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STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO ex rel. MARCELLA GAYDOSH

Relator

v.

CITY OF TWINSBURG, et al.

Respondents

C.A. No. 21238

JOURNAL ENTRY

Relator has petitioned this Court for a writ of mandamus to compel the Respondents, City of Twinsburg and members of Twinsburg City Council, to correct its Official Zoning Map until a vote is held to approve or disapprove zoning changes and to compel the Respondents to re-establish the Capital Improvement Board. Relator asserts that she is bringing the action as a taxpayer pursuant to R.C. 733.59 and is entitled to attorney fees. The matter is before the Court on cross-motions for summary judgment.

In an action for a writ of mandamus, the relator must establish (1) that the relator has a clear legal right to the requested relief; (2) that the respondent is under a clear legal duty to perform the act requested; and (3) that no adequate remedy is available at law. *State ex rel. Middletown Bd. of Edn.. v. Butler Cty. Budget Comm.* (1987), 31 Ohio St.3d 251, 253, citing *State ex rel. Westchester v. Bacon* (1980), 61 Ohio St.2d 42, paragraph one of the syllabus. Moreover, summary judgment is appropriate when:

> "(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it

> appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589.

The moving party has the burden of showing that summary judgment is appropriate. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. It must "inform[ ] the trial court of the basis for the motion, and identify[ ] those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The moving party "must state specifically which areas of the opponent's claim raise no genuine issue of material fact and such assertion may be supported by affidavits or otherwise as allowed by Civ.R. 56(C)." *Id.*

The nonmoving party bears a "reciprocal burden of specificity," which requires it to set forth specific facts, by affidavit or other evidence, explaining that a genuine issue for trial exists. *Id.* at 294, quoting *Mitseff*, 38 Ohio St.3d at 115. If the nonmoving party can offer only a scintilla of evidence, or if his evidence is merely colorable or not significantly probative, then the moving party is entitled to judgment as a matter of law. *Buckeye Union Ins. Co. v. Consol. Stores Corp.* (1990), 68 Ohio App.3d 19, 22.

COUNT I. ZONING ORDINANCE

The parties dispute whether certain annexed land was properly zoned. On May 23, 2002, Respondents adopted Ordinance 38-2002, which both approved annexation of certain property to the City of Twinsburg and which also purported to zone that property

as "I-2," Limited Industrial. Relator contends that the attempted zoning constituted a "change" in zoning, which, by virtue of the Twinsburg City Charter, could only be consummated through voter approval. Relator further argues that the ordinance, therefore, violated the constitutional right of the Twinsburg voters to reserve to themselves the initiative and referendum powers to vote on legislative actions of Twinsburg City Council. Respondents argue, first, that the zoning of the property did not constitute a "change" in zoning because the land, prior to its annexation, was not "within the city" and, therefore, could not have been previously zoned by the city. Essentially, they are arguing that the zoning was "new" zoning. Relator contends that Respondents' argument constitutes an admission that a change in zoning did, in fact, occur. Respondents further rely upon the Unified Development Code of the City of Twinsburg ("UDC"), which contained the following provision:

> 1107.07 Zoning of Annexed Land
>
> Any parcel of land hereafter annexed to the City shall upon annexation be classified in the closest compatible City of Twinsburg Zoning District. Such classification may be changed subsequent to annexation by the process described in Chapter 1201 of this Code.

Chapter 1201 of the UDC mirrored the Twinsburg Charter and required voter approval of any changes in zoning classification of use.

Relator counters that the UDC was not properly enacted. In *State of Ohio ex rel. Marcella Gaydosh v. City of Twinsburg Ins. Co.,* Summit App. No. 21491, 2003-Ohio-5779, at ¶15-16, which was an appeal from a declaratory judgment action that was decided while this case was pending, this Court determined that the UDC was not

properly enacted and, accordingly, was not effective. Both parties agree that there is no provision in the 1989 Zoning Code for the zoning of newly annexed land; therefore, the Charter provision controls. The Charter provides:

> "ARTICLE VIIA
> "CHANGES TO ZONING CLASSIFICATIONS OR DISTRICTS
>
> "SECTION 7A.01
> "Any change in zoning classifications or districts, or in the uses permitted in any zoning use classifications or districts within the City of Twinsburg must first be submitted to the Planning Commission, for consideration and report. In the event the City Council should approve any of the preceding requested changes, upon the report of the Planning Commission, it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a majority vote of all votes cast of the qualified electors of the City of Twinsburg and of each ward in which the property so changed is located at the next scheduled election. ***"

In light of this Court's conclusion that the UDC was ineffective upon adoption, it would appear that, if the Respondents effectuated a "change" in the zoning of the property annexed through Ordinance 38-2002, Relator has a right to the relief requested in the petition and Respondent has a duty to perform the relief.

Pursuant to R.C. 519.18, newly annexed land retains the zoning classification imposed by the township to which the property belonged until such time as it is properly rezoned. The parties have stipulated that the property was zoned as "Industrial" prior to annexation. It is now zoned "Limited Industrial." Although it is not clear whether there is a distinction to be made between the township zoning classification of Industrial and the city's zoning classification of Limited Industrial, the absence of evidence on this

fact is not dispositive inasmuch as the Charter also provides for voter referendum in the event of a change in zoning *districts*.

Section 1138.12 of the 1989 Twinsburg Zoning Code defines "Zoning District" as a "portion of the community that is officially delineated on the Zoning Map and is subject to a particular set of land use requirements set forth in the Zoning Ordinance." "Zoning Map" is further defined as "the officially adopted map that indicates the boundaries of zoning districts." Thus, a zoning district is a geographical area subject to a particular zoning use. It is only logical that any annexation of land will render a change in the geographical boundaries of land "within the city" that is subject to zoning regulation, i.e., a change in "districts." Pursuant to the Charter, that change must be submitted to the voters. We find, therefore, that Relator has a clear legal right to require the Twinsburg City Council, which has a concomitant duty, to change the official Zoning Map to reflect the township zoning of the property until such time as the zoning of the property is submitted to the voters.

The only issue remaining is whether Relator has an adequate remedy at law to provide the relief she requests. As noted above, the existence of an adequate remedy at law precludes the issuance of a writ of mandamus. R.C. 2731.05. Alternate remedies are inadequate unless they are complete, beneficial, and speedy. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health* (1997), 77 Ohio St.3d 247, 249-250. Relator argues that no remedy, other than mandamus, can compel the City to hold a vote. Respondents, citing *Gaydosh v. City of Twinsburg* (March 2, 2001), Summit App. No. 20120, argue

that Relator has an adequate remedy at law through either an administrative appeal or a declaratory judgment action.

In *Gaydosh*, *supra*, this Court held that Relator, who was seeking a writ to compel a change in the Zoning Map and to set aside a federal consent agreement concerning the zoning of particular land, had an adequate remedy at law through intervention in the federal action from which the consent agreement arose or in a declaratory judgment action pending in the Summit County Court of Common Pleas. The Ohio Supreme Court affirmed this Court, stating:

> "Gaydosh specifies no facts establishing that appeal in the federal litigation or intervention in the declaratory judgment action would not have been complete, beneficial, and speedy remedies."

As in this case, the matter had been before this Court on a motion for summary judgment. Gaydosh had not met her burden on summary judgment to show that she did not have an adequate remedy at law. If Relator has met her burden in this case, this Court is not bound to reach the same conclusion as we did before.

As noted by Respondent, the Ohio Supreme Court has held that the constitutionality of a zoning ordinance may be attacked through either an administrative appeal or a declaratory judgment action. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, paragraph one of the syllabus. In the instant case, an administrative appeal would not be applicable as Relator is not a property owner asserting a right to a specific use of the property that could be remedied through administrative relief. No administrative board could require Council to change its map or submit the zoning issue to the electorate.

Moreover, a declaratory judgment action would not provide complete relief in the absence of "extraordinary ancillary relief in the nature of a mandatory injunction." See, *State ex rel. Webb v. Bliss*, 99 Ohio St.3d 166, 2003 Ohio 3049, ¶23. In *State ex rel. Webb,* the Relator sought an order compelling a referendum vote on a zoning ordinance that had been unconstitutionally enacted as an emergency ordinance. The Court held that the availability of a declaratory judgment action in that case did not preclude the mandamus writ because, in order to provide complete relief, the Court would have had to also issue a mandatory injunction to effectuate the relief requested. It is well established that mandatory injunction is an extraordinary remedy, which, unlike a remedy in the ordinary course of law, does not preclude mandamus relief. *State ex rel Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 153. In the instant case, a declaration that Ordinance 38-2002 is unconstitutional would, in and of itself, provide no relief to Relator without ancillary relief ordering Respondents either to change the Zoning Map, or, in the alternative, to hold a vote on the I-2 zoning of the annexed land, which, if approved, would render the Zoning Map valid.

Respondents finally argue that R.C. 713.13 provides Relator with an adequate remedy at law. That statute provides:

> "*** In the event of any [zoning violations], or imminent threat thereof, the *** owner of any contiguous or neighboring property who would be especially damaged by such violation, ***, may institute a suit in injunction to prevent or terminate such violation."

Relator, however, has not claimed any special damage nor is there any evidence that Relator is a neighboring property owner. Relator seeks enforcement of a public duty for

the protection of a public right. Such cases as this are particularly suited for mandamus, the purpose of which is to compel the performance of *public* duties. See, generally, *State ex rel Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 467-475.

This Court, construing the facts in favor of Respondents, finds, as a matter of law, that Relator is entitled to summary judgment on Count I of her complaint for a writ of mandamus. The writ is granted. The portion of Ordinance 38-2002 that purports to zone the annexed property as I-2 is invalid and, therefore, ineffective. Costs of this action, yet to be determined, shall be taxed to Respondents.

COUNT II. Capital Improvements Board

Relator further sought a writ to compel Respondents to re-establish the Capital Improvement Board, which Relator claims was abolished in contravention of the City Charter. Subsequent to the filing of the complaint in this action, Respondents did establish and create a Capital Improvement Board. Relator concedes as much. A petition for a writ of mandamus is moot when the respondent fulfills his duty. *State ex rel. Richard v. Wells* (1992), 64 Ohio St.3d 76, 77. As Respondents have performed any duty owed to create the Board, Count II of Relator's petition is moot and is hereby dismissed.

ATTORNEY FEES

Relator has requested that attorney fees be awarded to her, pursuant to R.C. 733.61. Respondents contend that Relator did not include a prayer for damages in her petition and, therefore, is not entitled to attorney fees.

R.C. 733.61 states:

> "If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney."

According to R.C. 733.61, attorney fees may be awarded as "costs" and not damages. The absence of a prayer for damages in the petition does not foreclose an award of attorney fees provided the action is properly brought as a taxpayer action. Moreover, Relator did include a prayer for attorney fees should the Court rule in her favor. We determine that Respondents have not met their burden, as the moving party, to show that no genuine issue of material fact exists and Relator is not entitled to attorney fees as a matter of law.

We turn our discussion to whether Relator is entitled to summary judgment on the issue of attorney fees. First, we examine whether Relator has shown that he properly brought this action pursuant to R.C. 733.59.

> "Where the statutory requirements necessary to maintain a taxpayer's action, pursuant to R.C. 733.59, are met or waived, and the action has been brought on behalf of the public and resulted in a public benefit, the equity of the case demands that the trial court exercise its discretion in considering the allowance of attorney fees to the successful taxpayers." *State ex rel. White v. Cleveland* (1973), 34 Ohio St.2d 37, paragraph 3 of the syllabus.

R.C. 733.59 states:

> "If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make application provided for in sections 733.56 to 733.58 of the Revised Code, the

> taxpayer may institute suit in his own name, on behalf of the municipal corporation. *** No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding."

The parties have stipulated that demand was made upon the city law director to bring suit and that the demand was rejected. Additionally, Relator paid the deposit against costs when commencing this action. Finally, it cannot be disputed that enforcement of the Twinsburg City Charter confers a public benefit upon the citizens of the City of Twinsburg. Accordingly, we determine that Relator is entitled to recover costs that include "a reasonable compensation for [her] attorney."

The determination of what award of attorney's fees is "reasonable" is a matter within the sound discretion of the trial court. *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146. The initial estimate of a reasonable fee is made by determining the number of hours reasonably expended and multiplying that amount by an hourly fee. *Id.* at syllabus. Once the initial calculation is made, the trial court must then determine whether any of the factors set forth in DR 2-106(B) require an adjustment to the calculation. *Bittner*, 58 Ohio St.3d at 145-46. The factors listed in DR 2-106(B) were summarized by the Supreme Court as follows:

> the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation and ability of the attorney; and whether the fee is fixed or contingent.

Bittner, 58 Ohio St.3d at 145-46. The trial court may determine which factors apply to the particular case and how the factors affect the initial calculation. *Id.* at 146.

On or before April 26, 2004, Relator shall submit evidence relevant to this Court's inquiry of what award constitutes "reasonable compensation" for her attorney under the foregoing standard. The evidence shall include, *but is not limited to*, a detailed, itemized statement of attorney's fees and an affidavit of a qualified expert attesting to the reasonableness of said fees. Respondent may file objections to the amount requested and opposing evidence, if desired, on or before May 17, 2004.

All evidence must be properly authenticated and admissible pursuant to the Ohio Rules of Evidence, or it will not be considered by this Court.

WRIT

Respondents are hereby ordered to correct the Official Zoning Map of the City of Twinsburg to reflect that the property annexed by Ordinance 38-2002 is subject to Twinsburg Township "Industrial" zoning. Said zoning shall remain in effect until such time as a change in the zoning of the property is properly effectuated in accordance with the Twinsburg City Charter and the decision heretofore set forth. Respondents shall comply with this writ immediately upon service of the writ upon them.

The appellate clerk is ordered to certify and attach to this writ a copy of the complaint pursuant to R.C. 2731.02, and, further, to cause personal service of this decision and writ, with the petition attached, to be made upon Respondents by the sheriff in accordance with R.C. 2731.08.

Judge

COPY

William R Baird
Judge

A copy of this journal entry is being mailed to the following:

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