centers to design them, or to erect barriers, to protect visitors from this type of incident.[19]

II. The New Mexico Supreme Court's Ruling

The New Mexico Supreme Court reversed the lower court's ruling.[20] It held that "foreseeability is not a factor for courts to consider when determining the existence of a duty, or when deciding to limit or eliminate an existing duty in a particular class of cases."[21] Instead, courts must "articulate specific policy reasons, unrelated to foreseeability considerations, if deciding that a defendant does not have a duty or that an existing duty should be limited."[22] The court focused on the factual nature of the foreseeability analysis and found that only a jury can consider the facts of particular cases.[23]

Apparently recognizing that it was breaking new ground, the court devoted the bulk of its opinion to explaining why foreseeability plays no role in determining duty, comparing and contrasting a foreseeability-driven duty analysis with a policy-driven one.[24] It criticized the former for requiring courts to scrutinize the facts of particular cases, a practice resulting in "fluid" and overly-factually-dependent duty determinations.[25] By contrast, the latter approach enabled courts to articulate a duty standard for a broad class of cases, without considering whether a defendant's conduct was foreseeable under the particular facts of a case.[26] This approach is meant to protect the jury's role in weighing evidence and making factual determinations: "Courts should not engage in weighing evidence to determine whether a duty of care exists or should be expanded or contracted—weighing evidence is the providence of the jury; instead, courts should focus on policy considerations when determining the scope or existence of a duty of care."[27]

The supreme court criticized the court of appeals' reliance on foreseeability, instead of policy.[28] For example, when the lower court considered the "nature of the activity and the parties' relationship" to it, it noted the "sheer improbability and lack of inherent danger" of a vehicle colliding with people inside a building.[29] That discussion, according to the supreme court, rested on the belief that the incident in *Rodriguez* was unlikely to occur, an assumption that rested in turn on the court's assessment of the particular facts at hand.[30] The court held that such considerations applied only in the analysis of

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Supreme Court of Ohio Upholds Challenge to the Application of Zoning Restrictions

*By Oliver Dunford**

Introduction

The Supreme Court of Ohio has long held that land-use restrictions may not apply retroactively to preclude the lawful use of land unless such use creates a public nuisance.[1] Accordingly, when a new zoning law restricts or outlaws existing uses that would otherwise be lawful, these "nonconforming uses" are "grandfathered in" and permitted to continue after the new law's effective date.[2] But only an actual *use* may be grandfathered in. The law generally does not protect the *contemplated* or *expected* use of land.

Or does it? In *Boice v. Village of Ottawa Hills*,[3] the Supreme Court of Ohio upheld a challenge to the application of a zoning restriction, and in the process, may have upended the traditional rule that only land *use* may be protected against retroactive zoning restrictions.

I. Background

Willis and Annette Boice owned two adjoining lots of real property: a 57,000-square-foot lot that included their house, and a vacant 33,000-square-foot lot.[4] When the Boices purchased these lots, the zoning code permitted structures to be built on any lot that was at least 15,000 square feet.[5] An amendment to the zoning code, however, required that "buildable" lots be at least 35,000 square feet.[6] The Boices later wanted to sell the vacant lot as a buildable lot and sought a variance to that effect.[7] The variance, however, was denied.[8]

Following administrative challenges, the Ohio Court of Appeals affirmed the denial.[9] According to the court, "to qualify as a valid preexisting nonconforming use, the use must be both existing and lawful at the time of the enactment of the zoning ordinance."[10] A nonconforming use does not arise simply because a property owner contemplated such use.[11] Here, the Boices "never *used* the [vacant] parcel as a buildable lot and therefore never acquired a vested right to use the property as a buildable lot."[12]

II. The Ohio Supreme Court's Decision

The Boices appealed to the Ohio Supreme Court

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and argued that they had acquired a vested right in the "buildable" status of their vacant lot, and that therefore, the village should have granted the variance.[13] The court, in a 4-to-3 decision, agreed—emphasizing traditional notions of individual property rights.

The court explained that zoning laws "are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled," and therefore, zoning laws are "ordinarily" construed in favor of the property owner.[14] Further, because zoning authority is a police power and "interferes with individual rights," any use of the police power "must bear a substantial relationship to a legitimate government interest and must not be unreasonable or arbitrary."[15] With these precepts in mind, the court determined that the denial of the "area" variance had resulted in "practical difficulties,"[16] including the greatly reduced value of the vacant lot, and concluded that the variance should have been granted.[17]

The majority identified "three pillars" supporting its conclusion: (1) the buildable status of the Boices' vacant lot should have been grandfathered-in; (2) the difference between the 35,000-square-feet requirement and the vacant lot's 33,000 square feet was de minimis; and (3) the Boices had been subject to disparate treatment, as they were the only property-owners who had been denied similar variances.[18]

Discussing the first factor, the majority returned to its earlier theme of individual property rights. Here, the majority relied on *Norwood v. Horney*,[19] the Ohio Supreme Court's landmark decision that prohibited the use of eminent domain for solely economic-development purposes.[20] In particular, the *Boice* majority cited *Norwood*'s discussion of the "Lockean notions of property rights" that were incorporated into the Ohio Constitution, thereby demonstrating "the sacrosanct nature of the individual's 'inalienable' property rights," which are to be held "forever 'inviolate.' "[21]

On these grounds, the majority rejected the argument that "until construction has begun on a lot, the lot has no legal 'use,' and the property owner can have no expectations about the future use of the property. . . ."[22] Otherwise, property would be "subject to gov-

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Powers v. State of Wyoming: Separation of Powers and the Role of the Judiciary

*By Stephen R. Klein**

In its 2013 General Session, the Wyoming Legislature passed Senate File 104, or Senate Enrolled Act 1 ("SEA 1").[1] The bill reassigned most of the duties of the state superintendent of public instruction to a director of education, to be appointed by the governor.[2] On the very day Wyoming Governor Matt Mead signed the bill into law, state Superintendent of Public Instruction Cindy Hill sued, claiming the law violated the Wyoming Constitution.[3] One year later, the Wyoming Supreme Court ruled that SEA 1 was unconstitutional in its entirety.[4] The case is of particular interest here because the extensive decision in *Powers v. State of Wyoming* contributes to discussions of separation of powers and the role of the judiciary.

Cindy Hill's lawsuit was quickly certified by the state district court to the Wyoming Supreme Court, with four questions. The Court's majority found one question dispositive—whether SEA 1 violated Article 7, Section 14 of the Wyoming Constitution—and declined to address the other three.[5] The majority found that SEA 1 deprived the superintendent of exercising her constitutional duty of "the general supervision of the public schools," noting that the law "amends a total of 36 separate statutes and substitutes 'director' for 'state superintendent' in approximately 100 places[,]" and that "the Act transfers the bulk of the Superintendent's previous powers and duties to the Director."[6] The court based its interpretation of the state constitution on the language of the constitution, constitutional history, and legislative history.

Article 7, Section 14 of the Wyoming Constitution has read as follows since Wyoming became a state in 1889:

> "The general supervision of the public schools shall be entrusted to the state superintendent of public instruction, whose powers and duties shall be prescribed by law."[7]

The State and Hill took opposing positions on the

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23 *Id.* The Court noted that courts may consider foreseeability, but only when ruling as a matter of law on breach or causation because no reasonable jury could have found either that the defendant breached his or her duty, or that the breach caused the plaintiff's damages. *Id.* * 9, ¶ 24.

24 Rodriguez, Nos. 33,896, 33,949, 2014 WL 1831148, at *3, ¶¶ 8-11 (comparing the foreseeability-driven approach of Chavez v. Desert Eagle Distributing Co., 2007-NMCA-018, 151 P.3d 77, with the Restatement-approved policy-driven approach in Gabaldon v. Erisa Mortgage Co., 1997-NMCA-120, 949 P.2d 1193).

25 *Id.* *3, ¶ 9.

26 *See id.* *4, ¶ 11.

27 *Id.* *7, ¶ 19.

28 *See id.* *4, ¶ 12.

29 *Id.*

30 *Id.* *5, ¶ 13. The Court explained:

> Since remoteness [of the incident] invites a discussion of particularized facts, we do not approve of using remoteness as the basis for a policy determination. A determination of no duty based upon the foreseeability, improbability, or remote nature of the risk is inconsistent with the Restatement approach, which provides that only "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." *Id.*

31 *Id.* *5, ¶ 15.

32 Rodriguez, Nos. 33,896, 33,949, 2014 WL 1831148, at *6, ¶ 17; *id.* *7, ¶ 19.

33 *See* Restatement (Third) of Torts: Physical & Emotional Harm, § 7, comment j ("Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.").

34 *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

35 *Id.* at 340-41, 344-45. *Id.* at 352 (Andrews, J., dissenting).

36 *Id.* at 352 (Andrews, J., dissenting).

37 James v. Meow Media, Inc., 300 F. 3d 683, 691 (6th Cir. 2002).

38 *Id.*

39 *See*, *e.g.*, J. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. Rev. 921, 938 (2005) ("Foreseeability often operates as a proxy for decisions of policy that have little to do with foreseeability's other conceptual purposes [which include] moral responsibility . . . behavioral modification and economic efficiency.").

40 According to the California Supreme Court, for example, the determination of whether a duty exists, involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. Wiener v. Southcoast Childcare Ctrs., Inc., 32 Cal. 4th 1138, 1145, 12 Cal. Rptr. 3d 615, 620 (2004) (quoting Rowland v. Christian, 69 Cal. 2d 108, 112-13, 70 Cal. Rptr. 97, 100 (1968)); *see also* Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co., 393 S.W.3d 379, 399 (Tex. Ct. App. 2012) ("We consider several related factors, including the risk, foreseeability, and likelihood of injury, weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant."); Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092, 1101 (Ill. 2012) ("[W]e have repeatedly stressed that the existence of a duty turns, not only on foreseeability alone, but in large part on public policy considerations.").

41 *See* Rodriguez, 2013-NMCA-020, ¶ 28. The only state supreme court to rule otherwise is Illinois. *See* Marshall v. Burger King, 856 N.E. 2d 1048, 1051, 1065 (2006).

Supreme Court of Ohio Upholds Challenge to the Application of Zoning Restrictions

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ernmental regulations that can change overnight."[23] Such a result "would eliminate the constitutional protections that people must be afforded…."[24] The appellate court's decision to the contrary had thus "ignore[d] well-settled land-ownership rights in this country."[25]

III. Dissenting Opinion

Had the appellate court ignored well-settled law? Not according to the dissent, which emphasized that (until now), a nonconforming use could be established only if "the property [was] actually . . . *used in that [nonconforming] manner*" at the time the zoning restriction was put in place.[26] Here, the Boices had *used* the vacant lot only as a side yard to their residential lot; they had never begun construction, and they had not even requested a variance until 26 years after the zoning ordinance was enacted.[27] The Boices' expectation that their property would always remain buildable was just that—an expectation, not a vested right.[28]

IV. Conclusion

The crux of this dispute is the interpretation of "use." As noted above, the majority rejected the notion that construction must begin before property owners may obtain a vested right in a "legal use."[29] The dissent disagreed with what it described as the "majority's transformation of 'expectations' into a legally cognizable 'use[,]' "[30] and argued that the majority's rationale marks a "drastic change" in

Ohio's zoning law.[31] Perhaps it will.

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Endnotes

1 City of Akron v. Chapman, 116 N.E.2d 697 (Ohio 1953).

2 *See, e.g.*, O.R.C. § 713.15 ("The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or an amendment to the ordinance, may be continued, although such use does not conform with the provisions of such ordinance or amendment ….").

3 Boice v. Vill. of Ottawa Hills, 999 N.E.2d 649 (Ohio 2013).

4 *Id.* at 650.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Boice v. Vill. of Ottawa Hills, 2011 Ohio 5681, at ¶¶7, 45.

10 *Id.* at ¶48.

11 *Id.*

12 *Id.* at ¶49 (emphasis sic).

13 *Boice*, 999 N.E.2d at 651.

14 *Id.* at 651-52 (internal quotation marks and citation omitted).

15 *Id.* at 652 (internal quotation marks and citation omitted).

16 *See* Kisil v. City of Sandusky, 465 N.E.2d 848 (Ohio 1984), syllabus ("The standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use." A successful application need show only "practical difficulties.").

17 *Boice*, 999 N.E.2d at 652-53. See *id.* (" '[T]he factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (*e.g.*, water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.' ") (quoting Duncan v. Middlefield, 491 N.E.2d 692 (Ohio 1986), syllabus).

18 *Id.* at 653-54.

19 110 Ohio St.3d 353, 2006 Ohio 3799, 853 N.E.2d 1115.

20 *See Boice* at 654, citing *Norwood*, 2006 Ohio 3799, at ¶¶34-38.

21 *Norwood* at ¶37, quoting Ohio Const., Art. I, §§ 1, 19.

22 *Boice*, 999 N.E.2d at 653.

23 *Id.* at 653-54.

24 *Id.* at 654.

25 *Id.*

26 *Id.* at 656 (Lanzinger, J., dissenting) (emphasis in the original) (citations omitted).

27 *Id.* at 657 (Lanzinger, J., dissenting).

28 *Id.* (Lanzinger, J., dissenting).

29 *Id.* at 653.

30 *Id.* at 657 (Lanzinger, J., dissenting).

31 *Id.* at 656 (Lanzinger, J., dissenting).

Missouri Supreme Court Unanimously Declares Cap on Punitive Damages Unconstitutional

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1820 is unconstitutional."[10] In other words, the *Lewellen* court found its controversial *Watts* decision controlling on the issue of whether application of § 510.265's statutory cap on punitive damages to a cause of action that existed in 1820 violates the right to a jury trial (as it existed in 1820 when the right to a jury trial became a state constitutional right).

Reviewing established cases, the Missouri Supreme Court determined that "there existed a right to a jury determination of the amount of punitive damages in a fraud cause of action in 1820" and that "imposing punitive damages [has been] a peculiar function of the jury" since at least 1820.[11] The *Lewellen* court concluded that § 510.265's cap on punitive damages "necessarily changes and impairs the right of a trial by jury 'as heretofore enjoyed.'"[12] Accordingly, the court held that "because section 510.265 changes the right to a jury determination of punitive damages as it existed in 1820, it unconstitutionally infringes on [a plaintiff's] right to a trial by jury protected by article I, section 22(a) of the Missouri Constitution."[13]

In finding the constitutional infirmity of § 510.265's punitive damages cap, the Missouri Supreme Court rejected the defendant's argument that because the Due Process Clause of the United States Constitution limits punitive damages (by prohibiting "the imposition of grossly excessive or arbitrary punishments on a