

IN THE SUPREME COURT OF OHIO

SUNSET ESTATE PROPERTIES, LLC, ET AL.,	:	Case No. 2013-1856
	:	
Appellees,	:	On Appeal from the
	:	Ninth District Court of Appeals
	:	Medina County, Ohio
v.	:	
	:	Court of Appeals
VILLAGE OF LODI, OHIO,	:	Case No. 12CA0023-M
	:	
Appellants.	:	
	:	

**BRIEF OF AMICUS CURIAE THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF APPELLANT VILLAGE OF LODI.**

PHILIP K. HARTMANN (0059413)
(COUNSEL OF RECORD)
STEPHEN J. SMITH (0001344)
YAZAN S. ASHRAWI (0089565)
Frost Brown Todd LLC
10 West Broad Street; Suite 2300
Columbus, Ohio 43215
Phone: (614) 464-1211
Fax: (614) 464-1737
phartmann@fbtlaw.com
yashrawi@fbtlaw.com

JOHN GOTHERMAN (00000504)
Ohio Municipal League
175 S. Third Street, #510
Columbus, Ohio 43215-7100
Phone: (614) 221-4349
Fax: (614) 221-4390
E-mail: jgotherman@columbus.rr.com

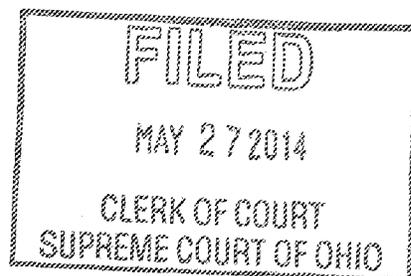
**COUNSEL FOR AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE**

IRVING B. SUGERMAN (0020607)
ALEXANDRA V. DATTILO (0086444)
Brouse McDowell
600 Superior Avenue East, Suite 1600
Cleveland, Ohio 44114
Phone: (330) 434-7516
Fax: (330) 253-8601
ibsugerman@brouse.com
adattilo@brouse.com

JOHN W. MONROE (0061845)
TRACEY S. MCGURK (0069631)
Mansour, Gavin, Gerlack & Manos Co., LPA
55 Public Square, Suite 2150
Cleveland, Ohio 44113
Phone: (216) 523-1500
Fax: (216) 523-1705
tmcgurk@mggmlpa.com

COUNSEL FOR THE VILLAGE OF LODI

**COUNSEL FOR SUNSET ESTATE
PROPERTIES, LLC AND
MEADOWVIEW VILLAGE, INC.**



ELIZABETH BIRCH (0042490)
Ohio Manufactured Homes Association
201 Bradenton Avenue, Suite 100
Dublin, Ohio 43017-3540
Phone: (614) 799-2340

**COUNSEL FOR THE AMICUS CURIAE
OHIO MANUFACTURED HOMES
ASSOCIATION**

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF AMICUS INTEREST1

STATEMENT OF THE CASE AND FACTS.....2

ARGUMENT.....2

Proposition of Law No. 1: Municipalities may enact and enforce zoning ordinances that prohibit property owners from re-establishing a nonconforming use after a specified period of nonuse.2

Proposition of Law No. 2: Municipalities may treat mobile homes as individually nonconforming in an effort to prohibit the expansion or alteration of such nonconforming uses.4

Proposition of Law No. 3: Zoning ordinances that regulate nonconforming mobile home parks are not in conflict with R.C. 4781.30......7

CONCLUSION9

CERTIFICATE OF SERVICE11

TABLE OF AUTHORITIES

Cases

Baker v. Blevins, 162 Ohio App.3d 258, 2005-Ohio-3664, 833 N.E.2d 327 (2nd Dist.) 6

Beck v. Springfield Twp. Bd. of Zoning Appeals, 88 Ohio App.3d 443, 446, 624 N.E.2d 286 (9th Dist.1993)..... 3

Bell v. Rocky Ricker Bd. of Zoning Appeals, 122 Ohio App.3d 672, 702 N.E.2d 910 (8th Dist.1997)..... 3

Brown v. Cleveland, 66 Ohio St.2d 93, 420 N.E.2d 103 (1981) 3

Canton v. State, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶24 8

City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953) 2

City of Akron v. Chapman; Estadt v. Board of Zoning Appeals, No. 14-97-1, 1997 Ohio App. LEXIS 2800 (Union County June 6, 1997) 8

Garcia v. Siffrin Residential Ass’n, 63 Ohio St. 2d 259, 270, 407 N.E.2d 1369 (1980) 7

Goldberg Companies, Inc. v. Council of the City of Richmond Heights, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998) 8

Hulligan v. Columbia Township Board of Zoning Appeals, 59 Ohio App. 2d 105, 392 N.E.2d 1272 (Lorain County 1978) 8

Hunziker v. Grande, 8 Ohio App.3d 87, 89, 456 N.E.2d 516 (8th Dist.1982) 3

Jaylin Investments, Inc. v. Moreland Hills, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903..... 2, 4

Sunset Estate Properties, LLC, et al. v. Village of Lodi, 9th Dist. No. 12CA0023-M, 2013-Ohio-4973 1, 4, 9

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct.114; 71 L.Ed. 303 (1926)..... 2

Village of Moscow v. Skeene, 65 Ohio App. 3d 785, 585 N.E.2d 493 (Clermont County 1989) 8

Village of Struthers v. Sokol, 1 Ohio Law Abs. 485, 108 Ohio St. 263, 140 N.E. 519 (1923) 8

Willott v. Village of Beachwood, 175 Ohio St. 557, 197 N.E.2d 201 (1964) 8

Statutes

R.C. 4781.27 9

R.C. 4781.31(F) 9

R.C. 713.15 1, 3

Other Authorities

1991 Op. Att'y Gen. No. 91-028 8

2000 Ohio Atty.Gen.Ops. No. 2000-022 5, 8

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. The Ohio Municipal League and its members have an interest in ensuring the proper application of R.C. 713.15. R.C. 713.15 grants municipalities the ability to regulate nonconforming uses through their zoning code. Specifically, municipalities may enact legislation that gradually eliminates nonconforming uses that have been abandoned or discontinued. The Ninth District in *Sunset Estate Properties, LLC, et al. v. Village of Lodi*, 9th Dist. No. 12CA0023-M, 2013-Ohio-4973 held that the Village of Lodi's nonconforming use ordinance, which addresses the discontinuance or abandonment of a nonconforming use of property, was ambiguous, arbitrary, and unreasonable, and facially unconstitutional as a violation of substantive due process. This decision is simply erroneous, and if it stands, municipalities across Ohio will be vulnerable to the alteration and expansion of nonconforming uses, rendering zoning ordinances obsolete, and jeopardizing the public welfare and safety.

Comprehensive zoning is the primary means to urban planning and development. Without zoning regulations, there would be an unorganized collection of industrial, commercial, and residential developments cluttered within municipalities' jurisdictions. Municipalities enact zoning ordinances to avoid this chaos and to protect the health, safety, and morals of their community. Additionally, zoning serves the public interest by stabilizing property uses, conserving property values, and securing the most appropriate use of land within a municipality. As such, nonconforming uses are frowned upon. This is precisely the reason that municipalities may gradually eliminate such uses. The Ninth District sets dangerous precedent, which will inevitably limit municipalities' ability to gradually eliminate nonconforming uses, leading to unstable urban development, lower property values, and compromised safety.

STATEMENT OF THE CASE AND FACTS

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

ARGUMENT

In addition to the following arguments, the Ohio Municipal League incorporates, to the extent applicable, the well-reasoned arguments and authorities contained in the brief of Appellant Village of Lodi, Ohio.

Proposition of Law No. 1: Municipalities may enact and enforce zoning ordinances that prohibit property owners from re-establishing a nonconforming use after a specified period of nonuse.

It is well-established that municipalities may exercise their police power to enact zoning ordinances for the protection of the health, safety, and morals of the community. *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903; *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct.114; 71 L.Ed. 303 (1926). Moreover, “[c]ourts should not interfere with zoning decisions unless the municipality exercised its power in an arbitrary and unreasonable manner and the decision has no substantial relation to the public health, safety, morals, or general welfare.” *Jaylin Investments, Inc.*, ¶10 (citations omitted).

Municipalities’ police power includes the authority to enact and enforcement zoning ordinances that gradually eliminate nonconforming uses. *City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953) (stating 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.”). Furthermore, Ohio courts have consistently recognized municipalities’ ability to “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). In fact, nonconforming uses 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, 420 N.E.2d 103 (1981); *Bell v. Rocky Ricker Bd. of Zoning Appeals*, 122 Ohio App.3d 672, 702 N.E.2d 910 (8th Dist.1997). Nonconforming uses are disfavored to such a degree that they may regulated to the point that they “wither and die.” *Beck*, at 446 (citing *Hunziker v. Grande*, 8 Ohio App.3d 87, 89, 456 N.E.2d 516 (8th Dist.1982)(citation omitted)).

Additionally, the Ohio Revised Code explicitly authorizes municipalities to enact ordinances to regulate the gradual elimination of nonconforming uses. R.C. 713.15 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.

In accordance with Ohio case law and the Ohio Revised Code, many municipalities, including Lodi, have enacted zoning ordinances that regulate nonconforming uses. To hold that a municipality may not gradually eliminate particular nonconforming uses or the extension of such unlawful uses after the use has been abandoned is contrary to law.

Proposition of Law No. 2: Municipalities may treat mobile homes as individually nonconforming in an effort to prohibit the expansion or alteration of such nonconforming uses.

Like many municipalities, Lodi enacted a zoning ordinance that regulates nonconforming uses, including nonconforming mobile homes. Lodi's zoning ordinance sets a six-month period of discontinued use for establishing conclusive evidence of abandonment for all nonconforming uses. Specifically, section 1208.05 of Lodi's Planning and Zoning Code ("L.Z.C.") 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 Ninth District's decision erroneously held that this zoning ordinance is unconstitutional on its face because it treats mobile home parks differently than other nonconforming uses. In order to make a finding that an ordinance is facially unconstitutional, the Ninth District must consider and determine that the ordinance is "arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Jaylin Investments Inc.* at ¶ 13. This decision is erroneous for several reasons.

First, the Ninth District's analysis specifically focused on the ordinance's effect on Sunset Estate Properties' and Meadowview's mobile home parks, rather than analyzing its facial constitutionality. The very definition of a facial challenge is to consider whether the ordinance "has no rational relationship to a legitimate governmental purpose and [whether] it may not constitutionally be applied *under any circumstance.*" *Sunset Estate Properties, LLC, et al. v. Village of Lodi*, 9th Dist. No. 12CA0023-M, 2013-Ohio-4973 (quoting *Jaylin Investments, Inc.* ,

¶11)(Emphasis added.) Rather than considering this ordinance under any circumstance, which is the very nature of a facial challenge, the Ninth District analyzed the ordinance as applied to Sunset Estate Properties and Meadowview Village. This analysis is simply flawed.

Second, the Ninth District erroneously stated that, “the Lodi ordinance does not distinguish ‘abandonment’ or ‘discontinuance’ for any type of nonconforming use other than relative to mobile homes.” *Sunset Estate Properties, LLC*, ¶15. This is simply not true. L.Z.C. 1208.05 makes no mention of mobile homes in the first two sentences quoted above. Again, L.Z.C. 1208.05 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.” (Emphasis added.) This six-month period of discontinued use is applicable to *all* nonconforming uses, not just mobile homes. Due to the their unique nature, the ordinance simply clarifies what constitutes discontinuance for mobile homes.

Similarly, the Ninth District misconstrues Lodi’s application of this zoning ordinance to mobile homes. The Ninth District cites 2000 Ohio Atty.Gen.Ops. No. 2000-022, 2000 WL 431368, which states that, “[i]n 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.” Accordingly, Lodi clarifies what constitutes discontinuance for mobile homes, i.e., their removal from the lot. L.Z.C. 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.” However, the six-month period of discontinuance applies to all nonconforming uses and does not discriminate against mobile homes.

Lastly, the Ninth District's comparison of a mobile home park to other business models such as apartment buildings, duplexes, and multi-office buildings is misguided. Each of these business models is distinct from mobile home parks. To be sure, apartment buildings, duplexes, and multi-office buildings all contain multiple units all in the same building. One cannot simply pick up and relocate an apartment unit or office unit; they are part of one building. This is not the case with mobile home parks. Such parks contain multiple individual units that may be relocated, renovated, and replaced independent of other units. This difference is both significant and telling.

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

The *Beck* case is particularly telling. In *Beck*, the property owner owned an 18.043-acre parcel that was zoned residential; mobile homes were not permitted on this residential-zoned property. However, prior to adoption of the zoning resolution, there were mobile homes located on the parcel, making the mobile homes nonconforming uses. When the property owners sought to construct thirty-four additional mobile homes on the parcel after the parcel was zoned residential, they were properly denied. The court in *Beck* recognized that nonconforming uses

are not favored and found ample authority for local governments to prohibit the extension of a nonconforming use. *Id* at 446. Implicitly, the court correctly treated each mobile home as a separate nonconforming use, rather than recognizing the mobile home park as a whole. Had the court in *Beck* recognized the entire parcel as a nonconforming use, as the mobile home park owners in the present matter argue, the property owners would presumably have unfettered discretion to add, remove, renovate, or rearrange each mobile home to any location within the 18.043-acre parcel. This cannot be. The court in *Beck* recognized the flaws in this argument and properly rejected the property owners' argument that they were permitted to establish their nonconforming use within the entire parcel.

Beck's application to the present matter establishes that these mobile home parks cannot be considered nonconforming as a whole. Each individual mobile home constitutes a separate nonconforming use and must be treated as such.

Proposition of Law No. 3: Zoning ordinances that regulate nonconforming mobile home parks are not in conflict with R.C. 4781.30.¹

This Court has 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 Ohio Manufactured Homes Association argues that R.C. 4781.30 permits mobile home parks to operate with their licenses issued by a county health department, and therefore, an ordinance that lawfully eliminates an abandoned, nonconforming mobile home park conflicts with state law. This argument is misguided.

The test to determine whether there is a conflict between a municipal ordinance enacted through an exercise of police power and a general law of the state is “whether the ordinance

¹ Formerly R.C. 3733.06.

permits or licenses that which the statute forbids and prohibits, and vice versa.” *Village of Struthers v. Sokol*, 1 Ohio Law Abs. 485, 108 Ohio St. 263, 140 N.E. 519 (1923).

First, it is important to note that the state of Ohio does not have a statewide zoning scheme. *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶24. Therefore, without further analysis, a state law cannot possibly conflict with a local zoning ordinance.

Moreover, the Ohio Attorney General has opined on this very issue. In 2000, the Ohio Attorney General opined that:

While the regulations of R.C. Chapter [4781] certainly help to protect the larger surrounding community, *see Stary v. City of Brooklyn*, 162 Ohio St. 120, 121 N.E.2d 11 (1954); 1977 Op. Att’y Gen. No. 77-038; 1958 Op. Att’y Gen. No. 2111, p. 297, their focus is clearly on protecting the well-being, physical safety, and living conditions of the inhabitants of the park.

In contrast, the focus of a local zoning code is on land use and planning for the welfare of the larger community, regulating either the size and placement of buildings or other structures on property within specified areas, or the use to which the structures and property within specified districts may be put. *See Willott v. Village of Beachwood*, 175 Ohio St. 557, 197 N.E.2d 201 (1964); *Village of Moscow v. Skeene*, 65 Ohio App. 3d 785, 585 N.E.2d 493 (Clermont County 1989); *Hulligan v. Columbia Township Board of Zoning Appeals*, 59 Ohio App. 2d 105, 392 N.E.2d 1272 (Lorain County 1978); 1991 Op. Att’y Gen. No. 91-028. *See also Goldberg Companies, Inc. v. Council of the City of Richmond Heights*, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998); *City of Akron v. Chapman*; *Estadt v. Board of Zoning Appeals*, No. 14-97-1, 1997 Ohio App. LEXIS 2800 (Union County June 6, 1997). *Provision for nonconforming use is part of a township's or village's zoning code, and determinations of nonconforming use are directly related to enforcement of that zoning code. Thus, such determinations are squarely within the purview of the local zoning authority.* (Emphasis added.)

2000 Ohio Atty.Gen.Ops. No. 2000-022.

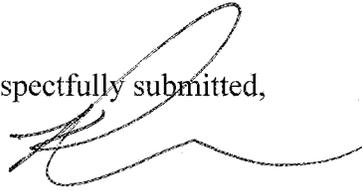
Furthermore, R.C. 4781.31(F)² specifically states that the “[p]lan approvals issued under this section *do not constitute an exemption from the land use and building requirements of the political subdivision in which the manufactured home park is or is to be located.*” (Emphasis added.) To be clear, R.C. 4781.27, *et seq.*, regulate the licensing of mobile home parks. State law, however, does not regulate the zoning of such mobile home parks. Accordingly, municipal ordinances that regulate nonconforming mobile home parks do not permit what state law prohibits, or vice versa, and are not in conflict with state law.

CONCLUSION

The Ohio Municipal League as amicus curiae on behalf of the Village of Lodi, Ohio, urges this Court to reverse the decision of the Ninth District Court of Appeals in *Sunset Estate Properties, LLC, et al. v. Village of Lodi*, 9th Dist. No. 12CA0023-M, 2013-Ohio-4973. This decision is flawed for the reasons stated herein and jeopardizes all Ohio municipalities’ ability to enact zoning ordinance to gradually eliminate nonconforming uses.

² Formerly R.C. 3733.021(F).

Respectfully submitted,



PHILIP K. HARTMANN (0059413)
STEPHEN J. SMITH (0001344)
YAZAN S. ASHRAWI (0089565)
Frost Brown Todd LLC
One Columbus, Suite 2300
10 West Broad Street
Columbus, Ohio 43215
Phone: (614) 464-1211
Fax: (614) 464-1737
phartmann@fbtlaw.com

*Counsel for Amicus Curiae
The Ohio Municipal League*

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae the Ohio Municipal League*, has been sent via regular U.S. mail, postage pre-paid this 27th day of May, 2014 to:

JOHN GOTHERMAN (00000504)
Ohio Municipal League
175 S. Third Street, #510
Columbus, Ohio 43215-7100
Phone: (614) 221-4349
Fax: (614) 221-4390
E-mail: jgotherman@columbus.rr.com

**COUNSEL FOR AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE**

IRVING B. SUGERMAN (0020607)
ALEXANDRA V. DATTILO (0086444)
Brouse McDowell
600 Superior Avenue East, Suite 1600
Cleveland, Ohio 44114
Phone: (330) 434-7516
Fax: (330) 253-8601
ibsugerman@brouse.com
adattilo@brouse.com

COUNSEL FOR THE VILLAGE OF LODI

ELIZABETH BIRCH (0042490)
Ohio Manufactured Homes Association
201 Bradenton Avenue, Suite 100
Dublin, Ohio 43017-3540
Phone: (614) 799-2340

**COUNSEL FOR THE AMICUS CURIAE
OHIO MANUFACTURED HOMES
ASSOCIATION**

JOHN W. MONROE (0061845)
TRACEY S. MCGURK (0069631)
Mansour, Gavin, Gerlack & Manos Co., LPA
55 Public Square, Suite 2150
Cleveland, Ohio 44113
Phone: (216) 523-1500
Fax: (216) 523-1705
tmcgurk@mggmlpa.com

**COUNSEL FOR SUNSET ESTATE
PROPERTIES, LLC AND
MEADOWVIEW VILLAGE, INC.**



Philip K. Hartmann (0059413)