

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION THREE

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KS. DISTRICT COURT  
THIRD JUDICIAL DIST.  
TOPEKA, KS

2016 NOV 22 P 1:54

PATRICK HABIGER and  
CHRISTINA HABIGER,

Petitioners

vs.

Case No. 2015CV809

CITY OF TOPEKA,

Respondent

**MEMORANDUM DECISION AND ORDER**

This is a zoning violation appeal. This matter comes before the Court on Respondent's motion for summary judgment. The parties did not request oral argument and none was ordered. The motion is fully briefed and is ready for decision.

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CITY ATTORNEY'S  
OFFICE

**FINDINGS OF FACT**

1. The Westboro Neighborhood Conservation District ("NCD") overlay zoning standards were enacted by City of Topeka Ordinance No. 19887 dated February 11, 2014. The NCD standards became effective February 17, 2014. The NCD standard relevant to this matter stated: "Fences shall not be allowed in front of the front face of the residence."
2. Petitioners Patrick and Christina Habiger applied for a fence permit on January 14, 2015. Their application was approved by the City on January 15, 2015. They constructed a fence shortly thereafter.
3. On June 11, 2015, the City issued violation notice no. 2015011 to Petitioners. The notice stated the zoning violation as follows: "Fence has been constructed in front of the front face of the residence." The notice described the required corrective action as follows: "Move

section of fence back to approved location, not to extend past the front porch on the face of the house.”

4. Petitioners timely appealed this violation notice to the Board of Zoning Appeals (“BZA”), which held a public hearing on August 10, 2015.

5. Petitioners were represented by attorney Thomas G. Lemon during the approximately 75-minute hearing. Petitioners also personally addressed the BZA, as did several members of the public.

6. Petitioners’ counsel, Lemon, stated that the City had used two meanings of “front face” at different times: the front of the residence and the front of the portico covering the porch, which extends off the front of the residence toward the street.

7. At the hearing, Lemon admitted that the Petitioners’ fence extended approximately 8 feet beyond the front of the residence and also extended approximately 3 feet beyond the front of the portico.

8. The BZA found that the front of the portico is the “front face” of Petitioners’ residence and the fence is located in front of the portico, thus was in violation of the NCD standard. The BZA affirmed the violation notice by a unanimous 6-0-0 vote.

### **CONCLUSIONS OF LAW**

#### **Standard of review.**

The standard of review for summary judgment is as follows:

“Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, 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. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment,

the facts subject to the dispute must be material to the conclusive issues in the case.” *Drouhard–Nordhus v. Rosenquist*, 301 Kan. 618, 622, 345 P.3d 281 (2015).

For purposes of summary judgment,

“an issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment. Stated another way, if the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact.” *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 934, 296 P.3d 1106, *cert. denied* 134 S. Ct. 162 (2013).

An appeal from a decision of the BZA is authorized by K.S.A. 12-759(f): “Any person, official or governmental agency dissatisfied with any order or determination of the board may bring an action in the district court of the county to determine the reasonableness of any such order or determination. Such appeal shall be filed within 30 days of the final decision of the board.”

The district court’s standard of review for BZA decisions is as follows:

- “(1) The local zoning authority, and not the court, has the right to prescribe, change or refuse to change, zoning.
- (2) The district court’s power is limited to determining
  - (a) the lawfulness of the action taken, and
  - (b) the reasonableness of such action.
- (3) There is a presumption that the zoning authority acted reasonably.
- (4) The landowner has the burden of proving unreasonableness by a preponderance of the evidence.
- (5) A court may not substitute its judgment for that of the administrative body, and should not declare the action unreasonable unless clearly compelled to do so by the evidence.
- (6) Action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at

large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate.

(7) Whether action is reasonable or not is a question of law, to be determined upon the basis of the facts which were presented to the zoning authority.” *R. H. Gump Revocable Trust v. City of Wichita*, 35 Kan.App.2d 501, 131 P.3d 1268 (2006) (internal quotes and citations omitted).

**Need for further discovery.**

Petitioners argue at the outset that summary judgment is premature because the parties have not conducted discovery and Petitioners must do so in order to gather the facts necessary to oppose it. The City’s motion to dismiss was denied in a memorandum decision and order dated January 15, 2016. The City filed an answer on February 8, 2016. The parties thereafter failed to meet their obligation to confer regarding a case management order, so none was ever submitted and no case management conference was held. See Third Judicial D.C.R. 3.201(1); K.S.A. 60-216(b). In the meantime, it appears that the parties did not conduct any discovery prior to the filing of the instant motion. Petitioners sought an extension of time to file their response to the summary judgment motion, which was granted, but did not request additional discovery at that time.

K.S.A. 60–256(f) provides a means for a party to move for additional discovery in order to properly defend against a summary judgment motion, and it says:

“If a party opposing the motion shows by affidavit or by declaration pursuant to K.S.A. 53-601, and amendments thereto, that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) Deny the motion;
- (2) order a continuance to enable affidavits or declarations to be obtained, depositions to be taken or other discovery to be undertaken; or
- (3) issue any other just order.”

The grant or denial of such a request is within the wide discretion of the district court. *Troutman v. Curtis*, 286 Kan. 452, 458–59, 185 P.3d 930 (2008).

Here, Petitioners' counsel provided a declaration with its response to summary judgment indicating: (1) Petitioners have not had the opportunity to conduct discovery in this case; and (2) Petitioners need to conduct discovery to gather facts essential to oppose summary judgment. Missing from the declaration were the "specified reasons" Petitioners cannot now present such facts. Petitioners' counsel does not explain in the declaration why he has not yet attempted to conduct discovery, what facts he hopes to find, or how these alleged facts would defeat summary judgment.

Elsewhere in the Petitioners' response, it becomes clear that Petitioners believe that discovery is needed on their claims that: (1) the NCD standards are vague and ambiguous; (2) the NCD standards are arbitrary and capricious and were adopted without affording due process to Petitioners; (3) Petitioners were denied due process in the BZA's consideration of their appeal as the result of ex parte communications and prejudgment by members of the BZA; and (4) the BZA is estopped from finding a zoning violation because the City granted Petitioners a permit to build the fence. As set forth below, these claims fail as a matter of law with or without additional discovery.

The parties have had ample time to conduct discovery and, for whatever reason, have not done so. Petitioners' K.S.A. 60-256(f) declaration lacks requisite specificity. Petitioners' desire to conduct further discovery is not a bar to summary judgment in this matter and Petitioners' request for additional time to conduct discovery is denied.

**Reasonableness.**

In evaluating the reasonableness of the BZA's decision, the Court must focus on the evidence presented to the BZA. *McPherson Landfill, Inc. v. Board of County Com'rs of Shawnee County*, 274 Kan. 303, 329, 49 P.3d 522 (2002). Whether the action was reasonable is a question of law. *Id.* at 329-30. It is not, as the Habigers suggest, a question for the jury. "An action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate." *Id.* at 331.

The NCD standard stated: "Fences shall not be allowed in front of the front face of the residence." There was some discussion at the hearing of whether "front face" means the front of the house proper or the front of the porch or portico on top, but this is not material. The Habigers' attorney admitted at the hearing that the fence extends 8 feet beyond the front of the house and 3 feet beyond the portico over the front porch. Whether "front face" of the residence means the house or the portico, there is no dispute that the Habigers' fence is in front of it. This violates the NCD standard. On this basis, the BZA upheld the notice of violation. This is entirely reasonable.

**Lawfulness.**

**1. Estoppel.**

The Habigers assert that the City is estopped from issuing a notice of violation for the fence because the City approved their permit to build the fence. The BZA considered the permit application and the attached hand-drawn rendering of where the fence would be built. There is a disputed question of fact regarding whether the fence in the drawing extended in front of the portico. But again, this is not material. Even if the City approved a permit application to build a

fence that appeared in the drawing to extend beyond the front plane of the portico, the City would not be estopped from issuing a notice of violation.

The question of whether the doctrine of equitable estoppel applies is a question of law. *Petty v. City of El Dorado*, 270 Kan. 847, 849–50, 19 P.3d 167 (2001).

“A party seeking to invoke equitable estoppel must show that the acts, representations, admissions, or silence of another party (when it had a duty to speak) induced the first party to believe certain facts existed. There must also be a showing the first party rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. There can be no equitable estoppel if any essential element thereof is lacking or is not satisfactorily proved. Estoppel will not be deemed to arise from facts which are ambiguous and subject to more than one construction.” *Tucker v. Hugoton Energy Corp.*, 253 Kan. 373, 383, 855 P.2d 929 (1993).

A landowner is charged with knowledge of zoning ordinances. *Goodwin v. City of Kansas City*, 244 Kan. 28, 33–34, 766 P.2d 177 (1988). City approval of a use prohibited by ordinances is without effect. “[T]here can never be estoppel against a city when it acts beyond its authority.” A city cannot authorize what amounts to the violation of an ordinance. “Landowners have the right to rely on strict compliance with those ordinances legislated by the city.” *Id.* Further, “a municipal officer generally cannot work an estoppel by his or her acts or waive any right the municipality has. The rationale for this rule is that a municipality serves to protect the public interest and that the public should not suffer because municipal officers were lax in performing their duties.” *B & E Investments, Inc. v. City of Wichita*, 2006 WL 1816328, at \*3 (Kan.App.) (unpublished opinion), *rev. denied* 282 Kan. 788 (2006).

See *St. Charles, LLC v. City of Topeka*, 2014 WL 3907116 (Kan.App. 2014) (unpublished) (city employees had no authority to violate city zoning ordinance and could not bind city when negotiating for such a term in a contract); *Sharp v. City of Leawood*, 2008 WL 3005280 (Kan.App. 2008) (unpublished) (city was not estopped from issuing a violation notice

even if city's planning director gave erroneous information about height restrictions on a treehouse); *Hockenbarger v. City of Topeka*, 2012 WL 6634359 (Kan.App. 2012) (unpublished) (city was not estopped from issuing a violation notice even if a city inspector gave permission to build a non-conforming shed).

The Habigers cannot show that the acts of the City induced them to believe certain *facts* existed. Zoning ordinances, including the NCD standards, are not facts but laws – and the Habigers are charged with knowledge of their existence. Petitioners could not have rightfully relied on a permit which would allow them to violate the law. Thus, even if the permit purported to approve of a fence built in front of the portico of the Habigers' home (which is disputed), the City is not bound by such an approval. The employee who approved the permit had no authority to authorize a violation of city zoning ordinances. The City is not estopped from enforcing its ordinances.

## **2. Due process.**

The Habigers argue that they were denied due process as a result of *ex parte* communications and prejudgment by the BZA. “In a quasi-judicial proceeding, it is incumbent upon the authority to comply with the requirements of due process in its proceedings. Thus, the proceedings must be fair, open, and impartial. A denial of due process renders the resulting decision void.” *Gump*, 35 Kan.App.2d at 513-14.

“[P]rejudgment statements by a decision maker are not fatal to the validity of the zoning determination as long as the statement does not preclude the finding that the decision maker maintained an open mind and continued to listen to all the evidence presented before making the final decision.” *McPherson Landfill*, 274 Kan. at 318. If any *ex parte* communications were

eventually made part of the record and the parties given an opportunity to respond, there is no denial of the due process right to a fair and impartial hearing. *Id.* at 321.

The Habigers point to no evidence even hinting at prejudgment or undisclosed ex parte communications. The 75-minute hearing was part of the record in this matter and the Court thoroughly reviewed it. The Habigers did not cite any portion of that hearing which might have suggested prejudgment or ex parte communications, likely because there was no such material to cite. The Habigers assert that they cannot find any evidence to support this claim without further discovery. But “[a] party cannot avoid summary judgment on the mere hope that something may develop later during discovery or at trial.” *Troutman v. Curtis*, 36 Kan.App.2d 633, 652, 143 P.3d 74 (2006).

When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. The Habigers have not come forward with any evidence to suggest a dispute about prejudgment or undisclosed ex parte communications. Further, even if they had, it is not clear that it would change the outcome here. There is no dispute that the Habigers’ fence extended beyond the furthest possible “front face” of the residence. The violation is clear, and any alleged prejudgment or ex parte communications would not change that.

### **3. Attack on the NCD.**

Petitioners challenge the NCD standard as vague and ambiguous based on the definition of “front face,” but the fence violates the NCD under either definition. Because the NCD standard has been violated regardless of the interpretation of “front face,” the Habigers have no standing to challenge the NCD standard on this basis. *Hearn v. City of Overland Park*, 244 Kan.

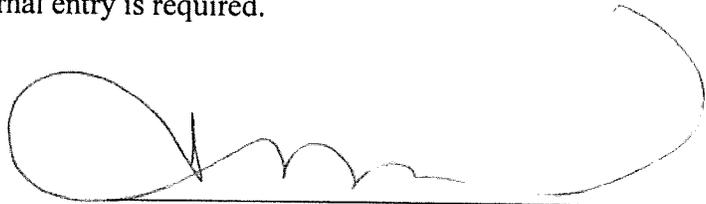
638, 639, 772 P.2d 758 (1989) (“One to whose conduct a statute applies may not successfully challenge it for vagueness.”).

Petitioners then argue that the NCD standards were adopted without affording them due process. Their vehicle for challenging the enactment of the NCD standards is K.S.A. 12-760, and it provides that an appeal from adoption of zoning regulations must be made within 30 days of the City’s final decision. The NCD standards were enacted in February 2014. Any attack on the adoption of the NCD standards is time-barred.

**Conclusion.**

This Court is limited to determining the reasonableness and lawfulness of the BZA’s action. Petitioners’ attorney admitted at the BZA hearing that the Petitioners’ fence extends beyond the “front face” of their residence under any interpretation of the NCD standards, and this is a violation. The BZA’s decision was reasonable, and Petitioners’ attempts to challenge the lawfulness of the decision fail as a matter of law.

Respondent’s motion for summary judgment is granted. The petition for review is denied. This disposes of the case and no further journal entry is required.



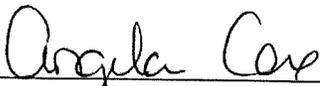
HON. TERESA L. WATSON  
District Court Judge

**CERTIFICATE OF SERVICE**

I, Angela Cox, hereby certify that the above document was delivered or deposited in the U.S. Mail, postage prepaid, on the 22<sup>nd</sup> day of November, 2016.

Thomas Lemon  
2942A SW Wanamaker Dr., Suite 100  
Topeka, KS. 66614  
*Attorney for Petitioners*

Nicholas Jefferson  
City of Topeka  
215 SE 7<sup>th</sup>, Room 353  
Topeka, KS. 66603  
*Attorney for Respondent*

  
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Angela Cox  
Administrative Assistant