

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.)	

MERIT BRIEF OF APPELLANT VILLAGE OF LODI

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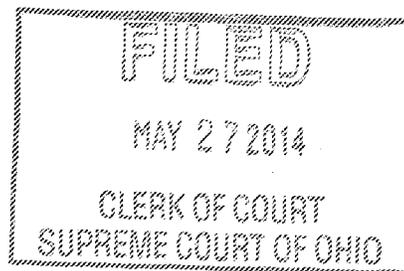


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SUMMARY OF ARGUMENT

This case concerns 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(a), 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(a), 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(a) provides that the absence or removal of the mobile home from the 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(a) 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, v. Lodi*, 9th Dist. Medina No. 12CA0023-M, 2013-Ohio-4973 (Moore, P.J., and Belfance, J., concurring in judgment only) [Appx. 0004-0018]. 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. The Ninth District also completely misinterpreted well-established precedent regarding the eradication of nonconforming uses. 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(a) 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 sixth 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 Ninth District specifically acknowledged that Lodi had the authority to enact zoning ordinances relating to nonconforming uses pursuant to Section 3, Article XVIII of the Ohio Constitution.

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 (Apr. 25, 1997). 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, in clear contravention of this long standing precedent, the Ninth District in this case declared a zoning ordinance aimed at gradually eliminating nonconforming uses facially unconstitutional.

The decision of the Ninth District was improper, confusing, and should be reversed accordingly. This Court should hold that a municipal zoning ordinance which precludes property owners from re-establishing a nonconforming use after a specified period of nonuse does not facially violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution or Section 16, Article I of the Ohio Constitution.

STATEMENT OF THE FACTS

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

In the 1980s, Lodi enacted a zoning ordinance relating to the discontinuance and abandonment of nonconforming uses. *See* L.Z.C. 1280.05(a) [Appx. 0030].¹ 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. (Deposition of Mayor Dan Goodrow, 10/12/2011 (“Goodrow Depo.”), p. 20 [Supp. 0107]).² 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’s Motion for Summary Judgment on Remaining Claims of Meadowview, Exhibit B, L.Z.C. Chapter 1256 [Supp. 0048-0049] and Exhibit C, L.Z.C. Chapter 1260 [Supp. 0050-0051]). Lodi wanted to promote more traditional housing in certain residential districts and to support the property values of the residents within them. (Lodi’s Memorandum in Opposition to Motion for Summary Judgment, Exhibit A, Affidavit of Donald Gilbert p. 2 [Supp. 0091]). 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. (*Id.*)

¹ Citations to the appendix will be abbreviated “Appx.”

² The Supplement to the Merit Brief of Appellant, citations to which are abbreviated “Supp.,” is being filed contemporaneously with this brief.

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. (Deposition of Annette Geissman, 10/12/2011 (“Geissman Depo.”) p. 14 [Supp. 0101]). 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. L.Z.C. 1280.05(b) [Appx. 0030]. 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 for a period of six months or more, Lodi will not re-establish the utility connection because to do so would be contrary to Lodi’s goal of eliminating nonconforming uses after a specified period of time. (Geissman Depo. pp.53-54, 56 [Supp. 0102-0104]).

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

Lodi has enacted a separate and distinct district zoned for mobile home parks, known as its MH District. (Lodi’s Motion for Summary Judgment on Remaining Claims of Meadowview, Exhibit C, L.Z.C. Chapter 1260 [Supp. 0050-0051].) Both Meadowview and Sunset, however, own manufactured home parks located in districts zoned R-2, Medium Density Residential District, and not MH, the manufactured home park district, rendering both parks nonconforming. (Goodrow Depo. p. 10 [Supp. 0106].) 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 nonconforming uses.

(Deposition of Gary Sparano, 11/11/2011 (“Sparano Depo.”) p. 17 [Supp. 0095]); (Lodi’s Motion for Summary Judgment on Remaining Claims of Meadowview, Exhibit F, Land Installment Contract [Supp 0061-0067].) 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. (Lodi’s Motion for Summary Judgment on Remaining Claims of Meadowview, Exhibit D, List of Inactive Utility Accounts, p. 2 [Supp. 0053]); (Sparano Depo. pp. 12, 22 [Supp. 0094, 0097].) Currently, seventeen of the forty-four lots have been abandoned. (See Lodi’s Motion for Summary Judgment on Remaining Claims of Meadowview, Exhibit D, List of Inactive Utility Accounts, p. 2 [Supp. 0053].) Meadowview still operates and collects rent from the lawful nonconforming mobile homes. (See Sparano Depo. pp. 20, 24-25 [Supp. 0096, 0098-0099].)

Sunset purchased the property where it currently operates a manufactured home park on October 1, 2008, at an auction for \$166,100. (Sunset’s Responses to Lodi’s Interrogatories and Requests for Admission, p. 12, Response to Interrogatory 14 [Supp. 0025].) 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. (See Deposition of Brady McCann, November 11, 2011 (“McCann Depo.”), p. 15, 23, 29-30 [Supp. 0109; 0111-0112].) When Sunset purchased the property, twenty of the thirty-three lots were unoccupied or abandoned, with some having been legally abandoned for ten years. (See Lodi’s Motion for Summary Judgment on Remaining Claims of Meadowview, Exhibit D, List of Inactive Utility Accounts, p. 1 [Supp. 0052]). Since the date of purchase, one additional lot has been abandoned. (See *Id.*) Sunset still operates and collects rent from the lawful nonconforming mobile homes. (See McCann Depo. p.32 [Supp. 0113]).

D. Meadowview and Sunset Filed a Declaratory Judgment Against Lodi in the Medina Court of Common Pleas.

Meadowview and Sunset filed an amended complaint for declaratory judgment and injunctive relief against Lodi on October 18, 2011, claiming, among other things, that L.Z.C. 1280.05(a) was unconstitutional on its face and as applied to them and that Lodi's application of L.Z.C. 1280.05(a) to their properties amounted to a compensable taking. (Plaintiffs' Amended Complaint, 10/11/2011 [Supp. 0001-0008]). Lodi filed its answer to the amended complaint on November 3, 2011. (Lodi's Answer to Plaintiffs' Amended Complaint, 11/3/2011 [Supp. 0009-0013]). On November 21, 2011 Meadowview and Sunset filed a motion for summary judgment against Lodi and on November 22, 2011, Lodi filed separate motions for summary judgment as to both Meadowview and Sunset. (Court of Common Pleas Journal Entry, 3/14/2012, p.1 [Appx. 0019].) A non-oral hearing was held on January 4, 2012 on all pending motions which included all of the parties' motions for summary judgment. (*Id.*)

E. The Trial Court Granted Lodi's Motion for Summary Judgment.

On March 14, 2012, the trial court entered summary judgment in favor of Lodi, concluding that L.Z.C. 1280.05(a) "is not arbitrary, capricious, unreasonable, or unrelated to the public health, safety, welfare and morals and therefore it does not contravene [Meadowview and Sunset's] constitutional rights regarding the use of their property." (Journal Entry Summary Judgment, 3/14/2012, p. 4 [Appx. 0022]). In making this determination, the Court quite correctly stated that Lodi had the right, under the police power granted to municipalities, to eradicate nonconforming uses in such a manner that the nonconforming use would "wither and die." (*Id.* at p 4, 8 [Appx. 0022, 0026]). In addition, the trial court observed that "there is no authority that prevents the Village of Lodi from classifying individual lots within a manufactured home park as nonconforming uses." (*Id.* at p. 7 [Appx. 0025]).

The trial court further concluded that Lodi's application of the nonconforming use provision of L.Z.C. 1280.05 to each lot in Meadowview's and Sunset's manufactured home parks did not deny them all economic uses of their properties and, therefore, did not give rise to a compensable taking. (*Id.*). In reaching its holding, the trial court reasoned that Meadowview and Sunset could choose to use their properties for any other use, such as single family residential homes, and remarked that "[t]he economically viable uses available to [them] [did] not have to be the best or most profitable economically viable uses, so long as it [was] not highly unlikely or practically impossible under the circumstances." (*Id.* at pp. 8-9 [Appx. 0026-0027]). On April 10, 2012, Meadowview and Sunset appealed that judgment to the Ninth District.

F. The Ninth District Reverses the Trial Court's Judgment and Declares L.Z.C. 1280.05(a) Facially Unconstitutional.

On November 12, 2013, the Ninth District entered its Decision and Journal Entry in which it reversed the trial court's March 14, 2012 decision, declaring L.Z.C. 1280.05(a) facially unconstitutional. *See Sunset Estate*, 2013-Ohio-4973, at ¶¶ 12, 28 [Appx. 0007-0008, 00016]. As previously noted, two of the Judges concurred in judgment only. In declaring Lodi's ordinance facially unconstitutional the Ninth District analyzed L.Z.C. 1280.05(a) as applied to mobile homes and mobile home parks only and found the ordinance unconstitutional because it attempts to "restrain mobile park owners' use of their properties by creating the situation which effectively extinguishes the nonconforming use of the property on a piecemeal basis." *Sunset Estate*, 2013-Ohio-4973, at ¶ 26 [Appx. 0015]. Additionally, the Ninth District, even after noting that it did not constitute binding precedent, cited an opinion of the Ohio Attorney General that discusses whether eliminating nonconforming mobile homes within a manufactured home park one-by-one would constitute a compensable taking, but which never addressed any issues relating to a facial constitutional challenge. *Id.* at ¶¶ 16-17, *citing* 2000 Ohio Atty.Gen.Ops. No.

2000-022, 2000 WL 431368 [Appx. 0010-0011]. Notwithstanding the Ninth District’s analysis, 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 discretionary appeal. See S.Ct.Prac.R. 5.02(A)(1) *and* (3).

ARGUMENT

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.

A. Municipal Zoning Ordinances Enjoy a Strong Presumption of Constitutionality.

Zoning ordinances are entitled to a strong presumption of constitutionality. *Goldberg Cos., Inc. v. Council of Richmond Hts.*, 81 Ohio St.3d 207, 209, 1998-Ohio-456, 690 N.E.2d 510. A zoning ordinance can be challenged as unconstitutional either on its face or as applied to a particular set of facts and 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; *Jaylin Invests., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903, ¶ 11. 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.” *Goldberg* at 210. The “beyond fair debate” standard is similar to the “beyond a reasonable doubt” standard. *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584, 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). 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.” *Id.*

B. This Court Has Set Forth Separate and Distinct Standards for Facial and As Applied Constitutional Challenges as well as for Compensable Takings.

1. Facial Constitutional Challenges

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.* “In a facial challenge to a zoning ordinance, the challenger alleges that the overall ordinance, on its face, has no rational relationship to a legitimate government purpose and it may not be constitutionally applied under any circumstance.” *Jaylin Invests.*, 2006-Ohio-4, at ¶ 11. 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 court, in determining the facial constitutionality of an ordinance, must focus exclusively on the ordinance, not the use of the property, without looking beyond the ordinance’s actual language or “speculate about hypothetical or imaginary cases.” *Id.* at ¶ 2; *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 21.

2. As Applied Constitutional Challenges

In contrast, a zoning ordinance is unconstitutional as applied where “the landowner questions the validity of the ordinance only as it applies to a particular parcel of property.” *Jaylin Invests.* at ¶ 12. If a zoning ordinance is found to be unconstitutional as applied, the ordinance will continue to be enforced in all other instances. *Id.* In analyzing the constitutionality of a zoning ordinance, the focus is on the ordinance itself and the legislative judgment underlying the enactment of the ordinance, while a property owner’s preferred use is only one of many factors to be considered. *Id.* at ¶ 18. Courts, in analyzing an as applied constitutional challenge, must focus on the constitutionality of the ordinance as applied to the prohibited use and not the reasonableness of the use of the property. *Id.* at ¶ 20.

3. Compensable Takings

Where a zoning law is determined to be constitutional, a property owner still may be entitled to compensation if the zoning, as applied to its property, constitutes a taking. *Goldberg*, 81 Ohio St.3d at 213, 690 N.E.2d 510. In *Goldberg*, this Court stated:

If the landowner has challenged the constitutionality of zoning and also alleged that it constitutes a taking of the property, the case is terminated if the zoning is found to be unconstitutional, because the landowner is free of the zoning that restricted the use of the land. However, if the zoning is determined to be constitutional, a court may then consider whether the zoning, as applied to this property, constitutes a taking so as to entitle the owner to compensation. In such a case, the zoning remains in effect as a legitimate exercise of police power for the public welfare.

Id. “[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.” (Emphasis sic). *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627, 765 N.E.2d 345.

C. A Municipal Zoning Ordinance that Precludes a Property Owner from Re-Establishing a Nonconforming Use after a Specified Period of Nonuse, such as L.Z.C. 1280.05(a), is Facially Constitutional.

1. The Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution

The Due Process Clause of the Fourteenth Amendment of United States Constitution provides that no state shall “deprive any person of life, liberty, or property without due process of the law.” [Appx. 0032] Section 16, Article I of the Ohio Constitution, in turn, provides that “[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” [Appx. 0033] This Court has consistently recognized that the protections afforded by the Due Process Clauses of the Fourteenth Amendment and Section 16, Article I of the Ohio Constitution are coextensive. *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 53; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 48; *see also Peebles v. Clement*, 63 Ohio St.2d 314, 408 N.E.2d 689 (1980); *Chapman*, 160 Ohio St. at 387. A court that is evaluating a statute or ordinance on due process grounds applies the rational-basis test, unless the statute or ordinance restricts the exercise of fundamental rights. *Arbino* at ¶ 49; *see also Carlisle v. Martz Concrete Co.*, 12th Dist. Warren No. CA2006-06-067, 2007-Ohio-4362, ¶ 39. An ordinance is “valid under the rational-basis test ‘[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.’” *Arbino* at ¶ 49 (quoting *Mominee v. Scherbath*, 28 Ohio St. 270, 274, 503 N.E.2d 717 (1985)).

2. Municipalities May Enact Zoning Ordinances that Gradually Eliminate Nonconforming Uses.

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 and 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. Woodmere*, 28 Ohio App.3d 66, 68, 502 N.E.2d 222 (8th Dist.1985); *see also Cent. Motors Corp.*, 73 Ohio St.3d at 585, 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”).

Municipalities’ police power also includes the authority to enact zoning legislation that gradually eliminates nonconforming uses. For example, in *Chapman*, this Court stated 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 sic.) *Chapman*, 160 Ohio St. at 386, 116 N.E.2d 697. The right of municipalities to prohibit the re-establishment of nonconforming uses and to provide for their gradual elimination has been consistently upheld by Ohio courts. *See, e.g., id.; Petti v. Richmond Hts.*, 5 Ohio St.3d 129, 130, 449 N.E.2d 768 (1983) (stating that both “the denial of the right to resume a nonconforming use after a period of nonuse” and “[t]he denial of the right to substitute new buildings for those devoted to an existing nonconforming use” have been upheld); *Beck*, 88 Ohio App.3d at 446, 624 N.E.2d 286 (observing that municipalities may “prohibit the expansion, or substantial alternation of a nonconforming use, in an attempt to eradicate that use”); *Hunziker*, 8 Ohio App.3d at 89, 456

N.E.2d 516 (stating that a municipality “may prohibit the expansion or substantial alteration or repair of existing buildings in attempting to eradicate the nonconforming use”).

The Ninth District discussed the disfavored status of nonconforming uses in *Beck*, stating:

Owners are permitted to continue a nonconforming use based on the recognition that one should not be deprived of a substantial investment which existed prior to the enactment of the zoning resolution. *Curtiss v. Cleveland* (1959), 170 Ohio St. 127, 132, 10 O.O.2d 85, 87, 163 N.E.2d 682, 686. However, it is recognized that nonconforming uses are not favorites of the law. *Kettering v. Lamar Outdoor Advertising, Inc.* (1987), 38 Ohio App.3d 16, at 18, 525 N.E.2d 836, at 839, states:

“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 termination of a use which was legal when the zoning ordinance was enacted.”

Beck at 446. Accordingly, nonconforming uses are disfavored in the law, because the function of zoning is to segregate uses for the beneficial results it brings to communities, and “to the extent this segregation is not carried out, the value of zoning is diminished and the public is thereby harmed.” *Kettering*, at 18. Because of the disfavored status of a nonconforming use, “the denial of the right to resume a nonconforming use after a period of nonuse has been upheld, as well as the denial of the right to extend or enlarge an existing nonconforming use.” *Chapman*, 160 Ohio St. at 386-87, 116 N.E.2d 697. Thus, as recognized by this Court, “[u]ses which do not conform to valid zoning legislation may be regulated and even girded to the point that they wither and die.” *Brown*, 66 Ohio St.2d at 96, 420 N.E.2d 103 (quoting *Columbus v. Union Cemetery Ass’n*, 45 Ohio St.2d 47, 341 N.E.2d 298 (1976)); *Beck* at 446; *Hunziker* at 89.

3. The Ohio Revised Code Specifically Authorizes Municipalities to Enact Ordinances that Gradually Eliminate Nonconforming Uses.

In addition, the Ohio General Assembly has enacted legislation that expressly authorizes municipalities to regulate the gradual elimination of nonconforming uses. R.C. 713.15 provides:

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.

R.C. 713.15 [Appx. 0034]. Under this statute, the Ohio General Assembly has authorized Ohio municipalities to enact ordinances the eliminate nonconforming uses that have been voluntarily discontinued for a period of not less than six months but no more than two years.

No one has suggested that R.C. 713.15 is unconstitutional, and Ohio courts have consistently applied municipal zoning ordinances enacted in conformity with R.C. 713.15 to eliminate nonconforming uses after a specified period of nonuse by the property owner. *See, e.g., Bell*, 122 Ohio App.3d at 675, 702 N.E.2d 910 (determining that the zoning ordinance, which provided for the discontinuance of a nonconforming use after six months of nonuse, was constitutional because “the six month period conforms with the statewide due process interest in preventing ordinances from retroactively prohibiting nonconforming uses”). In contrast, where a municipal zoning ordinance does not provide for an amount of time consistent with this statute, courts have refused to enforce the ordinance as violative of R.C. 713.15. *See Chapman*, 160 Ohio St. 382, 116 N.E.2d 697, paragraph three of the syllabus (holding that the zoning ordinance constituted an unconstitutional taking and an unreasonable exercise of police power because it

did not prescribe a period of time where nonuse would be considered abandonment, but instead allowed for the city council to discontinue a use after it “has been permitted to exist or continue for a reasonable time”).

4. L.Z.C. 1280.05(a) Is Facially Constitutional.

In the present case, it is undisputed that Lodi enacted L.Z.C. 1280.05(a) in conformity with R.C. 713.15, as it precludes a property owner from re-establishing a nonconforming use after the use has been discontinued for a period of six months or more. Moreover, Lodi enacted L.Z.C. 1280.05(a) in order to protect property values and encourage the development of surrounding properties. (Lodi’s Memorandum in Opposition to Motion for Summary Judgment, Exhibit A, Affidavit of Donald Gilbert p. 2 [Supp. 0091]). Lodi’s goals for the subject zoning legislation are unquestionably permissible, and L.Z.C. 1280.05(a) is unquestionably rationally related to those goals. *See* R.C. 713.06 and 713.07; *Clark*, 28 Ohio App.3d at 68, 502 N.E.2d 222 (stating that “economic considerations related to increased aesthetic values” was a permissible objective for a zoning ordinance); *Cent. Motors Corp.*, 73 Ohio St.3d at 585 (stating that courts have “consistently recognized that a municipality may properly exercise its zoning authority to preserve the character of designated areas”). Even the Ninth District conceded this fact when it stated that the ordinance was intended to, and did “address a valid public interest.” *See Sunset Estate*, 2013-Ohio-4973, at ¶ 24 [Appx. 0014]. Accordingly, Meadowview and Sunset have not, and cannot, meet their burden of proving beyond a reasonable doubt that L.Z.C. 1280.05(a) on its face has no rational relationship to a legitimate government purpose under any circumstance. *See Jaylin Invests.*, 2006-Ohio-4, at ¶ 11. Thus, when using the proper standard for analyzing a facial constitutional challenge, it is evident that L.Z.C 1280.05(a) is facially constitutional. *See Bell* at 675 (concluding that the zoning ordinance, which provided that

“[w]henver any nonconforming use is discontinued for a continuous period of six (6) months, any future use of such building, or portion thereof so discontinued, shall comply with this Zoning Code,” complied with due process).

5. Contrary to the Ninth District’s Decision, Municipalities May Treat Mobile Home Lots as Individually Nonconforming Uses.

In holding L.Z.C. 1280.05(a) facially unconstitutional, the Ninth District relied solely on the fact that L.Z.C. 1280.05(a) treats mobile homes differently than other nonconforming uses. This was improper for several reasons. First, the Ninth District’s focus on *the application* of L.Z.C. 1280.05(a) to Meadowview and Sunset’s properties made its analysis more appropriate for an as applied constitutional challenge. In particular, the Ninth District overlooked the fact that L.Z.C 1280.05(a) regulates all types of nonconforming uses and is not limited to mobile homes or manufactured home parks. It states that “[w]henver 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” and that “[a]t the end of the six-month period of abandonment, the nonconforming use shall not be re-established....” L.Z.C 1280.05(a) [Appx. 0030]. The ordinance then clarifies what constitutes discontinuance for mobile homes, i.e., their removal from the lot. *See* L.Z.C. 1280.05(a) (stating, in part, “[i]n the case of nonconforming mobile homes, their absence or removal from the lot shall constitute discontinuance from the time of absence or removal”) [Appx. 0030].

The six-month period of discontinuance, however, applies to all nonconforming uses and does not single out mobile homes.³

Because the ordinance applies to all types of nonconforming uses, the Ninth District's decision to strike down L.Z.C 1280.05(a) *in toto* violates the standard for a facial constitutional challenge set out by this Court. An ordinance is unconstitutional on its face only when there exists no set of circumstances under which the ordinance would be valid. *Collier*, 2005-Ohio-5334, at ¶ 37; *see also Jaylin Invests.*, 2006-Ohio-4, at ¶ 11 (“In a facial challenge to a zoning ordinance, the challenger alleges that the overall ordinance, on its face, has no rational relationship to a legitimate government purpose and it may not be constitutionally applied *under any circumstance*.” (Emphasis added.)). For the reasons previously discussed, L.Z.C. 1280.05(a) is a permissive exercise of Lodi's police powers. By failing to analyze L.Z.C. 1280.05(a) under scenarios other than as applied to mobile homes, the Ninth District ignored the distinguishing factor between a facial and as applied constitutional challenge and reached a conclusion antithetical to this Court's precedent.

Further compounding the confusion is the Ninth District's reference to the “economic viability” of the land. 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 would constitute *a compensable taking*. *Sunset Estate*, 2013-Ohio-4973, at ¶¶ 16-17, *citing* 2000 Ohio Atty.Gen.Ops. No. 2000-022, 2000 WL 431368 [Appx. 0010-0011]. Thus, the Ninth District used, in part, a takings analysis to support its

³ The Ninth District incorrectly concluded that “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 ... from a lot.” *Sunset Estate*, 2013-Ohio-4973, at ¶ 15 [Appx. 0010]. This is untrue. Under L.Z.C. 1280.05(a), mobile home parks are treated the same as everyone else, as they are considered to have abandoned a nonconforming use after a period of discontinued use of six months or more.

conclusion that the zoning ordinance was unconstitutional on its face. This is exceedingly problematic because this Court specifically rejected such a consideration in *Goldberg*: “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.” *Goldberg*, 81 Ohio St.3d at 213, 690 N.E.2d 510.

In addition, the Ninth District appears to have misconstrued L.Z.C. 1280.05(a) as applied to mobile homes. The Ninth District determined that the ordinance was ambiguous as to whether Lodi intended the nonconforming use to be the mobile home park as a whole or the individual lots within the mobile home park. *Sunset Estate* at ¶¶ 20-26 [Appx. 00012-0015]. It presumably engaged in this lengthy analysis because the Ohio Attorney General in her opinion appeared to acknowledge that municipalities have the ability to denominate individual mobile homes or lots within a mobile home park as the nonconforming use. *See Sunset Estate* at ¶ 16, quoting 2000 Ohio Atty.Gen.Ops. No. 2000-022, 2000 WL 431368 (“ ‘*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.’ ” (Emphasis added.)) [Appx. 0010]. There is, however, no such ambiguity. The ordinance explicitly states that “[i]n 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) [Appx. 0030]. It thus clearly treats a mobile home as the nonconforming use and not the mobile home park as a whole.

In a similar vein, the Ninth District expressed concern that there was no definition of “lot” contained in the zoning code, *Sunset Estate* at ¶ 23, yet the fact that no such definition exists is of no consequence whatsoever. [Appx. 0013]. The zoning code refers to nonconforming mobile homes, not nonconforming lots, and Lodi is free to deal with nonconforming mobile

homes whether or not they exist on individual lots or parcels or whether the space on which they are located is leased from the mobile home park operator. Moreover, the fact that mobile homes may be relocated or removed independently of other mobile homes within the park renders them distinguishable from buildings, duplexes, multi-office buildings, and storage unit complexes. As a result, and contrary to the Ninth District's suggestion, there is nothing arbitrary about treating these business models differently. *See Sunset Estate* at ¶ 24 [Appx. 0014].

It likewise should not matter that Lodi specifically mentioned mobile homes in the nonconforming use section. *Sunset Estate*, 2013-Ohio-4973, at ¶ 15 [Appx. 0010]. As stated previously, Lodi cannot be held to be “discriminatory” against mobile homes, as it actually created a district for such homes. What Lodi has done in furtherance of its police powers is to state that mobile home parks are not favored uses in residential districts, other than the one that was created especially for such use. Thus, it is of no consequence whether the mobile home in question is on an individual lot or simply on space leased from the operator. The goal of the zoning code, in accordance with long standing precedent, is to gradually eliminate such mobile homes from specified residential districts, even to the point that they wither and die. Consequently, the Ninth District's concern that the zoning code was “systematically squeezing the life out of the parks' businesses”⁴ is indisputably permissible under the nonconforming use law repeatedly enunciated by this Court, and a host of appellate districts, including the Ninth District itself.

Indeed, many courts have recognized that individual mobile homes or lots within a mobile home park are separate nonconforming uses. *See Baker v. Blevins*, 162 Ohio App.3d 258, 2005-Ohio-3664, 833 N.E.2d 327, ¶ 16 (2d Dist.) (deferring to the trial court's finding that when

⁴ *Sunset Estate*, at ¶ 26 [Appx. 0015].

a nonconforming mobile home was removed from its pad and moved to a different part of the property for a period of time, which 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 (affirming the trial court's judgment denying the request of a mobile home park to add 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. 565, 1975 Ohio App. LEXIS 7287, 4 (Sept. 15, 1975) (stating that the "extension of a non-conforming home trailer park onto land not used for that purpose prior to the zoning ordinance is an unlawful extension of use"). Additionally, 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. Dayton Bd. of Zoning Appeals*, 2d Dist. Montgomery No. 22083, 2008-Ohio-181, ¶ 26; *see also Plas v. Carlisle Twp. Bd. of Trustees*, 9th Dist. Lorain No. 96CA006428, 1997 Ohio App. LEXIS 3792, 6-7 (Aug. 27, 1997) (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).

As is evident, the Ninth District engaged in a tortured analysis in determining L.Z.C. 1280.05(a) was facially unconstitutional, interchangeably applying standards for both a facial and as applied constitutional challenge, and further addressing the taking standard. In *Goldberg*, this Court addressed the problem that comes from combining the standards for constitutional challenges and a takings challenge. *Goldberg*, 81 Ohio St.3d at 212, 690 N.E.2d 510. It recognized that throughout the years courts had combined the distinctly different standards for a constitutional challenge and the standard for establishing a taking, creating a new standard

applicable to all zoning challenges and allegations of a taking, and in doing so “established an unduly broad standard that encompassed both the standard for challenging the constitutionality of zoning regulations and the test to prove a taking.” *Id.* at 212-13. The Ninth District has not only violated these principles, it has gone beyond them. Indeed, it is impossible to determine exactly upon which basis the Ninth District reached its erroneous conclusion.

Based on the foregoing, Lodi respectfully requests that this Court hold that a municipal zoning ordinance, such as L.Z.C. 1280.05(a), 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.

E. L.Z.C. 1280.05(a) Is Constitutional As Applied to Meadowview and Sunset and Does Not Constitute a Taking of Meadowview or Sunset’s Property.

Although the Ninth District did not determine whether the trial court properly concluded that L.Z.C. 1280.05(a) was constitutional as applied and that it did not constitute a compensable taking, this Court nonetheless should address these issues. Doing so unquestionably would give necessary guidance to Ohio courts, municipalities, and property owners as to the proper application of these standards and the considerations unique to each of them. It would be beneficial to demonstrate, by means of comparison, how these separate and distinct standards should be applied to the same municipal ordinance. Here, the proper application of these standards lead to the inexorable conclusion that L.Z.C. 1280.05(a)—and ordinances like it—is not unconstitutional as applied to mobile homes and does not give rise to an unconstitutional taking under the circumstances presented herein.

1. L.Z.C. 1280.05(a) is Constitutional As Applied.

A zoning ordinance can be held unconstitutional as applied only if the party challenging the ordinance can demonstrate, beyond fair debate, that the ordinance is “clearly arbitrary and unreasonable *and* without substantial relation to the public health, safety, morals, or general welfare of the community” as applied to a particular property. (Emphasis added.) *Jaylin Invests.*, 2006-Ohio-4, at ¶ 11. In analyzing an as applied constitutional challenge, the Court must look at the ordinance and the municipality’s purpose in enacting the ordinance and not the property owner’s use of the land with other potential uses. *See id.* at ¶ 18. Courts must give deference to the municipality’s intent in enacting the ordinance as they are entitled to a presumption of constitutionality. *See Albrecht*, 9 Ohio St.3d at 71, 458 N.E.2d 852.

The facts, as they currently exist, involve individual mobile homes located in a manufactured home park, which homes have been abandoned for more than six months and, therefore, cannot be re-established as nonconforming uses under L.Z.C. 1280.05(a). In looking at the intent of the municipality, the Ninth District determined L.Z.C. 1280.05(a) is substantially related to the general welfare of the community. *Sunset Estate*, 2013-Ohio-4973, at ¶ 24 [Appx. 0014]. Lodi’s ability to prohibit the re-establishment of a nonconforming use on a piecemeal basis has been consistently recognized by courts. In fact, this Court has held that nonconforming uses may be “regulated to the point they ‘wither and die.’” *Brown*, 66 Ohio St.2d at 96, 420 N.E.2d 103. In applying the standard set forth by this Court, Ohio appellate courts allow local governments to prohibit the expansion or substantial alteration of a nonconforming use in an attempt to eradicate that use. *See Beck*, 88 Ohio App.3d at 446, 624 N.E.2d 286; *Martin v. Independence Bd. of Zoning Appeals*, 8th Dist. No. 81340, 2003-Ohio-2736, ¶ 26 (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). The purpose of L.Z.C. 1280.05(a), trying to eliminate the nonconforming use of having a mobile home in a residential zone “on a piecemeal basis,” supports the finding that the ordinance is constitutional as applied to Meadowview and Sunset. Based on the foregoing, this Court should find L.Z.C. 1280.05(a) is constitutional as applied.

2. L.Z.C. 1280.05(a) Does Not Constitute a Taking.

As previously discussed, a landowner cannot succeed on a takings claim against a municipality unless the landowner can prove the zoning ordinance deprived the owner of “all economically beneficial uses of the property” as a whole. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); see *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, 875 N.E.2d 50, ¶ 24 (stating that “[b]ecause the purchased parcel had many potential uses, no genuine issues of material fact existed that [plaintiff] had not been deprived of all economically viable use of its land”). The loss of market value as a result of a village’s rezoning, without more, does not by itself constitute a taking. *State ex rel BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 344, 1998-Ohio-287, 699 N.E.2d 1271; see also *State ex rel. Fair v. Canton*, 5th Dist. Stark No. 2011 CA 00132, 2012-Ohio-779, ¶ 48 (stating that there is no taking if the property is usable as zoned even if not to their best economic advantage); *Sullivan v. Hamilton Cty. Bd. of Health*, 155 Ohio App.3d 609, 2003-Ohio-6916, 802 N.E.2d 698, ¶ 37 (1st Dist.) (holding that zoning did not constitute a taking because plaintiff could pursue other developmental options for the property as a whole).

Here, there is no question that Meadowview and Sunset’s properties are still economically viable. Both Meadowview and Sunset collect rent from mobile homes located on their property. (McCann Depo. p.32 [Supp. 0113]); Sparano Depo. pp. 20, 24-25) [Supp. 00096, 0098-0099].) Furthermore, both properties can be developed with residential homes in

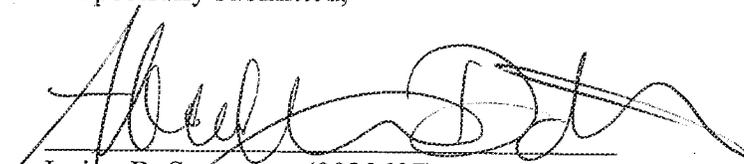
accordance with the current zoning either through themselves or by selling the property to a developer. The most Meadowview and Sunset assert is that they cannot use a portion of the lot for their preferred purpose, which is wholly insufficient to establish a taking. As correctly observed by the trial court, Meadowview and Sunset could choose to use their properties for any other use, such as single family residential homes, and remarked that “[t]he economically viable uses available to [them] [did] not have to be the best or most profitable economically viable uses, so long as it [was] not highly unlikely or practically impossible under the circumstances.” (Court of Common Pleas Journal Entry, 3/14/2012, pp. 8-9 [Appx. 00026-0027]). Meadowview and Sunset simply “failed to establish that all economically viable uses of the properties have been denied because of the Lodi Zoning Code.” (*Id.* at p. 8 [Appx. 00026]). Accordingly, a municipal zoning ordinance, such as L.Z.C. 1280.05(a), which prohibits an owner of a manufactured home park from re-establishing the nonconforming use after the specified period of nonuse, does not constitute a compensable taking where the owner is not denied all economically viable use of the land.

CONCLUSION

As discussed above, the Ninth District confused 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. The Ninth District also completely misconstrued well-established precedent regarding the eradication of nonconforming uses. If permitted to stand, 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. This Court, therefore, should hold that a municipal zoning ordinance, such as L.Z.C. 1280.05(a), which

precludes property owners from re-establishing a nonconforming use after a specified period of nonuse does not facially violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution or Section 16, Article I of the Ohio Constitution. In accordance with that holding, Appellant Village of Lodi respectfully requests that this Court further declare that L.Z.C. 1280.05(a) is constitutional on its face and as applied and does not give rise to a compensable taking in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this APPELLANT VILLAGE OF LODI, OHIO'S MERIT BRIEF
was sent by ordinary U.S. Mail on this 27th day of May, 2014, upon:

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APPENDIX

ORIGINAL

13-1856

IN THE SUPREME COURT OF OHIO

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.)	

NOTICE OF APPEAL OF APPELLANT VILLAGE OF LODI, OHIO

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RECEIVED
 NOV 22 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 NOV 22 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT VILLAGE OF LODI, OHIO

Appellant Village of Lodi, Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Medina County Court of Appeals, Ninth Appellate District, entered in *Sunset Estate Properties, LLC, et al., v. Village of Lodi, Ohio*, Court of Appeals Case No. 12CA0023-M, on November 12, 2013.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail on this 21st day of November, 2013, upon:

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872765

STATE OF OHIO)	COURT OF APPEALS	
COUNTY OF MEDINA)	IN THE COURT OF APPEALS	
	)	NINTH JUDICIAL DISTRICT	
SUNSET ESTATE PROPERTIES, LLC	)	13 NOV 12 PM 12:19	
al.	)	FILED	12CA0023-M
	)	DAVID B. WADSWORTH	
	)	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

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

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.

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

COMMON PLEAS COURT

2012 MAR 14 AM 9:16

SUNSET ESTATE PROPERTIES, LLC,	)	CASE NO. 11CIV0221
et al.,)	
)	
Plaintiffs,	)	JUDGE CHRISTOPHER J. COLLIER
)	
vs.)	
	)	<u>JOURNAL ENTRY</u>
VILLAGE OF LODI, OHIO,	)	<u>SUMMARY JUDGMENT</u>
)	
Defendant.)	

DAVID J. BARNWORTH
MEDINA COUNTY
CLERK OF COURTS

This matter came before the Court for non-oral hearing on January 4, 2012 on all pending motions. The pending motions before the Court are: 1) the Defendant Village of Lodi's motion for judgment on the pleadings filed November 17, 2011; 2) the Plaintiffs' motion for summary judgment filed November 21, 2011; 3) the Defendant's motion for summary judgment as to Sunset Estate Properties, LLC (hereinafter, "Sunset") filed November 22, 2011; 4) the Defendant's motion for summary judgment as to Meadowview Village, Inc. (hereinafter, "Meadowview"); 5) the Defendant's motions to strike filed December 12, 2011 and January 2, 2012; 6) the Plaintiffs' motions to strike filed January 3, 2012; and 7) the respective responses and supplemental motions in opposition or support of the aforementioned pending motions. In an attempt to resolve all pending motions, the Court finds as follows:

On February 4, 2011, the Plaintiffs Sunset and Meadowview filed a complaint for declaratory judgment and mandatory injunctive relief against the Defendant Village of Lodi. The Court held a case management conference and scheduled the matter for jury trial that was to commence on February 6, 2012. On October 18, 2011, the Plaintiffs filed a four-count amended complaint for declaratory judgment, mandatory injunctive relief and a petition for a Writ of Mandamus. Due to the Court's scheduling conflicts, and upon motion of the Defendant, the Court continued the jury trial date to March 19, 2012.

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 tiedowns 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.

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

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

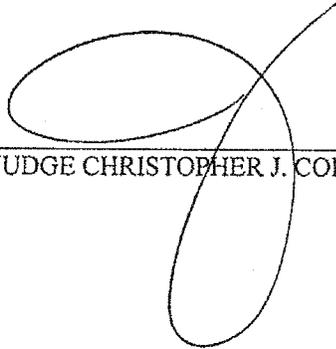
family residential homes, etc.). The economically viable uses available to the Plaintiffs do not have to be the best or most profitable economically viable uses, so long as it is not highly unlikely or practically impossible under the circumstances.

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.

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"

CHAPTER 1280
Nonconforming Uses

1280.01	Continuation of lawful uses; compliance required.	1280.04	Placement prohibited.
1280.02	Alterations, extension and restoration.	1280.05	Discontinuance or abandonment.
1280.03	Continuation of nonconforming construction.	1280.06	Nonconforming lots of record in combination.

CROSS REFERENCES

Division of municipal corporations into zones - see Ohio R.C. 713.06

Restrictions on buildings, structures, lots and setbacks - see Ohio R.C. 713.07 et seq.

Restrictions on height of buildings and structures - see Ohio R.C. 713.08

Restrictions on bulk and location of buildings and structures, percentage of lot occupancy and setback building lines - see Ohio R.C. 713.09

Basis of districting or zoning; classification of buildings and structures - see Ohio R.C. 713.10

Nonconforming signs - see P. & Z. 1276.07

Wall signs pertaining to nonconforming uses - see P. & Z. 1276.11

1280.01 CONTINUATION OF LAWFUL USES; COMPLIANCE REQUIRED.

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. (Ord. 1533. Passed 8-11-80.)

1280.02 ALTERATIONS, EXTENSION AND RESTORATION.

A nonconforming building or structure may be altered, improved or reconstructed, but not enlarged or extended, provided such work does not exceed, in aggregate cost, fifty percent of the total replacement value of the building or structure. The extension of a lawful use to any portion of a nonconforming building or structure which existed prior to the enactment of this Zoning Code shall not be deemed the extension of such nonconforming use.

Nothing in this Zoning Code shall prevent the reconstruction, repair, rebuilding and continued use of any nonconforming building or structure damaged by fire, collapse, explosion or Acts of God, subsequent to the date of this Zoning Code. Such uses may be rebuilt or restored, provided the area is not increased or extended.
(Ord. 1533. Passed 8-11-80.)

1280.03 CONTINUATION OF NONCONFORMING CONSTRUCTION.

Nothing in this Zoning Code shall prohibit the completion or construction and use of a nonconforming building for which a building permit has been issued prior to the effective date of this Zoning Code, provided that construction is commenced within ninety days after the issuance of such permit; construction is carried on without interruption for a continuous period in excess of thirty days; and that the entire building shall have been completed within one year after the issuance of said building permit.

(Ord. 1533. Passed 8-11-80.)

1280.04 DISPLACEMENT PROHIBITED.

No nonconforming use shall displace a conforming use.

(Ord. 1533. Passed 8-11-80.)

1280.05 DISCONTINUANCE OR ABANDONMENT.

(a) 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.

(Ord. 1679. Passed 5-18-87.)

(b) The Board of Public Affairs shall provide a list of new utility customers and a list of addresses that have had the occupants move out. This list shall be provided monthly to the Zoning Inspector.

The Zoning Inspector shall use the list to keep track of nonconforming uses and to determine when the six-month discontinuance anniversary has expired. The Zoning Inspector will endeavor to notify the property owner after the six-month period has expired. Failure to notify such property owners shall impose no obligation to waive discontinuance.

(Ord. 1715. Passed 12-19-88.)

1280.06 NONCONFORMING LOTS OF RECORD IN COMBINATION.

If two or more lots, or a combination of lots and portions of lots, with continuous frontage in single ownership are of record at the time of passage or amendment of this Zoning Code, and if all or part of the lots with no buildings do not meet the requirements established for lot width and area, the lands involved shall be considered to be an individual parcel for the purposes of this Zoning Code, and no portion of said parcel shall be used or sold in a manner which diminishes compliance with lot width and area requirements of this Zoning Code, nor shall any division of any parcel be made which creates a lot with a width or area below the requirements stated in this Zoning Code.

(Ord. 1533. Passed 8-11-80.)

USCS Const. Amend. 14, § 1

Current through PL 113-103, approved, 5/16/14

United States Code Service - Constitution of the United States > *CONSTITUTION OF THE UNITED STATES OF AMERICA* > *AMENDMENTS* > *AMENDMENT 14*

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE SERVICE
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Oh. Const. Art. I, § 16

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File
94 Annotations current through April 14, 2014

Ohio Constitution > CONSTITUTION OF THE STATE OF OHIO > ARTICLE I. BILL OF RIGHTS

§ 16. Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

History

(As amended September 3, 1912.)

Page's Ohio Revised Code Annotated:
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ORC Ann. 713.15

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 94 Annotations current through April 14, 2014

Page's Ohio Revised Code Annotated > TITLE 7. MUNICIPAL CORPORATIONS > CHAPTER 713. PLANNING COMMISSIONS > MUNICIPAL ZONING

§ 713.15. Retroactive zoning ordinances prohibited; nonconforming uses

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.*

History

127 v 18 (Eff 8-27-57); 141 v H 206, Eff 3-5-87.

Page's Ohio Revised Code Annotated:

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