

ORIGINAL

IN THE SUPREME COURT OF OHIO

WILLIS AND ANNETTE BOICE,	:	Case No. 2012-0413
	:	
Appellants,	:	On Appeal from the
	:	Sixth District Court of Appeals
v.	:	Lucas County, Ohio
	:	
VILLAGE OF OTTAWA HILLS, et. al.	:	Court of Appeals
	:	Case No. L-09-1253
Appellees.	:	
	:	
	:	

BRIEF OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF THE APPELLEES
VILLAGE OF OTTAWA HILLS

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INTRODUCTION

The Ohio Municipal League (“League”), as amicus curiae on behalf of the Village of Ottawa Hills (“Village”), urges this Court to affirm the decision of the Sixth District Court of Appeals, in *Willis Boice, et al. v. Village of Ottawa Hills, et al.*, 2011-Ohio-5681. In this decision, the Sixth District held that the Village’s enforcement of a minimum buildable lot zoning requirement and denial of a variance request did not constitute a regulatory taking and that the lot did not qualify as a valid preexisting nonconforming use because it was never used as a buildable lot.

In reaching the takings decision, the Sixth District and the trial court conducted the takings analysis established by the U.S. Supreme Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978) and, adopted by the U.S. Supreme Court, in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074 (2005), as the analysis to be applied in partial regulatory taking situations. The *Lingle* takings analysis was subsequently adopted by this Court in *State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners*, 115 Ohio St.3d 337, 2007-Ohio-5022, 875 N.E.2d 59.

After conducting the *Penn Central* analysis to the facts in this case, the trial court concluded that the appellants “failed to offer any probative expert testimony” regarding the value of the parcel and “failed to establish that they had any distinct investment-backed expectations.” *Boice* at ¶ 34.

Noting that it reviews the trial court’s application of the law to the facts de novo, the Sixth District also conducted the *Penn Central* analysis. *Boice* at ¶ 33. As part of the *Penn Central* analysis, the Sixth District stated “[i]t 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.’” *Boice* at ¶ 38, citing *State ex rel. Pitz v. City of Columbus*, 56 Ohio App.3d 37, 41, 564

N.E.2d 1081 (10th Dist. 1988). Upon conclusion of the *Penn Central* analysis, the Sixth District concluded “the record is clear ... the only loss appellants’ have sustained from the zoning regulation and denial of variance, is the loss in market value ... ‘something more than the loss of market value or loss of the comfortable enjoyment of property is needed to constitute a taking.’” *Boice* at ¶ 38, citing *Pitz* at 41.

In considering the Appellants claim that they had the right to continue to use the property as a nonconforming use, the Sixth District correctly summarized Ohio zoning law by stating “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.” *Boice* at ¶ 48. Noting that the Appellants never used the parcel as a buildable lot, the Sixth District agreed with the trial court that “the lot did not qualify as a preexisting nonconforming use.” *Boice* at ¶ 45.

The Appellants failed to meet the *Penn Central* criteria for a partial taking and failed to establish that the parcel was a legal nonconforming use. Therefore, this Court should affirm the decision of the Sixth District.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League (“League”) is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. The League and its members have an interest in ensuring that the courts apply the appropriate takings analysis when considering a takings claim and, consistent with the appropriate takings analysis, an interest in ensuring that a partial regulatory taking requires a property owner to establish something more than the loss of market value and to demonstrate distinct investment based expectations. The League and its members also have an interest in ensuring that only uses that were legal and in existence at the time a zoning regulation is adopted are found to be nonconforming uses.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Merit Brief of the Village.

ARGUMENT

Proposition of Law No. 1: In instances where a property owner is deprived some, but not all of the economically viable use of his or her land, the *Penn Central* test is applied to determine if a regulatory taking has occurred; a partial regulatory taking does not occur when a property owner fails to establish something more than loss of market value and fails to establish any distinct investment based expectations.

The Takings Clause

The Takings Clause, the Fifth Amendment to the U.S. Constitution, provides that “private property [shall not] be taken for a public use, without just compensation.” The Takings Clause is applicable to the states through the Fourteenth Amendment, which prohibits the states from making or enforcing any law that “deprive[s] any person of life, liberty, or property, without due process of law.” Article I, Section 19, of the Ohio Constitution also prohibits the taking of private property for public use without just compensation.

The Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314, 107 S.Ct. 2378 (1987). The Takings Clause “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” *Id.* at 315. (Emphasis in original.)

Evaluating Regulatory Takings Claims

In *Lingle*, the U.S. Supreme Court held that with the exception of “two relatively narrow categories ... regulatory challenges are governed by the standards set forth in *Penn Central Transportation Company v. City of New York*.” *Lingle* at 538. The two relatively narrow categories referenced by the U.S. Supreme Court are where a government requires an owner to suffer a permanent physical invasion of the owner’s property and when there is a total taking. In *Shelly Materials*, this Court adopted the *Lingle* framework for analyzing takings cases.

The U.S. Supreme Court has held that a total taking occurs “when the owner of a real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018, 112 S.Ct. 2886 (1992). (Emphasis in original.) This Court has adopted the *Lucas* total taking definition and held that a total taking occurs when a government regulation “denies the owner all economically beneficial use of its property.” *Shelly Materials* at ¶ 22.

In this case, the Village’s real estate appraiser testified that the value of the parcel as an unbuildable lot was \$105,000 and the value of the parcel as a buildable lot was \$210,000. *Boice* at ¶ 35. The Appellants’ real estate appraiser testified that the value of the parcel as an unbuildable lot was \$38,000 and the value of the parcel as a buildable lot was \$190,000. *Boice* at ¶ 36. This testimony before the trial court clearly demonstrates that the Village’s zoning regulation did not deprive the Appellants of *all* of the economically beneficial use of their property. Therefore, the Sixth District correctly applied the *Penn Central* partial takings analysis.

Penn Central Analysis

The *Penn Central* analysis requires a court to consider: “(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.” *Shelly Materials* at ¶ 19, citing *Penn Central* at 124.

Penn Central Analysis – The First Prong

The first prong of the *Penn Central* analysis is the economic impact of the regulation on the claimant. The U.S. Supreme Court has a long established rule that “mere diminution in the value of the property, however serious, is insufficient to demonstrate a taking.” *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645, 113 S.Ct. 2264 (1993). This Court also has an established rule that “something more than loss of market value or loss of the comfortable enjoyment of the property is necessary to constitute a taking.” *BSW Development Group v. City of Dayton*, 83 Ohio St.3d 338, 344, 699 N.E.2d 1271 (1998).

In this case, the trial court concluded that the appellants “failed to offer any probative expert testimony” regarding the value of the parcel and found the expert witness testimony provided by the Village’s real estate appraiser to be more credible. *Boice* at ¶ 34 and at ¶ 36. As previously mentioned, the Village’s real estate appraiser testified that the parcel could be sold for a higher price as a buildable lot. However, this mere diminution in market value is insufficient. Noting this Court’s established rule that something more than loss of market value or loss of comfortable enjoyment of the property is necessary to constitute a taking, the Sixth District concluded that the “the only loss appellants’ have sustained from the zoning regulation and denial of variance, is the loss in market value.” *Boice* at ¶ 40. (Emphasis added.)

The Appellants failed to establish anything other than a decrease in market value and, therefore, failed to meet the first prong of the *Penn Central* analysis.

Penn Central Analysis – The Second Prong

The second prong of the *Penn Central* analysis is the extent to which the regulation has interfered with distinct investment-backed expectations. As the Sixth District noted, “[t]he issues of the economic impact of a zoning regulation on a property owner and that owner’s distinct investment-backed expectations are intertwined.” *Boice* at ¶ 37.

The Appellants’ claim that they purchased the lot “with the expectation of later developing the lot or offering the lot for sale as a buildable lot.” *Boice* at ¶ 16. However, they “used the property as green space while they raised their children,” *Boice* at ¶ 40, and did not take any steps to develop the lot or offer the lot for sale as a buildable lot until 2004, more than 25 years after the Village amended its minimum buildable lot zoning requirements.¹

The U.S. Supreme Court has held that “a unilateral expectation or an abstract need” is insufficient to raise takings concerns. *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1005, 104 S.Ct. 2862 (1984). The Sixth Circuit, consistent with the U.S. Supreme Court’s holding, has held that being “denied the ability to exploit a property interest previously available for development” is also insufficient to raise takings concerns. *Tennessee Scrap Recyclers Association v. Bredesen*, 556 F.3d 442, 456-457 (6th Cir. 2009).

The Appellants’ claims that they purchased the parcel for future development or sale as a buildable lot is vague and abstract. The Appellants presented no evidence supporting their claims, including plans for development of the lot or engineering/architectural drawings. There

¹ In 1978, the Village amended its zoning requirements, changing the minimum lot size needed for a single-family residence from 15,000 square feet to 35,000 square feet. A further zoning amendment in 2002 did not change the minimum lot size, which remains at 35,000 square feet. *Opinion and Judgment Entry with Findings of Fact and Conclusions of Law*, Court of Common Pleas of Lucas County, Ohio, Case No. CI04-5482, page 3.

can be no distinct investment backed expectations where there is only an abstract desire to utilize a property interest sometime in the future for development.

The Appellants failed to demonstrate that there was interference with their distinct investment-backed expectations and, therefore, failed to establish the second prong of the *Penn Central* analysis.

Penn Central Analysis – The Third Prong

The third and final prong is the character of the governmental action. This prong involves a consideration of whether the regulation “amounts to a physical invasion or instead merely affects property interest through ‘some public program adjusting the benefits and burdens of economic life to promote the common good.’” *Lingle* at 539, quoting *Penn Central* at 124. In this case, the Village’s zoning regulation is not a physical invasion. However, the Village’s zoning regulation, consistent with all zoning regulations, affects property interests in the promotion of land use for the good of all residents.

As this Court has recognized, “[t]he purpose of a zoning ordinance is to limit the use of land in the interest of the public welfare.” *Smith v. Juillerat*, 161 Ohio St. 424, 428, 119 N.E.2d 611 (1954). Zoning ordinances protect the public health, safety, and welfare of residents and, therefore, serve a legitimate public purpose. This legitimate public purpose “weighs against” the Appellants’ takings claim. *Tennessee Scrap Recyclers Association* at 457.

The Appellants failed to demonstrate that the Village’s zoning regulation does not serve a legitimate public purpose and, therefore, failed to establish the third prong of the *Penn Central* analysis.

The Appellants failed to meet the burden of proof with each and every prong of the *Penn Central* analysis. Therefore, the League respectfully requests that this Court affirm the decision of the Sixth District.

Negin v. Board of Building and Zoning Appeals of the City of Mentor

In conducting its review, the Sixth District discussed the decision of this Court in *Negin v. Board of Building and Zoning Appeals of the City of Mentor*, 69 Ohio St.2d 492, 433 N.E.2d 165 (1982). In *Negin*, this Court held that a municipal zoning regulation rendered a lot useless for any practical purpose and, therefore, was a confiscation. *Negin* at 497. The Sixth District distinguished the facts in the current case from the facts in *Negin* and concluded that a taking did not occur.

The Appellants are encouraging this Court to “take this opportunity to expound upon and reaffirm its decision in *Negin*.” Merit Brief of Appellants Willis and Annette Boice, page 5. However, the League respectfully points out that *Negin* was decided before this Court’s adoption of the *Lingle* framework for analyzing takings case. Therefore, the confiscation or takings discussion in *Negin* is no longer relevant. The case before the Court now provides an opportunity to clarify any confusion that may exist regarding the appropriate takings analysis and to reaffirm the *Lingle* framework for analyzing takings cases.

Proposition of Law No. 2: A nonconforming use is a legal use that is in existence at the time a zoning regulation is adopted; a property owner must provide evidence of the prior existence of the use and mere contemplation of a particular use of property is insufficient to establish a nonconforming use.

A prior nonconforming use must meet the following two requirements: (1) the use must have been in existence prior to the enactment of the zoning regulation; and (2) the use must have been lawful when it began. *Pschesang v. Village of Terrace Park*, 5 Ohio St.3d 47, 448 N.E.2d 1164; *Martin v. City of Cleveland*, 8th Dist. No. 75405, 2000 WL 426546 (April 20, 2000).

The first requirement mandates a substantial use of the property. As this Court concluded in *Smith*, “where no substantial nonconforming use has been made of the property, even though such use is contemplated, and money has been expended in preliminary work to that end, a

property owner has acquired 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* at 431.

The first requirement also mandates an actual use of the property and not “mere intention or contemplation of use.” *Windsor v. Lane Development Co.*, 109 Ohio App.131, 139, 158 N.E.2d 391 (10th Dist. 1958).

The Appellants argue that because their parcel “was buildable at the time that they purchased it, because the lot is larger than several of the other buildable lots in their neighborhood, because their lot has been defined geographically as to 3 or 4 of its borders since it was originally platted in 1926 and has not been changed since five years prior to the 1978 zoning amendment, and because the lot remains fully capable of accessing streets and utilities, the lot should be grandfathered as buildable.” Merit Brief of Appellants Willis and Annette Boice, page 22.

However, the Appellants presented no evidence that the lot was used as a buildable parcel in 1978, the time the zoning regulation was enacted. Furthermore, the Appellants failed to present any evidence that they used the parcel as anything other than green space. As the Sixth District concluded, the Appellants “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.” *Boice* at ¶ 49. (Emphasis in original.)

The League urges this Court to affirm the Sixth District’s decision concluding that the Appellants failed to establish a prior nonconforming use. Failure to do so would render zoning regulations ineffective and negatively impact the ability of zoning regulations to regulate land use for the benefit of the public health, safety, and welfare.

CONCLUSION

Based upon the foregoing, the League respectfully requests this Court to affirm the Sixth District's judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

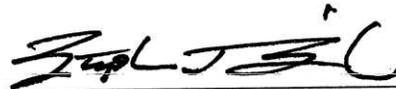
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