

**IN THE MIDDLETOWN MUNICIPAL COURT
MIDDLETOWN, OHIO**

CITY OF MIDDLETOWN	*	Case No. 09CRB06287-A
Plaintiff,	*	Judge: James D. Ruppert
v.	*	
COMMERCE CORNER, LLC,	*	DECISION AND ENTRY ON DEFENDANT'S MOTION TO DISMISS
Defendant.	*	

This matter came before this Court on Defendant's Oral Motion to Dismiss requested on December 17, 2009. In response to said Motion Magistrate Newlin requested Defendant submit a brief in support, which was filed on February 2, 2010. Plaintiff filed a Memorandum in Opposition to Defendant's Motion to Dismiss on March 1, 2010. This Court has reviewed both arguments and all applicable documents and has made the following findings, which do not appear to be in dispute:

FINDING OF FACTS

A dealership, Score Dodge, operated on property owned by Defendant, Commerce Corner, located at 3485 Commerce Drive (hereinafter the Score Property) until December 20, 2008. A gas station, Duke & Duchess, owned by Englefield Oil Company, operated on property owned by Defendant located at the corner of Commerce Drive and State Route 122 (hereinafter the Duke Property) until December 31, 2008. There are four signs concerning the above properties which are at issue in this matter: the Pylon sign, which identified Score Dodge from Commerce Drive, the Pole sign, which formerly identified the former Duke & Dutchess gas

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station from Interstate 75 and is currently advertising Defendant's business on the Score Property, a directional sign, which identified the service entrance for Score Dodge, and building signs which identified the Score Dodge showroom building.

Complainant, Linda L. Tong, Zoning Administrator for the City of Middletown, sent a letter to Defendant on or about August 12, 2009, alleging that the abovementioned signs are nonfunctional and abandoned, and as such are in violation of Zoning Ordinance Section 1272.04(a)(9). Leonard Robinson, an agent for Defendant, subsequently met with Complainant to respond to said letter and sent a letter on August 17, 2009 denying Complainant's allegations. Complainant responded with another letter dated September 15, 2009, which reiterated the City's position and demanded that the signs be removed by September 30, 2009. Defendant did not remove the signs by the above date, and on November 17, 2009, after an improper filing on November 5, 2009, Complainant filed an Affidavit in this Court charging Defendant with violating Zoning Ordinance Section 1280.06. Zoning Ordinance Section 1280.06 provides the following:

(a) *Action of Zoning Administrator.* If the Zoning Administrator finds that any provisions of this Zoning Ordinance are being violated, he or she shall notify in writing the person responsible for such violations, indicating the nature of such violations and ordering the action necessary to provide compliance with this zoning ordinance.
(Ord. 4886, passed 12-27-1968)

(b) *Violator to conform.* Any person determined to be in violation of this Zoning Ordinance shall take necessary action to bring the violation into compliance within the period of time set forth in a written notification of the Zoning Administrator. If the violation is not brought into conformance within the time established, the Zoning Administrator may:

- (1) Request legal action as provided in division (d) hereof;
- (2) Pursue criminal sanctions in Municipal Court as provided in division (c) hereof; or
- (3) Both.

(c) *Failure to comply with an order.* Any person who fails to comply with the lawful order of the Zoning Administrator, including, but not limited to, the failure to bring a violation into compliance within the period of time set forth in the written notification required in division (a), is guilty of a minor misdemeanor.

(d) *Action of Director of Law*. In case any building or structure is, or is intended to be erected, constructed, reconstructed, altered or converted, or any building, structure or premises is, or is intended to be used in violation of, or contrary to the provisions of this Zoning Ordinance, the Director of Law may, promptly upon a violation of this Zoning Ordinance, institute injunction or other appropriate action to prevent or enjoin construction, reconstruction, alteration, conversion, maintenance or use. Such action may be instituted by the owner of any contiguous or neighboring property as provided in Ohio R.C. 713.13.
(Ord. 4886, passed 12-27-1968; Am. Ord. O2003-66, passed 5-20-2003)

LAW AND ANALYSIS

Defendant made the following arguments in support of the Motion to Dismiss: A. Complainant failed to timely prosecute the charges against Commerce Corner; B. The Signs have not been abandoned; C. The Signs are fully functional; D. The Signs are lawfully existing nonconforming uses; and E. Zoning Ordinance Section 1272.04(9) is vague and indefinite.

A. Did Complainant Fail to Timely Prosecute the Charges Against Defendant

Defendant first argues that Complainant failed to timely prosecute the charge, and as such the charge is barred by the applicable statute of limitations found in Ohio Revised Code 2901.13(c). Ohio Revised Code 2901.13(c) provides that minor misdemeanors will be barred if not prosecuted within six months after the offense is committed. Defendant argues that the statute of limitations began to run on March 20, 2009, the 90th day after Score Dodge closed its business on the Score property. Defendant's argument is partially based on Complainant's interpretation of "dysfunctional" for purposes of Zoning Ordinance Section 1272.04(a)(9). Though the interpretation and meaning of the word "dysfunctional" is important to the determination of this case, it has no bearing on the application of the statute of limitations. The statute at issue for the purposes of the statute of limitations is Zoning Ordinance Section 1280.06. It is said statute

which Defendant has allegedly violated and it is said statute which is listed in the Affidavit Charging. Said statute clearly depicts that a violation has not occurred until one fails to comply with an order of the Zoning Administrator. Per the September 15, 2009 letter, Defendant was Ordered by the Zoning Administrator to remove the signs by September 30, 2009. A failure to remove any dysfunctional signs by that date would be a violation of Zoning Ordinance Section 1280.06. Accordingly, the statute of limitations would not have begun to run until October 1, 2009. Charges against the Defendant were filed on November 19, 2009. Said date was well within the six months allotted by the applicable statute of limitations. As such, Complainant timely prosecuted the charges against Defendant. Given that the charges were filed well within the amount of time allotted by the statute of limitations, there is no need for this Court to address whether or not the statute of limitations tolls.

B. Is Zoning Ordinance Section 1272.04(9) Vague and Indefinite

The charges filed against Defendant stem from Zoning Ordinance 1272.04(9). If said Ordinance does not apply to Defendant's signs, then Defendant cannot be guilty of violating Zoning Ordinance Section 1280.6. Zoning Ordinance 1272.04(9) provides the following:

"Nonfunctional or Abandoned Signs. Signs, sign posts, or sign mounting hardware which are no longer functional, or are abandoned, shall be removed or relocated, in compliance with the provisions of this Zoning Ordinance, within 90 days following such dysfunction."

An enactment is void for vagueness if its prohibitions are not clearly defined. USCA Cost. Amend 14; *State of Ohio v. Norman*, 441 N.E. 2d 292 (Ohio App 2nd Dist. 1981). As a matter of due process, a law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applications. *Id.* The standard for determining if a statute is vague can be found in *Conally v. General Construction Co.*, 269 U.S.

385 (1926). In said case, the Supreme Court, stated that a vague statute is one “which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *State of Ohio v. Walton*, 1982 WL 6739 (Ohio App. 3rd Dist. 1982), quoting, *Id.*

Zoning Ordinance 1272.04(9) consists in part of the words nonfunctional and dysfunctional. Unfortunately, said ordinance fails to define the meaning of said words. What makes a sign dysfunctional is simply not clear from the language of the statute; nor is it clear from the application of the statute. Although Complainant has clearly defined what a sign is, said definition fails to define what makes a sign dysfunctional.

This Court must begin this portion of the analysis by considering the meaning of the terms sign and non or dysfunctional. The City defined “sign” via Section 1288.01 (106), which defines “sign” as any surface, fabric or device bearing letters, pictorial or sculptured matter, designed to convey information visually and expose to public view, or *any structure, including billboard or poster, designed to carry such visual information*. The City attempts to draw the Court’s attention to the visual aspect of said definition. However, the Court is drawn to the practical application in the later part of said definition; that being that a sign is any structure designed to carry visual information. All of the signs at issue would fall under this definition.

This Court next considers the definition of nonfunctional or dysfunctional. O.R.C. 1.42 requires the use of the common and usual definition of a term when no definition is provided within a statute. Webster’s Dictionary defines “dysfunctional” as an “abnormal functioning”. The same defines “function” as a “special or typical action, use, or duty”. Dictionary.com defines “dysfunctional” as “an abnormal or impaired functioning”. The same defines “function” as “an assigned duty or activity”. The application of these definitions to Zoning Ordinance

1272.04(9) fails to give any guidance to this Court as to the meaning of dysfunctional or nonfunctional for the purposes of said Ordinance.

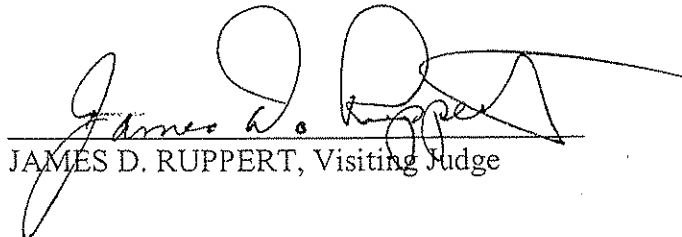
Under the City's analysis, where a tenant vacates the premises, and the property remains vacant for 90 days or longer, the "sign" is no longer functional. Such an interpretation ignores the clear language of the ordinance which defines "sign" and includes within that definition, the following: "any structure designed to carry visual information". Accordingly, this Court has no choice but to disagree with the City's interpretation.

A sign could be dysfunctional and fall under the above definitions because it was damaged in a storm, because it had faded and is no longer legible, because what it advertised no longer exists, or because it is no longer capable of advertising. The possible applications are left to conjecture. As such, it is simply impossible for this Court to come to any conclusion other than Zoning Ordinance 1272.04(9) terms are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Such an Ordinance cannot stand and should be tailored in manner which comports with common intelligence. Accordingly, this Court finds the Ordinance unconstitutionally vague and hereby **ORDERS** that the charges against Defendant be **DISMISSED**.

Due to the above finding this Court finds there is no need to address the additional arguments of the parties at this time.

SO ORDERED:

August 3, 2010


JAMES D. RUPPERT, Visiting Judge