IN THE SUPREME COURT OF OHIO

B.J. ALAN COMPANY, *et al.*,	:	CASE NO. 08-0306
Plaintiffs/Appellees,	:	
v.	:	On Appeal from the Wayne County Court of Appeals, Ninth Appellate District C.A. No. 07CA0051
CONGRESS TOWNSHIP BOARD OF ZONING APPEALS, et al.,	:	
Defendants/Appellants	:	

APPELLEES' MEMORANDUM IN RESPONSE TO CONGRESS TOWNSHIP'S JURISDICTIONAL MEMORANDUM

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THIS CASE DOES NOT INVOLVE A MATTER OF PUBLIC OR GREAT GENERAL INTEREST

This case arises from an administrative appeal under R.C. Chapter 2506 relating to the wrongful enforcement of a local township zoning resolution to block the construction of a commercial fireworks store that has been licensed and authorized by the State Fire Marshal under Ohio law. Contrary to Congress Township's assertions, the Ninth District Court of Appeals has not held that townships may never rely upon county comprehensive plans in exercising their statutory authority to zone property under R.C. 519.02. Rather, as set forth in the opinion, the Court of Appeals merely held, based upon the unique facts presented in this case, that the 1994 Congress Township Zoning Resolution violated R.C. 519.02 because it failed to follow the Wayne County Comprehensive Plan or any conceptual plan of zoning in determining what areas of the township would be subject to business/industrial uses under the Township's "B" zoning classification. See *B.J. Alan Co. v. Congress Twp. Bd. Of Zoning Appeals*, 2007-Ohio-7023, ¶ 2, 7, 14-15 (Dec. 28, 2007) ("Opinion").

In this regard, the Ninth District's opinion turns on the unique factual circumstances presented by this case and will not significantly affect other townships throughout the state. Here, it is undisputed that Congress Township's 1994 Zoning Resolution created two zoning classifications – "A" for Agricultural and "B" for Business/Industrial. (Opinion, ¶ 2). In so doing, however, Congress Township failed to follow any "general conceptual plan," including the Wayne County Comprehensive Plan, in determining what areas of the township would be subject to "B" business/industrial uses. (*Id.* at ¶ 14). Rather, as Appellants openly admitted in their appellate brief, the Township elected to delegate the responsibility for implementing the "B" zoning classification to the Board of Zoning Appeals, which reviews and approves

business and industrial uses on a case-by-case basis through the granting of "business use variances." (Opinion, ¶ 2).

As this Court and other appellate courts have long held, this *ad hoc* method of zoning is invalid and unenforceable under Ohio law because it violates R.C. 519.02's requirement that townships zone property "in accordance with a comprehensive plan" and because it wrongfully allows for the "arbitrary and unreasonable" enforcement of the zoning resolution by local zoning officials. *Cassell v. Lexington Twp. Bd. of Zoning Appeals* (1955), 163 Ohio St. 340, paragraph one and two of syllabus; *Bd. of Twp. Trustees of Ridgefield Twp. v. Ott*, 1994 WL 17542 (Ohio App. 6 Dist. 1994); *Clegg v. Bd. of Zoning Appeals of Newton Twp.*, 1987 WL 10755 (Ohio App. 11 Dist. 1987). Accordingly, the Court of Appeals' decision is consistent with existing precedent and does not present a certified conflict or a matter of public or great general interest that warrants Supreme Court review.

STATEMENT OF FACTS

A. Congress Township's Zoning Resolution

It is well-established that a township's power to zone property must comply with R.C. 519.02, which authorizes townships to regulate the use of land and buildings "by resolution, in accordance with a comprehensive plan." *Id.* Here, Congress Township (the "Township") first enacted a zoning resolution in 1994. As set forth therein, the 1994 Zoning Resolution called for two zoning districts: "A" for Agricultural and "B" for Business and Industry. In general, the permitted uses in the "A" zoning classification are residential and agricultural and do not include business or industrial uses. Although business and industrial uses are expressly permitted by the "B" zoning classification, Congress Township's Zoning Inspector, Chet Martin, has admitted that the Congress Township Zoning Resolution failed to designate any

specific areas within the township where business or industrial uses would be permitted under the "B" zoning classification. Rather, Congress Township elected to delegate the responsibility for implementing the "B" zoning classification to the Congress Township Board of Zoning Appeals ("BZA"), which reviews and approves proposed business uses on a case-by-case basis through the granting of "business use variances." (*See* Congress Twp. 9th Dist. Appeal Brief, pp. 15-16).[1]

B. Appellees' Proposed Business Use of the Property.

As set forth in the Ninth District's opinion, Appellees B.J. Alan Co., Phantom Fireworks, and Zoldan Family Ltd. Partnership ("Appellees" or "B.J. Alan") are seeking to construct and operate a state-licensed fireworks store on 6.815 acres of vacant land that was acquired at the intersection of Interstate 71 and State Route 539 (the "Property"). The proposed business use is a lawful and permitted use that has been licensed by the State Fire Marshal under R.C. Chapter 3743 and the regulations promulgated thereunder. Although the proposed fireworks store has been authorized by state law, the Congress Township Zoning Inspector initially refused to issue a zoning certificate because the Property was not designated for business use under the "B" zoning classification. Rather, like all other proposed business owners, the Zoning Inspector directed B.J. Alan to apply for a "business use variance" from the Congress Township BZA.

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[1] This undisputed fact is referenced in the Ninth District's Opinion at ¶ 2 and was openly admitted by Congress Township in its appellate brief. *See* Congress Twp. 9th Dist. Appeal Brief, pg. 15 ("Congress Township voted to maintain the unincorporated area of the Township as agricultural/residential, and reserve the option to the Board of Zoning Appeals to review and approve business or industrial uses for conditional uses or variances"); *Id.* at 16 (admitting that "[b]usiness use is approved on a case by case basis by the Board of Zoning Appeals").

On November 20, 2006, the Congress Township BZA voted to deny the proposed use variance and zoning certificate under the 1994 Zoning Resolution. Appellees then filed an administrative appeal under R.C. Chapter 2506 and, among other things, requested that the lower courts determine whether the 1994 Zoning Resolution was valid and enforceable under Ohio law. First, B.J. Alan argued that the Township failed to zone business uses "in accordance with a comprehensive plan" because it created two zoning classifications — "A" Agricultural and "B" Business/Industry — but wrongfully failed to designate any property within the Township for commercial/business use under the "B" Business/Industry zoning classification.[2] Second, B.J. Alan argued that the Township's zoning resolution was preempted by state law because the Township did not have the authority to prohibit this state-licensed activity in all zoning districts throughout the Township.[3] Accordingly, Appellants requested that the Court of Appeals declare that the Congress Township Zoning Resolution was invalid and unenforceable as a matter of law.

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[2] *Cassell v. Lexington Twp. Bd. of Zoning Appeals* (1955), 163 Ohio St. 340, paragraph one of syllabus (township's zoning resolution invalid because it failed to designate areas where designated uses would be permitted); *Bd Of Twp. Trustees of Ridgefield Twp. v. Ott*, 1994 WL 17542 (Ohio App. 6 Dist. 1994) (township zoning resolution was invalid because it created multiple zoning classifications, including a business zoning classification, but failed to designate any area where a business use would be permitted); *Clegg v. Bd. Of Zoning Appeals of Newton Twp.*, 1987 WL 10755 (Ohio App. 11 Dist. 1987) (township zoning resolution was invalid because it created an R2 zoning classification, but failed to designate where R2 uses would be permitted); *Armrose v. Kings Quarries, Inc.*, 1982 WL 5410, *5-7 (Ohio App. 5 Dist. 1982) (township zoning resolution was invalid because it created three zoning classifications ("R" "B" and "I"), but failed to designate any "R" "B" or "I" zoning districts).

[3] *See Edinburg Twp. Trustees v. 14 & 76 Novelty Co., Inc.*, 1992 WL 192377, *3 (Ohio App. 11 Dist. 1992) (holding that a township may have authority to limit licensed fireworks store to certain zoning districts, but did not have the authority to prohibit this licensed activity in all zoning districts).

C. The Court of Appeals' Opinion.

After the trial court initially affirmed the Township's zoning resolution under R.C. 2506.04, the Ninth District Court of Appeals sustained B.J. Alan's First Assignment of Error and reversed the trial court's judgment as a matter of law. In this regard, the court of appeals did not hold that a township zoning resolution was invalid because it was drafted in reliance upon a county comprehensive plan, as opposed to a township comprehensive plan. Rather, upon review of the evidence in the administrative record, the Court of Appeals sustained B.J. Alan's first assignment of error because it found that Congress Township failed to follow "any general conceptual plan" (including the Wayne County Comprehensive Plan) in determining the specific areas within the township where commercial development would be permitted under the "B" zoning classification. (Opinion, ¶ 7, 14-16).

In this regard, the Court of Appeals' opinion must be read in the context of the specific facts and legal issues presented by Appellants' First Assignment of Error. As previously discussed, Appellants' First Assignment of Error argued that the 1994 Zoning Resolution was invalid and unenforceable because it created a "B" zoning classification for business/industrial uses, but failed to designate, in advance and based upon a comprehensive plan of zoning, what specific areas would be subject to business uses under the "B" zoning classification. (Opinion, ¶ 7). In this regard, the Court of Appeals stated that it "agreed" with this first assignment of error and proceeded to follow this Court's decision in *Cassell v. Lexington Twp. Bd. Of Zoning Appeals* (1955), 163 Ohio St.3d 340, to hold that a township's zoning resolution is unlawful and unenforceable under the enabling statute (R.C. 519.02) if it "fails to delineate which specific areas may be used for specific uses when the township has established various zoning districts." (*Id.* ¶ 7, 15).

In so doing, the Court of Appeals did not hold that a township's zoning resolution was invalid because it allegedly was drafted in reliance upon the 1977 Wayne County Comprehensive Plan. Rather, upon review of the evidence in the administrative record, the Court of Appeals held that Congress Township's zoning resolution was invalid because, with respect to commercial development, the Township did not follow the Wayne County Comprehensive Plan (or any "general conceptual plan") in determining what areas would be subject to commercial development under the "B" zoning classification. (Opinion, ¶ 14). In particular, the Court of Appeals specifically examined the details of the 1977 Wayne County Comprehensive Plan and found that it provided that commercial development should occur in the region as a "result of local initiative *within a general conceptual plan.*" (*Id.*) (emphasis added). Thus, the Court of Appeals did not hold that it is unlawful for a township to rely upon the county's comprehensive plan in drafting a township zoning resolution. Rather, what was unlawful was the fact that the Township failed to follow the Wayne County Comprehensive Plan or any "general conceptual plan" in determining the areas where commercial development would be permitted under the "B" zoning classification. Thus, the Court of Appeals sustained B.J. Alan's first assignment of error and reversed the trial court's judgment as a matter of law.

ARGUMENT

RESPONSE TO PROPOSTION OF LAW NO. 1:

Congress Township's Zoning Resolution Is Invalid and Unenforceable Because It Fails To Follow Any Comprehensive Plan of Zoning In Determining Where To Permit Commercial Development Under The "B" Zoning Classification.

Congress Township's first proposition of law is based upon a legal issue that was not decided by the Court of Appeals and is not a legal issue that was actually presented in this case. As previously discussed, the legal issue presented below was not whether the Township

can rely upon a county comprehensive plan (as opposed to a township comprehensive plan) in drafting a township zoning resolution under R.C. 519.02. Rather, the key legal question presented by B.J. Alan's First Assignment of Error was whether Congress Township followed the Wayne County Comprehensive Plan or <u>any</u> "general conceptual plan" in determining the specific areas that would be subject to business/industrial uses under the "B" zoning classification. (Opinion, ¶ 7). Thus, it does not matter whether the Congress Township Rural Zoning Commission actually relied upon the Wayne County Comprehensive Plan in drafting the 1994 Zoning Resolution. Rather, as set forth above, the Township's zoning resolution is invalid because it failed to follow <u>any</u> general conceptual plan in determining, in advance, what areas would be subject to the "B" zoning classification under the 1994 Zoning Resolution. (Opinion, ¶ 14).

The case law on this particular legal issue is clear and well-established. The leading case is this Court's decision in *Cassell, supra*. In that case, the Lexington Township Zoning Resolution provided that land "shall be used for farming, residential, commercial and recreational purposes," but did not designate what specific uses would be permitted in which specific areas. *Id.*, 163 Ohio St.3d at 344-345. Upon review, this Court held that a township zoning resolution is not adopted "in accordance with a comprehensive plan" if it "does not specify therein which portions of said section may be used for any and all of such purposes or is not accompanied by a map designating such use areas." *Id.*, at 344-345, syllabus ¶ 2. Under such circumstances, this Court held that "[t]he refusal of a zoning commission or a board of zoning appeals to issue a building permit" to a property owner is "arbitrary and unreasonable" and must be reversed as a matter of law. *Id.*, syllabus ¶ 3. In particular, the Court stated:

> [I]n the absence of any designation in the plan of the uses to which a particular area could be put, it is equally difficult for this court to see how there could be any uniform administration of the regulation . . . a zoning regulation such as that involved herein could easily leave the administration thereof solely within the unwarranted whim or caprice of the officials charged with its enforcement.
>
> All zoning laws and regulations find their justification in their police power and it is well settled that the power to enact zoning regulations cannot be exercised in an arbitrary and unreasonable manner. The absence of any comprehensive plan in the regulation involved herein certainly opens the door to arbitrary and unreasonable enforcement.

Id. at 345-346 (internal citations omitted).[4]

Since 1955, there are at least two other appellate courts that have followed *Cassell* to invalidate township zoning resolutions where, as here, they wrongfully fail to designate the specific areas that would be subject to each of the zoning classifications set forth in the township's zoning resolution. The first case is *Clegg*, *supra*, which was decided by the Eleventh District Court of Appeals in 1987. In *Clegg*, the property owner applied for a use variance for R2 multi-family housing dwelling in a R1 district zoned for single family housing. *Id.*, 1987 WL 10755, *2-3. Although the Newton Township Zoning Resolution provided for both R1 and R2 zoning classifications, the township's zoning inspector admitted that "the entire township has been zoned R1 and that there are no multi-family units, except in those areas where property owners have requested a variance or a zoning change for their property, from a R1 to an R2 classification." *Id.* at *3. Thus, in order to implement a proposed R2 use, it was necessary for a property owner to apply for a variance or zoning change. *Id.*

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[4] It has long been recognized that the failure to follow a comprehensive plan inevitably results in "arbitrary enforcement" because it does not provide zoning officials with a clear guide for determining how to enforce the zoning resolution. *See Bd. Of Trustees of Howland Twp. v. Dray*, 2006-Ohio-3402, ¶ 58, 2006 WL 1816941, *appeal not accepted for review*, 111 Ohio St.3d 1493, 2006-Ohio-6171 (Nov. 29, 2006).

Upon judicial review of the township's actions under R.C. Chapter 2506, the *Clegg* court held that the township's zoning resolution was invalid and unenforceable because the "failure ... to divide any of the area of the township into a R2 district" violated the requirement to zone property "in accordance with the comprehensive plan." *Id.*, *4. In reaching this conclusion, however, the *Clegg* court did not stop there. The court further held that the township's zoning was unconstitutional and invalid because it inherently "created a procedure which invited every application for an R2 use to specifically request either a variance or a zone change" and therefore resulted in the "arbitrary and unreasonable" enforcement of the township's zoning resolution by local zoning officials:

> A further exacerbation in constitutional infirmity with such a system is that it inherently creates a procedure which invites every application for an R2 use to specifically request either a variance or a zone change to implement such use. Under these circumstances, such requests implicitly become catalysts and conduits for what altogether too often can only be described as an exercise in 'spot zoning,' an unlawful creature. There is simply a failure under this method of zoning to divide any of the area of the township into an R2 district in accordance with a comprehensive plan, *Cassell, supra*, and enhance exercises in spot zoning.
>
> * * *
>
> Again, this type of system simply promotes the sporadic grant of zoning variances and/or changes. There is no assurance that similarly situated land areas will be treated within the township zoning plan. Such treatment of the R2 classification is arbitrary and unreasonable in its nature and is not related to any comprehensive plan within the township.

Clegg, 1987 WL 10755, *5.

The same legal conclusion was reached by the Sixth District Court of Appeals in *Ott*, 1994 WL 17542. In *Ott*, the Ridgefield Township's zoning resolution was very similar to the Congress Township Zoning Resolution in that it created multiple zoning classifications, including a business zoning classification, but did not specify any area within the township

where business uses would be permitted under the business zoning classification. *Id.*, 1994 WL 17542, *4. Because the zoning ordinance and map failed "to designate a specific business/commercial" area within the township, the *Ott* court held that the zoning resolution was "invalid and unconstitutional" because it failed to zone property "in accordance with a comprehensive plan" and because it allowed the township "to administer the ordinance in an unreasonable and arbitrary manner." *Id.*, *4. In this regard, the Sixth District in *Ott* adopted the same legal reasoning as the Eleventh District in *Clegg*:

> "[T]he system employed by appellees creates a procedure which requires every applicant who wishes to engage in a nonagricultural/nonresidential use on his or her land to seek a variance or an amendment to the township zoning ordinance.
>
> * * *
>
> An ordinance that purportedly provides for five different districts but actually consists of only one district promotes spot zoning because there is no assurance that similarly situated lands will be treated equally. Thus, in a case, such as the one before us, the failure to designate a specific business/commercial area is unreasonable and arbitrary and is not related to any comprehensive plan."

Ott, 1994 WL 17542, *4.

For these reasons, therefore, the Court of Appeals' opinion is consistent with Supreme Court precedent and does not conflict with the decisions of any other appellate court. As in *Cassell*, *Clegg*, and *Ott*, Congress Township created multiple zoning classifications, but failed to rely upon <u>any</u> comprehensive plan of zoning in determining what areas of the township would be subject to "B" zoning classification. Rather, as in *Clegg* and *Ott*, Congress Township elected to delegate this responsibility to the BZA, which reviews and approves proposed business uses on a case-by-case basis through the granting of "business use variances." The Ninth District's decision, therefore, is based upon the faithful application of

the law to the unique facts of this case and does not present an issue of public or great general interest that might warrant Supreme Court review.

RESPONSE TO PROPOSITION OF LAW NO. 2:

The Court of Appeals' Opinion Does Not Prohibit Townships From Adopting Zoning Resolutions That Seek To Limit Commercial Development In Accordance With A Comprehensive Plan.

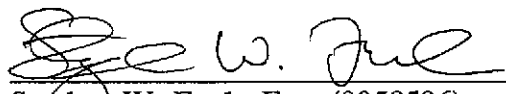
Contrary to Appellants' suggestions, the Court of Appeals' decision will not have an adverse impact upon other townships that seek to restrict commercial development in accordance with a comprehensive plan. As the Court of Appeals properly held, the legal issue presented in this case is not whether townships can lawfully seek to preserve the agricultural character of the township or to limit the expansion of commercial or industrials uses. (Opinion, ¶ 16) (distinguishing *Castle Mfg. Homes, Inc. v. Tegtmeier* (Sept. 29, 1999), 9th Dist. No. 98CA0065) (holding that township zoning resolution may seek to advance the legitimate governmental interest of preserving "the agricultural character of the township" and limiting "the expansion of commercial and industrial uses"). Rather, the legal question is whether a township may seek to implement proposed business uses in an *ad hoc* manner by granting "business use variances" on a case-by-case basis, without following any conceptual zoning plan *at all*. On this question, the law is clear and well-established. Townships must zone property in accordance with a comprehensive plan.[5] Thus, the Township's second proposition of law is meritless and does not warrant further review.

[5] In this regard, Congress Township is wrong in suggesting that it sought to prohibit all commercial development throughout the Township. The Township specifically created a "B" zoning classification in 1994 and has permitted commercial development to occur in a number of areas since 1994. In so doing, however, the Township failed to follow any general conceptual plan for determining where commercial development should occur, but arbitrarily decided this issue on a case-by-case basis through use variances.

CONCLUSION

For these reasons, the Court should decline to exercise jurisdiction over this discretionary appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2008, a true and correct copy of the foregoing Memorandum was served, via first-class mail, postage prepaid, on the following counsel of record:

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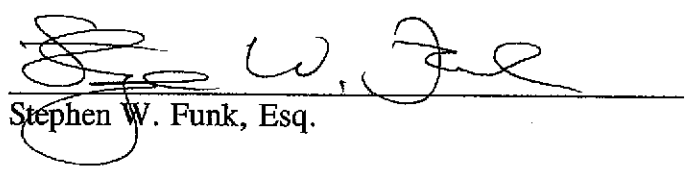

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