

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0461

*UGW*

NORTHWEST ST. TAMMANY CIVIC ASSOCIATION,  
CATHERINE FRIEDRICHS-BAUMANN, MARK GROTE, UNCAS  
FAVRET AND GERALDINE F. SINGER

VERSUS

ST. TAMMANY PARISH

Judgment Rendered: November 9, 2011

Appealed from the  
Twenty-second Judicial District Court  
In and for the Parish of St. Tammany, Louisiana  
Docket Number 2010-12915

Honorable Richard A. Swartz, Judge Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

*Kuhn, J. <sup>by itself</sup> dissents for reasons assigned.  
Guidry, J. concurs in the result.*

**WHIPPLE, J.**

In this matter involving the grant of a conditional use permit, plaintiffs appeal the district court's judgment, which maintained defendants' exception of prescription and dismissed plaintiffs' suit with prejudice. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

The instant litigation arises out of the proposed use of certain property in St. Tammany Parish as a "non-processing waste transfer station," for the handling, temporary storage, and relocation of waste to registered landfills outside of the parish. In the protracted procedural history regarding this proposed use of the property, both a previous owner, Southeast Investment, LLC (Southeast Investment), and the present owner of the property, IESI LA Corporation (IESI), sought at different times to obtain a conditional use permit for the proposed waste transfer station.

Initially, in September 2006, Southeast Investment sought a conditional use permit for the project, which application was assigned case number CP06-11-199. Following a public hearing before the St. Tammany Parish Zoning Commission, the Zoning Commission approved the application in November 2006. No appeal was taken from the Zoning Commission's approval of Southeast Investment's application for a conditional use permit in case number CP06-11-199. Thereafter, Southeast Investment sold the subject property in November 2007 to CAT-4, LLC, which in turn sold the property to IESI in December 2007.

Although no appeal was taken from the Zoning Commission's approval of Southeast Investment's conditional use permit application, on September 15, 2008, approximately one year and ten months after the

Zoning Commission's decision, Northwest St. Tammany Civic Association<sup>1</sup> and various St. Tammany Parish residents filed a petition for writ of mandamus in the Twenty-second Judicial District Court, assigned suit number 2008-14871, challenging the Zoning Commission's earlier decision and seeking a writ of mandamus ordering St. Tammany Parish to issue a cease and desist order at the property site and rescind the conditional use permit granted to Southeast Investment in case number CP06-11-199 (hereinafter referred to as "the Southeast Investment suit").

Following a hearing on the petition and on various exceptions filed, the district court found that St. Tammany Parish Land Use Regulation Ordinance 523, section 3.0202(A)(2) applied and **required** a Transportation Impact Analysis (also referred to as a Traffic Impact Analysis) for all conditional uses when certain minimum acreage thresholds are met or exceeded. The court further held that, because those threshold levels were exceeded (given that the project site was greater than eight acres), the Zoning Commission had **no discretion** to waive the requirements for a Transportation Impact Analysis. Thus, the district court concluded that the conditional use permit, which was approved without Southeast Investment having submitted a Transportation Impact Analysis, was void *ab initio*.

Accordingly, by judgment dated October 8, 2008, the district court granted the writ of mandamus in the Southeast Investment suit and ordered St. Tammany Parish to rescind and cancel the conditional use permit granted

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<sup>1</sup>In the record before us, the Civic Association is referred to variously as "N.W. St. Tammany Civic Association, Northwest St. Tammany Civic Association," and "North West St. Tammany Civic Association." We refer to this party herein as Northwest St. Tammany Civic Association.

to Southeast Investment in case number CP06-11-199. St. Tammany Parish suspensively appealed the judgment.<sup>2</sup>

Thereafter, on November 3, 2008, less than one month after the district court ordered St. Tammany Parish to rescind the conditional use permit granted to Southeast Investment, IESI, as the present owner of the property, filed its own application, together with the required Traffic Impact Analysis, seeking a conditional use permit to operate a non-processing waste transfer station on the property. This new permit process initiated by IESI was assigned case number CP08-12-187.

On January 6, 2009, the Zoning Commission approved IESI's application. Pursuant to section 18-051.05 of the St. Tammany Parish Code of Ordinances, an appeal of the Zoning Commission's decision was taken to the St. Tammany Parish Council. Following a public hearing, the Parish Council, by a resolution adopted on February 5, 2009, likewise approved IESI's application for a conditional use permit in case number CP08-12-187 to operate the waste transfer station on its property.

Thereafter, on May 3, 2010, more than one year after the Parish Council approved IESI's application for a conditional use permit in case number CP08-12-187, plaintiffs herein, Northwest St. Tammany Civic Association, Catherine Friedrichs-Baumann, Mark Grote, Uncas Favret, and Geraldine F. Singer, filed the instant Petition for Writ of Mandamus, naming St. Tammany Parish as defendant. In their petition, plaintiffs sought a writ of mandamus commanding St. Tammany Parish to order all work on the property to cease and desist and to rescind the new conditional use permit

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<sup>2</sup>Although not parties to the Southeast Investment suit, Southeast Investment, CAT-4, and IESI also appealed the judgment. See N. W. St. Tammany Civic Association v. St. Tammany Parish through St. Tammany Parish Council, 2009-0926 (La. App. 1<sup>st</sup> Cir. 12/23/09)(unpublished).

granted to IESI in case number CP08-12-187.

St. Tammany Parish responded to the petition by filing various exceptions, including a peremptory exception of prescription. IESI intervened in this matter and also filed a peremptory exception of prescription. In support of the exceptions of prescription,<sup>3</sup> both St. Tammany Parish and IESI averred that judicial review of zoning decisions of the Parish Council is governed by section 18-051.05 of the St. Tammany Parish Code of Ordinances, which provides that such judicial review **shall** be filed in the Twenty-second Judicial District Court **within thirty days** after the decision of the Parish Council becomes final. Thus, St. Tammany Parish and IESI asserted that because plaintiffs' petition was filed more than one year following the Parish Council's decision to approve IESI's conditional use permit application, plaintiffs' claim for judicial review was clearly prescribed.

In opposition to the exceptions of prescription, plaintiffs raised several arguments. First, plaintiffs averred that the district court lacked jurisdiction to hear their appeal of the grant of a conditional use permit to IESI while the judgment rendered in the Southeast Investment suit was pending and, thus, that prescription did not run as to their appeal of the IESI conditional use permit until the appeal in the Southeast Investment suit was dismissed. Secondly, plaintiffs asserted that their filing of a First Supplemental and Amending Petition for Writ of Mandamus on March 6, 2009, **in the Southeast Investment suit** (through which they sought to challenge the Parish Council's decision to grant the new conditional use permit to **IESI**) tolled prescription of their claim. Plaintiffs further asserted that they had not

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<sup>3</sup>Because the district court maintained the exceptions of prescription and, thus, decreed that St. Tammany Parish's remaining exceptions were rendered moot, our analysis herein focuses on the exceptions of prescription.

received notice of the February 5, 2009 Parish Council resolution approving the grant of the conditional use permit to IESI. Thus, they contended that the thirty-day prescriptive period set forth in section 18-051.05 of the St. Tammany Parish Code of Ordinances never began to run. Additionally, plaintiffs averred that because the conditional use permit granted to IESI was subject to, or contingent upon, various conditions being met, prescription did not begin to run until those conditions were satisfied. Finally, plaintiffs asserted that the Traffic Impact Analysis submitted by IESI with its application was "a sham." Thus, they contended that because the Traffic Impact Analysis was invalid, the conditional use permit granted to IESI was also invalid and null and void and, thus, prescription did not begin to run.

Following a hearing on the exceptions, the district court rendered judgment dated October 20, 2010, maintaining the exceptions of prescription and dismissing plaintiffs' petition with prejudice. In reasons for judgment, the district court concluded that the present petition for writ of mandamus was not timely filed, as it was not filed within the thirty-day period set forth in section 18-051.05 of the St. Tammany Parish Code of Ordinances. The court also rejected plaintiffs' arguments that the appeal in the Southeast Investment suit interrupted prescription as to any action plaintiffs had to challenge the Parish Council's decision to grant IESI a conditional use permit and that their attempted filing of an amended petition in the Southeast Investment suit somehow affected prescription as to their challenge of the IESI conditional use permit. Additionally, the district court rejected plaintiffs' argument that they were entitled to individual notice of the Parish Council's decision and that lack of such notice had precluded commencement of the thirty-day prescriptive period.

From the October 20, 2010 judgment dismissing their suit, plaintiffs appeal. Although they list seven assignments of error, they present only two issues for review: (1) Whether the district court erred in granting the exceptions of prescription and in failing to find that prescription was tolled; and (2) whether the district court erred in failing to find that the appeal of the decision of the Parish Council dated February 5, 2009 was timely filed when the First Supplemental and Amending Petition for Writ of Mandamus was filed in the Southeast Investment suit on March 6, 2009.

### **PRESCRIPTION**

Liberative prescription is a mode of barring actions as a result of inaction for a period of time. LSA-C.C. art. 3447; SS v. State, Department of Social Services, 2002-0831 (La. 12/4/02), 831 So. 2d 926, 931. Generally, the burden of proving that an action has prescribed rests with the party pleading prescription. However, when the plaintiff's petition shows on its face that the prescriptive period has run, and the plaintiff contends there is a suspension or interruption of prescription, the burden is on the plaintiff to prove suspension or interruption. Roba, Inc. v. Courtney, 2009-0508 (La. App. 1<sup>st</sup> Cir. 8/10/10), 47 So. 3d 500, 506. When evaluating which prescriptive period is applicable to an action, courts look beyond the style and caption of the pleadings to determine the true nature or character of the action disclosed therein. SS, 831 So. 2d at 931; Ascension School Employees Credit Union v. Provost, Salter, Harper & Alford, L.L.C., 2004-1227 (La. App. 1<sup>st</sup> Cir. 6/10/05), 916 So. 2d 252, 257.

### **DISCUSSION**

#### **Applicable Prescriptive Period**

In the instant case, plaintiffs styled their petition as a "Petition for Writ of Mandamus." Mandamus is a writ compelling a public officer to

perform a ministerial duty required by law. LSA-C.C.P. arts. 3861 and 3863. Mandamus is an extraordinary remedy, which must be used sparingly by the court, and only to compel action that is clearly provided by law.<sup>4</sup> Poole v. The Louisiana Board of Electrolysis Examiners, 2006-0810 (La. App. 1<sup>st</sup> Cir. 5/16/07), 964 So. 2d 960, 963. Additionally, the remedy of mandamus is used only where it is the sole available remedy or where the delay occasioned by the use of any other remedy would cause an injustice. LSA-C.C. art. 3862; City of Hammond v. Parish of Tangipahoa, 2007-0574 (La. App. 1<sup>st</sup> Cir. 3/26/08), 985 So. 2d 171, 181.

While plaintiffs' petition herein ultimately seeks relief in the form of a writ of mandamus, a review of the petition reveals that plaintiffs are attempting to obtain **judicial review**, and ultimately reversal, of the Parish Council's February 5, 2009 decision to grant IESI a conditional use permit in case number CP08-12-187. Specifically, plaintiffs contend in their petition that they are "aggrieved by the action of the St. Tammany Parish Zoning Commission in approving the conditional use permit and by the concurrence of the St. Tammany Parish Council." They further challenge the **substance** of the Traffic Impact Analysis submitted by IESI with its application, contending that it was an inaccurate study and did not comply with the St. Tammany Parish Zoning Ordinance. Plaintiffs also contend that there was insufficient evidence "showing there will not be a depreciation of nearby property values" and that the Zoning Commission failed to consider the effects that a waste transfer station would have on "the public welfare."

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<sup>4</sup>Although the granting of a writ of mandamus, as a general rule, is considered improper when the act sought to be commanded contains any element of discretion, it has been allowed in certain cases to correct an arbitrary and capricious abuse of discretion by public boards or officials, such as the arbitrary refusal by an administrative body to grant a license. Poole v. The Louisiana Board of Electrolysis Examiners, 2006-0810 (La. App. 1<sup>st</sup> Cir. 5/16/07), 964 So. 2d 960, 963.



Thus, they contend in their petition that the Parish Council abused its discretion in concurring with the decision of the Zoning Commission and in granting IESI a conditional use permit. The assertions in plaintiffs' petition clearly reflect that the character of the action asserted therein is **an action for judicial review** of the merits of the Parish Council's decision to grant IESI a conditional use permit, a remedy which, as set forth in the St. Tammany Parish Code of Ordinances, is available to persons aggrieved by a zoning decision of the Parish Council.<sup>5</sup> See generally Big Train Construction Company, Inc. v. Parish of St. Tammany, 446 So. 2d 889, 890 (La. App. 1st Cr. 1984) (while plaintiff attempted to compel the issuance of a building permit through a writ of mandamus, its appropriate remedy was via an ordinary proceeding appealing the factual determination of the Parish Council). Accordingly, the time period applicable to judicial review of zoning decisions of the Parish Council is the applicable prescriptive period herein.

Section 18-051.05 of the St. Tammany Parish Code of Ordinances addresses review of zoning decisions and provides as follows:

A. Appeal to the Parish Council. Any person claiming to be aggrieved by a decision of the Parish Zoning Commission may appeal to the Parish Council, through the Parish Department of Planning, in written form within ten (10) days following the Commission's hearing. The appeal may be heard by the Parish Council at its next regularly scheduled meeting following the ten-day appeal period. The Parish Council shall have the exclusive right to overturn any Zoning Commission decision by a majority vote of the membership of the Parish Council.

B. Review of Council Decisions. **Any person or persons jointly or severally aggrieved by any decision of the Parish**

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<sup>5</sup>Indeed, in their memorandum in opposition to IESI's exception of prescription and in their brief on appeal, plaintiffs acknowledge that the First Supplemental and Amending Petition for Writ of Mandamus they attempted to file in the Southeast Investment suit "**was an appeal**" of the grant of the conditional use permit to IESI. (Emphasis added). Similarly, the petition filed herein, styled "Petition for Writ of Mandamus," was also clearly **an appeal** of the Parish Council's decision to grant IESI the conditional use permit.

**Council** relative to a request for amendment, supplement, or change to the regulations, restrictions, zoning district, land use category, or boundaries **may file a petition to the Twenty-Second Judicial District Court** in and for the Parish of St. Tammany for the issuance of a writ of certiorari or for other appropriate legal proceedings. The petition shall be filed **within thirty (30) days after the decision of the Council becomes final**, which shall commence on the day following the effective date of the Council's resolution or, when the adoption of an ordinance is required, the day following the effective date of the ordinance. The actions of the Parish Council shall be subject to review on the grounds of abuse of discretion, unreasonable exercise of police powers, an excessive use of powers granted to the Council, or the denial of the right of due process. However, the right of judicial review shall not be limited to the foregoing grounds. (Empasis added.)

Thus, plaintiffs herein were required to file their petition asserting their right to judicial review within thirty days after the decision of the Council became final, *i.e.*, within thirty days of February 6, 2009, the day following the effective date of the Parish Council's resolution concurring with the Zoning Commission's approval of the conditional use permit sought by IESI.<sup>6</sup> See Hardman v. City of Shreveport, 41,058 (La. App. 2<sup>nd</sup> Cir. 5/17/06), 930 So. 2d 1157, 1159 (pursuant to the Shreveport Code of Ordinances, plaintiff had thirty days to appeal the zoning decision of the city council to a court of competent jurisdiction); Bernard v. Parish of Jefferson, 04-19 (La. App. 5<sup>th</sup> Cir. 5/26/04), 874 So. 2d 406, 407, writ denied, 2004-1796 (La. 10/15/04), 883 So. 2d 1056 (pursuant to the Jefferson Parish Comprehensive Zoning Ordinance, plaintiff had thirty days after the decision of the Parish Council to bring suit to challenge the Council's zoning decision); and Vieux Carre Property Owners, Residents and Associates, Inc. v. City of New Orleans, 2001-0658 (La. App. 4<sup>th</sup> Cir. 8/16/01), 797 So. 2d 103, 104-105 (the New Orleans Comprehensive Zoning Ordinance requires that an appeal of a

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<sup>6</sup>Considering the foregoing, and the absence of citation by plaintiffs to any countervailing authority, we reject plaintiffs' assertion that the one-year prescriptive period for delictual actions, as set forth in LSA-C.C. art. 3492, applies to their action for judicial review.

zoning decision of the City Council be filed with the Civil District Court for the Parish of Orleans within fifteen days of the final zoning decision); also see generally LSA-R.S. 33:4780.47(A) (setting forth a 30-day rule for appeals of zoning rulings of municipalities governed by LSA-R.S. 33:4727).

Because plaintiffs' petition herein was filed more than one year after the Parish Council's resolution granting IESI the conditional use permit, it was clearly filed outside of the thirty-day period set forth in Section 18-051.05 of the St. Tammany Parish Code of Ordinances. As such, the petition was prescribed on its face, and plaintiffs had the burden of establishing an interruption or suspension of prescription. SS, 831 So. 2d at 931.

#### **Tolling of Prescription**

As noted above, in opposition to the exceptions of prescription filed by St. Tammany Parish and IESI, plaintiffs set forth several arguments in support of their contention that prescription was tolled herein. In maintaining the exceptions of prescription, the district court rejected those arguments. On appeal, plaintiffs challenge the district court's conclusion that the thirty-day prescriptive period was not tolled or "quelled."

First, plaintiffs contend that the district court erred in finding that their filing of a First Supplemental and Amending Petition in the **Southeast Investment suit** did not toll prescription as to their action for judicial review of the Parish Council's decision to grant **IESI** a conditional use permit. As set forth above, the Southeast Investment suit was an action through which the Northwest St. Tammany Civic Association and various St. Tammany Parish residents sought a writ of mandamus ordering St. Tammany Parish to rescind the conditional use permit granted to **Southeast Investment** in case number CP06-11-199. Finding that the parish had no discretion to grant the

conditional use permit where no Traffic Impact Analysis was supplied, the district court granted the writ of mandamus by judgment dated October 8, 2008. This judgment ordering rescission of the conditional use permit to Southeast Investment was appealed by numerous parties.

Notably, after a final judgment had been rendered and while the appeal of that judgment was pending before this court, the plaintiffs therein (some of whom are plaintiffs in the present action, but many who are not) attempted to file a First Supplemental and Amending Petition for Writ of Mandamus in the Southeast Investment suit. Because an answer had been filed in that action (and, indeed, a final judgment had been rendered), leave of court was required in order for plaintiffs to validly file their supplemental and amending petition. LSA-C.C.P. art. 1151. While the district court did sign an order allowing the filing of the amended petition, this court, on a writ application, reversed the district court's order, noting that pursuant to LSA-C.C.P. art. 2088, the district court was without jurisdiction to allow the filing of an amended petition. N.W. St. Tammany Civic Association v. St. Tammany Parish, 2009 - 0610 (La. App. 1<sup>st</sup> Cir. 10/19/09)(unpublished writ action).

Louisiana Code of Civil Procedure article 2088 provides that, on the granting of an order of appeal and the timely filing of an appeal bond where required, the trial court is divested of jurisdiction "over all matters in the case reviewable under the appeal," and jurisdiction of the appellate court attaches. Union Planters Bank, N.A. v. City of Gonzales, 2005-1898 (La. App. 1<sup>st</sup> Cir. 2/10/06), 923 So. 2d 790, 793, writ denied, 2006-0991 (La. 6/16/06), 929 So. 2d 1292. The provisions of LSA-C.C.P. art. 2088 do not address and, thus, do not authorize the filing of an amending and supplemental petition after a final judgment has been rendered, nor do any

other provisions of the Code of Civil Procedure authorize such a new petition after the signing of a final judgment. Jordan v. Willis-Knighton Medical Center, 40,564 (La. App. 2<sup>nd</sup> Cir. 1/25/06), 920 So. 2d 368, 372-373. Accordingly, because this court reversed the district court's order granting the plaintiffs in the Southeast Investment suit leave to amend their petition, they did not have the required permission or authority to file the First Supplemental and Amending Petition for Writ of Mandamus therein, and the amended petition was not properly filed. See Jordan, 920 So. 2d at 375.

As such, the reliance by plaintiffs in the instant case upon the attempted filing of an amending petition in the Southeast Investment suit as allegedly tolling prescription is misplaced. For these reasons, we find no error in the district court's conclusion that the unsuccessful attempt by the plaintiffs in the Southeast Investment suit to file a supplemental and amending petition had no effect on the prescriptive period within which judicial review of the grant of the IESI conditional use permit could be sought.<sup>7</sup> Thus, plaintiffs' argument that the attempted filing of the amending pleading in the Southeast Investment suit tolled prescription in the instant

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<sup>7</sup>Moreover, even if a supplemental and amending petition could have been filed in the Southeast Investment suit, we note that these two suits involve two separate conditional permits granted to two separate entities through two different permit application processes. Prescription is interrupted only when an action is **commenced** in a court of competent jurisdiction and venue. LSA-C.C. art. 3462. Under the particular facts of this case, we cannot conclude that the attempt to raise new or additional claims involving additional or different facts through an **amending** petition in a pending, albeit in some respects vaguely related, action constitutes the "commencement of an action" within the meaning of LSA-C.C. art 3462. Rather, we are constrained to conclude that the appropriate procedure available was the filing of a **new** action for judicial review of the grant of the new permit to a new entity. See Jordan, 920 So. 2d at 373.

suit lacks merit.<sup>8</sup>

We likewise reject plaintiffs' assertion that the Twenty-second Judicial District Court lacked jurisdiction over their action for judicial review of the grant of the conditional use permit to IESI while the suspensive appeal in the Southeast Investment suit was pending and, thus, that prescription could not have run herein during the pendency of that appeal. In advancing this argument, plaintiffs are misconstruing this court's ruling in the above-referenced writ application in the Southeast Investment suit, wherein this court held that the district court lacked jurisdiction, pursuant to LSA-C.C.P. art. 2088, to allow the filing of an amending pleading.

As set forth above, LSA-C.C.P. art. 2088 provides that when an appeal is granted, the trial court is divested of jurisdiction "over all matters in the case reviewable under the appeal." Simply because jurisdiction over the matters raised in **the Southeast Investment suit** had attached to this court and, thus, had been divested from the district court, in no way suggests that the district court lacked jurisdiction to entertain a claim for judicial review of an entirely separate decision of the Parish Council granting a new conditional use permit to a different entity after the initiation of a new and

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<sup>8</sup>Similarly, plaintiffs' assertion that prescription was tolled in the instant matter until the judge in the Southeast Investment suit denied their motion to set a status conference on March 22, 2010, also lacks merit. Plaintiffs contend that with the denial of their motion for a status conference, the district court "decided that [it] no longer had jurisdiction." However, as set forth above, with this court's October 19, 2009 reversal of the district court's order granting leave to file a supplemental and amending petition, the attempted filing of the amending pleading was not allowed. Thus, because the required permission or authority to file the supplemental and amending petition was not granted, there was no pending petition or claim before the court over which the court had jurisdiction in that matter, and by its ruling of March 22, 2010, denying a status conference, the district court was simply recognizing that fact. Thus, because there was no properly filed amending pleading before the district court in the Southeast Investment matter, there could be no tolling of prescription based on that attempted filing. Accordingly, because there was no tolling of prescription, the subsequent denial by the district court in the Southeast Investment suit of the plaintiffs' attempt to set a status conference therein would likewise not trigger the commencement of the 30-day prescriptive period herein, where prescription was never tolled.

separate permitting process. Indeed, as stated in footnote 7 supra, plaintiffs' remedy, as set forth in Section 18-051.05 of the St. Tammany Parish Code of Ordinances, was simply to file a **new action** in the district court challenging the grant of the new conditional use permit to a different entity. See Jordan, 920 So. 2d at 373. Thus, this argument also lacks merit.

Plaintiffs further aver that the district court erred in finding that lack of notice to them of the February 5, 2009 decision of the Parish Council did not quell prescription. Specifically, plaintiffs contend that “[n]one of the petitioners received notice of the council resolution dated February 5, [2009],” and, thus, that the 30-day period for filing an appeal never began to run. Statutes requiring notice preparatory to the enactment or amendment of zoning measures need not provide for actual notice. Palermo Land Co., Inc. v. Planning Commission of Calcasieu Parish, 561 So. 2d 482, 496 (La. 1990). Rather, constructive notice, as by publication in a local newspaper a specified number of times, has been deemed to be sufficient notice. Palermo Land Co., Inc., 561 So. 2d at 496.

In the instant case, plaintiffs had the burden of establishing a tolling of prescription, yet no evidence was offered to suggest that any required notice provision, such as constructive notice by publication, was not complied with, nor have they established their entitlement to actual or personal notice. Accordingly, we find no merit to their contention that the district court erred in finding that they failed to establish the “quelling” of prescription due to an alleged lack of notice. Thus, this argument also lacks merit.

Finally, we also find no merit to plaintiffs' contentions that the district court erred in finding that the failure of IESI to comply with the requirements of the St. Tammany Parish Land Use Ordinance and the 10/8/08 judgment in the Southeast Investment suit “quelled” prescription. In

support of this assertion, plaintiffs contend that the Parish Council granted the conditional use permit to IESI subject to a number of contingencies and that “[s]ince the original approval had conditions attached, these have to be met or prescription never runs.” This argument is also untenable.

In the instant matter, the February 5, 2009 resolution, through which the Parish Council concurred with the Zoning Commission’s approval of the conditional use permit, provides that after hearing the appeal of the decision of the Zoning Commission, the Parish Council “determined that the approval should be upheld with the following conditions,” and then lists thirty-two conditions under which the permit was granted. These conditions include provisions for the construction and operation of the facility, such as distance of the buildings from the property line, hours of operation once constructed, and insect and rodent control at the facility. Clearly, these conditions were intended to limit the impact of the facility on the surrounding community during the construction of the facility and in its operation after construction, which operation clearly could extend well into the future. As such, requiring compliance with all of these conditions prior to the commencement of the prescriptive period for an action for judicial review of the grant of the permit would not be possible, nor do we conclude that such an approach was intended. Issues of **compliance** with the permit are clearly separate from the issue of the propriety of **granting** the permit, which occurred on February 5, 2009, and of which this action seeks judicial review.

Moreover, as set forth in Section 18-051.05 of the St. Tammany Parish Code of Ordinances, the thirty-day period within which such judicial review may be sought begins to run on “the day following the effective date of the Council’s resolution.” The purpose of a prescriptive period is to allow a defendant a definite time after which an action can no longer be initiated.



See Todd v. Tate, 2004-2754 (La. App. 1<sup>st</sup> Cir. 12/22/05), 928 So. 2d 113, 118, writ denied, 2006-0158 (La. 4/24/06), 926 So. 2d 542. To accept plaintiffs' argument that the thirty-day period never runs until all conditions of the conditional use permit are met would create great uncertainty and confusion as to when prescription would begin to run and could lead to situations where litigants claim that prescription for review of a zoning decision had not commenced to run even years after the zoning decision was made. For these reasons, we also find no merit to this contention by plaintiffs that prescription of their action for judicial review had never begun to run.

Considering the foregoing and the record as a whole, we find no merit to plaintiffs' contentions, as set forth in their seven assignments of error and the two stated issues for review, that the district court erred in concluding that the thirty-day prescriptive period for judicial review of the Parish Council's zoning decision had not been tolled and that their action for judicial review of the grant of the conditional use permit to IESI was prescribed.<sup>9</sup>

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<sup>9</sup>We note that while the first thirty-six paragraphs of plaintiffs' petition clearly address a claim for judicial review of the Parish Council's decision to grant the conditional use permit, in the thirty-seventh paragraph of their petition, plaintiffs asserted that pursuant to the St. Tammany Parish Zoning Ordinance, IESI had one year from the grant of the conditional use permit to obtain the appropriate building permits or occupy the site and, further, that because IESI "ha[d] not met these requirements or requested an extension," the conditional use permit was null and void. While the act of rescinding a conditional use permit on the basis that it expired by operation of law due to failure to timely obtain appropriate building permits may be construed as a ministerial act for which mandamus could be appropriate, we note that the record before us contains copies of two building permits issued to IESI on March 6, 2009, approximately one month after the grant of its conditional use permit at issue herein.

Moreover, in their brief to this court, plaintiffs acknowledge that the building permits were issued on March 6, 2009, but argue that "[a]ny building permits which issue will fall if the [conditional use permit] falls." Thus, their contention seems to be that IESI had not obtained **valid** building permits (based on the underlying argument that the conditional use permit was invalid), rather than there being no **timely** building permits. Accordingly, to this extent, the allegations of this paragraph of the petition likewise relate to the underlying claim for judicial review of the Parish Council's decision to grant the conditional use permit, which claim has prescribed. Conversely, to the extent that plaintiffs were in fact contending that IESI had not timely sought building permits, the

## CONCLUSION

For the above and foregoing reasons, the October 20, 2010 judgment of the district court, dismissing plaintiffs' petition with prejudice, is affirmed. Costs of this appeal are assessed against plaintiffs, Northwest St. Tammany Civic Association, Catherine Friedrichs-Baumann, Mark Grote, Uncas Favret, and Geraldine F. Singer.

**AFFIRMED.**

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record establishes, and plaintiffs have in brief acknowledged, the inaccuracy of such an allegation.

NORTHWEST ST. TAMMANY  
CIVIC ASSOCIATION, ET AL

FIRST CIRCUIT


VERSUS

COURT OF APPEAL

STATE OF LOUISIANA

ST. TAMMANY PARISH

NO. 2011 CA 0461

 KUHN, J., dissenting.

I disagree with the majority's dismissal of plaintiffs' petition for a writ of mandamus based on a finding that their action is prescribed. In reaching this conclusion, the majority describes "plaintiffs are attempting to obtain **judicial review**, and ultimately reversal, of the Parish Council's ... decision to grant ... a conditional use permit." Thus, having characterized their allegations as a petition for judicial review, the majority looks to Section 18-051.05 of the St. Tammany Parish Code of Ordinances to determine that plaintiffs had thirty days to challenge the Parish Council's resolution approving the conditional use permit sought by IESI LA Corporation (IESI).

The majority has correctly pointed out that a writ of mandamus may issue only to compel performance by a public official of a ministerial duty required by law. See La. C.C.P. art. 3863. Although the granting of a writ of mandamus is considered improper when the act sought to be commanded contains any element of discretion, it has, nevertheless, been allowed in cases to correct an arbitrary and capricious abuse of discretion by public boards or officials. *Fire Prot. Dist. Six v. City of Baton Rouge Dep't of Pub. Works*, 2003-1205 (La. App. 1st Cir. 12/31/03), 868 So.2d 770, 772, writ denied, 2004-0299 (La. 4/8/04), 870 So.2d 270 (citing *State ex rel. Torrance v. City of Shreveport*, 231 La. 840, 846, 93 So.2d 187, 189 (1957); *State ex rel. People's State Bank v. Police Jury of Red River Parish*, 154 La. 389, 396, 97 So. 584, 587 (1923); *Louisiana Dep't of Treasury, Bd. of Trustees of State Employees Group Benefits Program v. Williams*, 451

So.2d 1308, 1311 (La. App. 1st Cir. 1984)). Generally, the action of a governmental body is arbitrary, capricious and unreasonable if it bears no relation to the health, safety, or general welfare of the public. *Fire Prot. Dist. Six*, 868 So.2d at 772. The test of whether an action is arbitrary or capricious is whether the action is reasonable under the circumstances. *Clark v. City of Shreveport*, 26,638, p. 9 (La. App. 2d Cir. 5/10/95), 655 So.2d 617, 622. It has also been noted that the violation of a specific city ordinance, rule, or regulation that prohibits the action can constitute an abuse of discretion. *Fire Prot. Dist. Six*, 868 So.2d at 772-73.

There is no time limitation set forth in La. C.C.P. arts. 3861-3866, stating when an action for mandamus may be brought. And La. C.C. arts 3445-3492 (addressing prescription) likewise do not provide any time limitation for instituting mandamus proceedings. Since there are no specific statutes providing a time limitation in which to bring a mandamus action, the courts have generally resorted to equity to prevent the pursuit of a tardy action for mandamus. La. C.C. art. 4; *Benoit v. Devillier*, 94-514 (La. App. 3d Cir. 11/2/94), 649 So.2d 523, 527, writ denied, 94-2928 (La. 1/27/95), 650 So.2d 243.

In this case, plaintiffs' petition avers that the traffic impact analysis submitted to the Parish in conjunction with IESI's application for a conditional use permit does not comply with Section 3.202(A)(2)(a) of the St. Tammany Zoning Ordinance. Additionally, plaintiffs aver that no evidence was presented to the Parish which shows that the conditional use permit will "preserve and advance the property and general welfare of the neighborhood and community" as required by the St. Tammany ordinances.<sup>1</sup> Thus, plaintiffs have alleged an abuse of discretion by the Parish because (1) issuance of the conditional use permit to IESI violates specific St. Tammany ordinances and (2) it was issued without any evidence

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<sup>1</sup> See St. Tammany Zoning Ordinance No. 523, Section 3.0301(C).

showing whether the conditional use of the land as requested by IESI bears on the health, safety, or general welfare of the public. See *Fire Prot. Dist. Six*, 868 So.2d at 772-73. Accordingly, despite the element of discretion plaintiffs seek to compel of the Parish by ordering that it rescind the conditional use permit it issued to IESI, because plaintiffs have alleged that such an order is required to correct an arbitrary and capricious abuse of discretion by the Parish, it is appropriate that plaintiffs be afforded a hearing on their mandamus action if it was timely asserted.

Turning to an application of equity in this case, see *Benoit*, 649 So.2d at 527, to resolve whether plaintiffs timely asserted their petition for a writ of mandamus, we note that the Louisiana Supreme Court stated in *Barnett v. Develle*, 289 So.2d 129, 139 (La. 1974),

The doctrine of laches is predicated on equity. It addresses itself to the evidentiary effect of delay. It is based on the injustice that might result from the enforcement of long neglected rights, the difficulty, if not the impossibility, of ascertaining the truth of a matter in controversy, and doing justice between parties and on the public policy of discouraging stale and antiquated claims in the interest of the peace and repose of society.

In this case, in light of the suspensive appeal taken in the earlier mandamus suit, the procedural posture of the earlier mandamus litigation (including the timing of the attempted amended petition and the pending motion to set a status conference in that lawsuit), and the timing of the dismissal of the appeals in the earlier appealed mandamus suit, equity dictates that plaintiffs be given a hearing on the propriety of issuance of an alternative writ of mandamus. Accordingly, I dissent.