

ORIGINAL

IN THE SUPREME COURT OF OHIO

Willis and Annette Boice)	Supreme Court Case No. 2012-0413
)	
Appellants,)	On Appeal from the Lucas County
)	Court of Appeals, Sixth District
v.)	
)	Case No. L-09-1253
Village of Ottawa Hills, et al.,)	
)	
Appellees.)	
)	
)	

MEMORANDUM IN OPPOSITION TO APPELLEE'S
CROSS MOTION IN SUPPORT OF JURISDICTION

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I. ARGUMENT IN OPPOSITION TO APPELLEE'S PROPOSITIONS OF LAW

The Village of Ottawa Hills (hereinafter "Ottawa Hills") has presented this Court with two theories of why they should be granted certiorari. First, Ottawa Hills argues that they should be granted certiorari so as to present the argument that the Boices are time barred from presenting their claims. Secondly, Ottawa Hills argued that the Boices should have filed a mandamus claim as a prerequisite to filing their constitutional challenge. Ottawa Hills is both procedurally and substantively wrong on both accounts. As discussed hereinafter, Ottawa Hills waived the issue of Statute of Limitations and therefore is barred from raising that issue at this time. Additionally, the issue of mandamus was argued and decided in a prior appeal in this same case and therefore is barred by the law of the case doctrine. Finally, the case law pertaining to the application of the statute of limitations and pertaining to the requirement of mandamus runs contrary to the positions asserted by the Village of Ottawa Hills.

A. The Village of Ottawa Hills Failed to Timely Raise the Issue of Statute of Limitations

"Where the bar of the statute of limitations is not presented as a defense either by motion before pleading pursuant to Civ.R. 12(B), or affirmatively in a responsive pleading pursuant to Civ.R. 8(C), or by amendment made under Civ.R. 15, then the defense is waived under Civ.R. 12(H)..." *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St.2d 55.

In this matter, the Ottawa Hills did not raise the issue of statute of limitations with respect to the Boices' claims until well after the matter had been presented to the Zoning Commission, appealed to the Lucas County Court of Common Pleas, and briefed on in the Common Pleas case.

The Zoning commission hearing on this matter occurred on September in 2004. Ottawa Hills first raised the issue nearly a year and a half later in March of 2006. (See Defendant's Motion for Judgment on the Pleadings filed 03/30/2006). The Lucas County Court of Common Pleas ruled on Ottawa Hills' motion and on the administrative appeal on June 7, 2006. The Trial Court noted that "[a] statute of limitations is an affirmative defense that is waived unless pled in a timely manner. If not pled, the Court can proceed with the case. Since the affirmative defense of statute of limitations has not been pled, and had not been raised in prior briefs, the Court will not now consider such defense at this stage of the proceedings." (citations omitted). **A final appealable order was issued on June 9, 2006 and Ottawa Hills chose not to appeal the Lucas County Court of Common Pleas decision regarding the statute of limitations.**

The Ohio Supreme Court made clear that "The purpose behind the allowance of a Civ.R. 12(B) motion to dismiss based upon the statute of limitations is to avoid the unnecessary delay involved in raising the bar of the statute in a responsive pleading when it is clear on the face of a complaint that the cause of action is barred." *Mills*, 40 Ohio St.2d at 55. The Village of Ottawa Hills had the same facts before it from the time that this matter was initially presented until March of 2006. Therefore, there was no just cause for delay for the Village's late assertion of the Statute of Limitations and thus, the defense was waived.

B. The Boices Claims Are Not Time-Barred By The Applicable Statute Of Limitations Because Their Claims Did Not Accrue Until The Denial Of Their Appeal On September 23, 2004

Even if Ottawa Hills had timely presented its challenge of the Statute of Limitations, its analysis of the date upon which the state runs is incorrect. Ottawa Hills claims that the six (6) year

statute of limitation began to accrue when the subject statute was enacted in 1978. Ottawa Hills bases this claim in part on two decisions, *State ex rel. Shemo v. City of Mayfield Heights* (2002), 96 Ohio St.3d 379, 382, and *State ex rel. R.T.G., Inc. v. Ohio* (2002), 98 Ohio St.3d 1. In citing these decisions as supporting their argument, Ottawa Hills completely and totally mischaracterize these Court decisions.

Ottawa Hills claims that the mere enactment of the subject zoning regulation started the accrual of the statute of limitations. Neither of those cases or any other case, support Ottawa Hills' proposition. Rather, those cases stand for the proposition that the accrual date for a regulatory taking begins on the date the property owner is actually harmed by the application and enforcement of the zoning statute against their property, not the date it is enacted.

In *State ex. Rel. Shemo, infra*, the property owners filed an action challenging the enactment of a zoning regulation which applied to their property. After they dismissed the claim, they re-filed an action claiming that they were actually harmed by the refusal to rezone their property and actual enforcement of the statute as to their property. In holding that the accrual date was the date they were actually harmed by the application and enforcement of the statute, the Supreme Court explained:

“Therefore, they were not harmed by the application of the challenged regulations to their property, which was ultimately found unsuitable for residential use, during the period from March 1992 to June 1995 when they did not seek to use the property for a non-residential use. The appropriate starting date for the taking is consequently June 1995, when they specifically requested in their re-filed declaratory judgment action that the property be rezoned to permit retail and warehouse development. *Id* at 383.”

Likewise, in *R.T.G., Inc., infra*, the Court addressed a dispute where a coal company was prevented from continuing mining operations after its property was designated as unfit for mining (“UFM”) due

to its foreseeable impact on local water supplies. *See Id.* at 3-4. The property in question was designed as UFM on October 6, 1989, affecting approximately 275 acres of property that R.T.G, Inc. sought to mine. R.T.G., Inc. appealed this decision and on June 16, 1994, the Ohio Department of Natural Resources, Division of Reclamation (“DOR”) issued an order affirming the property’s designation as UFM. *See Id.* at 4. The Court held that R.T.G., Inc.’s cause of action accrued when the DOR issued its final decision in 1994, rather than 1989 when the UFM designation was first applied to the property sought to be mined. *See Id.* at 7.

“Normally, a cause of action does not accrue until such time as the infringement of a right arises. It is at this point that the time within which a cause of action is to be commenced begins to run.” *State ex rel. Teamsters Local Union v. City of Youngstown* (1977), 50 Ohio St.2d 200, 203-204, 364 N.E.2d 18.

The aforesaid case law makes sense in light of the concept of “grandfathering” a zoning statute. As the court is well aware, zoning statutes are enacted all of the time that could materially change the use of real property if applied and enforced against that real property. However, based upon constitutional principles, those real properties are considered “grandfathered” in that the new zoning statutes do not apply to them absent specific unique circumstances, such as a change in material use or a failure to use the non-conforming use for an extended period of time.

If Ottawa Hills’ position were correct as to the accrual date to challenge the enactment of new zoning statutes, then real property owners would have to sue every time a new zoning statute was enacted that could vary the use of their land. This would make absolutely no sense because they would not have been harmed by the mere enactment of the statute. They would only be harmed if the statute was actually applied and enforced against their property. For this reason, the

case law is clear that a claim for regulatory taking does not accrue until the property owner is harmed by the actual enforcement of a new zoning statute against their property, as opposed to the mere enactment of the statute.

Therefore, in the present case, the six (6) year statute of limitations did not begin to accrue until September 23, 2004, since that was the date that the Boices were harmed by the application of the new zoning statute to their property. Prior to that date, the zoning statute had never been interpreted and enforced to prevent the Boices from building a house on the subject real property.¹ On that date, Ottawa Hills formally denied their request for a variance to build a house on the property based on the application of this subsequently enacted zoning statute.

For these reasons, Ottawa Hills petition for Certiorari based upon the expiration of the statute of limitations is totally without merit. Ottawa Hills' position is based on a complete misunderstanding and/or misquotation of the law regarding the accrual date of regulatory takings.

C. Ottawa Hills' Argument for Certiorari based upon Mandamus is barred by the Law of the Case Doctrine.

1. Procedural History

The matter before the Court has a lengthy Appellate history. The case was initiated by the Boice family in 2004 as an appeal to the Zoning Commission of the Village of Ottawa Hills. The case proceeded to an administrative appeal in the Lucas County Court of Common Pleas in 2004. The decision of the Common Pleas court was ultimately appealed to the Sixth District court of Appeals in 2006 (hereinafter "Boice I"). The Sixth District reversed in part and remanded back to

1 Further, the Boices alleged they were never even notified of the enactment of the zoning statute. (See Notice of Appeal, ¶13 and 14).

the Common Pleas Court in 2007. Ottawa Hills moved for certiorari to this Court in Boice I but it was denied. A trial was held thereafter and the decisions of the trial court were appealed and cross-appealed to the Sixth District court of Appeals in 2009 (hereinafter “Boice II”). This application for certiorari arises out of Boice II.

2. Law of the Case

This Court has stated that the law of the case doctrine provides: “that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.” *Nolan v. Nolan* (1984), 11 Ohio St.3d 1 citing *Gohman v. St. Bernard* (1924), 111 Ohio St. 726, 730, 146 N.E. 291, reversed on other grounds; *New York Life Ins. Co. v. Hosbrook* (1935), 130 Ohio St. 101, 196 N.E. 888 [3 O.O. 138]; *Gottfried v. Yocum* (App.1953), 72 Ohio Law Abs. 343, 345, 133 N.E.2d 389. The rule 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. *See State, ex rel. Potain, v. Mathews* (1979), 59 Ohio St.2d 29, 32.

In Boice I, Ottawa Hills raised the issue of mandamus and presented argument that a party must seek compensation via a mandamus action as a prerequisite to making a constitutional challenge. Thereafter, Ottawa Hills raised the same issue in its petition for certiorari from Boice I (which this Court previously denied).

The Sixth District was presented with argument on the legal issue of mandamus in Boice I. The court did not find such argument persuasive and specifically ruled that a property owner was entitled to seek injunctive relief or compensatory relief as alternative remedies. Only where a property owner seeks compensatory relief is there a prerequisite of mandamus action. Applying the

law of the case doctrine, Ottawa Hills is barred from re-litigating the issue of mandamus in this subsequent appeal. Additionally, the very same issue was presented to this Court by Ottawa Hills in its petition for Certiorari to this Court from Boice I. This Court denied Certiorari on that very issue.

D. A Mandamus Action is not Necessary where Compensatory Relief is not Sought.

In their proposition of law, Ottawa Hills argues that the Boices were required to institute a mandamus action in order to argue that there has been unconstitutional regulatory taking of their property. However, as the Appellate Court correctly noted in Boice I, because a mandamus applies where monetary relief is sought, and the Boices did not seek monetary relief, a mandamus action was not appropriate. The Appellate Court noted in fact that the Boices sought a declaration that the statute, as applied, was an unconstitutional taking.

Since the Boices did not seek money, the Appellate Court appropriately found that a mandamus action was unnecessary. A mandamus action is only necessary where a party is seeking to obtain actual compensation. *State ex rel. Lavin v. Sheffield Lake* (1994), 70 Ohio St.3d 104. Under those circumstances, a property owner can file 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.*

E. A Mandamus Action cannot be brought until and unless a Taking has been proven.

The position asserted by Ottawa Hills regarding the use of Mandamus would turn the rule upon its head so-to-speak. Ottawa Hills would have this Court mandate the use of a Mandamus claim in all constitutional challenges to regulatory takings. However in this Court's recent decision

in *State ex rel. Wasserman v. Fremont* (2012), 131 Ohio St. 3d 52, the Court made clear that it was inappropriate to use a mandamus action to seek relief **until there had been a determination of whether or not a taking actually occurred**. In that decision, this Court noted that an “appropriation proceedings **may be compelled** through mandamus, but * * * the court must initially determine that the pertinent property has been appropriated.” citing *State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104, 109; see also *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385 (affirming judgment granting writ of mandamus to compel appropriation proceeding on physical-taking claim that had been established by relators and denying writ of mandamus on regulatory-taking claim that had not been proven)(emphasis added). The Court used the permissive term “may be compelled” rather than the mandatory phrase “must be compelled” in recognition of the fact that other means are available for asserting a constitutional challenge to a governmental taking.

In this matter, the Boices chose to prove “that the pertinent property has been appropriated” in the form of a separate lawsuit presenting a constitutional challenge to the application of the zoning ordinance with respect to their particular property and their particular circumstances. The Boices made their challenge without seeking compensation and therefore had no need to immediately file a Mandamus claim. Consistent with *Wasserman, supra*, the Boices first set forth that a taking had occurred and then if necessary, the Boices would in a subsequent suit, pursue compensation via a Mandamus action.²

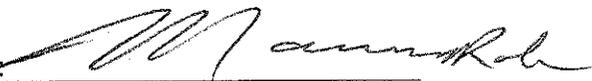
2 A suit for mandamus Case No. CI02010005848 was filed on August 17, 2010 in the Lucas County Common Pleas Court by the Boices and is currently held in abeyance pending the final determination in this matter.

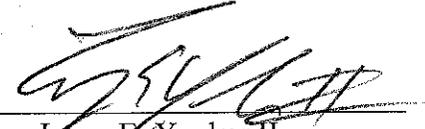
II. CONCLUSION

For the reasons discussed above, the petition for certiorari as filed by the Village of Ottawa Hills should be denied. The issues of law as presented for review to this Court have been finally resolved by the lower courts and are not appropriate for appeal. Furthermore, the substantive law regarding the statute of limitations and the use of mandamus have fully addressed by this Court and the state's Appellate Courts in their prior rulings. Therefore, the issues raised by the Village of Ottawa Hills present no new issue of great public interest.

Respectfully submitted,

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APPENDIX

* Certificate of Service

CERTIFICATION

This is to certify that a copy of the foregoing was served on this 10th day of May, 2012, by
ordinary U.S. Mail upon:

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