

ORIGINAL

IN THE SUPREME COURT OF OHIO

Willis and Annette Boice )  
 )  
 Appellants, )  
 )  
 v. )  
 )  
 Village of Ottawa Hills, et al., )  
 )  
 Appellees. )  
 )  
 )  
 )

On Appeal from the Lucas County  
Court of Appeals, Sixth District

Case No. L-09-1253

12-0413

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS

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I. **EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

If allowed to stand, the decision of the Sixth District Court of Appeals in this matter will have far reaching consequences and will redefine the boundary for **governmental** regulatory taking of **private** property in Ohio. This matter involves an upscale municipal government that has amended its zoning ordinances such that a landowner who held title to vacant, but buildable, residential property is no longer permitted to use that property for any purpose except as additional green space for the neighboring properties. The municipality denies that its actions are unconstitutional as applied and denies that its actions result in either a partial or total regulatory taking.

In a stunning decision, the Sixth District Court held that a municipality through a zoning amendment may **totally restrict** the permissible uses of a landowner's property so long as some theoretical value remains in the property and so long as the landowner does not **personally intend** to build upon the land. The Appellate Court stated where property owners do not personally intend to build upon their property, "the only loss [the property owners] have sustained from the zoning regulation and denial of variance, is the loss in market value." (Decision of Sixth District Court of Appeals, November 4, 2011, p. 18). In-so-holding, the Sixth District determined that mere diminution in market value does not establish a government taking!

However, the Sixth District's opinion flies in the face of this Court's decision in *Negin v. City of Mentor* (1982), 69 Ohio St.2d 492, 497 wherein this Court stated: "The rendering of [a building lot] useless for any practical purpose goes beyond mere limitation of use and becomes a confiscation."

If permitted to stand, the Sixth District's opinion will essentially give a license to governing bodies throughout this state to promulgate and apply zoning regulations upon vacant land without any regard for the affected landowners so long as the governing body can prove that the affected land retains some theoretical market value post regulation, regardless of how miniscule the value and regardless of how hypothetical the market. The natural and ultimate consequence of Sixth District's opinion will be to drive down the value of all undeveloped property in this great State.

Property owners **will no longer be able to rely upon vested property rights until and unless they build upon their land.** Following this line of thought, the state can expect landowners of vacant land to seek to have their vacant property reassessed for tax purposes to properly reflect the risky nature of their holdings and as a result, **the tax base of municipalities and other government bodies throughout the state will be reduced as assessed values of vacant land plummet.**

**This new decision by the Sixth District puts at risk any landowner who holds vacant property in Ohio, threatens to devalue such property, endangers tax rolls which affect school funding and stands to undermine nearly a century of well-founded jurisprudence which has always protected the interests and reasonable expectations of private landowners.**

## II. STATEMENT OF FACTS

### A. Presentation of Issue

As the result of an amendment to the residential zoning regulations as promulgated by the Village of Ottawa Hills, Appellants, Annette and Willis Boice have been left holding title to a 33,000 sq. foot parcel of residential of property (approximately 78/100 of an acre) located in a platted

subdivision which cannot be built upon and is totally restricted in its use because in the eyes of the Village, it is now “too small” to be used.<sup>1</sup>

### **B. Ownership of Property**

In 1974, Mr. and Mrs. Boice purchased two adjoining residential parcels in the Village of Ottawa Hills. The parcels each had a separate legal description, each parcel was separately titled, each was separately recorded, and each received a separate tax bill. Mr. and Mrs. Boice lived in a house that was located upon the larger of the two parcels. The smaller parcel is the subject of this appeal (hereinafter “vacant residential parcel”). At the time that Mr. and Mrs. Boice took title to the two residential parcels, the vacant residential parcel was completely empty with the exception of natural foliage and a small encroachment of the driveway which provided access to Mr. and Mrs. Boice’s larger parcel. At some point thereafter, Mr. and Mrs. Boice had their driveway realigned so that it would no longer encroach upon the vacant residential parcel. In 1974 the vacant residential parcel qualified as a buildable lot under the then existing zoning code.

### **C. Request for Declaration to Build and Denial**

After living in their home for about thirty years, in or about 2004, Mr. and Mrs. Boice had an “empty-nest” and sought to move to a smaller home within the Village of Ottawa Hills. In preparation for their move, Mr. and Mrs. Boice planned to sell their home and the residential lot. They communicated with the Village of Ottawa Hills and requested verification that each of their two residential parcels would be treated as a separate building lot. The Village Manager

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<sup>1</sup> When the lot was purchased in 1974, the zoning regulation only required 35/100 of an acre for the parcel to be buildable.

replied that the larger parcel was a buildable lot but the vacant residential parcel was not because that lot failed to meet the **new** minimum lot size requirement for residential building lots within the zoning district.

**D. Basis for Denial**

Upon investigation, Mr. and Mrs. Boice learned that the Village of Ottawa Hills had amended their zoning regulations in 1978 to change the minimum lot size from 15,000 sq. ft. to 35,000 sq. ft. and that the Village of Ottawa Hills intended to apply the 1978 zoning ordinance to their vacant residential parcel despite the fact that the vacant residential parcel met the applicable zoning requirements for building at the time that Mr. and Mrs. Boice purchased the lot in 1974. This clearly is a wrongful application of an *ex post facto* statute

**E. Request for Variance or Lot Split**

Being reasonable persons, Mr. and Mrs. Boice appealed the decision of the Village Manager and requested a variance arguing that the parcel was held separately and platted since 1926 and should be grandfathered from a subsequent zoning amendment which would in effect render the parcel useless. In the alternative, Mr. and Mrs. Boice presented a proposal to split a portion of their larger residential parcel and add it to the vacant residential parcel in order to satisfy the new minimum lot size requirement. The Village of Ottawa Hills Zoning Commission affirmed the ruling of the Village Manager and denied the lot-split proposal on the grounds that the resultant lot split would cause the house on the larger residential parcel to violate the minimum side-yard setback.

**F. Appeal to the Court of Common Pleas**

Mr. and Mrs. Boice appealed the decision of the Zoning Commission to the Court of Common Pleas of Lucas County. The matter was dismissed upon motion, appealed, remanded, and finally a bench trial was conducted in 2009. At trial, the Boices introduced the following evidence:

- 1) That their vacant residential parcel was separately platted for residential building purposes in 1926;
- 2) That the Village of Ottawa Hills permitted a lot split to reduce the size of the vacant residential parcel in 1973;
- 3) That pursuant to state law, a municipality shall not permit a lot split which results in the creation of a non-buildable parcel;
- 4) That in 1974, when Mr. and Mrs. Boice took title to the property, the vacant residential parcel met the minimum lot size requirements of the Village of Ottawa hills and that the lot was a buildable lot; (See Sixth Circuit Opinion, p.3)
- 5) That Mr. and Mrs. Boice believed that the vacant residential parcel was buildable throughout the time that they held title to the property;
- 6) That for over thirty years, Mr. and Mrs. Boice paid high real estate taxes on the vacant residential parcel while it was assessed as if it were a buildable lot;<sup>2</sup>
- 7) That as a result of the application of the 1978 zoning amendment, the vacant residential parcel cannot be used for any purpose except green space; and
- 8) That the only potential market for the vacant residential parcel would be to the adjoining lot owners.

In rebuttal, the Village of Ottawa Hills introduced evidence at trial in the form of an appraisal report which suggested that the vacant unbuildable lot might have a sale value of tens of thousands

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2 The Village of Ottawa Hills has no industry and a great school system so real estate taxes are extremely high on residential property.

of dollars. The trial court adopted the Village of Ottawa Hill's appraisal evidence and dismissed without discussion the issues as to whether the Boice's property could be put to any use other than green space and as to whether the Boice's property was actually saleable. In a strained application of the *Penn Central Transp. Co. v. New York City* (1978), 48 U.S. 104 test for regulatory takings, the trial court held that no taking had occurred because the Village of Ottawa Hills had carried its burden by simply demonstrating through appraisal that Mr. and Mrs. Boice's lot retained an appraised value regardless of how speculative that value.<sup>3</sup>

### **G. Appeal to the Sixth District**

Mr. and Mrs. Boice appealed the trial court decision, highlighting the fact that the trial court had failed to engage in a review of the zoning regulation's impact on the potential uses on the vacant residential parcel and highlighting the fact that Mr. and Mrs. Boice could do nothing with their vacant residential lot except to sell it to a neighboring landowner. The Sixth District Court of Appeals noted that "it was made clear at the trial below that the only practical purpose for the lot is to sell it to an adjacent landowner". The Sixth District court went on to cite this Court's decision in *Negin*, 69 Ohio St.2d 492, wherein it was stated that selling a lot to an adjacent landowner does not constitute a practical use of property as it pertains to regulatory takings analysis. In effect, the Sixth District acknowledged that the Village of Ottawa Hill's amended zoning regulation "as applied" totally restricted the use of Mr. and Mrs. Boice's residential lot. Nonetheless, the Sixth District did

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3 Upon cross examination the appraiser ostensibly admitted he made an error when he used a comparison where a lot was split and each adjacent homeowner purchased half the lot. Also, the other Expert for the Village of Ottawa Hills, a well-known realtor who sells many large estate homes and lots in the Village, upon cross examination admitted she would not accept a listing on the vacant lot **because it was not saleable.**

not apply the total regulatory taking test as dictated by *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, but rather continued with its analysis as a partial regulatory taking concentrating solely on investment-backed expectations. **The Sixth District upheld the trial court's decision and stated that because Mr. and Mrs. Boice did not intend to build on their vacant residential lot when they bought it, the regulation prohibiting the ability to build was not a regulatory taking.**

#### **H. Motion for Reconsideration before the Sixth District**

Appellants filed a motion for reconsideration, explaining at length how the *Negin*, supra decision as relied upon by the Sixth District, does not impose any requirement that a landowner build or intend to build upon his vacant land before a claim may arise regarding a total regulatory taking. The Sixth District disagreed and upheld its prior decision.

### **III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

#### **A. Proposition of Law No. 1: Elimination Of The Only Permissible Use Of A Parcel Of Residential Property Through Regulation Is A Total Regulatory Taking**

The United States Supreme Court has held that citizens acquire a "bundle of rights" when they take title to property. In accordance with the Takings Clause, that "bundle" cannot be stripped of all economically beneficial uses through government regulation unless compensation is paid to the owner. *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals* (1993), 66 Ohio St.3d 452, 457 citing *Lucas*, 505 U.S. at 1030. There is no economically beneficial use left in land when "the permitted uses are not economically feasible, or the regulation permits uses which are highly improbable or practically impossible under the circumstances." *Valley Auto Lease of Chagrin*

*Falls Inc. v. Auburn Twp. Bd. of Zoning Appeals* (1988), 38 Ohio St.3d 184, 186, 527 N.E.2d 825; *Ketchel v. Bainbridge Twp.* (1990), 52 Ohio St.3d 239, 243-44.

In this case, the Sixth District stated unequivocally, “No home can be built upon [the Boice’s residential lot] and **it was made clear at the trial below that the only practical purpose for the lot is to sell it to an adjacent landowner.**” (Sixth District Opinion, p. 17)(emphasis added). In *Negin v. Board of Bldg. and Zoning Appeals of City of Mentor* (1982), 69 Ohio St.2d 492, 496, this Court rejected the notion that selling land “as acreage residence land for property to adjoin to either side ...” was an economically beneficial use. This Court stated “[w]e find that these suggested uses are so illusory and unlikely as to render [the lot] effectively useless.” *Id.*<sup>4</sup>

Yet, the Sixth District rejected the opinions cited above and created a new exception in the law of regulatory takings. The court unilaterally declared that the question of whether a regulation strips land of all economically beneficial use is simply not relevant to a claim for regulatory taking so long as the landowner did not intend to build on the land. Appellants have been unable to identify a single reported case which supports the Sixth District’s contention that preservation of any economically beneficial use is contingent on the landowner’s subjective intent to personally use the property. If this were the case, landowners would be forced to immediately develop their vacant land or risk losing all vested property rights in that land!

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4 The Boices are now getting threats from the Village of Ottawa Hills that they will be criminally charged with maintaining a nuisance if they do not cut the grass!

**B. Proposition of Law No. 2: The Pre-Existing Vested Rights In Property Exist Independent Of A Landowner's Intent To Personally Exercise Those Rights**

This Court declared that “a zoning ordinance must be general in its application, the classification as to which the property may be devoted must be reasonable, and **the pre-existing vested rights must be recognized and protected.**” *Smith v. Juillerat* (1954), 161 Ohio St. 424 (emphasis added). “A vested right is the power to do certain actions or possess certain things lawfully and is substantially a property right and may be created either by common law, by statute or by contract. **A failure to exercise a vested right before the passage of a subsequent statute, which seeks to divest it, in no way affects or lessens that right.**” *Scamman v. Scamman* (1950), 56 Ohio Law Abs. 272, 274. *Washington Cty. Taxpayers Assn. v. Peppel* (4<sup>th</sup> Dist. 1992), 78 Ohio App.3d 146.

In this matter, the parties, the Sixth District Court, and the State Legislature all have conflicting views as to what the pre-existing vested rights in property are, when those rights come into being, and when those rights can be extinguished. According to the Village of Ottawa Hills, the pre-existing vested rights in property come into being at the time that a lot is “originally platted” for residential use and are extinguished by any subsequent alteration of the “originally platted” lot.<sup>5</sup> Applying the practice of the Village of Ottawa Hills, had the Appellants, Mr. and Mrs. Boice, purchased a vacant residential lot of the very same size in the very same neighborhood, the Village of

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5 The Village’s position would appear to be in conflict with this Court’s decision in *State ex rel. Spencer v. E. Liverpool Planning Comm.* (1999), 85 Ohio St.3d 678, 680 (holding that the effect of approval of a lot-split is to create a new lot as if approved under the original plat).

Ottawa Hills would have permitted the Boices to build on the lot so long as the lot had never been altered from its original plat.

The Sixth District Court takes a different approach to the question and states that pre-existing vested rights in property are simply extinguished by the landowner's lack of intent to exercise his vested property rights.<sup>6</sup> The court essentially says that a landowner must build or substantially commit funds and resources to the exercise of his property rights or he is at risk of losing those property rights. Finally, our state Legislature provides that property rights are vested at the time of enactment of zoning and continue throughout the use of the property. See R.C. 303.19:

The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with the provisions of such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of such land shall be in conformity with sections 303.01 to 303.25 inclusive, of the Revised Code. The board of county commissioners shall provide in any zoning resolution for the completion, restoration, reconstruction extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning resolution.

### C. Conflict in Appellate Districts

Unfortunately, as with all statutes, R.C. 303.19 is subject to interpretation. The Village of Ottawa Hills has argued that R.C. 303.19 does not apply to the Boice's vacant residential lot because the lot has been put to no use. **However, the Eleventh District court recognized that "lawful use"** for purposes of R.C. 303.19 includes vacant lots which are below the minimum lot size under new zoning resolutions. The court held that "lawful use" was established in light of the fact that an

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<sup>6</sup> The Sixth Circuit's position would appear to be in direct conflict with the Fourth Appellate District's position in *Washington Cty. Taxpayers Assn. v. Peppel* (4<sup>th</sup> Dist. 1992), 78 Ohio App.3d 146.

improved residential lot is different from a piece of barren land; it has unique topographical features, geometrical form, access to streets and access to utilities tailored for its use. See *Schreiner v. Russell Tp. Bd. of Trustees* (11<sup>th</sup> Dist. 1990) 60 Ohio App.3d 152, 573 N.E.2d 1230, motion overruled 52 Ohio St.3d 703, 556 N.E.2d 529.

The parties, the Appellate Courts, and even the Legislature have weighed in on this important issue but we cannot resolve this conflict. This Court has before it, the opportunity to apply some common sense and set forth once and for all a rule defining pre-existing vested rights. Appellants would urge this Court to clarify that a landowner has a reasonable expectation to maintain the same, similar or at very least, **some** of the options for use of his land that were in existence when the landowner originally paid for and took title to that land. Absent such a rule, a landowner really has no pre-existing vested property interests and this Court's declaration that "**pre-existing vested rights must be recognized and protected**" becomes **absolutely meaningless**. See *Smith*, 161 Ohio St. 424.

#### IV. CONCLUSION

For the reasons discussed above, this case involves matters of public or great general interest. Willis and Annette Boice, request that this Court grant jurisdiction and hear this appeal so that the important regulatory takings issues presented in this case will be reviewed, and pursuant to S.Ct.

Prac. R. 9.1(A)(2) Appellants invite this Court to hear oral argument with respect to the issues presented.

Respectfully submitted,

BARKAN & ROBON LTD.

By: Marvin A. Robon  
Marvin A. Robon

By: Larry E. Yunker II  
Larry E. Yunker II

## **APPENDIX**

- \* Certificate of Service
- \* Decision and Judgment Entry of the Sixth Appellate District, Lucas County, dated November 4, 2011
- \* Decision and Judgment Entry from the Sixth Appellate District, Lucas County, dated January 26, 2012

**CERTIFICATION**

This is to certify that a copy of the foregoing was served on this 9<sup>th</sup> day of March, 2012, by ordinary U.S. Mail upon:

Sarah A. McHugh, Esq., **Maloney, McHugh & Kolodgy, Ltd.**, 20 N. St. Clair Street, Toledo, Ohio 43604

  
Of Counsel

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COMMON PLEAS COURT  
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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Willis Boice, et al.

Court of Appeals No. L-09-1253

Appellants/Cross-Appellees

Trial Court No. CI04-5482

v.

Village of Ottawa Hills, et al.

**DECISION AND JUDGMENT**

**NOV 04 2011**

Appellees/Cross-Appellants

Decided:

\*\*\*\*\*

Marvin A. Robon and Larry E. Yunker, II, for appellants/cross-appellees.

Sarah A. McHugh, for appellees/cross-appellants.

\*\*\*\*\*

PIETRYKOWSKI, J.

{¶ 1} This is an appeal and cross-appeal from judgments of the Lucas County Court of Common Pleas in an administrative appeal from a decision of appellee the Village of Ottawa Hills Zoning Commission. Appellees, the village of Ottawa Hills, its zoning commission and the commission's individual members (collectively referred to as

**E-JOURNALIZED**

**NOV -4 2011**

"Ottawa Hills"), challenge the lower court's denial of their motion to dismiss. Appellants, Willis and Annette Boice, challenge the lower court's judgment affirming the decision of the zoning commission and determining that appellees' application of Zoning Code Ordinance 2002-08 to appellants' real property located at 2570 Westchester Road, Ottawa Hills, Lucas County, Ohio, is not an unconstitutional taking of real property without just compensation.

{¶ 2} This is the second time this case has been before this court. In *Boice v. Ottawa Hills*, 6th Dist. No. L-06-1208, 2007-Ohio-4471 (*Boice I*), we remanded the case back to the lower court for a redetermination of the regulatory takings issue in light of the correct standards that we set forth in that decision. Nevertheless, for the sake of clarity, we will repeat herein the relevant undisputed facts of this case.

{¶ 3} In 1974, appellants purchased two adjoining lots in the village of Ottawa Hills. Parcel 1, located at 2570 Westchester Road, included a home that was built in 1941. Parcel 2, located at 2550 Westchester Road, was vacant. The home on Parcel 1, however, extended slightly onto Parcel 2. In approximately 1926, Parcel 1 and Parcel 2 were platted as two separate lots and the plat was filed and accepted by the village of Ottawa Hills. In 1973, Robert and Kate Foster, who then owned both properties, reconfigured the lots by detaching a portion of Parcel 2 and adding it to Parcel 1 so that the house no longer sat across the lot line, although a portion of the driveway did. Appellees the village of Ottawa Hills and its Zoning Commission approved the reconfiguration of the lot line. As a result of this reconfiguration, the square footage of

Parcel 2 was reduced to approximately 33,000 square feet. When the parcels were reconfigured, and the following year when appellants purchased them, they were located in an A-4 zoning district. At that time, the minimum lot area requirement to build a single family residence in an A-4 district was 15,000 square feet. As such, when the lots were reconfigured and when appellants purchased them, Parcel 2 was a buildable lot.

{¶ 4} On May 15, 1978, the Council of the village of Ottawa Hills ("council") passed Ordinance 78-5, amending its zoning code. Under Article VII, Section 7.1 of Ordinance 78-5, the minimum lot area requirement to build a single family residence in an A-4 district was increased to 35,000 square feet. Subsequently, in 2002, the council again amended its zoning code. Through this amendment, Zoning Code Ordinance 2002-08, the council, in part, adopted a new district map which placed the two parcels at issue in a newly created A-12 zoning district. The minimum lot area requirement to build a single family residence in that district, however, remained 35,000 square feet.

{¶ 5} In 2004, appellants inquired of and were informed by the Ottawa Hills Village Manager that they could not build on Parcel 2 because the size of the lot did not meet the 35,000 square foot requirement. Appellants appealed that decision to the Zoning Commission of Ottawa Hills ("zoning commission"). They also requested a variance from the 35,000 square foot requirement or, if the variance was denied, a lot split which would reconfigure the line between Parcels 1 and 2 so as to increase the size of Parcel 2 to greater than 35,000 square feet. The zoning commission held a public meeting on August 19, 2004, at which they considered appellants' requests. A number of

Ottawa Hills residents expressed their opposition to the variance request for a number of reasons, including fear that it would set a precedent, housing density, and the general aesthetics of the area. Appellants' son, on behalf of appellants, responded that the original 1926 plat of the area showed two separate lots, that there was no evidence that the original developers of the plat intended to restrict the lot size to 35,000 square feet, that it had consistently been their understanding that Parcel 2 was a buildable parcel, and that they had paid taxes on the property as if it were a buildable parcel for many years. Upon consideration, the commission voted unanimously to deny the variance request.

{¶ 6} The commission then proceeded to consider the request for a lot split that would increase the size of Parcel 2. Again, the request was opposed by a number of residents and again the request was denied. Members of the commission stated that the denial was based on the lot size, green space, lot frontage and the effect on the neighborhood. In particular, one commission member stated that the surrounding parcels on Westchester Road were substantially larger than the proposed parcel.

{¶ 7} On October 24, 2004, appellants filed a notice of administrative appeal with the Lucas County Court of Common Pleas to challenge the decisions of Ottawa Hills and its zoning commission. Appellants filed their appeal pursuant to R.C. 2505.01 et seq. and R.C. 2506.01 et seq. and asserted that the decision of the zoning commission was erroneous, an abuse of discretion, procedurally defective, illegal, void, arbitrary, capricious, unreasonable, and/or unsupported by the preponderance of any substantial, reliable, or probative evidence. They further asserted that the decision constituted an

unconstitutional taking of real property without just compensation and that the 1978 zoning amendment was unconstitutional and unenforceable due to lack of proper notice. Appellants prayed for an order reversing the decision of the zoning commission, declaring that Parcel 2 is a buildable lot, and declaring that the decision of the zoning commission was unconstitutional, capricious, unreasonable and/or unsupported by a preponderance of substantial, reliable and probative evidence, and constituted an unlawful confiscation and taking of property.

{¶ 8} Upon review of the administrative record, the lower court determined that the decision of the Ottawa Hills Zoning Commission was not illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. The court, however, further held an evidentiary hearing and allowed the parties to submit additional evidence on the constitutionality of the zoning amendment as applied to Parcel 2. On June 9, 2006, the lower court issued a decision and order affirming the decision of the zoning commission. The court held that Zoning Code Ordinance 2002-08 is not unconstitutional as applied to Parcel 2 and held that the application of Zoning Code Ordinance 2002-08 to Parcel 2 does not constitute a taking of real property.

{¶ 9} Appellants challenged that judgment in an appeal before this court. On August 31, 2007, we issued our decision in *Boice I*. Upon review we determined that the lower court had applied the wrong standards in evaluating appellants' regulatory takings claim. That is, we held that the lower court erred in finding that no taking had occurred

in appellees' enforcement of its zoning ordinance and denial of appellants' variance request without first evaluating the case pursuant to the United States Supreme Court's standards set forth in *Lingle v. Chevron* (2005), 544 U.S. 528, and *Penn Central Transp. Co. v. City of New York* (1978), 438 U.S.104. We therefore remanded the case to the lower court for a redetermination of the regulatory takings issue in light of the correct standards set forth in our decision.

{¶ 10} After the case had been returned to the lower court, appellees filed a motion to dismiss for lack of jurisdiction and a separate motion to dismiss on the ground that the applicable statute of limitations had run on appellants' action. In an order of November 24, 2008, the lower court denied both motions, finding them "clearly without merit."

{¶ 11} Thereafter, the case proceeded to the rehearing on appellants' takings claim. On August 28, 2009, the lower court issued an opinion and judgment entry with findings of fact and conclusions of law. In reviewing the testimony submitted by the parties, the lower court found that the testimony of appellees' expert appraiser, Kenneth Wood, was more persuasive than the testimony of appellants' expert appraiser, Robert Domini. Domini had valued the parcel at \$38,000. In contrast, Wood had reviewed and considered for comparable value the sale of an unbuildable parcel one block from the Boices' property, for \$100,000, and the sale of an another unbuildable parcel nearby for \$176,000, to appraise the Boices' parcel at \$105,000. The court noted Wood's testimony that while the Boices' lot was not a buildable parcel, the \$105,000 appraised value

amounted to a 17 percent annual appreciated value and that the application of Domini's value to the parcel would constitute only a 5 2/3 percent annual appreciation rate. The court further noted that the Boices did not offer any contrary testimony with respect to the annual appreciation rate.

{¶ 12} The court then concluded, after applying the *Lingle* and *Penn Central* factors, that the Boices had not established that the 1978 amendment to the zoning regulation, or the 2002 amendment retaining 35,000 square feet as the minimum building lot size, interfered with their distinct investment-backed expectations. The court further concluded that the Boices had not established the parcel's nonconforming use as a buildable lot. The court therefore held that the application of the Ottawa Hills Zoning Code to appellants' property did not constitute an unconstitutional taking of property without just compensation and affirmed the decision of the Zoning Commission of Ottawa Hills.

{¶ 13} Appellants now challenge that judgment through the following assignments of error:

{¶ 14} "[1.] The trial court erred when it ignored the evidence that was presented showing the only practical use for the Boice's [sic] residential lot was as a park or as additional lawn acreage for adjacent lots.

{¶ 15} "[2.] The trial court erred when it completely discounted the evidence that showed that the Boice's [sic] residential lot was severely restricted in its marketability and that any valuation assigned would be illusory.

{¶ 16} "[3.] The trial court erred when it concluded that the Boice family was without investment backed expectations despite evidence that the Boice family purchased the Boice's [sic] residential lot with the expectation of later developing the lot or offering the lot for sale as a buildable lot.

{¶ 17} "[4.] The trial court erred when it ignored the disparate treatment of the Boice's [sic] residential lot in light of waivers given to other lots that were similarly situated.

{¶ 18} "[5.] The trial court erred when it failed to consider whether the denial of a variance on the Boice's [sic] residential lot resulted in an unconstitutional taking.

{¶ 19} "[6.] The trial court erred as a matter of law and/or abused its discretion when the court denied grand-fathering to the Boice's [sic] residential lot and by denying the testimony of appellants' real estate expert with regards to grand-fathering."

{¶ 20} In addition, appellees have challenged, through the following assignments of error, the trial court's denial of their motions to dismiss:

{¶ 21} "I. The trial court erred when it failed to dismiss plaintiffs' complaint, where plaintiffs failed to file their complaint regarding unconstitutional taking of property within the applicable statute of limitations.

{¶ 22} "II. The trial court erred when it failed to dismiss plaintiffs' complaint, based upon the doctrine of ripeness, where plaintiffs failed to exhaust the necessary statutory remedies before proceeding on their claim for an unconstitutional taking of property."

{¶ 23} We will initially address appellees' cross-assignments of error. Appellees first assert because appellants failed to file their complaint alleging an unconstitutional taking of property within the applicable statute of limitations period, the lower court erred in failing to dismiss the complaint. More specifically, appellees contend that appellants' claim of an unconstitutional taking is controlled by R.C. 2305.09(E), which provides that an action for a regulatory taking of real property shall be brought within four years after the cause of action accrued. Appellees assert that because appellants' challenge is based on the 1978 zoning ordinance that increased the minimum square footage of a buildable lot in the A-12 Zoning District of Ottawa Hills, that is the date on which the statute of limitations began to run. Appellants counter that because this case was filed before the lower court as an administrative appeal pursuant to R.C. 2505.07, that is the statute of limitations that applies. They further assert that if R.C. 2305.09(E) is the applicable statute of limitations, their claim did not accrue until 2004 when they requested, and were denied, a declaration from the village that the lot was buildable. They further claim that appellees have waived the statute of limitations defense.

{¶ 24} Civ.R. 8(C) states in relevant part: "**Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively \* \* \* statute of limitations, \* \* \* and any other matter constituting an avoidance or affirmative defense." Accordingly, a statute of limitations "is an affirmative defense that is waived unless pled in a timely manner." *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, citing *Lewis v. Trimble* (1997), 79 Ohio St.3d 231. In the proceedings below, appellees did raise the

issue of the statute of limitations, but they first raised it in a motion for judgment on the pleadings and/or motion to dismiss that they filed on March 30, 2006. That is, the motion was filed after the trial court's opinion and judgment entry of February 14, 2006, on the administrative appeal. In that entry, the court determined that the decision of the Ottawa Hills Zoning Commission was not illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence, but further set the matter for an evidentiary hearing to allow the parties to submit additional evidence on the issue of the constitutionality of the ordinance as applied to the parcel in question. The court held the hearing on the taking issue and the parties fully briefed the statute of limitations issue. In an order dated June 9, 2006, the lower court found no taking had occurred and further denied appellees' motion for judgment on the pleadings and/or motion to dismiss, citing appellees' failure to raise the affirmative defense in a timely manner. When appellants appealed that judgment to this court, appellees never challenged the lower court's statute of limitations ruling.

{¶ 25} The doctrine of the "law of the case" provides that the decision of a reviewing court remains the law of that case for all subsequent proceedings at both the trial court and reviewing levels. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1. This "doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." *Id.* at 3, citing *Gohman v. St. Bernard* (1924), 111 Ohio St. 726, 730-731. This rule of practice is "necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to

preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Id.*, citing *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32. The purpose of the rule is to ensure that upon remand, the mandate of an appellate court is followed by the trial court. *Stemen v. Shibley* (1982), 11 Ohio App.3d 263, 265.

{¶ 26} Appellees did not challenge the trial court's statute of limitations ruling on the first appeal in this case. Upon review, we remanded the case to the trial court for a redetermination of the takings issue. Pursuant to the doctrine of the law of the case, appellees can no longer challenge the trial court's ruling on the statute of limitations issue, and the trial court did not err in denying appellees' motion for judgment on the pleadings and/or motion to dismiss on that basis. Appellees' first cross-assignment of error is not well-taken.

{¶ 27} In their second cross-assignment of error, appellees contend that the lower court erred in denying their motion to dismiss the complaint for lack of jurisdiction. Appellees assert that appellants' claim alleging an unconstitutional taking is not ripe for review until they have sought and been denied just compensation by a governmental entity. This must be done, appellees assert, through a mandamus action against the village of Ottawa Hills seeking an order directing Ottawa Hills to institute an eminent domain proceeding to determine just compensation. Appellees counter that because they do not seek compensation for the alleged taking in the present action, it is ripe for review and the lower court had jurisdiction to hear the matter.

{¶ 28} We are again troubled by appellees' failure to raise this issue earlier in the proceedings. This case has been ongoing since October 2004, when appellants filed their notice of administrative appeal with the lower court and first raised the takings issue. Nevertheless, because jurisdiction can be raised at any point in a proceeding, we will address appellees' claim.

{¶ 29} In *Boice I*, we addressed the issue of whether the constitutional issues were properly before the trial court and held, at ¶ 21:

{¶ 30} "As to whether appellants were required to file a mandamus action, such an action is the proper vehicle for obtaining compensation for an unlawful taking. *State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104, 108. That is, the property owner files a mandamus action to compel a public authority to initiate appropriation proceedings to determine the property owner's right to compensation for the property taken. *Id.* In the present case, appellants did not seek compensation for the property that they alleged was taken. Rather, they sought an order that the zoning ordinance is unconstitutional as applied to their property, that the application of the ordinance to their property is confiscatory and constitutes an unconstitutional taking, and an order that the ordinance cannot be applied to Parcel 2."

{¶ 31} We, therefore, determined that the constitutional issues were properly before the lower court. Other courts have similarly addressed constitutional takings claims when they are raised in an administrative appeal from a decision of a zoning board

denying a request for a variance. See *Nichols v. Hinckley Twp. Bd. of Zoning Appeals* (2001), 145 Ohio App.3d 417; *Sullivan v. Hamilton Cty. Bd. of Health*, 1st Dist. No. C-020308, 2003-Ohio-6916; *Negin v. Bd. of Bldg. and Zoning Appeals* (1982), 69 Ohio St.2d 492. Accordingly, mandamus is not the exclusive method for challenging such decisions and the lower court did not err in denying appellees' motion to dismiss for lack of jurisdiction. The second cross-assignment of error is not well-taken.

{¶ 32} We will now address appellants' assignments of error which, together, challenge the trial court's finding that they did not suffer a regulatory taking of their property by appellees' enforcement of its zoning ordinance and denial of appellants' variance request.

{¶ 33} The first, second, third and fifth assignments of error are related and will be discussed together. In *Boice I*, we remanded this case to the trial court "for a redetermination of the regulatory takings issue in light of the correct standards" set forth by the United States Supreme Court in *Lingle*, supra, and *Penn Central*, supra. As we discussed in *Boice I*, the taking alleged in this case falls under the category of regulatory takings challenges governed by the standards set forth in *Penn Central*, supra. Pursuant to *Penn Central*, a court is to look to "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action," to determine if a regulatory taking has occurred in cases in which a regulation deprives a property owner of some but not all of the economically viable use of his or her land. *State ex rel. Shelly*

*Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, ¶ 19.

Accordingly, the court is to make a factual determination based on the evidence presented, *id.*, and this court will "defer to a lower court's factual determination if it is supported by competent, credible evidence." *State ex rel. BSW Dev. Group v. Dayton* (1998), 83 Ohio St.3d 338, 344. Regarding the lower court's application of the law to the facts, however, we review those decisions *de novo*.

{¶ 34} In evaluating the *Penn Central* factors, the lower court determined that appellants had failed to offer any probative expert testimony regarding Parcel 2's value and failed to establish that they had any distinct investment-backed expectations. On appeal, appellants challenge these findings through their assertions that the court ignored evidence showing the only practical use of the lot was as a park or additional acreage for the adjacent lots, discounted evidence that showed the lot was severely restricted in its marketability, and ignored evidence of appellants' investment-backed expectations.

{¶ 35} At the trial below, appellees presented the testimony of their expert witness, Kenneth Wood, a certified real estate appraiser. Wood testified that he was asked to determine the value of the subject lot as both a buildable and non-buildable parcel. Wood stated that he researched public records and looked at comparable sales. Although he admitted that there were only a few comparable sales of unbuildable lots in the estate section of Ottawa Hills, he did find two about which he testified. Both of those parcels were sold to abutting property owners who were motivated to buy so that they could build larger homes. In Wood's opinion, the value of appellants' parcel as an

unbuildable lot was \$105,000 at the time of the trial below. As a buildable lot, Wood's appraised the parcel at \$210,000. Wood also testified regarding the value of the property in 1978 at the time of the zoning amendment. He stated that as a buildable lot, the parcel would be worth \$33,000 in 1978, but as a non-buildable lot it would be worth \$16,500. Whether buildable or not buildable, Wood stated that appellants' parcel appreciated in value approximately 17 percent per year from 1978 to the present day. Wood agreed that as a non-buildable parcel, the only likely purchasers would be abutting property owners.

{¶ 36} Appellants presented their own real estate appraiser at the trial, Robert Domini. Domini, however, was called at the last minute when the testimony of appellants' original appraiser was ordered stricken from the record. Domini had originally appraised the property in 2005, prior to the first trial. At that time, he appraised the lot at \$190,000 if buildable and \$38,000 if not buildable. He stated, however, that in reaching the appraised values, there simply was not a reasonable amount of comparable sales data available. In evaluating this evidence, the lower court determined that appellees' expert witness presented a more credible estimate of the value of the parcel. As the trier of fact, that was his purview.

{¶ 37} The issues of the economic impact of a zoning regulation on a property owner and that owner's distinct investment-backed expectations are intertwined. Appellants assert that in reviewing these factors, the lower court failed to consider the economically viable uses of the property following the regulation and appellants' evidence of their investment-backed expectations.

{¶ 38} It is well-settled that "something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking." *State ex rel. Pitz v. Columbus* (1988), 56 Ohio App.3d 37, 41. Accordingly, in examining the economic impact of a zoning regulation, a court must look beyond the diminution in the fee simple value of the property. In the present case, the application of the Ottawa Hills zoning restriction to appellants' property and the denial of a variance caused a diminution in the value of the property and created an unbuildable parcel. As we stated in *Boice I*, ¶ 34, "while the property may have a fee simple value, absent a variance, Parcel 2 is effectively useless." On this issue, we find the case of *Negin*, supra, relevant.

{¶ 39} In *Negin*, the appellee, Negin, had inherited a sub-standard lot from his father. The lot, however, had been platted and held in single and separated ownership since before the enactment of the applicable zoning code. Nevertheless, the zoning board denied Negin's application for a declaration that the lot was buildable and for a variance. Upon an administrative appeal to the common pleas court, that court affirmed the decision of the zoning board, but the court of appeals reversed. On appeal to the Supreme Court of Ohio, the court affirmed and determined that the ordinance at issue, as applied to Negin, was unconstitutional. Specifically, the court stated: "The requirement of a municipal ordinance that a landowner purchase additional property before he is permitted to improve a substandard lot, which was platted and held in single and separate ownership prior to the enactment of the ordinance, renders that lot useless for any practical purpose. This would also be the case if the only use of the lot is for sale to an

adjacent landowner. The rendering of such a lot useless for any practical purpose goes beyond mere limitation of use and becomes a confiscation." *Negin*, at 496-497.

Although the *Negin* case addressed the issue of whether the ordinance had any reasonable relationship to the legitimate exercise of the police power by the municipality, the attention given by the court to the issue of the potential uses left to the property owner following a subsequent zoning restriction cannot be overlooked.

{¶ 40} In the present case, appellants purchased Parcel 2 in 1974. At that time, it was a buildable lot, despite the 1973 reconfiguration of the two lots. Although appellants used the property as green space while they raised their children, the lot was always plotted as a separate lot and appellants paid taxes on the property as a separate buildable lot for over 30 years. Following appellees' denial of appellants' requests that the lot be declared buildable and for a variance, the value of the lot dropped dramatically. Indeed, in 2006, the Lucas County Auditor reappraised the property and reduced the market value of it from \$233,500 to \$23,400, a \$210,100 decrease. No home can be built on it and it was made clear at the trial below that the only practical purpose for the lot is to sell it to an adjacent landowner. Pursuant to *Negin*, that does not constitute a practical "use" of the property. Contrary to *Negin*, however, appellants never intended to "use" their property as a building site. That is, under *Negin*, a taking is established when the property owner intended to use his property as a building site but was denied that use by the zoning restriction to the extent that the only remaining use of the property was to sell it to an adjacent property owner. With regard to distinct investment-backed expectations

in the present case, however, the record is clear. The only "use" appellants ever intended for Parcel 2 was to sell it for a profit. Accordingly, the only loss appellants' have sustained from the zoning regulation and denial of variance, is the loss in market value. Because they themselves never intended to build a house on the property, they have not been denied an economically viable use. As noted above, "something more than the loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking." *State ex rel. Pitz*, supra, at 41.

{¶ 41} We, therefore, conclude that the lower court did not err in finding appellants failed to establish an unconstitutional taking in the proceedings below, and the first, second, third and fifth assignments of error are not well-taken.

{¶ 42} In their fourth assignment of error, appellants assert that the lower court erred when it ignored evidence that appellees applied the regulation at issue inconsistently throughout the village of Ottawa Hills. Accordingly, appellants contend that the application of the regulation to their lot was arbitrary, capricious and, therefore, unconstitutional.

{¶ 43} In *Boice I*, we remanded the case to the trial court for a redetermination of the regulatory takings issue in light of the correct standards set forth in *Lingle* and *Penn Central*. Appellants' fourth assignment of error raises an issue that was beyond the scope of the remand. Accordingly, the trial court did not err in failing to address appellants' argument that raised a disparate treatment challenge to enforcement of its zoning regulations and denial of a variance and the fourth assignment of error is not well-taken.

{¶ 44} Finally, in their sixth assignment of error, appellants challenge the trial court's conclusion that they did not establish Parcel 2's nonconforming use as a buildable lot.

{¶ 45} An unconstitutional taking can also be predicated on the denial of the continuation of a nonconforming use which amounts to a deprivation of property without due process of law. See *City of Akron v. Chapman* (1953), 160 Ohio St. 382. In the proceeding below, the court determined that because appellants had never used the parcel as a buildable lot, the lot did not qualify as a preexisting nonconforming use. For the following reasons, we agree.

{¶ 46} "The right to continue a nonconforming use is based upon the concept that one should not be deprived of a substantial investment which existed prior to the enactment of the zoning ordinance." *Kettering v. Lamar Outdoor Advertising, Inc.* (1987), 38 Ohio App.3d 16, 18, quoting Young, *The Regulation and Removal of Nonconforming Uses* (1961), 12 W. Res. L.Rev. 681, 691. The right is not unlimited, however. *Id.* In Ohio, R.C. 713.15 limits the extent to which zoning ordinances apply to preexisting nonconforming uses and reads in relevant part:

{¶ 47} "The lawful use of any \* \* \* land or premises, as existing and lawful at the time of enacting a zoning ordinance or an amendment to the ordinance, may be continued, although such use does not conform with the provisions of such ordinance or amendment, but if any such nonconforming use is voluntarily discontinued for two years

or more, \* \* \* any future use of such land shall be in conformity with sections 713.02 to 713.15 of the Revised Code."

{¶ 48} Accordingly, to qualify as a valid preexisting nonconforming use, the use must be both existing and lawful at the time of the enactment of the zoning ordinance. Where, however, "no substantial nonconforming use is made of property, even though such use is contemplated and money is expended in preliminary work to that end, a property owner acquires no vested right to such use and is deprived of none by the operation of a valid zoning ordinance denying the right to proceed with his intended use of the property." *Smith v. Juillerat* (1954), 161 Ohio St. 424, 432. See, also, *Torok v. Jones* (1983), 5 Ohio St.3d 31, 33.

{¶ 49} In the present case, although appellants paid taxes on Parcel 2 as a buildable lot for many years, they never *used* the parcel as a buildable lot and therefore never acquired a vested right to the use of the land as a buildable lot. For many years, their driveway partially encroached on the parcel but otherwise the land was used as a side yard and for green space. Upon the enactment of the zoning regulation at issue in 1978, appellants did not request a variance or in any way seek to establish the lot as a valid nonconforming use. We, therefore, must conclude that appellants' claim that their property qualifies as a valid nonconforming use as a buildable lot fails. Appellants' sixth assignment of error is not well-taken.

{¶ 50} On consideration whereof, the court finds that substantial justice has been done the parties complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

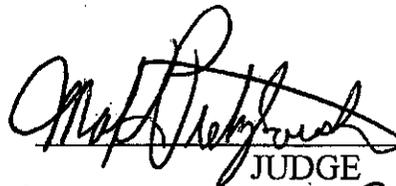
JUDGMENT AFFIRMED.

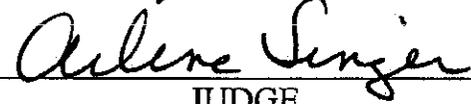
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

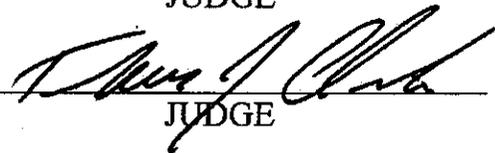
Mark L. Pietrykowski, J.

Arlene Singer, J.

Thomas J. Osowik, P.J.  
CONCUR.

  
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JUDGE

  
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JUDGE

  
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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

FILED  
COURT OF APPEALS  
2012 JAN 26 P 3:45  
COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Willis Boice, et al.

Court of Appeals No. L-09-1253

Appellants/Cross-Appellees

Trial Court No. CI04-5482

v.

Village of Ottawa Hills, et al.

**DECISION AND JUDGMENT**

Appellees/Cross-Appellants

Decided:

**JAN 26 2012**

\* \* \* \* \*

This matter is before the court on the motion of appellants Willis and Annette Boice for reconsideration of our decision and judgment of November 4, 2011. In that judgment, we affirmed the judgment of the Lucas County Court of Common Pleas in an administrative appeal and thereby determined that appellees' application of Zoning Code Ordinance 2002-08 to appellants' real property, located at 2570 Westchester Road, Ottawa Hills, Lucas County, Ohio, was not an unconstitutional taking of real property without just compensation. Appellees have filed a response in opposition to appellants' motion for reconsideration.

**E-JOURNALIZED**

**JAN 27 2012**

As stated in *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278 (10th Dist. 1981):

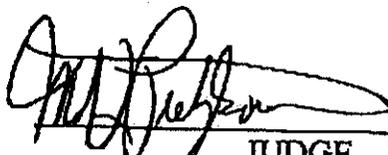
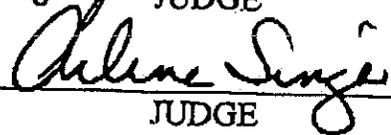
The test generally applied upon the filing a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.

Because appellants' motion neither calls to our attention an obvious error in our prior decision nor raises an issue for consideration that was either not considered at all or not fully considered when it should have been, the aforesaid test has not been met and appellants' motion for reconsideration is denied.

Mark L. Pietrykowski, J.

Arlene Singer, P.J.

Thomas J. Osowik, J.  
CONCUR.

  
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JUDGE  
  
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JUDGE  
  
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JUDGE