

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

<i>State ex rel.</i>)	CASE NO: 2012-09-5055
)	
MARCELLA GAYDOSH,)	JUDGE CORRIGAL JONES
)	
Relator,)	
)	<u>RELATOR’S TRIAL BRIEF</u>
vs.)	
)	
CITY OF TWINSBURG, et al.,)	
)	
Respondents.)	

Introduction

This case is about a disagreement over a basic concept: that regulating the height of buildings is fundamental to zoning classification and therefore triggers a Twinsburg Charter provision requiring voter approval. Gaydosh contends that height regulations, as a part of Twinsburg’s Commercial and Industrial Zoning Classifications, have been voted on in the past and any amendments to these classifications must be voted on again. The City of Twinsburg denies height regulations are fundamental to zoning classifications, but admits that if they are, then a vote is required. (Answer to Complaint paragraphs 6 and 8).

Height Regulations and Zoning Generally

The fundamental nature of height regulations to zoning classifications can be demonstrated by the examples of Washington, D.C. and Paris. Without height regulations skyscrapers could obscure and diminish Washington’s monuments and block the view of the Eiffel Tower. These cities’ height regulations are crucial to their beauty and livability.

Like many Ohio cities, Twinsburg has a zoning scheme sometimes referred to as Euclidean zoning. This type of zoning, named after the City of Euclid, regulates development through land use classifications and **dimensional** standards. Typical land use classifications are

single-family residential, multi-family residential, commercial, institutional, industrial and recreational. Each land use must comply with dimensional standards that regulate the height, bulk and area of structures. These dimensional standards typically take the form of setbacks for front, side and rear yards, height limits, minimum lot sizes, and lot coverage limits.

The traditional planning goals associated with Euclidean zoning organize growth, prevent overcrowding of land and people, alleviate congestion, and separate incompatible uses (such as insuring that a factory is not built near a residential neighborhood).

By the 1920s, municipalities power "...to regulate the **height of buildings**, area of occupation, strengths of building materials, modes of construction, and density of use, in the interest of the public safety, health, morals, and welfare, [were] propositions long since established." *Euclid v. Ambler Realty Co.*, syllabus, 272 U.S. 365 (U.S. 1926). The objective of zoning ordinances to ensure adequate light and air is most often mentioned in support of maximum height regulations. *Welch v. Swasey*, 193 Mass. 364, 79 N.E. 745 (1907) , aff'd, 214 U.S. 91, 29 S. Ct. 567, 53 L. Ed. 923 (1909).

Ohio Revised Code Section 713.06: Division of municipal corporation into zones, provides that:

The planning commission of any municipal corporation may frame and adopt a plan for dividing the municipal corporation or any portion thereof into zones or districts, representing the recommendations of the commission, in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare, for the **limitations and regulation of the height**, bulk, and location, including percentage of lot occupancy, set back building lines, and area and dimensions of yards, courts, and other open spaces, and the uses of buildings and other structures and of premises in such zones or districts. Effective Date: 10-01-1953

Changes to height regulations and voting on zoning in Twinsburg

The Twinsburg electorate voted to approve height regulations in 1989 and 2008. The code they voted on states that it is **designed to regulate and restrict height** of buildings:

1141.01 ESTABLISHMENT OF DISTRICTS.

For the purpose of promoting the public health, safety, morals, convenience and the general welfare of the community, and in order to classify, regulate and restrict the location of trades, residences, recreation and other uses and the buildings designed for special uses, **to regulate and limit the height**, bulk, number of stories and size of buildings and other structures hereafter erected or altered, to regulate and limit the percentage of lot area which may be occupied, setback building lines, size of yards, courts and open spaces within and surrounding such buildings, the density of population, the territory within the City of Twinsburg, Summit County, Ohio, is hereby divided into eighteen (18) classes of Districts and Classifications. These districts, as enumerated in Section 1141.02 are of such number, shape, kind and area and of such common unity of purpose, and adaptability of use that are deemed most suitable to carry out the purposes of this Ordinance. (Ord. 87-1989. Passed 7-11-89).¹ (Gaydosh Depo., Ex. A.)

Before Council's passage of Ordinance 97-2012, the Zoning Code's commercial classification regulated building height and was voted on in 2008. (Finch Depo., Ex. 3). The 2012 Ordinance rearranged wording but did not substantively change height regulations for Commercial Districts. (Finch Depo. Ex. 2). When Larry Finch, Twinsburg's Planning Director, was asked what changes were made by the amended 1148.15, he stated that "essentially nothing has changed." (Finch Depo. P. 19). Nevertheless, council has no right to change the wording of Ordinances passed by the voters.

Ordinance 97-2012 did change height regulations for Industrial Districts. Before the 2012 Ordinance was passed, the Industrial height regulations were:

1149.09 HEIGHT REGULATIONS.

The height of any main or accessory industrial building shall not exceed 35 feet. However, building height in an I-2 and I-3 district may exceed 35 feet provided the front and rear yard depth is increased two (2) feet for each additional foot of height over 35 feet and the side yard width is increased one (1) foot for each additional foot of height over 35 feet and a conditional use permit is approved. Maximum building height in an I-2 and I-3 Industrial

¹ When the wording of a paragraph in the Zoning Code is followed by the notation "Passed" and a date, it indicates that the wording in the paragraph was approved by the voters and the date of the election.

District shall be recommended by the Mayor and Planning Commission and confirmed by City Council. (Ord. 87-1989. Passed 7-11-89). (Finch Depo., Ex. 4).

This was changed to:

1149.09 HEIGHT REGULATIONS.

The height of any main or accessory industrial building in an I-1 district shall not exceed 35 feet. Building height in an I-2 and I-3 district may not exceed forty-five (45) feet. (Finch Depo., Ex. 2).

As Planning Director Larry Finch explained, "The prior 1149.09 permitted heights in excess of 35 feet, so they both are now in excess of 35 feet. The difference is that the additional setback requirement that was in the prior regulation was removed to allow 45 feet by right... without the conditional use for setbacks." (Finch Depo, p. 22).

Ohio Courts have held that the adoption or amendment of a zoning regulation is a legislative act. *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1 (1968). The legislative power for zoning or amendments to the zoning code resides with the people of Twinsburg not the council.

The right to vote on zoning regulations derives from Twinsburg's inception as a chartered municipality. Municipal powers are granted by Article XVIII of the Ohio Constitution. Under Article XVIII, known as the "Home Rule Amendment," the people of a municipality may, by their Charter, reserve to themselves the power to vote on any actions of a city council. *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 569. Article II § 1f of the Ohio Constitution guarantees that "the initiative and referendum powers are hereby **reserved to the people** of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action...." Where a city charter provision requires referendum approval of zoning changes, the city must submit the zoning changes to the

voters before enactment. See *City of Eastlake v. Forest City Enterprises, Inc.* (1976), 426 U.S. 668, 672-675.

These rights have been recognized by the U.S. Supreme Court. As emphasized in its *Eastlake* decision:

All power derives from the people, who can delegate it to representative instruments which they create. See, e.g., The Federalist No. 39 (J. Madison). In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. The reservation of such power is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to "give citizens a voice on questions of public policy." *City of Eastlake v. Forest City Enterprises, Inc.* (1976) 426 U.S. 668, at 672-673 (citations omitted).

In Ohio, where municipalities have home-rule powers, the Ohio Constitution authorizes a city to draft and adopt a charter on its own initiative. (Ohio Const. Art. XVIII § 7.) Cities which have adopted home-rule charters, are empowered to enact a comprehensive zoning ordinance. Twinsburg's citizenry exercised this power and voted to amend zoning classifications and districts in 1989 and 2008.

In its Answer, Twinsburg admits its Charter mandates voter approval of zoning changes. However, on August 28, 2012, the City Council passed Ordinance 97-2012 which amended Sections 1148 and 1149 of the Twinsburg Zoning Code without seeking voter approval. (Complaint, Ex. 1).

In Twinsburg, zoning changes violate the Charter unless they are adopted in compliance Charter Section 7A.01 which mandates that:

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, . . . it shall not be effective, but it shall be

mandatory that the same be approved by the 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. (Finch Depo., Ex. 1)

Section 1139.02 of the City of Twinsburg Zoning Code provides that:

.... Provisions of this Ordinance shall apply to **all structures** and land of any political subdivision, district, taxing unit or bond-issuing authority located within the corporate limits of the City to the extent allowed by law. All public officials of the City, vested with the duty and authority to issue legal documents, shall not issue permits or certificate for any structure that would result in conflict with this Ordinance. However, should such a permit or certificates be issued and be in conflict with this Ordinance, it shall be deemed null and void.

Furthermore Twinsburg's own code states that with regulations change there must be a vote:

CHAPTER 1201, AMENDMENTS

1201.01 AUTHORITY AND PROCEDURE.

A. The Council may from time to time on its own motion or on petition, after public notice and hearing, amend or **change the regulations, districts** or, building lines herein established, but no such amendment or change shall be effective unless the ordinance or petition proposing such amendment or change shall first be submitted to the Municipal Planning Commission for approval, disapproval or suggestions, and the Planning Commission shall have been allowed a reasonable time, not more than sixty days, for consideration and report....

D. In the event the City Council should approve any of the preceding changes, whether approved or disapproved by 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 general election or at a special election falling on the generally established day of the primary election. Said issue shall be submitted to the electors of the City only after approval of a change in zoning classifications or districts, or in the uses permitted in any zoning use classifications or districts by the Council for an applicant. (Ord. 173-2000. Passed 12-17-2000), (Finch Depo., Ex. 5).

Through the Charter, Twinsburg voters reserved to themselves legislative authority to establish zoning classifications or districts and to vote on **any change** in zoning classifications or districts. The classification of zoning districts occurs by defining regulations for all structures, including height (See Ohio Revised Code 713.06). When the height regulation changed, the

district was changed triggering the right to vote. Twinsburg's voters have not voted on that change as required by Charter Section 7A.01.

Conclusion

Twinsburg failed to follow Revised Code Section 713, its Charter, and its ordinances. Therefore, Gaydosh is entitled to judgment as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular U.S. Mail to on this 30th day of August 2013 to:

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