

ORIGINAL

IN THE SUPREME COURT OF OHIO
2013-1856

SUNSET ESTATE PROPERTIES, LLC,)	On Appeal from the Medina County Court
ET AL,)	of Appeals, Ninth Appellate District
)	
Appellees,)	Court of Appeals Case No. 12CA0023-M
)	
vs.)	
)	
VILLAGE OF LODI, OHIO,)	
)	
Appellant.)	

APPELLANT VILLAGE OF LODI, OHIO'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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TABLE OF CONTENTS

THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND FACTS..... 4

A. Lodi Enacted Zoning Laws to Provide for More Traditional Single and Multiple Family Homes within Certain Districts. 4

B. Lodi Provides Utility Services to Nonconforming Uses By Following Zoning Ordinances 4

C. Meadowview and Sunset Purchased the Subject Properties Well After the Enactment of L.Z.C. 1280.05 5

D. The Ninth District Reverses the Trial Court’s Judgment and Declares L.Z.C. 1280.05 Facially Unconstitutional 6

ARGUMENTS IN SUPPORT OF LODI'S PROPOSITION OF LAW..... 6

PROPOSITION OF LAW: A MUNICIPAL ZONING ORDINANCE WHICH PRECLUDES A PROPERTY OWNER FROM RE-ESTABLISHING A NONCONFORMING USE AFTER A SPECIFIED PERIOD OF NONUSE DOES NOT FACIALLY VIOLATE THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION..... 6

A. The Ninth District Applied the Improper Standard for Challenging L.Z.C. 1280.05 as Facially Unconstitutional..... 8

B. L.Z.C. 1280.05 Lawfully Prohibits the Re-Establishment of a Nonconforming Use 9

C. L.Z.C. 1280.05 is not Arbitrary or Unreasonable and is Rationally Related to Lodi’s Legitimate Goals 11

CONCLUSION 12

CERTIFICATE OF SERVICE 14

**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND IS OF PUBLIC OR GREAT GENERAL INTEREST**

This case involves a substantial constitutional question concerning a municipality's right to enact and enforce zoning laws that gradually eliminate nonconforming uses within a zoned area. As is typical in many municipalities within the State of Ohio, the Village of Lodi ("Lodi") has enacted a comprehensive zoning code, which includes zoning ordinances governing nonconforming uses.

Section 1280.01 of the Planning and Zoning Code of the Village of Lodi ("L.Z.C.") provides for the continuation of nonconforming uses existing on the date of the enactment of the zoning code: "The lawful use of any building or land existing on the effective date of this Zoning Code may be continued, although such use does not conform with the provisions of this Zoning Code, provided the conditions of this chapter are met."

L.Z.C. 1280.05, in turn, addresses the discontinuance or abandonment of lawful nonconforming uses, providing in relevant part:

Whenever a nonconforming use has been discontinued for a period of six months or more, such discontinuance shall be considered conclusive evidence of an intention to legally abandon the nonconforming use. At the end of the six-month period of abandonment, the nonconforming use shall not be re-established, and any further use shall be in conformity with the provisions of this Zoning Code. In the case of nonconforming mobile homes, their absence or removal from the lot shall constitute discontinuance from the time of absence or removal.

L.Z.C. 1280.05(a) (effective May 18, 1987). L.Z.C. 1280.05, thus, precludes a property owner from re-establishing a nonconforming use after the specified period of nonuse. In addition, for nonconforming mobile homes, L.Z.C. 1280.05 provides that the absence or removal of the mobile home from its lot marks the beginning of the period of nonuse.

In this case, the Ohio Ninth District Court of Appeals, with two judges on the appellate panel concurring in judgment only, reversed the decision of the trial court granting summary

judgment to Lodi, and invalidated L.Z.C. 1280.05 as facially unconstitutional under the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *See Sunset Estate Properties, LLC, et al., v. Village of Lodi, Ohio*, 9th Dist. Medina No. 12CA0023-M, 2013-Ohio-4973 (Moore, P.J., and Belfance, J., concurring in judgment only) (“*Sunset Estate*”) (attached hereto as Exhibit A). In reaching its holding, the Ninth District not only disregarded long-standing Ohio Supreme Court precedent governing facial constitutional challenges, but it also interchangeably applied and misapplied the standards set forth by this Court for deciding facial and as applied constitutional challenges as well as for determining the existence of a compensable taking. If permitted to stand, the Ninth District’s decision will create confusion among Ohio courts, municipalities, and property owners as to the validity of similar zoning ordinances as well as the proper analysis to be employed in adjudging their constitutionality. Moreover, the Ninth District’s decision will have a profound, detrimental impact on municipalities’ ability to exercise their police powers in enacting and enforcing zoning laws which have a substantial relationship to the public health, safety, morals and general welfare of their communities. *See Akron v. Chapman*, 160 Ohio St. 382, 385, 116 N.E.2d 697 (1953).

Many municipalities have zoning ordinances similar to L.Z.C. 1280.05 in that they preclude a property owner from re-establishing a nonconforming use after the specified period of nonuse. Indeed, R.C. 713.15 specifically authorizes a municipality to enact such an ordinance. *See* R.C. 713.15 (“The lawful use of any dwelling, building, or structure and 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, or for a period of not less than six months but not more than two years that a municipal corporation otherwise provides by ordinance, any future use of such land shall be in conformity with sections 713.01 to 713.15 of the Revised Code.”).

Moreover, Ohio courts have consistently recognized that a municipality “may prohibit the expansion, or substantial alteration of a nonconforming use, in an attempt to eradicate that use.” *Beck v. Springfield Twp. Bd. of Zoning Appeals*, 88 Ohio App.3d 443, 446, 624 N.E.2d 286 (9th Dist.1993); *Hunziker v. Grande*, 8 Ohio App.3d 87, 89, 456 N.E.2d 516 (8th Dist.1982); *Weber v. Troy Twp. Bd. Of Zoning Appeals*, 5th Dist. Delaware No. 07 CAH 04 0017, 2008-Ohio-1163, ¶25; *Coy v. Clarksfield Twp. Bd. Of Zoning Appeals*, 6th Dist. Huron No. H-96-041, 1997 Ohio App LEXIS 1714, *8, 1997 WL 221121. Nonconforming uses may even be regulated to the point that they “wither and die” and are disfavored under Ohio law because they undermine the purpose and value of zoning legislation, thereby harming the public. *Beck*, at 446; *Brown v. Cleveland*, 66 Ohio St.2d 93, 96, 420 N.E.2d 103 (1981); *Bell v. Rocky River Bd. of Zoning Appeals*, 122 Ohio App.3d 672, 676-77, 702 N.E.2d 910 (8th Dist.1997). Yet the Ninth District in this case declared a zoning ordinance aimed at gradually eliminating nonconforming uses facially unconstitutional. This case, therefore, affords this Court the opportunity to give guidance to Ohio courts, municipalities, and property owners as to the proper standard for determining whether a zoning ordinance governing nonconforming uses is facially unconstitutional. Because this case involves a substantial constitutional question and is of public or great general interest, Lodi respectfully requests that this Court accept jurisdiction over its discretionary appeal.

STATEMENT OF THE CASE AND FACTS

A. Lodi Enacted Zoning Laws to Provide for More Traditional Single and Multiple Family Homes within Certain Districts.

In the 1980's, Lodi enacted a zoning ordinance relating to the discontinuance and abandonment of nonconforming uses (L.Z.C. 1280.05). Through its zoning code, Lodi also divided the property within its borders into districts in an effort to establish more traditional-type housing in predominantly residential areas. The various districts include, among others, (1) C-1 and C-2 for commercial use; (2) I-1 and I-2 for industrial use; (3) PR for parks and recreation; (4) MH for mobile home; and (5) R-1, R-2 and R-3 for low, medium and high density residential use respectively. Lodi's zoning code permits mobile homes only in MH, while it allows single-family, two-family, townhouse, and multifamily dwellings in R-2. Lodi wanted to promote more traditional housing in certain residential districts and to support the property values of the residents within them. It believed that if mobile home parks were located within purely residential districts, they would decrease the property values of the more traditional housing and hinder the development of surrounding properties.

B. Lodi Provides Utility Services to Nonconforming Uses By Following Zoning Ordinances.

Lodi provides certain utilities such as water, sewer, electric, and storm sewer services to residents and businesses. L.Z.C. 1280.05(b) requires the Board of Public Affairs, who administers these utility services in Lodi, to provide a list of utility customers to the zoning inspector. The zoning inspector keeps a list of utility customers in order to keep track of nonconforming uses and determine when the property has been abandoned for six-months. The owner of a mobile home may switch the utilities from an existing occupant to a new occupant,

but once the nonconforming use has been discontinued, Lodi will not re-establish the utility connection because to do so would expand the nonconforming use.

C. Meadowview and Sunset Purchased the Subject Properties Well After the Enactment of L.Z.C. 1280.05.

Both Meadowview and Sunset own manufactured home parks located in districts zoned R-2, Medium Density Residential District, and not MH, the manufactured home park district. Meadowview purchased its property on January 5, 1994 for \$290,000 with full knowledge that the operation of a manufactured home park would be a nonconforming use and that it would not be permitted to expand the park, and of the existence of the regulations relating to the abandonment and discontinuance of non-conforming uses. At the time Meadowview purchased the property several of the mobile home lots were unoccupied, and since the date of its purchase, several more mobile home lots have been abandoned. Currently, seventeen of the forty-four lots have been abandoned. Meadowview still operates and collects rent from the lawful nonconforming mobile homes.

Sunset purchased the property where it currently operates a manufactured home park on October 1, 2008, at an auction for \$166,100. Sunset had a period of sixty days to conduct due diligence before finalizing its purchase but, in that time, admittedly failed to verify the zoning restrictions on it or to even inquire as to why many of the lots were unoccupied. When Sunset purchased the property, twenty of the thirty-three lots were unoccupied or abandoned, with some having been legally abandoned for ten years. Since the date of purchase, one additional lot has been abandoned. Sunset still operates and collects rent from the lawful nonconforming mobile homes.

D. The Ninth District Reverses the Trial Court’s Judgment and Declares L.Z.C. 1280.05 Facially Unconstitutional.

Meadowview and Sunset filed a complaint for declaratory judgment and injunctive relief against Lodi on February 1, 2011, claiming, among other things, that L.Z.C. 1280.05 was unconstitutional on its face and as applied to them and that Lodi’s application of L.Z.C. 1280.05 to their properties amounted to a compensable taking. On March 14, 2012, the Medina County Court of Common Pleas entered summary judgment in favor of Lodi. (Journal Entry Summary Judgment, 3/14/2012, attached hereto as Exhibit B). Sunset and Meadowview appealed that judgment to the Ninth District. On November 12, 2013, the Ninth District entered its Decision and Journal Entry in which it reversed the March 14, 2012 judgment, declaring L.Z.C. 1280.05 facially unconstitutional. *See Sunset Estate*, 2013-Ohio-4973 at ¶¶12, 28. As previously noted, two of the Judges concurred in judgment only. The Ninth District expressly declined to address the remaining issues on appeal (the “as-applied” constitutional claim and the “takings” claim) and remanded the case to the trial court for further proceedings consistent with its decision. *Id.*

This matter is now before this Court upon the City’s request that this Court accept jurisdiction over its discretionary appeal. *See* S.Ct.Prac.R. 5.02(A)(1) and (3).

**ARGUMENTS IN SUPPORT OF
LODI’S PROPOSITIONS OF LAW**

PROPOSITION OF LAW: A MUNICIPAL ZONING ORDINANCE WHICH PRECLUDES A PROPERTY OWNER FROM RE-ESTABLISHING A NONCONFORMING USE AFTER A SPECIFIED PERIOD OF NONUSE DOES NOT FACIALLY VIOLATE THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

Zoning ordinances are entitled to a strong presumption of constitutionality. *Goldberg Cos., Inc. v. Council of the City of Richmond Hts.*, 81 Ohio St.3d 207, 209, 1998-Ohio-456, 690

N.E.2d 510 (1998). A zoning ordinance is unconstitutional only if it is “clearly arbitrary and unreasonable *and* without substantial relation to the public health, safety, morals, or general welfare of the community.” (Emphasis added.) *Id.* at 214. Accordingly, a party challenging the validity of a zoning ordinance must demonstrate, beyond fair debate, that the zoning classification is “arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.” *Id.* at 210. The “beyond fair debate” standard is similar to the “beyond a reasonable doubt” standard. *Cent. Motors Corp. v. City of Pepper Pike*, 73 Ohio St.3d 581, 584, 1995-Ohio-289, 653 N.E.2d 639 (1995). Because a zoning ordinance that is “fairly debatable” is not unconstitutional, the legislative judgment in deciding to pass the zoning ordinance controls. *Hudson v. Albrecht, Inc.*, 9 Ohio St.3d 69, 71, 458 N.E.2d 852 (1984); *Smyth v. Butler Twp.*, 85 Ohio App.3d 616, 619, 620 N.E.2d 901 (2nd Dist.1993).

Courts allow these presumptions of constitutionality and deference to the legislative bodies, i.e., the municipalities, because they recognize that those bodies are in a better position to evaluate zoning legislation due to their familiarity with the local conditions “and degree of regulation required.” *Hudson*, at 71. It is firmly established that municipalities “in the interest of the promotion of the public health, safety, convenience, comfort, prosperity, or general welfare, may regulate and restrict the location of buildings and other structures” and divide the land into corresponding zones. R.C. 713.06; 713.07. Permissible goals for zoning legislation include controlling the population density, ease of access for firefighting equipment, and economic considerations relating to increased aesthetic values. *Clark v. Village of Woodmere*, 28 Ohio App.3d 66, 68, 502 N.E.2d 222 (8th Dist.1985); *Cent. Motors Corp.*, 73 Ohio St.3d 581, 653 N.E.2d 639 (stating that courts have “consistently recognized that a municipality may properly exercise its zoning authority to preserve the character of designated areas”).

A zoning ordinance can be challenged as unconstitutional either on its face or as applied to a particular set of facts. *Jaylin Invest., Inc. v. Village of Moreland Hills*, 107 Ohio St. 3d 339, 2006-Ohio-4, 839 N.E.2d 903, ¶11. Facial constitutional challenges are the most difficult challenges to bring successfully. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶37. An ordinance is unconstitutional on its face only when the challenger establishes that there exists no set of circumstances under which the ordinance would be valid. *Id.* The fact that an ordinance “might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid.” *Id.* An ordinance that is determined to be unconstitutional in a limited circumstance but which can still be enforced in other instances is not facially unconstitutional. *See id.*

A. The Ninth District Applied the Improper Standard for Challenging L.Z.C. 1280.05 as Facially Unconstitutional.

Here, the Ninth District initially set forth the correct standard for determining whether a zoning ordinance is facially unconstitutional, namely that there can be no set of circumstances where the ordinance would be upheld. *Sunset Estate*, 2013-Ohio-4973 at ¶13. However, the Ninth District misapplied the standard and compounded its error by interchangeably applying the standards for an as applied constitutional challenge and a takings standard. The Court also completely overlooked the fact that L.Z.C 1280.05 regulates all types of nonconforming uses and is not limited to mobile homes or manufactured home parks. By restricting its analysis of L.Z.C. 1280.05 in this manner, the Ninth District incorrectly determined that L.Z.C. 1280.05 was facially unconstitutional. *Id.* at ¶28. Indeed, the Ninth District’s exclusive focus on *the application* of L.Z.C. 1280.05 to Meadowview and Sunset’s properties made its analysis more appropriate for an as applied constitutional challenge, albeit it reached the wrong result.

Furthermore, in concluding that L.Z.C. 1280.05 was facially unconstitutional, the Ninth District cited with approval an opinion of the Ohio Attorney General that questioned whether eliminating nonconforming mobile homes within a manufactured home park one-by-one could constitute a compensable taking. *Id.* at ¶¶16-17, citing 2000 Ohio Atty.Gen.Ops. No. 2000-022, 2000 WL 431368. Thus, in addition to using the as applied constitutional analysis, the Ninth District used a takings analysis to support its conclusion that the zoning ordinance was unconstitutional on its face, thereby further confusing the three separate and distinct standards. The Ninth District's reference to "economic viability" of the land is exceedingly problematic because this Court specifically rejected such a consideration in *Goldberg*, 81 Ohio St.3d at 213, 690 N.E.2d 510: "We are convinced that *Gerijo* established an unduly broad standard that encompassed both the standard for challenging the constitutionality of zoning regulations and the test to prove a taking."

The confusion exhibited by the Court of Appeals by its use and misuse of the correct standard of review underscores the necessity for this Court to hear and decide this case.

B. L.Z.C. 1280.05 Lawfully Prohibits the Re-Establishment of a Nonconforming Use.

The proper application of the standard compels the conclusion that L.Z.C 1280.05 is constitutional on its face. The very thing this ordinance regulates, the right of a municipality to prohibit the re-establishment of a nonconforming use after a period of nonuse, and to provide for its gradual elimination, has been consistently upheld by this Court. *Akron*, 160 Ohio St. at 386, 116 N.E.2d 697; *Petti v. City of Richmond Hts.*, 5 Ohio St.3d 129, 130, 449 N.E.2d 768 (1983). Nonconforming uses are disfavored under Ohio law because they undermine the purpose and value of zoning legislation, thereby harming the public:

The reason for their [nonconforming uses] disfavored position is clear: if the segregation of buildings and uses, which is the function of zoning, is valid because of the beneficial results which this brings to the community, to the extent this segregation is not carried out, the value of zoning is diminished and the public is thereby harmed. Nonconforming uses are allowed to exist merely because of the harshness of and the constitutional prohibition against the immediate terminating of a use which was legal when the zoning ordinance was enacted.

Beck, 88 Ohio App.3d. at 446, 624 N.E.2d 286, quoting *Kettering v. Lamar Outdoor Advertising, Inc.* 38 Ohio App.3d 16, 18, 525 N.E.2d 836 (2nd Dist.1987).

In its opinion the Ninth District states that L.Z.C. 1280.05 is arbitrary and unreasonable because the ordinance treats mobile home parks differently than other types of businesses by trying “to extinguish the nonconforming use of the property on a piecemeal basis.” *Sunset Estate*, 2013-Ohio-4973, at ¶24. Courts, however, have held that nonconforming uses may be “regulated to the point they ‘wither and die.’” *Beck*, at 446. This includes allowing local governments to prohibit the expansion or substantial alteration of a nonconforming use in an attempt to eradicate that use. *Id*; see *Martin v. Independence Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 81340, 2003-Ohio-2736 (holding that a landowner had no vested right to expand the size of its nonconforming use by replacing his mobile home with a larger mobile home).

Courts also have recognized that mobile homes lots within a mobile home park are separate nonconforming uses and have prohibited mobile home parks from adding additional lots or pads to existing nonconforming mobile home parks. See *Baker v. Blevins*, 162 Ohio App.3d 258, 2005-Ohio-3664, 833 N.E.2d 327 (2nd Dist.) (holding that when a nonconforming mobile home was removed from its pad and moved to a different part of the property for a period of time, which act was considered a discontinuance of the nonconforming use, the mobile home could not later be returned to the pad); *Beck*, 88 Ohio App.3d 443, 624 N.E.2d 286 (prohibiting a mobile home park from adding mobile home lots because it was considered an expansion of a

nonconforming use); *Rolfes v. Bd. of Zoning Appeals of Goshen Twp.*, 1st Dist. Clermont No. 656, 1975 Ohio App. LEXIS 7287, *4, 1975 WL 181093 (stating that the “extension of a nonconforming home trailer park onto land not used for that purpose prior to the zoning ordinance is an unlawful extension of use”). Furthermore, courts addressing situations where only a portion of the nonconforming use was abandoned on a property have held that the law concerning changes or alterations to nonconforming use should be applied. *Gem City Metal Spinning Co. v. City of Dayton Bd. of Zoning Appeals*, 2d Dist. Montgomery No 22083, 2008-Ohio-181, ¶¶ 26-27 (holding that changing the nonconforming use from less restrictive to more restrictive nonconforming use precludes the owners or occupants from resuming the less restrictive nonconforming use).

C. L.Z.C. 1280.05 is not Arbitrary or Unreasonable and is Rationally Related to Lodi’s Legitimate Goals.

Moreover, a zoning ordinance is unconstitutional only if it is “clearly arbitrary and unreasonable *and* without substantial relation to the public health, safety, morals, or general welfare of the community.” (Emphasis added.) *Goldberg*, 81 Ohio St.3d at 214, 690 N.E.2d 510. Lodi enacted its zoning code in order to protect property values and encourage the development of surrounding properties. Lodi’s goals for the subject zoning legislation are unquestionably permissible, and L.Z.C. 1280.05 is rationally related to those goals. *See* R.C. 713.06; R.C. 713.07; *Clark*, 28 Ohio App.3d at 68; *Cent. Motors Corp.*, 73 Ohio St.3d 581. Tellingly, the Ninth District did not reach a contrary conclusion and actually acknowledged that the ordinance was intended to “address a valid public interest.” *Sunset Estate*, 2013-Ohio-4973 at ¶24. Notwithstanding this acknowledgement and the fact that L.Z.C. 1280.05 is neither arbitrary nor unreasonable, the Ninth District improperly struck down L.Z.C. 1280.05 as unconstitutional on its face. And in doing so, the Ninth District has cast considerable doubt on

the proper analysis to be employed in deciding whether a zoning ordinance is facially unconstitutional as well as on the validity of similar zoning ordinances.

CONCLUSION

The Ninth District, in deciding to invalidate as facially unconstitutional a zoning ordinance that precludes a property owner from re-establishing a nonconforming use after a specified period of nonuse, disregarded long-standing Ohio Supreme Court precedent governing facial constitutional challenges and interchangeably used and misapplied standards applicable to other types of constitutional challenges. If allowed to stand, the Ninth District's decision will create confusion as to the validity of similar zoning ordinances as well as the proper analysis to be employed in adjudging their constitutionality. It also will have a detrimental impact on municipalities' ability to exercise their police powers in enacting and enforcing zoning laws. Through this case, the Court can provide guidance to Ohio courts, municipalities, and property owners regarding the proper analysis to be employed for addressing the constitutionality of zoning ordinances that provide for the gradual elimination of nonconforming uses. Because this case involves a substantial constitutional question and is of public or great general interest, Lodi respectfully requests that this Court accept jurisdiction to decide the case on the merits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Irving B. Sugerman", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that a copy of this APPELLANT VILLAGE OF LODI, OHIO'S MEMORANDUM IN SUPPORT OF JURISDICTION was sent by ordinary U.S. Mail on this 24th day of December, 2013, upon:

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AND MEADOWVIEW VILLAGE, INC.


COUNSEL FOR APPELLANT
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#874755

EXHIBIT A

STATE OF OHIO)
COUNTY OF MEDINA)
COURT OF APPEALS
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
ss: 13 NOV 12 PM 12:19

SUNSET ESTATE PROPERTIES, LLC et al.)
DAVID B. WADSWORTH No. 12CA0023-M
MEDINA COUNTY
CLERK OF COURTS

Appellants

v.

VILLAGE OF LODI, OHIO

Appellee

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 11CIV0221

DECISION AND JOURNAL ENTRY

Dated: November 12, 2013

COMMON PLEAS COURT
13 NOV 12 PM 12:32
DAVID B. WADSWORTH
CLERK OF COURTS

CARR, Judge.

{¶1} Appellants, Sunset Estate Properties, LLC ("Sunset") and Meadowview Village, Inc. ("Meadowview"), appeal the judgment of the Medina County Court of Common Pleas that granted summary judgment in favor of appellee, Village of Lodi. This Court reverses and remands.

I.

{¶2} Sunset and Meadowview each own a parcel of land in Lodi on which each operates a mobile home park. Both of the properties are zoned R-2 for residential use, not MH for manufactured homes park use. However, both mobile home parks constitute authorized nonconforming uses of the properties. Each park was licensed for thirty-three (Sunset) and forty-four (Meadowview) mobile home lots or pads, respectively. Twenty-one of Sunset's thirty-three mobile home lots and seventeen of Meadowview's forty-four lots had been vacant for more than six months. Lodi refused to reactivate utilities for those lots for the asserted reason that the

COURT OF APPEALS, NINTH JUDICIAL DISTRICT-STATE OF OHIO
MEDINA COUNTY S.S. I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF
THE ORIGINAL AS FILED IN THE COURT ON THE 12th day of NOVEMBER 2013
at Lodi, Ohio. Clerk of Courts.
David B. Wadsworth
Clerk of Courts



nonconforming use of those particular lots had been abandoned pursuant to the terms of the local zoning code.

{¶3} Section 1280.05(a) of the Lodi Zoning Code ("L.Z.C.") addresses discontinuance or abandonment of a nonconforming use of property and provides:

Whenever a nonconforming use has been discontinued for a period of six months or more, such discontinuance shall be considered conclusive evidence of an intention to legally abandon the nonconforming use. At the end of the six-month period of abandonment, the nonconforming use shall not be re-established, and any further use shall be in conformity with the provisions of this Zoning Code. In the case of nonconforming mobile homes, their absence or removal from the lot shall constitute discontinuance from the time of absence or removal.

{¶4} There is no provision in the local zoning code that expressly authorizes or addresses the nonconforming use of mobile home lots or pads individually outside the existence of a mobile home park as a whole. The code does not define "lot." Neither does any other provision of the code define or clarify individual mobile homes as nonconforming uses.

{¶5} Because Sunset and Meadowview were unable to lease their mobile home lots which had been vacant for at least six months, they filed a complaint against the Village seeking (1) a declaration that L.Z.C. 1280.05(a) is unconstitutional on its face and as applied to them; (2) a declaration that L.Z.C. 1280.05 fails substantially to advance a legitimate governmental interest and/or is in conflict with state law and, thereby, constitutes a taking for which compensation must be made; (3) compensatory damages for the resulting regulatory taking of their properties; (4) an injunction requiring the Village to institute appropriation proceedings to determine the reasonable compensation for the taking; and (5) a writ of mandamus compelling the Village to institute appropriation proceedings. Lodi answered, denying that the plaintiffs were entitled to relief.

{¶6} Sunset and Meadowview filed a motion for summary judgment, and Lodi responded in opposition. Lodi filed separate, competing motions for summary judgment against Sunset and Meadowview, and the plaintiffs responded in opposition. The trial court granted summary judgment in favor of Lodi and declared that L.Z.C. 1280.05 is not unconstitutional or in conflict with state law. In addition, the court declared that the local ordinance does not amount to a regulatory taking so that appropriation proceedings are not necessary. Sunset and Meadowview filed a timely appeal, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DENYING PLAINTIFFS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

{¶7} Sunset and Meadowview argue that the trial court erred by granting summary judgment in favor of Lodi and by denying their motion for summary judgment. This Court agrees in part.

{¶8} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶9} Pursuant to Civ.R. 56(C), summary judgment is proper if:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶10} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶11} The non-moving party's reciprocal burden does not arise until after the moving party has met its initial evidentiary burden. To do so, the moving party must set forth evidence of the limited types enumerated in Civ.R. 56(C), specifically, "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R. 56(C) further provides that "[n]o evidence or stipulation may be considered except as stated in this rule."

{¶12} Sunset and Meadowview sought various declarations, including a declaration that L.Z.C. 1280.05(a) is unconstitutional on its face and as applied and that its application denies the entities the viable economic use of their properties and effects a taking for which just compensation is due. In this case, the trial court found that L.Z.C. 1280.05(a) was constitutional because it "is not arbitrary, capricious, unreasonable, or unrelated to the public health, safety, welfare and morals[.]" It premised that finding on the village's authority pursuant to Section 3,

Article XVIII of the Ohio Constitution to enact zoning ordinances as an exercise of its police power. This Court does not dispute a municipality's authority in that regard. *Sheffield v. Rowland*, 87 Ohio St.3d 9, 10 (1999) (noting that "[t]he enactment of zoning ordinances is an exercise of the police power, not an exercise of local self-government."). That authority is not absolute, however. Rather, zoning power "must be exercised within constitutional limits." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981), quoting *Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment). After recognizing the village's authority to enact zoning legislation as a function of its exercise of police powers, the trial court cited R.C. 713.15 which states:

The lawful use of any dwelling, building, or structure and 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, or for a period of not less than six months but not more than two years that a municipal corporation otherwise provides by ordinance, any future use of such land shall be in conformity with sections 713.01 to 713.15 of the Revised Code. The legislative authority of a municipal corporation shall provide in any zoning ordinance for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning ordinance.

Without any analysis, the trial court then summarily concluded that L.Z.C. 1280.05 was constitutional. This Court disagrees and concludes that L.Z.C. 1280.05(a) is unconstitutional on its face.

{¶13} A facial challenge to a zoning ordinance considers whether the ordinance "has no rational relationship to a legitimate governmental purpose and [whether] it may not constitutionally be applied under any circumstances." *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, ¶ 11. In a facial challenge, the presumption of constitutionality may be overcome by proof "beyond a fair debate" that the ordinance is

“arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community.” *Id.* at ¶ 13, citing *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St.3d 207 (1998), syllabus, 214.

{¶14} “Zoning is a valid legislative function of a municipality’s police power.” *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *see also* Article I, Section 19, Ohio Constitution (“Private property shall ever be held inviolate, but subservient to the public welfare.”). The Ohio Supreme Court has held that “the enactment of a comprehensive zoning ordinance, which has a substantial relationship to the public health, safety, morals and the general welfare and which is not unreasonable or arbitrary, is a proper exercise of the police power.” *Akron v. Chapman*, 160 Ohio St. 382, 385 (1953). The *Chapman* court further recognized that “[z]oning ordinances contemplate the gradual elimination of nonconforming uses within a zoned area, and where an ordinance accomplishes such a result without depriving a property owner of a vested *property right*, it is generally held to be constitutional.” (Emphasis in original) *Id.* at 386 (recognizing the propriety of the taking of private property, in exchange for adequate compensation, for public welfare or use to eradicate slums and blight conditions). The high court, however, held that “[t]he right to continue to use one’s property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established is within the protection of Section 1, Article XIV, Amendments, United States Constitution, and Section 16, Article I of the Ohio Constitution, providing that no person shall be deprived of life, liberty or *property* without due process of law.” (Emphasis in original) *Id.* at paragraph two of the syllabus. The *Chapman* court reasoned that “property” contemplates not only ownership and possession, but the substantial right of unrestricted use, enjoyment, and disposal. *Id.* at 388. The right to continue a lawful business on the property is subsumed within that right. *Id.*

{¶15} Consequently, in order for a nonconforming use to be extinguished, the use must be voluntarily abandoned. *See Bell v. Rocky River Bd. of Zoning Appeals*, 122 Ohio App.3d 672; 675 (8th Dist.1997) (concluding that, because municipal ordinances may not conflict with a general law, any act of abandonment must be voluntary as mandated by R.C. 713.15). Moreover, the village retains the burden of establishing that a property owner has voluntarily abandoned or discontinued the nonconforming use. *New Richmond v. Painter*, 12th Dist. Clermont No. CA2002-10-080, 2003-Ohio-3871, ¶ 9. "Abandonment requires affirmative proof of the intent to abandon coupled with acts or omissions implementing intent. Non-use alone is insufficient to establish abandonment." (Internal quotations omitted.) *Id.*, citing *Davis v. Suggs*, 10 Ohio App.3d 50, 52 (12th Dist.1983). Here, the Lodi ordinance does not distinguish "abandonment" or "discontinuance" for any type of nonconforming use other than relative to mobile homes. Accordingly, while all other property owners and businesses must voluntarily abandon the nonconforming use of the property, mobile home parks alone can be forced into involuntary abandonment simply by removing a mobile home (i.e., a structure that is designed to be moved) from a lot.

{¶16} In April 2000, upon request of the Medina County Prosecutor, the Ohio Attorney General issued an opinion on two questions. The question relevant to the issue raised in this appeal was: "If a local zoning authority has the power to decide what is a nonconforming use, may it consider each lot within a mobile home park to be a nonconforming use, or is it the park as a whole that constitutes the nonconforming use?" 2000 Ohio Atty.Gen.Ops. No. 2000-022, 2000 WL 431368. Then-Attorney General Betty Montgomery opined: "In the absence of a zoning resolution or ordinance to the contrary, the manufactured home park as a whole rather than individual lots within the park shall be considered the nonconforming use." *Id.*

{¶17} The Attorney General opined that a “village zoning ordinance governing nonconforming use must be consistent with constitutional limitations, and may not deprive the owner or operator of a manufactured home park of the economically viable use of his land without just compensation.” 2000 WL 431368. Although we recognize that the Attorney General’s opinion does not constitute binding precedent on this Court, we agree with its reasoning. The Attorney General wrote: “An ordinance or resolution that denies the owner or operator of a manufactured home park the ability to rent a lot within the park to a new home owner after the lot has been vacant for a time longer than that allowed for reestablishment of a nonconforming use, even though the park as a whole is an ongoing concern, would be of questionable validity * * *.” *Id.* The opinion premised that conclusion on three reasons: (1) Given the accessibility to the lots and other improvements the park operator is required to provide, as well as remaining utility connections, it is questionable whether the nonconforming use had, in fact, been discontinued. (2) Application of the ordinance or resolution would “likely render any such lot that had been vacated useless for any practical purpose.” (3) Application of the ordinance or resolution would likely interfere with the park owner’s right to conduct his mobile home park business as a whole. *Id.* This comports with the holding enunciated in *Chapman, supra*.

{¶18} This Court shares the concerns of the Attorney General. Because L.Z.C. 1280.05(a) is ambiguous, arbitrary, and unreasonable, we conclude that it is unconstitutional on its face.

{¶19} Chapter 1280 of the Lodi zoning code addresses nonconforming uses. L.Z.C. 1280.01 provides: “The lawful use of any building or land existing on the effective date of this Zoning Code may be continued, although such use does not conform with the provisions of this

Zoning Code, provided the conditions of this chapter are met.” The limitation of this provision enunciated in L.Z.C. 1280.05(a) presents with some ambiguity, however.

{¶20} This Court has recognized that “[a]n ordinance is ambiguous when it is subject to various interpretations. Specifically, an ambiguity exists if a reasonable person can find different meanings in the ordinance and if good arguments can be made for either of two contrary positions.” (Quotations omitted.) *Padrutt v. Peninsula*, 9th Dist. Summit No. 24272, 2009-Ohio-843, ¶ 20. “Because zoning ordinances deprive property owners of certain uses of their property, [] they will not be extended to include limitations by implication.” *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 152 (2000). The Ohio Supreme Court further explained:

Zoning ordinances are in derogation of the common law. They deprive a property owner of uses of his land to which he would otherwise be entitled. Therefore, where interpretation is necessary, such enactments are ordinarily construed in favor of the property owner. Furthermore, in determining the legislative intent of an ordinance, the provision to be construed should not be reviewed in isolation. Its meaning should be derived from a reading of the provision taken in the context of the entire ordinance.

(Internal citations omitted.) *Univ. Circle, Inc. v. Cleveland*, 56 Ohio St.2d 180, 184 (1978).

{¶21} There is nothing in Chapter 1280 to indicate that Lodi intended to classify individual mobile homes or mobile home lots as the contemplated nonconforming use. First, unlike R.C. 713.15, L.Z.C. 1280.01 makes no reference to “dwellings.” Nevertheless, L.Z.C. 1280.05 mandates discontinuance of the nonconforming use within the context of “nonconforming mobile homes.” The code as a whole fails to make any provision, however, for mobile homes or other dwellings as nonconforming uses.

{¶22} Furthermore, L.Z.C. 1280.05(a) premises “discontinuance” of the nonconforming use of a “mobile home” as the mere “absence or removal” of the home from the individual lot.

Accordingly, a mobile home could be removed from one specific lot for purposes of refurbishing or renovation, and immediately replaced with another mobile home on that lot. If the renovation took longer than six months, presumably that mobile home could not be returned to its original lot (or any other) within the mobile home park because it could reasonably be viewed as having lost its status as a valid nonconforming use, despite the fact that another mobile home had remained on the lot from which it was removed during the period of renovation. On the other hand, Lodi appears to have no issue with the presence or absence of specific mobile homes. Rather, it appears to interpret the provision to construe discontinuance of the nonconforming use as the absence of any mobile home on a specific lot, thereby precluding further use of the lot as a nonconforming use.

{¶23} Second, the code does not define "land" or otherwise provide that portions of individual parcels may be zoned differently. L.Z.C. 1280.05(b) imposes a duty on the Zoning Inspector to determine when a nonconforming use has been discontinued for six months and to "notify the *property owner*" of the expiration of the six-month period. The common scheme to delineate property is by parcels as defined by quantifiable geographic measures. Properties are bought and sold as parcels. Taxes are assessed by parcels. Lodi has failed to make any provision in its zoning code to distinguish mobile home parks to allow them to be bought and sold or taxed by individual mobile home lots as opposed to the full parcel. Significantly, the zoning code contains no definition section. Accordingly, there is no authority for construing individual mobile home lots as "land" subject to nonconforming use. *Compare State ex rel. McArthur v. Bd. of Adjustment of Crestwood*, 872 S.W.2d 651, 652 (Mo.App. 1994) (concluding that individual mobile home lots within a mobile home park are not "parcels" or "lots" for purposes of discontinuance of nonconforming use based on the zoning code's definition of those

terms). Accordingly, there is no evidence that the village has enacted any zoning resolution or ordinance to indicate anything other than that the manufactured home park as a whole rather than individual lots within the park shall be considered the nonconforming use.

{¶24} Finally, L.Z.C. 1280.05(a) is drafted to effect an arbitrary result. Zoning ordinances govern the use of land. Mobile home parks constitute business concerns in which portions or units of the property are leased for use by multiple others. The same business model is recognized in apartment buildings, duplexes, multi-office buildings, storage unit complexes, and the like. The ordinance makes no provision for delimiting the nonconforming use of any other type of business in which individual units on the property remain vacant and are not utilized within the scope of the nonconforming use. Only in cases of the absence or removal of mobile homes from portions of the park property does the village attempt to extinguish the nonconforming use of the property on a piecemeal basis. The provision is, therefore, arbitrary and unreasonable in its intent to address a valid public interest which might, when justified, reasonably be addressed by way of a nuisance action. *See Solly v. Toledo*, 7 Ohio St.2d 16 (1966); *see also* R.C. 3767.01(C)(1).

{¶25} Moreover, L.Z.C. 1280.05 negatively impacts the park owners' substantive due process rights. Article I, Section 1, of the Ohio Constitution recognizes that people have "certain inalienable rights, among which are those of enjoying and defending life and liberty, [and] acquiring, possessing, and protecting property * * *." In addition, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), and

Palko v. Connecticut, 302 U.S. 319, 325 (1937). The “liberty” interest protected by the Due Process Clause includes protection against “certain government actions regardless of the fairness of the procedures used to implement them” and “government interference with certain fundamental rights and liberty interests.” *Glucksberg* at 719-720, quoting *Collins v. Harker Hts.*, 503 U.S. 115, 125 (1992), and citing *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). “Liberty implies the absence of arbitrary restraint, [although] not immunity from reasonable regulations and prohibitions imposed in the interests of the community.” *Chicago, Burlington, & Quincy Ry. Co. v. McGuire*, 219 U.S. 549, 567 (1911).

{¶26} Again, Lodi has attempted to restrain mobile park owners’ use of their properties by creating the situation which effectively extinguishes the nonconforming use of the properties on a piecemeal basis. Specifically, by refusing to provide utility services via the utility lines and systems which remain intact, the village has forced the abandonment of various lots within the parks. The parks have not abandoned the nonconforming use of the land, i.e., use as a mobile home park. Rather, the village has caused the abandonment of pieces (the lots) within the whole (the park), systematically squeezing the life out of the parks’ businesses in an attempt to slowly extinguish the nonconforming use.

{¶27} Lodi has not argued that the abandonment of one or more, but fewer than all, lots within a mobile home park constitutes a discontinuance of the nonconforming use of the mobile home park as a whole. The village has interpreted L.Z.C. 1280.05, however, to mean that it is the absence of a mobile home on a lot that constitutes abandonment of the lot and, therefore, discontinuance of the nonconforming use. The village has then applied that logic to refuse to provide utilities to those “abandoned” lots. This Court has previously impliedly recognized, however, that it is not the presence or absence of a mobile home on an individual lot that might

determine whether the individual lot has been abandoned. *Lodi v. Ward*, 9th Dist. Medina No. 1918, 1991 WL 38043 (Mar. 20, 1991).¹ Rather, we recognized that it is the presence of intact utility connections which is key. *Id.* In *Ward*, the Wards dba LRTW Mobile Home Park were convicted of violating the village's zoning ordinance for allowing mobile homes on two lots within the mobile home park after the lots had been abandoned for six months or more. This Court reversed their convictions because the village had failed to present any evidence to dispute the Wards' evidence that, notwithstanding the absence of occupied mobile homes on lots 7 and 17, utility connections remained intact at those sites. *Id.* As the issue of whether each individual mobile home lot constituted a nonconforming use was not before us, we did not address that. However, our reasoning in *Ward* lends support to our conclusion that L.Z.C. 1280.05 allows Lodi to arbitrarily slowly extinguish nonconforming uses that the village finds distasteful despite the express provision in L.Z.C. 1280.01 which allows for the continuation of lawful, nonconforming uses.

{¶28} For the reasons articulated above, this Court concludes that L.Z.C. 1280.05 is unconstitutional on its face. Accordingly, the trial court erred by concluding otherwise. Because the determination regarding the constitutionality of the zoning code constitutes the foundation underlying the remaining issues relevant to this case, we decline to address the issues of whether Lodi's actions constitute a taking and what constitutes an appropriate remedy for Lodi's application of its unconstitutional ordinance to the park owners. Accordingly, the assignment of error is sustained inasmuch as it assigns error to the trial court's finding that L.Z.C. 1280.05 is constitutional. We decline to address the remaining issues as they are not yet ripe for review.

¹ Article 8, Section 801.4 of the Village of Lodi Zoning Ordinance cited in *Ward* is substantively identical to L.Z.C. 1280.05(a) at issue in this case.

The matter is remanded for a determination regarding the appropriate remedy to which Sunset and Meadowview may be entitled.

III.

{¶29} Sunset's and Meadowview's assignment of error is sustained in part. The judgment of the Medina County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.


DONNA J. CARR
FOR THE COURT

MOORE, P. J.
CONCURS IN JUDGMENT ONLY.

BELFANCE, J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

JOHN W. MONROE and TRACEY S. MCGURK, Attorneys at Law, for Appellants.

IRVING B. SUGERMAN and JAMES R. RUSSELL, JR., Attorneys at Law, for Appellee.

EXHIBIT B

DPY

The Court finds that the Defendant Village of Lodi's motion for judgment on the pleadings filed November 17, 2011 is rendered moot due to the fact that the same arguments are presented in the Defendant's motions for summary judgment. To the extent, if any, that the Defendant's motion for judgment on the pleadings presents issues not specifically addressed in the Defendant's motions for summary judgment, the Defendant's motion for judgment on the pleadings is hereby denied.

The Plaintiffs have moved for summary judgment on the amended complaint. The Plaintiffs seek 1) a declaration from the Court that the Village of Lodi Zoning Ordinance Section 1280.05 is arbitrary, capricious, unreasonable, unrelated to the public health, safety, welfare and morals, and contravenes the Plaintiffs' constitutional rights; 2) a declaration from the Court that Zoning Ordinance Section 1280.05, to the extent that it prohibits the Plaintiffs from using the properties as a mobile home park, is arbitrary, capricious, unreasonable, unrelated to the public health, safety, welfare and morals, and contravenes the Plaintiffs' constitutional rights; 3) a declaration from the Court that Zoning Ordinance Section 1280.05 fails substantially to advance a legitimate governmental interest and thereby constitutes a taking of the Plaintiffs' properties for which compensation must be made in an amount to be determined at trial; 4) a declaration from the Court that Section 1280.05, to the extent that it prohibits Plaintiffs from devoting the properties for use as a validly existing mobile home park, deny the Plaintiffs the viable economic use of the properties and thereby constitutes a taking of the properties for which just compensation is due; and 5) a declaration from the Court that Section 1280.05, to the extent that it prohibits the Plaintiffs from devoting the properties to use as mobile home parks, is in conflict with state law and thereby constitutes a taking of the properties for which just compensation is due. The Plaintiffs further seek a mandatory injunction and Writ of Mandamus from the Court ordering that the Village of Lodi initiate appropriation proceedings to determine the

compensation to be paid to the Plaintiffs for the Village's alleged regulatory taking of the properties.

The Defendant Village of Lodi filed motions for summary judgment, one relating to each Plaintiff, arguing that 1) the Zoning Ordinance is not unconstitutional; 2) the Defendant may enact zoning ordinances that provide for nonconforming uses to wither and die; 3) the Plaintiffs do not have a vested right to use the properties for a particular use – and even if that vested right does exist, the properties are not without economic value; and 4) there are other remedies at law, meaning that compelling appropriation proceedings is unreasonable. The Defendant asks the Court to find in favor of the Defendant as to the counts set forth in the Plaintiffs' amended complaint.

Summary judgment is appropriate when (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence in favor of the non-moving party, that conclusion favors the moving party. *Dresher v. Burt*, 75 Ohio St. 3d 280 (1996); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977). When deciding matters of summary judgment, the “judge’s function is not to personally weigh the evidence and determine the truth of the matter, but to determine **whether there is a genuine issue of fact for the trial.**” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (emphasis added). “[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 288-89 (1968).

The Court will begin its analysis by determining whether or not the Village of Lodi's adoption of its zoning code, specifically Section 1280.05, is constitutional. The party challenging the constitutionality of the zoning regulation has the burden of establishing that the

zoning regulation is either facially unconstitutional or unconstitutional as applied to that party.

Northampton Building Co. v. Board of Zoning Appeals of Sharon Township, 109 Ohio App.3d 193, 202 (9th Dist. 1996). Lodi Zoning Ordinance Section 1280.05(a) states, in pertinent part:

Whenever a nonconforming use has been discontinued for a period of six months or more, such discontinuance shall be considered conclusive evidence of an intention to legally abandon the nonconforming use. At the end of the six-month period of abandonment, the nonconforming use shall not be re-established, and any further use shall be in conformity with the provisions of this Zoning Code. In the case of nonconforming mobile homes, their absence or removal from the lot shall constitute discontinuance from the time of absence or removal.

The Ohio Supreme Court held that “zoning ordinances are an exercise of the police power granted to municipalities by Section 3, Article XVIII of the Ohio Constitution.” *Garcia v. Siffrin Residential Ass’n*, 63 Ohio St. 2d 259, 270, 407 N.E.2d 1369 (1980). The Court in *Garcia* further explained that “the exercise of the zoning power aims directly to secure and promote the public welfare, and it does so by restraint and compulsion.” *Id.*

R.C. 713.15, as it relates to the Village of Lodi, provides that:

The lawful use of any dwelling, building, or structure and 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, or for a period of not less than six months but not more than two years that a municipal corporation otherwise provides by ordinance, any future use of such land shall be in conformity with sections 713.01 to 713.15 of the Revised Code. The legislative authority of a municipal corporation shall provide in any zoning ordinance for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning ordinance.

Based on the foregoing, the Court finds that Section 1280.05 is not arbitrary, capricious, unreasonable, or unrelated to the public health, safety, welfare and morals, and therefore it does not contravene the Plaintiffs’ constitutional rights regarding the use of their property. The Zoning Ordinance provides for nonconforming uses and is a valid exercise of the police power granted to municipalities such as the Village of Lodi. A municipality “may properly exercise its

zoning authority in an attempt to preserve and protect the character of designated areas in order to promote the overall quality of life within the [municipality's] boundaries." *Gerijo, Inc. v. City of Fairfield*, 70 Ohio St. 3d 223, 228, 638 N.E.2d 533 (1994), citing *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St.3d 28, 33, 505 N.E.2d 966 (1987).

The Court must then determine whether or not Section 1280.05 is in conflict with state law. The Plaintiffs argue that R.C. 3733.01, et seq., specifically R.C. 3733.06(A), grant the sole and exclusive right to regulate manufactured home parks in Medina County to the Medina County Health Department. R.C. 3733.06(A) states that:

Upon a license being issued under sections 3733.03 to 3733.05 of the Revised Code, any operator shall have the right to rent or use each lot for the parking or placement of a manufactured home or mobile home to be used for human habitation without interruption for any period coextensive with any license or consecutive licenses issued under sections 3733.03 to 3733.05 of the Revised Code.

The test for determining whether there is a conflict between a municipal ordinance and a general law of the state is "whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Smith Family Trust v. City of Hudson Bd. of Zoning & Bldg. Appeals*, 9th Dist. No. 24471, 2009-Ohio-2557, ¶10. Ohio courts have held that:

Because the power of a home rule municipality was to be derived from the Constitution, the laws of the municipality would be every bit as authoritative and effective as a state law so long as the local law did not diminish the general state law: It is not intended to invade state authority in the least, but to make clear that the municipality has the right to enact such local police, sanitary and other similar regulations as are not in conflict with general laws. It can not take away ... [laws or] ... make them less strict than the state, but it can make them more strict.

Mentor Green Mobile Estates v. Mentor, 11th Dist. No. 90-L-15-135, 1991 Ohio App. LEXIS 4052, *10-11 (August 23, 1991).

Therefore, the provisions of R.C. 3733.01-08 would not preempt local zoning provisions as long as the local zoning provisions are not in conflict with R.C. 3733.01-08. To determine whether a conflict exists, the Court will first examine the focus and purpose behind both R.C.

3733 and Section 1280.05 of the Lodi Zoning Code. R.C. 3733 deals with manufactured home parks. Sections 3733.021-3733.08 of the Revised Code deal with “Development” and “Flood Plain Provisions” in relation to manufactured home parks. R.C. 3733.02(A)(1) states that:

The public health council ... shall adopt, and has the exclusive power to adopt, rules of uniform application throughout the state governing the review of plans, issuance of flood plain management permits, and issuance of licenses for manufactured home parks; the location, layout, density, construction, drainage, sanitation, safety, and operation of those parks; blocking and tie-downs of mobile and manufactured homes in those parks; and notices of flood events concerning, and flood protection at, those parks.

The Court finds the public health council, pursuant to R.C. 3733, has authority to regulate manufactured home parks for the purpose of health and safety of the community and residents of the manufactured home park. The provisions expressly indicate that the authority relates to flood plain management, density, drainage, sanitation and safety within the manufactured home park.

The public health authority and the local zoning authority have different authority and different concerns. Lodi Zoning Code 1280 deals specifically with zoning issues pertaining to land use and planning. The Court finds that based on the plain language of R.C. 3733, there is no indication that the legislature intended to transform a public health council into a zoning board for manufactured home park issues. The Court finds that the authority of the public health council and the local zoning board can coexist, and therefore the R.C. 3733.01-08 and Lodi Zoning Code 1280.05 are not in conflict. The authority of the two coexists for a variety of practical reasons. The public health authority is concerned with safety, sanitation and other health concerns, namely flood plain management, relating to manufactured home parks. The local zoning authority is concerned with, among other issues, the location of the structure on the lot, height of the structure, size of the structure, lot size and land use (residential vs. industrial). The simple fact that either the public health council or the local zoning board does not have a concern over the use of a particular piece of property does not automatically divest the other agency of authority to regulate based on different concerns.

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Having found that the R.C. 3733 and Section 1280.05 are not in conflict, the Court must examine the nonconforming use provision of 1280.05. The Court finds that R.C. 713.15 does not explicitly prohibit a local zoning ordinance from classifying each individual lot in a manufactured home park as a nonconforming use. Section 1280.05(a) states that “in the case of nonconforming motor homes, their absence or removal from the lot shall constitute discontinuance from the time of absence or removal.” The Court finds there is no authority that prevents the Village of Lodi from classifying individual lots within a manufactured home park as nonconforming uses.

The Court must then determine whether or not the Village of Lodi’s application of the nonconforming use provision of Section 1280.05 to each lot in the Plaintiffs’ manufactured home park denies the Plaintiffs the viable economic use of the properties and thereby constitutes a taking of the properties for which just compensation is due. Municipalities may “prohibit the expansion or substantial alteration of a nonconforming use, in an attempt to eradicate that use.” *Springfield Township v. Grable*, 9th Dist. No. 18832, 1998 Ohio App. LEXIS 3584, *14 (August 5, 1998). In fact, the municipality may regulate the nonconforming uses “to the point they wither and die.” *Id.* at *15. Nonconforming uses exist “merely because of the harshness of and the constitutional prohibition against the immediate termination of a use which was legal when the zoning ordinance was enacted.” *Id.*

However, the Ohio Supreme Court previously held that “a compensable taking can occur either if the application of the zoning ordinance to the particular property is constitutionally invalid, i.e., it does not substantially advance legitimate state interests, or denies the landowner all economically viable use of the land.” *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St. 3d 59, 63, 765 N.E.2d 345 (2002). Thus, even though the Court has found Section 1280.05 to be constitutional because it advances a legitimate state interest and is a valid exercise

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of the police power granted to municipalities, the Plaintiffs could still be entitled to compensation if the Court finds that the zoning ordinance constitutes a taking because it deprives the Plaintiffs of all economically viable uses of the properties.

The Plaintiffs argue that because Section 1280.05 denies them the right to reestablish the nonconforming use and rent a vacated lot within the manufactured home parks to a new home owner, the vacated lot is useless for any practical purpose as long as the manufactured home park as a whole remains operational. The Ohio Supreme Court found that "a zoning ordinance denies a property owner an economically viable use if it denies an owner all uses except those which are highly unlikely or practically impossible under the circumstances." *Gerijo, Inc. v. City of Fairfield*, 70 Ohio St. 3d 223, 228, 638 N.E.2d 533 (1994).

The Defendant Village of Lodi has the right to establish zoning code provisions that provide for nonconforming uses which will eventually "wither and die." The Ninth District Court of Appeals previously held that no taking occurred when the landowners failed to establish that the property had no value as residential property after the zoning board failed to allow zoning for mobile homes. *Beck v. Springfield Township Bd. of Zoning Appeals*, 88 Ohio App. 3d 443, 624 N.E.2d 286 (9th Dist. 1993).

In this case, the Plaintiffs have failed to establish that all economically viable uses of the properties have been denied because of the Lodi Zoning Code. Nonconforming uses are not favored in the law, but instead exist out of principles of fairness. The Village of Lodi has enacted a valid zoning ordinance which would prohibit a mobile home park in these locations absent the nonconforming use. The Plaintiffs' land is not without all economically viable use. While the Plaintiffs' continued operation of mobile home parks on the properties would likely provide less revenue to the Plaintiffs because not all the lots were rented, the Plaintiff could choose to use the property for any other use and it could be economically viable (i.e. single

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family residential homes, etc.). The economically viable uses available to the Plaintiffs do not have to be the best or most profitable economically viable uses, so long as it is not highly unlikely or practically impossible under the circumstances.

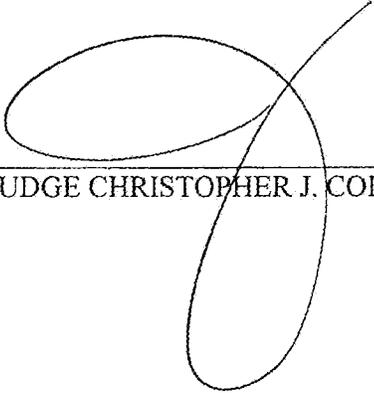
Based on the aforementioned analysis, the Court finds that the Plaintiffs' motion for summary judgment is denied and the Defendant's motions for summary judgment are granted. Judgment is hereby granted in favor of the Defendant on Count I of the Plaintiffs' amended complaint. The Village of Lodi Zoning Ordinance Section 1280.05 is not unconstitutional or in conflict with state law. The Zoning Ordinance does not amount to a regulatory taking of the Plaintiffs' property. Judgment is hereby granted in favor of the Defendant on Count II of the Plaintiffs' amended complaint. The Zoning Ordinance of the Village of Lodi, specifically Section 1280.05, is not arbitrary, capricious, unreasonable or without substantial relation to the public health, safety and morals. The Zoning Code does not constitute an unreasonable interference with the Plaintiffs' property rights as guaranteed by the U.S. and Ohio Constitutions. Judgment is hereby granted in favor of the Defendant on Count III of the Plaintiffs' amended complaint. The land use regulations adopted by the Village of Lodi do not amount to a taking for which just compensation must be paid. Judgment is hereby granted in favor of the Defendant on Counts IV and V of the Plaintiffs' amended complaint. The Court, having found that there was no regulatory taking in this matter, finds that appropriation proceedings are unnecessary.

The Defendant's motions to strike filed December 12, 2011 and January 2, 2012 and the Plaintiffs' motions to strike filed January 3, 2012 are hereby granted. The Court did not consider any of the exhibits or subject matter that was the focus of the motions to strike in rendering this decision. The remaining motions to compel and motions in limine are hereby denied as moot. In the interest of dealing with any outstanding motion or issue presented therein, any motion or argument presented therein not specifically addressed herein is denied.

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Costs are assessed to the Plaintiffs. No party is entitled to an award of reasonable attorney fees.

IT IS SO ORDERED.



JUDGE CHRISTOPHER J. COLLIER

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"FINAL APPEALABLE ORDER"