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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

DENNIS A. DICKARD, et al.,	:	
		CASE NO. CA2025-07-072
Appellees,	:	
		OPINION AND
vs.	:	JUDGMENT ENTRY
		11/16/2026
JACKSON & JACKSON, LLC,	:	
Appellant.	:	
	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2023-10-2062

Michael T. Gmoser, Butler County Prosecuting Attorney, and Stephen M. Wagner, Assistant Prosecuting Attorney, for appellees.

Suder, LLC, and John P. Burleigh and Sean S. Suder, for appellant.

O P I N I O N

DONOVAN, J.

{¶ 1} Appellant, Jackson & Jackson, LLC ("Jackson & Jackson"), appeals from the decision of the Butler County Court of Common Pleas which granted a Civ.R. 12(B)(6)

motion to dismiss filed by Appellees, Dennis A. Dickard and the Butler County Board of Commissioners. For the reasons discussed below, we sustain Jackson & Jackson's assignments of error in part, affirm the common pleas court's decision in part, reverse in part, and remand for further proceedings.

I. Background Law

{¶ 2} This appeal is more about the law than the particular facts of the case, turning on questions regarding whether various statutes and legal concepts were correctly applied by the trial court in the context of a case involving an alleged regulatory taking of property. To assist the reader, we will explain some of those statutes and legal concepts before describing the specific facts and the litigation history of this case.

A. Takings Under Federal Law

{¶ 3} The United States Constitution provides protections to property owners with respect to government takings of private property. The Fifth Amendment's Takings Clause states, "nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V. This means that when the federal government takes private property, such as when it uses its eminent domain power, it owes just compensation for that taking to the owner of the property. The Fifth Amendment's Takings Clause does not only bind the federal government; it is also applicable to the States through the Fourteenth Amendment. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, fn. 3 (1978).

{¶ 4} The United State Supreme Court has recognized that government regulation of property may constitute a taking of the property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Such takings are known as "regulatory takings." "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a [regulatory] taking." *Id.*

B. Takings Under Ohio Law

{¶ 5} Like the United States Constitution, the Ohio Constitution addresses property owners' rights with regard to takings of property by state government. Article I, Section 19 of the Ohio Constitution, titled "Eminent Domain," provides in relevant part,

> where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Ohio Const., art.I, § 19. Though the title of Article I, Section 19 refers to "eminent domain" takings, that state constitutional provision also concerns regulatory takings. *See TMS Ents., Ltd. v. Cleveland*, 2026-Ohio-3229, ¶ 38-40 (8th Dist.).

C. Types of Takings Claims

{¶ 6} In Ohio state courts, a private property owner who believes a regulatory taking has taken place has several options on how to proceed. These options differ based on whether the property owner seeks compensation for the regulatory taking or future non-enforcement of the regulation that created the regulatory taking, and based on whether the property owner seeks enforcement of federal or state property rights. We will outline these options below.

1. Federal Section 1983 Claim

{¶ 7} First, if the property owner seeks compensation pursuant to his or her rights under the Fifth Amendment to the United States Constitution, the property owner may bring a claim under a federal statute, 42 U.S.C. 1983 ("Section 1983"). Section 1983 provides a private cause of action against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . . " deprives another of any rights secured by federal laws or the United States Constitution. 42 U.S.C. 1983; *Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498, 508 (1990); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

Courts have long recognized that Section 1983 provides a mechanism for asserting a claim for just compensation arising out of a taking under the Fifth Amendment. *See Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 588 U.S. 180 (2019).

2. Petition for Writ of Mandamus

{¶ 8} Second, if the property owner seeks compensation pursuant to his or her rights under Article I, Section 19 of the Ohio Constitution, the property owner may bring a petition for a writ of mandamus ordering appropriation proceedings under Chapter 163 of the Ohio Revised Code. In Ohio, "[a]n appropriation action is the procedural device provided by statute to carry out the state government's eminent domain power, otherwise known as a condemnation proceeding." *Marchbanks v. JPMorgan Chase Bank, N.A.*, 2024-Ohio-5876, ¶ 18 (11th Dist.). The Ohio Supreme Court has held that a writ of mandamus is the "appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Elsass v. Shelby Cty. Bd. of Commr.*, 2001-Ohio-1276, ¶ 21, citing *State ex rel. BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 341 (1998); *accord State ex rel. Shemo v. Mayfield Hts.*, 2002-Ohio-1627.

3. Administrative Appeal

{¶ 9} Third, rather than seeking compensation, a property owner may seek a use variance, appeal the denial of the variance to the court of common pleas, and then ask the common pleas court to reverse the denial of the use variance and/or find that the zoning regulation is unconstitutional as applied to the property. *See Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 16 (1988). Such a finding of unconstitutionality would prevent future enforcement of the zoning regulation against the property.

{¶ 10} Because local zoning agencies may not decide constitutional issues, the property owner utilizing this procedure would not raise his or her constitutional argument for the first time until the matter reached the court of common pleas. In other words, the property owner would not be able to raise the constitutional argument before the zoning enforcement agency or the board of zoning appeals.

4. Declaratory Judgment Action

{¶ 11} Fourth, rather than seeking compensation, a property owner may ask a court to issue a declaratory judgment that the regulation is unconstitutional as applied to the property, and prohibiting the government from enforcing the regulation against the property on a going-forward basis. *See Karches* at 16; *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, 268 (1975). Such a declaratory judgment may be obtained pursuant to R.C. 2721.03, as discussed in more detail below, and may concern the constitutionality of a zoning regulation under either federal or state law.

II. Factual and Procedural Background

{¶ 12} This case was resolved on the pleadings pursuant to a Civ.R. 12(B)(6) motion to dismiss. The following facts are derived from Jackson & Jackson's counterclaim complaint, other pleadings, and any attachments, and are undisputed for purposes of this appeal. *Haery v. Spaeth*, 2025-Ohio-5801, ¶ 2 (12th Dist.) (in ruling on a pleading under Civ.R. 12[B][6] the trial court must presume that all factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party.)

A. Jackson & Jackson's Property Acquisition

{¶ 13} The real estate at issue in this case ("the Property") consists of approximately nine acres of land and various improvements located at 5670 West Alexandria Road in Madison Township, Butler County, Ohio.

{¶ 14} The Property is and has been zoned R-1 "Suburban Residence District." While this zoning does not permit commercial uses, over the years the Property was used for a variety of non-residential, commercial functions. This included a golf driving range which opened in 2003. In 2009, a pizza business opened in conjunction with the driving range. And in 2018, a church began operating on the property. Notably, while the Property was not zoned for commercial use, the Butler County Auditor designated the Property as being for "Commercial" use.

{¶ 15} On November 22, 2021, Jackson & Jackson acquired the Property from the previous owner for $270,000 through a general warranty deed.

{¶ 16} Jackson & Jackson provides commercial electrical and emergency response services to help state and local governments restore power lines after storms or other events. Jackson & Jackson—aware of the Property's prior use for commercial purposes—acquired the Property with the intent to use it in conjunction with its business. After acquiring the Property, Jackson & Jackson began parking its trucks and other equipment on the Property's parking lot and using existing office space in one of the buildings for business functions.

B. Zoning Violation Proceedings

{¶ 17} Despite the prior use of the Property for commercial purposes, commercial use—and specifically Jackson & Jackson's commercial use—was not permitted under R-1 District regulations. As a result, on or about May 9, 2023, the office of the Zoning Inspector for Butler County, Ohio served Jackson & Jackson with a notice of zoning violation and instructed Jackson & Jackson to cease and desist operating its business on the Property.

{¶ 18} In response to the notice of violation, Jackson & Jackson applied for a use variance, seeking permission to park company vehicles and use the Property as an

administrative office. On August 17, 2023, the Butler County, Ohio Board of Zoning Appeals ("BZA") denied Jackson & Jackson's variance application. Jackson & Jackson did not appeal the BZA's decision to the Butler County Court of Common Pleas, but it continued operating its business on the Property.

C. The County's Complaint for Injunctive Relief and Jackson & Jackson's Answer and Counterclaim

{¶ 19} In 2023, after Jackson & Jackson's deadline to appeal the BZA decision to the common pleas court expired, Butler County Zoning Inspector Dennis Dickard filed a complaint against Jackson & Jackson in the Butler County Court of Common Pleas, General Division. The complaint sought injunctive relief enjoining Jackson & Jackson from continuing to violate the applicable Butler County Zoning Resolution ("the Zoning Resolution"). Jackson & Jackson filed an answer and a counterclaim complaint. Jackson & Jackson's counterclaim added the "County of Butler, Ohio" as a counterclaim-defendant.

D. Jackson & Jackson's First Amended Answer and Counterclaim

{¶ 20} In December 2024, after the parties had engaged in a period of discovery and motion practice, Jackson & Jackson filed a First Amended Answers, Defenses, and Counterclaim Complaint against Dickard and the "Board of Commissioners of Butler County, Ohio," thus substituting the Board of Commissioners for the "County of Butler, Ohio." (In this opinion, we will refer to Dickard and the Board of Commissioners collectively as "the County.") Jackson & Jackson's amended counterclaim included three counts.

{¶ 21} Count One of Jackson & Jackson's amended counterclaim sought a declaratory judgment that the Zoning Resolution as applied to Jackson & Jackson and the Property violated several constitutional provisions, including the Fifth and Fourteenth

Amendments to the United States Constitution and Sections 1, 16, and 19 of Article I of the Ohio Constitution, and was thus unenforceable. Specifically, Jackson & Jackson argued that these constitutional provisions were violated because preventing Jackson & Jackson's commercial use was "clearly arbitrary," "unreasonable," and without "substantial relation to the public, health, safety, morals or general welfare of the community" given the Property's "historic use . . . for commercial purposes and the clear commercial function of the Property's improvements." Jackson & Jackson also argued that the arbitrary enforcement of the Zoning Resolution against Jackson & Jackson and the Property prevented "the vast majority of revenue-generating land uses on the Property including but not limited to [Jackson & Jackson's] low-intensity uses."

{¶ 22} Count Two of Jackson & Jackson's amended counterclaim sought a declaratory judgment that the Zoning Resolution and the R-1 district regulations constituted a regulatory taking of the Property in two ways. First, Jackson & Jackson argued the County interfered with Jackson & Jackson's "reasonable investment-backed expectations when it acquired the Property," including "using the Property for a commercial purpose in keeping with the history and function of the Property," without compensation. In support, the company cited *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Second, Jackson & Jackson argued the County prevented Jackson & Jackson "from making any economically viable use of the Property at all," without compensation. In support, the company cited *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). Though not stated explicitly, Count Two appears to also rely on the Fifth and Fourteenth Amendments to the United States Constitution and Sections 1, 16, and 19 of Article I of the Ohio Constitution, as those provisions are referenced in Count Two's caption. Count Two's caption also referenced 42 U.S.C. 1983,

but Section 1983 was not discussed in the body of Count Two. We therefore consider Count Two's reference to Section 1983 to be a typographical error.

{¶ 23} Notably, Count Two only requests a declaratory judgment that the Zoning Regulations "result in an uncompensated taking as applied to Jackson [& Jackson] and the Property," and does not request compensation for this taking.

{¶ 24} Count Three of Jackson & Jackson's amended counterclaim sought two forms of damages pursuant to Section 1983. First, Jackson & Jackson sought "actual damages" pursuant to Section 1983 for the loss of its use of the Property after the County's issuance of the zoning violation notice, which resulted "in a significant and detrimental impact on [Jackson & Jackson's] business." Second, Jackson & Jackson sought "just compensation" for the County's regulatory taking of the Property pursuant to Section 1983 and "the self-executing Fifth Amendment." Though not specifically referenced in the body of Count Three, the caption of Count Three also listed the Fourteenth Amendment to the United States Constitution (but not the Fifth Amendment) and Sections 1, 16, and 19 of Article I of the Ohio Constitution. We consider the reference to Ohio state constitutional provisions in the caption to Count Three to be typographical error because Section 1983 exists to enforce federal rights, not state rights.

{¶ 25} In the "Prayer for Relief" section of the amended counterclaim, Jackson & Jackson further sought "such reasonable costs, expenses, expert fees, and attorney fees" as it may incur, "including but not limited to reasonable attorney's fees under 42 U.S.C. 1988." That statute "allows 'the prevailing party' in certain civil rights actions, including suits brought under Section 1983, to recover 'a reasonable attorney's fee.'" *Simbo Properties, Inc. v. M8 Realty, L.L.C.*, 2019-Ohio-4361, ¶ 43, quoting *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012).

{¶ 26} To summarize, Jackson & Jackson's counterclaim brought the following claims:

Count	Federal or State Claim	Claim	Basis for Claim
Count One	Federal and State	Declaratory Judgment – that Zoning Resolution as applied is unconstitutional	U.S. Constitution: Fifth and Fourteenth Amendments Ohio Constitution: Article I, Sections 1, 16, and 19
Count Two	Federal and State	Declaratory Judgment – that Zoning Resolution and R-1 district regulations constituted a regulatory taking of Jackson & Jackson's property	U.S. Constitution: Fifth and Fourteenth Amendments Ohio Constitution: Article I, Sections 1, 16, and 19
Count Three	Federal	Section 1983 claim – compensation for regulatory taking	42 U.S.C. § 1983

E. The County's Motion to Dismiss and the Trial Court's Decision

{¶ 27} The County moved to dismiss Jackson & Jackson's counterclaim complaint pursuant to Civ.R. 12(B)(6). The County asserted three bases for its motion.

{¶ 28} First, the County argued that Jackson & Jackson's federal Section 1983 claim (Count Three) should be dismissed because that claim was barred by the two-year statute of limitations for personal injury claims set forth in R.C. 2305.10. Specifically, the County argued that Jackson & Jackson's Section 1983 claim accrued when the company took title to the Property on November 22, 2021, and that the company did not file its counterclaim until May 22, 2024, more than two years later.

{¶ 29} Second, the County argued that all Jackson & Jackson's claims (Counts One, Two, and Three) should be dismissed because the company "failed to bring its claims in the form of a writ of mandamus to compel appropriation proceedings." Citing R.C. 2721.07, the County further argued only appropriation proceedings could provide Jackson & Jackson with an adequate remedy, and its failure to request such proceedings meant that its "complaint in its current form would not terminate the uncertainty or controversy giving rise to the action." The County also argued that, as pleaded, Jackson & Jackson's requested relief would be "a staggeringly massive windfall" because Jackson & Jackson would both keep the Property and receive "massive amounts of compensation from the [C]ounty."

{¶ 30} Third, the County argued that Jackson & Jackson's Ohio state law declaratory judgment claims (Counts One and Two) should be dismissed because the company "failed to exhaust its administrative remedies" when it failed to appeal the BZA decision to the Butler County Court of Common Pleas.

{¶ 31} Jackson & Jackson opposed the County's Civ.R. 12(B)(6) motion to dismiss, raising various arguments that are discussed later in this opinion.

{¶ 32} After the matter was fully briefed, the trial court issued a Decision and Entry in which it agreed with the County's arguments and dismissed Jackson & Jackson's First Amended Complaint, including all the company's counterclaims. We will discuss the court's reasoning in more detail in "Law and Analysis" section of our opinion.

{¶ 33} Following the trial court's decision, the parties entered into an Agreed Judgment Entry. In the Agreed Judgment Entry, the parties stipulated that the common pleas court's decision granting the County's motion to dismiss Jackson & Jackson's First Amended Complaint, including all of its counterclaims, disposed of all the core legal issues, and that the decision, if upheld on appeal, would entitle the County to judgment

as a matter of law on its complaint (which, again, sought to enjoin Jackson & Jackson from continuing to violate the Zoning Resolution). The Agreed Judgment Entry stated it would be immediately appealable and there was no just reason for delay. The court approved the Agreed Judgment Entry.

{¶ 34} This appeal followed. Jackson & Jackson assigned three errors for our review. For ease of analysis, we will address those assignments of error out of the order presented.

III. Law and Analysis

A. Civ.R. 12(B)(6) Motion to Dismiss Standard and Appellate Standard of Review

{¶ 35} All three of Jackson & Jackson's assignments of error relate to the question of whether the common pleas court correctly granted the County's Civ.R. 12(B)(6) motion to dismiss.

{¶ 36} "Civ.R. 12(B)(6) authorizes the dismissal of a complaint if it 'fails to state a claim upon which relief can be granted.'" *Marchetti v. Blankenburg*, 2011-Ohio-2212, ¶ 9 (12th Dist.), quoting *Smith v. Village of Waynesville*, 2008-Ohio-522, ¶ 6 (12th Dist.) "In order to prevail on a Civ.R. 12(B)(6) motion, 'it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling relief.'" *Marchetti* at ¶ 9, quoting *DeMell v. Cleveland Clinic Found.*, 2007-Ohio-2924, ¶ 7 (8th Dist.). In ruling on a complaint under Civ.R. 12(B)(6), the trial court must presume that all factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). But unsupported legal conclusions are not accepted as true for purposes of a motion to dismiss. *Schulman v. City of Cleveland*, 30 Ohio St.2d 196, 198 (1972).

{¶ 37} "A trial court's order granting a motion to dismiss pursuant to Civ.R. 12(B)(6) is subject to de novo review on appeal." *BAC Home Loans Servicing, L.P. v. Kolenich*, 2011-Ohio-3345, ¶ 35 (12th Dist.), citing *Sparks v. Bowling*, 2009-Ohio-5071, ¶ 10 (12th Dist.). This court must independently review the complaint to determine the appropriateness of the trial court's dismissal. *Sparks* at ¶ 10.

B. Statute of Limitations

{¶ 38} Jackson & Jackson's second assignment of error states:

> THE TRIAL COURT ERRED IN DISMISSING JACKSON & JACKSON'S REGULATORY TAKINGS CLAIM UNDER 42 U.S.C. § 1983 AS TIME-BARRED.

{¶ 39} The trial court concluded that Jackson & Jackson's Section 1983 counterclaim (Count Three) was subject to the two-year statute of limitations set forth in R.C. 2305.10, which applies to tort claims. The court reasoned that the Section 1983 counterclaim accrued on November 22, 2021, when Jackson & Jackson purchased the Property—that is, more than two years before Jackson & Jackson filed its initial counterclaim complaint on May 22, 2024. As a result, the court dismissed the Section 1983 counterclaim as untimely filed and barred by the applicable statute of limitations.

{¶ 40} On appeal, Jackson & Jackson argues that the trial court erred in concluding that its Section 1983 claim was time barred. The company argues that the applicable statute of limitations is that set forth in R.C. 2305.09(E), which prescribes a four-year limitations period, rather than the two-year limitations period set forth in R.C. 2305.10. The company also argues that the Section 1983 counterclaim did not accrue in 2021, as concluded by the trial court, but rather in August 2023, when the BZA made a final decision on the company's variance request. If so, the company argues, the Section 1983 counterclaim was still timely filed even if the trial court was correct that the applicable statute of limitations was the two-year limitations period found in R.C. 2305.10.

1. Standard of Review

{¶ 41} Application of a statute of limitations presents a mixed question of law and fact. *Schmitz v. Natl. Collegiate Athletic Assn.*, 2018-Ohio-4391, ¶ 11, citing *Wells v. C.J. Mahan Constr. Co.*, 2006-Ohio-1831, ¶ 25 (10th Dist.). The issue of when a cause of action accrues is a question of fact. *Id*. Because this was a decision decided under Civ.R. 12(B)(6), we accept the factual allegations presented in Jackson & Jackson's counterclaim as true and make all reasonable inferences in favor of Jackson & Jackson. *Id*. But the application of the limitations period is a question of law, which we review de novo. *Id.*; *Mundy v. Centrome, Inc.*, 2024-Ohio-3358, ¶ 13 (12th Dist.)

2. What Statute of Limitations Applies?

{¶ 42} In determining which statute of limitations applies to a particular cause of action, "'courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors[;] the form is immaterial.'" *Lawyers Coop. Publishing Co. v. Muething*, 65 Ohio St.3d 273, 277-78 (1992), quoting *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984).

{¶ 43} R.C. 2305.10, which is Ohio's general provision on limitations periods applicable to torts, provides in relevant part: "an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues."

{¶ 44} R.C. 2305.09, on the other hand, provides a four-year limitations period on "certain torts" other than those addressed by R.C. 2305.10. With relevance to this appeal, R.C. 2305.09(E) provides for a four-year limitations period on claims "[f]or relief on the grounds of a physical or regulatory taking of real property." This provision was added to the statute in 2004.

{¶ 45} A Section 1983 takings claim is a claim "on the grounds of a physical or regulatory taking of real property" and therefore, under a plain language interpretation of R.C. 2305.09(E), is subject to the four-year limitations period set forth in that statute. *See State ex rel. Doner v. Zody*, 2011-Ohio-6117, ¶ 35, citing *State ex rel. Nickoli v. Erie MetroParks*, 2010-Ohio-606, ¶ 29. ("the four-year statute of limitations in R.C. 2305.09[E], which was expressly promulgated by the General Assembly to address takings claims, is generally applicable to such claims.")[1]

{¶ 46} Nevertheless, the County argues in favor of the trial court's determination that R.C. 2305.10 applies, rather than R.C. 2305.09(E), by citing two cases it asserts stand for the proposition that Section 1983 claims have been designated tort actions by the United States Supreme Court and are subject to a state's statute of limitations for personal injury torts. Those two cases are *Trzebuckowski v. City of Cleveland*, 319 F.3d 853 (6th Cir. 2003), and *Riveredge Dentistry Partnership v. City of Cleveland*, 2024 WL 639689 (N.D. Ohio Feb. 15, 2024).

{¶ 47} In *Trzebuckowski*, the Sixth Circuit held, generally, that Section 1983 claims are subject to a state's general personal injury statute of limitations and that the parties agreed that the claim brought in that case (a claim "for alleged violations of various federal and state rights, including denial of due process and equal protection of the law") was subject to the two-year limitations period set forth in R.C. 2305.10. *Id*. at 856.

{¶ 48} But, upon our review, it does not appear that *Trzebuckowski* involved a takings claim asserted under Section 1983. *Id*. at 855. Further, *Trzebuckowski* was decided in 2003, before R.C. 2305.09 was amended to add the (E) subsection (effective

1. To be clear, *Doner* was decided in the context of a mandamus action. However, we see no reason why a Section 1983 claim would not also be included within the ambit of R.C. 2305.09(E).

May 31, 2004). Therefore, *Trzebuckowski* is of limited import in determining the applicability of R.C. 2305.09(E) to a Section 1983 takings claim.

{¶ 49} *Riveredge*, on the other hand, was decided after the effective date of R.C. 2305.09(E) and squarely rejected the argument that R.C. 2305.09(E) applies to Section 1983 claims. 2024 WL 639689 at *13. In *Riveredge*, the plaintiff, argued that the four-year limitation period of R.C. 2305.09(E) applied citing *McNamara v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007). *McNamara* involved a regulatory taking that was commenced and decided by a district court before the passage and effective date of R.C. 2305.09(E). The Sixth Circuit in *McNamara* noted the passage of R.C. 2305.09(E) and stated that any takings actions brought after the effective date "should follow the four-year time bar." *McNamara* at 637, fn. 1. Nevertheless, the district court in *Riveredge* dismissed this language in *McNamara* as dicta. *Riveredge* at *13. In finding that R.C. 2305.10 applied to a Section 1983 takings claim and R.C. 2305.09(E) did not, the federal district court cited case law generally stating that Section 1983 claims are personal injury claims, not takings claims, and are "best characterized as tort actions." *Id*. But the *Riveredge* court engaged in no substantive legal or textual analysis as to why a Section 1983 takings claim would not be subsumed within the plain language of R.C. 2305.09(E). *See generally Riveredge*. The legal basis of the *Riveredge* decision is, essentially, that a Section 1983 claim is a tort claim, regardless of the nature of the claim. *Id.*

{¶ 50} We conclude that *Riveredge* elevated form over substance. This is precisely what the Ohio Supreme Court has held we may not do in assessing the applicability of a statute of limitations. *Lawyers Coop.*, 65 Ohio St.3d at 277-78, quoting *Hambleton*, 12 Ohio St.3d at 183 ("'courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded.'"). *Riveredge* is an unreported

federal district court decision, is not binding on this court, and we do not find its reasoning persuasive.

{¶ 51} Accordingly, we hold that Jackson & Jackson's Section 1983 takings claim was a claim "on the grounds of a physical or regulatory taking of real property" and was subject to the four-year statute of limitations period set forth in R.C. 2305.09(E). We further hold that, in applying that statute, the trial court should have found Jackson & Jackson's Section 1983 claim was timely when filed on May 22, 2024, regardless of whether the claim accrued for statute of limitations purposes when Jackson & Jackson purchased the Property on November 22, 2021, or when the BZA issued its final decision on August 17, 2023.[2] The trial court erred in applying the R.C. 2305.10 two-year statute of limitations period and erred in finding the Section 1983 claim to be untimely filed.

{¶ 52} Accordingly, we sustain Jackson & Jackson's second assignment of error.

C. Effect of Failure to Plead Mandamus

{¶ 53} Jackson & Jackson's first assignment of error states:

> THE TRIAL COURT ERRED IN DISMISSING JACKSON & JACKSON'S COUNTERCLAIMS FOR FAILURE TO PLEAD MANDAMUS.

{¶ 54} The trial court dismissed all three of Jackson & Jackson's counterclaims (Counts One, Two, and Three) on the basis that those claims were barred by Jackson & Jackson's failure to plead mandamus. The court reasoned that if Jackson & Jackson had petitioned for writ of mandamus to compel appropriation proceedings, those proceedings could have resulted in the County being required to compensate Jackson & Jackson for a taking. But by foregoing mandamus, Jackson & Jackson could not be compensated, so

2. As a result of our analysis above, we do not need to analyze the parties' arguments or the trial court's reasoning regarding when Jackson & Jackson's Section 1983 claim accrued for purposes of R.C. 2305.10.

its three counterclaims would not end the controversy between the parties. As a result, the court concluded that declaratory judgment would be improper. The court further noted that Jackson & Jackson was asking the court for an award compensating it for the County's "taking" of its property while also allowing it to retain the property, and that this was a windfall not permitted under Ohio law.

{¶ 55} In support of its first assignment of error, Jackson & Jackson argues that it presented viable claims, none of which were required to be pleaded in mandamus. The company presents this argument in two parts: first with respect to its federal Section 1983 claim, and second with respect to its declaratory judgment claims. We will address these two issues in turn.

1. Issue One: Federal Section 1983 Claim and Mandamus

a. Jackson & Jackson's Argument

{¶ 56} With respect to its Section 1983 claim, Jackson & Jackson relies on a United States Supreme Court opinion, *Knick v. Twp. of Scott*, 588 U.S. 180 (2019), which it characterizes as holding that federal law provides that a property owner may present a state court with a federal claim under Section 1983 regardless of the availability of similar or equivalent state-law remedies.

{¶ 57} Jackson & Jackson also asserts that the trial court may have believed that it did not have subject-matter jurisdiction to entertain the federal Section 1983 claim, though the trial court did not plainly state this in its decision. Jackson & Jackson argues that not only does a state court have concurrent jurisdiction to entertain a Section 1983 claim, but that the refusal to hear the Section 1983 claim is a violation of the Supremacy Clause.

b. *Knick v. Twp. of Scott*

{¶ 58} Before analyzing Jackson & Jackson's reliance on *Knick v. Twp. of Scott*, we must provide context by explaining an older case, *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In *Williamson*, the United States Supreme Court held that a property owner whose property had been taken by a local government had not suffered a violation of his Fifth Amendment rights and could not bring a federal takings claim in federal court until a state court denied his claim for just compensation under state law. *Id*. at paragraph 1(b) of the syllabus.

{¶ 59} In *Knick,* the United States Supreme Court overruled *Williamson*. *See generally Knick*. The Supreme Court noted that the "state-litigation requirement" imposed in *Williamson* had led to an unintended "preclusion trap." *Knick*, 588 U.S. at 185. That is, if a state court denied a claim for just compensation under state law, such a decision would generally have a preclusive effect in any subsequent federal takings suit. *Id*. at 184. This led a plaintiff with a taking claim to a Catch-22 scenario in which he could not go to federal court without first going to state court, but if he went to state court and lost, his claim could be barred in federal court. *Id*. at 184-85.

{¶ 60} In overruling *Williamson*, the Supreme Court held that a property owner has an actionable Fifth Amendment takings claim whenever the government takes his property without paying for it and therefore may bring his claim in federal court under Section 1983 at that time. *Id*. at 185.

c. The Parties' Arguments concerning *Knick*

{¶ 61} Jackson & Jackson argues that *Knick* overruled the *Williamson* requirement that it first pursue state appropriation proceedings by filing a petition for a writ of mandamus before asserting a Section 1983 claim and establishes that the company was therefore not required to first plead mandamus.

{¶ 62} But the County argues that Jackson & Jackson misreads *Knick*. The County contends that *Knick* only overruled the requirement for claimants to exhaust state remedies before filing a takings claim in federal court. The County argues that *Knick* did not completely overrule *Williamson* and notes that in *Williamson*, the Supreme Court recognized that the plaintiff had not yet suffered the injury contemplated by the Fifth Amendment's Takings Clause because the state had not yet refused to pay just compensation to the property owner. The County argues that in *Knick*, the Supreme Court acknowledged that a Fifth Amendment takings claim exists "when the government takes his property without paying for it." The County then points to language in *Knick* wherein the Court stated that its holding would "not expose governments to new liability." The County argues that this means that *Knick* should be interpreted to only allow a plaintiff to bring a takings claim in federal court that otherwise would have to have been first brought in state court.

{¶ 63} In other words, the County is arguing that *Knick* merely opened the doors of federal courts to Section 1983 claims alleging deprivation by state authorities, and that *Knick* "did not abrogate the requirement for state litigants to utilize adequate and available state law procedures to request and obtain compensation in state courts." The County contends that to hold otherwise would "expose governments to new liability," contrary to *Knick*. As to what "new" liabilities the County might face if federal Section 1983 claims were allowed in state court, the County contends that Jackson & Jackson could ask for compensatory damages, punitive damages, and attorney's fees.

{¶ 64} The import of the County's argument is that state courts do not have concurrent jurisdiction with federal courts to entertain Section 1983 takings claims. That is, according to the County, pursuant to *Knick* a property owner like Jackson & Jackson may proceed directly to federal court and assert a Section 1983 claim without first seeking

mandamus relief in Ohio's courts, but may not assert a Section 1983 claim in an Ohio state court without first seeking mandamus.

d. Legal Analysis

{¶ 65} Upon review, we do not find that a property owner is limited to one of two options: bringing a Section 1983 claim in federal court, or bringing a mandamus action in an Ohio state court. The Ohio Supreme Court has recognized that Ohio's common pleas courts possess concurrent jurisdiction with federal courts to entertain Section 1983 claims. *Schwarz v. Bd. of Trustees of Ohio State Univ.*, 31 Ohio St.3d 267, 272-73 (1987). And in *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 367 (1990), the United States Supreme Court stated:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.... The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

Id. at 367, quoting *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1990).

{¶ 66} Based on these precedents, we conclude that Jackson & Jackson could present its Section 1983 takings claim to the common pleas court. Section 1983 is applicable to Ohio state actors and Ohio courts have concurrent jurisdiction with federal courts to entertain Section 1983 claims. Because *Knick* permits the filing of a Section

1983 taking claim in federal court without exhausting state remedies, there is no reason why such an action could not be filed in Ohio's courts without first resorting to a state mandamus action. Therefore, Jackson & Jackson's failure to first plead a mandamus action did not preclude it from asserting its federal Section 1983 claim with the common pleas court.

{¶ 67} The County cites multiple cases for the general proposition that mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where the involuntary taking of private property is alleged. And these cases have generally rejected other remedies in lieu of mandamus, including declaratory and injunctive relief, trespass, and slander of title. *See State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 2008-Ohio-3181, ¶ 12-13; *State ex rel. Coles v. Granville*, 2007-Ohio-6057, ¶ 30-32. However, these cases were decided during the 34 years between *Williamson* and *Knick*, during which the "state-litigation requirement" of *Williamson* prohibited Section 1983 relief until state compensation remedies were exhausted. *Knick* has changed the legal landscape and the exhaustion of state remedies, including pursuit of mandamus in Ohio, is no longer a predicate to commencing a Section 1983 takings claim.[3]

{¶ 68} Additionally, in *1946 St. Clair Corp. v. City of Cleveland*, 49 Ohio St.3d 33 (1990), the Ohio Supreme Court noted the "significant" distinction between Section 1983 claims premised on substantive constitutional rights under federal law and those claims alleging the deprivation of a purely economic interest. *Id*. at 35. The Ohio Supreme Court stated that for substantive constitutional rights (such as the First Amendment guarantee

3. After briefing, but before oral argument, the County filed a notice of supplemental authority, citing *State ex rel. Boggs v. Cleveland*, 2025-Ohio-5094, for the general proposition that mandamus is the proper method to require state or local government to commence appropriation proceedings for just compensation. *Boggs*, however, did not involve Section 1983 claims. *Boggs* concerned an issue irrelevant to this appeal, namely, standing. *Id*. at ¶ 3. The portion of *Boggs* cited by the County merely reaffirmed earlier jurisprudence on mandamus and is of no relevance to the specific issues in this case.

of free speech or the Fourth Amendment prohibition against unreasonable searches), a Section 1983 suit is "always available" regardless of supplemental state remedies. *Id.*

{¶ 69} But for property interests, the Ohio Supreme Court held these interests and their parameters are defined by state law. *Id*. at 36. And the constitutional right invoked with respect to such interests is only the Fourteenth Amendment *procedural* due process right to notice and a hearing. *Id*. Therefore, if the state has provided "adequate post-deprivation state tort remedies" for unauthorized intentional property deprivations, the state has provided the "process" required under the Fourteenth Amendment, and a plaintiff must allege and prove the inadequacy of state remedies. *Id*.

{¶ 70} But here, the right to avoid a conversion of private property to public use without just compensation is a *substantive* right created by the Fifth Amendment's Takings Clause. Therefore, applying *St. Clair Corp.*, the exhaustion/inadequacy of state remedies should not be a predicate to the commencement of a Section 1983 takings claim in Ohio's courts.

{¶ 71} The County also presents a policy argument. The County argues that real property interests are shaped by state laws and states are better equipped to regulate and apply property rules in accordance with local preferences. Therefore, the County urges us to hold that to pursue a takings claim in Ohio, a claimant *must* file a mandamus action to compel appropriation proceedings under R.C Chapter 163. The County presents no textual or other legal argument in support of this policy argument. We do not set policy as a court, but interpret the laws and determine their constitutionality. *See Kaminski v. Metal & Wire Prods. Co.*, 2010-Ohio-1027, ¶ 61, 75. And the cases cited above support

Jackson & Jackson's position that it properly pleaded a Section 1983 claim and its failure to plead a mandamus action did not preclude its Section 1983 claim.[4]

{¶ 72} For these reasons, we find no merit to the arguments of the County in support of Issue 1 under Assignment of Error No. 1.

2. Issue Two: Federal and State Declaratory Judgment Claims and Mandamus

{¶ 73} The trial court also dismissed Jackson & Jackson's state and federal declaratory judgment claims for failure to plead mandamus. In doing so, the trial court reasoned that declaratory judgment would not terminate the controversy between the parties and "[t]his court has no mechanism to award damages to Jackson & Jackson." The trial court also noted that Jackson & Jackson was asking the court to compensate it for the taking of its property (via its Section 1983 claim) but to also allow it to retain the property upon finding in its favor that the Zoning Resolution was unconstitutional as applied (via its declaratory judgment claims). The court stated that this would result in a "windfall" unavailable under Ohio law.

{¶ 74} In Issue 2, Jackson & Jackson argues that the trial court erred when it dismissed its federal and state declaratory judgment claims based on its failure to plead mandamus. Jackson & Jackson cites *Jaylin Investments, Inc. v. Moreland Hills*, 2006-Ohio-4, ¶ 25, and *Miller v. Preble Cty. Bd. of Cty. Commr.*, 2008-Ohio-2108, ¶ 12-15 (12th Dist.), for the proposition that a declaratory judgment action is a proper method of raising an as-applied challenge to the constitutionality of a zoning ordinance. As to the "windfall" issue, Jackson & Jackson notes that the civil rules allow for alternative pleading in Civ.R.

4. We note that in its appellate brief, the County's argument was that "[Jackson & Jackson] has not filed a writ of mandamus to compel appropriation proceedings. Therefore, [Jackson & Jackson] has failed to plead a cause of action that provides a complete remedy." However, at oral argument, the County *conceded* that Jackson & Jackson could file a Section 1983 takings claim in state court. We are not entirely certain of the County's position on this issue, but for purposes of this appeal, we presume that the County's position is that mandamus must be pleaded in any takings claim asserted in Ohio courts.

8(A) and (B) and the common pleas court could have required Jackson & Jackson to elect a remedy prior to trial.

{¶ 75} We will review the application of these mandamus-related arguments separately as they relate to Count One and Count Two.

a. Count One

{¶ 76} As stated above, Count One seeks a declaratory judgment that the Zoning Resolution as applied to Jackson & Jackson and the Property was unenforceable because it violated various state and federal constitutional provisions.

{¶ 77} The Ohio Supreme Court has already spoken plainly on whether a property owner may seek declaratory judgment in these circumstances. In *Jaylin Investments., Inc. v. Moreland Hills*, 2006-Ohio-4, the supreme court explained that a property owner may bring "an action for declaratory judgment that challenges the constitutionality of a zoning ordinance, as applied." *Id.* at ¶ 25. And years earlier, in *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263 (1975), the Ohio Supreme Court held that "[t]he constitutionality of a zoning ordinance, as it applies to a specific parcel of property to proscribe the owner's proposed use of the property, can be determined in a declaratory judgment action." *Id.* at paragraph one of the syllabus. The Ohio Supreme Court has never stated or held that the only proper mechanism for pursuing an as-applied constitutional challenge to a zoning regulation is a mandamus proceeding. And our court has entertained appeals from declaratory judgment decisions in such cases without making any reference to mandamus being the appropriate mechanism. *See Miller*, 2008-Ohio-2108, at ¶ 12-15 (12th Dist.).

{¶ 78} The availability of declaratory judgment actions in as-applied constitutional challenges to zoning regulations is consistent with statute. Pursuant to Ohio's declaratory judgment statute, R.C. 2721.03,

> any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

{¶ 79} "The three prerequisites to declaratory relief include '(1) a real controversy between the parties, (2) justiciability, and (3) the necessity of speedy relief to preserve the parties' rights.'" *Ohioans for Concealed Carry, Inc. v. Columbus*, 2020-Ohio-6724, ¶ 30, quoting *ProgressOhio.org, Inc. v. JobsOhio*, 2014-Ohio-2382, ¶ 19.

{¶ 80} Based on the plain language of R.C. 2721.03, Jackson & Jackson properly pleaded in Count One for declaratory relief asking the court to declare the as-applied unconstitutionality of the Zoning Resolution under both federal and state law. Jackson & Jackson set forth a real controversy (that is, whether the Zoning Resolution was unconstitutional as applied to the Property), and the dispute was justiciable (because a finding in Jackson & Jackson's favor would have rendered the relief sought by Jackson & Jackson). More specifically, Count One of Jackson & Jackson's counterclaim sought a declaration that the Zoning Resolution was unconstitutional as applied. Such a declaration would have terminated the controversy as it would have rendered the Zoning Regulations unenforceable and permitted Jackson & Jackson to continue using the Property for its intended purposes of operating its electrical business. We find no merit to the Couty's argument and the trial court's finding that Jackson & Jackson's declaratory judgment actions would not terminate the controversy. Finally, Jackson & Jackson's requested relief demonstrated the necessity of speedy relief to preserve its rights.

{¶ 81} We also find no merit to the argument that Count One's declaratory judgment counterclaim had to be dismissed because Jackson & Jackson also sought

compensation for a regulatory taking, via its Section 1983 claim (Count Three). Although the trial court was correct that it could not award damages to Jackson & Jackson in conjunction with the declaratory judgment counterclaims, that fact would not prevent the court exercising its authority to determine the constitutional validity of the Zoning Resolution as applied to the Property. As to the windfall issue, we agree that Jackson & Jackson is permitted to plead alternative forms of relief and the court could have required Jackson & Jackson to elect its remedy prior to trial. *See* Civ.R. 8(A) ("Relief in the alternative or of several different types may be demanded."); Civ.R. 57 (sets forth procedural rules for declaratory judgment actions and states that the "existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.").

{¶ 82} Accordingly, we agree with Jackson & Jackson that the trial court erred in dismissing its Count One declaratory judgment counterclaim on the basis that Count One should have been brought in mandamus.

b. Count Two

{¶ 83} Count Two also sought a declaratory judgment, but its request was more limited than the declaratory judgment request in Count One. Specifically, Count Two requested a declaration that the Zoning Regulations "result in an uncompensated taking as applied to Jackson [& Jackson] and the Property."

{¶ 84} Because Count Two requests a declaration of a "taking" but does not request just compensation, Count Two does not request relief that would terminate the controversy giving rise to this action. As a result, Count Two was an improper request for declaratory judgment and the trial court did not err in dismissing that counterclaim. *See Elboco Ent. v. Billman*, 2020-Ohio-4877, ¶ 24 (12th Dist.) (explaining grounds for

dismissing a declaratory judgment action include when "the declaratory judgment will not terminate the uncertainty").

{¶ 85} Further, even if Count Two were construed as an attempt to pursue compensation for a taking, the trial court was correct in holding that such a state law claim must be pleaded in mandamus. *Shemo*, 2002-Ohio-1627, at ¶ 21 ("Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.").

{¶ 86} Therefore, we find that the trial court did not err to the extent it dismissed Count Two of Jackson & Jackson's First Amended Complaint.

4. Conclusion

{¶ 87} In sum, the County failed to establish that Count One and Count Three of Jackson & Jackson's First Amended Complaint failed to state claims upon which relief can be granted, and the trial court erred in dismissing those claims for failure to plead mandamus. *Marchetti*, 2011-Ohio-2212, at ¶ 9. We therefore sustain Jackson & Jackson's first assignment of error with regard to Count One and Count Three.

{¶ 88} But the trial court did not err in dismissing Count Two. We therefore overrule Jackson & Jackson's first assignment of error with regard to Count Two.

C. Exhaustion of Administrative Remedies

{¶ 89} Jackson & Jackson's third assignment of error states:

> THE TRIAL COURT ERRED IN DISMISSING JACKSON & JACKSON'S "AS APPLIED" CHALLENGES TO THE CONSTITUTIONALITY OF THE ZONING RESOLUTION FOR FAILURE EXHAUST ADMINISTRATIVE REMEDIES.

{¶ 90} The trial court dismissed Jackson & Jackson's declaratory judgment claims (Counts One and Two) to the extent they concerned the company's *state* property rights on the basis that the company failed to exhaust administrative remedies by not instituting

an R.C. Chapter 2506 administrative appeal to the common pleas court from the decision of the BZA denying its requested use variance.[5] The court stated that if Jackson & Jackson had done so, the court could have overturned the BZA's decision, and also could have potentially granted relief with respect to Jackson & Jackson's argument that the Zoning Regulation was unconstitutional as applied. The court also found that an exception to the requirement to exhaust administrative remedies—that is, where such an effort would be futile, onerous, or unusually expensive—was not applicable, given the time that the parties had dedicated to litigating the case.

{¶ 91} In support of its third assignment of error, Jackson & Jackson argues that the constitutionality of the Zoning Resolution became ripe for declaratory judgment when the BZA denied its use variance, therefore taking a "definitive" position on the zoning issue. Jackson & Jackson cites *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263 (1975), and *Karches v. City of Cincinnati*, 38 Ohio St.3d 12 (1988) in support. As a result, it argues, an exception to the requirement of exhausting administrative remedies applied and the trial court should not have dismissed its declaratory judgment claims relying on state law.

{¶ 92} Because we found with respect to Jackson & Jackson's first assignment of error that the trial court did not err in dismissing Count Two, we need not examine Count Two in the context of Jackson & Jackson's third assignment of error. We will therefore limit our analysis to Count One.

{¶ 93} In *Driscoll*, the Ohio Supreme Court held that a declaratory judgment action is a proper mechanism to challenge the constitutionality of a zoning regulation as applied to property notwithstanding the availability of an R.C. Chapter 2506 zoning appeal.

5. To be clear, the trial court did not dismiss Jackson & Jackson's declaratory judgment claims on this basis to the extent they concerned the company's *federal* property rights.

Driscoll at paragraphs one and two of the syllabus. But the court also held that if a property owner "has available to him an administrative remedy which can provide him with appropriate relief from a zoning restriction, and the administrative remedy is neither onerous nor unusually expensive, the landowner must exhaust that administrative remedy prior to instituting a declaratory judgment action challenging the constitutionality of the zoning restriction." *Driscoll* at paragraph four of the syllabus. In so holding, the supreme court recognized that an R.C. Chapter 2506 appeal from denial of a variance is *not* included among the administrative remedies which must be exhausted as a prerequisite to declaratory relief. *Id*. at 268.

{¶ 94} In *Karches v. City of Cincinnati*, 38 Ohio St.3d 12 (1988), the Ohio Supreme Court reiterated its holding in *Driscoll* that the constitutionality of a zoning ordinance may be raised in a R.C. Chapter 2506 administrative appeal or alternatively by way of a declaratory judgment action. *Id*. at 15.[6] The court went on to explain that the purpose of the exhaustion of administrative remedies requirement exists to ensure that the government has made a "final decision" on the matter such that there is an actual and justiciable controversy which may be resolved by declaratory relief. *Id.* at 16. "Once a controversy is established, jurisdiction is successfully invoked and the issue of constitutionality becomes ripe for determination" in a declaratory judgment action. *Id*.

{¶ 95} The court also pointed out the distinction between a declaratory judgment action challenging the constitutionality of a zoning regulation and an R.C. Chapter 2506 appeal. In a declaratory judgment action, the validity of an administrative decision is not

6. The Ohio Supreme Court recently cited *Karches* with approval in *Sheetz, Inc. v. Centerville*, 2026-Ohio-3531, decided after briefing and oral argument in this matter. *Sheetz* emphasized at ¶ 30 "Ohio law does not treat administrative appeals and claim for damages or declaratory relief as mutually exclusive."

in issue. However, in an R.C. Chapter 2506 appeal, the administrative decision itself and the constitutionality of the proposed or denied use is at issue. *Id*.

{¶ 96} We also note that in *Gates Mills Invest. Co. v. Village of Pepper Pike*, 44 Ohio St.2d 73 (1975), the Ohio Supreme Court considered whether seeking a variance was a prerequisite to a declaratory judgment action challenging the constitutionality of a zoning ordinance's application to certain property. Citing *Driscoll*, the Ohio Supreme Court held that it was not because the constitutionality of a zoning ordinance as applied may be determined by a declaratory judgment notwithstanding the availability of a R.C. Chapter 2506 appeal. *Gates Mills* at 76-77, citing *Driscoll*, 42 Ohio St.2d at 263. The declaratory action is independent from the administrative proceedings; it is not a review of the final administrative order. *Driscoll* at 271.

{¶ 97} *Driscoll, Karches*, and *Gates Mills* support Jackson & Jackson's position that a property owner may, through a declaratory judgment action, challenge the constitutionality of a zoning regulation without first exhausting administrative remedies, including an R.C. Chapter 2506 appeal from an adverse administrative decision.

{¶ 98} But *Karches* further establishes that a "final decision" is the only prerequisite in order to assert a declaratory judgment action. But does the record include any "final decision" that may form the basis for declaratory judgment in this case? Yes. The BZA's decision denying Jackson & Jackson's request for a use variance was a final decision. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001), quoting *Williamson*, 473 U.S. at 186. (holding a taking claim is ripe when "'government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'"). As a result, the "final decision" requirement presented no bar to the trial court hearing Jackson & Jackson's declaratory judgment claims.

{¶ 99} The County disagrees, citing *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146 (1992), *Swander Ditch Landowners' Assn v. Joint Bd. of Huron & Seneca Cty. Commr.*, 51 Ohio St.3d 131 (1990), and *Welsh Dev. Co. v. Warren Cty. Regional Planning Comm.*, 2010-Ohio-592 (12th Dist.), for the proposition that a litigant may not seek declaratory relief until available administrative remedies have been exhausted.

{¶ 100} In *Fairview Gen. Hosp.*, the Ohio Supreme Court held that a declaratory judgment action was improper due to the failure to exhaust administrative remedies because the plaintiff failed to appeal the denial of its request for redesignation of its neonatal care unit from Level II to Level III to the Ohio Department of Health's Certificate of Need Board. *Fairview Gen. Hosp.* at 153. *Fairview Gen. Hosp.* thus concerns hospital certification law, not property law, and does not address the necessity of filing a R.C. Chapter 2506 administrative appeal. *Fairview Gen. Hosp.* is therefore irrelevant. However, we note that *Fairview Gen. Hosp.* involved a failure to seek relief from an administrative agency that *could* have granted the relief sought by the plaintiff, whereas the BZA in our case could not have determined the constitutionality of its own Zoning Resolution. *See Jones v. Village of Chargin Falls*, 77 Ohio St.3d 456, 460-61 (1997).

{¶ 101} In *Swander Ditch*, the Ohio Supreme Court recognized that declaratory judgment was a proper vehicle to challenge the inclusion of property in a ditch project and the resulting assessment even though the property owner had not resorted to an R.C. 1515.24 administrative appeal procedure. *See generally Swander Ditch*. The court found that the administrative appeal procedure could not address the inclusion of the property in the ditch project and was therefore not an "equally serviceable" remedy to declaratory judgment. *Id.* at 135. But as set forth above, an appeal of the BZA decision to the common pleas court would not have been an "equally serviceable" remedy to challenge the

constitutionality of the Zoning Resolution. Therefore, *Swander Ditch* does not support the County's position.

{¶ 102} In *Welsh*, a developer filed two complaints which appealed separate administrative decisions by the Warren County Regional Planning Commission ("the WCRPC"). 2010-Ohio-592 at ¶ 3, 5. The complaints also sought a declaratory judgment that the zoning regulations at issue were unconstitutional as applied to the developer's proposed development plans. *Id*. at ¶ 53, 60 (12th Dist.). The trial court dismissed the administrative appeal for lack of subject-matter jurisdiction, based on the developer's failure to properly file a notice of appeal with the administrative agency (the developer had instead served the notice of appeal on opposing counsel). *Id*. at ¶ 4, 7-8. Because the developer had not properly filed his notice of appeal, the trial court also dismissed the declaratory judgment causes of action for failure to exhaust administrative remedies. *Id*. at ¶ 8, 52.

{¶ 103} In its first assignment of error, the developer argued serving a copy of its complaint on the agency's counsel was sufficient for purposes of perfecting an administrative appeal. *Id*. at ¶ 13. We overruled the developer's assignment of error, holding that service on opposing counsel was not sufficient to satisfy the statutory requirements for perfecting an administrative appeal. *Id*. at 47-48.

{¶ 104} In its second assignment of error, the developer argued that the trial court erred in dismissing its declaratory judgment claims and that because those claims challenged the constitutionality of zoning regulations, it was not required to exhaust administrative remedies. *Welsh*, 2010-Ohio-592 at ¶ 52.

{¶ 105} In assessing the developer's argument, this court cited *Karches* for the proposition that exhaustion of administrative remedies is not required when (1) there is no available remedy that can provide the relief sought or resorting to administrative

remedies would be wholly futile, and (2) when exhaustion of remedies is unnecessary when the availably remedy is onerous or unusually expensive. *Id*. at ¶ 56, citing *Karches*, 38 Ohio St.3d at 17. We stated:

> The first exception applies when it would be impracticable to pursue an administrative remedy because the administrative entity lacks the authority to render relief. Id. For instance, an administrative agency is without jurisdiction to determine the constitutional validity of a statute. *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, 460–461, 674 N.E.2d 1388. Therefore, it would be futile to force a party to exhaust its administrative appeals to an agency that can afford no meaningful relief. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 115, 564 N.E.2d 477.

Id. at ¶ 57.

{¶ 106} We further noted in *Welsh* that in *Karches* the property owners demonstrated the first exception (no available remedy, or resorting to administrative remedies would be wholly futile), by their repeated applications and denials, and a petition to change the city's zoning ordinance. *Id.* at ¶ 59.

{¶ 107} Ultimately, we found in *Welsh* that the developer had failed to demonstrate why the court should apply either exception to the general rule that it must first exhaust its remedies. *Welsh* at ¶ 60. We stated "[h]ad [the developer] properly perfected its appeal to the common pleas court, it would have had an adequate administrative remedy available that could have provided it with the appropriate relief sought." *Id*..

{¶ 108} In analyzing the holding of *Welsh* today, we note that the portion of *Karches* discussing the exhaustion rule focused on whether the property owners demonstrated that they received a "final decision" from the administrative agency. In *Karches*, the court noted that the property owners repeated and failed efforts to change the zoning demonstrated the city had "taken a definitive position on the zoning issues---a position which inflicts a concrete injury." *Karches* at 17. The *Karches* court found that once this

"final decision" had been rendered, a controversy is established and the issue of constitutionality is ripe for determination. *Id*.

{¶ 109} Here, we have already held that Jackson & Jackson established a "final decision" on the applicability of the Zoning Resolution as-applied to the Property through its variance application and its rejection by the BZA decision. Accordingly, applying *Karches*, Jackson & Jackson has demonstrated a "final decision" that is ripe for constitutional review. Having established this final agency decision, Jackson & Jackson was not required to appeal the BZA decision administratively in order to challenge the constitutionality of the Zoning Resolution. *Karches* at 16-17.

{¶ 110} And while it is accurate to state that the developer in *Welsh* could have pursued its constitutional claims by properly perfecting appeals of the WCRPC decision, the import of *Driscoll* and *Karches* is that an administrative appeal under R.C. 2506 is *not* a prerequisite to filing a declaratory judgment action challenging the constitutionality of a zoning regulation. *Driscoll*, 42 Ohio St.2d at 268; *Karches*, 38 Ohio St.3d at 15. To the extent that *Welsh* suggests otherwise, it was not an accurate statement of Ohio Supreme Court precedent and is overruled.[7]

{¶ 111} Jackson & Jackson was not required to exhaust administrative remedies by appealing the BZA decision prior to challenging the constitutionality of the Zoning Resolution. As such, Jackson & Jackson's declaratory judgment action was properly pleaded and should not have been dismissed at this stage of the proceedings.

{¶ 112} We sustain Jackson & Jackson’s third assignment of error with regard to Count One only.

7. We note that *Welsh* was overruled on other grounds in *Welsh Development Co. v. Warren Cty. Regional Planning Comm.*, 2011-Ohio-1604.

III. Conclusion

{¶ 113} We sustain Jackson & Jackson's first assignment of error with respect to Count One and Count Three, and overrule the first assignment of error with respect to Count Two. We sustain Jackson & Jackson's second assignment of error. We sustain Jackson & Jackson's third assignment of error with regard to Count One only.

{¶ 114} The practical effect of our holdings with regard to Jackson & Jackson's three assignments of error is that, on remand, Count Two remains dismissed, but Counts One and Three may be pursued in further litigation.

{¶ 115} Judgment affirmed in part, reversed in part, and remanded for further proceedings.

PIPER and M. POWELL, JJ., concur.

Donovan, J. retired, of the Second Appellate District, siting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

JUDGMENT ENTRY

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed in part, reversed in part, and remanded for further proceedings consistent with the above Opinion.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Opinion and Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed 35% to appellant and 65% to appellee.



Robin N. Piper, Presiding Judge



Mike Powell, Judge



Mary E. Donovan, Judge