[Cite as *State ex rel. Gorgievski v. Massillon*, 2009-Ohio-4533.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE EX REL. LOUIE GORGIEVSKI, et al.

Appellants/Cross-Appellees

-vs-

CITY OF MASSILLON

Appellee/Cross-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2008 CA 00239

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 01819

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 31, 2009

APPEARANCES:

For Appellants/Cross-Appellees

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For Appellee/Cross-Appellant

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Wise, J.

{¶1} Appellants Louie and Keti Gorgievski appeal the decision of the Stark County Court of Common Pleas, which denied, via a judgment on the pleadings, their petition for a writ of mandamus against Appellee City of Massillon. The relevant facts leading to this appeal are as follows.

{¶2} Appellants own real property at 2629 Lincoln Way West in Massillon, Ohio. The parcel at issue consists of approximately 1.76 acres. On January 6, 2005, appellants submitted an application for a conditional use permit to the City of Massillon Planning Commission. In their application, appellants requested the Commission's approval to use the "rear portion" of their Lincoln Way property, which is zoned as R-1 Single Family Residential, for a miniature golf course. The "front portion" of the single parcel of land involved in this case is zoned B-1, Business, and contains an ice cream stand operated by the appellants.

{¶3} The Massillon Law Director thereafter concluded that a miniature golf course is not a "golf course" and, therefore, was "not a principal use permitted subject to special conditions" under Massillon Codified Ordinance Chapter 1153 (hereinafter "Zoning Code"). The City of Massillon Planning Commission thus denied appellants a conditional use permit at its April 13, 2005 meeting.

{¶4} Appellants subsequently filed an administrative appeal with the Stark County Court of Common Pleas (Case No. 2005 CV 01506). Pursuant to a Judgment Entry dated February 7, 2006, the trial court found that the reference to "golf courses" in section 1153.03(f) may include miniature golf courses. The court further found that, under the Zoning Code, a miniature golf course may be a conditional use allowed in a

residential area subject to the conditions contained in Section 1153.03(f) of the Zoning Code. For such reason, the trial court reversed the decision of the Planning Commission and remanded the matter for determination as to whether appellants' application met the conditions set forth in Section 1153.03(f).

{¶5} A hearing of the Planning Commission was held on May 10, 2006. At the conclusion of the hearing, the Commission denied appellants' request for a conditional use permit, finding that the site plan submitted by appellants failed to make safe provision for pedestrian access as required under Section 1153.03(f)(2) of the Zoning Code.

{¶6} Appellants then administratively appealed to the Stark County Court of Common Pleas (Case No. 2006 CV 02188).

{¶7} Via a judgment entry filed on October 13, 2006, the trial court reversed the decision of the City of Massillon Planning Commission and directed the Commission to grant the application for a conditional use permit and issue such a permit to appellants. The trial court, in its entry, concluded that "the decision of the Massillon City Planning Commission in denying the Appellants' Application for a conditional use permit was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record."

{¶8} The City of Massillon thereupon appealed to this Court. On July 16, 2007, we affirmed the decision of the trial court. See *Gorgievski v. Massillon*, Stark App.No. 2006CA00334, 2007-Ohio-3636. Accordingly, the City of Massillon issued appellants' conditional use permit on July 24, 2007.

{¶9} On April 11, 2008, appellants filed an action in the Stark County Court of Common Pleas seeking the issuance of a writ of mandamus to compel the City of Massillon to commence appropriation proceedings for the temporary taking of appellants' property for the period of time the conditional use permit had been denied, approximately thirty-one months. Appellants asserted that compelling Massillon to commence appropriate proceedings would allow the determination of compensation for an "inverse condemnation" of appellants' property.

{¶10} Appellee Massillon filed a motion for judgment on the pleadings on September 15, 2008. The trial court, on October 16, 2008, granted said motion in favor of appellee, concluding that appellants' taking claim was moot.

{¶11} October 22, 2008, appellants filed a notice of appeal. They herein raise the following sole Assignment of Error:

{¶12} "I. THE TRIAL COURT BELOW ERRED IN GRANTING DEFENDANT'S/APPELLEE'S MOTION FOR JUDGMENT ON THE PLEADINGS."

{¶13} Appellee City of Massillon has filed a notice of cross-appeal and raises the following Cross-Assignment of Error:

{¶14} "I. THE TRIAL COURT ERRED WHEN IT FAILED TO DETERMINE THAT THE CITY OF MASSILLON IS ENTITLED TO GOVERNMENTAL IMMUNITY FROM ANY CLAIM PREMISED UPON AN ALLEGED TAKING, INVOLVING THE DENIAL OF A CONDITIONAL USE PERMIT."

Gorgievski Assignment of Error

I.

{¶15} In their sole Assignment of Error, appellants maintain the trial court erred in granting Appellee Massillon's motion for judgment on the pleadings. We disagree.

{¶16} Motions for judgment on the pleadings are governed by Civ.R. 12(C), which states: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Pursuant to Civ.R. 12(C), "dismissal is [only] appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570, 664 N.E.2d 931, 936. The very nature of a Civ.R. 12(C) motion is specifically designed for resolving solely questions of law. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166 63 O.O.2d 262, 264, 297 N.E.2d 113, 117. Reviewing courts will reverse a judgment on the pleadings if plaintiffs can prove any set of facts that would entitle them to relief. *Flanagan v. Williams* (1993), 87 Ohio App.3d 768, 772, 623 N.E.2d 185, 188, abrogated on other grounds by *Simmerer v. Dabbas,* 89 Ohio St.3d 586, 2000-Ohio-232. The review will be done independent of the trial court's analysis to determine whether the moving party was entitled to judgment as a matter of law. Id.

{¶17} In the case sub judice, appellants prayed for a writ of mandamus. A relator seeking a writ of mandamus must demonstrate: "(1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts,

and (3) that relator has no plain and adequate remedy in the ordinary course of the law." *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225, citing *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, 399 N.E.2d 66, paragraph one of the syllabus. Thus, the issue before us is whether appellants could prove any set of facts that would entitle them to utilize mandamus to compel appropriation proceedings by Appellee Massillon.

{¶18} We reiterate that appellants' original goal in 2005 was to obtain a conditional use permit regarding the rear part of their property (zoned R-1). However, in *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St.3d 452, 1993-Ohio-115, the Ohio Supreme Court held, under the facts of that case, that the denial of a conditional use permit was not a compensable "taking" under the Fifth or Fourteenth Amendments to the United States Constitution. In a similar vein, a conditional use is not the same as a permitted use. A conditional use is a lesser use and is not a matter of right. See *Groff-Knight v. Bd. of Zoning Appeals* (June 14, 2004), Delaware App. No. 03CAH08042, ¶ 18, citing *Gillespie v. City of Stow* (1989), 65 Ohio App.3d 601, 584 N.E.2d 1280. Furthermore, in order to demonstrate a regulatory taking, the landowner must prove that the taking deprived all economically viable uses of the land. See *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati*, 118 Ohio St.3d 131, 2008-Ohio-1966, ¶29. Accordingly, based on the allegations in their present complaint, we hold appellants cannot demonstrate any clear right to appropriation proceedings based on Massillon's original denial of a conditional use permit. As such, they fail to meet the first prong of *Berger*, supra, for the establishment of a writ of mandamus.

{¶19} In addition, appellants had, and utilized, an adequate remedy at law, to-wit, the administrative appeal process. See *Berger*, supra, prong three. The mere existence of procedural delays necessitated in the various appeal levels does not alter this fact. At least one Ohio appellate court has recognized that the pursuit of the administrative appeal remedy renders a mandamus action for appropriation moot. See *Crosby v. Pickaway County General Health Dist.*, Pickaway App.No. 06CA27, 2007-Ohio-6769, ¶20.

{¶20} Therefore, upon review, we hold as a matter of law that appellants can prove no set of facts that would entitle them to utilize mandamus to compel appropriation proceedings for inverse condemnation under the circumstances of this case. Appellants' reliance on *Trumbull Cty. Bd. of Health v. Schneider* (1996), 74 Ohio St.3d 357, 1996-Ohio-314, is unpersuasive, as that case did not involve the denial of a conditional use permit by a zoning authority.

{¶21} Appellants' sole Assignment of Error is therefore overruled.

Massillon Cross-Assignment of Error

{¶22} In its sole Cross-Assignment of Error, appellee contends the trial court erred in failing to determine that the City of Massillon is immune from appellants' claims in this matter.

{¶23} We note appellee has correctly postured its argument as a cross-assignment of error, which is appropriate "if the party seeking affirmance does so based upon reasoning that is different from, and even inconsistent with, the reasoning of the trial court." See *Bustinduy v. Bustinduy* (Dec. 18, 1998), Champaign App. No. 98-CA-21. However, under the circumstances of this case and our redress of appellants'

assigned error, we find the issue of governmental immunity to be moot. See, e.g., *Desai v. Franklin*, 177 Ohio App.3d 679, 703, 2008-Ohio-3957.

{¶24} We therefore decline to further address appellee's Cross-Assignment of Error.

{¶25} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

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JUDGES

JWW/d 818

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE EX REL. LOUIE GORGIEVSKI, et al.	:	
Appellants/Cross-Appellees	:	
-vs-	:	JUDGMENT ENTRY
CITY OF MASSILLON	:	
Appellee/Cross-Appellant	:	Case No. 2008 CA 00239

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellants.

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JUDGES