

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

RURAL BUILDING OF CINCINNATI, LLC,	:	APPEAL NO. C-140404 TRIAL NO. A-1400889
	:	
Plaintiff-Appellant,	:	<i>OPINION.</i>
	:	
vs.	:	
	:	
VILLAGE OF EVENDALE,	:	
	:	
Defendant-Appellee,	:	
	:	
and	:	
	:	
DONALD MERCER,	:	
	:	
and	:	
	:	
JACK CAMERON,	:	
	:	
Defendants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: April 29, 2015

Cohen, Todd, Kite & Stanford, LLP, Michael R. Schmidt, Robert S. Rubin, Able & Monroe, P.C., and David L. Monroe, for Plaintiff-Appellant,

Schroeder Maundrell Barbieri & Powers, Lawrence E. Barbieri and Katherine L. Barbieri, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

Mock, Judge.

{¶1} Plaintiff-appellant Rural Building of Cincinnati, LLC, (“RBOC”) appeals from the trial court’s judgment dismissing its complaint for a writ of mandamus to compel defendant-appellee the Village of Evendale to begin an appropriation proceeding for an alleged regulatory taking of RBOC’s private property. Because we conclude that it would have been a vain or futile act for RBOC to exhaust its administrative remedies prior to initiating this lawsuit, we reverse the trial court’s judgment.

{¶2} Because of the posture of this case, the facts are taken from RBOC’s complaint and the documents attached to the complaint.

Facts and Procedure

{¶3} In 2010, the United States General Services Administration (“the GSA”) solicited bids for office space to house the Cincinnati office of the United States Immigration and Customs Enforcement (“ICE”). RBOC, which owned a building in Evendale, submitted a bid for the lease and was eventually awarded the contract. ICE intended to use the building to “house a staff of 45, most of who[m] are in supervisory, administrative or support roles.” The 30,000-square-foot building would also include “an employee fitness room and lockers, a kitchen/break room for staff, numerous file/storage rooms necessary to support the agency’s work, a large reception area, and various administrative/IT spaces.” Also within the building would be four temporary holding areas for staff to question or interview detainees for no more than eight hours. The detainees would then be released or taken to a detention facility; no detainees would be residents of or held at the

building overnight. The holding rooms made up 3.3 percent of the square footage of the building.

{¶4} One of RBOC's competitors for the ICE lease told Evendale, through defendants Jack Cameron, assistant to the mayor of Evendale, and Donald Mercer, the Evendale building commissioner, that ICE intended to use the building as a detention facility. RBOC alleges that despite this interference from its competitor, Evendale knew that ICE did not intend to operate a detention facility at the building, which would be used as ICE's administrative offices.

{¶5} The building was located in an area zoned "General Industrial District" ("GI District"). RBOC alleges that "governmental administrative office space" is a permitted use in that district. Therefore, after being awarded the lease, RBOC applied to Evendale's Building Department for a certificate of zoning approval, which the building commissioner denied. RBOC alleges that the denial of the certificate was based on Evendale's wrongful determination that ICE was going to use the building as a detention facility even though Evendale knew that RBOC's competitor's representations about the use of the facility had been "malicious and false."

{¶6} RBOC appealed the denial of the zoning certificate to Evendale's Board of Zoning Appeals. Following a public hearing, the board upheld the building commissioner's denial of the zoning certificate. In its decision, the board concluded that the building would be partially used as a detention facility, which is not a permitted use in the GI District. The board reached that conclusion because ICE's detainees would be considered under custodial arrest.

{¶7} RBOC alleges in its complaint that after the board's decision, the GSA revoked the ICE lease for nonperformance and awarded the contract to another. RBOC was unable to lease the building and was forced to sell it at a loss in July 2011.

{¶8} In February 2014, RBOC filed a complaint for a writ of mandamus in the Hamilton County Court of Common Pleas, seeking to compel Evendale to begin appropriation proceedings under R.C. Chapter 163 for a partial regulatory taking of its property. In the complaint, RBOC claimed that the "taking" had occurred when Evendale wrongfully denied RBOC's application for a zoning certificate, causing RBOC to lose the ICE lease and the attendant profits. Evendale moved to dismiss the complaint for failure to state a claim, arguing that RBOC had not exhausted its administrative remedies prior to bringing its lawsuit, and that RBOC had not filed its complaint within the applicable limitations period. The trial court found that the complaint had been timely filed, but determined that RBOC had not exhausted its administrative remedies, and thus, RBOC had an adequate remedy at law. The trial court dismissed the complaint for the writ. RBOC has appealed.

Administrative Remedy is a Vain or Futile Act

{¶9} In a single assignment of error, RBOC challenges the trial court's determination that RBOC's failure to first exhaust its administrative remedies bars its complaint in mandamus. Because we conclude that it would have been a "vain or futile act" for RBOC to pursue an additional administrative appeal in this case, we sustain the assignment of error.

{¶10} When reviewing a motion to dismiss, we must presume that "all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190,

192, 532 N.E.2d 753 (1988). For a court to dismiss a plaintiff's petition for a writ of mandamus under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling it to the extraordinary relief of mandamus. *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati*, 166 Ohio App.3d 171, 2005-Ohio-6817, 849 N.E.2d 1064, ¶ 10; *see State ex rel. Gilmour Realty Inc. v. City of Mayfield Hts.*, 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d 320 (dismissal of a mandamus action is proper if there is an adequate remedy at law). A judgment granting a Civ.R. 12(B)(6) motion is subject to de novo review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶11} It is well-established that “a party seeking relief from an administrative decision must pursue available administrative remedies before pursuing an action in court.” *Noernberg v. Brook Park*, 63 Ohio St.2d 26, 29, 406 N.E.2d 1095 (1980), citing *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 97 N.E.2d 414 (1951). But the rule that a party must exhaust administrative remedies is not absolute: there is no need to pursue administrative remedies if doing so would be a futile or a vain act. *Driscoll v. Austintown Assocs.*, 42 Ohio St.2d 263, 275, 328 N.E.2d 395 (1975). Futility in this context means not that the administrative agency would not grant the requested relief, but that the administrative agency lacks the authority or power to grant the relief sought. *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115, 564 N.E.2d 477 (1990).

{¶12} RBOC contends that pursuing an additional administrative appeal to Evendale's Village Council under the Village of Evendale, Ohio Code of Ordinances 1284.06, would have been a vain or futile act because the council could not provide

the relief RBOC sought. We agree. Although the council had the authority to reverse the board and grant RBOC a zoning certificate of compliance, RBOC no longer sought that relief because the ICE lease had been revoked. Instead, RBOC was seeking an adjudication to determine whether a taking had occurred and the amount of compensation to which it may be entitled. Since the Council did not have the authority to determine whether a taking had occurred or to grant a monetary award in an administrative appeal, *see The Village of Evendale, Ohio Code of Ordinances 1284.06*, further action at that level could not have provided the remedy RBOC was seeking.

{¶13} In *AMM Peric Property Invest., Inc. v. City of Cleveland*, 8th Dist. Cuyahoga No. CV753463, 2014-Ohio-821, the court held that it would have been a vain act to require the plaintiff to pursue an administrative appeal to challenge the condemnation of his building after the city had demolished it, because the Cleveland Board of Building Standards and Building Appeals was not authorized to grant monetary relief, even if it found in the plaintiff's favor. Likewise, it would be a vain act to require RBOC to appeal to the village council, because the council was not authorized to determine if a taking had occurred or to grant monetary relief, even if it found in RBOC's favor. The harm that RBOC has alleged cannot be cured by any subsequent administrative action. Instead, as the Ohio Supreme Court has consistently recognized, "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Gilmour Realty Inc.*, 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d 320, at ¶ 13.

Statute of Limitations

{¶14} Evendale argues that even if we determine that an additional administrative appeal to the village council would be a vain act, the trial court still properly dismissed RBOC's complaint because it had been filed outside the statute of limitations. We disagree.

{¶15} R.C. 2305.09(E) provides that an action for a physical or regulatory taking of real property shall be brought within four years after the cause accrued. The Ohio Supreme Court has held that the limitations period set forth in R.C. 2305.09(E) is applicable to a takings claim brought in a mandamus action. *See State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶34-35. And Evendale does not dispute that RBOC brought its claim within four years of the accrual of its cause of action.

{¶16} Accordingly, we sustain RBOC's single assignment of error. We reverse the trial court's judgment and remand the cause for further proceedings consistent with the law and this opinion.

Judgment reversed and cause remanded.

HENDON P.J. and HILDEBRANDT, J., concur.

LEE H. HILDEBRANDT, JR., retired, from the First Appellate District, sitting by assignment.

Please note:

The court has recorded its own entry on the date of the release of this opinion.