1962

Mandamus for Zoning Appeals

James Jay Brown

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The statutory action in mandamus should not be emasculated of its proper function by too narrowly construing the legislative prerogative of original conception. Restrictive generalization of the function of the writ of mandamus cannot become the absolute criterion of its proper application to the particular facts in each case.[1]

THIS STATEMENT, in its two-fold intent, succinctly identifies a current dilemma and offers a method of correction. With the passage of chapter 2506 of the Ohio Revised Code, the legal profession in Ohio has been confused as to whether the writ of mandamus is the most effective tool for challenging and reversing a rejection for a building permit by a municipal zoning officer or board. Doubts as to its use have become solidified because of the negative results obtained in several cases which relied upon this writ. In an attempt to comprehend the future use of mandamus for zoning appeals, an analysis will be made of its past use in relation to its effectiveness under Chapter 2506 of the Revised Code.

Function

Mandamus can be identified through definition[2] and exemplary function. Where an individual has his own special interest to enforce or protect, independent of those interests which he holds in common with others, he may resort to mandamus in order to enforce or protect such rights.[3] He may resort

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1 State, ex rel. Cubbon, Jr. v. Winterfeld, 104 Ohio App. 260, 148 N. E. 2d 523 (1957).

2 ". . . mandamus is a writ which issues from a court of superior jurisdiction, and is directed to any private or municipal corporation of any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived." 2 Yokley, Zoning Law and Practice, Sec. 194, p. 15 (2d ed. 1953).

"Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, a board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Ohio Rev. Code (1953), Sec. 2731.01. See also State, ex rel. Selected Properties, Inc. v. Gottfried, 163 Ohio St. 469, 56 Ohio Ops. 397, 127 N. E. 2d 371 (1955).

3 55 C. J. S., Mandamus, Sec. 47.

to mandamus to compel zoning officials to perform duties defined by valid statutes or ordinances.[4] The writ has been deemed applicable in several situations:

1. To compel action on the part of an officer or body where it is claimed that such officer or body has wrongfully refused to exercise the power which resides in him or it.

2. To review the action of the officer where no other method of review is available.

3. To test the validity of a zoning restriction where the action of the officer is predicated solely upon the prohibitions of the ordinance.[5]

Mandamus may compel the issuance of a building permit where the relator can show that the position and office casts upon the municipal officer or body a duty to comply with said request.[6] The writ will lie where it can be proven that the administrative criteria, established by statute or ordinance, by which an officer or board judge the adequacy of the anticipated improvement within the zoning restrictions, was inadequate.[7] It has been successfully used where a court held that an arbitrary and unduly long period of time, in which a zoning board of appeals held up a relator's petition without deciding upon it, amounted to a denial.[8] If relator's building application is refused under the terms of a zoning ordinance previously declared invalid, mandamus will lie.[9] This right to challenge the validity of a zoning ordinance

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[4] 101 *Id.*, Zoning, Sec. 345.

[5] 2 Rathkopf and Rathkopf, Law of Zoning and Planning, 68-4 (3rd ed. 1960).

[6] State, ex rel. Voad Hachinuch Hacharedi v. Baxter, 148 Ohio St. 221, 74 N. E. 2d 242, dism. 332 U. S. 827, 68 S. Ct. 209 (1947). See also State, ex rel. The Ice and Fuel Co. v. Kreuzweiser, Inspr., 120 Ohio St. 352, 166 N. E. 2d 193, 228 (1929); State, ex rel. Gaede v. Guion, 117 Ohio St. 327, 158 N. E. 748 (1927); State, ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406, 124 N. E. 232 (1919), rev. Columbus, ex rel. Moore Oil Co. v. Dauben, 28 Ohio C. A. 281 and Moore Oil Co. v. Dauben, 30 CD 480; Selby, Auditor v. State of Ohio, ex rel. Smiley, 63 Ohio St. 541, 59 N. E. 218 (1900); State, ex rel. Adams v. Pendleton, 100 Ohio App. 1, 59 Ohio Ops. 443, 135 N. E. 2d 458 (1955).

[7] State, ex rel. Associated Land and Investment Corp. v. City of Lyndhurst, 168 Ohio St. 289, 154 N. E. 2d 453 (1958).

[8] State, ex rel. Del Monte v. Woodmansee, Comm'r., 47 Ohio L. Abs. 513, 72 N. E. 2d, 789 (1946),—four month delay without hearing.

[9] State, ex rel. Geletka v. City of Campbell, 66 Ohio L. Abs. 300, 113 N. E. 601, dism. 157 Ohio St. 553, 106 N. E. 2d 83 (1952).
See also, C. J. S. *op. cit. supra*, n. 4 at Sec. 346; Ordinance ruled unconstitutional: Lucas v. State, ex rel. Abt, 21 Ohio L. Rep. 363; 33 ALR 287 n. (1923); State, ex rel. Cadwallader v. Village of Antwerp, 104 Ohio App. 109, 146 N. E. 2d 877 (1957).

through a proceeding in mandamus has been variously recognized.[10] By far, the writ's most frequently utilized function has been to attack the justification of zoning ordinances. Mandamus has been permitted where the zoning regulations have borne no reasonable relation to the promotion of public health, safety, morals, convenience, or general welfare.[11]

Under the terms of the Ohio Statute, Section 2731.01,[12] the writ was granted in compelling the issuance of a permit where a city building commissioner attempted to expand an interpretation and application of a restrictive ordinance.[13] If the relator has complied with all of the requirements of a zoning ordinance, including that of building setback, mandamus is ruled effective, even though he may not have complied with requirements of the

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[10] C. J. S., *op. cit. supra,* n. 4 at 1177.

[11] State, ex rel. Enverard v. Miller, Inspector, 98 Ohio App. 283, 129 N. E. 2d 209 (1954). See also Women's Kansas City St. Andrew Society v. Kansas City, 58 Fed. 2d 593 (CCA 8, 1932); State, ex rel. Voad Hackinuch Hacharedi v. Baxter, *supra,* n. 6; Pritz v. Messer, 112 Ohio St. 628, 149 N. E. 30 (1925); City of Youngstown v. Kahn Bros. Building Co., 112 Ohio St. 654, 148 N. E. 842, 43 ALR 662 (1925); McCloud v. Woodmansee, 165 Ohio St. 271, 59 Ohio Ops. 298, 135 N. E. 2d 362 (1956); L. & M. Investment Co. v. Cutler, 125 Ohio St. 12, 180 N. E. 379, 86 ALR 707 (1932); State ex rel. Shafer v. Ohio Turnpike Commission, 159 Ohio St. 581, 50 Ohio Ops. 465, 113 N. E. 2d 14 (1953); Mehl v. Stegner, Dir., 38 Ohio App. 416, 175 N. E. 712 (1930); Partain v. City of Brooklyn, 101 Ohio App. 279, 1 Ohio Ops. 2d 263, 133 N. E. 2d 616 (1956); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 49 Ohio Ops. 422, 110 N. E. 2d 440 (1952); State, ex rel. Cook v. Turgeon, 84 Ohio App. 287, 50 Ohio L. Abs. 45, 77 N. E. 2d 283 (1947); Nectow v. City of Cambridge, 277 U. S. 183, 72 L. ed. 842, 48 S. Ct. 447 (1928).

For Preservation of Constitutional Rights see: Hauser v. Erdman, 113 Ohio St. 662, 150 N. E. 42 (1925); State, ex rel. Gaede v. Guion, *supra,* n. 6; State, ex rel. Ice and Fuel Co. v. Krenyweiser, *supra,* n. 6; Bauman v. State, ex rel. Underwood, 122 Ohio St. 269, 171 N. E. 336 (1930); State, ex rel. Fairmount Center Co. v. Arnold, 138 Ohio St. 259, 34 N. E. 2d 777, 136 ALR 840 (1941); State, ex rel. Castle National Inc. v. Village of Wickliffe, 80 N. E. 2d 200, Ct. of Appeals, Lucas County (1947); dism. 148 Ohio St. 410; 74 N. E. 2d 270 (1947); State, ex rel. The Synod of Ohio of United Lutheran Church in America v. Joseph, 139 Ohio St. 229, 39 N. E. 2d 515, 138 ALR 1274 (1942); State, ex rel. Prentke v. Village of Brookpark, 107 Ohio App. 325, 79 Ohio L. Abs. 540, 153 N. E. 2d 677 (1958).

If a case may be determined upon any other theory than that of the constitutionality of a challenged statute, no consideration will be given to the constitutional question: Rucker v. State, 119 Ohio St. 189, 162 N. E. 802 (1928); State, ex rel. Herbert v. Ferguson, Aud., 142 Ohio St. 496; 52 N. E. 2d 980 (1944); Wiggins v. Babbitt, 130 Ohio St. 240, 198 N. E. 873 (1935); Village of Strongsville v. McPhee, 142 Ohio St. 534, 53 N. E. 2d 522 (1944); State, ex rel. Lieux v. Village of Westlake, 154 Ohio St. 412, 96 N. E. 2d 414 (1951); American Cancer Society Inc. v. City of Dayton, 160 Ohio St. 114, 114 N. E. 2d 219 (1953).

[12] Ohio Rev. Code, *supra,* n. 2.

[13] State, ex rel. Moore Oil Co. v. Dauben, *supra,* n. 6.

zoning board.[14] However, where an appeal is taken in order to get permission for conversion of use of part of a building, which use was not specifically identified in the terms of the original permit, mandamus has been denied.[15]

Procedure and Pleading

Utilization of mandamus has resulted in certain procedural methods which define, somewhat, the scope of the writ. Upon the relator is placed the burden of generally pleading and proving these issues: that there is no plain and adequate remedy in the ordinary course of the law, including equitable remedies; that there has been a gross abuse of discretion on the part of the officer or agency; that the relief sought is not merely to determine a controversy of a strictly private nature.[16] Allen Fonoroff of Cleveland has suggested that in such zoning cases the issue resolves itself into one of reasonableness. It is the relator's task to prove that no public interest is being served and that the zoning of his land bears no substantial relation to the purpose of the zoning ordinance.[17] Direct attack upon the reasons for and application of the comprehensive zoning plan, where such case exists, will go to the essence of relator's problem.[18] Where he attacks the validity of an ordinance, he has the burden of showing this by clear and satisfactory evidence.[19]

In his process of pleading the writ of mandamus, petitioner should not look to the court to pass upon the wisdom and judgment of the legislatively enacted ordinance or statute, for this is outside of the court's purview. Its function is to determine whether or not an ordinance is sufficiently and reasonably comprehensive in its applicability and bearing upon the preservation of health, safety, morals, and general welfare.[20] Where he does

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[14] State, ex rel. Adams v. Pendelton, *supra,* n. 6. See also 2 Metzenbaum, The Law of Zoning, 853 (2d ed. 1955).

[15] State, ex rel. Euclid-Doan Building Co. v. Cunningham, 97 Ohio St. 130, 119 N. E. 361, LRA 1918 D 700 (1918).

[16] State, ex rel. Libbey-Owens-Ford Glass Co. v. Industrial Commission of Ohio, 162 Ohio St. 302, 123 N. E. 2d 23 (1954).

[17] 29 Fordham L. Rev. 693, 702 (1961).

[18] *Id.* at 705.

[19] State, ex rel. Cook v. Turgeon, Comm'r., 84 Ohio App. 287, 50 Ohio L. Abs. 45, 77 N. E. 2d 283 (1947).

[20] State, ex rel. Jack v. Russell, Comm'r., 162 Ohio St. 281, 123 N. E. 2d 261 (1954); Curtis v. City of Cleveland, 166 Ohio St. 509, 144 N. E. 2d 177 (1957).

invoke the court's power to declare the ordinance unconstitutional he must plead and prove that he has sustained, or is close to sustaining, a direct injury from the enforcement.[21] Unless it can be shown that there has been a clear abuse of legislative power in enacting the subject ordinance, the court will not substitute its judgment for that of the legislature's where the validity of the zoning purpose is fairly debatable.[22] Under the terms of Section 2731.03 of the Ohio Revised Code,[23] mandamus will not, in any way, control or compel the court's exercise of judicial discretion.[24] When the relator chooses to attack the ordinance upon constitutional grounds, the respondent cannot demur to such a petition.[25]

Conditions Precedent

A. *Generally*

To become entitled to apply for the writ of mandamus, the relator must comply first with all requirements in the ordinance (i.e., forms, permits, plans, building lines, etc.).[26] Where such building plans and specifications conform to state and city building codes, and there is no contrary or restrictive zoning ordinance in force at that time, the writ will lie to compel issuance. Once relator has shown full compliance under the ordinance, the duty cast upon the officer or board is purely ministerial and mandamus will issue to compel performance of this duty.[28]

In *State, ex rel. Wiegel v. Randall, Dir.*,[29] relator church had complied with all procedural steps under the existing ordinance,

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21 Annot., 136 A. L. R. 1378, 1380.

22 State, ex rel. Cook v. Turgeon, Comm'r., *supra*, n. 19.

23 "The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion."

24 State, ex rel. De Ville Photography, Inc. v. McCarrol, Judge, 167 Ohio St. 210, 4 Ohio Ops. 2d 268, 147 N. E. 2d 254 (1958).

25 State, ex rel. Gaddis v. City of Oakwood, 49 N. E. 2d 956 (Ct. of Appeals, Montgomery County 1942).

26 State, ex rel. Adams v. Pendleton, *supra*, n. 6. See also C. J. S., *op. cit. supra*, n. 9. Compliance with conditions precedent.

27 Hauser, Comm'r. v. State, ex rel. Erdman, *supra*, n. 11. See also, State, ex rel. The Fairmount Center Co. v. Arnold, Dir., *supra*, n. 11; where compliance with all ordinance requirements, grounds for denial held unreasonable and discriminatory; Village of Ottawa v. Odenweller Milling Co., 57 Ohio App. 170, 13 N. E. 2d 144, 136 A. L. R. 850 n. (1936).

28 C. J. S., *op. cit. supra*, n. 9.

29 160 Ohio St. 327, 116 N. E. 2d 200 (1953).

which permitted church construction in the desired location. Upon being refused a permit, it resorted to mandamus. Because all conditions precedent under the ordinance were fulfilled, the permit was granted.

In another instance, the petitioner failed to submit his final plans and specifications to a city zoning commission after receiving conditional approval for a building permit. Mandamus was held to be ineffectual under this set of circumstances.[30]

Where the submission of plans and specifications proves to be a financial hardship, and an unnecessary expense, although one of the procedural requirements in the zoning ordinance, the relator need not submit plans and specifications in order to prove the validity of his petition.[31]

B. *Clear Legal Right*

The condition precedent of clear legal right is a specific facet of the right to use mandamus.[32] Such right may arise from statute.[33] It will also arise when the petitioner seeks to establish a use in a residential area which does not substantially and permanently injure the appropriate uses of neighboring property,[34] or a use in a location not subject to a present and definite municipal plan or zone.[35] In a case where the relator sought to erect a gasoline station upon land zoned retail, a clear legal right was established when the respondent could not show a definite municipal use for or eminent domain proceeding upon the subject property.[36] Religious institutions have established clear legal right by showing that a municipal ordinance provided

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[30] State, ex rel. The Ice and Fuel Co. v. Krenyweiser, *supra,* n. 6.

[31] State, ex rel. The Killeen Realty Co. v. City of East Cleveland, 169 Ohio St. 375, 160 N. E. 2d 1 (1959) (Syllabus 2).

[32] C. J. S., *op. cit. supra,* n. 9.

[33] Ohio Rev. Code, *supra,* n. 2; see also: State, ex rel. Voad Hachinuch Hackaredi v. Baxter, *supra,* n. 6; Selby, Auditor v. State of Ohio, ex rel. Smiley, *supra,* n. 6; C. J. S., *op. cit. supra,* n. 3, Sec. 157.

[34] State, ex rel. Voad Hackinuch Hacharedi v. Baxter, *supra,* n. 6.

[35] Henle v. City of Euclid, 97 Ohio App. 258, 56 Ohio Ops. 39, 118 N. E. 2d 682, 125 N. E. 2d 355, dism. 162 Ohio St. 280, 55 Ohio Ops. 151, 122 N. E. 2d 792 (1954). See also: State, ex rel. Sun Oil Co. v. City of Euclid, 164 Ohio St. 265, 130 N. E. 2d 336 (1955).

[36] State, ex rel. Sun Oil Co. v. City of Euclid, *ibid.*; see also: State, ex rel. Dille Laboratories Corp. v. Woditsch, 106 Ohio App. 541; 7 Ohio Ops. 2d 318, 156 N. E. 2d 164 (1958); the municipality has no power or authority to appropriate lands for some contemplated future use—City of Cincinnati v. Vester, 281 U. S. 439, 50 S. Ct. 360 (1930).

for or did not specifically exclude such a use in a residential zone.[37] A religious institution established its right by proving that compliance with the zoning ordinance was in violation of its Constitutional Rights[38] (*i.e.*, Article I, Sections 1 and 19 of the Ohio Constitution, and Article XVI, Section 1 of the United States Constitution).

In many cases the proof of a clear legal right may be controlled by the peculiar location and neighborhood of the property. If the petitioner can prove that property adjacent to or within close proximity to his lot has been improved in the identical manner in which he anticipates improvement, then mandamus may become his appropriate remedy. Relator, in *State, ex rel. Rosenthal v. Bedford,*[39] seeking a permit for a filling station, was successful with mandamus by showing (1) that his corner lot was a busy intersection where two of the four corners were being used presently as filling stations and (2) that there was little probability that the lot would be utilized as zoned, residentially, since there had been previous acquisitions of the lot for highway and utility purposes. *State, ex rel. Prentke v. Village of Brookpark*[40] presented the situation of a residentially zoned lot fronting on a heavily traveled highway, used in large part by trucks from the surrounding industrial area. The court held the ordinance to be arbitrary, unreasonable and confiscatory, and allowed the change.

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[37] State, ex rel. Anshe Chesed Congregation v. Bruggeneier, 97 Ohio App. 67, 115 N. E. 2d 65 (1953). See also: State ex rel. The Synod of Ohio of United Lutheran Church in America v. Joseph, *supra,* n. 11.

[38] Young Israel Organization of Cleveland v. Dworkin, 105 Ohio App. 89, 133 N. E. 2d 174 (1956). See also: Preservation of Constitutional Rights, *supra,* n. 11; private individual property rights guaranteed under the constitution—State, ex rel. Geletka v. City of Campbell, *supra,* n. 9.

In Village of Ottawa v. The Odenweller Milling Co., *supra,* n. 27, Syllabus 1, the Court of Appeals upheld the relator's clear legal right where it found that the ordinance prohibiting the issuance of the building permit was "an unreasonable and discriminatory regulation having no substantial relation to the public health, morals, safety, or public welfare." Although relator's appeal was under mandatory injunction, court dictum stated that writ of mandamus could also have been used.

[39] 74 Ohio L. Abs. 425, 134 N. E. 2d 727 (1956). See also: State, ex rel. Husted v. Woodmansee, Comm'r, 86 Ohio L. Abs. 121, 169 N. E. 2d 655 (1960); Injunctive relief to overcome restrictions which substantially decrease value: Curtis v. City of Cleveland, 170 Ohio St. 127, 10 Ohio Ops. 2d 85, 163 N. E. 2d 682 (1959).

[40] *Supra,* n. 11.

C. *Acts in Excess of Authority*

Acts of refusal by municipal officers or boards which are in derogation of the powers invested in such officers or boards, ordinarily present sufficient grounds for mandamus. The statutes and ordinances from which such powers are derived will be strictly construed and cannot be extended to include limitations which originally were never clearly prescribed.[41] When such statutes or ordinances fail to lay down sufficient guidelines or criteria by which zoning officers or boards may exercise these vested powers, mandamus will lie to challenge such acts which appear to be outside of these powers.[42] It should be noted that where the relator files his writ of mandamus under a newly enacted temporary zoning ordinance, instituted pending the completion of an area zoning plan, his writ may be denied. For the law in force at the time the writ was taken out governs.[43] This is true, also, where a petition is filed following the suspension of a zoning ordinance.[44] However, under the laws in force at that time, mandamus will not issue where it is positively shown that no right can be enforced or wrong possibly remedied.[45]

Some acts in excess of legally vested authority arise from abuses of discretion.[46] An important case in this area is *State, ex rel. The Killeen Realty Co. v. City of Cleveland.*[47] Although

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[41] State, ex rel. Gulf Refining Co. v. DeFrance, 89 Ohio App. 1, 45 Ohio Ops. 315, 100 N. E. 2d 689 (1950). See also: State ex rel. Moore Oil Co. v. Dauden, *supra,* n. 6; State, ex rel. The Ice and Fuel Co. v. Krenyweiser, *supra,* n. 6; State, ex rel. Husted v. Woodmansee, Comm'r., *supra,* n. 39.

[42] State, ex rel. Associated Land and Investment Corp. v. City of Lyndhurst, *supra,* n. 7; see also: State, ex rel. Selected Properties, Inc. v. Gottfried, *supra,* n. 2; Cassell v. Lexington Township Board of Zoning Appeal, 163 Ohio St. 340, 127 N. E. 2d 11 (1955); State, ex rel. The Ice and Fuel Co. v. Krenyweiser, *supra,* n. 6; C. J. S., *op. cit. supra,* n. 4, Sec. 349.

[43] State, ex rel. The Ice and Fuel Co. v. Krenyweiser, *supra,* n. 6. See also: Hauser, Comm'r. v. State, ex rel. Erdman, *supra,* n. 11; State, ex rel. Gaede v. Guion, *supra,* n. 6; Bauman v. State, ex rel. Underwood, Dir., *supra,* n. 11; State, ex rel. Fairmount Center Co. v. Arnold, *supra,* n. 11; *Contra:* Ordinance in effect at time application for permit taken out governs—Gibson v. City of Oberlin, 171 Ohio St. 1, 12 Ohio Ops. 2d 1, 167 N. E. 2d 651 (1960); C. J. S., *op. cit. supra,* n. 4, Sec. 346.

[44] State, ex rel. Gaede v. Guion, *supra,* n. 6.

[45] State, ex rel. Ray v. Klein, 88 Ohio App. 237, 44 Ohio Ops. 426, 99 N. E. 2d 326 (1950). See also: State, ex rel. Apple v. Penze, 137 Ohio St. 569, 575, 31 N. E. 2d 841 (1941); State, ex rel. Stoer v. Raschig, Dir., 141 Ohio St. 477, 49 N. E. 2d 56 (1943); State, ex rel. Rhinehart v. Celebrezze, Dir., 147 Ohio St. 24, 67 N. E. 2d 776 (1946).

[46] C. J. S., *op. cit. supra,* n. 4, Sec. 346.

[47] *Supra,* n. 31.

relator's land was zoned for apartment use, it was surrounded on three sides by commercial-retail zones and on the fourth by a railroad track. The only means of ingress and egress for the proposed shopping center was over another's land. The court found that by failing to grant relator's permit, his land could not be economically utilized in relation to the surrounding development.[48] Mandamus compelled the permit to be issued because, under the particular circumstances, the refusal was an abuse of discretion. Such abuse may be found where municipal officials exercise their legislative function in an arbitrary, unreasonable and unlawful manner. For such acts do not bear a reasonable relation to the exercise of the delegated powers.[49]

D. *Exhaustion of Administrative Remedies*

The usefulness of mandamus has slowly been limited through the evolvement of stare decisis and enactment of statute. The condition precedent, that the relator must exhaust his administrative remedies before resorting to mandamus,[50] was recognized in court dictum in 1927.[51] A later case stated the identical condition is found in *State, ex rel. Lieux v. Village of Westlake.*[53] tion.[52] The leading Ohio Supreme Court decision on this condition is found in *State, ex rel, Lieux v. Village of Westlake.*[53] Herein, the relator was denied use of the writ of mandamus because he had not taken his appeal to the Board of Zoning Appeals before resorting to the courts. The Supreme Court felt that such a step would have given relator the relief requested. Then in 1953, the Ohio Legislature enacted Chapter 2731 of the Revised Code, which specifically defined this condition.[54]

In those instances where all administrative remedies have been exhausted, the courts have granted leave to rely upon man-

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[48] Declaratory judgment to compel permit where lot not economically usable—Krom v. City of Elmhurst, 8 Ill. 2d 104, 133 N. E. 2d 1 (1956).

[49] Schlagheck v. Winterfeld, 108 Ohio App. 299, 9 Ohio Ops. 2d 277, 161 N. E. 2d 498 (1958). See also: C. J. S., *op. cit. supra,* n. 3 at Sec. 156.

[50] Yokley, *op. cit. supra,* n. 2, Sec. 180, at 457. See also C. J. S., *op. cit. supra,* n. 4, Secs. 334 and 347.

[51] State, ex rel. Gaede v. Guion, *supra,* n. 6.

[52] Cleveland Trust Co. v. City of Cincinnati, 62 Ohio App. 139, 23 N. E. 2d 450 (1939).

[53] 154 Ohio St. 412, 96 N. E. 2d 414 (1951).

[54] "The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law." Sec. 2731.05.

damus.[55] Where the relator has fulfilled the condition precedent, he has not forfeited his right to question the constitutional validity of the ordinance through mandamus.[56] But to make such an attack justified, the available remedies must have been exhausted.[57] Regardless of whether constitutionality is an issue, either in a township[58] or a city,[59] resort to the available administrative remedy, usually a board of appeals,[60] is important.

Illustrative of the extent of such appeals is *State, ex rel. Ricketts v. Balsly.*[61] Relator operated a mobile home site on a portion of his land, such use being termed non-conforming under the existing zone. Seeking to transform the use to conforming, he petitioned the Hamilton County Rural Zoning Commission in 1952 and the Hamilton County Board of Zoning Appeals in 1953. Obtaining two rejections, he took his petition to the Court of Common Pleas, which granted his prayer. But when he attempted to enlarge his trailer park in 1959, he could not get a building permit or zoning certificate. Relator took his petition to court immediately, without following the once-tried administrative appeals. The court held against his writ of mandamus, holding that he had a plain and adequate remedy as defined by statute.

An exception to the exhaustion of remedies is to be found in *State, ex rel. Cubbon Jr. v. Winterfeld.*[62] Here, the relator established a clear legal right to the issuance of a permit of occupancy. The Court of Appeals of Lucas County ruled in favor of the writ of mandamus, stating that the petitioner did not have

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55 The Young Israel Organization of Cleveland v. Dworkin, *supra*, n. 38; State, ex rel. Anshe Chesed Congregation v. Bruggenmeier, *supra*, n. 37.

56 State, ex rel. Lieux v. Village of Westlake, *supra*, n. 53.

57 Pfeiffer v. Graves, Secretary of State, 88 Ohio St. 473, 104 N. E. 529 (1913); City of Cincinnati v. Hillenbrand, 103 Ohio St. 286, 133 N. E. 556 (1921); State, ex rel. Kittel, a Taxpayer v. Bigelow, 138 Ohio St. 497, 37 N. E. 2d 41 (1941); Belden v. Union Central Life Insurance Co., 143 Ohio St. 329, 55 N. E. 2d 629 (1944).

58 State, ex rel. Iaus v. Carlton, 168 Ohio St. 279, 60 Ohio Ops. 485, 154 N. E. 2d 150 (1958).

59 State, ex rel. Ronald, Inc. v. City of Willoughby, 170 Ohio St. 39, 9 Ohio Ops. 2d 386, 161 N. E. 2d 890 (1959). See also: State ex rel. Grant Se. v. Kiefaber, 171 Ohio St. 326, 14 Ohio Ops. 2d 3, 170 N. E. 2d 848 (1960); State, ex rel. Heights Jewish Center v. Haake, Ohio App. 8th District, dism. 165 Ohio St. 547 (1956).

60 Metzenbaum, *op. cit. supra*, n. 14, at 847.

61 112 Ohio App. 555, 171 N. E. 2d 538, affd. 171 Ohio St. 553, 173 N. E. 2d 117 (1960).

62 104 Ohio App. 260, 4 Ohio Ops. 2d 407, 148 N. E. 2d 523 (1957).

to exhaust his remedies where they were a cumbersome method of administrative appeals which did not afford an adequate legal remedy.[63]

Although specific cases make no reference to present statute, those which do have held for strict compliance under their terms. Section 2731.01[64] was interpreted to deny mandamus where the relator had not exhausted his remedies.[65] Section 2731.05[66] was the ground for refusing the writ where relator sought a single-family dwelling permit in a limited industrial zone.[67]

Important exceptions to such strict compliance have been found where the relator can attack the constitutionality of the law, ordinance, or regulation,[68] or he can establish a clear legal right to the issuance of the permit.[69] If such a right can be proved as a matter of fact and of law, the court will issue a peremptory writ of mandamus in the first instance.[70]

Chapter 2506

The enervation of the writ of mandamus was made more nearly complete on September 16, 1957 by the passage into law of Chapter 2506 of the Ohio Revised Code. The essence of this statute provides for appeals from decisions of any agency of any political division, (*i.e.,* officer, tribunal, authority, board, bureau, commission, department, etc.), to the Court of Common Pleas.[71] The authority of the Common Pleas Court to hear cases of zoning appeal from lower administrative boards has been affirmed in *Kolker v. Morr.*[72] The appellate court followed the statutory terms, stating that Common Pleas has jurisdiction to hear such cases on their merits, but that such appeal is "in addition to any

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[63] C. J. S., *op. cit. supra,* n. 4, Sec. 347.

[64] Ohio Rev. Code, *supra,* n. 2.

[65] State, ex rel. Ians v. Carlton, *supra,* n. 58; State, ex rel. Grant v. Kiefaber, *supra,* n. 59.

[66] Ohio Rev. Code, *supra,* n. 53.

[67] State, ex rel. Ronald Inc. v. City of Willoughby, *supra,* n. 59.

[68] State, ex rel. Vielhauer v. Leighton, 111 Ohio App. 227, 14 Ohio Ops. 2d 160, 171 N. E. 2d 748 (1959).

[69] State, ex rel. Trusz v. Village of Middleburg Heights, 112 Ohio App. 87, 82 Ohio L. Abs. 481, 163 N. E. 2d 778 (1960).

[70] Sec. 2731.06 of Rev. Code; State, ex rel. Gulf Refining Co. v. DeFrance, *supra,* n. 41.

[71] Ohio Rev. Code, Sec. 2506.01.

[72] 111 Ohio App. 300, 14 Ohio Ops. 2d 178, 165 N. E. 2d 469 (1959).

other remedy of appeal provided by law," [73] (*i.e.*, appeals to inferior administrative tribunals). If such inferior tribunal refuses to hear relator's appeal, Common Pleas may be resorted to directly.[74]

Cases controlled by this statute show mandamus being denied use for zoning appeals. In *State, ex rel. Fredrix v. Beachwood,*[75] relator was denied a permit to erect a commercial structure upon a residentially zoned lot. His resort to mandamus was hopeless because under the terms of Chapter 2506, he had a precise method of appeal which he failed to utilize. Relator's petition, in *State, ex rel. Gund Co. v. Solon,*[76] stated that the prevailing zoning ordinance was invalid because it was arbitrary and unreasonable and, for this reason, appeal from the zoning commissioner's refusal would be useless. Once again the court ruled that the statutory remedy was adequate; mandamus denied.

In the extremely comprehensive case of *State, ex rel. Trusz v. Village of Middleburg Heights,*[77] appeal from an adverse permit decision was denied because the court (1) could not find that the relator had a clear legal right to the remedy sought through mandamus, and (2) did find that he had an adequate remedy in the ordinary course of statutory procedure, (*i.e.*, Sections 2506.01 to 2506.04). Relator's procedural error was in resorting to mandamus, following an unsuccessful appeal to the Board of Zoning Appeals, when he should have appealed to Common Pleas. The adequacy of the legal remedy would have been impaired only where a clear legal right to the permit is established or the relief would be unreasonably delayed in the processes of appeal. The court cited *Eggers v. Morr,*[78] which states that a mere inconvenience in complying with the prescribed administrative steps of appeal does not amount to a valid excuse for resorting to another remedy. Taken together, it appears that the adequacy of the available legal remedy cannot be loosely construed.

One possible exception, on the appellate level, must be noted

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[73] "The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law." *Supra,* n. 71.

[74] Shaker-Coventry Corp. v. Shaker Hts. Planning Commission, 86 Ohio L. Abs. 47, 16 Ohio Ops. 2d 432, 176 N. E. 2d 332 (1961).

[75] 171 Ohio St. 343, 14 Ohio Ops. 2d 12, 170 N. E. 2d 847 (1960).

[76] 171 Ohio St. 318, 13 Ohio Ops. 2d 444, 170 N. E. 2d 487 (1960).

[77] *Supra,* n. 69.

[78] 162 Ohio St. 521, 55 Ohio Ops. 417, 124 N. E. 2d 115 (1955).

from a citation in the *Trusz Case. State, ex rel. Cubbon, Jr. v. Winterfeld*[79] involved Sections 519.12 and 519.19 of the Ohio Revised Code, which prescribes zoning appeal procedure in townships. These statutes are identical in administrative procedure with Chapter 2506, giving jurisdiction for appeals to the Court of Common Pleas. The relator proved his clear legal right to the issuance of a certificate of occupancy, and the court granted relief through mandamus. They stated ". . . that where a clear legal right is shown, the provisions for such cumbersome appeals (under Sections 519.12 and 519.19) do not constitute an adequate remedy at law." [80]

If the method of appeals under these sections is an inadequate remedy, what kind of a remedy does Chapter 2506 provide?

Conclusion

At this time the future of mandamus for zoning appeals must, of necessity, remain cloudy and uncertain. From its original unlimited utility, the writ has become useful in only limited circumstances. Under Sections 2731.06 and 2506.01, of the Ohio Revised Code, and Ohio Supreme Court decision, mandamus cannot be utilized where the administrative remedies have not been exhausted, or a clear legal right not established. The few cases where mandamus was allowed under current statutory restriction have only been tried at the appellate level. The exceptions involve a challenge of the constitutionality of an ordinance, or a showing of a clear legal right. The section above, entitled *Condition Precedent,* presents many instances of the use of the writ, but such instances have been untested against the current statutes.

Whether such procedural remedies, as defined by statute, are desirable has not been questioned in this work. But the extent of time involved in pursuing a private claim for a permit has not been overlooked. If, in order to finally resort to mandamus, the relator must go through all administrative steps, much time and money will have been exhausted, which may defeat any justifiable right originally possessed. A reduction in administrative procedure may become desirable.[81]

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[79] *Supra,* n. 1.

[80] State, ex rel. Cubbon Jr. v. Winterfeld, *supra,* n. 1, at 264.

[81] Fonoroff, Problems in Zoning Administration, 33 Ohio Bar 783 (1960).