

[Cite as *S. Cent. Ohio Preservation Soc. v. Chillicothe Design Rev. Bd.*, 2016-Ohio-1495.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

SOUTH CENTRAL OHIO	:	
PRESERVATION SOCIETY, ET AL.,	:	
Appellants-Appellants,	:	Case No. 15CA3500
	:	
v.	:	
	:	DECISION AND JUDGMENT ENTRY
CHILLICOTHE DESIGN REVIEW	:	
BOARD,	:	
	:	
Appellee-Appellee.	:	

APPEARANCES:

J. Jeffrey McNealey and Christen M. Blend, Porter, Wright, Morris & Arthur, LLP, Columbus, Ohio 43215, for appellants.

Sheri K. Rutherford, Chillicothe Law Director, and Carrie L. Charles, Chillicothe Assistant Law Director, Chillicothe, Ohio 45601, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-18-16
ABELE, J.

{¶ 1} The Chillicothe Design Review Board issued a certificate of appropriateness for the Catholic Diocese of Columbus to demolish the building known as the old Rectory on the campus of St. Mary's Church in Chillicothe. South Central Ohio Preservation Society, Chillicothe Conservancy, Chillicothe Restoration Foundation, Robert L. Etline, William E. Hirsch, and Franklin B. Conaway appealed the board's decision to the Ross County Common Pleas Court, but did not seek or obtain a stay or injunction to prevent the building's demolition. After the building was demolished, the common pleas court granted the board's motion to dismiss the appeal as moot.

This appeal followed.

{¶ 2} Appellants assert that the common pleas court erred by dismissing their administrative appeal based on mootness. Because the board's decision was limited to authorizing the demolition of the building, appellant's appeal was likewise restricted to contesting that demolition. Because the event that appellants attempted to prevent (the demolition) occurred after they failed to obtain a stay pending their appeal, the trial court properly dismissed it as moot. Additionally, they do not assert that any viable exception to the mootness doctrine is applicable. Therefore, we reject appellants' claim and affirm the trial court's judgment.

I. FACTS

{¶ 3} The Catholic Diocese of Columbus owns the buildings that comprise the campus of St. Mary's Church. The church campus is located in Chillicothe's Historic Design Review District. The campus consisted of the Church, the Academy, the Worthington building, and the old Rectory. The old Rectory was built in the late 1800s, and during the 1970s and early 1980s, it was used as a convent for the nuns. Later, the building reverted to its use as the Rectory until a priest deemed it uninhabitable and it was closed in 2005. The buildings required extensive renovation. The church-estimated cost of renovating the Rectory was \$400,000, including costs to remove asbestos, lead-based paint, and mold. The other buildings were considered to have greater historical relevance and architectural character. Thus, the church decided to commit its \$3.1 million to restoring the other buildings and to demolish the old Rectory, which would allow the church to install handicap parking spaces on the north side of the church.

{¶ 4} In January 2014, Michael Haller, the Chairman of the Restoration Committee for St. Mary's Church, filed an application on behalf of the Catholic Diocese of Columbus for a certificate

of appropriateness for the demolition of the Rectory. In March 2014, the Chillicothe Design Review Board conducted a public hearing on the application and heard from representatives of the church, local preservation groups, and the public. On March 20, 2014, the board issued a certificate of appropriateness for the demolition of the structure. It contained no post-demolition design plans.

{¶ 5} Appellants, South Central Ohio Preservation Society, Chillicothe Conservancy, Chillicothe Restoration Foundation, Robert L. Etline, William E. Hirsch, and Franklin B. Conaway, appealed the board's decision pursuant to R.C. Chapter 2506 to the common pleas court. In their notice, appellants specified that they were appealing “the decision of the Chillicothe Design Review Board issuing a Certificate of Appropriateness for the demolition of the property known as the St. Mary’s Rectory.”

{¶ 6} Appellants did not seek or obtain a stay of the board’s decision pending their administrative appeal, and before the certificate expired, the church demolished the Rectory. The board then filed a motion in the trial court to dismiss the administrative appeal based on mootness. After appellants filed a memorandum in opposition and sought to stay any approvals or permits relating to new construction on the property of the demolished building, the trial court granted the board’s motion and dismissed the appeal based on mootness. The trial court determined that “the genuine matter in controversy of this appeal was to prevent the demolition of St. Mary’s Rectory” and that its demolition rendered the appeal moot. This appeal followed.

II. ASSIGNMENT OF ERROR

{¶ 7} Appellants assign the following error for our review:

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S APPEAL BELOW.

III. STANDARD OF REVIEW

{¶ 8} "The issue of mootness presents a question of law; therefore, we review the trial court's finding under the de novo standard of review." *Athens Cty. Commrs. v. Ohio Patrolmen's Benevolent Assn.*, 4th Dist. Athens No. 06CA49, 2007-Ohio-6895, ¶ 45; *see also Tucker v. Leadership Academy for Math and Science of Columbus*, 10th Dist. Franklin No. 14AP-100, 2014-Oho-3307, ¶ 7; *Pla v. Wivell*, 9th Dist. Summit No. 25814, 2011-Ohio-5637, ¶ 7.

IV. LAW AND ANALYSIS

{¶ 9} In their sole assignment of error, appellants assert that the trial court erred by dismissing their appeal from the decision of the Chillicothe Design Review Board based on mootness.

{¶ 10} A " 'case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). "It is not the duty of the court to answer moot questions, and when pending proceedings * * *, an event occurs, without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the petition * * *." *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910), syllabus; *see also Tschantz v. Ferguson*, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991) ("Ohio courts have long exercised judicial restraint in cases which are not actual controversies. No actual controversy exists where a case has been rendered moot by an outside event"). "Conversely, if an actual controversy exists because it is possible for a court to grant the requested relief, the case is not moot, and a consideration of the merits is warranted."

State ex rel. Gaylor v. Goodenow, 125 Ohio St.3d 407, 2010–Ohio–1844, 928 N.E.2d 728, ¶ 11;

State v. Consilio, 114 Ohio St.3d 295, 2007–Ohio–4163, 871 N.E.2d 1167, ¶ 7.

{¶ 11} "These general precepts are not limited to original actions—they also apply to appeals." *Coates Run Property LL, LLC v. Athens Bd. of Zoning Appeals*, 4th Dist. Athens No. 15CA5, 2015-Ohio-4732, ¶ 12 (applying the mootness doctrine to an administrative appeal under R.C. 2506.01), citing *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm. of Ohio*, 103 Ohio St.3d 398, 2004–Ohio–5466, 816 N.E.2d 238, ¶ 15 ("an appellate court need not consider an issue, and will dismiss the appeal, when the court becomes aware of an event that has rendered the issue moot").

{¶ 12} "More pertinently, it is well settled that '[w]here an appeal involves the erection of a structure and the appellant has failed to obtain a stay of execution of a trial court's order permitting construction, the appeal will be moot if construction has commenced pursuant to the order.' " *Coates Run* at ¶ 13, citing Meck and Pearlman, *Baldwin's Ohio Planning and Zoning Law*, Section 14:18 (2015 Ed.); *Smola v. Legeza*, 11th Dist. Ashtabula No.2004–A–0038, 2005–Ohio–7059, ¶ 32 ("courts in Ohio have held that when an appeal involves the construction of a building and the appellant fails to obtain a stay of execution of the trial court's ruling, and construction commences, the appeal is rendered moot"); compare *Gaylor* at ¶ 11 ("In a construction-related case, if an unsuccessful bidder seeking to enjoin the construction of a public-works project fails to obtain a stay of the construction pending judicial resolution of its claims challenging the decision, and construction commences, the unsuccessful bidder's action will be dismissed as moot"). "Consequently, a party is not 'at fault' for purposes of determining whether a proceeding is moot if it proceeds with construction that is the subject of a case in which it has not been enjoined from

proceeding.” *Coates Run* at ¶ 13.

{¶ 13} Similarly, any appeal or action challenging the demolition of a building is rendered moot when a stay is not obtained and the building is demolished during the pendency of the proceeding. *See Mayfield v. Costanzo & Son Co.*, 8th Dist. Cuyahoga No. 96890, 2012-Ohio-271, ¶ 14, citing *Armour v. Luckey*, 9th Dist. Summit No. 10220, 1981 WL 4125, *2 (Aug. 27, 1981) (denial of stay and demolition of building rendered moot argument on appeal challenging the demolition of the building); *see also Pence v. Darst*, 62 Ohio App.3d 32, 574 N.E.2d 548, fn. 1 (2d Dist.1989).

{¶ 14} Appellants argue that the trial court erred by dismissing their appeal as moot because there remains a live controversy in that Section 1167.08(b) of the Chillicothe Codified Ordinances requires the board to approve a replacement design consistent with the intent of the Historic Design Review District after the demolition of the building. For the following reasons, we believe that appellants’ argument is without merit.

{¶ 15} First, the Chillicothe Design Review Board issued a certificate of appropriateness that authorized the Catholic Diocese of Columbus, through St. Mary’s Church and Mike Haller, to demolish the Rectory. Nothing more was requested in the application or granted by the board in its certificate.

{¶ 16} Second, the portion of Section 1167.08(b) of the Chillicothe Codified Ordinances relied on by appellants provides only that “[a] Certificate of Appropriateness shall not be issued unless the Design Review Board has been presented with suitable plans for the replacement design for the site after demolition consistent with the intent of the Historic Design Review District along with enforceable deadlines for completion of the work.” That is, if appellants are correct that this

did not occur, the board erred in issuing the certificate of appropriateness to demolish the Rectory. However, that building has now been demolished, and because the certificate issued did not include any plan for replacement design, appellants should still be able to contest any approval or permit for new construction on the demolition site—just not in an appeal where the only contested action was the issuance of the certificate to authorize the demolition of the Rectory building.

{¶ 17} Third, appellants’ administrative appeal was specifically limited to appealing “the decision of the Chillicothe Design Review Board issuing a Certificate of Appropriateness for *the demolition of the property* known as the St. Mary’s Rectory.” (Emphasis added.) It was only after the demolition occurred, and when appellants failed to timely seek and obtain a stay, that they started to raise issues concerning the church’s post-demolition plans for the site. These after-the-fact claims do not alter the correctness of the trial court’s conclusion that based on their notice of appeal, “the genuine matter in controversy of this appeal was to prevent the demolition of St. Mary’s Rectory.”

{¶ 18} Finally, appellants do not assert that any viable exception to the application of the mootness doctrine applies. “That is, they do not suggest that th[eir administrative appeal] raises issues that (1) are capable of repetition, yet evading review, (2) involve matters of great public importance, or (3) constitute unresolved debatable constitutional questions.” *Coates Run*, 2015-Ohio-4732, at ¶ 15, citing *Millenia Hous. Mgt., Ltd. v. Withrow*, 4th Dist. Athens No. 12CA2, 2013-Ohio-278, ¶ 9-10.

{¶ 19} Therefore, after our de novo review, we believe that the trial court correctly dismissed appellants’ administrative appeal based on mootness because the appeal contested the demolition of the Rectory building, no stay or injunction was obtained pending appeal, and the

demolition of the building was completed. We thereby overrule appellants' sole assignment of error.

V. CONCLUSION

{¶ 20} Having overruled appellants' assignment of error, we affirm the trial court's judgment that dismissed their administrative appeal as moot.

JUDGMENT AFFIRMED.

Harsha P.J., dissenting:

{¶ 21} I conclude this appeal is not moot because under CCO 1167.08(b), a properly issued Certificate of Appropriateness accomplishes two results: (1) grants demolition if appropriate conditions exist and (2) includes a suitable replacement design together with enforceable deadlines for the completion of the replacement work. Here the Certificate of Appropriateness contained no replacement design or deadlines. In effect, the Certification of Appropriateness did only half of what the law requires of it. As a result, even if the demolition renders moot any argument about whether demolition should have been granted, the remaining controversy concerning whether the Certificate of Appropriateness contains adequate replacement design plans and completion deadlines remains justiciable.

{¶ 22} CCO 1167.08 requires the Certificate of Appropriateness to do more than grant a demolition request. It requires the applicant to present suitable plans for a replacement design with enforceable deadlines for the completion of the replacement work:

1167.08 DEMOLITION OF STRUCTURES.

(b) Failure to Submit Plans. The Certificate of Appropriateness for demolition as issued shall contain enforceable deadlines and design commitments for the site. A Certificate of Appropriateness for demolition shall not be issued unless the Design Review Board has been presented with suitable plans for the replacement design for the site after demolition consistent with the intent of the Historic Design Review District along with enforceable deadlines for completion of work.

(Ord. 23-12. Passed 3-26-12.) (Emphasis Added.)

{¶ 23} It appears that the Catholic Diocese application may not have complied with CCO 1167.08(b) as the Certificate does not reference any plans for a replacement design and deadlines for completion of any work. According to CCO 1167.08(b), a replacement design with enforceable

deadlines for completion of work must be part of the Certificate of Appropriateness.

{¶ 24} Here, the Preservation Society filed an appeal in common pleas court in which it contested both the demolition and the complete lack of any replacement plan and completion deadlines required in CCO 1167.08(b). Excerpts from its notice of appeal state, “Applicant [Catholic Church] failed to submit suitable evidence, as set forth under Sections 1167.08(a) or (b) of the Code” and “Appellee [Design Review Board] failed to consider the . . . requirements of Section 1167.08(b) of the Code;”. (OR 1) Thus, the Preservation Society raised issues with the failure to comply with CCO 1167.08(b) in its notice of appeal filed prior to the actual demolition date of April 25, 2014.

{¶ 25} Courts are required to decide actual controversies. *Drydock Coal Co. v. Ohio Div. of Reclamation*, 115 Ohio App.3d 563, 565, 685 N.E.2d 863, 865 (4th Dist.1996). Here, the controversy concerning the lack of any replacement plan or deadlines in the Certificate of Appropriateness is not rendered moot by the demolition. A remedy in the appellant’s favor is possible if the Design Review Board issued a Certificate of Appropriateness without considering suitable plans for a replacement design to comply with the integrity of the District. I take no position at stage on whether a replacement design must include a structure, or in the alternative, whether the replacement design can include other types of uses, or even simply the creation of open space.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J.: Concurs in Judgment & Opinion

Harsha, P.J.: Dissents with Dissenting Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.