[Cite as *Viviano v. Sandusky*, 2013-Ohio-2813.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Joseph Viviano	Court of Appeals No. E-12-058
Appellee	Trial Court No. 2011-CV-0583
v.	
City of Sandusky	**DECISION AND JUDGMENT**
Appellant	Decided: June 28, 2013

* * * * *

Barry W. Vermeeren, for appellee.

William P. Lang, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, the city of Sandusky, appeals an order from the Erie County Court of Common Pleas, granting summary judgment to appellee, Joseph Viviano, and holding sections of the Sandusky Planning and Zoning Code unconstitutional under the void-for-vagueness doctrine.

{¶ 2} For the reasons that follow, we affirm the judgment of the trial court.

{¶ 3} Appellee is the owner of a house located at 721 Cedar Point Road in Sandusky, Ohio (Cedar Point House). The Cedar Point House is located along the causeway, known as the Cedar Point Chaussee, connecting the city of Sandusky to the peninsula containing the Cedar Point amusement park.

{¶ 4} The city of Sandusky has the lot on which the Cedar Point House sits zoned as R1-75, which is authorized for "one-family dwellings" under Sandusky Codified Ordinance 1129.03. "Dwelling" is defined as a "building designed or occupied exclusively for non-transient residential use (including one-family, two-family, or multi-family buildings)" pursuant to 1107.01(g)(2) of the Sandusky Codified Ordinance (Zoning Ordinances).

{¶ 5} Though appellee is the owner of the Cedar Point House, it was not his residence at the time of the alleged zoning violation. Appellee had listed the estate on a vacation property rental website, VBRO, and proceeded to rent the house to a series of third parties. These serialized renters would occupy the house for a predetermined interval, often as part of a vacation to the amusement park. There were neither reports of misconduct nor citations issued by police related to the renting parties in the Cedar Point House.

{¶ 6} On August 4, 2011, appellee was issued a cease and desist order from the city of Sandusky alleging violations of 1109 of the zoning code for the short-term rentals of the Cedar Point House arising from the VBRO listing. Each violation was designated

a misdemeanor of the fourth degree, punishable by a $250 fine, 30 days in jail, or both. An appeal was made to the Board of Zoning Appeals (BZA), which heard the appeal on October 20, 2011, and issued a written decision denying the appeal on January 26, 2012. In their written decision, the BZA referenced 1107.01(g)(2) and 1129.03, finding "the rental of an entire Dwelling, located in a Residential District on a serial basis is not permitted."

{¶ 7} The issue was then appealed to the Erie County Court of Common Pleas where it was consolidated with appeals from several other property owners concerning the BZA's decision regarding renting properties on the Chaussee. On March 5, 2013, the trial court issued an order granting summary judgment to appellee based on the unconstitutionality of the referenced portions of the zoning code. From this judgment, appellant now brings this appeal setting forth the following assignment of error:

> I. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT FOR THE PLAINTIFF, AND HELD THAT THE DEFINITION OF DWELLING PURSUANT TO § 1107.01(g)(2) IS UNCONSTITUTIONAL UNDER THE VOID-FOR-VAGUENESS DOCTRINE FOR ITS INABILITY TO PROVIDE PROPERTY OWNERS FAIR NOTICE OF WHAT USES ARE PERMITTED IN THE R1-75 DISTRICT PURSUANT TO § 1129.03 OF THE SANDUSKY MUNICIPAL CODE.

{¶ 8} We review the trial court's grant of summary judgment de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Civ.R. 56(C) provides:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

{¶ 9} Summary judgment is proper where (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936.

{¶ 10} It is well established that a local zoning ordinance is a legitimate use of the state's police power, save for instances when the ordinance is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 1926 WL 21336, 71 L.Ed. 303 (1926). The specific thrust of the Sandusky Zoning Ordinances, to demarcate an area solely for single-family residences,

also has a clear foundation in constitutional tradition. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

{¶ 11} In evaluating the constitutional challenge to the Zoning Ordinances, this court must adhere to the directive that a court's power to invalidate a statute "is a power to be exercised only with great caution and in the clearest of cases." *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, at ¶ 16. Once enacted, those statutes are entitled to a "strong presumption of constitutionality," and the individual asserting the unconstitutionality of a statute "bears the burden of proving that the law is unconstitutional beyond a reasonable doubt." *Id.*

{¶ 12} The court recognizes, however, that "the line separating the legitimate use of police power [in zoning] from the illegitimate is often incapable of precise delimitation, as it varies from circumstance to circumstance." *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 225-26, 638 N.E.2d 533 (1994), *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St.3d 207, 690 N.E.2d 510 (1998). When attempting to ascertain the constitutionality of a zoning ordinance, "the object of scrutiny is the government's action; therefore, the state or local law or regulation is the focal point of the analysis." *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903, ¶ 2.

{¶ 13} Under the tenets of due process, an ordinance is unconstitutionally vague under a void-for-vagueness analysis when it does not clearly define what acts are prohibited under it. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33

L.Ed.2d 222 (1972). *See also State v. Tanner*, 15 Ohio St.3d 1, 472 N.E.2d 689 (1984); *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115. A law is vague in this manner when it "trap[s] the innocent by not providing fair warning." *Grayned* at 108. Additionally, in order to defeat an assertion of unconstitutional vagueness, a law must contain explicit standards as guidance for those who apply them, thereby preventing arbitrary and discriminatory enforcement. *Id*.

{¶ 14} However, as words are a limited medium to express ideas, absolute precision is not required when drafting an ordinance. *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342 (2000). *See also Perez v. Cleveland*, 78 Ohio St.3d 376, 378, 678 N.E.2d 537 (1997) ("void-for-vagueness doctrine does not require statutes to be drafted with scientific precision"). "Rather, [judicial analysis] permits a statute's certainty to be ascertained by application of commonly accepted tools of judicial construction." *Buckley v. Wilkins*, 105 Ohio St.3d 350, 2005-Ohio-2166, 826 N.E.2d 811, ¶ 19 (internal quotations removed). "The fact that the fertile legal imagination can conjure up hypothetical cases in which the meaning of disputed terms could be questioned does not render the provision unconstitutionally vague." (Citations omitted.) *Id.* at ¶ 19.

{¶ 15} To pass muster under the void-for-vagueness doctrine, Ohio law dictates an ordinance must survive the tripartite analysis set forth in *Grayned*. The three aspects examined under *Grayned* are: (1) the ordinance must provide fair warning to the ordinary citizen of what conduct is proscribed, (2) the ordinance must preclude arbitrary, capricious, and discriminatory enforcement, and (3) the ordinance must not impinge

constitutionally protected rights. *Grayned*, 408 U.S. at 108-09, 92 S.Ct. 2294, 33 L.Ed. 222.

{¶ 16} For the first prong of the *Grayned* examination, an ordinance must be comprehensible to a person of ordinary intelligence, to the extent that it would inform such a person of the activities it proscribes. At issue in the Zoning Ordinances is the ambiguous use of the conjunction 'or' in 1107.01(g)(2) ("building designed *or* occupied * * * ") (emphasis added). As written, either the conjunctive or disjunctive reading is valid and plausible.

{¶ 17} The city of Sandusky urges us to retroactively specify that the conjunctive use was the legislative intent when drafting the ordinance. Under Ohio principles of statutory construction, however, it is the convention of the courts to read disjunctive clauses together only when necessary to avoid unreasonable, absurd or ridiculous consequences. *In re Shaffer*, 228 B.R. 892, 894 (N.D.Bankr.Ohio 1998), citing *Nielson v. Bob Schmidt Homes, Inc.*, 69 Ohio App.3d 395, 398, 590 N.E.2d 1291 (8th Dist.1990). *Accord State v. Poirier*, 6th Dist. Nos. L-01-1479, L-01-1480, L-01-1481, 2002-Ohio-4218 ("The only logical reading of the statute requires that it be read disjunctively."); *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 20 (legislative use of disjunctive "or," as opposed to the conjunctive "and," indicates that the classifications are intended to be read separately from each other.") The courts, with experience and wisdom in the legal arena, are inclined to read the Zoning Ordinances disjunctively. A citizen of ordinary intelligence would, therefore, not

be unreasonable in believing, as appellee did, that having a house meet a single listed criterion would be sufficient to satisfy the Zoning Ordinances. Therefore, the Zoning Ordinances do not satisfy the first prong of *Grayned*.

{¶ 18} To not run afoul of the second prong under *Grayned*, the ordinance must preclude arbitrary, capricious, or discriminatory enforcement. An ordinance cannot leave what constitutes a violation open to interpretation by relying on the enforcing body to use "common sense." Such an assessment is "exactly the kind of unfettered discretion that the vagueness doctrine prohibits." *State v. Collier*, 62 Ohio St.3d 267, 274, 581 N.E.2d 552 (1991).

{¶ 19} The concern here centers on the term "non-transient" as used in the Zoning Ordinances and notices. It is undefined within the ordinance and does not lend itself to a plain and unambiguous meaning. The remaining option is to adequately define "transient" and apply its negation. Merriam-Webster defines "transient" in relevant part as "passing through * * * with only a brief stay or sojourn." *Merriam Webster's Collegiate Dictionary* 1254 (1996).

{¶ 20} Applied to the case at bar, the defined term still provides little clarity. The label "transient" does nothing to provide a time reference beyond the equally imprecise "brief." Absent a time scale, the term is rendered entirely subjective and incapable of providing guidance to either the citizen or the enforcing party. *See City of Toledo v. Ross*, 6th Dist. Nos. L-00-1337, L-00-1338, L-00-1339, L-00-1340, L-00-1341, L-00-1342, 2001 Ohio App. LEXIS 3981 (Aug. 31, 2001) (holding the terms transient, limited,

and seasonal as requiring such subjective interpretation to render them unconstitutionally vague). In this manner, "transient" (and by extension "non-transient") would encompass not only rentals, but month-to-month leases, vacation homes used sporadically, and loans of a property to friends. Given a sufficiently long timeframe, the zoning board could declare any use of any property by any citizen to be "transient."

{¶ 21} When presented with the uncertainty of the term during the BZA hearing, a member of the board admitted that the term non-transient was "subject to various interpretations" and "can lead to arbitrary applications." The code does not provide substantive guidance for a citizen who wishes to be in compliance with the "non-transient" use requirement. In the appellant's reply brief, the city of Sandusky attempts to invoke Justice Stewart's eminent "I know it when I see it" quote to show that the board can identify such offending use of the property. By illustrating that no firm characterization of the term has been adopted, it serves to underscore the highly subjective nature of the "non-transient" condition. Allowing such a manipulation would subject the citizens to the caprices and whim of the board, which could change its position drastically—both without warning and without any substantive change to the code. The specter of this arbitrary and potentially discriminatory enforcement bars the ordinance under the second prong of *Grayned*.

{¶ 22} As a consequence of failing the *Grayned* examination, the Zoning Ordinances are found to be unconstitutional under the void-for-vagueness doctrine. Appellant's sole assignment of error is not well-taken.

{¶ 23} On consideration, the March 15, 2013 judgment awarding summary judgment to appellee by the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE