[Cite as *Nextel West Corp. v. Franklin Cty. Bd. of Zoning Appeals*, 2004-Ohio-2943.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Nextel West Corp.,	:	
Appellant-Appellee,	:	No. 03AP-625 (C.P.C. No. 00CVF-07-6363)
v.	:	(REGULAR CALENDAR)
Franklin County Board of Zoning Appeals,	:	
Appellee-Appellant.	:	

D E C I S I O N

Rendered on June 8, 2004

Barry Wurgler, for appellant-appellee.

Ron O'Brien, Prosecuting Attorney, and *Nick A. Soulas, Jr.,* for appellee-appellant.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

{¶1} On April 12, 2000, appellant-appellee, Nextel West Corp. ("Nextel"), filed a conditional use request with the Franklin County Board of Zoning Appeals ("the Board of Zoning Appeals"), appellee-appellant, seeking approval to construct a telecommunication facility at 3960 Bowen Road, Madison Township, Franklin County, Ohio. In June 2000, the Board of Zoning Appeals denied the conditional use request. Nextel filed an appeal to the Franklin County Court of Common Pleas from the Board of Zoning Appeals decision.

{¶2} In its appeal to the trial court, Nextel argued: (1) that the Board of Zoning Appeals does not have authority, under R.C. 303.211, to regulate public utilities in the "Rural Zoning District" that was designated in the "Franklin County Zoning Regulations"; and (2) that the record does not contain reliable, probative, and substantial evidence supporting the Board of Zoning Appeals' decision to deny the conditional use request. The trial court found that the Board of Zoning Appeals was without jurisdiction to require a conditional use permit for the construction of the telecommunications facility. (May 31, 2001 Decision, at 5.) The trial court stated in its decision that "[s]ince [R.C. 303.211] specifically precludes the Board of Zoning Appeals from attempting to regulate the construction of this public utility on property not zoned solely for residential use, the Board was without jurisdiction to require a conditional use permit." Id. Having found that issue dispositive of the case, the trial court declined to address the issue of whether there was reliable, probative, and substantial evidence in the record to support the Board of Zoning Appeals' decision. Id.

{¶3} On July 2, 2001, the Board of Zoning Appeals appealed to this court. The case was docketed as case No. 01AP-759. On July 9, 2001, property owners Calvin O. and Laura S. Miller, as well as Noel M. and Gerri L. Rini, also appealed to this court from the decision of the trial court. That appeal was docketed as case No. 01AP-783. None of the aforementioned property owners were parties in the proceedings before the trial court. On July 20, 2001, this court consolidated the two appeals.

{¶4} On August 3, 2001, appellee Nextel filed a motion to dismiss the appeal on the basis that it was moot because the telecommunications facility had already been constructed. *Nextel West Corp. v. Franklin Cty. Bd. of Zoning Appeals* (Feb. 14, 2002),

Franklin App. No. 01AP-759 (nunc pro tunc memorandum decision). On August 9, 2001, the Millers and the Rinis filed a motion to intervene. Id.

{¶5} In *Nextel West Corp.*, this court determined that the trial court may have lacked subject-matter jurisdiction over the case. Id. at 3. Also, this court observed the following: "Nextel had begun construction of the tower following the common pleas court's judgment. Construction of the tower was completed on July 16, 2001. The board had not filed a motion for a stay of the common pleas court's decision until July 17, 2001. The stay was granted on July 23, 2001." Id. at 2. Notwithstanding these facts, this court determined that the mootness issue raised by Nextel's motion to dismiss could not be evaluated by this court if the judgment of the trial court was void ab initio. Id. at 4. As stated in *Nextel West Corp.*:

> [S]ubject-matter jurisdiction is a prerequisite to assertion of the mootness doctrine. Indeed, if the common pleas court did not have subject-matter jurisdiction over the action, its "judgment" is void *ab initio* and a nullity. Therefore, no "satisfaction" of such void judgment (here, the construction of the telecommunications facility) could occur. For this reason, the common pleas court's possible lack of subject-matter jurisdiction to render any judgment in this matter cannot somehow be avoided by application of the mootness doctrine.

(Citation omitted.) Id. at 4-5.

{¶6} The cause was remanded to the trial court "for an evidentiary hearing on the issue of whether a notice of appeal was filed with the BZA." Id. at 5. This court therefore did not reach the merits of the appeal, the mootness issue, or the motion to intervene issue in that appeal.

{¶7} On remand to the trial court, an evidentiary hearing was held before a magistrate to determine whether Nextel filed a timely notice of appeal with the Board of Zoning Appeals. In a decision rendered on October 16, 2002, the magistrate found that

the notice of appeal was properly filed and that the common pleas court had jurisdiction over the appeal. (See October 16, 2002 Magistrate's Decision on Evidentiary Hearing, at 9.) No party filed objections to the magistrate's decision. (See November 25, 2002 Journal Entry Adopting Magistrate's Decision and Reversing the Board of Zoning Appeals.) On May 28, 2003, the trial court overruled Calvin and Laura Miller's motions to intervene in the proceedings and for reconsideration of the trial court's May 31, 2001 decision that reversed the order of the Board of Zoning Appeals. (See May 28, 2003 Journal Entry.) The trial court also adopted the magistrate's decision and found that Nextel had properly invoked the trial court's jurisdiction. Id. Furthermore, the trial court stated that "the decision of the court rendered on May 31, 2001 which reversed the order of the Board of Zoning Appeals stands." Id.

{¶8} The Board of Zoning Appeals has appealed to this court and has assigned the following error:

> THE TRIAL COURT ERRED BY HOLDING THAT THE RURAL DISTRICT OF THE FRANKLIN COUNTY ZONING RESOLUTION WAS NOT AN AREA ZONED FOR RESIDENTIAL USE UNDER R.C. 303.211(B).

{¶9} Because we find the appeal moot, we do not reach the merits of this appeal.

{¶10} As a general rule, courts will not resolve issues that are moot. See *Miner v. Witt* (1910), 82 Ohio St. 237. "The doctrine of mootness is rooted both in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint. * * * While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain

jurisdiction over a moot question." (Citations omitted.) *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App.3d 788, 791.

{¶11} In support of its August 3, 2001 motion to dismiss on the basis of mootness, Nextel submitted an affidavit of Richard Helmbright. According to the affidavit, Mr. Helmbright is responsible for the management of wireless telecommunications towers in the Columbus, Ohio market, "including the tower that was constructed at 3960 Bowen Road, Madison Township, Franklin County." (See Affidavit of Appellee, Nextel West Corp., in Support of Appellee's Motion to Dismiss.) The affidavit states that the tower at issue in this case was constructed using a normal construction schedule, which is between five and six weeks. Id. We note that according to the affidavit, the telecommunications tower was completed on July 16, 2001, and the "only other building or structure that is a part of the telecommunications facility is a * * * prefabricated equipment shelter," which was "put onto the site on July 13, 2001." Id. Furthermore, as stated in the affidavit, "construction was completed on [July 16, 2001]." Id.

{¶12} In response to Mr. Helmbright's affidavit, an affidavit of Calvin Miller was filed. Mr. Miller, an owner of property adjoining the site of the tower, asserted that "there were no visible signs of any construction on the site until June 22, 2001." (See Affidavit of Appellant Calvin Miller in Opposition to Motion to Dismiss of Appellee Nextel West Corp.) Mr. Miller also stated that "[t]he telecommunications tower itself was erected by July 16 or 17, 2001, but installation of the facilities was not complete for at least ten more days thereafter, and work has continued on the facility up to and including August 16, 2001." Id.

{¶13} The Ninth District Court of Appeals has held that "where an appeal involves the construction of a building or buildings and the appellant fails to obtain a stay of

execution of the trial court's ruling and construction commences, the appeal is rendered moot." *Schuster v. Avon Lake*, Lorain App. No. 03CA008271, 2003-Ohio-6587, at ¶8. Here, the Board of Zoning Appeals did not obtain or even file an application for a stay of the trial court's decision vis-à-vis the construction of the tower prior to the completion of the telecommunications tower.[1] Nextel acted in compliance with the trial court's May 31, 2001 decision, which found that the Board of Zoning Appeals was without jurisdiction to require a conditional use permit in this case, and pursued its interests by constructing the telecommunications tower. Even though the submitted affidavits are conflicting with respect to when any supplementary "facilities" to the tower were completed, this conflict does not preclude our dismissal of this case. Considering the facts of this case, we conclude that the mootness doctrine applies.

{¶14} Notwithstanding the above discussion, there are exceptions to the mootness doctrine. A court may hear an appeal that is otherwise moot when the issues raised are "capable of repetition, yet evading review." *State ex rel. Plain Dealer Pub. Co. v. Barnes* (1988), 38 Ohio St.3d 165, paragraph one of the syllabus. The "capable of repetition, yet evading review" exception to the mootness doctrine "applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231. As conceded at oral argument by the Board of Zoning Appeals, this exception to the mootness doctrine is not an issue in this appeal. We concur with the

[1] At best, the application for a stay was filed the same day that the telecommunications tower was completed, which was after multiple weeks of construction had transpired.

Board of Zoning Appeals and find that this exception to the mootness doctrine does not apply to the case at bar.

{¶15} Additionally, " '[a]lthough a case may be moot with respect to one of the litigants, the court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of great public or general interest.' " *State ex rel. White v. Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, ¶16, quoting *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, paragraph one of the syllabus. This court has observed:

> * * * On rare occasions, the court may retain an otherwise moot action for determination when it involves an issue of great public importance so that the question can be properly determined on its merits. See *McDuffie v. Berzzarins* (1975), 43 Ohio St.2d 23, 330 N.E.2d 667. Ordinarily, however, it is only the highest court of the state that adopts this procedure rather than a court whose decision does not have binding effect over the entire state * * *."

Harshaw v. Farrell (1977), 55 Ohio App.2d 246, 251.

{¶16} As stated by the Board of Zoning Appeals, the issue presented for review in this case is "[w]hether the Rural Zoning District of the Franklin County Zoning Resolution is an 'Area Zoned for Residential Use' under R.C. 303.211(B)." (Appellant's brief, at 2.) We do not view the case sub judice as one of those "rare occasions" that warrants this court's invocation of the "public or general interest" exception to the mootness doctrine.[2]

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[2] We observe that the Supreme Court of Ohio has assessed the ambiguous phrase "an area zoned for residential use." In *Symmes Township Bd. of Trustees v. Smyth* (2000), 87 Ohio St.3d 549, the Supreme Court discussed the phrase's context and common usage as well as legislative intent, and the court determined the phrase to mean "an area zoned as a residential district, an area with a residential zoning classification under the township's zoning resolution, or an area zoned primarily for residential use." Id. at 558.

{¶17} Based on the foregoing, we find that this appeal is moot. Additionally, because no exception to the mootness doctrine applies, we dismiss this appeal.

Appeal dismissed.

BOWMAN, J, concurs.

SADLER, J., dissents.

SADLER, J., dissenting.

{¶18} Because I believe that this appeal presents a real case and controversy, and that effectual relief could be granted to the Board of Zoning Appeals if the trial court's judgment were reversed, I respectfully dissent.

{¶19} The United States Supreme Court has held that courts, "will only decide actual controversies, and if, pending an appeal, something occurs without any fault of the [party who prevailed below] which renders it *impossible*, if our decision should be in favor of the [appealing party], *to grant him effectual relief*, the appeal will be dismissed." *So. Pac. Terminal Co. v. Interstate Commerce Comm.* (1911), 219 U.S. 498, 514, 31 S.Ct. 279, 55 L.Ed. 310, citing *Jones v. Montague* (1904), 194 U.S. 147, 24 S.Ct. 611, 48 L.Ed. 913. (Emphasis added.) "* * * [W]hen, pending proceedings [on appeal], *an event occurs without the fault of either party*, which renders it impossible for the court to grant any relief, it will dismiss the [appeal]." *Miner v. Witt* (1910), 82 Ohio St. 237, 92 N.E. 21, at syllabus. (Emphasis added.)

{¶20} "Actions or opinions are described as 'moot' when they are or have become fictitious, colorable, hypothetical, academic or dead. The distinguishing characteristic of such issues is that they involve no actual genuine, live controversy, the decision of which can definitely affect existing legal relations. * * * 'A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none [* * *] or a judgment

upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy.' " *Grove City v. Clark*, Franklin App. No. 01AP-1369, 2002-Ohio-4549, ¶11, quoting *Culver v. City of Warren* (1948), 84 Ohio App. 373, 393, 83 N.E.2d 82. (Citations omitted.)

{¶21} Guided by these authorities, I do not believe that the construction of Nextel's telecommunications facility renders this appeal "fictitious, colorable, hypothetical, academic or dead." At present, the issue before this court is whether the Rural Zoning District of the Franklin County Zoning Resolution is an "area zoned for residential use" pursuant to R.C. 303.211(B)(1)(c) such that construction of telecommunication towers upon land located within a Rural Zoning District is subject to zoning regulation by Franklin County. The fact that Nextel was able to construct its tower within a few weeks following journalization of the trial court's judgment, and before a stay thereof went into effect, does not change the fact that this legal issue is still before the court.

{¶22} The Board of Zoning Appeals' decision to deny the conditional use request was not calculated solely to prevent construction in the first instance; another object of the decision was certainly to prevent an ongoing zoning violation. Thus, this court should exercise its jurisdiction to provide complete relief to the appealing party, even when, as here, a portion of the relief sought in the first instance may at present be apparently foreclosed. See *United States v. Trans-Missouri Freight Assn.* (1897), 166 U.S. 290, 308, 17 S.Ct. 540, 41 L.Ed. 1007.

{¶23} As this court recently noted in *The Wheeling Corp. v. Columbus & Ohio River RR. Co.* (2001), 147 Ohio App.3d 460, 771 N.E.2d 263, at 481, discretionary appeal not allowed (2002), 95 Ohio St.3d 1436, 766 N.E.2d 1002 "* * * the failure to request a stay of the trial court's decision * * * is not necessarily conclusive; * * * the existence of a

stay would have no bearing on the ultimate [legal] determination * * *." Applying this analysis to the present case, there is still a legal controversy in existence and, if we chose to resolve it, it is simply not true that there would be "no relief that this court could afford." *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App.3d 788, 791, 600 N.E.2d 736.

{¶24} Furthermore, I do not share the majority's view that if we rendered a decision on the merits it would be impossible for this court to grant the Board of Zoning Appeals any effectual relief. To the contrary, should this court reverse the judgment of the court of common pleas, action may be taken pursuant to R.C. Chapter 303 to remedy what would essentially be a zoning violation.

{¶25} In applying the mootness doctrine, the majority relies on a line of cases from the Ninth Appellate District in which construction was completed during the pendency of an appeal involving a challenge to some predicate to the legality of the construction. In that line of cases, the Ninth Appellate District held that if construction has commenced and/or concluded by the time the case is submitted on appeal, the underlying legal issues are moot.

{¶26} I believe that the Sixth Appellate District employed a better treatment of such a situation in *Roberts v. Put-in-Bay Planning Comm.* (July 15, 1994), 6th Dist. No. 93OTO40. In that case, construction was completed before an appeal of a grant of a variance for such construction reached the court of common pleas. The court of common pleas dismissed the appeal, finding the same was moot.

{¶27} The *Roberts* court relied on the "without the fault of either party" language of *Miner*, supra, and the holding of the Supreme Court of Ohio in *Tschantz v. Ferguson* (1991), 57 Ohio St.3d 131, 133, 566 N.E.2d 655, that only an "outside event" (that is, an occurrence not due to any action or inaction of either party to the litigation) can render an

appeal moot. The *Roberts* court concluded that a case "may not be rendered moot as a result of the fault of a party to the litigation." *Roberts*, 1994 Ohio App. LEXIS 3115, at *8.

{¶28} The court in *Roberts* determined that it was the planning commission's failure to issue a stop-work order, and not an "outside event" that resulted in completion of the construction. Thus, the prerequisite for mootness identified in *Tschantz* and *Miner* had not occurred. The *Roberts* court went on to note that, "the mere fact that [the builder] has completed its project does not negate the controversy between the parties and deny appellants their right to relief; i.e., a determination of whether the variance was properly granted." Ibid.

{¶29} I find myself in agreement with this rationale, and I would apply the same to this case. I would thus reach the merits of the appeal. Because the majority has determined it appropriate to dismiss the appeal, I respectfully dissent.

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