ORIGINAL

IN THE SUPREME COURT OF OHIO

Willis and Annette Boice

Appellants,

v.

Village of Ottawa Hills, et al.

Appellees.

Supreme Court Case No. 2012-0413

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

Court of Appeals Case No. L-09-1253

APPELLEES'/ CROSS-APPELLANTS' COMBINED MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPEAL AND IN SUPPORT OF CROSS-APPEAL

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I. The Appeal

A. The appeal does not involve a matter of public or of great general interest.

Appellants, Willis and Annette Boice, assert that this case involves a question of great general or public interest. But the appeal raises no issues of unsettled law, and the propositions of law advanced by Appellants were not even at issue in the proceedings below. The case is not of great importance merely because it involves a constitutional issue. Rather, this was a fact-intensive case properly analyzed under the correct legal standard. As such, this Court should decline to accept jurisdiction over the appeal.

The Appellants in this case owned two adjoining parcels of property in the Village of Ottawa Hills, which they purchased in 1974. Their home was on Parcel 1, and they utilized Parcel 2 as green space for the entire period of their ownership. The ordinance of which Appellants complain was enacted by the Village's council in 1978. The ordinance amended the minimum square footage required for a buildable lot in Appellant's zoning district to 35,000 square feet. As such, in Appellants' zoning district, since 1978, the minimum square footage for a buildable lot has been 35,000 square feet in area. The change in the 1978 zoning ordinance meant that although it was sufficient in 1974, since 1978, Appellants' second parcel has not been large enough to meet the requirements to build a home in the Village of Ottawa Hills.

The 6th District has issued two opinions on this case, reversing and remanding the case in its first opinion, ordering the trial court to analyze the issue of a taking under the framework of the U.S. Supreme Court's decisions in *Penn Central Trans. v. New York City*, 438 U.S. 104 (1978) and *Lingle v. Chevron U.S.A.* 544 U.S. 528 (2005). The case proceeded to trial on remand in 2009. At trial, the court analyzed the issues pursuant to the standards set forth in *Penn Central* and *Lingle*, as required by the 6th District Court of Appeals. Considering the specific

facts of the case, the Court determined that Appellants had not been deprived of all economically beneficial use of land, therefore it analyzed the case under the framework of the *Penn Central* decision. The trial court determined that Appellants failed to establish any distinct investment backed expectations, but rather merely believed the value of their property would go up over time. The 6th District Court of Appeals also analyzed the case under the *Penn Central* framework, and affirmed this decision. Appellants appeal the decision of the 6th District.

In an effort to obtain this Court's jurisdiction, Appellants have advanced propositions of law that were not actually established by the lower courts. This was simply a fact-intensive case analyzed under the appropriate legal standard. As such, this Court should decline to accept jurisdiction over the appeal.

B. The propositions of law advanced by Appellants are not at issue in this case.

The first proposition of law advanced by Appellants is as follows:

> Elimination of the only permissible use of a parcel of residential property through regulation is a total regulatory taking.

As an abstract statement, this proposition of law is not particularly offensive, but adds nothing to existing law. However, in this case, the lower courts determined the ordinance did not eliminate the only permissible use of property. Under the law of constitutional takings, a total regulatory taking does not occur unless a party has been deprived of 100 percent of the economically viable use of the land. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n. 8 (1992). Because the ordinance did not deprive Appellants of 100 percent of economically beneficial use of land, an analysis of the *Penn Central* factors was required. The ruling by the appellate court did not create a new rule of law in the State of Ohio, but rather was made in accordance with existing law.

The Takings clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." *U.S. Const. amend. V.* The Supreme Court has recognized two categories of takings: physical takings and regulatory takings. *D.A.B.E., Inc., v. City of Toledo*, 292 F.Supp.2d 968, 970 (2003). A plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by either alleging (1) a physical taking, (2) a "total regulatory" taking otherwise known as a categorical or complete taking, or finally (3) a partial taking that is sometimes referred to as a non-categorical taking. See *Lingle*, 544 U.S. 528; *D.A.B.E.*, 292 F. Supp. at 971-72.

Appellants allege a regulatory taking. There are two levels of regulatory takings. First, a total taking, which is one that allows the property owner "no productive or economically beneficial use of land", and entitles the property owner to just compensation under the Fifth Amendment. *D.A.B.E., Inc.*, 292 F. Supp. at 971 (quoting L*ucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). Second, is a partial taking, which is a less intrusive regulation and prevents the property owner from some, but not all economic use of his land. *D.A.B.E., Inc.*, 292 F.Supp. at 971; *Lucas*, 505 U.S. at 1019. Where there has been a less-than-all deprivation of economically beneficial use of property, courts must analyze the case under the factors set forth in the *Penn Central* case. *Lingle*, 544 U.S. at 539-540, See also *State ex. rel. Anderson v. Obetz*, 10th Dist. No. 06AP-1030, 2008-Ohio-4064 at ¶ 13. The *Penn Central* decision requires an analysis of three factors: (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. *Penn Central*, 428 U.S. at 129.

In this case, the zoning ordinance did not deprive Appellants of all economically beneficial uses of their property, nor did the ordinance amount to an unconstitutional taking of Appellants' property under a partial regulatory takings analysis. The appellate court did not, as Appellants suggest, hold that if a property owner does not intend to build on property, the only loss the property owners have sustained is loss in market value. Rather, the court analyzed whether Appellants had any distinct investment-backed expectations regarding the property and their intentions for use of the property, as required by the *Penn Central* decision. The court analyzed the testimony of Annette Boice, and determined the only "use" Appellants intended was to sell the parcel for a profit, but that they never intended to use the parcel as a buildable lot, instead using it as a side yard adjacent to their residence. Further, the Village introduced testimony of an expert witness, who valued the property at $105,000 and also considered Appellants' rate of return on the property. He determined that Appellants realized a 17 percent increase in appreciation from 1978 to 2009. The trial court, in its discretion, found the Village's expert to be more reliable than Appellants' expert, who placed a lower value on the property. This evidence established that Appellants merely lost market value, and Ohio law required Appellants to show something more than loss in market value or loss of comfortable enjoyment to establish a taking.

The lower court adequately analyzed the *Penn Central* factors in its opinion dated November 4, 2011, and this Court need not repeat this analysis. Appellants have set forth a strained reading of the case, creating their own propositions of law that were not actually advanced by the appellate court. This was simply a factual case, which the court analyzed under the correct legal standard. As such, this Court should decline to accept jurisdiction based on Appellants' first proposition of law.

In their second proposition of law, Appellants argue as follows: "The pre-existing vested rights in property exist independent of a landowner's intent to personally exercise those rights." Appellants' proposition of law would in fact change the existing and well-established law on vested property rights in Ohio, and eliminate the rule set forth in the case of *Smith v. Juillerat*, 161 Ohio St. 424 (1954). Pursuant to *Juillerat*, where no substantial nonconforming use has been made of the property, a property owner has acquired no vested right to such use of the property. *Id.* at 431. If this Court were to accept Appellants' argument, it would be changing a rule that has been law in Ohio for more than 50 years. Under Appellants' proposition, property owners would no longer need to make a substantial use of property in conformance with a previous zoning regulation. Instead, property owners would merely need to establish ownership of the property while a prior zoning regulation was in existence. They would need no intention to use their property in conformance with the existing zoning regulation, as they would have a vested right regardless of their intent to actually exercise that right in the property. This is directly contrary to longstanding Ohio law on the issue of vested property rights, and inconsistent with the law of regulatory takings.

In analyzing this case, both lower courts found that Appellants never intended to build on Parcel 2. Rather, the only use Appellants ever intended was to sell Parcel 2 at a profit. Pursuant to *Juillerat*, supra, Appellants had no vested right to sell their property as a buildable parcel, as they never made any use of Parcel 2 as a buildable lot. This Court need not reengage in the analysis conducted by the lower courts, as the lower courts adequately analyzed the facts of the case under the appropriate legal standard, and determined Appellants did not have a vested right to sell the parcel as a buildable lot. Further, this Court should not reverse the existing law regarding vested property rights, as the rule of law is longstanding in Ohio and reversal would

create uncertainty among lower courts.

Appellants, for the first time, have addressed a statute they contend establishes that property rights are vested at the time of the enactment of zoning and continue throughout the use of property. Appellants' Br. P. 10, citing R.C. 303.19. What Appellants fail to recognize is "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.*, 38 Ohio App. 3d 16, 18 (1987). In this case, Appellants had no substantial investment in the property prior to the enactment of the zoning ordinance in 1978. The appellate court made this factual determination after considering all the relevant evidence, and this Court should not acquiesce to Appellants' attempts to convolute the lower court's decision.

This appeal does not present a matter of great public interest, nor does it raise any significant legal issue. This decision was made in accordance with existing and well-established law. As such, this Court should decline jurisdiction over the matter.

II. The Cross-Appeal

(A) The issue is of public or great general interest.

This cross-appeal arises from the court's denial of the Village's motion to dismiss Appellants' claims based on the expiration of the statute of limitations and based on lack of jurisdiction. The trial court denied these motions without engaging in a legal analysis of the issues. The appellate court affirmed, even though it is undisputed, that Appellants challenged the zoning ordinance nearly 30 years after the Village council enacted the ordinance, and that they did not timely file a mandamus action seeking compensation for their property. If this appeal is accepted, the opportunity on cross appeal will be before this Court to establish the procedural

requirements landowners must adhere to before bringing a constitutional claim alleging a taking of real property.

The cross-appeal raises important questions, because it opens municipalities to the possibility of defending challenges to zoning ordinances for unlimited periods of time after the enactment of the ordinances. Additionally, the ruling will allow property owners to disregard the proper procedure to challenge an involuntary taking of property, as under the ruling they are not required to seek and have been denied just compensation for their property. These rulings will create a floodgate of litigation, as it essentially eliminates all prerequisites to filing a takings lawsuit. As such, the cross-appeal raises questions of great public or general interest.

(B) Statement of the case and facts relevant to cross-appeal.

As noted earlier, the Village of Ottawa Hills' council enacted the zoning ordinance at issue in 1978. Twenty six years later, Appellants initiated this action in 2004 by filing a Notice of Appeal from the decision of the Village's Zoning Commission denying their request for a variance or a lot split. They first raised the issue of a regulatory taking on appeal to the Lucas County Court of Common Pleas. It is undisputed that the ordinance Appellants challenged had been law in the Village of Ottawa Hills for 26 years before they challenged it. Additionally, Appellants did not file a mandamus action until 2010, which was stayed pending the decision of the 6th District Court of Appeals, so there has not been a final decision on Appellants' mandamus action.

(C) Arguments in support of proposition of law

First proposition of law: The statute of limitations for a regulatory takings claim begins to run at the time the ordinance affecting the relevant property is enacted.

In this case, the basis of Appellants' claim is the ordinance changing the minimum lot size to build a home. Thus, the enactment of the 1978 zoning ordinance is the event that should

have alerted Appellants of the need to protect their rights. Appellants either knew or had reason to know of any injury that may result from the ordinance when the Council enacted it in 1978, as it was that time when their land became unbuildable for a single-family residence. There is no dispute that the regulation in question has been in effect and has applied to the Appellants' property since 1978. It is this event that should have initiated the running of the statute of limitations.

A regulatory taking may begin on the date the challenged regulation was either enacted or applied to the subject property. *State ex rel. Shemo v. City of Mayfield Heights*, 96 Ohio St. 3d 379, 382 (2002); See also *State ex rel. R.T.G., Inc. v. The State of Ohio*, 98 Ohio St.3d. 1, 7 (2002); *State of Ohio ex rel. Nozik v. City of Mentor*, 11th Dist. No. 2003-L-195, 2004-Ohio-5628, ¶ 9. Where a property owner alleges a zoning ordinance amounts to an unconstitutional taking of property, the enactment of that ordinance should begin the running of the statute of limitations. Any other ruling would result in uncertainty in the validity of municipal zoning ordinances, as they would forever be subject to challenge. That the lower courts allowed this case to proceed presents a matter of great public interest. It creates a dangerous precedent, allowing property owners an unlimited amount of time to challenge a zoning ordinance.

This Court should accept jurisdiction to decide this issue, and affirmatively establish the date in which the statute of limitations begins to run in a regulatory takings case.

Second proposition of law: A property owner must have been denied compensation before a court can address a claim for a Fifth Amendment taking of property.

In this case, Appellants did not file a mandamus action seeking just compensation for their property prior to bringing the constitutional issues before the trial court. As the U.S. Supreme Court has recognized, "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation

through the procedures provided by the State..." *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson* (1985), 473 U.S. 172, 194. Because the Fifth Amendment prohibits a governmental taking of property without just compensation, a governmental entity must have denied compensation to a party before the party can claim a Constitutional violation. *Id.* at 195 n.13. Therefore, a party alleging an unjust taking has a duty to seek compensation by "reasonable, certain, and adequate procedures" before a case is ripe for judicial review. *Id.* at 194.

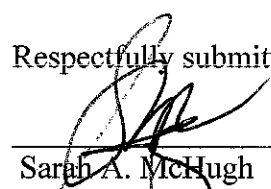
Ohio has established "reasonable, certain, and adequate procedures" for obtaining just compensation in a takings case. *Coles v. Granville* (6th Cir. 2006), 448 F.3d 853, 861. Despite the mandamus procedure established by Ohio law, courts have permitted property owners to raise the constitutional issues for the first time on appeal from a zoning commission's decision.

The cross-appeal raises questions of great public concern or general interest. As such, this Court should accept jurisdiction over the cross-appeal.

III. Conclusion

The appeal raises no matters of public or great general concern. It was a fact-intensive case analyzed under the appropriate legal standard. The Court should decline to accept jurisdiction. The cross-appeal does raise an issue of public or great general interest, and contingent upon the acceptance of jurisdiction, this Court should hear it.

Respectfully submitted,



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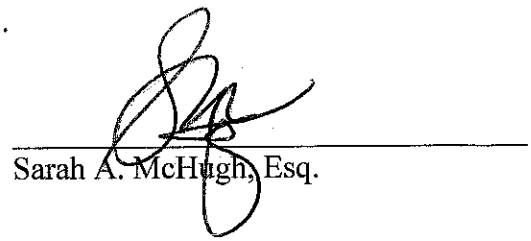
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was this 10th day of April, 2012 sent to **Marvin Robon, Esq. and Larry Yunker, Esq.** Attorneys for Appellants/Cross-Appellees, 1701 Woodlands Drive, Suite 100, Maumee, Ohio 43537.



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