[Cite as *John Fithian Contracting Co. v. Salem*, 2008-Ohio-5055.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JOHN FITHIAN CONTRACTING CO.,	)	
	)	CASE NO. 07 CO 33
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	O P I N I O N
	)	
CITY OF SALEM,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 06CV537.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:
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For Defendant-Appellee:
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JUDGES:
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Cheryl L. Waite

Dated: September 25, 2008

VUKOVICH, J.

¶{1} Plaintiff-appellant John Fithian Contracting Company appeals the decision of the Columbiana County Common Pleas Court denying its request to declare that defendant-appellee City of Salem acted unlawfully when it charged him a contractor's registration fee and that its ordinance pertaining to such fee was unconstitutional. Procedurally, we are asked to determine whether the trial court's entry in this declaratory judgment action was sufficient. Substantively, we are asked to evaluate the ordinance and determine whether it is applicable, whether it conflicts with certain state statutes and whether it is rationally related to a legitimate government interest. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} The general contractor of the new McDonald's in Salem, Ohio hired a subcontractor for excavating, who in turn hired appellant as a subcontractor for horizontal boring services. Specifically, appellant was to bore under the street and connect with the City's sewer. Appellant was aware that the City had an ordinance requiring contractors and subcontractors working in the City to pay a $50 annual registration fee. After informal discussions in May 2006, appellant through its attorney informed the City that it did not believe the ordinance applied to a horizontal boring contractor. The City persisted and required the fee before work on the project could commence. After work was delayed, appellant paid the fee.

¶{3} In June 2006, appellant filed a complaint for declaratory relief and for damages, claiming that the City's application of the ordinance was unconstitutional and unlawful, citing to the language of the ordinance and to certain state statutes. In April 2007, the parties jointly requested to submit the case to the court on briefs and attachments. We now review the specifics of these briefs as the content becomes relevant in assessing appellant's procedural argument infra.

¶{4} Appellant's trial brief and the later reply urged that appellant does not qualify as a contractor or subcontractor under the ordinance or that appellant was excluded from registration under R.C. 715.27 and R.C. 4740.12, which should preempt the ordinance. As to the ordinance, appellant urged that it is a "public utility contractor"

rather than a private commercial contractor and thus should not be encompassed by the ordinance because a horizontal boring contractor is not subject to license and its work is inspected by the particular government entity whose facilities are being affected by the connection. Appellant also claimed that the ordinance is not rationally related to the public welfare and does not substantially advance a legitimate interest. Regarding R.C. 715.27, appellant urged that it is not a "specialty contractor" as defined therein. Finally, appellant argued that R.C. 4740.12 prohibits a city from requiring a contractor to register and pay a fee unless the contractor is required to be licensed.

¶{5} The City's trial brief refuted appellant's characterization of itself as a "public utility contractor" and pointed out that appellant was hired by private entities in a private commercial project. The City stated that appellant plainly fits the definition of subcontractor under its ordinance, noted that excavating is specifically listed therein and pointed out that the list of trades is not exclusive in any event. In response to appellant's claim that the ordinance and the de minimis fee are not rationally related to a legitimate interest, the City proposed that the fee covers various administrative costs in processing the registration and the registration allows the City to detect who will be bisecting public property and who will need to be inspected for such bisection. The City also urged that the registration allows the City to ensure that the contractors purchased adequate liability insurance, paid into the workers' compensation system and registered with the City income tax office.

¶{6} Next, the City agreed that appellant is not a specialty contractor under R.C. 715.27. The City then stated that since chapter 4740 only deals with trades required to be licensed by the state, it is irrelevant here as appellant is not required to be state-licensed. The City interpreted R.C. 4740.12(A) as merely stating that if the City requires registration of contractors, the City can only register those subject to state licenses if they actually have a state license. In other words, the statutory provision of conditions to register a specialty contractor does not mean that the City cannot register a non-specialty contractor; it just means a City should not register a non-licensed contractor who is supposed to be licensed. Thus, the City concluded that its ordinance does not conflict with the state statutes.

¶{7} On August 10, 2007, the trial court found in favor of the City adopting all of its arguments and responses. Appellant filed timely notice of appeal and now raises the following two assignments of error:

¶{8} "THE TRIAL COURT ERRED IN FINDING FOR DEFENDANT-APPELLEE SOLELY ON THE BASIS OF THE ARGUMENTS AND AUTHORITIES CITED IN DEFENDANT-APPELLEE'S TRIAL BRIEF WHICH THE COURT ADOPTED IN FULL."

¶{9} "THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF-APPELLANT'S REQUEST FOR RELIEF AS IT FAILED TO CONSIDER THE WRITTEN ARGUMENTS AND AUTHORITIES SUBMITTED BY PLAINTIFF-APPELLANT IN SUPPORT OF ITS POSITION FOR DECLARATORY JUDGMENT."

¶{10} The City has not filed a brief in response. Appellant presents two general arguments on appeal: that the trial court's entry was insufficient and that the trial court's decision was erroneous due to the various arguments within appellant's trial brief.

PROCEDURAL ARGUMENT

¶{11} We shall first address appellant's procedural complaint that the trial court's entry was not a sufficient declaration of rights. In its entry, the court quoted a lengthy portion of appellant's trial brief where appellant had summarized its claims and arguments. The court then stated that it considered the written arguments of the parties and was persuaded by the City's position. The court found for the City on the basis of the arguments and authorities cited in the City's brief. Specifically, the Court adopted the City's trial brief as its own and incorporated it in the judgment entry as though fully rewritten. Finally, the Court denied the remedies requested by appellant.

¶{12} When entering judgment in a properly filed declaratory action, the court is to affirmatively or negatively declare the rights of the parties. See R.C. 2721.02(A). Thus, it has been determined that unlike a regular civil action, where the judgment can be generally stated as, "judgment for the defendant," a judgment disposing of a declaratory action must be more detailed. That is, the court's function is to declare the parties' rights and set forth its construction of the law under consideration. *Haapala v.*

Nationwide Prop. & Cas. Ins. Co. (Nov. 9, 2000), 8th Dist. No. 77597; *Waldeck v. City of North College Hill* (1985), 24 Ohio App.3d 189, 190 (1st Dist.).

¶{13} Some appellate courts reviewing inadequate entries have supplied the declaration that the trial court should have rendered. See *Haapala*, 8th Dist. No. 77597, citing *Harris, Jolliff & Michel, Inc. v. Motorist Mut. Ins. Co.* (1970), 21 Ohio App.2d 81, 88. See, also, *Motorists Mut. Ins. Co. v. Grischkan* (1993), 86 Ohio App.3d 148 (where the Eighth District noted the problem but affirmed summary judgment without remanding). Other courts refuse to complete the trial court's original declaratory function in the guise of appellate review, and these courts thus reverse and remand for the trial court to make an explicit declaration. *Haapala*, 8th Dist. No. 77597; *Johnson v. North Union Loc. Sch. Dist. Bd. of Edn.* (May 26, 2000), 3d Dist. No. 14-2000-07; *Velasquez v. Ghee* (1994), 99 Ohio App.3d 52, 53 (9th Dist.); *Grange Mut. Cas. Co. v. Jordan* (Nov. 6, 1991), 3d Dist. No. 5-90-46; *Fioresi v. State Farm Mut. Auto. Ins. Co.* (1985), 26 Ohio App.3d 203, 203 (1st Dist.). It must be recognized, however, that these cases typically involve the situation where the basis for the trial court's decision could not be ascertained and deal with mere "judgment for * * *" language. See *Haapala*, 8th Dist. No. 775957 (also noting that the lacking entry "crippled" the ability to review the decision).

¶{14} The entry before us has two distinguishing features: a fairly detailed summary of appellant's arguments and an adoption and incorporation of the City's trial brief. Thus, the court found for the City, but its language was not a mere, "judgment for the City." Rather, the court first explained appellant's main claims using appellant's own language. Specifically, the court noted that appellant's declaratory action requests the court to declare unconstitutional and unlawful Salem City Ordinance Number 1145.03, which requires a contractor and subcontractor to pay an annual $50 fee for a contractor's certificate. The court disclosed that appellant believes it does not qualify as a contractor under the language of the ordinance and that the ordinance and relevant statutes, being R.C. 715.27 and R.C. 4740.01, do not warrant the application of the fee to a horizontal boring utility contractor. It was revealed that appellant claimed to be working on a public construction project rather than a private commercial project. The court then laid out appellant's arguments that the fee does not

substantially advance a legitimate interest in the health, safety and welfare of the community and that the ordinance deprives appellant of due process.

¶{15} After setting forth the declarations appellant wished the court to make, the court explicitly refused to do so and instead disclosed that it was persuaded by the declarations the City wished it to make. The court not only pointed to the arguments and authorities in the City's trial brief, but the court also announced that it was adopting the City's trial brief as its own and incorporated such brief as if fully rewritten in the court's entry. As outlined above, the City's trial brief was detailed and filled with relevant construction of the ordinance and statutes.

¶{16} Although it may have been preferable if the trial court had clearly stated that declaratory relief was denied to appellant because the ordinance was applicable and its application was not unconstitutional because it was compatible with the statutes and was rationally related to a legitimate interest, the court's entry here was not insufficient. The declaration required is not some detailed analysis; rather, it is a conclusory statement declaring the rights under the construction of the law at issue. The express refusal to adopt declarations that are specifically listed by the court is equivalent to making the negative declaration spoken of in R.C. 2721.02(A). Thus, the portion of the court's entry (setting forth the central issues and the declarations sought by appellant and then finding for the City by refusing to make the previously listed declarations requested by appellant) accomplished the declaratory function desired. Moreover, the entry adopted and incorporated by reference the City's trial brief.

¶{17} Unlike the entries in the cases cited above, the entry here does not require us to assume the trial court's intentions. Instead, the court's holding and even the reasons behind it are ascertainable. Accordingly, we uphold the sufficiency of the trial court's entry in this declaratory judgment action.

APPLICABILITY OF THE ORDINANCE

¶{18} Chapter 1145 of the City of Salem's municipal ordinances deals with the registration of contractors and subcontractors. An application for contractor registration must be made on the prescribed form and shall disclose a federal tax identification number, proof of at least $300,000 per occurrence of liability insurance coverage, proof of an Ohio Workers' Compensation Certificate and proof of

compliance with state or federal licensing if applicable. Ord. No. 1145.02(b). Before the contractor's registration is granted, the applicant must submit a $50 annual fee to the Zoning Office after obtaining a registration number from the income tax office. Ord. No. 1145.03.

¶{19} These requirements apply to any person, firm or corporation who enters into a contract as a primary or general contractor or subcontractor to supply goods, services or labor within the corporate limits. Ord. No. 1145.02 (a)(1). There are exceptions for those under eighteen singularly engaged in the casual employment of a property owner and individuals engaged in work with total gross annual receipts under $5,000. Ord. No. 1145.02 (a)(2), (4). The following definitions are provided:

¶{20} "'Contractor' means any person, firm or corporation who enters into a written or oral contract or agreement as primary or general contractor to supply goods, services and/or labor within the corporate limits of the City of Salem. For the purpose of this ordinance contractors are, but not limited to: construction, cement, demolition, driveway-asphalt, electrical, excavating, general, HVAC, insulation, landscaping/lawn maintenance, masonry, painting, plumbing, remodeling, roofing, siding, sign, snow removal, spouting, swimming pool and windows."

¶{21} "'Subcontractor' means any person, firm or corporation, assuming by secondary contract or agreement, some or all of the obligations of the primary or general contractor."

¶{22} Appellant maintains its contention that it is a subcontractor performing horizontal boring services on a "public project" regardless of the fact that they were hired and paid by a private contractor to assist in fulfilling a private contract to build a McDonald's. They rely on the mere facts that they bored under a city street to a city sewer and that the city thus inspects their work. However, we find this argument to lack merit. As the City argued below, this is not a public project. Appellant was retained by a private business to assist in a private commercial project.

¶{23} Regardless, as the City pointed out, there is no exception in the ordinance for those performing work for the City on a public utility. Appellant fits the definition of subcontractor by way of the related definition of contractor. Appellant assumed some of the obligations of the primary contractor who contracted to provide

goods, labor and services within the City. As the City points out, the list of trades in the definition of contractor is not exclusive, and excavating is even listed as an example. Under the plain language of the ordinance, appellant is encompassed by its requirements. Plain language is applied, not interpreted through extrinsic evidence or policy. See, e.g., *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, 400. Consequently, appellant's argument that the ordinance does not apply is without merit.

RATIONAL RELATION OF ORDINANCE TO LEGITIMATE INTEREST

¶{24} Appellant complains that the affidavits submitted with the City's trial brief merely state that the intent of the ordinance was to cover all contractors and subcontractors and they fail to state the various purposes of the ordinance listed in the City's trial brief such as to ensure liability insurance, workers' compensation coverage or income tax registration. Appellant believes that the City's attorney's suggestions of how the ordinance advances City interests are not proper considerations without evidence to support those suggestions. This argument is misguided.

¶{25} There is no absolute requirement of testimonial evidence on whether an enactment is rationally related to a legitimate interest. See, e.g., *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 668 (upholding pre-trial *dismissal motion* finding statute reasonably calculated to advance legitimate government interests). This is especially true when the enactment contains a recitation of the legislative interests. See *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 36, 46, 49.

¶{26} "Legislative enactments are presumed to be constitutional." *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, ¶20. An ordinance, such as the one herein, is afforded this same presumption. See, e.g., *Jaylin Invests., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, ¶ 18. The party challenging an enactment bears the burden of proving it is unconstitutional beyond a reasonable doubt. *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 38-39. Thus, appellant, not the City, had the burden here.

¶{27} It must also be remembered that the rational basis test merely provides that an enactment shall be held constitutional "if it bears a rational relationship to a legitimate governmental interest." *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923, ¶7. The court is permitted to conceive grounds to justify the enactment. See id.

See, also, *Heller v. Doe* (1993), 509 U.S. 312, 320 (the challenger has the heavy burden of negating every conceivable basis before rational basis challenge will be upheld); *State v. Williams* (2000), 88 Ohio St.3d 513, 531. As such, the City's attorney could formulate arguments to support the City's position that the ordinance bears a rational relationship to a legitimate government interest.

¶{28} In any event, the ordinance here specifies that when registering, the contractor must supply proof of liability insurance in a specified minimum amount, the contractor must show proof of compliance with workers' compensation laws and the contractor must register with the City income tax office. Thus, the ordinance itself shows the various legitimate interests advanced by the registration requirement.

¶{29} We also note that the fact that expenses, including personnel time, are incurred in collecting and processing these applications is not a fact that must be established by testimony in order to find that the admittedly de minimis fee is rationally related to a legitimate interest. Contrary to appellant's argument below, the small nature of the fee is a proper consideration is determining whether such fee is rationally related to the conceivable interests of the political subdivision. Here, in construing the ordinance most favorably toward upholding its constitutionality, it is clear there exists a rational basis for such ordinance. In fact, appellant does not appear to dispute that the various listed interests are legitimate; rather, appellant is focused here on the contention that witnesses must claim these interests were specifically the purpose of the ordinance's enactment. Finally, we note that the parties agreed to submit the case to the trial court on the briefs rather than go to trial.

¶{30} Appellant also sets forth an argument here complaining that the City untruthfully stated that part of the fee is rationally related to the cost of official visits to the site. Appellant contends that the City hires an engineering firm to do inspections of the boring's bisections of city property and thus no City official visited the site. This argument is without merit. The City's trial brief stated that the fee helps defray expenses associated with ensuring proper insurance, workers' compensation coverage and registration with the income tax department and for "site inspections by city personnel or their designees." The engineering firm described by appellant would fall under this category of city personnel or designee.

¶{31} As for appellant's suggestion on appeal that the ordinance is vague because it does not address a non-specialty contractor who need not obtain a license, this argument is without support as the ordinance need not list all types of contractors by trade or by general title such as non-specialty contractor. In any case, the ordinance does establish more direct applicability to a contractor who need not be licensed when it lists the attachments needed such as a tax number and liability insurance and then states, "Proof of compliance with state or federal licensing requirement, *if applicable* * * * ." Ord. No. 1145.02(b)(4) (emphasis added). This shows that the subdivision on proof of license does not apply to those not required to have licenses and thus that the remainder of the ordinance does in fact apply to all contractors and subcontractors, including those who do not require licenses.

¶{32} Appellant also complains that the ordinance should have no exclusions in order to be uniform since the City claimed that the ordinance was intended to apply to all contractors and subcontractors. However, exceptions for children and for those grossing under $5,000 per year are not unconstitutional. We note that a child cannot legally contract and thus cannot be a contractor or subcontractor. We also note that the City could have rationally decided that a sole proprietor grossing under $5,000 per year is unlikely to be able to afford the required amounts of liability insurance; additionally, such person may not be subject to workers' compensation and is not likely to be involved in a trade that could cause great harm for which insurance is intended. Furthermore, placing a monetary threshold for registration is a valid cost-benefit consideration for a city. Regardless, appellant's arguments before the trial court on this topic were not clear enough to constitute a validly argued and supported topic for serious consideration.

¶{33} For all of the foregoing reasons, the above minimally-briefed arguments are without merit.

RELATIONSHIP OF ORDINANCE TO STATE STATUTES

¶{34} Besides the rational basis argument analyzed above, it is also claimed that the ordinance's requirement (that a non-specialty contractors such as appellant must register and pay an annual fee) is in conflict with R.C. 715.27 and thus unconstitutional. (At the trial level, appellant claimed that the ordinance conflicted with

both R.C. 715.27 and R.C. 4740.12, but appellant does not raise the argument regarding this latter statute on appeal).

¶{35} The Home Rule Amendment authorizes Ohio municipalities "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Section 3, Article XVIII, Ohio Constitution. To determine if an ordinance conflicts with general laws, we must evaluate whether the ordinance positively permits that which the statute prohibits or positively prohibits that which the statute permits. *State ex rel. King v. Summit Cty. Council*, 99 Ohio St.3d 172, 2003-Ohio-3050, ¶38-39, citing *Struthers v. Sokol* (1923), 108 Ohio St. 263, ¶2 of syllabus and *Cincinnati v. Hoffman* (1972), 31 Ohio St.2d 163, 169. As aforementioned, legislation, including a city ordinance, is presumed constitutional, and thus, any doubts are resolved in favor of upholding the ordinance. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61.

¶{36} The contents of the ordinance at issue were reviewed above. Most basically, it requires contractors and subcontractors working in the City of Salem to submit an application for contractor registration containing certain information and to pay a $50 annual registration fee. As set forth supra, the ordinance applies to appellant.

¶{37} The statute to be reviewed here for conflict defines a specialty contractor as a heating, ventilating, and air conditioning contractor, refrigeration contractor, electrical contractor, plumbing contractor, or hydronics contractor, as those contractors are described in Chapter 4740 of the Revised Code. R.C. 715.27(G). The statute also provides that a municipal corporation may provide for licensing of specialty contractors who are not required to hold a license issued pursuant to Chapter 4740 and may test, register and charge a registration fee to such contractors. R.C. 715.27(A)(3)-(4). The statute continues that no municipal corporation shall test a specialty contractor who holds a valid license issued pursuant to Chapter 4740 but may require such contractor to register, pay a registration fee and require proof of insurance, workers' compensation compliance and registration with the city's tax department. R.C. 715.27(B)-(C). Finally, the statute provides that a municipal corporation shall not

register a specialty contractor who is required to hold a license under Chapter 4740 but who does not hold such license. R.C. 715.27(F).

¶{38} Thus, the statute merely protects state-licensed specialty contractors from over-licensing while specifically allowing city testing and licensing of specialty contractors who are not required to hold a state license. It also requires cities who register contractors to ensure that any specialty contractors that are required to be state-licensed are in fact validly licensed by the state. Both parties agree that appellant is not a specialty contractor and is not subject to license under Chapter 4740 (which chapter established a Construction Industry Examining Board in order to preside over the licensing of a heating, ventilating, and air conditioning contractor, refrigeration contractor, electrical contractor, plumbing contractor, or hydronics contractor). The statute at issue, R.C. 715.27, does not mention non-specialty contractors. As such, this statute neither grants rights to appellant nor prohibits the city from registering appellant.

¶{39} Contrary to appellant's position, the statute's failure to mention appellant's category of contractors, non-specialty contractors, does not mean that the city is prohibited from acting regarding such contractors. As outlined above, the ordinance does not conflict with the statute unless the ordinance permits that which the statute prohibits or the ordinance prohibits that which the statute permits. See *King*, 99 Ohio St.3d 172 at ¶38-39, citing *Struthers*, 108 Ohio St. at ¶2 of the syllabus and *Hoffman*, 31 Ohio St.2d at 169. If the legislation to be evaluated is silent on a certain matter, an ordinance that is not silent on that matter cannot conflict with the legislation under consideration. See id. at ¶40. See, also, *State ex rel. Fite v. Aeh* (1997), 80 Ohio St.3d 1, 4. As such, we overrule appellant's argument that the ordinance conflicts with R.C. 715.27.

¶{40} Finally, as for any contention that the ordinance fails to comply with the statute's requirement that a specialty contractor cannot be registered if he does not possess his required state license, appellant admits it is not a specialty contractor. Appellant cannot argue that an ordinance is invalid due to its belief that the ordinance attempts to register an exempt category under which appellant admittedly does not

fall. In any case, the ordinance requires production of any required licenses in order to complete the application; so, it in fact complies with that portion of the statute.

¶{41} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

DeGenaro, P.J., concurs.
Waite, J., concurs.