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Opinion No. 09-136

Statute of Limitations Applicable to Challenges to Zoning Changes

QUESTIONS

1. What statute of limitations and/or statute of repose applies to challenges to zoning changes to tracts of real property?

2. At what point does a zoning change, even if subject to collateral attack on a substantive or procedural ground, become insulated from challenge as to its validity?

OPINIONS

1. No specific statute of limitations applies to declaratory judgment actions challenging the validity of zoning ordinances and amendments. If the declaratory judgment action is pursued in the context of various substantive claims, the statutes of limitations applicable to the underlying substantive claims govern.

2. No absolute time limitation applies to challenges to the validity of a zoning ordinance or amendment. Nevertheless, an improperly enacted zoning ordinance or amendment may become insulated from attack where the ordinance has been in effect for a substantial period of time and there has been extensive public reliance on the ordinance's provisions.

ANALYSIS

As an initial matter, it should be noted that the common law writ of certiorari is the proper vehicle by which to seek judicial review of zoning decisions made by a local board of zoning appeals. *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983); *State ex rel. Moore & Assocs., Inc. v. West*, 246 S.W.3d 569, 576 (Tenn. Ct. App. 2004). The statute of limitations applicable to petitions for writ of certiorari is sixty days from the entry of the order or judgment appealed. Tenn. Code Ann. § 27-9-102 (2000).

Your request, however, appears to be directed to changes or amendments to zoning laws, which are legislative in nature and are not subject to the remedy of certiorari. An action for declaratory judgment "is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other legislative action of county, city or other municipal legislative authority enacting or amending zoning legislation." *Fallin*, 656 S.W.2d at 342. No specific statute of limitations applies to declaratory judgment actions. Inasmuch as a declaratory judgment action "is merely a procedural device for asserting various types of substantive

claims," the courts look to the substance of the claims to determine what statute of limitation applies. *State ex rel. Moore & Assocs.*, 246 S.W.3d at 581. In Tennessee, statutes of limitations for substantive claims can vary from a matter of days, such as the sixty-day requirement for filing petitions for writ of certiorari, to ten years, the longest possible period as set out in Tenn. Code Ann. § 28-3-110 (2000). *Edwards v. Allen*, 216 S.W.3d 278, 282 (Tenn. 2007). As long as the complaint is within the statute of limitations for the underlying substantive claims, the plaintiff can seek declaratory relief within the context of those claims.

Nevertheless, where a plaintiff contends that a zoning ordinance or amendment is void ab initio, such as where a local legislative body fails to comply with the statutory provisions for enacting the legislation, the plaintiff may seek a declaratory judgment of the zoning ordinance's or amendment's validity without regard to any particular statute of limitations. *See id*. Under the void ab initio doctrine, "an invalid statute or ordinance is treated as though it never existed." *Id*. at 289. Tennessee courts long have "recognized the doctrine of void ab initio" and specifically have acknowledged the doctrine's continuing viability in the context of zoning ordinances. *Id*. at 290.

Although no specific statute of limitations applies to declaratory judgment actions claiming that a zoning ordinance or amendment is void ab initio, the doctrine does have its limitations. In the zoning context, an exception exists to the doctrine of void ab initio where a zoning ordinance has remained unchallenged over a significant period of time. As the Court of Appeals has explained, "after long public acquiescence in the substance of an ordinance, public policy does not permit such an attack on the validity of the ordinance because of procedural irregularities." *Hutcherson v. Criner*, 11 S.W.3d 126, 134 (Tenn. Ct. App. 1999) (quoting *Trainor v. City of Wheat Ridge*, 697 P.2d 37, 39 (Colo. At. App. 1984)). The Supreme Court also has recognized this exception, observing that "[t]he modern trend is to find that the void ab initio approach fails when there has been reliance on an ordinance that has given rise to vested rights." *Edwards v. Allen*, 216 S.W.3d at 291.

The foregoing authorities reveal that there is no specific, measurable time limitation for challenging zoning ordinances and amendments under the void ab initio doctrine. In two Court of Appeals decisions, *Hutcherson v. Criner*, *supra*, and *Metropolitan Government v. Hudson*, 148 S.W.3d 907, 911 (Tenn. Ct. App. 2003), the court refused to invalidate zoning ordinances that had been in effect for over ten years. These authorities indicate, however, that the length of time the zoning ordinance has been in effect is not the only consideration. Key to the court's analyses in these cases is whether there has been public reliance on the ordinance such as to give rise to vested rights. Where there has been extensive reliance on the ordinance by local residents, the courts are less likely to invalidate such ordinances on the grounds of belatedly-discovered procedural irregularities.

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