Zoning Resolution is unconstitutional as applied to All Crane's real property. All Crane contends the P-O zoning is "arbitrary and unreasonable, having no substantial relationship to the health, safety, and welfare of the Township."

{¶39} All Crane further contends that the trial court's decision regarding the constitutionality of the ordinance was against the manifest weight of the evidence. Consequently, upon a review of the trial court's decision, we must affirm if it is "'supported by competent credible evidence going to all the material elements of the case(.)'" *Hart v. Somerford Twp. Bd. of Twp. Trustees*, 12th Dist. No. CA2007-05-019, 2008-Ohio-1793, at ¶14. (Citations omitted.) "'We must indulge every reasonable presumption in favor of the lower court's judgment and finding of facts. *Seasons Co. v.*

Cleveland (1984), 10 Ohio St.3d 77 ***. In the event the evidence is susceptible to more than one interpretation, we must construe it consistently with the lower court's judgment. See *Ross v. Ross* (1980), 64 Ohio St.2d 203 ***.'" *In re S.Y.*, 11th Dist. No. 2008-A-0023, 2008-Ohio-4512, at ¶20. (Parallel citations and citation omitted.)

{¶40} In its judgment entry, the trial court observed the testimony of All Crane's expert witness that the "designation of the real property as being in the P-O District has no rational basis and does not serve the interest of the public." Additionally, All Crane's expert testified that Newbury's argument relating to buffering is not applied consistently, as he identified properties that were afforded zoning relief from the P-O zoning, although they were located adjacent to residential areas.

{¶41} The evidence presented on behalf of Newbury at trial indicates that the property and building at issue lies in a transitional zoning area that buffers an adjacent residential neighborhood. One of Newbury's witnesses testified as to the rationale for its zoning plan, as there is a need for a transitional buffer from a more-intensive land use category to a less-intensive land use category. Additionally, the current zoning of the property at issue is consistent with the purpose and intent statement contained in the zoning resolution. Newbury's expert also testified that the current zoning classification controls the intensity of the land use, controls the impact on residential properties, preserves the established character of the area, and is consistent with both the Township Comprehensive Land Use Plan and Newbury's Comprehensive Zoning Policy.

{¶42} All Crane also maintains that Newbury's transitional zoning argument is without merit, as the building located on the property at issue was built before the

adjacent residential development. The Supreme Court of Ohio, however, in *Curtiss v. Cleveland* (1957), 166 Ohio St. 509, 520, has observed the unstatic nature of zoning. In its discussion of a property owner's reliance on a zoning "in effect at the time of the purchase or improvement of land," the *Curtiss* Court observed:

{¶43} "'While stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static. Changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise. Accordingly, the power of a village to amend its basic zoning ordinance in such a way as reasonably to promote the general welfare cannot be questioned. Just as clearly, decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it.'" Id., quoting *Rodgers* v. *Tarrytown* (1951), 302 N.Y. 115, 96 N.E.2d 731, 733.

{¶44} Furthermore, this instant case is inapposite, as All Crane acquired the subject property in 1992, at a time when it had already been rezoned to P-O. There is no evidence in the record to suggest there was ever an objection on the part of the previous owner to the rezoning of the property at issue.

{¶45} All Crane's expert acknowledges the need for transitional zoning. He acknowledges the existence of residential property that borders the subject property to the north. All Crane argues that its property should be zoned Industrial because of the

numerous surrounding properties that are zoned Industrial. However, the fact that surrounding properties may be zoned contrary to good transitional zoning principles does not mean the problem should be compounded by adding this property to the list.

{¶46} Based on the evidence presented, the record establishes there was competent, credible evidence upon which the trial court relied in reaching its conclusion that All Crane failed to meet its burden of proof that Newbury's zoning ordinance was unconstitutional, as applied to All Crane. The judgment of the Geauga County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.