IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.
RICHARD DUNCAN

APPELLANT

vs.

CITY OF MENTOR

APPELLEE

CASE NO. 2023-0336

On Appeal From The Lake County
Court of Appeals, 11th District

Court of Appeals 2022-L-106

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# MERIT BRIEF OF APPELLANT RICHARD DUNCAN

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Richard Duncan Pro Se
1101 East Blvd
Aurora, Ohio 44202
330-968-7749
Appellant

Joseph Szeman
8500 Station Street Suite 245
Mentor, Ohio 44060
Attorney for Appellee

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## STATEMENT OF FACTS

Richard Duncan purchased his 3 plus acre lot at a forfeited land sale. The prior owner allegedly went bankrupt and stopped paying their property taxes to Lake County, Ohio. Duncan thus believed and expected that since the title to the lot was no longer in the homeowners association that the prior restrictions, covenants or the like were voided out and did not apply to his lot. Duncan a few times informally and orally asked the Mentor officials what he could do with his lot. On May 20th, 2021, Duncan in a formal letter to the City wanted to know Mentor's final position of what procedures he needed to follow to use his lot. Duncan waited 5 months without a reply, so he resent an October 2021 followup letter(see paragraph 10 complaint). (Docket No. 2)

This time Mentor responded and they told Duncan to submit an application for a building permit which he did on November 8, 2021(see paragraph 11 complaint). On November 22, 2021 Mentor denied Duncan a building permit(see complaint par. 13) and told him to apply for variances before the zoning board of appeals, Duncan did so and such were denied. Duncan even asked for a continuance to supply more information to help them reach a final decision but that was denied(see Complaint paragraph 14 and 15 Emphasis added). Because Mentor did not want to negotiate with Duncan any longer he filed his writ of mandamus thereafter. The 11th District Court of Appeals dismissed Duncan's complaint.

## ARGUMENT

Proposition of Law Number 1- A litigant filing a taking claim needs only exhaust his administrative remedies before that governmental agency, and is not required to seek judicial remedies which review such administrative decisions, which optionally may be available.

The 11th District on page 5 of its decision stated that Duncan's taking claim is subject to dismissal as he failed to follow the proper procedures before filing his writ. In support they set forth (3) three case law sources, none of which have merit to Duncan's case. 

Firstly they discuss the case of Dynamic Industries Inc. v. Cincinnati 147 Ohio State 3d 422. In that case the owner failed to apply for a certificate of appropriateness as required by Cincinnati Zoning Code 1435-09. Thus such error rendered their case unripe as they did not exhaust its administrative remedies(see Palazzolo v. Rhode Island 533 U.S. 606). The Court reasoned that the City may have allowed waivers or variances which would have rendered the taking claim unnecessary.

In contrast, Duncan's case was ripe as he diligently sought and was denied the variances the City asked him to apply for. Duncan even requested to return with more information to try to reach a settlement, but Mentor denied his continuance request! This Dynamics case did not even mention an RC 2506 appeal and so it is erroneous to dismiss Duncan's case based theron.

The Second case stated by the 11th District is the case of State ex rel. U.S. Bank vs Cuyahoga County. Duncan believes this case is presently before the Ohio Supreme Court so he will not address the 8th circuits ruling pre-maturely.

The Third case set forth by the 11th District is Crosby v. Pickway County. This case also has no bearing on Duncan's case in that the landowner failed to fully complete the administrative process as requested by the government body. The owners disregarded the lengthy letters submitted to them by the health district explaining that they needed to correct drainage issues to prevent harm to the surrounding neighbors. Instead, the owners prematurely went to both Federal and State Court to hopefully force the grant of a writ of mandamus, so the Courts dismissed the cases.

In contrast to Duncan's case, he got a final decision from the zoning board of appeals and he even asked to return thereafter but the board "washed their hands" of Duncan abruptly sending him away! The Crosby case even cites an earlier Duncan v. Mentor case (2005) in which this high court ruled that Duncan had fully exhausted his administrative remedy because thereafter the planning commission had indeed reached a final decision(therefore, Duncan could do no more). Likewise, in this case Duncan got the zoning board to reach its final position on what they would or would not give back to Duncan. Duncan got nothing!, so he was free to file his writ of mandamus.

Duncan in his Brief before the 11th District Court setforth the case of Negin v. City of Mentor Ohio 601 F. Supp. 1502 to further support that he followed the proper procedures prior to filing his takings claim. In Negin, the Court stated "Section 2506.01 does not empower state courts to award damages for injuries suffered as a result of erroneous administrative decisions". Thus, while Duncan could have filed a RC 2506.01 action to hopefully reverse Mentor's zoning board denial, he was not required to do so! If he did so, he would have been precluded from seeking just compensation in a takings claim in line with Negin. Also, res judicata would have ended his case on just compensation. Duncan, in lieu chose the writ of mandamus claim as he was not required to seek RC 2506! This high Court urgently needs to save much judicial waste of time by ruling on this matter to set a precedent!

It has often been the case in zoning law that courts have forced litigants to resort to unnecessary and wrong procedures prior to litigating the merits of a case. This was clearly illustrated in the case of Knick v. Township of Scott, PA (No. 17-647, decided 6/21/19). In 1985, in the case of Williamson County v. Hamilton Bank the U.S. Supreme Court ruled that a litigant cannot bring a federal takings claim until a state court has denied his claim for just compensation under state law. This was thereafter coined "Prong 2" of Williamson.

In Knick after 35 years of erroneous law, the high Court overturned its mistake and stated that a taking claim can be filed at the time the constitutional violation takes place. Thus, the Prong 2 rule no longer had to be satisfied.

Proposition of Law 2- The Motion to Strike was properly overruled as moot.

Proposition of Law 3- Duncan's remaining claims are proper in this original action of mandamus.

Duncan asserts he should be able to hear all his claims, in addition to his taking claim, as it makes sense for judicial economy and time and effort to litigate them in one case and to avoid preclusion or res judicata later on in a later suit.

## CONCLUSION

Duncan clearly followed Mentor's instructions and Mentor reached its final decision at it's administrative level as to what permitted development they would allow on his lot. This was a flat denial of every thing. While Duncan could have sought an RC 2506.01 review or a declaratory judgement action therefrom, he was not required to do so. If he did so, under Negin v. Mentor he would have been deprived of his 5th amendment taking claim. Duncan sought to choose the writ of mandamus action which is established in Ohio, and thus he can not be deprived of his constitutional right because of a state statute enactment. A reversal of the 11th District's ruling is clearly warranted herein. Duncan requests that this high court to settle years of confusion and waste of resources by setting forth a rule of law putting forth the correct law for litigants to follow in the future!

Richard Duncan

Respectfully submitted and requested,
Richard Duncan 1101 East Blvd Aurora, Ohio 44202

SERVICE- A copy of this Brief has been served on Joseph Szeman this 29TH day of March 2023 by first class mail at the address of 8500 Station Street Suite 245, Mentor, Ohio 44060.

Richard Duncan Richard Duncan

Appendix 1

IN THE SUPREME COURT OF OHIO

THE STATE EX. REL
RICHARD DUNCAN
APPELLANT

VS.
CITY OF MENTOR
APPELLEES

On Appeal from the Lake County Court of Appeals, 11th Appellate District

Court of Appeals Case No. 2022-L-106

23-0336

NOTICE OF APPEAL OF APPELLANT RICHARD DUNCAN

Richard Duncan, 1101 East Blvd, Aurora, Ohio 44202 Appellant Pro Se
City of Mentor, Joseph Szeman 8500 Station Street Suite 245, Mentor, Ohio 44060 Counsel

NOTICE OF APPEAL OF APPELLANT RICHARD DUNCAN

Appellant Richard Duncan hereby gives notice of appeal to the Supreme Court of Ohio from the judgement of the Lake County Court of Appeals, 11th District, entered in the Court of Appeals case No. 2022-L-106, on 2/13/2023. This is an appeal by right. (original)

Respectfully submitted,

Richard Duncan 1101 East Blvd. Aurora, Ohio 44202

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail this 8th day of March 2023 to Joseph Szeman at 8500 Station Street Suite 245, Mentor, Ohio 44060.

Richard Duncan

FILED
MAR 08 2023
CLERK OF COURT
SUPREME COURT OF OHIO

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Filing # 103559 / 2022-L-106 / FILED: COURT OF APPEALS
Lake Co Common Pleas Court, Clerk Faith Andrews 02/13/2023 09:01 AM

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | ) SS. | |
| COUNTY OF LAKE | ) | ELEVENTH DISTRICT |

STATE OF OHIO ex rel.
RICHARD DUNCAN,

Relator,

- vs -

CITY OF MENTOR,

Respondent.

**JUDGMENT ENTRY**

**CASE NO. 2022-L-106**

For the reasons stated in the Per Curiam Opinion of this court, respondent's Motion to Dismiss is granted, and Relator's Complaint for Writ of Mandamus and Damages and Other Relief is dismissed. Costs to be taxed against relator.

John J. Eklund

PRESIDING JUDGE JOHN J. EKLUND

Mary Jane Trapp

JUDGE MARY JANE TRAPP

JUDGE MATT LYNCH

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Filing # 103872 / 2022-L-106 / FILED: COURT OF APPEALS
Lake Co Common Pleas Court, Clerk Faith Andrews 02/14/2023 01:36 PM

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| **STATE OF OHIO** | ) | **IN THE COURT OF APPEALS** |
| | ) **SS.** | |
| **COUNTY OF LAKE** | ) | **ELEVENTH DISTRICT** |

STATE OF OHIO ex rel.
RICHARD DUNCAN,

Relator,

- vs -

CITY OF MENTOR,

Respondent.

**JUDGMENT ENTRY**

**CASE NO. 2022-L-106**

Pursuant to this court's February 13, 2023 per curiam opinion and judgment entry dismissing the compliant, respondent's February 6, 2023 motion to strike is overruled as moot.

JUDGE MATT LYNCH

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Filing # 103557 / 2022-L-106 / FILED: COURT OF APPEALS
Lake Co Common Pleas Court, Clerk Faith Andrews 02/13/2023 08:58 AM

# IN THE COURT OF APPEALS OF OHIO
## ELEVENTH APPELLATE DISTRICT
## LAKE COUNTY

| | |
|---|---|
| STATE OF OHIO ex rel. RICHARD DUNCAN,<br><br>Relator,<br><br>- vs -<br><br>CITY OF MENTOR,<br><br>Respondent. | **CASE NO. 2022-L-106**<br><br>Original Action for Writ of Mandamus |

**PER CURIAM**
**OPINION**

Decided: February 13, 2023
Judgment: Complaint dismissed

*Richard Duncan*, pro se, 1101 East Boulevard, Aurora, OH 44202 (Relator).

*Joseph P. Szeman*, City of Mentor Director of Law, The Matchworks Building, 8500 Station Street, Suite 245, Mentor, OH 44060 (For Respondent).

PER CURIAM.

{¶1} Pending before this court is plaintiff-relator, Richard Duncan's, Complaint for Writ of Mandamus and Damages and Other Relief, filed on November 10, 2022, against defendant-respondent, the City of Mentor. Also pending is the Respondent City of Mentor's Motion to Dismiss, filed on December 12, 2022. Duncan filed his Brief in Opposition to Motion to Dismiss on January 19, 2023. On February 6, 2023, Mentor filed a combined Reply Brief in Support of Motion to Dismiss and Motion to Strike the

"averments of fact and exhibits submitted by Relator in his responsive pleading which are outside of those set forth in his Complaint."

{¶2} The Complaint makes the following allegations:

> 5. Duncan purchased his lot [Parcel No. 16-B-036-A-00-047-0] on 9/7/94 at a forfeited land sale where it was appraised for over 40,000 dollars by [Lake] County.
>
> 6. From the testimony of neighbors at a January 11th, 2022 zoning board of appeals meeting, Duncan was told that shortly after his lot's subdivision plat was approved, in December of 1987 that some party went bankrupt. Thus it is believed that the homeowners association within the Hollycroft Subdivision was never setup or took effect and that the neighboring property owners did not pay their required dues. As a result therefore, no County taxes were ever paid. No neighbors or the City of Mentor ever objected and thus they benefited from their negligence or inaction.
>
> 7. Thus the County Auditor put the property of 3 acres up for sale and Duncan purchased it. Because the lot was no longer in the homeowners association, Duncan believed and expected that any of such restrictions, covenants or the like were voided out and non applicable. Duncan also believed and expected that since Mentor remained silent as to the issue, their claims as to any regulations they had on Duncan's lot or in the subdivision would be void and non-effective.
>
> 8. Due to that Duncan's lot is unique in that it is partially covered by a pond, land-locked and unregulated, Duncan once or twice over a 20 year period asked the City what use could be made of his lot. Mentor told him that he would need to submit a written request to the City. Duncan believes he could get access to his lot by way of several easements which connect the public street to his lot.
>
> 9. Duncan never submitted a proposal but a few times he listed his lot for sale over the last 20 years. Recent prospective buyers who inquired about the 3 acre parcel asked to use the property for an outdoor yoga site and a fishing dock (recreational uses).
>
> 10. On May 20th, 2021 and October 2021 Duncan in a formal letter to the City wanted to know Mentor's final position on what procedures he needed to follow to use his lot.

11. The City told Duncan to submit an application for a building permit which he did on November 8, 2021.

12. In this application Duncan specifically requested a recreational houseboat on the pond and stated Mentor's drainage easement would be unaffected.

13. Duncan received a denial by the City on November 22, 2021 detailing about 9 reasons or so in support, citing building plan review, zoning review, and engineering review standards or laws.

14. Duncan was advised to file an appeal to the appeals board. On 12/14/21 he prepared and submitted a written rebuttal to each of the 9 reasons stated for the permit denial and he requested variances in support * * *.

15. At the January 11th, 2022 hearing a point was raised that Duncan needed to submit more detailed houseboat plans. Duncan agreed to do so and he asked for a continuance but the board denied such, and voted to deny all his variance requests after a 2 hour hearing. Few if any of the 9 reasons were analyzed or discussed.

{¶3} Based on the foregoing allegations, the Complaint raises four Counts: Count I Taking of Property, Count II Quiet Title, Count III Estoppel/Laches, and Count IV Landlocked Properties Must Get Access.

{¶4} "In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. "In construing a complaint upon a motion to dismiss for failure to state a claim, [the court] 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).

{¶5} Mentor argues, and this Court agrees, that Duncan's claims for Quiet Title, Estoppel/Laches, and Landlocked Properties Must Get Access are outside the scope of the original jurisdiction granted to a court of appeals. Accordingly, they must be dismissed.

{¶6} A court of appeals' original jurisdiction is limited by the Ohio Constitution to the following types of cases: quo warranto; mandamus; habeas corpus; prohibition; procedendo; and any cause on review as may be necessary to its complete determination. Ohio Constitution, Article IV, Section 3. As a court of appeals' original jurisdiction is limited, the court "is obligated to raise sua sponte questions related to [its] jurisdiction." *Smirz v. Smirz*, 2014-Ohio-3869, 18 N.E.3d 868, ¶ 8 (9th Dist.); *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 684 N.E.2d 72 (1997) ("[s]ubject-matter jurisdiction may not be waived or bestowed upon a court by the parties to the case" and "may be raised *sua sponte* by an appellate court").

{¶7} The claim for Quiet Title is based on R.C. 5303.01 and asserts that Mentor's attempts to apply restrictive covenants, deed restrictions, zoning ordinances, building department or engineering storm water codes or the like are illegal and constitute a cloud upon his property rights. The claim for Estoppel/Laches asserts that Mentor and the neighboring property owners (not identified as parties in the Complaint) should be estopped from enforcing or giving effect to their regulations so as to deny Duncan a building permit. The claim for Landlocked Properties Must Get Access asserts that Duncan is entitled to the use of access easements contained on the approved plat for the Hollycroft Subdivision. None of these claims are encompassed by the types of cases

over which this court may exercise original jurisdiction. This court is without jurisdiction to consider them.

{¶8} With respect to the claim for Taking of Property, Mentor argues that Duncan has failed to state a claim upon which relief may be granted in that he has an adequate remedy at law "by way of a Chapter 2506 appeal of the decision of the Board of Building and Zoning." We find that Duncan's failure to pursue an appeal of the denial of his building permit and/or variance request constitutes a failure to exhaust his administrative remedies which precludes this Court's consideration of whether Mentor has unconstitutionally appropriated his property by "totally denying [him] of any use of his lot (not only economically viable use, but recreational)." Accordingly, this claim is also subject to dismissal.

{¶9} When seeking mandamus relief, "a party must wait for a final administrative decision before asserting a takings claim." *State ex rel. Dynamic Industries, Inc. v. Cincinnati*, 147 Ohio St.3d 422, 2016-Ohio-7663, 66 N.E.3d 734, ¶ 10. "Where a statutory scheme would obviate the need for a takings claim, a party may not ignore that scheme in favor of instituting a takings claim." *State ex rel. US Bank Trust Natl. Assn. v. Cuyahoga County*, 8th Dist. Cuyahoga No. 110297, 2021-Ohio-2524, ¶ 25; *Crosby v. Pickaway Cty. Gen. Health Dist.*, 4th Dist. Pickaway No. 06CA27, 2007-Ohio-6769, ¶ 23 ("the nature of appellants' mandamus action necessarily challenges the permit denials and, thus, they must exhaust their administrative remedies before seeking the extraordinary remedy of mandamus").

{¶10} According to the allegations in the Complaint, Duncan purchased his property in 1994. In November 2021, Duncan submitted a building permit application for

a recreational houseboat on his property which Mentor denied. On December 14, 2021, Duncan requested a variance from the Board of Building and Zoning Appeals. The request was denied in January 2022. No further action on Duncan's part has been alleged. Rather, Duncan acknowledges in his Brief in Opposition that he "was required to at least try to get a variance before the zoning board" and that "the court must decide if an area variance was warranted."

{¶11} The Ohio Revised Code provides that "every final order, adjudication, or decision of any * * * board * * * of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located." R.C. 2506.01(A); Mentor Codified Ordinances 1131.06(f) ("[d]ecisions of the Board [of Building and Zoning Appeals] shall be final and binding on the applicant provided, however, that any persons or the City aggrieved by any decision of the Board may appeal said decision by a filing a petition with the Common Pleas Court").

{¶12} Here, Duncan has failed to avail himself of the available administrative appeal processes which could obviate the need for the initiation of appropriation proceedings. *Compare State ex rel. Sibarco Corp. v. Hicks*, 177 Ohio St. 81, 82, 202 N.E.2d 615 (1964) ("the right to appeal pursuant to Chapter 2506, Revised Code, is an adequate remedy at law"); *The Chapel v. Solon*, 40 Ohio St.3d 3, 530 N.E.2d 1321 (1988), syllabus ("[t]he proper procedure to test an official's refusal to issue a building permit is by of appeal to the court of common pleas after all administrative remedies of appeal, if any, are exhausted").

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{¶13} For the foregoing reasons, Mentor's Motion to Dismiss is granted and Duncan's Complaint is, accordingly, dismissed. Mentor's Motion to Strike is overruled as moot.

JOHN J. EKLUND, P.J., MARY JANE TRAPP, J., MATT LYNCH, J., concur.