2012 IL App (1st) 111212-U

FIFTH DIVISION
July 13, 2012

No. 1-11-1212

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

661 OHIO LLC and RADIUS, INC., Plaintiffs-Appellees, v. ZONING BOARD OF APPEALS OF THE CITY OF CHICAGO, BRIAN CROWE, GIGI McCABE-MIELE, DEMITRI KNOZTANELOS, REVEREND WILFREDO DeJESUS, and JONATHAN SWAIN, Defendants-Appellants and PATRICIA A. SCUDIERO, ZONING ADMINISTRATOR, CITY OF CHICAGO, DEPARTMENT OF HOUSING AND ECONOMIC DEVELOPMENT, Non-Party Appellant.	)	Appeal from the Circuit Court of Cook County 10 CH 117500 Honorable Mary Anne Mason, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.[1]

O R D E R

¶ 1 HELD: Zoning Board of Appeals properly denied plaintiffs' permit request

[1] Although Justice Joseph Gordon participated in this case at oral arguments, Justice Howse has replaced him on the panel and has reviewed the briefs and oral argument recordings.

because location of proposed sign was within 500 feet of an expressway, as designated by the Chicago Department of Transportation.

¶ 2 Defendant, the Zoning Board of Appeals of the City of Chicago (Zoning Board), and Patricia Scudiero, Zoning Administrator (Zoning Administrator) appeal from the circuit court's order reversing the Zoning Board's denial of plaintiffs', 661 Ohio LLC and Radius, Inc., permit request for an advertising sign on the side of a building adjacent to the Ohio Street ramp of the Kennedy Expressway. The Zoning Board argues that its decision affirming the Zoning Administrator's denial of the sign permit was not against the manifest weight of the evidence because a zoning ordinance prohibits signs within 500 feet of expressways, as designated by the Chicago Department of Transportation (CDOT) and the trial court exceeded its authority when it ordered the Zoning Administrator to issue a permit for the advertising sign.

¶ 3 661 Ohio LLC (661 Ohio) owns the property located at 661 West Ohio Street in Chicago. The owners of this company are Charles Norwesh and Jeff Jozwiak. Norwesh and Jozwiak also own Norcon Construction, Inc., which occupies the building located at the subject address. Radius, Inc. (Radius), is an outdoor advertising company. 661 Ohio and Radius entered into a lease for the erection of an advertising sign on the eastern side of the building's facade.

¶ 4 Plaintiffs sought permit approval for the proposed sign from the ward's alderman, Walter Burnett. Alderman Burnett asked plaintiffs to notify and obtain approval from the neighborhood association. The neighborhood association approved the sign, with the right to approve the sign's content. Alderman Burnett submitted a request to the Commissioner of Buildings that the sign permit be issued. The permit application was submitted to the City Council. In March 2009, the application was approved by the Committee on Buildings and passed by the City Council, subject

to compliance with all zoning ordinances.

¶ 5 In June 2009, the Zoning Administrator entered a written denial of plaintiffs' application for a sign permit. The official denial stated that the application did not conform with sections 17-12-1003-E and 17-12-1006-F of the Chicago Zoning Ordinance, part of the Chicago Municipal Code. Chicago Municipal Code §17-12-1003-E, 17-12-1006-F (amended Nov. 19, 2008).

¶ 6 Section 17-12-1003-E allowed for a maximum total sign area of 308 feet on the building and plaintiffs' proposed sign was 338 square feet, exceeding the maximum allowed per building. Chicago Municipal Code §17-12-1003-E. Section 17-12-1006-F(1)(b) prohibited off-premise signs within 500 feet of any expressways or toll roads, as designated by the Chicago Department of Transportation. Chicago Municipal Code §17-12-1006-F(1)(b). The Zoning Administrator found that plaintiffs' sign was approximately 120 feet from the Interstate 90 expressway ramp.

¶ 7 In July 2009, plaintiffs filed an appeal with the Zoning Board. They agreed to change the size of the proposed sign to meet any applicable ordinances for that location. In November 2009, the Zoning Board conducted a hearing on plaintiffs' permit appeal.

¶ 8 Robert Budington, president of Radius, testified regarding the process he followed to obtain a permit for the sign. Budington stated that he received approval from the ward alderman and City Council, but the Zoning Administrator denied the permit because the sign would be located within 500 feet of the Kennedy Expressway, specifically the Ohio Street feeder ramp. As part of his group exhibit, Budington provided an aerial map of the area and noted that there are five other signs within 500 feet of the Ohio Street ramp. Budington testified that he met with CDOT employees to determine whether CDOT considered the Ohio Street ramp a part of the

expressway. He was told that CDOT did not have jurisdiction over the Ohio Street ramp, but rather they defer to the Illinois Department of Transportation (IDOT). Budington said he met with six individuals at CDOT, but no written documents were submitted from CDOT.

¶ 9 Budington then met with people at IDOT. He presented an email from Michael Galgano, acting outdoor advertising coordinator for IDOT, stating that IDOT classified the Ohio Street ramp as a primary or secondary route.

¶ 10 661 Ohio's owners Norwesh and Jozwiak also presented testimony at the hearing. Norwesh testified about the planning and construction of the building for Norcon Construction at 661 West Ohio. Jozwiak stated that they improved the street in their construction and did not seek any variances in their building permits, but they had planned for the sign as part of their revenue.

¶ 11 The attorney for the Zoning Administrator presented a memorandum, dated October 14, 2009, to the Zoning Administrator and from Thomas Powers, acting commissioner of CDOT. The memo stated that per her request, CDOT has provided a right of way map which shows that

> "the feeder ramps at that location are clearly within the 'access control line' of the Kennedy Expressway. Although the State of Illinois and the City, by agreement, have apportioned maintenance responsibilities for the ramps to the City, the Chicago Department of Transportation considers this to be an integral part of the expressway system."

¶ 12 Plaintiffs objected to this memo, noting that it was dated October 2009, but the permit

request was denied in June. They asserted that there was no evidence that CDOT identified the Ohio Street ramp part of the expressway prior to October 2009. They also objected to the map provided with the memo. They contended that the map was not prepared by CDOT and was from 1962.

¶ 13 Mike Grochowiak from the Department of Zoning and Planning stated that he received the sign permit application and contacted plaintiffs regarding the ordinance. In response, Grochowiak received Budington's email from IDOT stating that the Ohio Street ramp was considered a primary or secondary route. Grochowiak testified that he contacted Budington to clarify that he needed a designation from CDOT. Budington told him he talked to several people at CDOT, but did not have a letter or any document. Grochowiak stated that he contacted the assistant to the commissioner of the Department of Transportation and requested that she or the commissioner "generate some information on what her opinion or her boss's opinion was on *** what the designation of the Ohio feeder ramp is." Grochowiak stated that he received the memorandum in the due course of business.

¶ 14 Andrew White testified as an objector. He stated that he was a real estate representative with Clear Channel Outdoor. He stated that he had attempted to lease the sign location, but no agreement was reached. He said he notified Norwesh the location was not "permitable." White further testified that during his efforts to lease the sign location, he spoke with CDOT and they expressed to him that the Ohio Street ramp was considered an expressway. White also admitted that he was a competitor and stated that he wanted to see "fair play."

¶ 15 In February 2010, the Zoning Board affirmed the decision of the Zoning Administrator to

deny plaintiffs' permit request. The written order made the following findings of fact.

> "The applicant presented testimony from sign company, property owner and architect concerning the allowance of an off-premise sign at this location. The Council order was passed subject to the compliance of the zoning code. The applicant submitted a letter from the Illinois Department of Transportation stating the location of the sign, next to the Ohio Feeder Ramp was not part of the expressway or right of way. The sign company [owner] stated that he was told by unknown persons at the Chicago Department of Transportation (CDOT) that it follows IDOT. The Department of Zoning and Land Use Planning offered a memorandum which considers the expressway right of way adjacent to 661 W. Ohio to be an integral part of the expressway system. The ordinance at §17-12-1006 F- 1(b) prohibits off premise signs within 500 feet of an expressway as designated by the Chicago Department of Transportation. The Board finds this building and sign is within 500 feet of an expressway as designated by CDOT. The decision of the Zoning Administrator is affirmed and the sign permit is denied."

¶ 16 In March 2010, plaintiffs filed a complaint for administrative review of the Zoning Board's decision in the circuit court. In February 2011, following a hearing, the circuit court

reversed the decision of the Zoning Board and ordered the Zoning Administrator to issue a permit for plaintiffs' off-premise sign, not greater than 308 square feet. The court specifically found that "there is no evidence in the record that CDOT designated the Ohio Feeder Ramp an expressway prior to October 14, 2009." The Zoning Board filed a motion to reconsider and request for findings of fact or proposition of law, which the circuit court denied.

¶ 17 This appeal followed.

¶ 18 On appeal, the Zoning Board argues that the circuit court erred in reversing its decision denying plaintiffs' sign permit for violating a zoning ordinance prohibiting a sign within 500 feet of an expressway. Specifically, the Zoning Board contends that its finding that the Ohio Street ramp was part of the expressway, as designated by CDOT, was correct.

¶ 19 When a party appeals the circuit court's decision on a complaint for administrative review, the appellate court's role is to review the administrative decision rather than the circuit court's decision. *Siwek v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 324 Ill. App. 3d 820, 824 (2001). The Administrative Review Law provides that judicial review of an administrative agency decision shall extend to all questions of law and fact presented by the entire record before the court. 735 ILCS 5/3-110 (West 2008). "In an action under the Administrative Review Law, factual determinations by an administrative agency are held to be *prima facie* true and correct and will stand unless contrary to the manifest weight of the evidence." *Kimball Dawson, LLC v. City of Chicago Department of Zoning*, 369 Ill. App. 3d 780, 786 (2006); see also 735 ILCS 5/3-110 (West 2008). A reviewing court must give deference to the administrative agency's interpretation of the statute it was created to enforce

because the agency makes informed decisions based on its experience and expertise. *Illinois Council of Police v. Illinois Labor Relations Board,* 387 Ill. App. 3d 641, 660 (2008). "To find a determination against the manifest weight of the evidence requires a finding that all reasonable people would find that the opposite conclusion is clearly apparent." *Kimball Dawson,* 369 Ill. App. 3d at 786. "[T]he plaintiff in an administrative hearing bears the burden of proof and relief will be denied if the plaintiff fails to sustain that burden." *Kouzoukas v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago,* 234 Ill. 2d 446, 464 (2009). "Simply put, if there is evidence of record that supports the agency's determination, it must be affirmed." *Kimball Dawson,* 369 Ill. App. 3d at 786 (citing *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992)).

¶ 20 Section 17-12-1006-F(1)(b) of the Chicago zoning ordinance prohibits off-premise signs within 500 feet of any expressway, as designated by CDOT. Plaintiffs sought a permit for a sign located at 661 West Ohio, which is adjacent to the Ohio Street ramp of the Interstate 90 expressway. The key question is whether the Ohio Street ramp has been designated part of the expressway by CDOT.

¶ 21 The Zoning Board, relying on an October 14, 2009, memo from CDOT that designated the Ohio Street ramp an "integral part of the expressway system," found that plaintiffs' proposed sign violated the zoning ordinance and affirmed the Zoning Administrator's permit denial. Plaintiffs contend that the evidence presented at the hearing showed that as of the filing of their permit application, CDOT had not designated the Ohio Street ramp part of the expressway. According to plaintiffs, CDOT did not designate the ramp part of the expressway prior to

October 14, 2009. Instead, plaintiffs assert that Grochowiak, director of code enforcement for the department of zoning and land use planning, "requested that CDOT designate the ramp an expressway." Plaintiffs also argue that "a necessary designation" can be applied only prospectively and the CDOT designation occurred after their permit application.

¶ 22 Plaintiffs rely on the principle that "a law applies only prospectively." Plaintiffs further argue that "[l]ikewise, in the application of a law or ordinance, evidence of the necessary designation that would limit the applicants' property rights should only act prospectively." Plaintiffs cite *J.C. Penney Company, Inc. v. Andrews*, 68 Ill. App. 3d 901 (1979), in support. There, the plaintiff sought a declaratory judgment to determine its right to free access to a public street across a two foot wide strip of the defendant's land. In 1959, the defendant had divided his land to create a subdivision. Included in this plat was 66 feet of a 68 foot wide section for a public road and the remaining two feet, the portion at issue in the appeal, were retained by defendant which prohibited J.C. Penney from accessing the road. *J.C. Penney*, 68 Ill. App. 3d at 902. The plaintiff argued for the application of a section of a county zoning code that prohibited reserve or "spite" strips controlling access to streets, but this ordinance became effective one month after the defendant's subdivision plat of land had been approved by the county board of supervisors and recorded. The reviewing court recognized the general principle that a statute applies only prospectively and declined to apply the ordinance to the facts of the case because "the clear language" of the section indicated that it only applied to "new subdivisions," and did not include any language requiring compliance for preexisting subdivisions and the defendant's subdivision had already been recorded before the effective date. *J.C. Penney*, 68 Ill. App. 3d at

904-05.

¶ 23 Here, section 17-12-1006-F was enacted in 2004 and was not applied retroactively in this case because on the date plaintiffs applied for a permit, the pertinent section already prohibited off-premise signs within 500 feet of an expressway, as designated by CDOT. Plaintiffs seek to extend the principle that statutes can apply only prospectively and argue that the designation of the Ohio Street ramp by CDOT in this case was in derogation of this principle and was being applied retroactively. Plaintiffs have failed to argue how the designation by CDOT at a certain date in a memo showed that the designation was being applied retroactively. Plaintiffs also fail to cite any authority that an agency designation cannot be applied retroactively in the same manner as a statute or ordinance. Supreme Court Rule 341(h)(7) requires an appellant to include in its brief an "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Moreover, it is well settled that a contention that is supported by some argument but does not cite any authority does not satisfy the requirements of Supreme Court Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal. *Wasleff v. Dever*, 194 Ill. App. 3d 147, 155-56 (1990). Moreover, plaintiffs have not established that the CDOT designation was applied retroactively in this case.

¶ 24 As previously stated, plaintiffs carried the burden of proof in this case and they failed to offer any formal proof or evidence regarding CDOT's designation of the Ohio Street ramp. Plaintiffs argue that they should not have the burden to "prove a negative" and that the Zoning Administrator had the duty to produce evidence of CDOT's designation. Although plaintiffs

presented some evidence about the Ohio Street ramp's designation, that evidence did not establish that the CDOT designation did not exist prior to October 2009.

¶ 25 Budington testified that he spoke with six people at CDOT regarding the Ohio Street ramp, but he did not provide the names of any of the individuals or their positions at CDOT. He stated that they told him CDOT did not have jurisdiction over the ramp and deferred to IDOT. Budington did not present any written documentation from CDOT concerning the Ohio Street ramp. Budington then contacted IDOT and was informed via email that IDOT considered the Ohio Street ramp a primary or secondary route. This email was presented at the hearing. However, a designation from IDOT had no direct bearing on the issue because the ordinance turns only on the designation by CDOT.

¶ 26 Budington also submitted an aerial map marking five other signs within 500 feet of the expressway to show that the Zoning Administrator had permitted signs near the location at issue. This photo, however, has little if any evidentiary value. Whether these signs preexisted the zoning ordinance and were permitted to remain as nonconforming signs is unclear from the record of proceedings. We also note that section 17-12-0401 allowed for all signs legally erected or installed prior to August 1, 2004, to remain in place and in use subject to section 17-15-0500, which governs nonconforming signs. Chicago Municipal Code §17-12-0401 (Amended Mar. 9, 2005), see also Chicago Municipal Code §17-1-0200 (Amended July 21, 2004), Chicago Municipal Code §17-15-0500 (Amended Sep. 13, 2006).

¶ 27 In response to Budington's email from IDOT, Grochowiak testified at the hearing that he asked the assistant to the commissioner of the Department of Transportation for information on

what the designation of the Ohio Streep ramp was. Grochowiak did not ask CDOT to designate the ramp as part of the expressway, but only requested information regarding CDOT's designation of the ramp. Nothing in the language of the ordinance requires CDOT to have a written, documented policy regarding the designation of expressways. Further, CDOT's memo does not indicate that this was a new designation as of that date.

¶ 28 The testimony from White as an objector supports a finding that CDOT's designation existed prior to the memo. White stated at the hearing that CDOT had informed him that the Ohio Street ramp was part of the expressway and the proposed sign was not "permitable." This testimony is evidence that CDOT considered the Ohio Street ramp part of the expressway prior to October 2009.

¶ 29 Plaintiffs assert that the Zoning Board "completely dismissed" White's testimony at the hearing because he appeared as an objector and admitted he was a competitor to Radius. Plaintiffs misconstrue the record. While the members of the Zoning Board questioned White to understand the reasons for his appearance at the hearing, the Zoning Board did not dismiss White's testimony. White admitted that he was a competitor who initially discussed leasing the proposed sign and he wanted to see the ordinance applied fairly. He also stated that in his efforts to lease the sign location, he found out that CDOT considered the ramp an expressway and he passed that information on to Norwesh. The Zoning Board's written decision did not refer to White at all. Plaintiffs also argue that White's testimony should be dismissed because his company possessed one of the five signs located within 500 feet of the Ohio Street ramp. However, the record does not support this statement. Plaintiffs cite to the aerial map in the

record, but the map does not disclose what company owns the signs or any other information. Despite White's self-interest in the case, his testimony offered some additional support that CDOT had considered the Ohio Street ramp part of the expressway prior to the October 2009 memo.

¶ 30 Plaintiffs had the burden of proof to establish that the Ohio Street ramp had not been designated by CDOT as part of the expressway and they failed to satisfy this burden. While Budington testified that he tried to ascertain what CDOT's designation of the ramp was, he did not present any documentation that the ramp had not been designated part of the expressway by CDOT. The October 2009 memo from CDOT established that CDOT designated the Ohio Street ramp "an integral part" of the expressway. Section 17-12-1006-F(1)(b) did not require a documented policy by CDOT as to the designation. Further, White's testimony supported the Zoning Board's conclusion that the CDOT had designated the Ohio Street ramp part of the expressway prior to October 2009. Based on the record before us, plaintiffs' burden of proof and giving some deference to the Zoning Board's interpretation of the ordinance, we cannot say that all reasonable people would find that the opposite conclusion was clearly apparent. Accordingly, we hold that the Zoning Board's decision affirming the Zoning Administrator's denial of plaintiffs' permit application was not against the manifest weight of the evidence.

¶ 31 Since we have affirmed the Zoning Board's decision, we need not reach the question of whether the circuit court erred in ordering the Zoning Administrator to issue the permit because that issue has become moot. The Zoning Board, however, asks this court to review the issue despite its mootness because "the issue arises frequently and will always become moot once an

appeal is decided." The Zoning Board asserts that this issue is likely to evade review because it will be mooted by the appellate process. The Zoning Board also provides general citations to cases, but fails to argue for the application of an exception to the mootness doctrine. By failing to adequately argue any exception to the mootness doctrine and to cite relevant authority, the Zoning Board has forfeited this issue. See Ill. S. Ct. R. 341(h)(7).

¶ 32 Forfeiture aside, as a general rule, Illinois courts do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided. *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 632 (2010); see also *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009); *In re Barbara H.*, 183 Ill. 2d 482, 490 (1998). "Where, as here, a decision on the merits cannot result in appropriate relief to the prevailing party, such a decision is essentially an advisory opinion." *Barbara H.*, 183 Ill. 2d at 491. "Actions will be dismissed as moot once '[t]he plaintiffs have secured what they basically sought.' " *Morgan v. Department of Financial and Professional Regulation*, 374 Ill. App. 3d 275, 305 (2007) (quoting *People ex rel. Newdelman v. Weaver*, 50 Ill. 2d 237, 241 (1972)).

¶ 33 The supreme court in *Alfred H.H.* discussed three exceptions to the mootness doctrine: the public interest exception, the capable of repetition yet avoiding review exception, and the collateral consequences exception. *Alfred H.H.*, 233 Ill. 2d at 355-63. Here, the Zoning Board argues for this court to apply the capable of repetition exception, but fails to present the two elements of this exception and to show how the elements apply in this case. "First, the challenged action must be of a duration too short to be fully litigated prior to its cessation. Second, there must be a reasonable expectation that the 'the same complaining party would be

subjected to the same action again.' " *Alfred H.H.*, 233 Ill. 2d 358 (quoting *Barbara H.*, 183 Ill. 2d at 491). These elements are not present in this case. The trial court's order directing the Zoning Administrator to issue the permit had not ceased to exist prior to the instant appeal because no permit has been issued.

¶ 34 Further, we disagree with the Zoning Board's assertion that this issue would "always" be moot on appeal. If this court had found the Zoning Board's decision to be against the manifest weight of the evidence, then the issue would not have become moot and the issue of the trial court's authority and the proper remedy would be properly before the court. Since no exception to the mootness doctrine was adequately argued, and because we conclude no exception applies in this case, we do not reach the question of the circuit court's order to issue a permit.

¶ 35 Based on the foregoing reasons, we reverse the order of the circuit court of Cook County and reinstate the decision of the Zoning Board affirming the Zoning Administrator's denial of the permit.

¶ 36 Reversed.