

[Cite as *Simmons v. Plain Twp. Bd. of Zoning Appeals*, 2015-Ohio-1361.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JEFFREY SIMMONS, et al.

Appellees

-vs-

PLAIN TOWNSHIP BOARD OF
ZONING APPEALS, et al.

Appellants

JUDGES:

Hon. John W. Wise, P. J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 2014 CA 00164

OPINION

CHARACTER OF PROCEEDING:

Administrative Appeal from the Court of
Common Pleas, Case No. 2013 CV 02545

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

April 6, 2015

APPEARANCES:

For Appellees

For Appellant Easton Village Co.

NO APPEARANCE

JOHN J. RAMBACHER
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Wise, P. J.

{¶1}. Appellant Easton Village Company LLC appeals two decisions of the Court of Common Pleas, Stark County, which issued further stay/cessation orders during a protracted zoning dispute regarding construction of a restaurant in Plain Township, Stark County. Appellees Jeffrey Simmons, Nancy Locke, Dean Mohler, Cynthia Mohler, Robert Ernst, Trustee, and Sharon Ernst, Trustee are residential home owners near the property in question.¹

{¶2}. On August 5, 2013, a representative of Larsen Architects requested two conditional use permits from the Plain Township Board of Zoning Appeals (“BZA”) regarding property located near Walsh University in the 6300 block of Market Avenue North, Plain Township. Larsen at that time sought to build a McDonald's restaurant with a drive-thru design on said property, which is owned by Appellant Easton Village. The lot is zoned B-1 Neighborhood Business District, and it abuts an R-1 Single Family Residential District.

{¶3}. The BZA held a hearing on September 4, 2013. Following the hearing, the BZA approved the conditional use permits. Appellees herein, Jeffrey Simmons, et al., thereupon filed an appeal under R.C. Chapter 2506 to the Stark County Court of Common Pleas (hereinafter “trial court”).

{¶4}. On February 13, 2014, following review, the trial court issued a judgment entry affirming the decision of the BZA to grant the requested permits.

{¶5}. Appellees Simmons, et al. thereafter filed an appeal to this Court, raising three assigned errors. We affirmed the trial court's decision on November 3, 2014. See

¹ No appellees' briefs have been filed in the present appeal.

Simmons v. Fulk, 5th Dist. Stark No. 2014CA00041, 2014-Ohio-4905. On December 10, 2014, we denied a motion to reconsider filed by Appellees Simmons. We are presently not aware of any appeal to the Ohio Supreme Court.

{¶6}. In the meantime, on April 3, 2014, the trial court had stayed both its February 13, 2014 judgment and the September 4, 2013 decision of the BZA, pending the aforesaid appeal to this Court. The BZA, the Plain Township Zoning Inspector, and Easton Village Company, LLC, thereafter filed a separate appeal to this Court, challenging the trial court's granting of the stay. On November 3, 2014, we decided the issues were moot because of our decision on the merits in App.No. 2014CA00041, and the appeal by the BZA et al. was accordingly dismissed. *See Simmons v. Fulk*, 5th Dist. Stark No. 2014CA00064, 2014-Ohio-4908.

{¶7}. While the above two appeals were underway, the trial court, in response to a motion to show cause filed by Appellees Simmons, et al., issued further orders to cease any construction activities, via judgment entries filed on July 22, 2014 and August 1, 2014.

{¶8}. On September 2, 2014, Appellant Easton Village filed a notice of appeal as to the July 22, 2014 and August 1, 2014 judgment entries. It herein raises the following three Assignments of Error:

{¶9}. "I. THE TRIAL COURT WAS DEPRIVED OF ALL JURISDICTION CONCERNING MATTERS ON APPEAL.

{¶10}. "II. THE TRIAL COURT IMPERMISSIBLY AWARDED AN INJUNCTION (IN EFFECT) WITHOUT REQUIRING COMPLIANCE WITH CIV.R. 65 AND APPELLEES' HIGH BURDEN OF PROOF THEREUNDER.

{¶11}. “III. THE TRIAL COURT’S JULY 22, 2014 AND AUGUST 1, 2014 JUDGMENT ENTRIES CONCERNED MOOT ISSUES.”

I., II., III.

{¶12}. In its First, Second, and Third Assignments of Error, Appellant Easton Village Company presents arguments that the stay judgment entries of July 22, 2014 and August 1, 2014 were erroneous, inconsistent with matters then on appeal, and constituted improper injunctive relief.

{¶13}. Appellant’s brief does not discuss whether the stay orders at issue are final appealable orders for purposes of immediate appellate review. See, e.g. *Novak v. Studebaker*, 9th Dist. Summit No. 24615, 2009-Ohio-5337, ¶ 12. However, as an appellate court, we are not required to issue an advisory or merely academic ruling. See, e.g., *In re Merryman/Wilson Children*, Stark App.Nos. 2004 CA 00056 and 2004 CA 00071, 2004–Ohio–3174, ¶ 59, citing *State v. Bistricky* (1990), 66 Ohio App.3d 395, 584 N.E.2d 75. Based on the developments in the two related appeals since the present appeal was initiated, we find appellant’s arguments are moot.

{¶14}. For the reasons stated in the foregoing opinion, the appeal of the July 22, 2014 and August 1, 2014 rulings of the Court of Common Pleas, Stark County, Ohio, is hereby dismissed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/d 0308

