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EXPLANATION OF WHY THIS CASE IS NOT A CASE  
OF PUBLIC OR GREAT GENERAL INTEREST

Article IV, Section 2(B)(2)(e) of the Ohio Constitution dictates that this court's discretionary jurisdiction is reserved for cases of public or great general interest, rather than for cases where the only parties interested in the outcome are the litigants in a particular case. See *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254, 12 O.O.2d 379, 168 N.E.2d 876. This case falls into the latter category. The Court of Appeals decision challenged here hinges in part on the fact that Brimfield Township is not a limited home-rule township under R.C. Chap. 504; it therefore does not affect townships that have adopted limited home rule. It is of interest only to the Brimfield Township Trustees and Kelli Bush, and township zoning regulations around the state are in no peril.

This case does not present any question of public or great general interest for two additional reasons: 1) because the Court of Appeals merely followed this Court's long-established reasoning when interpreting R.C. § 519.01; and 2) because Brimfield Township's second Proposition of Law was not before the Court of Appeals, and is therefore waived.

The appeals court decision at issue is remarkable only because it held the line for rural landowners against the tendency of a board of township trustees to exceed its authority. Contrary to the Brimfield Township Board of Trustees' position, the Eleventh District judges did not expand the scope of "agricultural uses" that Ohio law does not allow townships to regulate through zoning resolutions; instead, it held fast to the definition this Court established in the 1970s in the face of township officials who improperly wished to narrow it

This Court spoke to how Ohio defines "agricultural uses," particularly when dogs are involved, in another case arising out of Portage County, *Harris v. Rootstown Township Zoning*

*Board of Appeals* (1975), 44 Ohio St.2d 144, 73 O.O.2d 451, 338 N.E.2d 763. In *Harris*, this Court adopted a similar ruling from the Portage County Court of Appeals that held that the raising of dogs constitutes “animal husbandry” that falls within the definition of an agricultural use in R.C. § 519.01. In *Harris*, Rootstown Township officials wished to restrict “animal husbandry” to activities involving the breeding and raising of animals for human food consumption, which – especially as regards dogs – this Court found unpalatable. See *Harris*, 44 Ohio St.2d at 147-148.

Brimfield’s second Proposition of Law is barred by the doctrine of waiver. Brimfield asks this Court to declare that the Portage County Prosecutor’s Office was authorized to bring an action to enjoin an alleged common-law nuisance at Bush’s property. As the Court of Appeals held in denying Brimfield’s Motion for Reconsideration on this issue, only the question of whether Brimfield had properly brought a statutory public nuisance action was before the Court of Appeals. The question regarding common law nuisance was also not implicitly before the appeals court. It is therefore not a legitimate issue before this Court. See *Belvedere Condominium Unit Owners’ Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 1993-Ohio-119, 617 N.E.2d 1075.

As this case presents no question of public or great general interest, Appellee Bush respectfully urges the Court to decline jurisdiction.

## STATEMENT OF THE CASE AND FACTS

The Court of Appeals in this case restored to Kelli Bush the ability of to operate a nonprofit, state-licensed shelter for abused and abandoned dogs on her seven-acre parcel in Brimfield Township, which is located just south of the city of Kent at the western edge of Portage County. Bush does not take issue with Brimfield Township's recitation of the procedural history in this case, but would point out to the Court that the animal shelter at her property is not a *business*, as Brimfield claims. It manifestly *not* a "pet store" operated for profit; is instead a not-for-profit animal welfare organization concerned with the compassionate treatment of the abused, the neglected, and the unwanted among man's best friends. Furthermore, the Portage County Court of Common Pleas judgment from which Bush appealed to the Eleventh District granted Brimfield an injunction based on *statutory* nuisance, not common-law nuisance. Finally, Brimfield Township is not a limited home-rule township under R.C. Chap. 504.

### ARGUMENT OPPOSING APPELLANT'S PROPOSITIONS OF LAW

**Appellee's Proposition of Law No. 1: Using real property to operate an animal rescue shelter for unwanted and stray animals is an agricultural use of land and may not be regulated by a township zoning resolution.**

Two Ohio Revised Code sections are particularly relevant to this discussion: R.C. § 519.21, which restricts the zoning power of boards of township trustees; and R.C. § 519.01, which defines agricultural uses.

Revised Code Section 519.21, states, in pertinent part, that no board of township trustees may "prohibit the use of any land for agricultural purposes or the construction or use of buildings

or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located \*\*\*.” R.C. § 519.21(A). In turn, R.C. § 519.01 states that “ ‘agriculture’ includes farming; ranching; aquaculture;<sup>1</sup> apiculture;<sup>2</sup> horticulture; viticulture;<sup>3</sup> animal husbandry, including, but not limited to, the care and raising of livestock, equine, and fur-bearing animals \*\*\*.”

By its plain language, R.C. § 519.01’s definition of “animal husbandry” constitutes a non-exclusive list of activities that includes the *care* and raising of a wide variety of animals.<sup>4</sup> There is no dispute that the activities of the animal shelter on Bush’s property fall within the category of *care*, which is explicitly covered by this Section. Despite the statute’s plain language, Brimfield Township wants this Court to judicially amend the statute to exclude *care* and restrict dog husbandry to the narrow category of dog breeding. This is an untenable concept; not only is this a legislative, not a judicial function, it would serve to allow inhumane “puppy mill” breeding operations to go without regulation or scrutiny but allow townships to prohibit compassionate rescue operations. Furthermore, the activities the section explicitly mentions are so widely varied – from grape-growing and fish farming to beekeeping – that the language itself indicates an intent by the General Assembly to include, not exclude, all of the myriad ways in which Ohioans engage in agricultural pursuits.

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<sup>1</sup> The keeping and raising of fish.

<sup>2</sup> Beekeeping.

<sup>3</sup> Grape growing, as in vineyards.

<sup>4</sup> Ohio’s statute defines these terms differently than those in other states that Brimfield mentions. See, e.g., *Weber v. Board of County Com’rs of Franklin County* (Kansas 1994), 20 Kan.App.2d 152, 884 P.2d 1159.

Brimfield Township also asks the Court to further constrict the statute by defining dogs right out of the category of “livestock.” Again, the statute’s inclusive language is not so circumscribed, and this Court has already decided that “animal husbandry” includes the care and raising of dogs, polo ponies and mink, along with hogs and cattle. See *Harris*, 44 Ohio St.2d at 149-150. Furthermore, the question of whether a dog is “livestock” or a “companion animal”<sup>5</sup> is wholly irrelevant, given R.C. § 519.01’s broadly inclusive language.

Finally, Brimfield’s argument that R.C. § 519.02 allows a township to zone in the interests of public convenience, comfort, prosperity and general welfare mandate reversal is fatally flawed. First, the express language of R.C. § 519.21 *specifically supercedes* R.C. § 519.02. See R.C. § 519.21(A). Second, Brimfield Township did not argue this point before the Court of Appeals and has therefore waived it.

**Proposition of Law No. 2: A county prosecutor may not initiate an injunctive action on behalf of a township that lacks limited home-rule status in the case of an alleged common law nuisance.**

The question whether the Portage County Prosecutor’s Office had the authority to initiate an injunctive action against Bush for Brimfield Township on a common law nuisance theory was not before the Court of Appeals, because the Portage County Common Pleas Court did not issue any injunction against Bush on a *common law* nuisance theory. The issue is therefore waived.

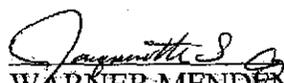
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<sup>5</sup> See R.C. § 959.131.

CONCLUSION

For the foregoing reasons, the propositions of law Brimfield Township raises do not pose questions of either public or great general interest. On this basis, Appellee Kelli Bush respectfully asks the Court to DENY jurisdiction and to decline to hear this case.

Respectfully submitted,

  
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*Counsel for Appellee, Kelli L. Bush*

CERTIFICATE OF SERVICE

A copy of the foregoing was sent via regular U.S. Mail on 31 November, 2007, to the following:

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Assistant Portage County Prosecutor  
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One of the Attorneys for Appellee

**APPENDIX**

STATE OF OHIO )  
 )SS.  
COUNTY OF PORTAGE )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT  
FILED  
COURT OF APPEALS

BOARD OF BRIMFIELD TOWNSHIP  
TRUSTEES,

NOV 09 2007

LINDA K. FANKHAUSER, CLERK  
PORTAGE COUNTY OHIO

Plaintiff-Appellee,

JUDGMENT ENTRY

- vs -

CASE NO. 2005-P-0022

KELLI L. BUSH,

Defendant-Appellant.

This matter comes before us on Appellee Brimfield Township Board of Trustees' motion for reconsideration under App.R. 26. For the reasons that follow, the motion is denied.

This court has held that a motion for reconsideration is not designed for instances in which the movant simply disagrees with the conclusions reached and the reasoning adopted by the court of appeals. *State v. Owens* (1997), 112 Ohio App.3d 334, 336. Rather, App.R. 26 provides a mechanism by which a party may prevent a miscarriage of justice that would arise where the court of appeals makes an obvious error or renders an unsupportable decision under the law. *Owens*, supra.

The standard of review on a motion for reconsideration is very limited. The test to be applied is whether the motion calls to the attention of the court of appeals an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it

should have been. *Id.* at 335-336; *In re Estate of Traylor*, 7th Dist. Nos. 03 MA 253-259 and 03 MA 262, 2005-Ohio-1348, at ¶3-4.

The purpose of a motion for reconsideration is not to again invoke a decision from the court on matters that have previously been considered, but rather to direct the attention of the court to some questions of law or fact that have not been given attention. *Garfield Heights City Sch. Dist. v. State Bd. Of Educ.* (1992), 85 Ohio App.3d 117, 127-128; *Leganshuk v. Department of Liquor Control* (1953), 67 Ohio L. Abs. 402. Thus, reconsideration will be denied where no new question is presented or no issue is raised that was not discussed in the original opinion. *Larimore v. Brown* (1943), 40 Ohio L. Abs. 385.

Reconsideration will not be allowed to simply assign new errors that were not brought to the attention of the court in the original hearing. *State ex rel. Helpmeyer v. Shroyer* (1936), 23 Ohio L. Abs. 420.

"[A] motion for reconsideration pursuant to App.R. 26(A) is not an opportunity to raise new arguments that a party simply neglected to make earlier in the proceedings, but is an opportunity to correct obvious errors in the appellate court's opinion in order to prevent a miscarriage of justice." *Traylor*, *supra*, at ¶8.

Upon review of the board's motion, it has not pointed to any obvious error in our decision, nor has it raised any issue for consideration that was not considered or not fully considered by this court in its decision.

Appellee argues we should reconsider our decision and affirm the trial court's judgment entry on the ground that appellant alleged common law nuisance in its complaint. The flaw in appellee's argument is that the trial court

did not base its final judgment on this theory and appellee failed to raise this issue in its appellate brief.

The trial court's journal entry, dated September 7, 2004, awarded a preliminary injunction to appellee on the basis of a zoning violation and common law nuisance. The case was later called for trial, following which the court, by its entry, dated March 9, 2005, awarded a permanent injunction to appellee on the basis of a zoning violation and a public nuisance. The trial court did not find appellant's conduct constituted a common law nuisance in its final judgment.

In its motion for reconsideration, appellant concedes that "statutory nuisance did not apply in this case" and that the trial court did not include common law nuisance as a basis for its permanent injunction. Since appellee failed to raise the issue of nuisance on appeal, it cannot ask us to reconsider our decision on this basis. *Helpmeyer, supra; Traylor, supra*. As the court in *Traylor* held, "If Appellees failed \*\*\* during the direct appeal to rebut Appellant's arguments, it is Appellees' error and not this Court's error." *Id.*

Appellee's argument about the right of various parties to bring an action for common law nuisance is irrelevant to these proceedings in that appellee did not pursue such theory on appeal.

Appellee's argument that it alleged common law nuisance in its complaint is also irrelevant because it did not assert this issue on appeal. By failing to raise the issue of common law nuisance, or any other type of nuisance, on appeal, appellee is precluded from asserting this argument now. As indicated *supra*, a party moving for reconsideration may not assert arguments that were not brought to the attention of the court of appeals in the original hearing. *Traylor, supra*.

Appellee misconstrues its burden on appeal. Contrary to its argument, appellant was under no obligation to "assign as error any issue relating to common law nuisance." Appellant's appeal did not rely on this theory, and so she had no obligation to assert it. In fact, we do not see how the issue could have been properly raised since the permanent injunction was not based on common law nuisance. In any event, if appellee believed the permanent injunction should have been based on common law nuisance, it, rather than appellant, had the duty to raise the issue on appeal.

Appellee argues the trial court's finding of common law nuisance in its preliminary injunction survives as a basis for the permanent injunction, even though there is no finding of common law nuisance in the final judgment. This argument ignores the basic distinction between a preliminary and permanent injunction.

It is well-established that an order of the common pleas court granting a temporary injunction in an action in which the ultimate relief sought is a permanent injunction is not a final order. *State ex rel. Tollis v. Cuyahoga Cty. Court of Appeals* (1988), 40 Ohio St.3d 145. The Court in *Tollis* established the rule that a preliminary injunction, not being final, is not a final appealable order.

A trial court in issuing a preliminary injunction attempts to merely "preserve, from irreparable harm, the rights of the party in whose favor the preliminary injunction was granted, until such time as the matter [can] finally be decided on the merits." *Interamerican Trade Corp. v. Phillips* (Sept. 30, 1992), 2d Dist. Nos. 13664 and 13677, 1992 Ohio App. LEXIS 4963, \*4-\*5. The court in

*Phillips* held that "a preliminary injunction is not a final appealable order." *Id.* at \*5.

In *East Galbraith Nursing Home, Inc. v. Ohio Dept. of Job and Family Services*, 10th Dist. No. 01AP-1228, 2002-Ohio-3356, the Tenth Appellate District, in holding that an order granting a preliminary injunction was not a final appealable order, noted that the injunction at issue was not meant by the trial court to be a permanent injunction. The trial court labeled the order as preliminary. The court retained jurisdiction over the subject matter while the preliminary injunction was in effect. Finally, by the preliminary injunction, the court did not make a final determination concerning the merits of the case.

Virtually the same procedural background in *East Galbraith* was presented here. The trial court's entry, dated September 7, 2004, states that appellant is "hereby *preliminarily* restrained and enjoined from bringing to her property \*\*\* any dogs, but Defendant may continue to care for such dogs located on the premises *during the pendency of this action* \*\*\*." (Emphasis added.) Thereafter, the trial court set the matter for trial on appellee's request for a permanent injunction on November 5, 2004. The court later granted a defense request for a continuance to allow discovery to proceed. Subsequently, a permanent injunction issued. The trial court thus retained jurisdiction of the case after it issued the preliminary injunction and did not consider its temporary order to be final.

It must also be noted that Civ.R. 54(B) provides in part: "\*\*\*\* [A]ny order or other form of decision \*\*\*, which *adjudicates* fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and *the order or other form of decision is subject*

*to revision at any time before the entry of [final] judgment \*\*\*.*" (Emphasis added.) Since the preliminary injunction did not finally adjudicate the rights of the parties, the decision incorporating the same was subject to revision at any time until the entry of final judgment. Thus, by not including common law nuisance as a basis for the permanent injunction, the trial court in effect revised its earlier preliminary injunction to exclude common law nuisance as a basis for the permanent injunction.

Appellant argues that the agricultural-use defense set forth at R.C. 929.04 would not be available to appellant in a civil nuisance action. As appellant did not assert this defense at trial or on appeal, appellee's argument is irrelevant. Further, appellee failed to raise this argument on appeal, and may not make it for the first time on a motion for reconsideration.

Next, appellee argues that because townships may act in the interest of the general welfare under the 2005 amendment to R.C. 519.02, this might have an impact on our review of this matter with respect to public nuisance. Since appellee concedes appellant's activities did not constitute a public nuisance, this argument is irrelevant. In any event, we note that the 2005 revision reinstated the general rule that townships do not zone in the interest of general welfare and only allows a township to regulate for the general welfare in very limited circumstances not pertinent here.

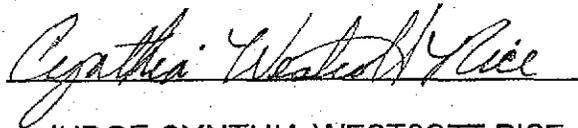
Next, appellee argues the fact that appellant operates her business pursuant to a state-issued license is irrelevant to whether her business constitutes a nuisance. It must be noted that appellee failed to make this argument on appeal, although the record clearly established that appellant has a

state-issued license to operate her facility. As a result, appellee cannot maintain this argument as a basis for its motion. Appellee further argues that because dog shelters are not extensively regulated by the state, appellant's license is irrelevant. However, there is nothing in the record to establish this.

In sum, the sole argument asserted by appellee on appeal was that the agricultural use exemption did not apply to appellant's dog shelter activities. Because appellee did not even address the nuisance issue on appeal, it cannot raise it now.

Appellee has failed to identify any obvious errors in this court's original decision or any factual or legal issues that we did not fully address.

Based upon the foregoing analysis, appellant's motion for reconsideration is denied.



JUDGE CYNTHIA WESTCOTT RICE  
PRESIDING JUDGE

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., dissents.