

**THE STATE EX REL. BONA ET AL., APPELLANTS, v. VILLAGE OF ORANGE, OHIO,  
ET AL., APPELLEES.**

**[Cite as *State ex rel. Bona v. Orange*, 1999-Ohio-431.]**

*Mandamus to compel Orange Clerk of Council to submit zoning ordinance to village electors for their approval or rejection at the November 3, 1998 general election—Appeal of denial of writ dismissed due to laches and mootness.*

(No. 98-1814—Submitted January 26, 1999—Decided March 17, 1999.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 74790.

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{¶ 1} Appellee P & Y Development Co. Limited Partnership (“P & Y”), an Ohio limited partnership, owns land in appellee village of Orange, Ohio. The northern portion of P & Y’s property is zoned S-1, Special Residential District, a village zoning classification that permits “combinations of developments such as single or attached family units, extended care facilities and senior citizen dwelling units, all well set back from streets in landscaped surroundings.” Appellant Rose Bona owns real property that abuts the northern edge of P & Y’s property and is zoned U-1, a village zoning classification permitting single-family homes.

{¶ 2} In 1993, P & Y filed a declaration of restrictions with the Cuyahoga County Recorder’s Office that set forth a preliminary development plan for the property. The village of Orange Council enacted Ordinance No. 1993-38/39, which accepted P & Y’s declaration of restrictions. Under the approved declaration, the restrictions could be “modified or amended by [P & Y], in whole or in part, only with the consent of the Council of the Village by an ordinance duly adopted by Council of the Village as evidenced by its minutes.”

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{¶ 3} On May 13, 1998, the village council enacted Ordinance No. 1997-30, which amended the 1993 declaration of restrictions on P & Y's property by approving a revised development plan that, among other things, decreased the number of residential units to be developed on the property from one hundred fifty-one to one hundred forty-two units.

{¶ 4} On May 19, 1998, appellant Frank Bona submitted a referendum petition to appellant Susan Bonk, clerk of the village council. The referendum petitioners requested that Ordinance No. 1997-30 be submitted to the village electors for their approval or rejection at the November 3, 1998 general election. In June 1998, upon the advice of the village law department, Bonk informed appellant Frank Bona that the referendum petition was defective. The law department had concluded that Ordinance No. 1997-30 was not subject to referendum because it was an administrative rather than a legislative act of village council.

{¶ 5} Shortly thereafter, appellants, Frank and Rose Bona, filed a complaint in the Court of Appeals for Cuyahoga County against appellees, village of Orange, Clerk of Council Bonk, Mayor Kathy Mulcahy, Village Council President Herbert L. Braverman, and the Cuyahoga County Board of Elections. The Bonas requested a writ of mandamus to compel appellee Bonk to certify that the referendum petition was sufficient and to immediately thereafter submit Ordinance No. 1997-30 to the village council either to repeal the ordinance within thirty days after its submittal or cause it to be submitted to village electors at the November 3, 1998 general election. The Bonas also requested that the writ of mandamus require the village council to reconsider the ordinance, and if it did not repeal the ordinance within thirty days after its submittal, that appellee board of elections submit the ordinance to the village electors at the November 3, 1998 general election. The Bonas alleged that time was of the essence. The court of appeals granted P & Y's motion to

intervene as a respondent, and the parties and *amicus curiae* Ohio Municipal Attorneys Association submitted briefs on the merits.<sup>1</sup>

{¶ 6} On July 28, 1998, the court of appeals denied the writ. The court of appeals determined that Ordinance No. 1997-30 was an administrative action that was not subject to referendum. Thirty-five days later, on September 1, 1998, the Bonas filed a notice of appeal from the court of appeals' judgment. On November 3, 1998, the date of the general election and forty days after the record was transmitted on September 24, the Bonas filed their merit brief. At no time did the Bonas request expedited treatment of their appeal.

{¶ 7} This cause is now before the court upon the appeal as of right.

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*Perskey, Shapiro, Salim, Esper, Arnoff & Nolfi Co., L.P.A., Stewart D. Roll and Jeffrey P. Posner*, for appellants.

*Barry M. Byron and Stephen L. Byron*, for appellees Orange Village, Susan Bonk, Kathy Mulcahy, and Herbert L. Braverman.

*Kahn, Kleinman, Yanowitz & Arnson Co., L.P.A., and Sheldon Berns*, for appellee P & Y Development Co.

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***Per Curiam.***

{¶ 8} P & Y contends that laches and mootness require dismissal of this appeal. For the following reasons, P & Y's contention has merit.

{¶ 9} First, the Bonas did not act with the requisite diligence and promptness required in this election case. " 'Extreme diligence and promptness are required in election-related matters.' " *State ex rel. Manos v. Delaware Cty. Bd. of*

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1. The board of elections filed a motion for judgment on the pleadings or alternative motion for summary judgment based on uncontroverted evidence that the petition had not been submitted to it and the board had not adopted Ordinance No. 1997-30. The court of appeals granted the board's motion and found that the board had no duty to act.

*Elections* (1998), 83 Ohio St.3d 562, 563, 701 N.E.2d 371, 372, quoting *In re Contested Election of November 2, 1993* (1995), 72 Ohio St.3d 411, 413, 650 N.E.2d 859, 862. If a party seeking extraordinary relief in an election-related matter fails to act with the requisite diligence and promptness, laches may bar the action. *State ex rel. Ascani v. Stark Cty. Bd. of Elections* (1998), 83 Ohio St.3d 490, 493, 700 N.E.2d 1234, 1236.

{¶ 10} Even though the Bonas and the referendum petitioners requested that Ordinance No. 1997-30 be submitted to the village electors at the November 3, 1998 general election and advised the court of appeals that time was of the essence, they delayed thirty-five days to file their notice of appeal from the court of appeals' judgment and another forty days following the record transmittal to file their merit brief, which was the same date as the November 3, 1998 general election at which they requested that the ordinance be considered by village electors as a referendum issue. The Bonas also did not request expedited treatment of this appeal. By contrast, appellants in similar cases have taken steps to assure an expedited determination of their appeals. Cf. *Keenan v. Leis* (1998), 81 Ohio St.3d 1430, 689 N.E.2d 50 (motion to expedite granted and expedited briefing schedule set in appeal as of right); *State ex rel. Sinay v. Soddors* (1997), 80 Ohio St.3d 224, 685 N.E.2d 754 (appellants in election case filed motions for expedited briefing schedule and review of appeal, filed their merit brief within seven days of their notice of appeal, and filed their reply brief within five days of appellee's merit brief, permitting the court to render determination in election-related appeal before the November 4, 1997 general election); *State ex rel. Arnett v. Winemiller* (1997), 80 Ohio St.3d 255, 685 N.E.2d 1219 (appellants in election case filed motions to expedite appeal and filed merit and reply briefs in time for court to render determination before the November 4, 1997 general election).

{¶ 11} Second, because the Bonas and the referendum petitioners requested that Ordinance No. 1997-30 be submitted to the village electors at the November 3,

1998 general election and that election has now passed, this appeal is moot. See, e.g., *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 175, 177, 602 N.E.2d 622, 623; *State ex rel. Snider v. Stapleton* (1992), 65 Ohio St.3d 40, 41-42, 600 N.E.2d 240, 241. This conclusion comports with the general rule that “election cases are moot where the relief sought is to have a name or an issue placed on the ballot and the election was held before the case could be decided.” *In re Protest Filed by Citizens for the Merit Selection of Judges, Inc.* (1990), 49 Ohio St.3d 102, 103, 551 N.E.2d 150, 151, citing *State ex rel. Gyurcik v. Brown* (1964), 176 Ohio St. 288, 27 O.O.2d 200, 199 N.E.2d 596, and *State ex rel. Santora v. Bd. of Elections of Cuyahoga Cty.* (1962), 174 Ohio St. 11, 21 O.O.2d 35, 185 N.E.2d 438; but, cf., *State ex rel. Huebner v. W. Jefferson Village Council* (1996), 75 Ohio St.3d 381, 662 N.E.2d 339, where the issue of mootness was not raised.

{¶ 12} This is also not a case in which the merit issues raised are capable of repetition yet evading review. Cf. *In re Protest*, 49 Ohio St.3d at 103, 551 N.E.2d at 151-152. If the Bonas had acted with the requisite diligence, the merits of their appeal would not have necessarily evaded review. Nor is this appeal still viable because the Bonas also requested in their complaint that the village council reconsider Ordinance No. 1997-30 so that if the council repealed it within thirty days after certification, no election would be necessary.<sup>2</sup> There is no evidence in the record that suggests that the village council would have repealed Ordinance No. 1997-30. Mandamus will not issue to compel a vain act. *State ex rel. Thomas v. Ghee* (1998), 81 Ohio St.3d 191, 192, 690 N.E.2d 6, 7.

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2. Section 3, Article VII of the village of Orange Charter provides:

“Within ten (10) days after any referendum petition is filed, the Clerk shall determine its sufficiency and if found sufficient, shall certify the same to the Council. Council shall, within thirty (30) days after such certification, reconsider such ordinance or resolution. If Council fails to repeal the ordinance or resolution within that thirty (30) days it shall submit such ordinance or resolution to a vote of the electors at the next general election occurring more than ninety (90) days after the certification of such petition by the Clerk. \* \* \*”

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{¶ 13} Based on the foregoing, we dismiss this appeal due to laches and mootness.

*Appeal dismissed.*

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, COOK and LUNDBERG  
STRATTON, JJ., concur.

PFEIFER, J., dissents and would affirm the judgment of the court of appeals.

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