Municipal Case Law Update

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OHIO CASE LAW

Annexation

***Lawrence Township Board of Trustees v. City of Canal Fulton,* 185 Ohio App.3d 267, 2009-Ohio-6822.**

The procedure for an expedited type II annexation is contained in R.C. 709.023, and a board of county commissioners is required to approve the annexation if the annexation petition meets the criteria set forth in R.C. 709.023(E)(1)-(7). Lawrence Township objected to an expedited type II annexation by Canal Fulton, arguing that there had been an error in the legal description of the annexation plat and argued that the United States, as the "owner" of the Tuscarawas River, had not signed the petition for annexation. The township also challenged the contiguity of the annexed property. The township brought a mandamus action to prevent the annexation. Noting that only substantial compliance is required, the Fifth District Court of Appeals held that a description contained in the plat attached to the annexation petition "was a scrivener's error that was readily corrected and that did not rise to the level of a reason that the Commissioners should have denied the annexation." The court also clarified that the United States did not "own" the Tuscarawas River but had authority to regulate the navigable right of way. Finally, the court analyzed the relevant statutes and concluded that the contiguity requirement in R.C. 709.023(E)(4) was controlling in an expedited type II annexation proceeding, to the exclusion of R.C. 709.02(A).

It's important to note that this case was decided before *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945, was decided. The same case brought today would be dismissed because of the township's lack of standing.

***City of Alliance v. Lexington Township Board of Trustees,* 185 Ohio App.3d 256, 2009-Ohio-6792.**

The Fifth District Court of Appeals, in a case that had previously been reversed on the issue of whether the signature of a property owner had been properly withdrawn from an annexation petition, again reversed and remanded the case to the common pleas court. After the first remand, the trial court had remanded the matter to the Stark County Board of County Commissioners with instructions to approve the annexation. That order was appealed. On this appeal, the Court of Appeals remanded the case to the trial court with instructions to remand the matter to the Stark County Board of County Commissioners with

a mandate to the Commissioners to evaluate the City's annexation petition under the six statutory factors set forth in R.C. 709.033.

Building Code Enforcement

***Cleveland v. Washington Mut. Bank*, Slip Opinion No. 2010-Ohio-2219.**

Corporate defendant, Washington Mutual Bank, was convicted in Cleveland Municipal Court for misdemeanor building and housing code violations. Defendant appealed, arguing that R.C. 2941.47 does not authorize a trial in absentia in matters involving corporate defendants. The Eighth District Court of Appeals agreed, concluding that a trial in absentia may occur either at the express request of a misdemeanor defendant or upon the defendant's voluntary absence after trial has begun, but Ohio law does not allow a clerk to enter a plea on the defendant's behalf and does not allow for the trial of a corporate defendant in absentia when the defendant has never appeared in the case.

The City appealed the decision and the Ohio Supreme Court concluded that R.C. 2941.47 authorizes a clerk of the court of common pleas to enter a plea of "not guilty" when the case is instituted by indictment or information. In this case, "the misdemeanor prosecution against Washington Mutual was instituted by complaint or affidavit in the municipal court, not by indictment or information in the common pleas court." The court noted that misdemeanors may also be presented in common pleas court and, therefore, the court of appeals "was mistaken in stating that prosecution by indictment and information is reserved for felony prosecutions." The court of appeals, however, correctly concluded that R.C. 2941.47 applies to prosecutions against a corporation that were instituted by indictment or information, and "[b]ecause this criminal prosecution was brought by affidavit or complaint in municipal court rather than by indictment or information in common pleas court, R.C. 2941.47 does not apply."

In a concurring opinion, Justice O'Connor encouraged the legislature to modify R.C. 2941.47 to permit a municipal court to proceed in absentia.

Competitive Bidding

***State ex rel. Northern Ohio Chapter of Associated Builders & Contractors, Inc. v. Barberton City School Board of Education,* 2010-Ohio-1826.**

Ohio's prevailing wage law requires contractors and subcontractors to pay the prevailing wage on public improvement projects. An exception to the prevailing wage requirement for "public improvements undertaken by, or under contract for, the board of education of any school district" is set forth in R.C. 4115.04(B)(3).

The Barberton City School District invited bids for the construction of a new middle school. The invitation to bid stated that all bids were to comply with State of Ohio prevailing wage requirements.

The School District awarded the contract to Mr. Excavator. Fechko Excavating, Inc. ("Fechko") and Associated Builders & Contractors, Inc. ("ABC") filed a complaint seeking to permanently enjoin the Board from applying Ohio's prevailing wage requirement to the middle school project. City of Barberton residents Dan Villers and Jason Antill ("taxpayers") joined Fechko and ABC in the filing of the complaint. The trial court granted the Board's motion to dismiss, concluding that Fechko, ABC and the taxpayers lacked standing.

The Ninth District Court of Appeals affirmed the decision of the trial court. With respect to Fechko's claim, the court rejected Fechko's argument that it would have been the lowest bidder had the Board not included the prevailing wage requirement and concluded Fechko did not demonstrate actual injury. With respect to ABC's claim, the court found that ABC, a trade association, lacked standing as Fechko, a member of the trade association, lacked standing.

In reviewing the claim of the taxpayers, the court followed the Ohio Supreme Court's decision in *State ex rel. Masterson v. Ohio State Racing Commission*, 162 Ohio St. 366, which had held that "[i]n the absence

of statutory authority, a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy" and a person's "property rights are in jeopardy" when the person can "allege and prove damage to themselves different in character from that sustained by the public generally." The Ninth District concluded that the taxpayers could not allege that the Board's actions caused them to sustain "any damages different in kind than those sustained by any other taxpayer in Barberton whose property taxes are burdened by the 2008 levy."

Computer Usage Policies

***Bowman v. Butler Township Board of Trustees,* 185 Ohio App.3d 180, 2009-Ohio-6128.**

Bowman was employed by Butler Township as a part-time firefighter and emergency medical technician. Butler Township firefighters were permitted to use township computers and other media for personal use during their down time at the firehouse. Butler Township did not have a specific computer usage policy but instructed firefighters that they were "bound by the highest standards of morality" and "should conduct themselves so as to not bring discredit upon the township." Bowman was accused of accessing legal, non-pornographic videos on the computer, and the Butler Township Board of Trustees terminated Bowman's employment due to malfeasance. Bowman appealed, and the Montgomery County Court of Common Pleas affirmed the decision of the Board of Trustees. Bowman then appealed to the Second District Court of Appeals.

The Second District held that Butler Township failed to provide specific guidance as to appropriate computer usage noting:

> The code of ethics requirement that employees adhere to the "highest standards of morality," while laudable, is vague and not clearly definable. Although watching pornographic videos would more universally be classified as conduct that does not satisfy the "highest moral standards," here, the appropriateness of Bowman's conduct turned upon the more amorphous question of where to draw the line about which violent behaviors are consistent with the highest standards of morality and thus acceptable to watch on television or computer. At oral argument, the township conceded that some violate content was permissible, such as football coverage, news reports, or perhaps even fighting championships, while arguing that the military-themed violence in the videos watched by Bowman was "inappropriate." The township concedes that "common sense" and "appropriateness" should have informed Bowman that the videos in question were improper in the workplace but, in our view, these estimable concepts provide no meaningful guidance.

The decision of the trial court was reversed, and the matter was remanded to the trial court to vacate the order of the Board of Trustees.

Conflict Cases

***City of Cleveland v. State of Ohio*, 185 Ohio App.3d 59, 2009-Ohio-5968.**

In 2006, the Ohio General Assembly enacted Ohio Revised Code §9.68:

> (A) The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. Except as specifically

> provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.
>
> (B) In addition to any other relief provided, the court shall award costs and reasonable attorney fees to any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section.
>
> (C) As used in this section:
>
> (1) The possession, transporting, or carrying of firearms, their components, or their ammunition include, but are not limited to, the possession, transporting, or carrying, openly or concealed on a person's person or concealed ready at hand, of firearms, their components, or their ammunition.
>
> (2) "Firearm" has the same meaning as in section 2923.11 of the Revised Code.
>
> (D) This section does not apply to either of the following:
>
> (1) A zoning ordinance that regulates or prohibits the commercial sale of firearms, firearm components, or ammunition for firearms in areas zoned for residential or agricultural uses;
>
> (2) A zoning ordinance that specifies the hours of operation or the geographic areas where the commercial sale of firearms, firearm components, or ammunition for firearms may occur, provided that the zoning ordinance is consistent with zoning ordinances for other retail establishments in the same geographic area and does not result in a de facto prohibition of the commercial sale of firearms, firearm components, or ammunition for firearms in areas zoned for commercial, retail, or industrial uses.

The City of Cleveland filed a complaint for declaratory judgment challenging the constitutionality of Ohio Revised Code §9.68. The City argued that the Ohio Revised Code §9.68 violates the Home Rule Amendment of the Ohio Constitution as it is not a general law and attempts to curtail the City's police powers. The City pointed out that the State did not enact a comprehensive scheme to regulate firearms and sought "to preempt all local ordinances, notwithstanding the absence of conflict between the City's local ordinances and a corresponding general law enacted by the State." The trial court held that Ohio Revised Code §9.68 is constitutional, and the City appealed.

The Eighth District Court of Appeals applied the *Canton* test and concluded that Ohio Revised Code §9.68 is not part of a statewide and comprehensive legislative enactment (the Eighth District noted that it "leaves a great deal of firearm activity unregulated"); does not establish police regulations "but instead limits legislative power of municipal corporations"; and does not prescribe a rule of conduct upon citizens generally as it "is a limitation upon law making by municipal legislative bodies." The Eighth District concluded that because Ohio Revised Code §9.68 "unconstitutionally attempts to limit municipalities' home-rule police powers," the trial court erred by upholding the constitutionality of the statute.

Note: This case was appealed to the Ohio Supreme Court and the appeal was accepted. The case was recently briefed by the City and its amici curiae.

***Garrity* Statements**

***State v. Jackson,* 125 Ohio St.3d 218, 2010-Ohio-621.**

In *Garrity v. New Jersey* (1967), 385 U.S. 493, the U.S. Supreme Court held that when police officers are given a choice between forfeiting their jobs and incriminating themselves, the 5th Amendment protection against self-incrimination prohibits the use of statements made under threat of removal from office. In *Kastigar v. United States* (1972), 406 U.S. 441, the U.S. Supreme Court held that any testimony and any evidence derived from the testimony of a person granted immunity cannot be used against the person in a later criminal proceeding.

A Canton police officer was indicted for carrying a concealed weapon into a bar while he was off-duty. The City of Canton conducted an investigation and got a statement from the officer after giving the officer his "*Garrity*" rights. The prosecutor learned about the statement that the officer had made but did not use the statement in any way to obtain the officer's indictment. Nonetheless, the trial court dismissed the charges against the officer. The court of appeals reinstated the charges but determined that the mere knowledge of the *Garrity* statement by the prosecutor was a violation of the *Garrity* rule and that a special prosecutor must be brought in to prosecute the case.

The Ohio Supreme Court held that "the state makes derivative use of a *Garrity* statement both when the prosecutor presents to the grand jury testimony from a witness to a *Garrity* statement and when the prosecutor reviews a *Garrity* statement in preparation for trial." This decision effectively requires a police department to assign the internal investigation of a police officer's conduct to a police officer who has not and will not take part in the criminal investigation or, in the alternative, to wait until the conclusion of the criminal matter before conducting the internal investigation. It also requires a trial court to suppress a *Garrity* statement and all evidence derived from it.

Public Contracts

***State ex rel. Associated Builders & Contractors of Central Ohio v. Franklin County Board of Commissioners*, 125 Ohio St.3d 112, 2010-Ohio-1199.**

The Franklin County Board of Commissioners ("Board of Commissioners") solicited bids for painting work in connection with the construction of a county-owned baseball stadium. The Board of Commissioners received two bids. The lowest bid was submitted by The Painting Company, a non-union shop. The other bid was $46,000 more than The Painting Company's bid and was submitted by a union contractor. The Board of Commissioners rejected The Painting Company's bid, finding that it did not satisfy a policy of the Board of Commissioners, included within the Invitation to Bid documents, prohibiting the award of the contract to a bidder that has *violated* prevailing wage laws more than three times in a two-year period within the last ten years. The Board of Commissioners based the bid rejection on materials indicating that 14 complaints were filed with the Ohio Department of Commerce alleging prevailing wage violations during the last ten years.

The Painting Company appealed the decision of the Board of Commissioners arguing that all of the complaints were investigated by the Ohio Department of Commerce, and several investigations concluded that any violation was not intentional or resulted in no liability. Another group of investigations was resolved through a settlement agreement between The Painting Company and the Director of the Ohio Department of Commerce. The agreement authorized The Painting Company to expressly disclaim any liability or wrongdoing in connection with prevailing wage laws.

The trial court and the Tenth District Court of Appeals held that the Board of Commissioners had the authority to set relevant criteria to evaluate bids on county public work projects and, therefore, the Board of Commissioners did not abuse its discretion in rejecting The Painting Company's bid because it failed to meet the prevailing wage criteria established by the Board of Commissioners.

In considering this matter, the Ohio Supreme Court first held that the preemption analysis does not apply as a policy of a board of county commissioners is not the equivalent of a municipal ordinance or similar

provision having the force of law and, therefore, is not a local law within the meaning of Article XVIII, Section 3, of the Ohio Constitution.

The court then reviewed the record of the case and held that the Board of Commissioners failed to exercise sound discretion in the application of its bid evaluation criteria to the bid submitted by The Painting Company. The court concluded that The Painting Company demonstrated with clear and convincing evidence that it did not *violate* prevailing wage laws as the Director of Commerce did not make a formal finding that a violation occurred. Noting that the Board of Commissioners misapplied its evaluation criteria and relied on its misapplication to exclude The Painting Company, the court reversed and remanded the case back to the trial court.

Resignation of Official

***State ex rel. Layshock v. Moorehead*, 185 Ohio App.3d 94, 2009-Ohio-6039.**

Layshock, the Mayor of the City of Newton Falls, presided over the regularly-scheduled July 6, 2009, meeting of the Newton Falls City Council. Moorehead, the Council Vice President, raised a question relating to whether disciplinary action should be taken against the Mayor. The Mayor then handed his gavel to the President of Council and left the council table and sat in the area reserved for the public. During the public comment portion of the meeting, the Mayor stepped to the podium and announced that he was resigning his position as Mayor, effective August 1, 2009, and left the meeting. Council adjourned into executive session but did not take any action to accept the resignation.

The next day, Moorehead instructed the Clerk to schedule an emergency meeting of City Council. Four minutes after the Clerk completed the process of mailing the notices, the Mayor walked into the Clerk's office and handed her a written correspondence rescinding his prior resignation. The written correspondence requested that the Clerk "make sure that all of council receives a copy of this letter." The Clerk provided copies to the members three days later, after the emergency meeting, as part of the packet for the regular council meeting. On the morning of the emergency meeting, the Mayor had delivered a second written correspondence to the Clerk clarifying that the rescission of the resignation took effect immediately. The letter was also sent as part of the pack for the regular council meeting and, therefore, the Council members did not receive actual notice of either of the Mayor's rescission letters prior to the emergency meeting. At the emergency meeting, City Council voted to unanimously accept the Mayor's prior resignation, and Moorehead was designated as the "acting" Mayor pursuant to City Charter. The Mayor then brought an action for a writ of quo warranto alleging that Moorehead had unlawfully usurped the office of the Mayor.

The Eleventh District Court of Appeals began its analysis by noting that case law in Ohio "clearly permits a public employee to rescind his resignation of a position office, unless certain exceptions apply." In this instance, the Eleventh District concluded the Mayor "acted appropriately in officially filing his 'rescission' letters" with the Clerk and "the sitting members of city council had constructive notice of the rescission prior to passage of the resolution accepting the resignation." The Eleventh District granted the writ of quo warranto against Moorehead and held that "he is hereby ousted from the position of 'acting' mayor of the City of Newton Falls, Ohio."

Note: This case was appealed to the Ohio Supreme Court, and the appeal was accepted. Layshock filed a motion to dismiss and the motion was granted on June 23, 2010. On July 2, 2010, Moorehead filed a motion for reconsideration.

Smoke Free Workplace Act

***Northside Amateur Boxing School Bingo Club v. Hamilton Cty. Gen. Health Dist.*, 184 Ohio App.3d 596, 2009-Ohio-5122.**

An investigator observed ashtrays and several individuals smoking inside the Northside Amateur Boxing School Bingo Club ("Bingo Club"). The Bingo Club was found to be in violation of the Ohio Smoke Free Workplace Act ("Act") by the Hamilton County General Health District ("Health District"). The trial court affirmed the order, and the Bingo Club appealed.

The Tenth District Court of Appeals affirmed the trial court's decision concluding that the Bingo Club was not a "private club" exempt from the Act. Private clubs, exempt from the Act, are defined in R.C. 4301.01(B)(13) as "provided all of the following apply: the club has no employees; the club is organized as a not for profit entity; only members of the club are present in the club's building; no persons under the age of eighteen are present in the club's building; the club is located in a freestanding structure occupied solely by the club; smoke from the club does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter; and if the club serves alcohol, it holds a valid D4 liquor permit."

The Tenth District noted that "freestanding structure" is not defined in the Act or accompanying rules, however, it concluded that the Health District's interpretation of that term and its application to the facts in the case was reasonable as the Bingo Hall constituted one of several operations conducted in separate rooms within a single structure that was not "occupied solely" by the Bingo Hall. The Tenth District also concluded that the Health District's conclusion that the Bingo Hall was a "place of employment" was reasonable as there was evidence that the Bingo Hall "in order to accomplish its business of operating a bingo hall, utilized workers (even if deemed volunteers) to accomplish the various tasks" and that the Bingo Hall operated control over those workers.

***Pour House, Inc. v. Ohio Department of Health*, 185 Ohio App.3d 680, 2009-Ohio-5475.**

Pour House, Inc., was found to be in violation of Ohio's Smoke-Free Workplace Act when an investigator walked into the Pour House and observed a lit, burning cigarette in an Altoid tin on the bar. The bartender told the investigator that the cigarette belonged to a customer who just left the bar after she told him to put the cigarette out or take it outside. The bartender did not immediately extinguish the cigarette because she was serving a customer. The owner of the Pour House testified that he enforces a strict no-smoking policy. The hearing examiner concluded that R.C. 3794.02(A), Ohio's Smoke-Free Workplace Act, imposes strict liability on a proprietor if smoking occurs in a prohibited place and because it was undisputed that there was a lit cigarette inside the premises, a violation occurred. The Toledo-Lucas County Health Department affirmed the violation as did the Franklin County Court of Common Pleas.

The Tenth District Court of Appeals reversed concluding that a "proprietor violates R.C. 3794.02(A) only when the proprietor permits smoking" and that a proprietor permits smoking "when the proprietor affirmatively allows smoking or implicitly allows smoking by failing to take reasonable measures to prevent patrons from smoking – such as by posting no-smoking signs and notifying patrons who attempt to smoke that smoking is not permitted." In this instance, there was no evidence that the proprietor permitted smoking and, therefore, the Pour House did not violate the statute.

Takings Cases

***State ex rel. Gilbert v. Cincinnati*, Slip Opinion No. 2010-Ohio-1473.**

In 1998, Gilbert purchased a house and 5.5 acres of property in Cincinnati. The property was adjacent to a sewage line that is served by a nearby pump station. The property, however, used a septic system. Gilbert intended to develop the property by dividing it into ten lots in accordance with zoning regulations. After Gilbert purchased the property, he became aware of a 1997 letter from the City explaining that the existing sewer system was at full capacity and that the City planned to upgrade the pump station in late

1998. Gilbert requested approval for the development of the property, however, the City denied the requests as the pump station had not been upgraded to handle additional sewage.

After Gilbert purchased the property, the pump station repeatedly overflowed and spilled sewage into the creek on the property. The City was found to be in violation of the Federal Water Pollution Control Act and pursuant to a consent decree posted a sign near the creek stating "that the area was a sanitary-sewer-overflow area, and that water in the area 'may contain sanitary sewage,' and that contact with sewage poses a 'potential health risk.''

Gilbert filed a writ of mandamus to compel the City to commence an appropriation proceeding. The mandamus petition alleged two takings claims: (1) a regulatory taking based on the City's failure to improve the sewer-system pump station; and (2) a physical taking based on the City's failure to upgrade the pump station.

Regulatory Taking: Gilbert claimed that the City's failure to timely improve the sewer-system pump and to permit sewage connections from the property interfered with his reasonable investment-backed expectations for the property. The Ohio Supreme Court disagreed noting that a successful Takings Clause claim must include a constitutionally protected interest and "access to government-provided sewer service is not a constitutionally protected interest subject to the Takings Clause." The court also found that the investment-backed expectations for the property were not reasonable as Gilbert purchased the property without inquiry regarding a tap into the sewer system and "without investigating or knowing whether there would be limitations on his ability to use the sewer system." The court held that the City "had no clear legal duty to provide these sewer taps sooner than it did when the pump station was already operating at capacity and an upgrade would have required the expenditure of additional government resources."

Physical Taking: Gilbert claimed the City's failure to upgrade the pump station caused raw sewage to directly encroach upon his property by flowing into the creek. The Ohio Supreme Court, citing previous holdings that "a municipality in creating a public improvement, may be liable for causing sewage *** to be cast upon the land of another, if in so doing the owner is deprived of any of the use and enjoyment of his property," agreed. The court concluded that there was evidence of frequent sewage overflows and that the overflows deprived Gilbert of the use and enjoyment of his property. A taking was established because the City "physically displaced" Gilbert "from exercising dominion and control of the creek and surrounding area on their property."

***Clifton v. Blanchester*, 2010-Ohio-2309.**

The Village of Blanchester rezoned certain property that enabled J&M Precision Machining, Inc. ("J&M") to expand their operations. Clifton owns property adjacent to the J&M property that is located outside of the Village limits. Clifton filed a complaint alleging that the Village's rezoning of the J&M property constituted a taking of his property. The trial court concluded that Clifton lacked standing to pursue his claim of a partial regulatory taking against the Village and Clifton appealed.

The Twelfth District Court of Appeals, after noting that this is an issue of first impression and conducting a review of case law issued by several courts throughout the country, concluded that a nonresident contiguous property owner does not have standing to bring an action against an adjacent political subdivision seeking compensation for a rezoning of property located solely within the jurisdictional boundaries of the political subdivision.

The Twelfth District Court of Appeals also noted that even if it had found that Clifton had standing, the Village's act of rezoning the J&M property did not amount to a partial taking entitling Clifton to compensation as Clifton alleged that the rezoning caused property to suffer a significant diminution in value and "diminution in a property's value, however serious, is insufficient to demonstrate a taking."

Tort Immunity Cases

***Lambert v. Clancy,* 125 Ohio St.3d 231, 2010-Ohio-1483.**

Lambert, a traffic ticket recipient, brought an action against "Greg Hartmann, Hamilton County, Ohio Clerk of Courts" alleging that she was harmed when her identity was stolen after the clerk published her social security number and other personal, private information on the clerk's website. The trial court dismissed Lambert's complaint, and Lambert appealed. The First District Court of Appeals reversed, holding that Lambert's claims were not barred by Chapter 2744 provisions applicable to employees of political subdivisions.

The Ohio Supreme Court began its review by determining whether Hartmann was sued individually or in his capacity as the elected officeholder of a political subdivision. Noting that the complaint did not include any denotation that Hartmann was being sued in his individual capacity and that the allegations pertain to the policies and practices of the clerk of court's office and not to actions of Hartmann, the court concluded that Hartmann was sued in his official capacity.

The court then determined that the three-tiered political subdivision immunity analysis set forth in R.C. 2744.02 applies, and not the employee-immunity provisions of R.C. 2744.03(A)(6), as "a clerk of court's office is an instrumentality of the county, through which the county's governmental functions are carried out, the clerk of court's office, like the county itself, is cloaked with the immunity granted to the political subdivision under R.C. 2744.02."

After holding that "the political-subdivision-immunity analysis set forth in R.C. 2744.02 applies to lawsuits in which the named defendant holds an elected office within a political subdivision and that officeholder is sued in his or her official capacity," the court reversed the decision of the First District and remanded the matter for further proceedings to determine the applicability of immunity exceptions and defenses under R.C. 2744.02 and R.C. 2744.03.

***State ex rel. Conroy v. Williams*, 185 Ohio App.3d 69, 2009-Ohio-6040.**

Conroy filed a mandamus action seeking to compel the City to appoint him to the position of police officer in accordance with the "rule of ten" provision set forth in Ohio Revised Code §124.27. Prior to Conroy's examination, the City passed an ordinance authorizing it to waive, suspend, or alter the application of the "rule of ten" provision. Conroy alleged that the City failed to establish cause to suspend the application of the "rule of ten" provision because the record contains no evidence that suspension of Ohio Revised Code §124.27 was necessary to comply with a federal law or rule adopted pursuant to federal law as required by Ohio Revised Code §124.90.

The City certified two examination result lists: a majority list and a minority/female list. Conroy was the fourth highest score on the majority list and the fifth highest score if the two lists were combined. Conroy later amended his complaint to add reverse discrimination claims against the former Mayor of the City, the current Mayor of the City, and the three individuals appointed by the former Mayor to police officers as defendants.

At the trial court level, the City moved for summary judgment on all four claims asserted in the amended complaint and, in the alternative, moved for summary judgment on the state law claims based upon Ohio Revised Code Chapter 2744. The motion was denied, and the City appealed.

The Seventh District Court of Appeals held that the City's motion for summary judgment on the issue of sovereign immunity was properly denied, as sovereign immunity does not apply to reverse discrimination allegations. The Seventh District, however, concluded that summary judgment should have been granted to the three individuals appointed by the former Mayor to police officers and to the former Mayor, as civil service appointments are discretionary and "we are at a loss to see how Appellee can ever demonstrate two essential elements of his mandamus actions; that is, that he has a clear legal right to the relief requested or that Appellants have a clear legal duty to appoint him."

The City also argued that summary judgment should be granted to the City pursuant to Chapter 2744 as the decision of the former Mayor was discretionary and was not conducted in bad faith, with malicious purpose, or in a wanton or reckless manner. The City raised this statutory immunity argument on behalf of the City for the first time on appeal and, therefore, the Seventh District declined to consider this issue and remanded the matter to the trial court.

***Walker v. Toledo*, 185 Ohio App.3d 212, 2009-Ohio-6259.**

Walker was wrongfully arrested on a capias warrant that provided for the arrest of a similarly-named individual. She was transported to jail and held for an extended period of time. Walker brought an action against the sheriff's department employees ("defendants") alleging that the defendants "had a duty to ascertain the proper identity of the plaintiff, issue a capias warrant in the name of the proper arrestee, and had information available to them that was perversely disregarded, knowing that a mistake in issuance of a warrant would inflict an innocent person to arrest, and despite such knowledge, chose to disregard established procedures that would have prevented the arrest of the plaintiff." The defendants filed a motion for judgment on the pleadings on the basis of sovereign immunity. The trial court denied the motion, and the defendants appealed.

R.C. 2744.03(A)(6)(b) establishes the following exception to sovereign immunity for employees of political subdivisions: "[t]he employee's acts or omissions were with malicious purposes, in bad faith, or in a wanton or reckless manner." The Sixth District Court of Appeals affirmed the decision of the trial court concluding that "these allegations, if true, present a claim within an exception to the immunity afforded employees of political subdivisions in Ohio for reckless or wanton misconduct."

Zoning

***Syrianoudis v. Zoning Board of Appeals of Ellsworth Township*, 185 Ohio App.3d 204, 2009-Ohio-6247.**

Syrianoudis, d.b.a. Redemption House, submitted an application for a zoning permit and a certificate of occupancy to the Ellsworth Township zoning inspector. The application indicated that a dwelling located in a residentially zoned district would be used for a group home. The zoning inspector denied the application, noting that "a group home for up to ten adjudicated juveniles is not a permitted use" in the residential district. Syrianoudis appealed the decision to the Board of Zoning Appeals and testified that the children would live together as a "single family unit." The zoning inspector testified that the residents would not be living as a single housing unit due to "the absence of any adult permanently residing in the house with the juveniles, the rotating presence of group-home workers," and "the substantial and highly individualized needs of the residents."

The Board of Zoning Appeals affirmed the decision of the zoning inspector, and Syrianoudis appealed to the Mahoning County Court of Common Pleas. The Court of Common Pleas concluded that Redemption House did not constitute a single family dwelling and that a group home was not a permitted use in the residential district. Syrianoudis appealed to the Seventh District Court of Appeals.

The Seventh District Court of Appeals affirmed the trial court's decision, noting that no evidence was "presented to support a finding that the juveniles in the group home would operate as a single housekeeping unit apart from Syrianoudis's iteration of the legal conclusion."

***Butz v. Township of Danbury*, 186 Ohio App.3d 7, 2010-Ohio-179.**

The Butzes purchased a single-story, single-family residence in Lakeside, Ohio. The residence was and is a nonconforming use in two respects: (1) the porch encroaches on the front-yard setback by approximately three feet, and (2) there is no off-street parking. The only way to achieve off-street parking, due to residences on both sides of the property, is to tear down the residence and rebuild it near the rear of the lot.

The Butzes submitted a permit application and plans proposing to add 264 square feet of living space to the rear of the existing structure and a 946 square foot second story. The Danbury Township Zoning Inspector determined that the addition would not be in compliance with a Danbury Township Zoning Resolution limiting enlargement of a nonconforming building to no more than 20% of the original building and, therefore, rescinded a previously issued permit.

The Butzes filed a variance application seeking two variances: (1) to allow no off-street parking, and (2) to allow the expansion of the residence in excess of 20% of the floor area. At the public hearing, evidence was presented that the proposed addition was consistent with the design and size of neighboring homes and that the proposed addition does not result in any further infringement upon zoning-code requirements. Neighboring property owners objected to the requested variances stating that the variance request is substantial and the property can be used "as it has been for the last 80 years." Neighboring property owners also claimed, without providing any evidence, that the proposed addition is basically a new house and that it would be cheaper to build a new house in conformance with all zoning regulations.

The Board of Zoning Appeals reviewed the seven *Duncan* factors and voted unanimously to reject the requested variances. The Butzes appealed to the Ottawa County Court of Common Pleas. The common pleas court reversed the decision of the Board of Zoning Appeals, finding that the decision was not supported by a preponderance of "reliable, probative evidence adduced at the hearing" and that it was "arbitrary and capricious" as the findings of fact did not support the decision. The common pleas court also found that the Butzes had established practical difficulties sufficient to support their request for the variances and that the enforcement of the zoning code would unreasonably deprive them of the use of their property.

Danbury Township appealed, and the Sixth District agreed with the common pleas court finding that the trial court did not abuse its discretion or otherwise err in reversing the denial of the variances by the Board of Zoning Appeals. In its analysis, the Sixth District reviewed each of the *Duncan* factors and, citing the Ohio Supreme Court in *Consol. Mgt., Inc. v. Cleveland* (1983), 6 Ohio St.4d 238, 240, noted that "[a] variance is intended to permit amelioration of strict compliance of the zoning ordinance in individual cases. It is designed to afford protection and relief against unjust invasions of private property rights and to provide a flexible procedure for the protection of constitutional rights."

***Dinardo v. Chester Township Board of Zoning Appeals*, 186 Ohio App.3d 111, 2010-Ohio-40.**

Dinardo applied for a zoning certificate to use his property for the sale of "building material supply, seed, plant, lawn, garden equipment and supply." The request was denied by the township zoning inspector who determined that the proposed use was "not a permitted use" as it created "offensive air pollutants and dust." Dinardo appealed, pointing out that the proposed use follows the exact language of the current zoning code.

At the board of zoning appeals hearing, neighboring property owners objected and pointed out that the mulch, currently sold by Dinardo, created an odor. The board of zoning appeals affirmed the decision of the township zoning inspector, and Dinardo appealed. The trial court concluded that zoning officials "may consider an applicant's past and present conduct in deciding whether to issue a permit, even if the applicant promises to use the property only for permitted uses and in conformity with applicable zoning regulations" and affirmed the decision of the board of zoning appeals. Dinardo appealed to the Eleventh District Court of Appeals.

Noting that the only evidence presented to substantiate the denial of the zoning certificate was Dinardo's past conduct and that his application sought authorization for *permitted* uses under the township's zoning regulation, the Eleventh District reversed concluding that "[t]he main problem with the township's approach is the contention that an application for a zoning certificate, completely proper and valid on its face, may be denied at the discretion of the zoning inspector." As to enforcement of zoning laws, the Eleventh District noted: "[t]he fact that the township claims appellant cannot have a zoning certificate because he has violated the zoning laws in the past begs this court to ask why it did not previously enforce its zoning laws. It appears enjoining appellant's conduct would have been an easy task, since

appellant apparently had no certificate to operate anything at all at that location. It is difficult to understand why the township thinks it should be able to use its dilatory enforcement to serve as the basis for the current denial of a permitted use."