

[Cite as *Hudson ex rel. Freedman v. King*, 2010-Ohio-880.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CITY OF HUDSON, ex rel.
MICHAEL FREEDMAN, PH.D.

C.A. No. 24944

Appellant

v.

THOMAS KING

Appellee

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2009-05-3789

DECISION AND JOURNAL ENTRY

Dated: March 10, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Dennis Symes leased an empty bank building in the core district of the City of Hudson with plans to convert it to a drive-through restaurant. Because drive-through restaurants are not a permitted or conditional use in that district under the City’s land development code, he applied to the Board of Zoning and Building Appeals to substitute one non-conforming use for another. Following a public hearing, the Board approved his application with conditions. Before the City’s community development director issued a zoning certificate to Mr. Symes, however, Michael Freedman filed a taxpayer action under Section 733.59 of the Ohio Revised Code, seeking to enjoin him from issuing it. The trial court granted summary judgment to the community development director, concluding that “[t]he city was well within its authority to issue the zoning certificate” This Court affirms because the trial court correctly determined that all of the prerequisites for the issuance of a zoning certificate were met.

FACTS

{¶2} Dennis Fisher owns a building in the City's core district. The building was constructed in the mid-1990s to be used as a bank with a drive-through teller window. At the time, banks with drive-through teller windows were a permitted use under the City's land development code. In 1999, however, the City amended the code and made such banks a non-conforming use. It amended the code again in 2002 to make them a conditional use.

{¶3} In 2007, the bank that was leasing the building vacated it. Mr. Fisher was unable to find a new bank tenant. In 2009, Mr. Symes offered to lease the building and convert it to a restaurant. He wanted to use the drive-through window, but knew that drive-through restaurants were not a permitted or conditional use in the district. He, therefore, applied to the Board of Zoning and Building Appeals to substitute his non-conforming restaurant use for the non-conforming bank use. Following a public hearing, the Board approved Mr. Symes's application, but imposed conditions regarding landscaping, traffic flow, and the type of food that could be sold.

{¶4} After receiving approval from the Board, Mr. Symes sought a zoning certificate from the community development director. Before the director could issue the certificate, Mr. Freedman filed a complaint under Section 733.59 of the Ohio Revised Code, arguing that the Board had exceeded its authority and that the issuance of a zoning certificate would be an abuse of the community development director's corporate power. In particular, he alleged that the building stopped being a non-conforming use when the last tenant vacated it. He sought an injunction prohibiting the director from issuing a zoning certificate or, in the event the director had already issued one, a writ of mandamus instructing him to rescind it.

{¶5} Both sides moved for summary judgment. The community development director, meanwhile, issued a zoning certificate, but conditioned the restaurant’s use of the drive-through window on the outcome of Mr. Freedman’s action. Mr. Freedman, therefore, withdrew his request for mandamus relief. The trial court granted summary judgment to the community development director, concluding that the Board had considered all the required issues when it approved Mr. Symes’s application and that he could issue a zoning certificate allowing for the use of the drive-through window. Mr. Freedman has appealed, arguing that the court incorrectly granted summary judgment to the community development director.

ULTRA VIRES

{¶6} Mr. Freedman has argued that the Board acted ultra vires when it granted Mr. Symes’s application to substitute one non-conforming use for another. He has also argued that, even though the Board approved the application, the community development director could not grant a zoning certificate for the drive-through restaurant because he has an independent duty to uphold the City’s zoning laws. In reviewing a trial court’s ruling on a motion for summary judgment, this Court applies the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶7} “The doctrine of ultra vires has its foundation in public policy and its chief value consists in being a brake upon improper corporate action” *City of Columbus v. Pub. Utils. Comm’n*, 103 Ohio St. 79, 107 (1921). “An act of a corporation is *ultra vires* when it is beyond the characted powers of the corporation, and is therefore said to be void.” *Cleveland & M.R. Co. v. Himrod Furnace Co.*, 37 Ohio St. 321, 327 (1881). Although it is a concept arising out of

corporate law, it also has been applied to attempted action by governmental bodies. See *Hagerman v. City of Dayton*, 147 Ohio St. 313, 338-39 (1947) (concluding that city could not pass an ordinance that did not promote a governmental, public, or municipal purpose, but only the interests of a nonpublic organization); *City of Wellston v. Morgan*, 59 Ohio St. 147, paragraph one of the syllabus (1898) (concluding that city could not enter into contract of longer duration than was authorized under statute).

{¶8} The City’s land development code has a table of “By-Right Permitted” or “Conditional” uses for each district. Hudson, Ohio, Codified Ordinances § 1206.01 (2003). Any use not identified as permitted or conditional is not allowed in the district unless either through a rezoning or the code’s use classification procedure. Hudson, Ohio, Codified Ordinances § 1206.01(c). Although “[r]estaurants” are generally “permitted” in the core district, drive-through restaurants are not. Hudson, Ohio, Codified Ordinances § 1205.08, 1206.01.

{¶9} While drive-through restaurants are not a permitted or conditional use in the core district, the Board “may permit a nonconforming use to be changed to a second non-conforming use provided that the new use shall be of the same general character or of a character less intensive than the original nonconforming use and provided the new use will result in equal or less impact on the surrounding community and district.” Hudson, Ohio, Codified Ordinances § 1206.05(e)(5)(A). The code defines “[n]onconforming use” as “a use that was lawful under prior law on the day before the effective date of this Land Development Code or subsequent amendment thereof, but that fails by reason of such adoption, revision, or amendment, to conform to all the present requirements of this Code.” Hudson, Ohio, Codified Ordinances § 1213.02(a)(189).

{¶10} Section 1203.06 of the land development code provides the “*Procedures for Approval of . . . Substitution of Nonconforming Uses/Structures.*” Hudson, Ohio, Codified Ordinances § 1203.06(a). Mr. Symes submitted an application under that section, requesting “approval of the substitution of a nonconforming use/structure/lot” Under Section 1203.06, the Board was required to “review the application . . . and take final action by either approving, approving with conditions, or denying such application.” Hudson, Ohio, Codified Ordinances § 1203.06(a)(1). Section 1202.03(a), listing the Board’s powers and functions, also directs it to “[h]old public hearings, review, and take final action on applications for enlargement, extension, substitution, or replacement of a nonconforming use or structure.” Hudson, Ohio, Codified Ordinances § 1202.03(a)(4). The Board approved Mr. Symes’s application with conditions, finding that there was a prior nonconforming use at the property that was involuntarily discontinued, that the substituted use would be of the same general character or of a less intrusive character than the prior use, and that the substituted use would result in equal or less impact to the surrounding community than the drive-through bank.

{¶11} Mr. Freedman has argued that the Board should not have considered the application because the drive-through bank building did not meet the requirements of a “nonconforming use.” According to him, because “the first use was not ‘nonconforming’ in the first place . . . the [Board] had no jurisdiction for [its] action.”

{¶12} This Court concludes that Mr. Freedman has forfeited his argument. See *Holman v. Grandview Hosp. & Med. Ctr.*, 37 Ohio App. 3d 151, 157 (1987) (“Issues not raised . . . in the trial court cannot be raised for the first time on appeal.”). In his response to the community development director’s motion to dismiss, Mr. Freedman explained that he was only challenging the authority of the director, not the decision of the Board. He wrote that it was “simply

irrelevant to [him] or this suit exactly what has moved [the director] to the brink of issuing a zoning permit for an illegal use—whether that inspiration comes from some action of the Hudson [Board of Zoning and Building Appeals] or a voice from a burning bush. Whatever the process, it has led to a threatened issuance of an illegal permit which [Mr. Freedman] seeks to enjoin.” He argued, therefore, that “the bulk of [the director’s] Motion and attached exhibits regarding the [Board’s] action are irrelevant and should be disregarded.” The trial court noted in its decision that Mr. Freedman “has not challenged the procedures employed by the [Board] or its decision.” Accordingly, this Court will not review whether the Board’s determination that the drive-through bank was a prior non-conforming use was correct.

INDEPENDENT DUTY

{¶13} Mr. Freedman has argued that the community development director had an independent duty not to issue a zoning certificate until the restaurant complied with the City’s ordinances. According to him, the director may not issue a zoning certificate to a drive-through restaurant in the core district of the city because that use is not permitted under the land development code.

{¶14} As noted earlier, Section 1203.06(a) of the land development code provides the “*Procedures for Approval of . . . Substitution of Nonconforming Uses/Structures.*” The process follows the code’s seven-step “Core Development Review Procedure” with certain modifications. Hudson, Ohio, Codified Ordinances § 1203.02; 1203.06(a)(1). The first three steps, pre-application conceptual review, application, and staff review and report, are the same. Steps four and five are different. “No review or action by either the [Municipal Planning Commission] (Step 4) or the City Council (Step 5) is required on an application for the . . . substitution of a nonconforming use/structure/lot.” Hudson, Ohio, Codified Ordinances §

1203.06(a)(1). Instead, after step three, the staff report is forwarded to the Board of Zoning and Building Appeals for “final action” on the application. *Id.* Step six, which is review by the Architectural and Historic Board of Review, is required after the Board approves the substitution “only if the approved application involves new construction or any alteration to the exterior architectural features of an existing structure(s).” Hudson, Ohio, Codified Ordinances § 1203.06(a)(2).

{¶15} Step seven of the process, “[z]oning [c]ertificate,” is the same under Section 1203.06 or the core development review procedure. Hudson, Ohio, Codified Ordinances § 1203.02; 1203.06. The code defines “[z]oning [c]ertificate” as “a written statement issued by the Community Development Department authorizing buildings, structures, or other uses consistent with the terms of this Code and for the purpose of carrying out and enforcing its provisions.” Hudson, Ohio, Codified Ordinances § 1213.02(a)(359). “Prior to issuance of a zoning certificate for commercial development, the applicant shall have received all of the following: [f]inal site plan approval; and [Architectural and Historic Board of Review] approval” Hudson, Ohio, Codified Ordinances § 1203.02(g)(2)(B). For commercial developments, “[a] zoning certificate shall be issued within seven (7) days after final action and approval by the [Architectural and Historic Board of Review]” Hudson, Ohio, Codified Ordinances § 1203.02(g)(3).

{¶16} Under the code, there are two prerequisites that must be met before the community development director may issue a zoning certificate: final site plan approval and approval by the Architectural and Historic Board of Review. Hudson, OH, Codified Ordinances § 1203.02(g)(2)(B); 1203.02(g)(3). As previously noted, the Board of Zoning and Building Appeals took final action on Mr. Symes’s application and approved his site plan with conditions not related to the use of the drive-through window. Mr. Freedman has not argued that Mr.

Symes's plan "involve[d] new construction or any alteration to the exterior architectural features of an existing structure" that required approval by the Architectural and Historic Board of Review. Hudson, Ohio, Codified Ordinances § 1203.06(a)(2).

{¶17} If the prerequisites listed in Section 1203.02(g)(3) are met, "[a] zoning certificate shall be issued within seven (7) days." Hudson, Ohio, Codified Ordinances § 1203.02(g)(3). Contrary to Mr. Freedman's assertion, the community development director does not have authority to independently review the Board of Zoning and Building Appeals' decision and withhold a zoning certificate if he concludes that a plan does not meet code requirements. Independent review by the community development director would be directly contrary to the code's delegation of power to the Board to "take final action on applications for enlargement, extension, substitution, or replacement of a nonconforming use or structure." Hudson, Ohio, Codified Ordinances § 1202.03(a)(4).

{¶18} Because the Board of Zoning Appeals approved Mr. Symes's application and review by the Architectural and Historic Board of Review was not required, the trial court correctly determined that the community development director had authority to issue a zoning certificate permitting Mr. Symes to operate a drive-through restaurant. Mr. Freedman's assignment of error is overruled.

CONCLUSION

{¶19} The trial court correctly granted summary judgment to the community development director. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

DEAN S. HOOVER, attorney at law, for appellant.

CHARLES T. RIEHL, R. TODD HUNT, and AIMEE W. LANE, attorneys at law, for appellee.