District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306 (303) 441-3744	
THE CITY OF LONGMONT, Plaintiff-Appellee, v. **RAYMOND SMITH,** Defendant-Appellant.	**▲ COURT USE ONLY ▲**
Attorney for Plaintiff: Rodrigo H. Rangel *Attorney for Defendant:* James M. Manley	Case Number: **15CV30808** Division 2 Courtroom Q

RULING AND ORDER ON APPEAL

This matter comes before the Court on Defendant Raymond Smith's ("Defendant") appeal of Municipal Court case 2014-1. Defendant filed an Opening Brief on September 8, 2015. Plaintiff City of Longmont ("City" or "Plaintiff") filed an Answer on September 24, 2015. Defendant filed a Reply on October 7, 2015. Having carefully considered the briefs, record, and applicable law, the Court enters the following ruling and order:

I. BACKGROUND

This dispute arises out of a code enforcement action in which the City of Longmont brought charges against Defendant for five counts of conducting a mobile auto repair business, which was not permitted in the zoning districts of the City, in violation of section 15.09.030.D of the Longmont Municipal Code ("L.M.C." or "Code") and one count for expired license plate tags in violation of section 11.12.050, L.M.C.

The City of Longmont Municipal Court held a bench trial on April 1, 2015. At the trial, Susan Basabe, a City of Longmont Code Enforcement Officer, testified she had observed and documented Defendant's windshield chip repair business at 1550 Main Street, Longmont, Colorado, informed Defendant that such use of the property was not permitted under the zoning and use ordinances, sent Defendant written notices to cease operations, and eventually filed the present charges after Defendant failed to cease operations. The Court also heard testimony from Dane Hermsen, a City of Longmont Code Enforcement Inspector, and Defendant.

The municipal court found Defendant guilty on all counts. On June 11, 2015, the municipal court sentenced Defendant to a 20 day suspended jail sentence, $385 fine, and one year of probation. Defendant appeals only his conviction on the five counts for violation of section 15.09.030.D, L.M.C., and does not appeal the conviction for expired license plate tags.

II. ISSUES ON APPEAL

In his appeal, Defendant argues he did not violate the City of Longmont Municipal Code because the Code does not criminalize windshield repair and the City of Longmont failed to prove the elements of the offense charged. Defendant asserts the City of Longmont Municipal Code is unconstitutional because the code is unconstitutionally vague, violates Defendant's right to earn a living, and violates equal protection under the Colorado and United States Constitutions.

III. STANDARD OF REVIEW

An appeal taken from a judgment and conviction in a qualified municipal court of record shall be made to the district court of the county in which the municipal court is located, and the practice and procedure shall be the same as that provided by section 13-6-310, C.R.S., and applicable rules of procedure for appeal of misdemeanor convictions from county court to the district court. § 13-10-116, C.R.S.; C.M.C.R. 237; *see also Hylton v. City of Colo. Springs*, 505 P.2d 26, 28 (Colo. App. 1973).

In general, section 13-6-310(1), C.R.S., permits a party to appeal a decision from county court to the district court of the judicial district in which the county court entering judgment is located. Such appeals shall be based upon the record made in the county court. *Id*. Section 13-6-310(2), C.R.S., provides that the district court "shall review the case on the record on appeal and affirm, reverse, remand, or modify the judgment; except that the district court, in its discretion, may remand the case for a new trial with such instructions as it may deem necessary, or it may direct that the case be tried *de novo* before the district court." If the district court chooses to exercise its powers of review rather than conduct a trial *de novo*, it may not act as factfinder and is bound by the findings of the trial court which have been determined on disputed evidence. *People v. Williams*, 473 P.2d 982, 983-84 (Colo. 1970); *People v. Brown*, 485 P.2d 500, 502 (Colo. 1971).

On appeal, questions of law are reviewed *de novo*; questions of fact are reviewed for clear error; and questions of discretion are reviewed for abuse of discretion. *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1988).

IV. ANALYSIS

A. Violation of Longmont Code

1. Ordinance Interpretation

Statutory interpretation is a question of law that the district court reviews de novo. *Gessler v. Colo. Common Cause*, 327 P.3d 232, 235 (Colo. 2014). The same rules of construction apply in the interpretation of ordinances and statutes. *Steamboat Springs Rental & Leasing, Inc. v. City & Cnty. of Denver*, 15 P.3d 785, 787 (Colo. App. 2000).

Defendant argues the Longmont Municipal Code does not apply to Defendant's conduct because the Code does not address windshield repair businesses and cannot be interpreted to

include such business. The Court finds the Code does not specifically address "windshield repair" businesses but does address "motor vehicle repair and maintenance." *See* section 15.04.010, L.M.C. The Code provides "where the definition or meaning of a word used in any section is not sufficiently apparent in its connection with the subject, the definition given in Merriam-Webster's Collegiate Dictionary, 11th Edition (2003) shall be taken as the true meaning." § 1.04.020, L.M.C. The Court finds the term "motor vehicle repair and maintenance" is sufficiently apparent and includes repairs to windshields of a motor vehicle.

The City argues the Code's zoning and use provisions limit the "principal use" of "[m]otor vehicle repair and maintenance" to certain zoning districts, and when the motor vehicle repair and maintenance is being "[c]onducted partially or completely outside an enclosed structure" it may only be allowed as a "conditional use" in a "mixed industrial zoning district" or as a "limited use" in a "general industrial zoning district." § 15.04.010, L.M.C.

The Court interprets section 15.04.010, L.M.C., to prohibit motor vehicle repair and maintenance that is conducted partially or completely outside of an enclosed structure unless the user has received approval from the appropriate authority for such conditional use in a mixed industrial zone or limited use in a general industrial zone.

Defendant argues, in his Reply, that section 15.04.010, L.M.C., applies only to principal uses and Defendant's windshield repair business was not the principal use of the property. The Code's use regulations differentiate between principal uses, accessory uses, and temporary uses. *See* Chapter 15.04, L.M.C. The Code defines a principal use as "the specific primary purpose for which a property is used" and states "[a]ny specific use listed in the Table of Principal Uses by Zoning District (Table 15.04-A in subsection 15.04.010.J) established on a lot or parcel would generally be considered a 'principal use' of such property." § 15.10.020, L.M.C. An accessory use is "a use that is subordinate to and serves the principal use; is subordinate in area, extent, and purpose to the principal use; is located on the same lot as the principal use; and is customarily incidental to the principal use." *Id.*

The Court finds Defendant's windshield repair business is a principal use subject to the zoning and use limitations in the Code. Defendant is using the property for a specific primary purpose of motor vehicle repair and maintenance. Defendant's motor vehicle repair and maintenance use, listed in the Table of Principal Uses in section 15.04.010.J, is generally considered a principal use of property. *See* § 15.10.020, L.M.C. Defendant's use of the property is not an accessory use that is subordinate to and serving another principal use. While Defendant may operate his business in the parking lot of the Countrywood Inn & RV Park, the motor vehicle repair and maintenance use has no relation to the Countrywood Inn & RV Park, except that the two operations are functioning on the same tract of land.

The Court relies on the Colorado Supreme Court's decision in *Board of Cnty. Comm'rs v. Thompson*, 493 P.2d 1358 (Colo. 1972), in reaching its conclusion that a tract of land is not limited to one principal use. In *Thompson*, the family owned a tract of land that was zoned A-Agricultural and used the property as their family home, for farming operations, and also to store sixty automobiles, scrap metal, and other discarded materials. 493 P.2d at 1359. The county brought an action against the Thompsons arguing the property was being used as a junk yard, a

principal use that was impermissible for property in an agricultural zone. *Id.* at 1359-60. The Supreme Court found the Thompsons used their tract of land for two permitted principal uses, as a family dwelling and for grazing of cattle. *Id.* at 1360. The Court further held the storage of the vehicles fell within the definition of a "junk yard" as defined in the zoning resolution as a principal use, and such use was not permitted in the agricultural zone. *Id.*

Like *Thompson*, Defendant used the parking lot of the Countrywood Inn & RV Park for the specific primary purpose of motor vehicle repair and maintenance, a principal use. Defendant cannot show the motor vehicle repair and maintenance was subordinate to or serving the Countrywood Inn & RV Park. The two principal uses may coexist on the same property at the same time. That the property was primarily used for agriculture and dwelling as in *Thompson*, or for lodging as in the present case, cannot exempt another principal use of the property from complying with applicable laws.

Therefore, Defendant's windshield repair business constitutes a principal use of motor vehicle repair and maintenance that is not permitted in any zoning district when it is being conducted partially or completely outside an enclosed structure unless the user has received approval from the appropriate authority for such conditional use in a mixed industrial zone or limited use in a general industrial zone.

2. Violation of the Code

Defendant argues the City failed to prove the elements of the offense charged and that the record does not list the elements of the offense charged nor identify the evidence supporting each element. Defendant additionally argues he cannot be criminally liable under section 15.09.030.D, L.M.C., because the City cannot prove the following elements of the crime: i) that one or more approvals were available and ii) Defendant engaged in the use of land without first obtaining the required approvals.

"A defendant can be convicted only upon proof beyond a reasonable doubt of every element of the crime charged." *People v. Rodriguez*, 914 P.2d 230, 271 (Colo. 1996).

The enforcement provision of the Code under which the City brought charges against the Defendant is section 15.09.030.D, L.M.C., which states, "It shall be a violation of this land development code to . . . engage in the use of a building or land, the subdivision or development of land or any other activity requiring one or more approvals under this subdivision ordinance without first obtaining all required approvals."

Section 15.09.050, L.M.C., provides the remedies and powers to enforce the development code and prescribes both civil and criminal remedies. Section 15.09.050.B.1, L.M.C., states "Criminal offense. It is a violation of this development code, after service of a notice of violation including any stop work order, to fail to comply with such notice or stop work order." Here, Defendant was charged with a criminal violation of the Code and ultimately found guilty of criminal offenses. Therefore, pursuant to section 15.09.050.B.1, L.M.C., Defendant must have been served with a notice of violation and failed to comply with such notice. The Court finds these are additional elements of the crime that must be proven beyond a reasonable doubt.

Thus, the elements of the crime are that 1) Defendant engaged in the use of a building or land, the subdivision or development of land or any other activity, 2) requiring one or more approvals under this subdivision ordinance, 3) without first obtaining all required approvals, 4) for which Defendant was served with a notice of violation, and 5) Defendant failed to comply with such notice. *See* §§ 15.09.030.D, 15.09.050.B.1, L.M.C.

This Court cannot overturn findings of fact unless they are clearly erroneous. *Valdez,* 966 P.2d at 590. However, where the trial court has not made findings of fact to support its conclusion, the action shall be remanded to give the trial court an opportunity to make appropriate findings. *People v. Martinez*, 523 P.2d 1405, 1405-06 (Colo. 1974).

The Court finds the municipal court failed to make all necessary findings of whether the elements of the crime were proved beyond a reasonable doubt. The elements were not identified at trial or sentencing. While the municipal court stated "the evidence establishes each of the violations and the elements have been established beyond a reasonable doubt," the municipal court does not identify what the elements were and how they were proved.

The first element is that Defendant engaged in the use of a building or land, the subdivision or development of land or any other activity. The municipal court made factual findings that Defendant engaged in the use of land on five occasions: January 25, 2014; February 28, 2014; March 24, 2014; April 17, 2014; and November 5, 2014. The Court finds no clear error in these findings.

The second element is that Defendant's use of a building or land required one or more approvals under this subdivision ordinance, and the third element is that Defendant did not first obtain all required approvals.

The Court is unable to identify in the record any evidence presented by the City or finding by the municipal court regarding any approval available to Defendant under the Code for his specific use of the land in question. The only testimony regarding an approval is the following testimony from Susan Basabe: "He would have to get an approval from the City, yes. But we would not give such approval for outdoor use." Ms. Basabe's testimony is vague and does not clearly establish that an approval was available to Defendant. "He would have to get an approval from the City" suggests an approval was available. "But we would not give such approval for outdoor use" could be construed to mean that the City would exercise discretion to deny Defendant's request for approval or that there is no approval available because the Code does not allow Defendant's specific use of the land in question. Ms. Basabe's testimony does not identify what approval was necessary and under what provision of the Code Defendant could seek and obtain such approval.

The first time the arguments regarding the applicability of section 15.04.010, L.M.C., to Defendant's conduct have been made to the court is on appeal. While sections 15.04.010-15.04.040 and sections 15.09.010-15.09.080, L.M.C., are included in the record within the filing "Lower Court Record Exhibits," the Court is unable to locate any instance where the sections of the code were presented as evidence by testimony or exhibit. The municipal court's ruling does

not address these sections of the code. Further, neither party desired to make a closing statement to argue the applicability of the law to Defendant's conduct.

In the parties' briefing to this Court on appeal, the City argues Defendant used land to conduct an activity, motor vehicle repair or maintenance conducted completely outside an enclosed structure, in the parking lot of 1550 Main Street, which required one or more approvals under the subdivision ordinance. The City relies on section 15.04.010, L.M.C., which sets forth the zoning districts in which certain principal uses may be conducted. The table sets forth that motor vehicle repair and maintenance that is conducted partially or completely outside of an enclosed structure is only allowed as a conditional use in a mixed industrial zoning district or as a limited use in a general industrial zoning district, and such use is prohibited in all other districts. The City states any conditional use or limited use, where permitted, requires approval of the planning and zoning commission or planning director, respectively. *See* §§ 15.02.050.C, 15.02.060.E, L.M.C. The City argues Defendant did not request or receive approval from either the planning and zoning commission or the planning director to conduct his automobile windshield repair business.

Defendant argues section 15.04.010, L.M.C., does not require Defendant to obtain one or more approvals because approvals are only available in a general industrial or mixed industrial zone and are not available to a property in a commercial zone, such as the instant property at 1550 Main Street.

The parties appeal briefs both imply that 1550 Main Street is in a commercial zoning district. The City in their brief presumes the property is in a commercial zone, and Defendant concedes in his brief "the Countrywood Inn is in a commercial zone." The only evidence at trial regarding the zoning of the property was the testimony of Defendant that it was a "commercial property." (Trial Tr. 42:5.) However, no evidence was presented to the municipal court as to the specific zoning district in which the property is located. While the municipal court concluded at sentencing "[Defendant] was conducting repairs on privately owned commercially zone property," there is no evidence or finding of fact at trial as to how the property was zoned. With no evidence in the record of the zoning district applicable to the land on which Defendant's conduct took place, there is no basis for determining if any approvals were required.

If the testimony of Defendant that "it's commercial property" were sufficient to establish that 1550 Main Street is in a commercial zoning district, which is a finding of fact that this reviewing court does not reach, the remaining issue is whether any approvals would be available to Defendant under the subdivision code.

Pursuant to section 15.04.010, L.M.C., cited by the City, Defendant could seek approval if he were operating his business in a general industrial or mixed industrial zone. If Defendant were not operating in a general industrial or mixed industrial zone, no approvals would be available for Defendant to seek under section 15.04.010, L.M.C. Section 15.09.030.D, L.M.C., the violation for which Defendant was charged, does not state "any" approvals. Rather the provision states "one or more approvals," implying that approvals must be available to the land user.

The Court does not reach whether any other approvals were available under a different section of the Code and whether the City failed to prove an essential element of the crime charged because there is no such finding by the municipal court to review.

Because no findings were made regarding whether one or more approvals under this subdivision ordinance were available for Defendant's use of the land and whether Defendant engaged in the use of the land without first obtaining such approval, the Court remands the case to the municipal court to make such findings if it is able to do so. The municipal court should determine whether there was sufficient evidence at trial to prove the proper zoning district for the instant property and whether one or more approvals were available to Defendant for his specific use of the land. If the municipal court finds such evidence is not available in the record, this matter shall be set for a new trial.

For the fourth and fifth elements, identified by this Court, the municipal court must find Defendant was served with a notice of the violation and Defendant failed to comply with such notice. As Defendant argues in his brief and the municipal court notes at sentencing, the City provided a Notice to Defendant advising Defendant that he was in violation of section 15.04.030.D.4, L.M.C., regarding Home Occupations.[1] However, Defendant was charged under section 15.09.030.D, L.M.C., and ultimately convicted under section 15.09.030.D, L.M.C., for a violation of section 15.04.010, L.M.C.[2] The municipal court did not make any findings at trial regarding the notice and whether the notice was sufficient to satisfy section 15.09.050.B.1, L.M.C.

The municipal court's ruling states: "Counts 1 through 5 were doing business not in compliance with the City Code. . . . The Municipal Code says you can't do this kind of business outside . . . and that's what Ms. Basabe testified to today, and that's what the Code specifies." However, the charged offense is more specific than simply doing business not in compliance with the Code. The municipal court must consider all elements of the offense charged and make findings accordingly, if it is able to do so based on the evidence at trial.

The Court notes other applicable code enforcement provisions exist within Chapter 15.09, L.M.C., that would not have required the City to prove the element of "requiring one or more approvals under this subdivision ordinance" and Defendant's use of the land "without first obtaining all required approvals." While the municipal court sentenced Defendant under section 15.09.030, the charges were clearly brought under subsection (D) of section 15.09.030, L.M.C. Therefore, section 15.09.030.D, L.M.C., is the only provision under which the municipal court can convict Defendant in the present case.

---

[1] Section 15.04.030.D.4 states "Home occupations shall be conducted entirely within the principal structure or an accessory structure associated with the residential use."

[2] While the municipal court did not make a finding that Defendant violated section 15.04.010, , L.M.C., the Court finds, based on the briefings to this Court, that such section is the basis for the City's prosecution of Defendant. The City made no mention of section 15.04.030.D, L.M.C., for Home Occupations at trial and does not argue the provision on appeal. Therefore, the Court finds the City's action was brought under the enforcement provision in section 15.09.030.D, L.M.C., for a violation of section 15.04.010, L.M.C.

On remand, the municipal court shall make findings on the elements of sections 15.09.030.D and 15.09.050.B.1, L.M.C., in accordance with this Court's ruling. If the municipal court determines it does not have sufficient information in the record to do so, it shall conduct a new trial.

B. Constitutional Challenges

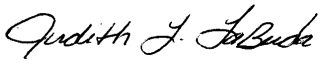
The Court holds there are insufficient factual findings in the record and remands the case to the Municipal Court to make such findings. As such, the Court does not reach the constitutional claims asserted by Defendant.

IV. CONCLUSION

In accordance with the foregoing analysis, the Municipal Court's ruling is REMANDED for further proceedings consistent with this opinion.

DATED: 12/11/15

BY THE COURT



Judith L. LaBuda
District Court Judge