[Cite as *Village of Ottawa Hills v. Boice*, 2014-Ohio-1992.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Village of Ottawa Hills, et al.	Court of Appeals No. L-12-1301
Appellee	Trial Court No. CVF-12-16133
v.	
Annette Boice, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: May 9, 2014

* * * * *

Sarah A. McHugh, for appellee.

Marvin A. Robon, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Toledo Municipal Court, which granted the motion for a temporary restraining order and preliminary injunction, filed by appellee, the Village of Ottawa Hills, and ordered appellant, Annette Boice, to comply with the property maintenance provisions of the Codified Ordinances of the Village of

Ottawa Hills. Boice now challenges that judgment through the following assignments of error:

1. The trial court denied the defendant her constitutional right of due process when it issued a final and appealable judgment in this matter without allowing defendant to introduce evidence or present witnesses in defense of the claims which were brought against her.

2. The trial court erred in denying defendant's motion for stay after having been presented with the fact that the Ohio Supreme Court has accepted jurisdiction in defendant's constitutional challenge regarding the use of her property; thus, the decision of the Supreme Court will be the law of the case regarding defendant's use of her property.

3. Ordinance 92-12 of the Village of Ottawa Hills is unconstitutionally vague and therefore unenforceable.

4. The trial court erred in issuing an injunction where plaintiff's [sic] failed to establish urgency, danger, or irreparable harm which are prerequisites to the granting of such extraordinary equitable relief.

{¶ 2} Annette Boice is the owner of a parcel of vacant real property, located at 2570 Westchester Road in the village of Ottawa Hills, Lucas County, Ohio. She has owned the property since she and her now deceased husband purchased it in 1974. At that time, they also purchased the adjoining lot, upon which sat their home. The vacant parcel is approximately 33,000 square feet and was always maintained as an undeveloped

side lot to the parcel which held the Boices' home. In 2004, in anticipation of selling their home and the vacant lot, the Boices sought a declaration by Ottawa Hills that the vacant parcel was a buildable lot. When the Boices first purchased the parcel, it qualified as a buildable lot under the zoning code of Ottawa Hills. Subsequent amendments to that code, however, increased the minimum square footage requirement to build a single family residence in that zoning district from 15,000 square feet to 35,000 square feet. In light of the larger square footage requirement, the Ottawa Hills Village Manager notified the Boices that the vacant parcel was not a buildable lot, and thereby touched off nearly a decade of litigation regarding the Boices' right in the lot's status. *See Boice v. Village of Ottawa Hills*, 6th Dist. Lucas No. L-09-1253, 2011-Ohio-5681, and *Boice v. Village of Ottawa Hills*, 137 Ohio St.3d 412, 2013-Ohio-4769, 999 N.E.2d 649, for a history of that litigation.

{¶ 3} On November 4, 2011, this court affirmed Ottawa Hills' enforcement of its zoning ordinance and denial of a variance. The Boices appealed that ruling to the Supreme Court of Ohio, which accepted jurisdiction in the matter. They also stopped maintaining the parcel.

{¶ 4} In a letter dated April 26, 2012, Village Manager Marc Thompson, notified appellant that her property was in violation of the provisions of the Ottawa Hills property maintenance ordinance as a result of fallen and broken trees on the property. Thompson asked that appellant take immediate steps to address the problem. Appellant responded, through her son, Peter Boice, that she planned to keep the property in its "natural state"

and quoted the provision of the Ottawa Hills ordinance that exempts such property from the maintenance requirements. Throughout the summer of 2012, the parties continued their battle through correspondence, with appellant expressing her intent to leave the property in its "natural state."

{¶ 5} On September 11, 2013, the village filed a motion for a temporary restraining order ("TRO") and preliminary injunction in the court below, along with a verified complaint for injunctive relief. The village asserted that appellant maintained her property with fallen and dead trees and miscellaneous other debris which constituted unsightly materials not appropriate to the area, created blight on the neighborhood, provided an unsafe and attractive nuisance to children, and was a threat to the general health of the community. The village claimed that appellant's failure to keep her property in good repair was in violation of section 660.14 of Ordinance 2006-01 of the Codified Ordinances of the Village of Ottawa Hills, and in violation of R.C. 3767.02. The village further asserted that appellant's maintenance of tall grass and weeds on her property was in violation of Ordinance 92-12 and section 660.14 of Ordinance 2006-01 of the Codified Ordinances of the Village of Ottawa Hills. The village sought an order from the lower court directing appellant to correct the deficiencies on her property and comply with section 660.14 by removing fallen and dead trees and removing debris from her property.

{¶ 6} The court subsequently granted appellee's motion for a consolidated hearing on the verified complaint for injunctive relief and TRO, and scheduled that hearing for

October 1, 2012. Prior to that hearing, however, appellant filed a motion to stay and/or dismiss those proceedings pending a decision from the Supreme Court of Ohio in *Boice, supra*.

{¶ 7} On October 1, 2012, the lower court proceeded to the consolidated hearing. After hearing the parties' arguments regarding the motion for stay, the court proceeded to take evidence on appellee's complaint. Marc Thompson testified as to appellant's failure to maintain the property. Photographs of the property, which were taken by Thompson, were also admitted into evidence. The pictures depict the condition of the property on October 1, 2012, and earlier in the summer of 2012. In particular, the pictures depict a dead tree that had fallen and remained on the property. There was also a dead tree on the property that had been standing. Because it threatened to damage neighboring property if it fell, appellant did have that tree removed shortly before the hearing below. The pictures admitted below also depict the length of the grass when the village entered the property in June 2012 to cut the grass. Thompson estimated that the grass was approximately four feet high at that time and testified that the village only cut the grass that one time. On the question of the harm caused to the village by the dead tree on appellant's property, Thompson testified that it detracted from the adjoining properties from an aesthetic standpoint, could harbor rodents, and had a blighting or deterring effect on the neighborhood. Finally, Thompson testified that when appellant lived at the home on the adjoining property, the vacant parcel was properly maintained.

{¶ 8} After the village rested, appellant moved for a directed verdict. The parties presented their arguments to the court, at which point the court stated that it would take the matter under advisement. Appellant's counsel then stated: "If you rule against us, Your Honor, we do have a – we want to put on a defense to the case." The court responded: "All right, very good. Thank you."

{¶ 9} On October 5, 2012, the lower court issued its decision on the pending motions. The court found that based on the evidence provided, the property had not been properly maintained, in violation of the laws of the village of Ottawa Hills and the state of Ohio. The court further rejected appellant's argument that the property was exempt from section 92-12 of the Codified Ordinances of the Village of Ottawa Hills, and stated: "While the Defendant may have an ongoing dispute with the Village of Ottawa Hills concerning the zoning restrictions on the property, Defendant cannot fail to maintain the property and develop a public nuisance in an effort to harass the Village of Ottawa Hills." The court then denied appellant's motion to stay and/or dismiss the case pending the Ohio Supreme Court's ruling in *Boice*, granted appellee's motion for a TRO and preliminary injunction, and restrained and enjoined appellant from failing to maintain her property in violation of the stated village of Ottawa Hills ordinances. The court ordered appellant to bring the property into compliance with the property maintenance code within 14 days of the date of the order by removing the fallen and dead trees from the property and cutting the grass. The court further decreed that if appellant failed to bring the property into compliance with the stated ordinances within 14 days of the date of the

order, she would be found in contempt. Finally, the court decreed that if, at the end of the 14 day period, appellant had not brought the property into compliance with the property maintenance code, appellee could enter the property and correct the violations to bring the property into compliance. This is the judgment that appellant now challenges on appeal.

{¶ 10} In her first assignment of error, Boice asserts that the lower court erred and violated her right to due process by granting the preliminary and permanent injunctions without giving her an opportunity to present a defense.

{¶ 11} In Ohio, injunctions are classified as (1) a temporary restraining order "which may be issued *ex parte* without notice in an emergency situation" and which lasts "'only long enough for a hearing'"; (2) a preliminary injunction which is issued after notice and, normally, a hearing, and is used only to maintain the status quo until such time that a fair trial on the merits is held; and (3) a permanent injunction which is issued after a fair trial on the merits. *City of Bexley v. Duckworth*, 10th Dist. Franklin No. 99AP-414, 2000 WL 249121 (Mar. 7, 2000), citing McCormac, *Ohio Civil Rules Practice* (2 Ed.1992) 403, Section 14.08.

{¶ 12} Civ.R. 65 sets forth the procedures a court is to follow upon the filing of a complaint for injunctive relief. That rule states, in pertinent part:

(B) Preliminary injunction

(1) *Notice*. No preliminary injunction shall be issued without reasonable notice to the adverse party. The application for preliminary injunction may be included in the complaint or may be made by motion.

(2) *Consolidation of hearing with trial on merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (B)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

{¶ 13} As this court recognized in *Lend-A-Paw Feline Shelter, Inc. v. Lend-A-Paw Found. of Greater Toledo, Inc.*, 6th Dist. Lucas No. L-01-1052, 2001 WL 1388029 (Nov. 9, 2001), citing *Turoff v. Stefanac*, 16 Ohio App.3d 227, 228, 475 N.E.2d 189 (1984), "the general rule is that a court must '*order* the consolidation of a hearing on the application for a preliminary injunction with a trial on the merits, thus providing the parties with notice that the case is, in fact, being heard on the merits.'" That notice provides the parties a "'full opportunity to present their respective cases.'" *Id.*, quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830 (1981).

{¶ 14} In the present case, appellee requested such consolidation. In an order of September 14, 2013, three days after appellee filed its motion for a TRO and preliminary injunction and complaint for injunctive relief, the court granted appellee's request and ordered the case to "come before the Court for an evidentiary hearing upon the Plaintiff's motion for a consolidated hearing on the Plaintiff's Verified Complaint for preliminary and permanent injunction and Temporary Restraining Order" on October 1, 2014. At that hearing, the lower court clearly indicated that both parties would have an opportunity to present their case. The court also stated that it would not decide the "natural state" issue, but then declared that the parcel was not property that could remain in its natural state. Following appellee's presentation of its case, appellant moved for a directed verdict. The court stated that it would take the matter under advisement and would issue a ruling shortly. Appellant then asked to be given an opportunity to put on a defense if the court denied her motion for a directed verdict. The court responded affirmatively. When the court issued its decision several days later, however, the court denied appellant's motion for a directed verdict and ruled on the merits of appellee's case, granting appellee's motion for a TRO and preliminary injunction and enjoining appellant from failing to maintain her property in violation of the property maintenance ordinances at issue. That is, the court treated the entire proceeding as a trial on the merits and granted appellee's motion without giving appellant an opportunity to present a defense, despite stating on the record that it would provide appellant that opportunity.

> Ordinarily, a party requesting a preliminary injunction must show that (1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction.
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> A permanent injunction is not considered an interim remedy. It is issued after a hearing on the merits in which a party has demonstrated a right to relief under the applicable substantive law. A party seeking a permanent injunction must show that the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law. *Procter & Gamble Co. v. Stoneham,* 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (1st Dist.2000).

{¶ 15} By proceeding as it did, the lower court denied appellant her due process right to present her defense and be heard on the factors that the court was required to consider. *See Ohio Serv. Group, Inc. v. Integrated & Open Systems, L.L.C.*, 10th Dist. Franklin No 06AP-433, 2006-Ohio-6738, and *Sea Lakes, Inc. v. Sea Lakes Camping, Inc.*, 78 Ohio App.3d 472, 605 N.E.2d 422 (11th Dist.1992). We further note that the court entered its final judgment on the merits before appellant had filed her answer. Appellant was served with the summons and complaint on September 14, 2012. The trial court's final judgment was filed on October 5, 2012, and journalized on October 9, 2012, three days before appellant's answer was due to be filed. Civ.R. 12(A). At least two

appellate districts have held that where the sole, ultimate issue is the plaintiff's entitlement to a permanent injunction, which is clearly what appellee was seeking in this case, it is improper for a court to enter a judgment on the merits immediately following a consolidated hearing if the time has not yet expired for the defendant to answer. *See Bd. of Edn. Ironton City Schools v. Ohio Dept. of Edn.*, 4th Dist. Lawrence App. No. CA92-39, 1993 WL 256320 (June 29, 1993), and *Sea Lakes, Inc., supra*.

{¶ 16} For the reasons stated, we find that the lower court erred in granting appellee injunctive relief and the first assignment of error is well-taken. Given that conclusion, we need not address appellant's fourth assignment of error, which challenges the underlying grounds for the trial court's judgment.

{¶ 17} In her second assignment of error, appellant asserts that the lower court erred in denying her motion to stay the trial court proceedings given that the Ohio Supreme Court had accepted jurisdiction in *Boice, supra.* Because the Ohio Supreme Court has now ruled in that matter, this issue is moot.

{¶ 18} Finally, in her third assignment of error, appellant contends that Ordinance 92-12 of the Codified Ordinances of the Village of Ottawa Hills, one of the ordinances appellant was found to have violated, is unconstitutionally vague and, therefore, unenforceable. Because a ruling on this issue will affect the lower court's further consideration of this matter, we are compelled to address it herein.

{¶ 19} Appellant was charged with violating two property maintenance ordinances. Chapter 660.14 of the Codified Ordinances of the Village of Ottawa Hills is

the general property maintenance ordinance of the village. That ordinance requires owners of property within the village, in part, to "keep all yards or lots free from unsightly materials not appropriate to the area and debris, which may cause a fire hazard or may act as a breeding place for vermin or insects or constitute a public nuisance or have a blighting or deteriorating influence on the neighborhood." Ordinance 92-12 specifically addresses the issue of grass and weed height on properties in the village of Ottawa Hills. That ordinance provides in relevant part:

> SECTION 1. It shall be the responsibility of the owner, agent, or tenant having charge of any land in the Village of Ottawa Hills to cut and remove any grass or weeds on said property in excess of eight inches of height.
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> * * *
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> SECTION 6. Any land in the Village of Ottawa Hills that is larger than 15 acres or any land that is predominantly wooded or is maintained in its natural state is exempt from the provisions of this Ordinance.

{¶ 20} As is clear from a reading of the two ordinances, the "natural state" exemption only applies to grass and weed heights in the village, not to any other property maintenance issues covered by Chapter 660.14. Accordingly, although appellant appears to argue that the exemption applies to the obligation to remove brush and fallen trees from property, we will limit our discussion to the mowing obligations.

{¶ 21} We start by recognizing the strong presumption that all legislative enactments are constitutional. *State v. Collier*, 62 Ohio St.3d 267, 269, 581 N.E.2d 552 (1991). If a statute or ordinance is alleged to be void for vagueness, all doubts must, if possible, be resolved in favor of its constitutionality, *Oregon v. Lemons*, 17 Ohio App.3d 195, 196, 478 N.E.2d 1007 (1984), and the individual challenging the constitutionality of a statute "bears the burden of proving that the law is unconstitutional beyond a reasonable doubt." *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16. Moreover, "a litigant asserting a vagueness defense must demonstrate that the statute in question is vague as applied to the litigant's conduct without regard to its potentially vague applications to others." *City of Mayfield Hts. v. Barry*, 8th Dist. Cuyahoga No. 82129, 2003-Ohio-4065, ¶ 11, citing *Parker v. Levy*, 417 U.S. 733, 757, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), and *In re Harper*, 77 Ohio St.3d 211, 221, 673 N.E.2d 1253 (1996).

{¶ 22} It is well established that a local zoning ordinance is a legitimate use of the state's police power, save for instances when the ordinance is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Moreover, the Supreme Court of Ohio has recognized that zoning regulations calculated to maintain the aesthetics of a community are a reasonable exercise of the police power and bear a substantial relationship to the general welfare of the public. *Hudson v. Albrecht, Inc.*, 9 Ohio St.3d 69, 458 N.E.2d 852 (1984),

paragraphs one and two of the syllabus. Property maintenance ordinances fall into that category of zoning regulations in that they promote the public health, safety and general welfare of the community by advancing the appearance of property, protect real estate from impairment and destruction of value, and encourage economic and community development. *Carlisle v. Martz Concrete Co.*, 12th Dist. Warren No. CA2006-06-067, 2007-Ohio-4362, ¶ 18.

{¶ 23} Under the tenets of due process, an ordinance is unconstitutionally vague under a void-for-vagueness analysis when it does not clearly define the acts that it prohibits. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). To pass muster under the void-for-vagueness doctrine, Ohio law dictates an ordinance must survive the tripartite analysis set forth in *Grayned*: (1) the ordinance must provide fair warning to the ordinary citizen of what conduct is proscribed, (2) the ordinance must preclude arbitrary, capricious, and discriminatory enforcement, and (3) the ordinance must not impinge constitutionally protected rights. *Id.* at 108-109. *See also State v. Collier*, 62 Ohio St.3d 267, 269-270, 581 N.E.2d 552 (1991).

{¶ 24} Ordinance 92-12 is clear in the responsibilities it sets forth for property owners in the village of Ottawa Hills regarding the maintenance of grass and weeds. That is, all property owners (and others having control of property) must cut and remove all grass and weeds that exceed eight inches in height. In its preamble, the ordinance states the reasons for the ordinance as to assure the continued peace, health, safety, and welfare of the community, and the maintenance of high property values. These are valid

governmental interests to which the ordinance bears a direct relationship. The ordinance then identifies three distinct exceptions to the mowing requirement: (1) land that is larger than 15 acres, (2) land that is predominantly wooded, and (3) land that is maintained in its natural state. Only the third exception is at issue in this appeal. The ordinance does not define what is meant by "maintained in its natural state."

{¶ 25} Appellant asserts that a property owner can elect to maintain her property in its natural state. We disagree, for appellant's interpretation of the ordinance would defeat its entire purpose by allowing every property owner in the village to elect to maintain property in its natural state and allow the grass and weeds to grow wild. Appellant makes no other arguments in support of her assertion that the ordinance is unconstitutionally vague.

{¶ 26} The Supreme Court of Ohio has held that an ordinance is not void for vagueness merely because it could have been more precisely worded. *State v. Dorso*, 4 Ohio St.3d 60, 61, 446 N.E.2d 449 (1983). Rather, it must be comprehensible to a person of ordinary intelligence, to the extent that it informs him or her of the activities it proscribes. The photographs of appellant's property that were admitted into evidence at the trial below show a lot that fronts a residential street and is surrounded by other residential parcels. Although there are trees toward the back of the lot, the lot is predominantly a grassy lawn. Given the construction of appellant's property, a person of ordinary intelligence would have recognized her obligation to abide by Ordinance 92-12 and keep her grass and weeds cut to the required height.

{¶ 27} Appellant makes no arguments regarding, and thus has failed to prove, that the village enforced the ordinance against her arbitrarily or that the ordinance impinged upon her constitutionally protected rights.

{¶ 28} We therefore find that Ordinance 92-12 is not unconstitutionally vague as applied to appellant's property. Given the topography of the village of Ottawa Hills, whether it is vague as applied to other parcels is a question for another day. The third assignment of error is not well-taken.

{¶ 29} On consideration whereof, the court finds that substantial justice has not been done the party complaining and the judgment of the Toledo Municipal Court is reversed. This case is remanded to that court for further proceedings consistent with this decision. Costs assessed equally between the parties pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE