

[Cite as *Kurilla v. Basista Holdings, L.L.C.*, 2017-Ohio-9370.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MICHAEL P. KURILLA JR.,
DEPUTY ZONING INSPECTOR
ELLSWORTH TOWNSHIP

PLAINTIFF-APPELLEE

VS.

BASISTA HOLDINGS, LLC, et al.

DEFENDANTS-APPELLANTS

CASE NO. 16 MA 0101

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common
Pleas of Mahoning County, Ohio
Case No. 2012 CV 03377

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. James F. Mathews
Atty. Tonya J. Rogers
Baker, Dublikar, Beck, Wiley
& Mathews
400 South Main Street
North Canton, Ohio 44720

For Defendants-Appellants:

Atty. Frank Bodor
157 Porter Street NE
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JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 22, 2017

[Cite as *Kurilla v. Basista Holdings, L.L.C.*, 2017-Ohio-9370.]
WAITE, J.

{¶1} Appellant Basista Holdings, LLC appeals the decision of the Mahoning County Court of Common Pleas to dismiss Appellant's counterclaims in favor of Appellee, Michael J. Kurilla ("Kurilla"). Based on the following, we find Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This matter is part of an extremely contentious and long-running dispute regarding zoning of the subject property, an 18-acre parcel located on State Route 45 in Ellsworth Township, Mahoning County, Ohio ("the property"). Appellant is a limited liability company whose owner and sole member is David J. Lewis. Appellant purchased the property on May 20, 2003. At the time of the purchase the property consisted of two parcels, which Appellant had consolidated into a single parcel in 2007.

{¶3} On July 24, 2007, Appellant submitted an application for a zoning certificate to then zoning inspector, Diane Dudek ("Dudek") to allow for industrial use of the entire property, which had a frontage of 900 feet and a depth of 871 feet. Dudek approved the application in a letter dated September 14, 2007. The approval went to the Ellsworth Township Trustees at a meeting on October 8, 2007. Appellee contends, and a 1969 township zoning map reflects, that the entire property was not zoned industrial.

Current Lawsuit – Enforcement Action

{¶4} Laura Lewis, the wife of David Lewis, was an authorized representative for Appellant and also served on the Ellsworth Township Board of Trustees in 2011.

At the suggestion of legal counsel and to avoid any potential conflict of interest while Laura Lewis served as a trustee, the township retained Kurilla as a deputy zoning inspector to investigate all complaints against Appellant.

{¶15} On September 1, 2011, Kurilla issued two notices of zoning violations to Appellant regarding the subject property and a separate property owned by Appellant in the township. The other property was subsequently transferred to Laura Lewis and is not involved in this litigation. Appellant appealed the zoning violations on the subject property. In 2012, Appellant also submitted a revised site plan for the subject property, which was denied on October 10, 2012. This denial was appealed as well. Appellant later dismissed both the zoning violation appeal and the denial of the site plan appeal.

{¶16} As Appellant had failed to remedy the zoning violations, Kurilla, in his capacity as zoning inspector, filed a complaint against Appellant in the Mahoning County Court of Common Pleas. Appellant filed a counterclaim to Kurilla's enforcement action, seeking declaratory judgment regarding the zoning classification of the property, as well as injunctive relief and monetary damages. It also filed a counterclaim for violation of the Ohio Open Meetings Act, which was later dismissed. Appellant's counterclaim was bifurcated for trial purposes. A trial on the issues contained in Appellant's counterclaim was held before a magistrate on March 23, 2015. In a decision dated April 8, 2015, the magistrate found that the 1969 Ellsworth Township Zoning Map was unambiguous and that the parties' rights were determined by the Ellsworth Township Zoning Resolution which incorporated the zoning map.

Therefore, the property was zoned industrial only up to a depth of 500 feet. Appellant filed objections. Hearing was held before the trial court, which adopted the magistrate's decision and dismissed Appellant's objections. Appellant filed this appeal.

{¶7} In addition to the current matter, a series of other lawsuits were filed as a result of the parties' dispute. A brief synopsis of each follows.

The Lyden Lawsuit

{¶8} After Dudek erroneously certified the property as industrial, a neighboring property owner ("the Lydens") contacted Dudek to inform her that the industrial classification of the property was in error and contrary to the existing 1969 zoning ordinance. Those neighbors subsequently filed a lawsuit against Appellant, David Lewis, the Ellsworth Township Zoning Inspector and the Ellsworth Township Trustees, as well as the Ohio Department of Natural Resources. That complaint alleged that the property's prior owner was East Fairfield Coal Company, which had operated the site as a coal tippie until 1970. This left the property polluted and subject to reclamation under state and federal laws. The complaint alleged that the property was designated as agricultural, but a nonconforming use by East Fairfield Coal Company had been allowed. The complaint further alleged that allowing any industrial use of the property would create additional pollution and damage to neighboring properties and a stream shared by these neighbors and Appellant. Importantly to all following litigation, Dudek was deposed during the course of the lawsuit. She testified that she believed the property was designated as industrial at

the time she approved Appellant's application, but realized after this lawsuit was filed that she was incorrect. She testified, however, that she never revoked the permit that had been issued to Appellant. The lawsuit was subsequently dismissed by the Lydens but they lodged numerous complaints with the township against Appellant, alleging that Appellant was in violation of the township zoning ordinance.

Federal Lawsuit

{¶19} On August 27, 2014, Appellant filed a lawsuit in the Mahoning County Court of Common Pleas. Appellant sought a declaratory judgment, injunctive relief, and money damages for an alleged 42 U.S.C. 1983 unconstitutional deprivation of Appellant's use of its property. The named defendants in that action were: Ellsworth Township, Kurilla, Dudek, and other township officials in their official capacity. They removed the action to federal court based on the 1983 claim. We note that the claims and facts on which the federal suit was based by Appellant are virtually identical to those made in the counterclaim in the instant case.

{¶10} The defendants in the federal action filed a motion for summary judgment alleging Appellant's claims were untimely, which was granted by the district court. The district court held that Appellant should have known of its alleged injury in May of 2009, following Dudek's deposition. As the complaint was not filed until August 27, 2014, it was filed after the statute of limitations had run. The district court granted judgment to defendants on the first three claims based on failure to meet the statute of limitations and granted judgment to defendants on the Open Meetings Act claim because Appellant failed to produce any evidence of violation. This claim was

not further appealed. However, Appellant did appeal the court's decision on its first three counts to the Sixth Circuit Court of Appeals.

{¶11} In an opinion dated October 11, 2017, the Sixth Circuit Court of Appeals agreed with the district court and held that the statute of limitations on the 42 U.S.C. 1983 claim began to run when Appellant attended Dudek's deposition in May of 2009. *Basista Holdings, LLC v. Ellsworth Twp*, 6th Cir. No. 16-4112, 2017 WL 4534808. In that deposition testimony, Dudek admitted that her decision to grant Appellant's permit was not valid because she was mistaken that the property fell totally within an industrial zone. This testimony put Appellant on notice that its legal rights were at risk. The Sixth Circuit also affirmed the district court's dismissal of Appellant's state law claims based on *res judicata*. Appellant had argued that the federal district court lacked jurisdiction over the state claims once it concluded the federal claim was barred by the statute of limitations. The Sixth Circuit held, "[o]nce the § 1983 claim was dismissed, however, the district court had the discretion to decline to exercise its supplemental jurisdiction over the state law claims." *Id.* at *5. The Sixth Circuit concluded however, that the district court had spent nearly two years and was "very invested in this case, and was undoubtedly familiar with the parties, the facts, and the claims." *Id.* at *5. The Court of Appeals also discussed the common pleas court's decision in the instant matter (where trial had been held and the court determined that the property was only zoned industrial to a depth of 500 feet) and the decision of the common pleas court in Appellant's administrative appeal case, discussed below. The Sixth Circuit held that based on these state court

decisions, the federal court could determine that Appellant's other claims were barred by *res judicata*. Although Appellant had further appealed his state court cases, it did not preclude the doctrine of *res judicata* from taking effect. *Id.* Therefore, the Sixth Circuit held the remaining Ohio law claims were barred by the doctrine of *res judicata*. *Id.* at *7.

Administrative Appeal Lawsuit

{¶12} While both the instant case and the federal matter were pending, on March 26, 2015 Appellant submitted another permit application and site plan to Kurilla. This application proposed utilizing a portion of the property for self storage buildings, and the remainder for a cement batch plant, where materials would be mixed to prepare ready-mix concrete. (10/12/15 Ellsworth Twp. Zoning Commission Public Hearing, Tr., p. 54.)

{¶13} In a letter dated June 16, 2015, Appellant's permit application was denied by Kurilla for, among other things, failing to comply with an enclosure requirement set forth in the zoning ordinance. As Appellant's plan did not provide that the entire cement batch operation would be contained within an enclosure, it failed to meet the specifications of the ordinance.

{¶14} Appellant appealed the zoning inspector's decision to the Ellsworth Township Board of Zoning Appeals ("BZA"). Along with the appeal, Appellant filed two requests for variances: a use variance seeking for the rear portion of the property to be zoned industrial, and an area variance for certain setbacks in order to build the proposed cement batch operation.

{¶15} A public hearing was held on October 12, 2015, at the conclusion of which the BZA went into executive session. After returning from executive session and reopening the regular meeting, the BZA voted unanimously to uphold the decision of the zoning inspector and to deny both variance requests. Appellant filed an administrative appeal of all of these decisions with the Mahoning County Court of Common Pleas. In a judgment entry dated November 1, 2016, the common pleas court upheld the decisions of the BZA, concluding: (1) Appellant's challenge to the constitutionality of the zoning ordinance was not appropriately raised in an administrative appeal; and (2) Appellant's constitutional challenge was barred by *res judicata* because Appellant was required to timely raise this challenge in an earlier proceeding (the instant case). Appellant filed an appeal which is currently pending before us, Case No. 16 MA 0181.

ASSIGNMENT OF ERROR NO. 1

THE MAGISTRATE AND TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO DECLARE THE ELLSWORTH TOWNSHIP "COMPREHENSIVE" ZONING MAP INVALID AS IT PERTAINED TO THE DEFENDANTS-APPELLANTS' REAL ESTATE.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN 1) OVERRULING DEFENDANTS-APPELLANTS' OBJECTIONS TO THE MAGISTRATE'S DECISION; 2) OVERRULING DEFENDANTS-APPELLANTS' MOTION TO REVERSE THE MAGISTRATE'S

DECISION OR SET THE CASE FOR HEARING FOR INDEPENDENT COURT REVIEW OF THE MAGISTRATE'S DECISION AND RECEIVE ADDITIONAL EVIDENCE; AND 3) OVERRULING DEFENDANTS-APPELLANTS' MOTION FOR WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW OR SET THE TRIAL OF THE CASE FOR REVIEW BY THE COURT.

{¶16} In both its first and second assignments of error, Appellant makes overlapping arguments challenging the validity of the township zoning ordinance as a comprehensive plan. Thus, both will be addressed together.

{¶17} An appellate court reviews the trial court's adoption of a magistrate's decision under an abuse of discretion standard. *Proctor v. Proctor*, 48 Ohio App.3d 55, 548 N.E.2d 287 (3d Dist.1988). The trial court's determination will only be reversed where it appears the trial court's action was unreasonable or arbitrary. *Id.*

{¶18} An Ohio township has authority to enact zoning legislation which derives from the Ohio General Assembly. *Torok v. Jones*, 5 Ohio St.3d 31, 32, 448 N.E.2d 819 (1983). R.C. 519 grants townships the authority to regulate the size and locations of buildings; and land use for residences and business. R.C. 519.02(A) provides:

Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board by resolution, in accordance with a comprehensive plan, may regulate the location of, set back lines for, and the uses of buildings and other

structures * * * and the uses of land * * * in the unincorporated territory of the township, and may establish reasonable landscaping standards and architectural standards excluding exterior building materials in the unincorporated territory of the township.

{¶19} Appellant challenges the constitutionality of the 1969 zoning ordinance as a whole, asserting that it does not qualify as a comprehensive plan. Citing *Apple Group Ltd. v. Granger Twp. Bd. of Zoning Appeals*, 144 Ohio St.3d 188, 2015-Ohio-2343, 41 N.E.3d 1185, Appellant claims the zoning ordinance does not meet the criteria set forth by the Ohio Supreme Court in order to qualify as a comprehensive plan. Appellant cites errors in drafting, such as the failure to designate specific property lines so that any purchaser of property would be able to ascertain the zoning designation for a particular property. Thus, Appellant seeks a determination that the 1969 Ellsworth Township Zoning Ordinance is invalid, and seeks to have its entire property classified as industrial and to remove any use restrictions contained within the 1969 zoning ordinance and its 2015 amendment.

{¶20} Appellees sought enforcement of their zoning through the issuance of citations of violation to Appellant. When it failed to correct these violations, Appellee turned to the trial court for enforcement. In the trial court, Appellant filed a counterclaim to Appellee's enforcement suit, which included: (1) a claim for declaratory judgment relating to the zoning classification of the property; (2) a claim pursuant to 42 U.S.C. 1983 alleging Ellsworth Township had improperly interfered with Appellant's right to use the property in compliance with the local zoning

ordinance; and (3) a claim under the Ohio Open Meetings Act (now abandoned). Thus, Appellant requested that the trial court declare and enforce its rights under the zoning ordinance. Appellant never raised a claim regarding the constitutionality of the zoning ordinance or that it failed to qualify as a comprehensive plan. Appellant never sought leave to amend its counterclaim or sought to join necessary parties to any suit regarding the constitutionality of the zoning plan. Appellant requested judgment based on the zoning in place and to enforce the zoning plan as it existed, not a declaration that the zoning plan was invalid. This claim is brought for the first time on appeal.

{¶21} The bifurcated trial on Appellant's counterclaim seeking declaratory judgment was held on March 23, 2015. A review of the trial transcript in its totality reflects that Appellant at no time raised any claims or arguments relating to whether the township zoning ordinance qualified as a comprehensive plan. Appellant did not challenge the constitutionality of the ordinance. In fact, all of Appellant's arguments pertained to the classification of the property under the plan and whether there was a mistake in the calculation of the dimensions on the zoning map, which Appellant urged led to an ambiguity regarding whether the property was entirely industrial. In his opening statement, counsel for Appellant stated:

Your Honor, we're here on Defendant Basista Holdings, LLC's declaratory judgment action, and we're asking the Court to determine whether or not the two parcels located on Route 45 are both classified as industrial under the Ellsworth Township Zoning Ordinance or

whether or not it's merely the first 500 feet of the Ellsworth Township Zoning Ordinance.

* * *

Our position is that zoning is in violation or in -- violative of the common law and therefore should be strictly construed when there's an ambiguity. And the ambiguity here isn't whether or not the blue square is a half inch in depth. The ambiguity is that the blue square is placed on the wrong spot on the 1969 map.

(3/23/15 Tr., pp. 3-5.)

{¶22} Appellant alludes in its brief that as *Apple, supra*, was released after the date of trial, the issue was not one that could have been raised at trial. However, a challenge to the comprehensive nature of a zoning ordinance has long existed in Ohio pursuant to R.C. 519.02(A).

{¶23} Appellant was not precluded from raising the issue of whether the zoning ordinance was constitutional as a comprehensive plan under the statute. Appellant simply failed to raise this issue in the trial court. Thus, Appellant has waived this argument. A reviewing court does not generally consider questions not presented to the court below. *State ex rel. Ohio Civil Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, at ¶ 10. Moreover, Appellant cannot now change the theory of its case and present new arguments on appeal. *State ex rel. PIA Psychiatric Hosps., Inc. v. Ohio Certificate of Need Review Bd.*, 60 Ohio St.3d 11, 17 (1991).

{¶24} Appellant relied on one argument at trial: that the zoning map was ambiguous and, as such, should be construed against the drafter. Appellant did not raise, and the trial court did not address, whether the zoning ordinance constituted a comprehensive plan as dictated by R.C. 519.02. Therefore, when applying the general rule of waiver, Appellant waived this argument and cannot now assert it on appeal. Appellant's declaratory judgment claim, requesting its rights be defined under the zoning ordinance, is a different issue from whether the zoning ordinance itself was a constitutionally valid comprehensive plan. Appellate courts will generally apply the waiver doctrine absent "some extraordinary reason to disregard it." *Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio App.3d 33, 46, 713 N.E.2d 1075 (8th Dist.1998). Appellant presents no "extraordinary reason" to forego waiver in this instance.

{¶25} Appellant also contends the trial court erred in adopting the decision of the magistrate without holding a hearing to collect additional evidence.

{¶26} The magistrate concluded that the township zoning map was not ambiguous regarding the depth of the industrial district applied to Appellant's property. The magistrate declined to interfere with the township's legislative enactment of the zoning ordinance voted on publicly where the map was not ambiguous and Appellant simply disagreed with the zoning boundaries it contained. Appellant stipulated at trial that the 1969 zoning map presented was a true and authentic copy of the official map and that it showed the industrial district had a depth of 500 feet. Moreover, a 2015 zoning amendment retained this 500 feet depth

limitation. As Appellant had stipulated to these matters and the amended ordinance conforms and includes an accurate orientation to the frontage of Appellant's property, the trial court did not err in adopting the decision of the magistrate.

{¶27} Because Appellant's argument on appeal greatly differs with the argument presented to the trial court and raises entirely new issues, Appellant has waived that argument. Appellant raises no valid argument as to error on the part of the trial court, here. There is nothing in this record to lead us to the conclusion that the court abused its discretion.

{¶28} Based on the foregoing, Appellant's first and second assignments of error relating to whether the township zoning ordinance was a constitutionally valid comprehensive plan have been waived for purposes of appellate review. Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.