[Cite as *State ex rel. Am. Outdoor Advertising Co., L.L.C. v. Abell,* 2010-Ohio-319.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE ex rel. AMERICAN OUTDOOR ADVERTISING COMPANY, LLC,	:	**O P I N I O N**
Relator,	:	**CASE NO. 2008-P-0073**
- vs -	:	
SAM ABELL, FRANKLIN TOWNSHIP ZONING INSPECTOR,	:	
Respondent.	:	

Original Action for Writ of Mandamus.

Judgment: Writ granted.

Richard T. Lauer and *Jarrod M. Mohler*, Robbins, Kelly, Patterson & Tucker, 7 West Seventh Street, #1400, Cincinnati, OH 45202 (For Relator).

Victor V. Vigluicci, Portage County Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 and *Christopher J. Meduri*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 and *James F. Mathews*, Baker, Dublikar, Beck, Wiley & Mathews, 400 South Main Street, North Canton, OH 44720 (For Respondent).

CYNTHIA WESTCOTT RICE, J.

{¶1} This original action is before the court for final disposition on the merits based on the parties' stipulations and their respective briefs. Upon fully reviewing these materials, this court holds that relator, American Outdoor Advertising Company, LLC, is entitled to a writ of mandamus ordering respondent, Sam Abell, Franklin Township Zoning Inspector, to issue zoning certificates to relator for five billboards to be located in

Franklin Township. As a result, relator is entitled to the entry of final judgment in its favor.

{¶2} The statement of facts and analysis that follow are based on the parties' stipulations and the township zoning resolution in effect at the time relator applied for its zoning certificates. Relator is an Ohio limited liability company engaged in the business of locating and constructing billboards for outdoor advertising. In early 2006, relator entered into two leases, which allowed for the construction and maintenance of two billboards in Franklin Township, one on State Route 59 and one on State Route 43. Both of the proposed sites were located in commercially-zoned districts.

{¶3} Once the leases had been secured, on July 17, 2006, relator applied to respondent for zoning certificates for the two billboards. On October 26, 2006, respondent denied the zoning certificates for the two billboards as being in violation of Section 501.3.C of the township zoning resolution. That section provided: "No billboards shall be erected, constructed or maintained in Franklin Township, Portage County, Ohio." Respondent's denial of the application was based "solely" on Section 501.3.C.

{¶4} In response to this decision, relator filed an application for two variances before the Franklin Township Board of Zoning Appeals ("BZA"). During the BZA's hearing, relator argued that it was entitled to a variance and that Section 501.3.C was unenforceable because its prohibition against billboards conflicted with R.C. 519.20. Following the hearing, the BZA denied relator's variance request.

{¶5} Relator then filed an administrative appeal pursuant to R.C. Chapter 2506 in the Portage County Court of Common Pleas. While that appeal was pending, relator

entered into two new leases for the construction of two additional billboards in the Township on State Route 59. After respondent denied relator's request for zoning certificates as to these two new locations, relator moved to amend its notice of appeal in the common pleas court so it could contest respondent's decisions concerning all four locations in one appeal. Since the BZA did not object, the common pleas court granted relator's motion to amend.

{¶6} In the administrative appeal, relator argued that it was entitled to a variance and that Section 501.3.C was not enforceable because it conflicted with a state statute that permitted billboards. The BZA argued relator was not entitled to a variance because it had failed to demonstrate an unnecessary hardship. The court upheld the BZA's denial of the variance and denied relator's appeal.

{¶7} Relator then appealed the trial court's judgment to this court in *American Outdoor Advertising Co., LLC v. Franklin Twp. Bd. of Zoning Appeals*, 177 Ohio App.3d 131, 2008-Ohio-3063 ("*American I*"). In that case, this court noted that while Section 501.3.C prohibited billboards anywhere in the township, R.C. 519.20 provided that billboards shall be classified as a business use and permitted in all districts zoned for "industry, business, or trade, or lands used for agricultural purposes." Id. at ¶18. This court held the township's ban on all billboards could not be upheld because Section 501.3.C prohibits that which the general law clearly permits. Id. at ¶24. Therefore, this court held that Section 501.3.C was void and reversed the trial court's judgment.

{¶8} Following the release of our decision in *American I*, relator sent a letter, dated July 1, 2008, to counsel for Franklin Township and respondent. In that letter, relator asked that the zoning certificates for the four proposed billboards be issued

immediately. In a response letter, dated July 7, 2008, the township's counsel only indicated that the township was in the process of amending its zoning resolution in light of this court's decision in *American I*. The township's counsel suggested the new zoning resolution would apply retroactively to relator's applications.

{¶9} Thereafter, relator's counsel sent to respondent's counsel a letter, dated July 10, 2008, citing authority for the proposition that a political subdivision may not give retroactive effect to a zoning amendment, which has the effect of depriving a property owner of his right to a zoning permit in accord with the zoning ordinance in effect at the time of the application for such permit. Respondent's counsel did not respond to this letter, and respondent continued to refuse to issue the zoning certificates.

{¶10} On August 20, 2008, relator applied to respondent for a zoning certificate for a billboard at a fifth location in the township on State Route 59. This location is also in a commercially-zoned district.

{¶11} When it became apparent that respondent did not intend to issue the zoning certificates, relator filed the instant action for a writ of mandamus. Relator alleged that, since the township's prohibition against billboards had been struck down in *American I*, respondent has a clear legal duty to issue the zoning certificates. Relator also alleged that, by refusing to grant the certificates, respondent was acting in bad faith. In addition to the writ, relator sought damages for lost profits, costs of the action, and attorney fees.

{¶12} After respondent filed his answer to the petition, the parties tried over a three-month period to settle their dispute. Although these negotiations proved fruitless, the parties agreed to certain stipulations of facts pertaining to the merits of the case.

Attached to these stipulations were eight exhibits that supported the stipulations.

{¶13} Upon reviewing the stipulations of facts and exhibits, this court rendered a judgment, dated April 10, 2009, in which this court found that the parties had submitted stipulations and attached exhibits; that these stipulations and exhibits addressed all factual issues in the case; and that the parties intended them to serve as a substitute for an evidentiary submission at an oral hearing. In this entry, this court accepted the stipulations and exhibits for purposes of rendering a final decision on the merits, and allowed both parties to submit an initial and response brief on the merits.

{¶14} In its initial brief, relator maintains that the stipulated facts are sufficient to satisfy the elements for a writ of mandamus because there is no justifiable reason for respondent to continue to refuse to issue the zoning certificates. Relator states that respondent's denial of the certificates was based solely on Section 501.3.C, which prohibited all billboards in the township. According to relator, now that the ban on billboards has been declared void by this court, respondent can no longer refuse to grant the zoning certificates.

{¶15} In his brief, respondent argues that his denial of relator's application in 2006 was based on an "initial, threshold inquiry." He argues that, despite this court's decision in *American I*, respondent was justified in continuing to refuse to issue the zoning certificates because relator must still comply with other applicable provisions of the zoning resolution. Respondent argues that other sections of the zoning resolution classified billboards as "structures" that were permitted in commercially-zoned districts, and that all such structures must meet applicable setback and height restrictions.

{¶16} In support of his position, respondent attached his affidavit to his initial

brief, in which he stated that relator's proposed billboards were located in a commercial district, and that all structures in such districts, which include billboards, are permitted uses that must comply with a 50-foot setback and a 35-foot height limitation. Respondent did not attach these alleged provisions of the zoning resolution to his affidavit, nor did he cite the sections to which he referred. Respondent stated in his affidavit that relator's proposed billboards do not meet the "height" and "setback" provisions so he is "not in a position" to issue the zoning certificates. Finally, he stated that on October 30, 2008, the township amended its zoning resolution to adopt new billboard requirements, and that relator's applications do not comply with the new resolution.

{¶17} In its response brief, relator argues that respondent never previously stated his denial of the zoning certificates was based on such height and setback limitations, and that, in fact, respondent stipulated the sole reason he denied the zoning certificates was the ban on billboards in Section 501.3.C.

{¶18} In *State ex rel. Widmer v. Mohney*, 11th Dist. No. 2007-G-2776, 2008-Ohio-1028, this court held:

{¶19} "A mandamus is a civil proceeding, extraordinary in nature since it can only be maintained when there is no other adequate remedy to enforce clear legal rights. *State ex rel. Brammer v. Hayes* (1955), 164 Ohio St. 373. Mandamus is a writ issued to a public officer to perform an act that the law enjoins as a duty resulting from his or her office. R.C. 2731.01. For a writ of mandamus to issue, [1.] the relator must establish a clear legal right to the relief prayed for; [2.] the respondent must have a clear legal duty to perform the act; and [3.] the relator must have no plain and adequate

remedy in the ordinary course of the law. *State ex rel. National Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 80." *Widmer*, supra, at ¶31.

{¶20} To summarize their respective positions, relator argues it is entitled to a writ of mandamus because it has a clear legal right to zoning certificates for its proposed billboards. Respondent argues that relator does not have a clear legal right to the certificates because, even if Section 501.3.C is void, his denial of relator's application for zoning certificates in 2006 was merely a preliminary determination, and he remained free to deny the zoning certificates based on other alleged violations of the zoning resolution. Specifically, he argues that relator's proposed billboards violate other sections of the resolution that permit billboards as "structures," but impose setback and height restrictions that, he argues, relator has not satisfied. For the reasons that follow, respondent's argument lacks merit.

{¶21} First, respondent's argument is not supported by the evidence. The only article of the zoning resolution in the record is Article V, which includes Section 501.3.C, the township's ban on billboards. Respondent failed to include in the record any other articles or sections of the resolution. Specifically, he failed to include the other alleged provisions of the resolution, which, he argues, provide that relator's billboards are "structures," which are permitted, but required to meet setback and height requirements.

{¶22} Relator argues in its response brief that we cannot consider respondent's "structure" argument because respondent failed to include the township zoning resolution in the record. Relator's argument is well taken.

{¶23} When the interpretation of a provision in a zoning resolution is at issue, the court must consider the resolution text. The most obvious reason for this

requirement is that provisions in a zoning resolution often cross-reference other provisions in the resolution, and review of the other provisions is necessary to construe the provision at issue. Further, even if such cross-references are not made, a court must review the resolution to determine the effect of other provisions on the subject provision.

{¶24} As noted above, respondent failed to file the other sections of the zoning resolution on which he relies, and, consequently, they are not in the record. Civ.R. 44.1 addresses the power of a court to take judicial notice of certain laws. Civ.R. 44.1(A)(2) provides:

{¶25} "A party who intends to rely on a *municipal ordinance, a local rule of court, or an administrative regulation within this state* shall give notice in his pleading or other reasonable written notice. *** A court may, however, take judicial notice of *its own rules or of a municipal ordinance within the territorial jurisdiction of the court* without advance notice in the pleading of a party or other written notice." (Emphasis added.)

{¶26} Thus, while Civ.R. 44.1(A)(2) specifically lists those laws of which a court may take judicial notice, township resolutions are not included in that list.

{¶27} This court has held that the canon of construction "expressio unius est exclusio alterius" means that the inclusion of one thing in a law implies the exclusion of another. *Vasquez v. Village of Windham*, 11th Dist. No. 2005-P-0068, 2006-Ohio-6342, at ¶28. Accord Black's Law Dictionary (4th Ed. Rev., 692) (The maxim "expressio unius est exclusio alterius" means that the "expression of one thing is the exclusion of another. *** When certain persons or things are specified in a law ***, an intention to exclude all others from its operation may be inferred").

{¶28} Because respondent failed to file the other sections of the zoning resolution on which he relies, he has failed to give this court or relator notice of the provisions on which he relies. Moreover, since these provisions are not in the record, they are not properly before us, and cannot be considered in support of respondent's argument.

{¶29} Further, since this court in its April 10, 2009 judgment held that the parties' stipulations and attached exhibits would serve as a substitute for the presentation of evidence at an oral hearing, this court held it was not the parties' intent that they would be given an opportunity to submit additional evidentiary materials with their merit briefs. Respondent was therefore not authorized to file his affidavit in support of his "structure" argument with his brief. If respondent wanted to present evidence on this issue, it was incumbent on him to do so at an evidentiary hearing or in the parties' stipulations. He failed to do either, and thus filed his affidavit in violation of this court's judgment. As a result, respondent's affidavit is not properly before us and we do not consider it.

{¶30} Based on the foregoing analysis, respondent's argument is not supported by any evidence.

{¶31} Second, even if the zoning resolution and respondent's affidavit were in the record, respondent's "structure" argument is not properly before us because he failed to cite in either his brief or his affidavit the other provisions allegedly in the zoning resolution on which he relies, in violation of App.R. 16(A)(7).

{¶32} Third, based on our review of Article II and an excerpt of Article IV of the zoning resolution, they do not support respondent's argument. As a preliminary matter, we note that from the unauthenticated copies provided to us, it is unclear whether these

provisions were in effect when relator applied for its zoning certificates or whether they are still in effect.

{¶33} As noted above, Section 501.3.C prohibited all billboards in all districts in the township. Article IV listed certain, specific "structures" as permitted uses in commercial districts, but required that they meet setback and height restrictions. Thus, contrary to respondent's argument, not all structures were permitted in commercial districts; only those structures listed in Section 411.2.A were permitted. For example, Section 411.2A.12 provided that in a commercial district, no structure shall be used except for "Signs – As regulated by Article V hereof." By qualifying "Signs" with the phrase, "As regulated by Article V hereof," the signs that were permitted under Article IV were limited to those signs that were permitted under Article V. Article V permitted certain signs and prohibited others, including billboards. Since Article V prohibited billboards, the cross-reference in Article IV to Article V acted to exclude billboards as a permitted use because Article V banned all billboards in the township. Thus, contrary to respondent's argument, other sections of the zoning resolution did not permit billboards in commercial districts, and therefore the setback and height limitations in Article IV did not apply to them.

{¶34} Therefore, based on our review of Article II, an excerpt of Article IV, and Article V, billboards were not permitted anywhere in the township. By virtue of our decision in *American I*, declaring this prohibition to be void, relator was permitted to locate its billboards in the township in accordance with R.C. 519.20 without regard to any setback, height, or other township restrictions.

{¶35} Fourth, we note respondent never asserted his "structure" argument in any

of the prior proceedings initiated by relator in the three years since respondent denied relator's initial application. The first time respondent raised it was in his initial brief filed in this action. This argument would have militated against relator's prior variance request, and, thus, would have been relevant in the prior proceedings. Therefore, respondent could have, but failed, to raise his "structure" argument during any of the various stages of relator's administrative appeal from the BZA's denial of his variance request.

{¶36} Fifth, respondent's argument that he remained free to deny relator's applications for zoning certificates based on the alleged violation of other sections of the zoning resolution is defeated by the parties' stipulation number four. That stipulation provides: "Based solely upon a provision contained in the Franklin Township Zoning Resolution which prohibited all advertising billboards in the township (Section 501.3.C), Abell denied the permit applications." In *Stile v. Brimfield Twp. Bd. Of Zoning Appeals* (June 7, 1996), 11th Dist. No. 95-P-0128, 1996 Ohio App. LEXIS 2362, this court held:

{¶37} "'Ohio courts have long recognized the validity of stipulations.' *** 'Once the parties have entered into and filed stipulations, one party may not, without the consent of the other, be permitted to withdraw from the stipulations without the leave of court upon good cause shown.'" (Internal citations omitted.) *Stile*, supra, at *6.

{¶38} Likewise, in *Kinback v. Herstine*, 5th Dist. No. 2006 CA 00078, 2007-Ohio-926, the court held:

{¶39} "'[A] stipulation is a voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate the need for proof or to narrow the range of litigable issues.' *In the Matter of Body* (June 23, 1998), Coshocton

App. No. 97 CA 33, 1998 Ohio App. LEXIS 3030, quoting 89 Ohio Jurisprudence 3d (1989), Trial, Section 69. 'Thus, a stipulation, once entered into, filed and accepted by the court, is binding upon the parties and is a fact deemed adjudicated for purposes of determining the remaining issues in that case. A party who has agreed to a stipulation cannot unilaterally retract or withdraw from it.' Id., quoting *Horner v. Whitta* (March 16, 1994), Seneca App. No. 13-93-33, 1994 Ohio App. LEXIS 1248, at *5." *Kinback*, supra, at ¶9.

{¶40} By stipulating that he denied relator's applications "based solely" upon Section 501.3.C, which prohibited all billboards in the township, respondent was precluded from, in effect, unilaterally retracting this stipulation by asserting he remained free to deny relator's application due to its alleged violation of other provisions of the zoning resolution.

{¶41} We find it appropriate at this time to note that, while we give the parties great leeway in arguing the evidence in the record in support of their respective positions, such leeway is not without limit. It certainly does not permit misstatements of the record. As noted above, stipulation number four provides:

{¶42} "Based solely upon a provision contained in the Franklin Township Zoning Resolution which prohibited all advertising billboards in the township (Section 501.3.C), Abell denied the permit applications."

{¶43} Yet, in respondent's initial brief, in purporting to set forth this stipulation, respondent stated that stipulation number four provides:

{¶44} "The Franklin Township Zoning Resolution, at the time, included a prohibition on all advertising billboards in the township (Section 501.3.C), and Abell

denied the permit applications, *based upon this initial, threshold inquiry*." (Emphasis added.)

{¶45} Respondent's misstatement of this stipulation was obviously meant to save his belated argument that his denial of relator's zoning certificates on the basis of Section 501.3.C was merely a preliminary decision. Apparently, his "threshold, initial inquiry" lasted three years from relator's first application to respondent's initial brief filed in this case. In any event, based on the parties' actual stipulation, there was nothing preliminary or tentative in respondent's 2006 denial of relator's application.

{¶46} This misrepresentation of stipulation number four far exceeds the bounds of reasonable argument, and constitutes a clear attempt to mislead this court concerning the record. The implications of this misconduct should be readily apparent to respondent's counsel.

{¶47} Sixth, respondent argues that relator is not entitled to a writ of mandamus because he had an adequate remedy at law in the form of an administrative appeal. However, since our decision in *American I*, respondent has consistently refused to issue the zoning certificates to which relator is entitled, and has failed to demonstrate any justifiable, good faith reason for his refusal to act.

{¶48} Consistent with the foregoing legal discussion, this court holds that relator has carried its burden of proof as to all three elements for the issuance of a writ of mandamus, and is therefore entitled to the issuance of the writ.

{¶49} Having disposed of the merits of the mandamus claim, three additional issues remain for our consideration. First, as part of their stipulations of fact, the parties have agreed that, after the filing of the instant proceeding, relator filed a new application

for a zoning certificate regarding the construction of a fifth billboard to be built on property located in a commercial district. Based on this, relator requested in its initial brief that respondent be ordered to issue a zoning certificate as to this proposed site. While relator never moved to amend its mandamus petition to include the fifth location, respondent never objected to this request.

{¶50} Civ.R. 15(B) provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Since relator's application for a fifth zoning certificate was included in the parties' stipulations, relator's entitlement to same was tried by consent of the parties. We therefore hold relator's entitlement to a zoning certificate for its fifth billboard shall be treated as if it had been raised by the pleadings.

{¶51} In light of the foregoing analysis, we further hold that relator is entitled to the issuance of a writ of mandamus concerning a zoning certificate for its fifth billboard.

{¶52} Second, respondent contends that, because relator never attempted to comply with general standards for a "structure" under the prior version of the township zoning resolution, relator should now be required to satisfy the new "sign" regulations which Franklin Township enacted on October 30, 2008. Since we hold the zoning resolution does not support respondent's "structure" argument, this argument is not well taken. In any event, this court has held that an applicant's right to a zoning certificate is governed by the zoning resolution in effect as of the date of the filing of the application. *Levey & Co. v. Willoughby Bd. of Zoning Appeals*, 11th Dist. No. 98-L-218, 2000 Ohio App. LEXIS 4371, at *21. Since relator's applications for the five billboards were all submitted prior to the effective date of the new resolution, any retroactive application of

the new regulations is unlawful, and respondent must follow the provisions of the prior resolution.

{¶53} Finally, as noted above, as part of its prayer for relief, relator requested an award of damages for lost profits. Pursuant to Section 3(B), Article IV of the Ohio Constitution, the original jurisdiction of a court of appeals is limited to five causes of action. Because a claim for monetary damages is not included in those five causes of action, an appellate court does not have the authority to proceed on such a claim. See, e.g., *Williams v. Franklin Cty. Sheriff Dept.*, 10th Dist. No. 05AP-207, 2005-Ohio-4573. As a result, we do not have jurisdiction to consider relator's request for damages.

{¶54} Further, relator requested attorney fees in its prayer. However, it has not cited any authority in support of such request, nor has it submitted any evidence in support. The request, therefore, is not well taken.

{¶55} In light of the foregoing, judgment is hereby rendered in favor of relator and against respondent as to relator's claim for relief. It is therefore the order of this court that a writ of mandamus shall be issued in favor of relator. Pursuant to this writ, respondent shall have 14 days from the date of this opinion to issue the five subject zoning certificates to relator.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.