[Cite as *Koutsounadis v. Newton Falls Joint Fire Dist.*, 2009-Ohio-6517.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

MARY KOUTSOUNADIS, d.b.a. COVERED BRIDGE RESTAURANT,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-T-0031**
- vs -	:	
NEWTON FALLS JOINT FIRE DISTRICT, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 2175.

Judgment: Reversed and remanded.

Daniel G. Keating, Keating, Keating & Kuzman, 170 Monroe Street, N.W., Warren, OH 44483 (For Plaintiff-Appellant).

David C. Comstock, Jr., Comstock, Springer & Wilson Co., L.P.A., 100 Federal Plaza East, #296, Youngstown, OH 44503-1811 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mary Koutsounadis, the owner of Covered Bridge Restaurant, appeals from a judgment of the Trumbull County Court of Common Pleas granting Newton Falls Joint Fire District's ("Fire District") motion for summary judgment. Ms. Koutsounadis filed a complaint seeking preliminary and permanent injunction to prevent the enforcement of the Fire District's designation of an alley next to her restaurant as a

private fire lane. For the following reasons, we reverse and remand the matter to the trial court for further proceedings consistent with this opinion.

{¶2} **Substantive and Procedural History**

{¶3} Ms. Koutsounadis owns the Covered Bridge Restaurant in downtown Newton Falls, which her family has operated for the past 18 years. The restaurant operates catering, dine-in, and carry-out services. It does not have a parking lot. The employees park in the alleys behind and to the side of the restaurant; the restaurant patrons park in the street in the front of the restaurant. At issue in this appeal is the alley between the restaurant and an adjacent building owned by the Talanca Family Trust. The alley, co-owned by Ms. Koutsounadis and the Talanca Family Trust, is utilized by the restaurant for loading and unloading supplies and finished products for its catering service. Ms. Koutsounadis believes the availability of the alley for parking is vital to the restaurant's ability to continue its catering service, which is a substantial part of the restaurant's business.

{¶4} In 2002, a dispute arose between Ms. Koutsounadis and the Talanca Family Trust over the use of the alley. As a result, the Talanca family erected a fence along the Talanca family's property line down the alley to prevent the restaurant's employees from parking in the alley. The erection of the fence triggered an inspection by the Fire District of the adjacent buildings around the alley, which were built in the late 1800's and early 1900's without sprinkler or fire alarm systems. As a result of the inspection, the Fire District designated the entire alley a private fire lane, in which parking is prohibited.

{¶5} On May 23, 2002, Newton Falls Fire Chief Richard Bauman sent a letter to Albert Talanca, trustee of the Talanca Family Trust, and Ms. Koutsounadis informing them the alley has been designated as a private fire lane for the efficient and effective operation of fire apparatus in the event of fire emergencies. He ordered the fence be removed, the pavement in the alley be marked as "fire lane" and "no parking," and proper signs for the fire lane designation be installed. The letter required the fence to be removed within 14 days, the pavement to be marked within 45 days, and the signs to be installed within 60 days. The letter stated that "[f]ailure to comply with this order will result in a fine of $100 per day, for each violation (fence, pavement marking, and signs) or $300 per day." There was no statement or advice regarding the property owners' right of administrative appeal regarding the fire lane designation, despite that such notification is required by the statute.[1]

{¶6} On September 5, 2003, Chief Bauman sent another letter to Ms. Koutsounadis, restating that the alley had been designated as a fire lane. Ms. Koutsounadis filed a complaint on September 11, 2003, requesting a preliminary and permanent injunction, and challenging the designation of the alley as a fire lane. She filed an amended complaint on March 1, 2005, adding the claim that the designation of the fire lane amounted to a taking entitling her to just compensation.

{¶7} The Fire District filed a motion for summary judgment. The trial court granted it, finding the fire lane designation proper and further that no unconstitutional

1. Despite a lack of notice of a right to appeal, Mr. Talanca appealed the fire lane designation to the State of Ohio Board of Building Appeals. The Board conducted a hearing on August 21, 2002, and upheld the designation. Mr. Talanca then filed an action in the Trumbull County Court of Common Pleas pursuant to R.C. 119.12 to appeal that administrative decision. The case was subsequently dismissed and was not part of the instant appeal.

taking occurred in the designation.

{¶8} Ms. Koutsounadis now appeals, assigning the following error for our review:

{¶9} "The trial court erred in granting summary judgment in favor of the defendant/appellee Newton Falls Joint Fire District."

{¶10} Under the assignment of error, Ms. Koutsounadis raises two issues for our consideration. She asserts the adjudication order regarding the fire lane designation is not valid because she was not afforded an opportunity for hearing pursuant to R.C. 119.06. She also asserts the designation of the alley as a fire lane amounts to a compensable taking because it prohibits parking in the alley necessary for loading and unloading relating to her catering business, which would severely hinder her ability to continue to operate the restaurant's catering service.[2] Our resolution of the first issue renders a consideration of the second issue unnecessary.

{¶11} **R.C. 119.06 and R.C. 119.07**

{¶12} The parties here agree that the Fire Chief's May 23, 2002 designation of the subject alley as a fire lane constituted an adjudication order. Ms. Koutsounadis contends the order is not valid because it failed to comply with R.C. 119.06, which provides a procedural safeguard to citizens affected by orders of the state's agencies. R.C. 119.06 requires the opportunity for a hearing to be provided to a party affected by an adjudication order before the order becomes valid, and the statute enumerates only three exceptions to the notice and hearing requirement. It states, in pertinent part:

2. According to her testimony at a deposition, the restaurant provides catering services for the Ohio National Guard at locations throughout northeast Ohio, serving 1,000 meals every weekend, and the delivery vans are parked for loading by the door that enters the kitchen over a six-hour period every weekend.

{¶13} "No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise."

{¶14} The preadjudication hearing required by R.C. 119.06 has three exceptions; the opportunity for a prior hearing is required unless one of the enumerated exemptions to the statute is applicable. *General Motors Corp. v. McAvoy* (1980), 63 Ohio St.2d 232, 234.

{¶15} "'Adjudication' is defined under R.C. 119.01(D) as 'the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person.'" *State ex rel. Bd. of Edn. v. State Bd. of Edn.* (1978), 53 Ohio St.2d 173, 176. "No adjudication order, which is the determination by the highest agency authority on the rights, duties, privileges, benefits or relationships of a specified person, is valid unless the agency affords the individual an opportunity for a hearing." *Sowald* at 342, citing R.C. 119.06.

{¶16} "R.C. 119.07 prescribes the manner in which the opportunity for hearing should be provided. This process begins with the issuance of a notice informing the individual of his right to a hearing." *State ex rel. Ohio Dep't. of Health v. Sowald* (1992), 65 Ohio St.3d 338, 342. The statute provides, in pertinent part:

{¶17} "Except when a statute prescribes a notice and the persons to whom it shall be given, in all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing the party of the party's right to a hearing.

Notice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days of the time of mailing the notice. The notice shall also inform the party that at the hearing the party may appear in person, by the party's attorney, or by such other representative as is permitted to practice before the agency, or may present the party's position, arguments, or contentions in writing and that at the hearing the party may present evidence and examine witnesses appearing for and against the party. A copy of the notice shall be mailed to attorneys or such other representatives of record representing the party."

{¶18} Here, the Fire District did not follow the mandates of R.C. 119.07. No notice and opportunity for a hearing was ever given to Ms. Koutsounadis regarding the Fire District's designation of the subject alley as a fire lane, as required by R.C. 119.07. Pursuant to R.C. 119.06 and R.C. 119.07, therefore, the fire lane designation cannot be a valid adjudication order.

{¶19} In response to Ms. Koutsounadis' claim of lack of notice and opportunity for a hearing pursuant to R.C. 119.06 and R.C. 119.07, the Fire District maintains a hearing was not required because the exception set forth in R.C. 119.06(C) is applicable here. R.C. 119.06 states, in pertinent part:

{¶20} "The following adjudication orders shall be effective without a hearing:

{¶21} "***.

{¶22} "(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a

higher authority within such agency, to another agency, ***, and also give the appellant a right to a hearing on such appeal."

{¶23} The Fire District argues the designation of the fire lane fits into the exception provided in R.C. 119.06(C) and refers us to R.C. 3737.43, a statute pertaining to the fire marshal and fire code. The Fire District argues R.C. 3737.43(A) provides a right to appeal fire marshal orders, such as the fire lane designation, and therefore it claims the notice and hearing provision in R.C. 119.06 does not apply in this case.

{¶24} R.C. 3737.43 states:

{¶25} "(A) If, after an inspection or investigation, the fire marshal, an assistant fire marshal, or a certified fire safety inspector issues a citation under section 3737.41 or 3737.42 of the Revised Code, the issuing authority shall, within a reasonable time after such inspection or investigation and in accordance with Chapter 119 of the Revised Code, *notify* the responsible person of the citation and penalty, if any, proposed to be assessed under section 3737.51 of the Revised Code, *and of the responsible person's right to appeal the citation and penalty*, under Chapter 119 of the Revised Code, to the state board of building appeals established under section 3781.19 of the Revised Code within thirty days after receipt of the notice."

{¶26} The Fire District's reliance on R.C. 3737.43 is misplaced. That statute refers to a "citation." The wording of the May 23, 2002 correspondence, however, does not reflect a citation, and therefore, R.C. 3737.43 is not pertinent here.

{¶27} The Fire District is required to give Ms. Koutsounadis notice and an opportunity for a hearing regarding the fire lane designation under R.C. 119.07. It failed

to do so, and therefore there never was a proper adjudication order issued regarding the fire lane designation.

{¶28} Accordingly, the trial court erred in granting summary judgment in favor of the Fire District. There is no valid fire lane designation as applied to appellant, and therefore we reverse the judgment of the trial court and remand the case with instructions for the trial court to issue a judgment entry dismissing this lawsuit.

{¶29} The judgment of the Trumbull County Court of Common pleas is reversed and this case is remanded for the foregoing reasons.

COLLEEN MARY O'TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur.