IN THE
SUPREME COURT OF OHIO

B.J. ALAN COMPANY, DBA PHANTOM FIREWORKS, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 08-0306
v.	:	ON APPEAL FROM THE WAYNE COUNTY COURT OF APPEALS, NINTH APPELLATE DISTRICT
CONGRESS TOWNSHIP BOARD OF ZONING APPEALS, et al.,	:	COURT OF APPEALS C. A. NO. 07CA0051
Defendants-Appellants.	:	

MERIT BRIEF OF CONGRESS TOWNSHIP BOARD OF ZONING APPEALS, ET AL.

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SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES v

I. **INTRODUCTION** 1

O.R.C. §519.02 1

II. **STATEMENT OF CASE AND FACTS** 3

O.R.C. §519.02 ..... 5, 6

B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals,
Wayne Co. App. No. 07CA0051, 2007-Ohio-7023 6

III. **ARGUMENT** 6

A. **APPELLANT CONGRESS TOWNSHIP'S FIRST PROPOSITION OF LAW:**

The requirement set forth in R.C. §519.02 that a township zoning resolution be created "in accordance with a comprehensive plan," is met where the township's zoning resolution relies on a county plan that sets forth the land use and planning goals for the county, which includes the township in the plan. 6

Evans-Cowley, Jennifer,
"Land Use Planning and Zoning in Ohio Townships"
Journal of Extension, August 2006, Vol. 44, No. 4 6

O.R.C. §519.02 ..... 6, 7, 8, 13

Ketchel v. Bainbridge Township (1992),
79 Ohio App.3d 174 6

Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals
(Dec. 21, 2001), Portage App. No. 98-P-0131, unreported 6, 7

Ryan v. Bd. of Twp. Trustees of Plain Twp. (Dec. 11, 1990),
Franklin App. No. 89AP-1441, unreported 7

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

Reese v. Copley Twp. Bd. of Trustees (1998),
129 Ohio App.3d 9 7

Howland Twp. Bd. of Trustees v. Dray (June 30, 2006),
Trumbull App. No. 2004-T-0137, 2006-Ohio-3402 7

Lanphear v. Antwerp (1973),
50 Mich App. 641, 214 N.W.2d 66 7

Bell v. Elkhorn (1985),
122 Wis.2d 558, 364 N.W.2d 144 7

B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals,
Wayne Co. App. No. 07CA0051, 2007-Ohio-7023 9

Stuart Meck and Kenneth Pearlman,
Oh. Plan. & Zoning L. Section 4:31 (2007) 9

Willcott v. Village of Beachwood (1964),
175 Ohio St. 557 ..... 10, 13

Ziegler, Rathkopf's The Law of Zoning and Planning §28.01[1] 10

Miller v. Town of Tilton (1995, N.H.),
139 N.H. 429, 655 A.2d 409 11

Rodgers v. Village of Terrytown (1951),
302 N.Y. 115, 96 N.E.2d 731 11

Ohio Constitution, Article VIII, Section 20(A) 12

Village of Belle Terre v. Borass (1974),
416 U.S. 19, 94 S.Ct. 1536 12

Clegg v. Bd. of Zoning Appeals of Newton Twp. (May 1, 1987),
Trumbull App. No. 3668, unreported, 1987 WL 10755 ..... 12, 13

Board of Township Trustees v. Ott (January 21, 1994),
Huron App. No. H-93-16, unreported, 1994 WL 17542 ..... 12, 13

B. APPELLANT CONGRESS TOWNSHIP'S SECOND PROPOSITION OF LAW:

The requirement set forth in R.C. §519.02 that a township zoning resolution be created "in accordance with a comprehensive plan," is a flexible concept that must be evaluated by looking at the nature of the land to be zoned. 14

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

O.R.C. §519.02 ..... 14, 16

East Fairfield Coal Co. v. Miller Zoning Inspector (1955),
71 Ohio L. Abs. 490 14

O.R.C. §519.05 15

Rumpke Waste, Inc. v. Henderson (S.D. Ohio 1984),
591 F. Supp. 521 15

Zeltig Land Dev. Corp. v. Bainbridge Twp. Bd. of Trustees (1991),
75 Ohio App.3d 302 15

Agins v. Tiburon (1980),
447 U.S. 255 15

Franchise Developers, Inc. v. Cincinnati (1987),
30 Ohio St.3d 28 15

Castle Manufactured Homes, Inc. v. Tegtmeier (Sept. 29, 1999),
Wayne County App. No. 98CA0065,
unreported, 1999 WL 771605 15

Cassell v. Lexington Township Bd. of Zoning Appeals,
163 Ohio St. 340 (1955) 16

IV. **CONCLUSION** 17

O.R.C. 519.02 17

CERTIFICATE OF SERVICE 19

APPENDIX OF EXHIBITS 20

Notice of Appeal ..... Ex. 1

Opinion, Ninth District Court of Appeals ..... Ex. 2

O.R.C. §519.02 ..... Ex. 3

Ohio Constitution, Art. VIII, Section 20 ..... Ex. 4

Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals
(Dec. 21, 2001), Portage App. No. 98-P-0131 ..... Ex. 5

Ryan v. Bd. of Twp. Trustees of Plain Twp. (Dec. 11, 1990),
Franklin App. No. 89AP-1441 ..... Ex. 6

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

Clegg v. Bd. of Zoning Appeals of Newton Twp. (May 1, 1987),
Trumbull App. No. 3668 ..... Ex. 7

Bd. of Twp. Trustees v. Ott (Jan. 21, 1994),
Huron App. No. H-93-16 ..... Ex. 8

Castle Manufactured Homes, Inc. v. Tegmeier (Sept. 29, 1999),
Wayne County App. No. 98CA0065 ..... Ex. 9

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

TABLE OF AUTHORITIES

PAGE

Cases

Agins v. Tiburon
(1980), 447 U.S. 255, 261 15

B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals,
Wayne Co. App. No. 07CA0051, 2007-Ohio-7023 ..... 6, 9

Bell v. Elkhorn (1985),
122 Wis.2d 558, 364 N.W.2d 144 7

Board of Township Trustees v. Ott (January 21, 1994),
Huron App. No. H-93-16, unreported, 1994 WL 17542 ..... 12, 13

Cassell v. Lexington Township Bd. of Zoning Appeals,
163 Ohio St. 340 (1955) 16

Castle Manufactured Homes, Inc. v. Tegtmeier (Sept. 29, 1999),
Wayne County App. No. 98CA0065, unreported, 1999 WL 771605 15

Clegg v. Bd. of Zoning Appeals of Newton Twp. (May 1, 1987),
Trumbull App. No. 3668, unreported, 1987 WL 10755 ..... 12, 13

East Fairfield Coal Co. v. Miller Zoning Inspector (1955),
71 Ohio L. Abs. 490 14

Franchise Developers, Inc. v. Cincinnati (1987),
30 Ohio St.3d 28 15

Howland Twp. Bd. of Trustees v. Dray (June 30, 2006),
Trumbull App. No. 2004-T-0137, 2006-Ohio-3402 7

Ketchel v. Bainbridge Township (1992),
79 Ohio App.3d 174 6

Lanphear v. Antwerp (1973),
50 Mich App. 641, 214 N.W.2d 66 7

Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals
(Dec. 21, 2001), Portage App. No. 98-P-0131, unreported 6, 7

Miller v. Town of Tilton (1995, N.H.),
139 N.H. 429, 655 A.2d 409 11

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

Reese v. Copley Twp. Bd. of Trustees (1998),
129 Ohio App.3d 9 7

Rodgers v. Village of Terrytown (1951),
302 N.Y. 115, 96 N.E.2d 731 11

Rumpke Waste, Inc. v. Henderson (S.D. Ohio 1984),
591 F. Supp. 521 15

Ryan v. Bd. of Twp. Trustees of Plain Twp. (Dec. 11, 1990),
Franklin App. No. 89AP-1441, unreported 7

Village of Belle Terre v. Borass (1974),
416 U.S. 19, 94 S.Ct. 1536 12

Willcott v. Village of Beachwood (1964),
175 Ohio St. 557 ..... 10, 13

Zeltig Land Dev. Corp. v. Bainbridge Twp. Bd. of Trustees (1991),
75 Ohio App.3d 302 15

Statues and Rules

O.R.C. §519.02 ..... 1, 5, 6, 7, 8, 13, 14, 16, 17

O.R.C. §519.05 15

Ohio Constitution, Article VIII, Section 20(A) 12

Other

Evans-Cowley, Jennifer,
"Land Use Planning and Zoning in Ohio Townships"
Journal of Extension, August 2006, Vol. 44, No. 4 6

Stuart Meck and Kenneth Pearlman,
Oh. Plan. & Zoning L. Section 4:31 (2007) 9

Ziegler, Rathkopf's The Law of Zoning and Planning §28.01[1] 10

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

I. INTRODUCTION

Congress Township is a rural, agricultural community located in the northwest corner of Wayne County, Ohio. Congress Township has a total population of 4,400, of which only approximately 2,800 reside in the unincorporated areas. Wayne County, likewise, is predominantly rural, with less than 2% of the County's 555 square miles consisting of urban areas. Much of its rural and agricultural heritage is attributable to the fact that Wayne County is home to one of the largest Amish communities in the United States.[1]

The Court of Appeals' decision in this case undermines the goals of the Congress Township Zoning Resolution and the Wayne County Comprehensive Plan to preserve this agricultural heritage and prevents Congress Township from exercising legitimate land use controls enacted to prevent the spoliation of farmland through sprawl and unregulated urbanization. Moreover, the Court of Appeals' decision jeopardizes the established zoning in hundreds of rural townships across Ohio, that have enacted zoning in the same manner as Congress Township.

The outcome of this case will rest on the Court's interpretation of Section 519.02 of the Ohio Revised Code, which provides that township zoning must be prepared, "in accordance with a comprehensive plan." Appeals courts across Ohio have arrived at differing conclusions as to what the requirement entails. As a result, Ohio case law varies on the standards to be applied in determining whether a comprehensive plan exists, as well as how courts are to analyze whether township zoning was adopted "in accordance with" such a plan.

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[1] Information gathered from the 2000 Census and the Ohio Historical Society at www.ohiohistorycentral.org/entry.php?rec=2032.

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

The ability to use zoning to protect farmland and rural communities is essential for townships like Congress. The question therefore, is what must small, rural townships do to ensure that their zoning is properly enacted.

In this case, Congress Township established a rural zoning commission in 1992 to create a zoning resolution for the unincorporated areas of the township. (Tr. at 73; Affidavit of William "Bill" Cletzer; Supp. at 47 and 71-72). The zoning commission relied on the Wayne County Comprehensive Plan in drafting its zoning resolution, which was approved by the electors of Congress Township in 1994. (Tr. at 73-75; Affidavit of William "Bill" Cletzer; Supp. at 47-49 and 71-72). The Court of Appeals, however, determined that the Zoning Resolution was not enacted "in accordance with" a comprehensive plan, based on its perception that the Wayne County Comprehensive Plan did not set forth goals and recommendations specific to Congress Township.

In determining whether Congress Township's Zoning Resolution was adopted "in accordance with" a comprehensive plan, the Court of Appeals adopted a stringent, academic test that many rural townships in Ohio would not pass. Given that the size of Ohio townships vary from populations of fewer than 100 to over 60,000,[2] this approach will prevent smaller townships from regulating their growth and land use through zoning due to their limited resources. This is clearly not the intent of the requirement that township zoning be adopted "in accordance with a comprehensive plan."

The Court of Appeals decision is erroneous in two ways. First, it erroneously found that the Congress Township Zoning resolution was not adopted in accordance with a comprehensive plan when, in fact, it was based upon the county-wide

[2] 2000 U.S. Census found on the Ohio Township Association website, http://cpmra.muohio.edu/otaohio/Membership/twp%20rank%202000%20census.pdf

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

comprehensive plan. Second, the stringent test the Court of Appeals used for determining whether township zoning is valid calls into question the validity of township zoning resolutions in rural townships across the state.

II. STATEMENT OF CASE AND FACTS

In 1977, Wayne County, a rural county with a total population of 113,950 and a total land area of 555 square miles, adopted a comprehensive plan for the county and the sixteen townships that make up the county.[3] The plan, which consists of over 200 pages, sets forth, inter alia, a model zoning text for all the townships in Wayne County. (Wayne County Comp. Plan (Part I) at 34; Supp. at 102). The Wayne County Comprehensive Plan makes numerous recommendations for all of Wayne County, which, of course, includes Congress Township. Some of the planning tools found in the plan include:

- The Wayne County Comprehensive Plan provides under the title "Proposed Land Use and Development Goals for Wayne County Area" goals and recommendations for preservation of agriculture, urban development, energy, and environmental and natural resources. (Wayne County Comp. Plan (Part 1) at 27-28; Supp. at 104-105);
- The plan states that the regional planning commission had drafted a model zoning text for the townships in Wayne County to use, which included recommended districts, lot dimensions and administration procedures. (Wayne County Comp. Plan (Part I) at 33-35; Supp. at 101-103);
- There is an entire chapter entitled "Regional Development Factors and Goals," which indicates that the plan serves, "the entire area of Wayne County and all its communities." (Wayne County Comp. Plan (Part III) at 1; Supp. at 106);

[3] U.S. Census Bureau website, http://quickfacts.census.gov/qfd/states/39/39169.html

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

- There is a discussion of the effect of Interstate 71 on Congress Township. Wayne County Comp. Plan (Part III) at 8; Supp. at 107);
- There are proposed regional land use and development goals for the entire County, which include the preservation of farmlands in the light of urban development; the conservation of energy, and the retention and improvement of environmental and natural resources. Wayne County Comp. Plan (Part III at 10-26; Supp. at 108-124).

In late 1992, Congress Township formed the Congress Township Rural Zoning Commission in order to create a zoning resolution for the unincorporated areas of the Township. (Tr. at 73; Affidavit of William "Bill" Cletzer; Supp. at 47 and 71-72). The Zoning Commission relied upon the Wayne County Comprehensive Plan in drafting its zoning resolution because it wanted to "follow suit in their planning of an agricultural county for agricultural use." (Tr. at 75; Supp. at 49.)

Congress Township consists of approximately 43 square miles.[4] While its overall population consists of approximately 4,400 residents, over a third of those residents reside within one of the three incorporated villages in the township, which collectively consist of less than two square miles in land area. [5] The remaining 2,800 residents of Congress Township reside in the remaining 41 square miles of the unincorporated areas of the Township.

The Congress Township Zoning Resolution contains two zoning districts: A-Agricultural and B-Business/Industry. (Zoning Resolution at 6-7; Supp. at 80-81.) The

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[4] http://www.city-data.com/township/Congress-Wayne-OH.html.

[5] There are three incorporated areas in Congress Township: the Villages of West Salem, Congress, and Burbank. According to the 2000 U.S. Census, West Salem has a population of 1,501 and a total land area of one square mile; Congress has a population of 192 and a total land area of 0.2 square miles, and Burbank has a population of 279 and a total land area of 0.3 square miles. This information is all available on the U.S. Census Bureau website, http://www.census.gov/.

Congress Township Zoning District Map, incorporated by reference as part of the Zoning Resolution, designated all land in the unincorporated areas of the Township as A-Agricultural, which was consistent with the overwhelming use of land throughout the Township at the time the district map was created, and as the land is still used today.

This controversy arose when the Appellees B.J. Alan Company, Zolden Family Ohio Ltd. Partnership, and Phantom Fireworks (collectively "Phantom") purchased land in Congress Township in order to relocate its large commercial fireworks operation from another location within Congress Township, with knowledge that the land was zoned Agricultural. (Tr. at 48; Supp. at 38.) Phantom applied for a zoning certificate, which was denied by the zoning inspector, and subsequently filed an appeal and request for a use variance with the Board of Zoning Appeals ("BZA"). (Phantom Application; Supp. at 131). Phantom did not seek a zone change.

After a full hearing, which included testimony from the residential neighboring property owners who opposed the request and testimony of Bill Cletzer, a township trustee who chaired the Congress Township Rural Zoning Commission at the time the Zoning Resolution was created, the BZA denied Phantom's appeal and request for a use variance. (Tr. at 73-85; 88-93; Supp. at 47-59; 60-65.) In deciding not to grant the variance, the BZA specifically found that the site lacked the necessary infrastructure, including water, sewer, and storm water drainage and the proximity of residences to the site. (Tr. at 105; Supp. at 66).

The BZA's decision was affirmed by the Court of Common Pleas. The Court of Appeals, however, reversed the BZA's decision on the <u>sole ground</u> that it found that the Zoning Resolution was an invalid exercise of the Township's authority under R.C.

§519.02. See *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals,* Wayne Co. App. No. 07CA0051, 2007-Ohio-7023, at ¶16.

The Court of Appeals evaluated the sufficiency and detail of the Wayne County Comprehensive Plan, and found that the Congress Township Zoning Resolution was not created "in accordance with a comprehensive plan" because the Court determined that the Wayne County Comprehensive Plan did not identify goals and recommendations specific to Congress Township.

III. ARGUMENT

A. APPELLANT CONGRESS TOWNSHIP'S FIRST PROPOSITION OF LAW:

The requirement set forth in R.C. §519.02 that a township zoning resolution be created "in accordance with a comprehensive plan," is met where the township's zoning resolution relies on a county plan that sets forth the land use and planning goals for the county, which includes the township in the plan.

It is common for townships in Ohio to rely on their county comprehensive plan to establish zoning regulations.[6] Indeed, a 2006 survey of Ohio townships found that approximately one-third of the townships that responded to the survey based their zoning regulations on a county comprehensive plan.[7] Several Ohio courts have held that R.C. §519.02 does **not** require that a comprehensive plan be independently adopted by a township in order to have a valid zoning resolution. See *Ketchel v. Bainbridge Township* (1992), 79 Ohio App.3d 174; *Midwest Fireworks Mfg. Co. v. Deerfield Twp.*

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[6] Evans-Cowley, Jennifer, "Land Use Planning and Zoning in Ohio Townships," Journal of Extension, August 2006, Volume 44, No. 4.

[7] See *Id.*

Bd. of Zoning Appeals (Dec. 21, 2001), Portage App. No. 98-P-0131, unreported; *Ryan v. Bd. of Twp. Trustees of Plain Twp.* (Dec. 11, 1990), Franklin App. No. 89AP-1441, unreported; *Reese v. Copley Twp. Bd. of Trustees* (1998), 129 Ohio App.3d 9. The Court in *Howland Twp. Bd. of Trustees v. Dray* (June 30, 2006) Trumbull App. No. 2004-T-0137, 2006-Ohio-3402, at ¶52, defined comprehensive plan as "a specific plan which sets forth uniform standards in a given district or zone." Under the reasoning set forth in these cases, reliance on a county comprehensive plan would more than meet the requirements of R.C. 519.02.

In addition, at least one Ohio court has explicitly stated that the zoning resolution itself can contain the necessary comprehensive plan. *See Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals, supra.* This is in accord with the national trend for interpreting the language, "in accordance with a comprehensive plan. *See Lanphear v. Antwerp* (1973), 50 Mich App. 641, 646, 214 N.W.2d 66, wherein the court stated, "There is no requirement in (the statute) that the 'plan' must be written or be anything beyond 'a generalized conception by the members of the board as to how the districts in the township shall be ... used.' This 'generalized conception' is exhibited in the zoning ordinance itself, since the document zones districts, prescribes variances, land uses, etc. for the entire township, and this plans the township's future development." *See also Bell v. Elkhorn* (1985), 122 Wis.2d 558, 364 N.W.2d 144, 148, wherein the Wisconsin Supreme Court held, "While [the statute] requires that zoning regulations be made 'in accordance with a comprehensive plan,' the statute contains no requirement that a comprehensive plan must be a formal document separate from the zoning ordinance nor does it require that a comprehensive plan be adopted prior to the enactment of a zoning ordinance. The purpose of a comprehensive plan is to provide an

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

orderly method of land use regulation for the community. That purpose can be accomplished by the zoning ordinance itself without the need of a separate document labeled 'Comprehensive Plan.'"

Here, the Congress Township Zoning Resolution was adopted in reliance upon the Wayne County Comprehensive Plan. Additionally, the Zoning Resolution itself contains the requisite planning concepts necessary to constitute a "comprehensive plan." Despite having more than adequate planning in place to establish proper zoning, the Court of Appeals examined the Wayne County Comprehensive Plan and determined that, because the plan, in its view, did not have goals and recommendations specific to Congress Township, it did not meet the requirements of R.C. §519.02 and therefore the zoning adopted by the Township was invalid. In doing so, the Court relied on a rigid academic definition of comprehensive plan. Specifically, the Court stated: "[t]o planners, the terms *** have a distinct, concrete meaning: they are the local government's textual statement of goals, objectives, and policies accompanied by maps to guide public and private development within its planning jurisdiction. The comprehensive plan is the chief policy instrument for: (1) the administration of zoning and subdivision regulations; (2) the location and classification of streets and thoroughfares; (3) the location and construction of public and semi-public buildings and related community facilities and infrastructure (water, storm and sanitary sewers, gas, etc.); (4) the acquisition and development of public and semi-public properties such as parks and open spaces; and (5) the initiation of new programs, such as those in the areas of housing, rehabilitation and economic development, to address pressing community needs. *** The essential characteristics of a plan are that it is comprehensive, general and long range. 'Comprehensive' means that the plan encompasses all geographical

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

parts of the community and integrates all functional elements. 'General' means that the plan summarizes policies and proposals and does not, in contrast with a zoning ordinance, provide detailed regulations for building and development. 'Long range' means the plan looks beyond the foreground of pressing current issues to the perspective of problems and possibilities then to twenty years into the future." See *B.J. Alan Co., supra,* at ¶13, Stuart Meck and Kenneth Pearlman, Oh. Plan. & Zoning L. Section 4:31 (2007).

This academic definition, **never adopted in law**, goes far beyond what Ohio courts have found constitutes a valid comprehensive plan. Indeed, if this is the definition to be applied in Ohio, then many Ohio township zoning codes are at risk of being invalidated on similar grounds.

Phantom's argument relates to the identification of a "B" zoning district in the Zoning Resolution, but the absence of such a district on the Congress Township District Zoning Map. Phantom argues that, because of this omission, the Congress Township Zoning Resolution was not adopted "in accordance with a comprehensive plan." However, as stated above, at least one Ohio court has held that the Zoning Resolution itself can constitute a comprehensive plan. A zoning resolution does not simply adopt the text of a zoning code, it also adopts a zoning district map. The Congress Township District Zoning Map is part of the Congress Township Zoning Resolution, as set forth in Section 101 of the Zoning Resolution, which provides that, "the district map and all the notations, references and other information shown thereon are a part of this Resolution and have the same force and effect as if the district map and all its notations, references and other information shown thereon were all full (*sic*) set forth or described herein."

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

The mere fact that a text for a zoning district is identified conceptually in the zoning resolution but not geographically on the district map does not mean that the zoning was not adopted "in accordance with a comprehensive plan." Rather, in adopting a zoning map with all the unincorporated area being zoned for agriculture, the township was reflecting the then existing uses and goals of the township as supported by and reflected in the county comprehensive plan. It was not inconsistent to provide in the text of the Zoning Resolution for the possibility of a business district. That provision simply recognized that conditions could change in some parts of the township in the future, which would justify a zone change from agricultural to business. In fact, Phantom could have requested such a zone change to the B District, but chose not to do so.

In the case of Congress Township, there was simply not enough commercial growth to allow the township to rationally create a business district in its unincorporated areas. The Township created mechanisms in its Zoning Resolution which would allow for the rezoning of property or the ability of a property owner to obtain a use variance in those limited circumstances where the proposed use is commercial in nature and permitted in the B – Business/Industry District.

Phantom incorrectly argued below that this type of zoning practice leads to illegal spot zoning. The concept of spot zoning is largely misunderstood. Spot zoning refers to the rezoning of a small parcel of land to permit a use which fails to comply with a comprehensive plan or is inconsistent with the surrounding area, grants a discriminatory benefit to the parcel owner, and/or harms neighboring properties or the community welfare. *See Willcott v. Village of Beachwood* (1964), 175 Ohio St. 557, 559; Ziegler, Rathkopf's The Law of Zoning and Planning §28.01[1]. Small parcel rezonings, however, are generally upheld unless they clearly fail to advance the purposes of the

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

comprehensive plan or result in an illogical development pattern. *See Miller v. Town of Tilton* (1995, N.H.), 139 N.H. 429, 655 A.2d 409. By its own terms, the Congress Township Zoning Resolution avoids instances of spot zoning by insuring that small lots are not zoned differently by providing for a minimum lot size of three acres in both the A-Agricultural and B-Business/Industry districts (Zoning Resolution at 8; Supp. at 82). In *Rodgers v. Village of Terrytown* (1951), 302 N.Y. 115, 96 N.E.2d 731 the court explained the difference between spot zoning and valid small parcel zoning as follows: "Defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners, 'spot zoning' is the very antithesis of planned zoning. If, therefore, an ordinance is enacted in accordance with a comprehensive zoning plan, it is not 'spot zoning,' even though it (1) singles out and affects but one small plot; or (2) creates in the center of a large zone small areas or districts devoted to a different use. Thus, the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community." Simply because the Congress Township Zoning Resolution allows a possible business use through the rezoning process or the granting of a use variance does not mean that the practice uniformly amounts to spot zoning.

The fact that no areas of the township are designated B-Business/Industry on the district zoning map does not invalidate Congress Township's zoning. Indeed, the use of "floating" districts, i.e., ones that do not attach to specific properties until the need arises, is not unusual. Most planned unit development districts (PUDs) remain

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

floating until a development concept for a particular area is proposed. This allows for more efficient and controlled growth and land use by allowing the community to specify uses that are consistent with its land use goals without mapping their location in advance. Given the minimal level and rate of commercial development in Congress Township, this furthers the goals of preserving farmland and other lands devoted to agriculture by not committing lands unnecessarily to speculative future commercial or industrial uses.

The Ohio Constitution specifically states that the preservation of farmland and other lands devoted to agriculture "are proper public purposes of the state and local governmental entities and are necessary and appropriate means to improve the quality of life and the general economic well-being of the people of Ohio. *See* Ohio Constitution, Article VIII, Section 20(A). Zoning for agriculture is also consistent with the United States Supreme Court's decision in *Village of Belle Terre v. Borass* (1974), 416 U.S. 19, 94 S.Ct. 1536, 1541, which held that: "A quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.... The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Phantom cites to *Clegg v. Bd. of Zoning Appeals of Newton Twp.* (May 1, 1987), Trumbull App. No. 3668, unreported, 1987 WL 10755 and *Board of Township Trustees v. Ott* (January 21, 1994), Huron App. No. H-93-16, unreported, 1994 WL 17542, for the proposition that Congress Township's decision to provide regulations for a business district but not to designate such a district on the zoning map invalidates

225 WEST COURT STREET
CINCINNATI 45202-1098
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Congress Township's zoning as having been adopted in accordance with a comprehensive plan. However, in *Clegg*, the township did not have a zoning map *at all.* In *Ott*, the text of the zoning ordinance and the zoning map were inconsistent: while the Township testified that the entire Township was zoned Agricultural, the zoning map depicted only several "B's", which the Court interpreted to mean "Business/Commercial" and did not depict any of the remaining four zoning classifications set forth in the zoning resolution.

Here, Congress Township made a legislative determination to provide for more than one use district in the text of its Zoning Resolution, but to maintain the current use of the land in the Township as Agricultural until the time became appropriate to rezone, a decision that was approved by the electors of the Township. The *Clegg* and *Ott* decisions focused on the uncertainty of district boundaries and haphazard zoning. Here, there is no question – the entire township is zoned Agricultural. Should the possibility of a commercial use arise, the Township has regulations in place to allow for a rezoning and a proper district for that use.

The decision of Congress Township and the electors thereof to maintain agricultural zoning throughout the Township is entitled to a high degree of deference from the Court. As Justice (later Chief Justice) O'Neill concluded in *Wilcott v. Village of Beachwood,* supra: "Even though the court, on the facts presented, might decide otherwise ***, so long as the matter is reasonably debatable, the court has no authority to interfere."

In sum, the Congress Township Zoning Resolution is a proper exercise of its zoning authority under R.C. 519.02. Not only does the Zoning Resolution draw its goals from the Wayne County Comprehensive Plan, but the Zoning Resolution itself

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
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constitutes a comprehensive plan within the meaning of R.C. 519.02. As such, the Court of Appeals erred in finding that the Congress Township Zoning Resolution was not adopted in accordance with a comprehensive plan and thus was an invalid exercise of the township's zoning power.

B. APPELLANT CONGRESS TOWNSHIP'S SECOND PROPOSITION OF LAW:

The requirement set forth in R.C. §519.02 that a township zoning resolution be created "in accordance with a comprehensive plan," is a flexible concept that must be evaluated by looking at the nature of the land to be zoned.

As discussed above, there are varying standards in Ohio case law as to what constitutes a valid comprehensive plan. The lower court in the case invoked a very high standard in setting out what it believed was necessary for Congress Township to have validly enacted its Zoning Resolution. However, many Ohio courts have properly questioned how to treat this requirement in light of the fact that R.C. §519.02 is applicable to all townships that wish to enact zoning, regardless of their size or the nature of their communities. In *East Fairfield Coal Co. v. Miller Zoning Inspector* (1955), 71 Ohio L. Abs. 490, 502, the court stated, "what might be comprehensive in an agricultural township in Mahoning County would very likely not be comprehensive in the metropolitan area of Cleveland or Cuyahoga County."

Additionally, one Ohio federal district court made the following observation: "[W]e find that 'comprehensive plan' is a flexible term. Whether a particular resolution is comprehensive or not can be determined only by looking at the particular circumstances of the case, in particular and perhaps more important, the nature of the area which is to be zoned. Using this standard, we find that a

comprehensive plan for an urban area is necessarily more detailed than one for a rural area that reflects current uses and allows for change as additional needs develop, and that bears a substantial relationship to the public health, safety or welfare, is a comprehensive plan within the meaning of Ohio Rev. Code § 519.05[a similar provision to R.C. 519.02]. ***" *Rumpke Waste, Inc. v. Henderson* (S.D. Ohio 1984), 591 F. Supp. 521, 534.

Congress Township is a small agricultural community with minimal commercial uses. Its zoning resolution is aimed at maintaining its agricultural heritage. The standard that the Court of Appeals set forth in deciding whether the Zoning Resolution was enacted "in accordance with a comprehensive plan" is simply beyond the reach of small rural communities like Congress Township, that are merely trying to protect against sprawl and "the ill effects of urbanization." *Zeltig Land Dev. Corp. v. Bainbridge Twp. Bd. of Trustees* (1991), 75 Ohio App.3d 302, 308 quoting *Agins v. Tiburon* (1980), 447 U.S. 255, 261. A local government may "properly exercise its zoning authority in an attempt to preserve and protect the character of designated areas" to promote "the overall quality of life." *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 33. "A valid purpose for zoning restrictions is to preserve the character of a neighborhood ***. Thus, a valid purpose for the Zoning Resolution is to preserve the agricultural character of the township and limit the expansion of commerce and industry onto agriculturally productive soils." *Castle Manufactured Homes, Inc. v. Tegtmeier* (Sept. 29, 1999), Wayne County App. No. 98CA0065, unreported, 1999 WL 771605.

The Congress Township Zoning Map conforms to the recommendations of the Wayne County Comprehensive Plan to preserve the area's agricultural land uses.

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
FAX NO. (513) 721-4268

Looking to the future, the Congress Township Zoning Resolution provides for the possibility of land to be zoned for commercial purposes, but to date, no commercial zoning districts have been adopted. In this case, although they could have, Phantom elected not to seek a zone change. Instead, Phantom sought to meet the rigorous requirements of the grant of a variance and was unable to do so.

Phantom has relied heavily on *Cassell v. Lexington Township Bd. of Zoning Appeals*, 163 Ohio St. 340 (1955). This case is unlike the *Cassell* case. In *Cassell*, the zoning regulation provided "merely that a section of a township, one square mile in area, shall be zoned for farming, residential, commercial and recreational uses, which does not specify therein which portions of said section may be used for any or all of such purposes, or is it accompanied by a map designating such use areas, is not adopted in accordance with a comprehensive plan." *Cassell*, Syl. 2, 163 Ohio St. 340 at 340. Unlike Lexington Township, Congress Township had a Zoning Map designating the entire unincorporated area of the Township for agricultural uses. Congress Township adopted its Zoning Resolution in reliance upon the Wayne County Comprehensive Plan. In its Resolution, Congress Township merely reserved the ability to zone commercially at some future point, as the map identified the voters' intent to remain agriculturally zoned.

The rigid standard set forth in the Court of Appeals decision is contrary to Ohio law and threatens the validity of rural township resolutions across the state. Due to the drastic differences in townships across Ohio, the requisite level of detail and complexity required to meet the requirements of R.C. 519.02 must be flexible so that all townships can enjoy the benefits of township zoning.

225 WEST COURT STREET
CINCINNATI 45202-1098
(513) 721-5525
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IV. CONCLUSION

The agricultural zoning that exists throughout the unincorporated areas of Congress Township honors both the simple Amish farmland-based lifestyle so prevalent in Wayne County and the public purpose recognized by the Ohio Constitution of the preservation of Ohio's agricultural land uses.

Like so many small rural townships, Congress Township has limited resources. In the interests of preserving its agricultural heritage, Congress Township adopted a zoning resolution, relying on the county-wide Wayne County Comprehensive Plan. Upholding a decision that a township's reliance on a county-wide comprehensive plan in adopting its zoning resolution does not meet the requirements of R.C. 519.02 would jeopardize the zoning that exists in many townships throughout Ohio and certainly undermines the efforts to preserve Ohio's agricultural land through zoning protection.

Appellants, joined by amici Ohio Prosecutor's Association, Ohio Township Association, the Ohio Farm Bureau Federation, Inc. and the Wayne County Farm Bureau, respectfully request that this Court reverse the decision of the Ninth District Court of Appeals, uphold the Congress Township Zoning resolution, and reinstate the trial court's decision.

225 WEST COURT STREET
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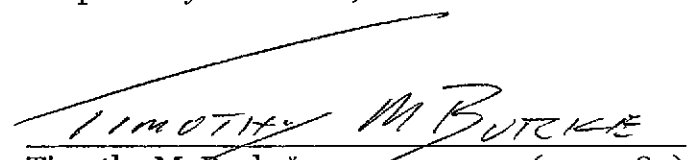
Respectfully submitted,



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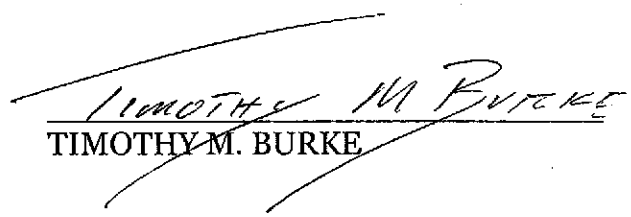
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Defendants-Appellants is being served on all parties entitled to service this 15th day of July, 2008 by regular U.S. Mail.



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APPENDIX OF EXHIBITS

Notice of Appeal ..... Ex. 1

Opinion, Ninth District Court of Appeals ..... Ex. 2

O.R.C. §519.02 ..... Ex. 3

Ohio Constitution, Art. VIII, Section 20 ..... Ex. 4

Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals (Dec. 21, 2001), Portage App. No. 98-P-0131 ..... Ex. 5

Ryan v. Bd. of Twp. Trustees of Plain Twp. (Dec. 11, 1990), Franklin App. No. 89AP-1441 ..... Ex. 6

Clegg v. Bd. of Zoning Appeals of Newton Twp. (May 1, 1987), Trumbull App. No. 3668 ..... Ex. 7

Bd. of Twp. Trustees v. Ott (Jan. 21, 1994), Huron App. No. H-93-16 ..... Ex. 8

Castle Manufactured Homes, Inc. v. Tegmeier (Sept. 29, 1999), Wayne County App. No. 98CA0065 ..... Ex. 9

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SUPREME COURT OF OHIO

B.J. ALAN COMPANY, DBA PHANTOM FIREWORKS, et al.,	:	08-0306
Plaintiffs-Appellees,	:	ON APPEAL FROM THE WAYNE COUNTY COURT OF APPEALS, NINTH APPELLATE DISTRICT
v.	:	
CONGRESS TOWNSHIP BOARD OF ZONING APPEALS, et al.,	:	COURT OF APPEALS C. A. NO. 07CA0051
Defendant-Appellants.	:	

NOTICE OF APPEAL OF APPELLANT CONGRESS TOWNSHIP BOARD OF ZONING APPEALS, ET AL.

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FILED
FEB 08 2008
CLERK OF COURT
SUPREME COURT OF OHIO

Appellant the Congress Township Board of Zoning appeals hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Wayne County Court of Appeals, Ninth Appellate District, entered in Court of Appeals case No. 07CA0051 on December 28, 2007.

This case raises a substantial question and is one of public or great general interest.

Respectfully submitted,

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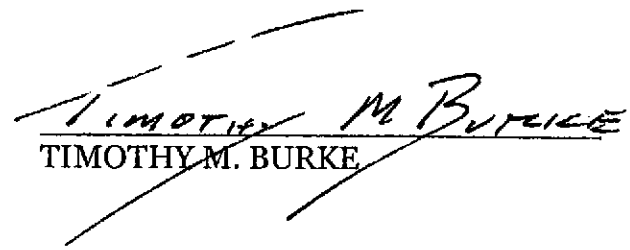
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal is being mailed to all parties entitled to service under Rule 5 of the Ohio Rules of Civil Procedure on the 8TH day of FEB, 2008.



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[Cite as *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals*, 2007-Ohio-7023.]

STATE OF OHIO COUNTY OF WAYNE	))ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
B. J. ALAN COMPANY, DBA PHANTOM FIREWORKS, et al. Appellants v. CONGRESS TOWNSHIP BOARD OF ZONING APPEALS, et al. Appellees		C. A. No. 07CA0051 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 06-CV-0821

DECISION AND JOURNAL ENTRY

Dated: December 28, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellants, B. J. Alan Co., Zoldan Family Ohio Ltd. Partnership, and Phantom Fireworks (collectively "Phantom"), appeal the judgment of the Wayne County Court of Common Pleas, which affirmed the decision of appellee, the Congress Township Board of Zoning Appeals ("BZA"). This Court reverses.

I.

{¶2} On July 25, 1994, the Board of Township Trustees of Congress Township adopted a zoning resolution regarding the unincorporated area of the township. Pursuant to the resolution, the township was divided into two districts,

specifically, "A" Agricultural District and "B" Business/Industry District. The township voters approved the resolution in November, 1994, at which time it became effective. Notwithstanding the division of the township into two distinct types of districts, the township zoning inspector Chet Martin testified that all the land in the township falls into the "A" district. Mr. Martin further admitted that, under the current resolution, any property owner who wishes to use property for a business purpose must apply for a use variance.

{¶3} Phantom purchased a 6.815-acre property at the intersection of S.R. 539 and I-71 in the township. Phantom wanted to sell fireworks out of a large state-of-the-art facility it planned to build there. The company was licensed by the state and already selling fireworks in the township out of a smaller, out-dated facility,[1] but wished to relocate to a prime location off the interstate.

{¶4} Phantom applied to the township zoning inspector for a zoning certificate, so it could do business on its purchased land. The zoning inspector refused to issue a zoning certificate because the property is not zoned for business use under the "B" zoning classification. Phantom then appealed to the BZA,

seeking either a zoning certificate or a business use variance. The BZA held a hearing on November 20, 2006. At the conclusion of the hearing, the BZA denied

Phantom's request for a zoning certificate and application for a business use variance.

{¶5} Phantom filed an administrative appeal in the Wayne County Court of Common Pleas, generally arguing that the township's zoning resolution is unconstitutional, unlawful, invalid, arbitrary, capricious and unreasonable. In reliance on this Court's decision in *Castle Manufactured Homes, Inc. v. Tegtmeier* (Sept. 29, 1999), 9th Dist. No. 98CA0065, the trial court found that Phantom failed to demonstrate beyond fair debate that the township's zoning resolution is unconstitutional or otherwise invalid. The trial court overruled Phantom's appeal and affirmed the decision of the BZA.

{¶6} Phantom timely appeals, raising five assignments of error for review. This Court addresses only the first assignment of error as it is dispositive of the appeal.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO CONCLUDE THAT THE TOWNSHIP'S ZONING RESOLUTION IS INVALID, UNLAWFUL, AND UNENFORCEABLE AGAINST APPELLANTS BECAUSE IT CREATES A BUSINESS 'B' ZONING CLASSIFICATION, BUT FAILS TO DESIGNATE ANY LAND FOR

---

[1] Phantom's fireworks business was established prior to the adoption of the 1994 zoning resolution and its authority to do business within the township was, therefore, "grandfathered."

COMMERCIAL/BUSINESS USE UNDER THE 'B' ZONING CLASSIFICATION."

{¶7} Phantom argues that the trial court erred as a matter of law in failing to conclude that the township's zoning resolution is invalid because it creates a business "B" zoning classification but fails to designate any land for business use under the "B" zoning classification. This Court agrees.

{¶8} This matter came to the trial court as an appeal from the BZA's decision pursuant to R.C. Chapter 2506. In such an appeal, the common pleas court considers the whole record to determine whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable, and probative evidence. *South Park, Ltd. v. Council of the City of Avon,* 9th Dist. No. 05CA008737, 2006-Ohio-2846, at ¶¶5-6. However, "[t]his statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on 'questions of law[.]'" *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, at fn. 4.

{¶9} The Ohio Supreme Court has held that a board of zoning appeals' approval or denial of an application for a variance is presumed to be valid, and the party challenging the board's determination has the burden of showing its invalidity. *Consol. Mgt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238, 240, citing *C. Miller Chevrolet, Inc. v. Willoughby Hills* (1974), 38 Ohio St.2d 298, paragraph two of the syllabus. The Supreme Court further held:

> "A trial court, within an appeal pursuant to R.C. Chapter 2506, and a court of appeals, would accordingly be obliged to affirm the action taken by the board, absent evidence that the board's decision was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence." *Consol. Mgt., Inc.* (1983), 6 Ohio St.3d at 240.

{¶10} The BZA argues that this Court is restrained by our generally limited scope of review. Because the trial court premised its determination regarding the validity of the zoning resolution upon its interpretation of law, this Court's standard of review is de novo. See *North Fork Properties v. Bath Twp.*, 9th Dist. No. 21597, 2004-Ohio-116, at ¶9.

{¶11} This Court finds that the trial court erred as a matter of law in affirming the BZA's decision, because the township's zoning resolution is an invalid exercise of the township's authority under R.C. 519.02.

{¶12} Townships, as creatures of statute, have only those powers specifically granted to them or necessarily implied therefrom. *Rua v. Shillman* (1985), 28 Ohio App.3d 63, 64. R.C. 519.02 is the enabling statute which grants townships the authority to regulate by resolution "in accordance with a comprehensive plan, *** the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township[.]" In the absence of a comprehensive plan, a township zoning resolution is an invalid exercise of the township's authority under R.C. 519.02.

{¶13} Although the Revised Code does not define the term "comprehensive plan,"

> "[t]o planners, the terms *** have a distinct, concrete meaning: they are the local government's textual statement of goals, objectives, and policies accompanied by maps to guide public and private development within its planning jurisdiction. The comprehensive plan is the chief policy instrument for: (1) the administration of zoning and subdivision regulations; (2) the location and classification of streets and thoroughfares; (3) the location and construction of public and semi-public buildings and related community facilities and infrastructure (water, storm and sanitary sewers, gas, etc.); (4) the acquisition and development of public and semi-public properties such as parks and open spaces; and (5) the initiation of new programs, such as those in the areas of housing rehabilitation and economic development, to address pressing community needs.
>
> "***
>
> "The essential characteristics of a plan are that it is comprehensive, general and long range. 'Comprehensive' means that the plan encompasses all geographical parts of the community and integrates all functional elements. 'General' means that the plan summarizes policies and proposals and does not, in contrast with a zoning ordinance, provide detailed regulations for building and development. 'Long range' means the plan looks beyond the foreground of pressing current issues to the perspective of problems and possibilities ten to twenty years into the future." Stuart Meck and Kenneth Pearlman, Oh. Plan. & Zoning L. Section 4:31 (2007).

{¶14} In this case, township trustee William Cletzer testified that he was involved in the drafting of the current zoning resolution. He admitted that the township did not have its own comprehensive plan, when it drafted the resolution. Rather, Mr. Cletzer testified that the trustees looked to the Wayne County comprehensive plan and "molded or formed" the township resolution "based on that plan." The Wayne County comprehensive plan reports submitted as part of the record are from 1977 and note that Congress Township is one of nine

townships in the county which were merely requesting rural zoning at the time. The county comprehensive plan does not set forth goals or recommendations specific to Congress Township. Rather, in regard to commercial development, the county comprehensive plan states, "Often, the most fruitful developments in a community or region are the result of local initiative within a general conceptual plan." No one disputes that Congress Township did not have any general conceptual plan either at the time the resolution was drafted, or today.

{¶15} The Ohio Supreme Court emphasized the requirement set out in R.C. 519.02 that a township board of trustees draft zoning regulations in accordance with a comprehensive plan. See *Cassell v. Lexington Twp. Bd of Zoning Appeals* (1955), 163 Ohio St. 340, at paragraph one of the syllabus. The high court further held that a zoning resolution has not been properly adopted pursuant to the enabling statute where it fails to delineate which specific areas may be used for specific uses, when the township has established various types of districts.

{¶16} Because the zoning resolution does not regulate the use of unincorporated township land in accordance with a comprehensive plan, the resolution is invalid. This Court finds that the trial court erred as a matter of law by upholding the validity of the zoning resolution on the authority of *Castle Manufactured Homes, Inc.*, merely because the resolution is substantially related to governmental interests. The trial court ignored the requirement of R.C. 519.02 that the township resolution be adopted "in accordance with a comprehensive

plan." The failure of the township to have a comprehensive plan renders the zoning resolution invalid. Phantom's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO CONCLUDE THAT THE TOWNSHIP'S ENFORCEMENT OF THE 1994 ZONING RESOLUTION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE UNDER R.C. 2506.04."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO CONCLUDE THAT THE TOWNSHIP'S ZONING RESOLUTION, AS APPLIED TO APPELLANTS, IS UNLAWFUL AND PREEMPTED BY STATE LAW BECAUSE IT WRONGFULLY PROHIBITS THE LAWFUL SALE OF COMMERCIAL FIREWORKS THAT ARE REGULATED AND LICENSED BY THE STATE FIRE MARSHALL UNDER STATE LAW."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN REJECTING APPELLANTS' LEGAL ARGUMENTS AND IN FINDING THAT THE TOWNSHIP'S ZONING RESOLUTION WAS NOT UNCONSTITUTIONAL, INVALID, AND UNENFORCEABLE UNDER OHIO LAW."

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO REVERSE THE ADMINISTRATIVE ACTIONS OF THE BOARD OF ZONING APPEALS AND THE ZONING INSPECTOR AND IN FAILING TO REMAND WITH INSTRUCTIONS TO ALLOW THE LAWFUL CONSTRUCTION AND OPERATION OF THIS STATE-LICENSED FIREWORKS STORE TO PROCEED IN ACCORDANCE WITH STATE LAW."

{¶17} As this Court's resolution of the first assignment of error is dispositive of the appeal, we decline to address the remaining assignments of error as moot. See App.R. 12(A)(1)(c).

III.

{¶18} Phantom's first assignment of error is sustained. This Court declines to address the remaining assignments of error. The judgment of the Wayne County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this

judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellees.

DONNA J. CARR
FOR THE COURT

SLABY, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

STEPHEN W. FUNK and PAUL W. LOMBARDI, Attorneys at Law, for appellants.

MARTIN FRANTZ, Prosecuting Attorney, and KATHERINE GALLAGHER, Assistant Prosecuting Attorney, for appellees.

519.02 Board of township trustees may regulate location, size and use of buildings and lands in unincorporated territory.

(A) Except as otherwise provided in this section, in the interest of the public health and safety, the board of township trustees may regulate by resolution, in accordance with a comprehensive plan, the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures, including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board by resolution, in accordance with a comprehensive plan, may regulate the location of, set back lines for, and the uses of buildings and other structures, including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township, and may establish reasonable landscaping standards and architectural standards excluding exterior building materials in the unincorporated territory of the township. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board may regulate by resolution, in accordance with a comprehensive plan, for nonresidential property only, the height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, sizes of yards, courts, and other open spaces, and the density of population in the unincorporated territory of the township. For all these purposes, the board may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.

For any activities permitted and regulated under Chapter 1513. or 1514. of the Revised Code and any related processing activities, the board of township trustees may regulate under the authority conferred by this section only in the interest of public health or safety.

(B) A board of township trustees that pursuant to this chapter regulates adult entertainment establishments, as defined in section 2907.39 of the Revised Code, may modify its administrative zoning procedures with regard to adult entertainment establishments as the board determines necessary to ensure that the procedures comply with all applicable constitutional requirements.

Effective Date: 09-17-1957; 11-05-2004; 05-06-2005; 05-27-2005; 08-17-2006

Exhibit 3

OH Const. Art. VIII, § 2o

Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio (Refs & Annos)
Article VIII. Public Debt and Public Works (Refs & Annos)
O Const VIII Sec. 2o Environmental and related conservation, preservation, and revitalization purposes

(A) It is determined and confirmed that the environmental and related conservation, preservation, and revitalization purposes referred to in divisions (A)(1) and (2) of this section, and provisions for them, are proper public purposes of the state and local governmental entities and are necessary and appropriate means to improve the quality of life and the general and economic-well being of the people of this state; to better ensure the public health, safety, and welfare; to protect water and other natural resources; to provide for the conservation and preservation of natural and open areas and farmlands, including by making urban areas more desirable or suitable for development and revitalization; to control, prevent, minimize, clean up, or remediate certain contamination of or pollution from lands in the state and water contamination or pollution; to provide for safe and productive urban land use or reuse; to enhance the availability, public use, and enjoyment of natural areas and resources; and to create and preserve jobs and enhance employment opportunities. Those purposes are:

(1) Conservation purposes, meaning conservation and preservation of natural areas, open spaces, and farmlands and other lands devoted to agriculture, including by acquiring land or interests therein; provision of state and local park and recreation facilities, and other actions that permit and enhance the availability, public use, and enjoyment of natural areas and open spaces in Ohio; and land, forest, water, and other natural resource management projects;

(2) Revitalization purposes, meaning providing for and enabling the environmentally safe and productive development and use or reuse of publicly and privately owned lands, including those within urban areas, by the remediation or clean up, or planning and assessment for remediation or clean up, of contamination, or addressing, by clearance, land acquisition or assembly, infrastructure, or otherwise, that or other property conditions or circumstances that may be deleterious to the public health and safety and the environment and water and other natural resources, or that preclude or inhibit environmentally sound or economic use or reuse of the property.

(B) The General Assembly may provide by law, subject to the limitations of and in accordance with this section, for the issuance of bonds and other obligations of the state for the purpose of paying costs of projects implementing those purposes.

(1) Not more than two hundred million dollars principal amount of obligations issued under this section for conservation purposes may be outstanding in accordance with their terms at any one time. Not more than fifty million dollars principal amount of those obligations, plus the principal amount of those obligations that in any prior fiscal year could have been but were not issued within the fifty-million-dollar fiscal year limit, may be issued in any fiscal year. Those obligations shall be general obligations of the state and the full faith and credit, revenue, and taxing power of the state shall be pledged to the payment of debt service on them as it becomes due, all as provided in this section.

Exhibit 4

(2) Not more than two hundred million dollars principal amount of obligations issued under this section for revitalization purposes may be outstanding in accordance with their terms at any one time. Not more than fifty million dollars principal amount of those obligations, plus the principal amount of those obligations that in any prior fiscal year could have been but were not issued within the fifty-million-dollar fiscal year limit, may be issued in any fiscal year. Those obligations shall not be general obligations of the state and the full faith and credit, revenue, and taxing power of the state shall not be pledged to the payment of debt service on them. Those obligations shall be secured by a pledge of all or such portion of designated revenues and receipts of the state as the General Assembly authorizes, including receipts from designated taxes or excises, other state revenues from sources other than state taxes or excises, such as from state enterprise activities, and payments for or related to those revitalization purposes made by or on behalf of local governmental entities, responsible parties, or others. The General Assembly shall provide by law for prohibitions or restrictions on the granting or lending of proceeds of obligations issued under division (B)(2) of this section to parties to pay costs of cleanup or remediation of contamination for which they are determined to be responsible.

(C) For purposes of the full and timely payment of debt service on state obligations authorized by this section, appropriate provision shall be made or authorized by law for bond retirement funds, for the sufficiency and appropriation of state excises, taxes, and revenues pledged to the debt service on the respective obligations, for which purpose, notwithstanding Section 22 of Article II of the Ohio Constitution, no further act of appropriation shall be necessary, and for covenants to continue the levy, collection, and application of sufficient state excises, taxes, and revenues to the extent needed for those purposes. Moneys referred to in Section 5a of Article XII of the Ohio Constitution may not be pledged or used for the payment of debt service on those obligations.

As used in this section, "debt service" means principal and interest and other accreted amounts payable on the obligations referred to.

(D)(1) Divisions (B) and (C) of this section shall be implemented in the manner and to the extent provided by the General Assembly by law, including provision for procedures for incurring, refunding, retiring, and evidencing state obligations issued pursuant to this section. Each state obligation issued pursuant to this section shall mature no later than the thirty-first day of December of the twenty-fifth calendar year after its issuance, except that obligations issued to refund or retire other obligations shall mature not later than the thirty-first day of December of the twenty-fifth calendar year after the year in which the original obligation to pay was issued or entered into.

(2) In the case of the issuance of state obligations under this section as bond anticipation notes, provision shall be made by law or in the bond or note proceedings for the establishment, and the maintenance during the period the notes are outstanding, of special funds into which there shall be paid, from the sources authorized for payment of the particular bonds anticipated, the amount that would have been sufficient to pay the principal that would have been payable on those bonds during that period if bonds maturing serially in each year over the maximum period of maturity referred to in division (D)(1) of this section had been issued without the prior issuance of the notes. Those special funds and investment income on them shall be used solely for the payment of principal of those notes or of the bonds anticipated.

(E) In addition to projects undertaken by the state, the state may participate or assist, by grants, loans, loan guarantees, or contributions, in the financing of projects for purposes referred to in this section that are undertaken by local governmental entities or by others, including, but not limited to, not-for-profit

organizations, at the direction or authorization of local governmental entities. Obligations of the state issued under this section and the provisions for payment of debt service on them, including any payments by local governmental entities, are not subject to Sections 6 and 11 of Article XII of the Ohio Constitution. Those obligations, and obligations of local governmental entities issued for the public purposes referred to in this section, and provisions for payment of debt service on them, and the purposes and uses to which the proceeds of those state or local obligations, or moneys from other sources, are to be or may be applied, are not subject to Sections 4 and 6 of Article VIII of the Ohio Constitution.

(F) The powers and authority granted or confirmed by and under this section, and the determinations and confirmations in this section, are independent of, in addition to, and not in derogation of or a limitation on, powers, authority, determinations, or confirmations under laws, charters, ordinances, or resolutions, or by or under other provisions of the Ohio Constitution including, without limitation, Section 36 of Article II, Sections 2i, 2l, 2m, and 13 of Article VIII, and Articles X and XVIII, and do not impair any previously adopted provision of the Ohio Constitution or any law previously enacted by the General Assembly.

(G) Obligations issued under this section, their transfer, and the interest, interest equivalent, and other income or accreted amounts on them, including any profit made on their sale, exchange, or other disposition, shall at all times be free from taxation within the state.

(2000 HJR 15, adopted eff. 11-7-00)

UNCODIFIED LAW

2001 H 3, § 3, eff. 7-26-01, reads:

The Ohio Public Facilities Commission, upon request by the Ohio Public Works Commission, is hereby authorized to issue and sell, in accordance with Section 2o of Article VIII, Ohio Constitution, and sections 151.01 and 151.09 of the Revised Code, original obligations of the State of Ohio, in an aggregate principal amount not to exceed $50,000,000. These authorized obligations shall be issued and sold from time to time and in amounts necessary to ensure sufficient moneys to the credit of the Clean Ohio Conservation Fund (Fund 056) to pay costs charged to that fund, as estimated by the Director of Budget and Management.

EDITOR'S COMMENT

2001:

This section was enacted November 7, 2000 following an election campaign that highlighted its purposes as protecting water purity, and the preservation of natural and open areas throughout Ohio. Opponents pointed to broad language in subsection (A) that exceeded those goals, specifically by "protect [ing] water *and other natural resources*," and "conservation and preservation of natural and open areas and farmlands, *including by making urban areas more desirable or suitable for development and revitalization*" (emphasis added).

LIBRARY REFERENCES

Environmental Law ⚷13.
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Westlaw Topic Nos. 149E, 360.
C.J.S. States §§ 203 to 212, 214 to 215, 218, 221, 252.

RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d State of Ohio § 11, State Indebtedness Limits.

Const. Art. VIII, § 2o, OH CONST Art. VIII, § 2o
Current through 2008 Files 1 to 119, & 121 of the 127th GA (2007-2008), apv. by 6/23/08, and filed with the Secretary of State by 6/23/08.

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91 Ohio St.3d 174, 743 N.E.2d 894, 2001 -Ohio- 24

Briefs and Other Related Documents

Supreme Court of Ohio.
MIDWEST FIREWORKS MANUFACTURING COMPANY, INC., Appellee,
v.
DEERFIELD TOWNSHIP BOARD OF ZONING APPEALS et al.; Carver, Appellant.
No. 00-196.
Submitted Nov. 15, 2000.
Decided March 28, 2001.

Zoning certificate applicant sought judicial review of township board of zoning appeals' revocation of the zoning certificate that had been granted by township zoning inspector. The Court of Common Pleas, Portage County, affirmed. Applicant appealed. The Court of Appeals reversed. Discretionary appeal was allowed. The Supreme Court, Lundberg Stratton, J., held that property owner who lived immediately adjacent to applicant's fireworks factory, separated only by two-lane road, was a "person aggrieved" by, and therefore had standing to appeal to township board of zoning appeals, issuance of zoning certificate to replace two buildings destroyed by fire caused by fireworks explosion with one structure that would be nearly five times the combined size of the two former buildings.

Court of Appeals reversed; remanded.

Cook, J., filed a dissenting opinion in which Francis E. Sweeney, Sr. and Pfeifer, JJ., concurred.

West Headnotes

[1] KeyCite Citing References for this Headnote

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k571 k. Right of Review. Most Cited Cases

Property owner who lived immediately adjacent to fireworks factory, separated only by two-lane road, was a "person aggrieved" by, and therefore had standing to appeal to township board of zoning appeals, township zoning inspector's issuance of zoning certificate to replace two buildings destroyed by fire caused by fireworks explosion with one structure that would be nearly five times the combined size of the two former buildings, though the fireworks factory site already contained multiple buildings; neighboring property owner's position was unique as compared to others within the general community who did not live across the street from the fireworks factory, because fireworks explosions had the potential to propel ignited materials directly onto the neighboring property owner's property. R.C. § 519.15.

[2] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak651 k. In General. Most Cited Cases

The right to appeal an administrative decision is neither inherent nor inalienable; to the contrary, it must be conferred by statute.

Exhibit 5

[3] KeyCite Citing References for this Headnote

30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k151 Parties or Persons Injured or Aggrieved
30k151(2) k. Who Are "Aggrieved" in General. Most Cited Cases

An "aggrieved party," as basis for right to appeal, is one whose interest in the subject matter of the litigation is immediate and pecuniary, and not a remote consequence of the judgment.

[4] KeyCite Citing References for this Headnote

30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k151 Parties or Persons Injured or Aggrieved
30k151(2) k. Who Are "Aggrieved" in General. Most Cited Cases

In order to have standing to appeal as an "aggrieved party," a person must be able to demonstrate a present interest in the subject matter of the litigation which has been prejudiced by the judgment appealed from.

[5] KeyCite Citing References for this Headnote

30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k151 Parties or Persons Injured or Aggrieved
30k151(2) k. Who Are "Aggrieved" in General. Most Cited Cases

A future, contingent, or speculative interest is not sufficient to confer standing to appeal as an "aggrieved party."

****895** ***181** Cole Co., L.P.A., and Mark H. Ludwig, Akron, for appellee.

Craig T. Conley, Canton, for appellant.

***175** LUNDBERG STRATTON, J.

SUNDBERG STRATTON, J. R.C. 519.15 allows "any person aggrieved" by an administrative officer's zoning decision to appeal to the township board of zoning appeals. This case asks whether the property owner herein has standing as a "person aggrieved" by a zoning decision allowing the construction of a building on neighboring property. For the reasons set forth below, we hold that appellant, Jesse J. Carver, Jr., is a "person aggrieved" and, therefore, has standing to appeal the decision to the township board of zoning appeals.

****896** I

Appellee, Midwest Fireworks Manufacturing Company, Inc. ("Midwest"), operates a fireworks factory on approximately eighty-six acres of land in Deerfield Township, Portage County. Midwest and its predecessors have occupied this property since the early 1970s, before any township zoning regulations were in place. Prior to 1980, the Deerfield Township Board of Trustees enacted the Deerfield Zoning Regulations ("DZR"), which zoned Midwest's land as a residential district. Midwest continued its fireworks operation as a valid, nonconforming use. See R.C. 519.19.

In 1982, an explosion and fire destroyed two buildings and several trailers on Midwest's property. The fire injured four persons and caused an estimated $1 million in damages. Although Midwest continued its fireworks business and constructed buildings on other parts of its land, it did not reconstruct the buildings destroyed in 1982.

Fifteen years later, in 1997, Midwest and Pacific Financial Services, Inc., the record owner of the property on which Midwest is situated, applied for a zoning certificate that would allow Midwest to construct a single building to replace the two buildings that had burned down in the 1982 fire. The application stated that the proposed building would be seven thousand two hundred square feet. Attached to the application was an affidavit from Larry Lomaz, who controlled Midwest and Pacific Financial Services. According to Lomaz, the proposed building was approximately the same size as the two buildings destroyed in 1982. Lomaz also claimed that Midwest had not rebuilt the destroyed buildings before 1997 due to several years of litigation involving it and Deerfield Township. A Deerfield Township zoning inspector granted the zoning certificate nine days after Lomaz submitted the application.

***176** Appellant, Jesse J. Carver, Jr., owns and lives on property directly across a two-lane highway from Midwest's property. He was living there when the fire occurred at Midwest in 1982. Carver appealed the issuance of the zoning certificate to the Deerfield Township Board of Zoning Appeals ("BZA"). He argued to the BZA that Midwest had abandoned its nonconforming use privileges by failing to rebuild the destroyed buildings within two years. He testified that he had regularly viewed Midwest's property and had not observed, since the 1982 fire, any activity related to Midwest's fireworks business on the site of the proposed building. Carver also presented evidence to the BZA that the two buildings destroyed in 1982 were of a combined 1,536 square feet-considerably smaller than the seven-thousand-two-hundred square-foot structure that Midwest proposed to build.

The BZA conducted hearings on February 11 and 21, 1998. Carver appeared with counsel at both hearings and testified at the second one. Lomaz attended on behalf of Midwest the February 11 hearing only. The BZA confined its inquiry to two issues: whether this was a nonconforming use, and the size of the proposed building. Following the two hearings, the BZA ruled in Carver's favor and revoked Midwest's zoning certificate.

Midwest filed an R.C. 2506.01 administrative appeal with the Portage County Court of Common Pleas. The company argued, among other things, that Carver lacked standing to appeal to the BZA because he was not a "person aggrieved" by the zoning inspector's issuance of a zoning certificate. The trial court disagreed:

"Carver's property and residence is located directly across the road from [Midwest's] property. Only a two lane roadway separates the two properties. From his property Carver can see the site where the proposed new building was to be built. The former buildings had exploded and burned in 1982, creating a legitimate concern for the safety of his own property. It was Carver's position that issuance of the ****897** zoning permit was unlawful. From all the circumstances presented in the transcript to proceedings, it can be concluded that Carver was a 'person aggrieved' of [Midwest's] receipt of a zoning permit and had standing to appeal to the Board from the zoning inspector's decision to issue that zoning permit."

The trial court also rejected Midwest's remaining arguments and affirmed the BZA's decision to revoke the zoning certificate. The Eleventh District Court of Appeals reversed and entered judgment in favor of Midwest. The court of appeals concluded that Carver made "no showing that allowing Midwest to build one more building on property that already contained multiple buildings would affect Mr. Carver's personal, pecuniary or property rights." Absent such a showing, Carver was not a "person aggrieved" by the zoning inspector's issuance of the zoning certificate. The court concluded that Carver lacked standing to ***177** appeal to the BZA and, consequently, the BZA lacked authority to revoke the zoning certificate issued to Midwest.

This cause is now before this court upon the allowance of a discretionary appeal.

II

[1] [2] The sole issue before us is whether Carver had standing to challenge the issuance of Midwest's zoning certificate by bringing an appeal to the BZA. The right to appeal an administrative decision is neither inherent nor inalienable; to the contrary, it must be conferred by statute. See *Roper v. Richfield Twp. Bd. of Zoning Appeals* (1962), 173 Ohio St. 168, 173, 18 O.O.2d 437, 440, 180 N.E.2d 591, 594. Carver claims a statutory right to appeal under R.C. 519.15 and DZR 701.52, both of which allow "any person aggrieved * * * by any decision of the administrative officer" to appeal that decision to the BZA. Therefore, whether Carver had standing to bring an appeal before the BZA depends upon whether he was a "person aggrieved" by the zoning inspector's issuance of a zoning certificate to Midwest.

[3] [4] [5] In *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 23 O.O. 369, 42 N.E.2d 758, this court held: "Appeal lies only on behalf of a party aggrieved by the final order appealed from." *Id.* at syllabus. An "aggrieved" party is one whose interest in the subject matter of the litigation is " 'immediate and pecuniary, and not a remote consequence of the judgment.' " *Id.* at 161, 23 O.O. at 369, 42 N.E.2d at 759, quoting 2 American Jurisprudence (1936) 942, Appeal and Error, Section 50. Thus, in order to have standing to appeal, a person must be "able to demonstrate a present interest in the subject matter of the litigation which has been prejudiced" by the judgment appealed from. *Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 26, 591 N.E.2d 1203, 1205. See, also, Black's Law Dictionary (7 Ed.1999) 1144 (defining "aggrieved party" as one whose "personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment"). A future, contingent, or speculative interest is not sufficient to confer standing to appeal. *Ohio Contract Carriers*, 140 Ohio St. at 161, 23 O.O. at 369, 42 N.E.2d at 759.

The question of Carver's standing to appeal the issuance of the zoning certificate did not become an issue until Midwest's appeal to the common pleas court. To initiate the appeals process, Carver had completed a preprinted form entitled "Deerfield Township Application for Appeal." The form instructs the appealing party to describe the "error" allegedly made by the zoning inspector. It does not require the person to explain or give reasons why the person is ***178** entitled to appeal the decision. At the hearings, the BZA expressly limited its inquiry by proceeding under the assumption that Carver had standing. Therefore, the record before the BZA on the issue is sparse at best.

****898** In its appeal to the common pleas court, Midwest argued that Carver was not a "person aggrieved" and, therefore, the BZA lacked jurisdiction to consider the administrative appeal. We agree with the trial court that the facts adduced before the BZA support a conclusion to the contrary. The record establishes that Carver sufficiently satisfied the term "person aggrieved" within the meaning of R.C. 519.15.

Carver is a taxpayer and property owner who lives immediately adjacent to the fireworks factory, separated only by a two-lane road. In 1982, two buildings on the fireworks property exploded and burned, causing injuries to four persons. The company plans to replace the two destroyed buildings with one structure that would be nearly five times the combined size of the two former buildings. The fact that Midwest's property already contains multiple buildings does not diminish the impact of yet another building with a proposed size of seven thousand two hundred square feet. To an adjacent property owner, construction of an additional, larger building may be an immediate concern under certain circumstances. Carver's position is unique as compared to others within the general community who do not live across the street from the fireworks factory.

Carver's position is further buttressed by this court's opinion in *Roper v. Bd. of Zoning Appeals*, 173 Ohio St. 168, 18 O.O.2d 437, 180 N.E.2d 591. In *Roper,* this court decided whether a particular property owner had standing to appeal a board of zoning appeals' issuance of a variance to another property owner in the township. Although the opinion does not state whether Roper's property was neighboring or adjacent to the rezoned property, Roper commenced an administrative appeal to the common pleas court that was ultimately dismissed for lack of standing. This court reversed the dismissal and held that Roper had standing to bring an administrative appeal because he (1) was a resident, elector, and property owner of the township, (2) appeared before a township board of zoning appeals with an attorney to protest a zoning change, and (3) stated his intention on the record to appeal the board's decision to the common pleas court. *Id.* at syllabus. See, also, *Schomaeker v. First Natl. Bank of Ottawa*

(1981), 66 Ohio St.2d 304, 20 O.O.3d 285, 421 N.E.2d 530. Schomaeker was an adjacent property owner who was "directly affected" by the grant of a zoning variance to property contiguous to her and who had previously challenged the proposed use. Therefore, she was within the "class of persons * * * entitled to appeal." *Id.* at paragraph two of the syllabus.

Here, there were no public hearings where Carver could voice his concerns before the zoning inspector unilaterally issued the permit to Midwest. Yet, ***179** within twenty days of issuance of the zoning certificate, Carver made his opposition known when he appealed to the BZA. He personally attended the public hearing held by the BZA and was represented by counsel. Carver's lack of participation prior to the initial zoning decision (where he had no opportunity to object) does not diminish his concerns for safety due to his proximity to the construction of yet another larger building on Midwest's property.

Midwest argues that fear of a future explosion is a speculative or remote consequence. Had there never been an explosion or fire on the property, this argument may be more persuasive. Indeed, we find that the opposite is true. With the manufacture of fireworks, requiring the use and handling of explosive materials, the risk of catastrophic explosion exists at all times. In addition, fireworks explosions have the potential to propel ignited materials directly onto Carver's property, thereby spreading the risk of fire. This creates a real and serious threat to persons or property. The fact that an explosion has occurred in the past only augments a neighboring property owner's concern about the operation.

****899** Consequently, we hold that, under the facts of this case, Carver is a "person aggrieved" within the meaning of R.C. 519.15 and, therefore, he has standing to appeal the decision of Deerfield Township granting a zoning certificate to Midwest Fireworks. The judgment of the court of appeals is reversed, and the cause is remanded to the court of appeals to consider the case on its merits.

Judgment reversed and cause remanded.

MOYER, C.J., DOUGLAS and RESNICK, JJ., concur.

FRANCIS E. SWEENEY, SR., PFEIFER and COOK, JJ., dissent.

COOK, J., dissenting.

COOK, J., dissenting. This case asks whether a property owner is a "person aggrieved" by a zoning decision absent a showing by the property owner of a present and substantial interest in the decision beyond a desire to see zoning regulations properly enforced. Because an immediate personal or pecuniary injury is an indispensable element of standing, I respectfully dissent.

Carver claims a statutory right to appeal under R.C. 519.15 and Deerfield Zoning Regulation 701.52, both of which allow "any person aggrieved * * * by any decision of the administrative officer" to appeal that decision to the Board of Zoning Appeals ("BZA"). To be "aggrieved" for purposes of appellate standing, a person must have a *present* and *substantial* interest in the challenged action (in this case, the issuance of the zoning certificate). For a private litigant in a zoning appeal, a present and substantial interest consists of harm that is unique to that ***180** party. *Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 27, 591 N.E.2d 1203, 1205-1206. A future, contingent, or speculative interest will not suffice. *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 161, 23 O.O. 369, 42 N.E.2d 758, 759.

The majority concludes that Carver is uniquely harmed by the issuance of the building permit in view of the fact that Midwest's fireworks facilities exploded in 1982 and could explode again, posing a serious threat to Carver's personal and proprietary interests. But Carver alleged no personal or pecuniary injury when he filed his BZA appeal. He simply alleged that Midwest's proposed structure was larger than the buildings it was supposed to replace and that the zoning inspector did not make a "reasonable effort to determine" whether the building was a proper nonconforming use. Similarly, in his brief to this court, Carver describes his harm as the "blatantly wrongful issuance" of a zoning certificate that allows Midwest to "expand" its commercial fireworks operation in a residential zone. Carver maintains that he has a right

"to expect and to demand" enforcement of the township zoning regulations, which exist for his family's health, safety, and welfare.

The common thread in Carver's allegations of harm is that they have less to do with his personal or proprietary interests than they do with ensuring Midwest's compliance with duly enacted zoning regulations. But enforcement of zoning laws is a concern shared by other citizens of the township at large. Carver's asserted interest is therefore akin to a generalized grievance shared equally by other members of the public. And such harm normally will not confer standing to appeal. *Am. Aggregates Corp. v. Columbus* (1990), 66 Ohio App.3d 318, 323, 584 N.E.2d 26, 29, citing *Warth v. Seldin* (1975), 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343, 354.

I also disagree with the majority's view that Carver's asserted harm is "unique" to him in light of his status as an owner of property across the road from Midwest's. Neither Carver nor the majority has explained how Carver's personal, pecuniary, or property rights would be adversely affected by Midwest's construction of one more building on a parcel that already ****900** contains multiple buildings devoted to Midwest's commercial fireworks business. Nevertheless, the majority concludes that there is a "real and serious threat" to Carver's property because the manufacture of fireworks carries "the risk of catastrophic explosion * * * at all times." But these fears of future explosion are speculative at best and based on little more than the assumption, without support in the record, that Midwest is generally vulnerable to explosions and fires regardless of how safely it engages in its business. Even if Carver has a general fear for life and limb because of Midwest's activities, he cannot use an intangible possibility of *future* injury as a springboard to R.C. 519.15 review. Standing exists only if the ***181** appealing party can show a present interest in the matter appealed, not simply a concern of future injury that may or may not occur. Cf. *In re Petition for Incorp. of Holiday City* (1994), 70 Ohio St.3d 365, 371, 639 N.E.2d 42, 47 (arguments concerning what injuries *may* occur in event of incorporation were "speculative at best and fail to expose a present interest in the matters at issue").

Moreover, the majority inexplicably overlooks a fact that undermines its finding of immediate harm based on a perceived fear of future explosion. Midwest's application for a zoning certificate expressly stated that the proposed building would be used as *garage storage for company vehicles* and not for fireworks manufacturing or storage. Although the majority emphasizes the "risk of catastrophic explosion" related to fireworks manufacturing, the zoning application on its face suggests a significantly diminished threat of this type of harm.

To buttress its conclusion, the majority cites *Roper v. Richfield Twp. Bd. of Zoning Appeals* (1962), 173 Ohio St. 168, 18 O.O.2d 437, 180 N.E.2d 591, and *Schomaeker v. First Natl. Bank of Ottawa* (1981), 66 Ohio St.2d 304, 20 O.O.3d 285, 421 N.E.2d 530, to support a finding that Carver has standing to bring an R.C. 519.15 appeal. Carver relies on both of these cases to support the proposition that he would have standing, as a neighboring property owner, if this were an R.C. 2506.01 appeal and that he should therefore have standing under R.C. 519.15. But these cases provide weak support for this conclusion. Neither *Roper* nor *Schomaeker* suggests that mere adjacency of one's property is enough to confer standing to bring an administrative zoning appeal. When read together, these cases clarify that harm unique to the complaining party provides the basis upon which a private property owner, as distinguished from the public at large, can challenge a zoning decision in an administrative appeal. See *Willoughby Hills*, 64 Ohio St.3d at 27, 591 N.E.2d at 1205-1206. An adjacent or neighboring property owner *may* have standing to bring an appeal under R.C. 519.15 *if* that owner demonstrates the immediate personal or pecuniary injury required to be a "person aggrieved" within the meaning of the statute. Carver has not demonstrated unique harm in this case and thus cannot rely on *Roper* and *Schomaeker* to support his argument for standing.

Absent sufficient allegations of a present and substantial interest in the litigation that is unique compared to that shared by the public at large, Carver has not established that he has standing to appeal to the BZA under R.C. 519.15. I would therefore affirm the judgment of the court of appeals.

FRANCIS E. SWEENEY, SR. and PFEIFER, JJ., concur in the foregoing dissenting opinion.

Ohio,2001.
Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals
91 Ohio St.3d 174, 743 N.E.2d 894, 2001 -Ohio- 24

Briefs and Other Related Documents (Back to top)

- 2000 WL 34335369 (Appellate Brief) Appellant's Reply Brief (Aug. 25, 2000) Original Image of this Document with Appendix (PDF)
- 2000 WL 34335370 (Appellate Brief) Appellee Midwest's Merit Brief Opposing Appeal (Jul. 26, 2000) Original Image of this Document with Appendix (PDF)
- 2000 WL 34335371 (Appellate Brief) Revised Merit Brief of Appellant Jesse J. Carver, Jr. (Jun. 26, 2000) Original Image of this Document with Appendix (PDF)
- 2000 WL 34333394 (Appellate Petition, Motion and Filing) Memorandum in Support of Jurisdiction of Appellant Jesse J. Carver, Jr. (Jan. 31, 2000) Original Image of this Document with Appendix (PDF)

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Not Reported in N.E.2d, 1990 WL 204968 (Ohio App. 10 Dist.)

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
James M. RYAN, Plaintiff-Appellee,
v.
BOARD OF TOWNSHIP TRUSTEES OF PLAIN TOWNSHIP, and David Curtis, Roy Mason and Richard Fisher, Defendants-Appellants.
(The New Albany Company, Dr. Glyde A. Marsh and Margaret P. Marsh, Intervenors-Appellants).
No. 89AP-1441.
Dec. 11, 1990.

Appeal from the Franklin County Common Pleas Court.
Ronald B. Noga, for appellee.

Albers & Albers, James B. Albers and John B. Albers, for appellants.

Squire, Sanders & Dempsey, Michael W. Pettit and Thomas E. Palmer, for intervenors.

OPINION

PEGGY L. BRYANT, Judge.
*1 Defendants-appellants, who are members of the Plain Township Board of Trustees, appeal from the judgment of the trial court finding that property owned by plaintiff-appellee, James M. Ryan, is zoned auto-oriented commercial pursuant to the township's zoning resolution. Intervening appellants, The New Albany Company, Dr. Glyde A. Marsh, and Margaret P. Marsh, own property near that of plaintiff.

Plaintiff is a landowner in Plain Township who wishes to use his property commercially. In 1987, the township zoning officer ordered plaintiff to cease using his property in a commercial manner because the township zoning regulations zoned plaintiff's property as "rural." In February 1988, plaintiff brought suit in the Franklin County Court of Common Pleas. Plaintiff's primary contention in his complaint was that the township's zoning resolution, adopted in 1976, had zoned plaintiff's property "auto-oriented commercial."

Upon motion, the trial court bifurcated the determination of liability and damages. In November 1988, the trial court entered a judgment finding that the township's zoning resolution zoned plaintiff's property auto-oriented commercial. The trial court also dismissed a counterclaim and third-party complaint that defendants had filed. Defendants appealed the trial court's judgment to this court, which dismissed the appeal for lack of a final appealable order. Subsequently, in November 1989, plaintiff waived his claim for damages in order to obtain a final judgment, which the trial court entered on November 13, 1989.

The trial court denied intervenors-appellants' motion to intervene. This court reversed that decision on July 23, 1990 and granted intervening-appellants' request to intervene for the purposes of appeal only. *Ryan v. Bd. of Twp. Trustees of Plain Twp.* (July 17, 1990), Franklin App. No. 89AP-1044, unreported

Exhibit 6

(1990 Opinions 3027). By that time, the original defendants had perfected their appeal in the declaratory judgment action but this court had not yet issued an opinion.

Defendants and intervening-appellants now appeal from the November 13, 1989 order in the declaratory judgment action, assigning the following ten errors:

"1. The trial court erred in concluding that the 1967 comprehensive development plan for Plain Township and New Albany is the statutory 'comprehensive plan' for Plain Township.

"2. The trial court erred in concluding that the 1967 plan is binding upon Plain Township and currently or ever established zoning in Plain Township.

"3. The trial court erred in finding that the official zoning maps used by the Plain Township trustees and the Plain Township zoning commission since November, 1976 were not lawfully adopted.

"4. Even if the official zoning maps used by Plain Township were not properly adopted, the trial court did not have the power to judicially re-zone appellee's property.

"5. The trial court erred in concluding that appellee was issued a commercial building permit upon which he was entitled to rely.

*2 "6. The grant of judgment to appellee on count six of the complaint was contrary to law.

"7. The trial court erred in concluding that the actions of appellants have denied appellee all reasonable economic use of his properties.

"8. The trial court's finding that appellants have diminished the value of appellee's property since 1976 is against the manifest weight of the evidence and contradictory to other findings of the trial court.

"9. The trial court erred in dismissing appellants' counterclaim and third party complaint.

"10. The trial court erred in denying appellants' motion for new trial."

We will address defendants' first three assignments of error together, since the assignments are all based on the premise that the trial court erred by finding that the 1976 zoning resolution adopted the map in the township's 1967 comprehensive development plan as zoning plaintiff's property "auto-oriented commercial." Defendants contend that the map designated as exhibit four in the trial court, zoning plaintiff's property as rural, is the township's official zoning map.

In his brief, plaintiff does not argue that the 1967 plan created zoning in 1967 pursuant to the procedural requirements of R.C. 519.03 *et seq*. Rather, plaintiff argues that the 1976 zoning resolution incorporated the 1967 comprehensive development map as the official zoning map. Plaintiff refers to the definitional section of the resolution, which defines "comprehensive development plan" as:

" * * * The plan, or any portion thereof, adopted by the Village of New Albany Council and Planning Commission and the Plain Township Trustees showing the general location and extent of present and proposed physical facilities, including housing, industrial, and commercial uses, major thorough-fares, parks, schools, and other community facilities. This plan establishes the goals, objectives and policies of the community." (Exhibit 5, at 5.)

Plaintiff's argument is not well-taken. As defendants point out, section 710 of the 1976 zoning resolution states "[t]he Official Zoning Map shall be identified by the signature of the Chairman of the Board of Township Trustees, attested by the Clerk." Exhibit four, unlike the 1967 map, is so identified. In

addition, section 720 of the resolution states that "the name and symbol for Standard Zoning Districts as shown on the Zoning District Map are as follows * * *." The listed names and symbols correspond to the names and symbols on exhibit four, but not those on the 1967 map. Exhibit four is also much more detailed than the 1967 map. In sum, the trial court erred when it concluded that the 1967 map, rather than exhibit four, was the "official zoning map" under the zoning resolution.

Furthermore, the language of the 1967 comprehensive development plan indicates that the plan falls short of establishing zoning categories. The plan states that "[a]s a guide, the Plan is meant to point a way or set a direction rather than present a rigid framework within which all actions must take place." (Exhibit 3, at 45.) Moreover, the plan merely "recommended," that the area in which plaintiff's property is located be "oriented toward drive-in-type establishments." (Exhibit 3, at 54.) In addition, the zoning resolution's reference to the comprehensive development plan, instead of stating that the plan establishes zoning, merely states that "[t]his plan establishes the goals, objectives and policies of the community."

*3 However, even though we have concluded that exhibit four is the official zoning map under the resolution, a conflict remains between the official map's designation of plaintiff's property as rural and the 1967 plan's recommendation that plaintiff's property be designated "auto-oriented commercial." (Exhibit 3, at 54.) Plaintiff's reliance on the 1967 map thus necessitates an interpretation of R.C. 519.02's language that requires that zoning be "in accordance with a comprehensive plan."

We conclude that R.C. 519.02 does not mandate compliance with the 1967 plan. Ohio cases have held that the zoning resolution itself can constitute the comprehensive plan. See *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App.2d 34, 65; *Rumpke Waste, Inc. v. Henderson* (S.D.Ohio 1984), 591 F.Supp. 521, 534-535; *Barnett v. Lesher* (Apr. 26, 1983), Miami App. No. 82-CA-50, unreported. Cf. *Cassell v. Lexington Twp. Bd. of Zoning Appeals* (1955), 163 Ohio St. 340, 345-346 (equating "comprehensive plan" with designation of "the use to which a particular area could be put"). This interpretation accords with the other provisions of R.C. Chapter 519, which do not refer to a "plan" separate from the zoning resolution. See R.C. 519.05, 519.06, 519.07, 519.08, 519.10, and 519.11.

Moreover, even if, as in this case, a township has set forth a comprehensive plan in a separate document, nothing in R.C. Chapter 519 would require compliance with the document, although the actual zoning's failure to conform to the separate plan could be evidence that the township is creating arbitrary distinctions or engaging in "spot zoning." See *Willott v. Beachwood* (1964), 175 Ohio St. 557, paragraph two of the syllabus (definition of spot zoning). Nevertheless, under R.C. Chapter 519, a separate planning document does not create, in the words of the 1967 plan, "a rigid framework."

Plaintiff's brief cites a Florida case, *Machado v. Musgrove* (Fla.App.1987), 519 So.2d 629, for the proposition that compliance with a pre-zoning planning document is mandatory. However, Florida's statutes differ significantly from the "in accordance with" language of R.C. 519.02. Florida's code sets forth in great detail what a separate comprehensive plan should include, as well as specifically stating that land development regulations must conform to the comprehensive plan. Fla.Stat.Ann. sec. 163.3177, 163.3194, and 163.3202. Moreover, in at least one other jurisdiction in which the law requires compliance with a comprehensive plan that exists apart from the zoning resolution, courts have interpreted the plan as prohibiting only "a more intensive use than that prescribed in the plan." *Baker v. Milwaukie* (Ore.1975), 533 P.2d 772, 779. See, also, *Marracci v. Scappoose* (Ore.App.1976), 552 P.2d 552, 553. In other words, even if we were to construe the 1967 plan as mandatory, the township's zoning of plaintiff's property as rural would not necessarily conflict with the plan's recommendation of "auto-oriented commercial," since the rural designation is arguably a less-intensive use.

*4 In sum, despite the 1967 plan's recommendation, R.C. Chapter 519 permitted the township to enact a resolution and map that zoned plaintiff's property as rural.

Plaintiff also urges that the minutes of trustees' meetings demonstrate that the township never adopted exhibit four as the official zoning map. Plaintiff's brief does not specify pertinent statements in the minutes, relying instead upon plaintiff's interpretation of the content of the minutes in his testimony at trial and his conclusion that the zoning map did not exist. However, an examination of the minutes does not establish the fact that the map never existed, although periodic references were made in the minutes to updating the map. In addition, exhibit four was marked pursuant to section 710 of the zoning resolution and dated January 1976. Plaintiff presented no evidence attacking the authenticity of exhibit four. Furthermore, Betty Jane Garrett, the township's former clerk, identified the map at trial and testified that it had hung in the township firehouse. In short, exhibit four, section 710 of the resolution and Garrett's testimony refute plaintiff's argument and the trial court's finding that "[t]here is no record of any other zoning map being properly adopted by the Plain Township Board of Trustees."

Based on the foregoing, we sustain defendants' first three assignments of error.

In their fourth assignment of error, defendants contend that the trial court did not have the power to "judicially re-zone" plaintiff's property. However, the trial court did not purport to be rezoning on its own initiative; rather, the court concluded that the use classification in the 1967 plan prevailed. In addition, case law indicates that, in some instances, a court that has invalidated zoning may, in effect, rezone the property if the court's decision would otherwise "leave the property in an unzoned condition." *Union Oil Co. v. Worthington* (1980), 62 Ohio St.2d 263, 266. We overrule defendants' fourth assignment of error.

In their fifth assignment of error, defendants argue that the trial court erred when it found that the township recognized plaintiff's property as being zoned commercial by issuing a permit for plaintiff to build a commercial structure on the property. Defendants' argument is well-taken, in that the permit application states that the property was "Presently Zoned as rural." The permit application contains a section for proposed use. The application left the categories "business" and "industry" blank and instead listed the proposed use on the "other" line as "Storage and Carpenter Shop." The trial court thus had no basis to conclude that the permit recognized the property's zoning use classification as commercial or that it permitted a commercial structure. We therefore sustain defendants' fifth assignment of error. .

In their sixth assignment of error, defendants argue that the trial court improperly granted summary judgment to plaintiff on the sixth count of his complaint. Plaintiff's sixth count alleged that the Township Zoning Board (apparently the entity denominated as the township zoning commission in R.C. 519.04) had approved commercial zoning for plaintiff's property and that "Defendants' failure to approve of commercial zoning * * * was arbitrary, an abuse of discretion, against the manifest weight of the evidence, contrary to law, and contrary to the Comprehensive Plan." Defendants' argue that the trial court could not have granted judgment on the sixth count in plaintiff's favor because the court had, at trial, granted a directed verdict on the count in defendants' favor.

***5** We initially note that the court's action at trial was necessarily a dismissal under Civ.R. 41(B)(2), rather than the granting of a directed verdict under Civ.R. 50, in that Civ.R. 50 applies only to jury trials. See *Bishop v. Hybud Equip. Corp.* (1988), 42 Ohio App.3d 55, 57; *McIntrye v. Northern Ohio Properties* (1979), 64 Ohio App.2d 179. More to the point, the trial court's dismissal was not journalized. Civ.R. 58 provides that "[a] judgment is effective only when filed with the clerk for journalization." Therefore, the trial court's decision in the present case to dismiss was not "imbued with a permanent character." *Cale Products, Inc. v. Orrville Bronze & Alum. Co.* (1982), 8 Ohio App.3d 375, 378. See, also, *Pitts v. Dept. of Transportation* (1981), 67 Ohio St.2d 378, 379, fn. 1 (orders rendered before final judgment are subject to motions for reconsideration). Nonetheless, the trial court erred in granting judgment to plaintiff on the sixth count, since no basis for the trial court's change of opinion appears in the trial court's findings, other than the court's findings in regard to the 1967 plan, which in our discussion of the first three assignments of error, we have determined were erroneous. Consequently, we sustain defendants' sixth assignment of error.

In their seventh and eighth assignments of error, defendants attack the trial court's findings that defendants' failure to zone the property commercial has deprived plaintiff of all reasonable economic use of the property. Plaintiff's brief asserts that defendants' "economic use" arguments have become moot because plaintiff waived his monetary claims against defendants in order to obtain a final judgment in the matter. Plaintiff's argument is well-taken with respect to defendants' eighth assignment, which argues that the value of plaintiff's property has been diminished only after 1987, not, as the trial court found, since 1976. We therefore overrule defendants' eighth assignment of error. However, we address the arguments in defendants' seventh assignment because the trial court's findings that defendants deprived plaintiff of all reasonable use and that defendants' actions were an unconstitutional taking without just compensation could serve as the basis for injunctive and declaratory relief.

In regard to the trial court's finding of unconstitutionality, the Supreme Court of Ohio has stated:

"To strike a zoning ordinance on constitutional grounds appellants must demonstrate, beyond fair debate* * * that the zoning classification is unreasonable and not necessary to the health, safety and welfare of the municipality. *Mayfield-Dorsh, Inc. v. South Euclid* (1981), 68 Ohio St.2d 156, 22 O.O.3d 388, 429 N.E.2d 159. See, also, *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 395; *Goldblatt v. Hempstead* (1962), 369 U.S. 590. Appellants must demonstrate that the ordinance denies to them the economically viable use of their land without substantially advancing a legitimate government interest. *Superior Uptown, supra; Agins, supra; Penn Central Transp. Co. v. New York City* (1978), 438 U.S. 104. See, also, *Ruckelshaus v. Monsanto Co.* (1984), 467 U.S. 986." *Karches* v. *Cincinnati* (1988), 38 Ohio St.d 12, 19.

***6** Plaintiff testified in the present case on direct examination that "there is no economic viable use for the property at the present time." However, under cross-examination, plaintiff stated that he meant his "anticipated" economic use of the property in his earlier testimony. Plaintiff also indicated that the property could be used for residential rental purposes. From the evidence, the trial court could not have concluded that plaintiff demonstrated that the resolution denied him economically viable use of his land. Accordingly, we sustain defendants' seventh assignment of error.

In their ninth assignment of error, defendants argue that the trial court erred by dismissing their counterclaim and "third-party complaint." The third party in actuality is a party joined, pursuant to Civ.R. 13(H), to defendants' counterclaim against plaintiff, not a party who is liable to defendants for plaintiff's claim and is joined as third party pursuant to Civ.R. 14. Defendants' counterclaim sought enforcement under R.C. 519.24 and 519.99 of the allegedly rural zoning of plaintiff's property. However, in its entry of November 1988, the trial court dismissed the counterclaim, in that the counterclaim was "the subject of another pending action in this court."

Defendants' counterclaim claim would seem to be compulsory under Civ.R. 13(A), meaning that the claim arose out of the same "transaction or occurrence that is the subject of the opposing party's claim." A party waives a compulsory counterclaim if it is not raised in the opposing party's action. Civ.R. 13 Staff Note. However, "the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action * * *." In the present case, plaintiff alleges that defendants' counterclaim was not compulsory because it raised the same issues as plaintiff's appeal to the common pleas court of the township zoning board of appeals' decision upholding the zoning officer's ordering of plaintiff to cease commercial activity on his property.

Defendants' claim arguably did not fall within the "pending action" exception in Civ.R. 13(A). The pending action exception is intended to operate at the counterclaimant's election. The owner of the counterclaim may use the exception to "escape the waiver rule normally applicable to compulsory counterclaims that a party fails to plead," or may elect to "treat the counterclaim as compulsory (if it arises out of the same transaction or occurrence)." *Brach v. Amoco Oil Co.* (C.A.7, 1982), 677 F.2d 1213, 1226. Thus, the pending action exception to Civ.R. 13(A) arguably does not apply when it is asserted by

the opposing party as a bar to treating a counterclaim as compulsory.

Furthermore, defendants were required to treat the counterclaim as compulsory in the instant case because the subject of the administrative appeal pending before the Franklin County Court of Common Pleas is whether the decision of the Board of Zoning Appeals was arbitrary, capricious, or unreasonable. The subject of the counterclaim, in contrast, is the township's affirmative enforcement of the zoning ordinance pursuant to R.C. 519.24. Although the counterclaim and the administrative appeal arise out of the same basic controversy, defendants cannot pursue its claim for injunctive relief pursuant to R.C. 519.24 and a penalty pursuant to R.C. 519.99 in the administrative appeal. Thus, the counterclaim is not the subject of a pending action.

***7** Defendants properly raised its counterclaim in the present action to avoid waiver. We therefore sustain defendants' ninth assignment of error.

In their tenth assignment of error, defendants argue that the trial court erred by not granting a new trial because of the trial judge's bias in the original trial. Defendants' ground for a new trial does not seem to fall within one of the specific grounds listed in Civ.R. 59(A), but rather within the general language of Civ.R. 59(A) stating that "[i]n addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown." We conclude that defendants did not show that the court abused its "sound discretion" in denying defendants' motion. First, because the Chief Justice of the Supreme Court of Ohio has exclusive authority to determine the disqualification of a common pleas judge, this court cannot find that the trial judge erred by not recusing himself. *Beer v. Griffith* (1978), 54 Ohio St.2d 440; *Pegues v. Freedom Fed. S. & L. Assn.* (Mar. 23, 1989), Franklin App. No. 88AP-631, unreported (1989 Opinions 729, 735). Second, the evidence did not appear to show that the trial court was biased. Defendants' allegations demonstrate, at most, that the trial judge conducted the trial in a peremptory manner. Although defendants allege that the trial judge had sold property to developers in the same general area as plaintiff's property, defendants do not explain how that completed transaction would bias the judge against defendants. Consequently, we overrule defendants' tenth assignment of error.

Intervening-appellants have also requested that we clarify their ability to participate in further proceedings after remand of this action to the trial court. This court reversed the trial court's denial of intervening-appellants' motion to intervene, finding that the trial court's denial of the motion was an abuse of discretion. However, in view of the fact that the trial court had entered final judgment in the declaratory judgment action before the appeal of the motion was heard, intervening-appellants' sought, and this court granted, intervention only for the purposes of appeal.

Intervening-appellants argue that they should be afforded full party status in all future proceedings in order to protect their interests, which may be inconsistent with those of the original defendants. Plaintiff argues that intervening-appellants should be denied the opportunity to participate in any future proceedings, as their interests will be adequately represented by the original defendants. Plaintiff further argues that affording full party status to intervening-appellants would prejudice him in that intervening-appellants potentially could raise new issues or claims on remand, thereby forcing him to relitigate the entire action.

Because we have determined that a remand of the declaratory judgment action is necessary, we must now interpret the meaning of the phrase "for the purposes of appeal only" in this court's decision on intervention. A narrow reading of this term would preclude intervening-appellants from any participation after remand; they would be unable, without again seeking to intervene, even to enforce the substantive relief afforded them by our decision should the original defendants fail to do so. Conversely, a broad interpretation of this term would permit intervening-appellants to raise new claims and issues, even though they moved to intervene at such a late stage of the proceedings that this court determined that denial of intervention for the purpose of seeking a new trial would not have been an abuse of the trial

court's discretion. Neither of these interpretations effectuates the interests of the parties nor judicial economy that this court considered in its opinion reversing the trial court's denial of intervention.

*8 Interpreting the term "for the purposes of appeal only" to effectuate these interests, we conclude that this term limits only the scope of intervening-appellants' participation in future proceedings, not the time during which intervening-appellants may continue to participate in subsequent proceedings. However, in light of intervening-appellants' request that they be allowed to intervene only for purposes of appeal, they may participate to the extent necessary to preserve their rights to the relief granted herein; our opinion does not provide intervening-appellants the opportunity to raise any new claims or issues in the trial court.

Based on the foregoing, and having overruled all assignments of error, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

BOWMAN and HAYES, JJ., concur.

HAYES, J., of the Portage County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

Ohio App.,1990.
Ryan v. Board of Tp. Trustees of Plain Tp.
Not Reported in N.E.2d, 1990 WL 204968 (Ohio App. 10 Dist.)

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.
ROBERT W. CLEGG, Plaintiff-Appellant,
v.
BOARD OF ZONING APPEALS OF NEWTON TWP., et al., Defendants-Appellees.
No. 3668.
May 1, 1987.

Civil Appeal from Trumbull County Common Pleas Court Case No. 83 CV 337
GILBERT L. RIEGER, DENISE L. SMITH, Warren, for Plaintiff-Appellant.

DENNIS WATKINS, PROSECUTING ATTORNEY, PAUL E. HELTZEL, ASSISTANT PROSECUTOR, Warren, for Defendants-Appellees.

OPINION

Before FORD, P.J., and COOK and CHRISTLEY, JJ.

FORD, Judge.
***1** Appellant, Robert W. Clegg, filed an application for a zoning variance with appellee, Newton Township Board of Zoning Appeals, to have a three apartment complex in a district zoned R1 residential. R1 districts are residential areas which provide for 'single and two family dwellings' and 'the taking of boarders and leasing of rooms by a resident family * * * providing the total number * * * does not exceed two.' An administrative hearing was conducted on March 16, 1983, at the conclusion of which appellant's request for a variance was denied.

Appellant filed an appeal, pursuant to R.C. Chapter 2506, in the Trumbull County Court of Common Pleas, challenging the board's decision. A hearing was conducted on the cause and, on October 25, 1985, the trial court affirmed the decision denying appellant's request for a variance.

Appellant filed a timely notice of appeal in this court on November 22, 1985, and submitted the following assignments of error.

1. The trial court errored (sic) to the prejudice of appellant in denying appellant's appeal from the decision of the Newton Township Zoning Board of Appeals.

2. The trial court errored (sic) to the prejudice of appellant in denying appellant's appeal as the Newton Township Zoning Ordinance is arbitrary, unreasonable, and capricious, and therefore, unconstitutional.

Although not framed as such, appellant's first assignment of error asserts in part that it was not

Exhibit 7

necessary for appellant to obtain a zoning variance since the proposed use of appellant's property met the requirements of an R1 district, as a rooming or boarding house.

The appellant argues in support of this assignment that the Newton Township Zoning Resolution permits the usage in an R2 district of the taking of boarders or leasing rooms by a resident family provided that the total number of boarders in such residence does not exceed two.

The record before the appellee board indicates that the appellant's subject property is located within an R1 classification or district under the Newton Falls Zoning Ordinance.

First of all, the appellant is mistaken in this particular argument for the reason that the language that be quotes in support of his position as being contained in the Township Zoning Ordinance under an R2 district is not the case. That language is contained in section four of the ordinance under the designation R1 district section two.

'The taking of boarders or leasing of rooms by a resident family provided that the total number of boarders or roomers does not exceed two, in addition to the members of the family, in a dwelling containing one bathroom in a dwelling.'

Again, a review of the testimony received before the appellee board clearly indicates that the property in question was never described as being that of a residence or a boarding house in which the number of boarders or roomers did not exceed two. In fact, the testimony of the zoning inspector is unequivocal that his findings indicated that it was a three apartment unit. Further, the testimony of the appellant himself on this subject is one in which he concedes and acknowledges that his structure is in fact a three apartment unit.

***2** Essentially, appellant's position before the appellee board at the administrative hearing was that he was in compliance with the zoning ordinance. Consequently, it is unequivocally clear from the proceedings before the appellee board that the appellant was not in fact in compliance with the zoning regulations, particularly those contained in the R1 classification district in which the subject property reposed.

Appellant's primary argument in support of the first assignment of error is that he had adequately demonstrated a hardship before the appellee board which would entitle him to a variance to permit a three apartment unit in an R1 district. An analysis of the record before the zoning board of appeals on this issue demonstrates that the appellant failed to submit any specific evidence to show the character of any recognizable economic hardship to him as a result of appellee's being permitted to maintain his property as a two apartment unit in an R1 district.

It is fundamental in this area that generally financial or pecuniary loss alone does not establish an unnecessary hardship in a use variance request based on alleged hardship.

'An owner does not suffer hardship sufficient to warrant the granting of a variance simply because his land would be more valuable or yield more profits if the variance were granted.[FN58] However, the rule that financial or pecuniary loss does not in itself establish unnecessary hardship does not apply in a case where it is not reasonably practicable to devote the land to a conforming use.[FN59] A real hardship does not justify a variance if it is one shared by other property owners. The zoning regulation imposes an unnecessary hardship which will warrant a variance only where the hardship is unique to a particular owner's property.[FN60]' 10 Ohio Jurisprudence 3d, Buildings, etc., Section 282, pages 492-493.

The evidence before the appellee board was uncontroverted that there were no other three apartment units located anywhere in the R1 district either by way of variance or zoning change.

Therefore, we are of the opinion that this assignment of error must fail since there is more than a sufficient basis for the trial court's conclusion on this issue that the ruling of the appellee board was supported by reliable, probative, and substantial evidence and was in accordance with law.

Appellant's second assignment of error challenges the Newton Township Zoning Resolution alleging that it violates statutory and constitutional law. The record demonstrates that the constitutional issue was not raised before the appellee board, but was presented in a timely fashion in the proceedings before the trial court.

When an appeal is taken from an administrative agency to the court of common pleas, the trial court's review is generally confined to the transcript of evidence adduced at the administrative hearing and the issues raised before that tribunal, unless the transacript is defective on its face or an affidavit is filed alleging a defect in the hearing process. R.C. 2506.03. Since none of the conditions contained in R.C. 2506.03 were alleged or substantiated to exist here, with respect to noncompliance with the directives of R.C. 519.02, and because this issue was not raised before the appellee board, this court is precluded from addressing this portion of appellant's second assignment of error. Hence, even though not assigned as error, the trial de novo approach by the trial court on the table of evidence relating to the issues in this administrative appeal was substantially inappropriate.

***3** However, a general proposition of administrative law is that administrative agencies are to address their functions by assuming the constitutionality of pertinent legislative enactments such as zoning ordinances. The constitutionality of such enactments is to be resolved by the courts. The trial court was not precluded from considering constitutional questions which were not raised before the appellee board. East Ohio Gas Co. v. Public Utilities Com. (1940), 137 Ohio St. 225 at pages 237-239. Further, there is authority in Ohio for the proposition that in an administrative appeal under R.C. 2506 to a court of common pleas from a municipal board of zoning appeals, the issue of the constitutionality of zoning restrictions must be tried de novo by the court. SMC, Inc. v. Lardi (1975), 44 Ohio App. 2d 325.

The transcript demonstrates that the zoning resolution at issue provides for R1 and R2 districts in Newton Township. R1 districts are residential areas for 'single and two family dwellings,' while R2 districts permit 'apartment houses and/or multi-family units.' The Newton Township Zoning Inspector testified 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 an R1 to an R2 classification. Consequently, in order for appellant to build a triplex in the township, under its practice, it is necessary for appellant to either obtain a variance or a zoning amendment since no specific area of the township has actually been designated under the R2 classification as an actual R2 district.

Appellant's argument, in part, is thus premised on the fact that while the resolution provides for R2 districts, there are no boundary lines in Newton Township, defining R1 districts and R2 districts.

Appellant further challenges the township zoning resolution in this form as being so arbitrary and unreasonable as to render it unconstitutional.

Generally, this court agrees with the postulated that a township zoning ordinance is not constitutionally infirm where it provides for only one zoning classification or district within its boundaries. Valley View Village v. Proffett (C.A.6, 1955), 221 F.2d 412, 417.

'There is certainly nothing in the home rule amendment itself which requires a village council to divide the village area into more than one district in order to regulate the use of property therein. The Legislature expressly provided that the enabling statutes should not be deemed 'to impair or restrict the power of any municipality under Article XVIII of the Constitution of Ohio.' Section 4366-12, Ohio General Code. We therefore conclude that the village of Valley View had power under the statutes of Ohio and

Article XVIII, Section 3, of the Ohio Constitution to incorporate the entire area of the village into a single use district.' Proffett, supra, at 417. (emphasis added.)

See, also, Euclid v. Ambler Realty Co. (1926), 272 U.S. 365. Although the Village case, supra, also involved the application of the home rule amendment, its rationale regarding a single use district applies also to township zoning in this court's review. This case is, indeed, factually distinguishable from Village, supra.

*4 A basic requirement exists under Ohio law that township zoning classifications be based on a comprehensive plan. R.C. 519.02. Although it is equally accepted that the preparation of a township zoning map is not mandated in connection with the adoption of a township zoning ordinance, it has been held that 'the faiure to define with certainty, the location, the boundaries and areas of the * * * districts rendered invalid the zoning ordinance.' Westlake v. Elrick (1948), 52 Ohio Law Abs. 538, at page 541.

Here the township trustees adopted a zoning ordinance that provided for an R2 district, which would allow 'apartment houses and/or multi-family units-no more than six (6) dwelling units shall be constructed on any one acre of land excluding streets and easements.' Yet the zoning ordinance failed to designate an area in the township to which this classification would apply, either in the ordinance or any maps pertinent to the zoning plan. This, thus, engrains a critical difference between the acceptable format expressed in Village, supr, and the case at hand.

There are many reasons why such a method does not enjoy valid standing, and why it is a vehicle for arbitrary, capricious, and inconsistent results in its application. Several of these concerns were aptly expressed by the Ohio Supreme Court in Cassell v. Lexington Twp. Board of Zoning Appeals (1955), 163 Ohio St., first in paragraph two of the syllabus on page 340, and then at pages 345, 346:

'A township zoning regulation, which provides merely that a section of a township, one square mile in area, shall be zoned for farming, residential, commercial and recreational uses, and which does not specify therein which portions of said section may be used for any or all of such purposes or is not accompanied by a map designating such use areas, is not adopted in accordance with a comprehensive plan.

* * *

And, in 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 within the section as required by Section 3180-26, General Code. Although we make no imputation of such action in this instance, 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 the police power and it is well settled that the power to enact zoning regulations can not be exercised in an arbitrary or unreasonable manner. City of Youngstown v. Kahn Bros. Building Co., 112 Ohio St., 654, 148 N.E., 842, 43 A.L.R., 662, and State, ex rel. Synod of Ohio v. Joseph et al., Village Comm., 139 Ohio St., 229, 39 N.E.(2d), 515, 138 A.L.R., 1274.

The absence of any comprehensive plan in the regulation involved herein certainly opens the door to an arbitrary and unreasonable administration of the regulation.

*5 * * *

There being no yardstick in the regulation by which the zoning commission could possibly be guided, we can come to no conclusion other than that the commission in this instance acted arbitrarily and unreasonably in refusing to issue the permits.'

A further execerbation 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 the 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.

'The term 'spot zoning' is used by the courts to describe a zoning ordinance * * * which is invalid because it classifies or reclassifies an area in a manner which is unreasonable and not sufficiently related to the classification of similarly situated land.' 10 Ohio Jurisprudence 3d (1979) 430, Buildings, Zoning and Land Controls, Section 227; see, also, Willott v. Beachwood (1964), 175 Ohio St. 557, paragraph two of the syllabus.

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 equally treated within the township zoning plan. Such treatment of the R2 classification is arbitray and unreasonable in its nature and is not related to any comprehensive plan of zoning within the township.

For the foregoing reasons, this court concludes that appellant's second assignment of error is well taken, and we hold that the present form and substance of the R2 classification of the Newton Township Zoning Ordinance is invalid and unconstitutional.

Therefore, the judgment of the trial court is affirmed as to the first assignment of error, but the judgment is reversed as to the second assignment.

COOK and CHRISTLEY, JJ., concur.

Ohio App., 1987.
Clegg v. Board of Zoning Appeals of Newton Twp.
Not Reported in N.E.2d, 1987 WL 10755 (Ohio App. 11 Dist.)

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Not Reported in N.E.2d, 1994 WL 17542 (Ohio App. 6 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Huron County.
BOARD OF TOWNSHIP TRUSTEES RIDGEFIELD TOWNSHIP, Appellee,
v.
Kevin OTT, Appellant.
No. H-93-16.
Jan. 21, 1994.

Russell Leffler and Charles Derby, Norwalk, for appellee.

Curtis Koch, Norwalk, for appellant.

PER CURIAM.

*1 This case is before the court on appeal from a judgment of the Huron County Court of Common Pleas which granted plaintiffs-appellees' request for an injunction. Defendant-Appellee, Kevin Ott, appeals that judgment and sets forth the following assignments of error:

"THE COMMON PLEAS COURT ERRORED [sic] IN HOLDING RIDGEFIELD TOWNSHIP HAD A COMPREHENSIVE PLAN."

"THE FAILURE OF THE COMMON PLEAS COURT OF HURON COUNTY TO EXERCISE JURISDICTION OVER THE AFFIRMATIVE DEFENSE OF UNCONSTITUTIONALITY WAS REVERSIBLE ERROR."

"THE FINDING OF THE COMMON PLEAS COURT OF HURON COUNTY, OHIO THAT RIDGEFIELD TOWNSHIP IS NOT SPOT ZONED IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

The undisputed facts underlying this case are fully set forth in the first appeal of this case. See *Bd. of Twp. Trustees Ridgefield Twp. v. Ott* (July 24, 1992), Huron App. No. H-91-044, unreported. Briefly, in 1990, appellant wanted to establish an automobile repair shop and a used car lot on his property located in Ridgefield Township. Appellant first applied for a conditional use variance. The Zoning Appeals Board for Ridgefield Township denied this application. Appellant then applied for a zoning change in order to change the zoning of his property from "Agricultural" to "Business/Commercial." Appellees, the Board of Trustees of Ridgefield Township, denied his request. Appellant appealed the denial to the Huron Court of Common Pleas, but he subsequently voluntarily dismissed that appeal.

Appellant then proceeded to open an automobile repair shop on his property. In August 1990, appellees filed a complaint in which they requested a temporary and a permanent injunction restraining appellant from engaging in any commercial activity on his property and requiring him to remove all signs of commercial activity on his property. Appellant answered and subsequently filed a motion for summary judgment in which he alleged that the Ridgefield Township zoning ordinance was invalid because Ridgefield Township lacked a comprehensive zoning plan as required by R.C. 519.02. Appellant also argued that the manner in which the ordinance was applied constituted "spot zoning." The trial court granted the motion for summary judgment finding that on the evidence offered in support of and in

Exhibit 8

opposition to the motion no genuine issue of material fact existed as to whether Ridgefield Township is spot zoned. On this basis, the lower court found the zoning ordinance invalid.

Appellees (then appellants) appealed this judgment. This court reversed the grant of the summary judgment motion finding that genuine issues of material fact existed on the questions of "whether a comprehensive zoning plan exists, whether the Ridgefield Zoning Ordinance was based on such a plan, and whether, pursuant to that ordinance, Ridgefield Township is spot zoned." *Id.,* at 7. At no point during this entire proceeding did appellees ever argue that appellant could not raise his constitutional arguments, either on the ground of *res judicata* or any other ground.

***2** On remand, the parties stipulated to several exhibits including a copy of the Ridgefield Township Zoning Ordinance and the Zoning Map for Ridgefield Township. Appellant reserved the right to challenge the validity of these documents. The preamble to the Ridgefield Township Zoning Ordinance reads, in part:

"A RESOLUTION enacted for the purpose of promoting the Public health, safety and general welfare; to conserve and protect property and property values; to secure the most appropriate use of land; to regulate the density of population and facilitate adequate and economical provisions for public improvements, all in accordance with a comprehensive land use plan of Huron County and Ridgefield Township * * * as authorized by Section 519 of the Ohio Revised Code."

The stated purpose of the ordinance is to "protect and preserve the predominate agricultural land in Ridgefield Township." Section 201 of the ordinance states that "[A]ll land shall be deemed 'Agricultural' unless otherwise classified on the Official Zoning Map." To achieve its purpose, the (Ridgefield) Zoning Commission is directed to "submit a plan, including texts and maps representing the recommendations of the Zoning Commission for carrying out, by the Township Trustees, the powers, purposes and provisions set forth in Section 519 of the Ohio Revised Code." The ordinance also requires that an Official Zoning Map be drawn, identified by the trustees, and certified by the Ridgefield Township Clerk. The ordinance further provides that land being used for business or commercial purposes is to be zoned "BC". Additional suitable locations may be provided by the Ridgefield Township Officials for sales or service facilities, upon need or demand. Other portions of the ordinance provide for an industrial zone, a floodplain district and for mobile home parks. The ordinance was enacted in 1953 and amended in 1980.

A hearing was held before a referee on October 20, 1992. Testimony at that hearing reveals that appellees believed that Section 201 of the Ridgefield Township Zoning Ordinance was the equivalent of Ridgefield Township's comprehensive zoning plan. Each trustee stated that the plan was to maintain Ridgefield Township as an agricultural-residential area. The Official Zoning Map disclosed that, except for nine individual businesses zoned "Business/Commercial," all of Ridgefield Township is zoned "Agricultural." Testimony at trial also indicated that all but one of these business zones existed prior to the time the ordinance became effective and were "grandfathered" in. The remaining business operated for several years on property zoned "Agricultural." After the commencement of this case, the owner of that business applied for and was granted a zoning change so that his land was zoned "Business/Commercial."

In his report and recommendations, the referee found that all of appellant's arguments addressed the constitutionality of the Ridgefield Township Zoning Ordinance. The referee concluded that these constitutional questions could not be considered because the common pleas court lacked the jurisdiction to consider the constitutionality of the ordinance. The referee based this conclusion on the "fact" that the denial of appellant's request for a zoning change did not constitute legislative action. He also cited to the fact that appellant failed to appeal the denial of his application for a variance as support for his decision.

***3** The referee recommended that appellees' request for injunctive relief be granted. He also recommended that a fine of $100 per day be imposed for the twenty day period in which appellant operated his automobile repair shop. The fine was to be suspended on the condition that appellant cease

all commercial activity on his property within ten days of the trial court's approval of the referee's report.

Appellant filed timely objections. On February 19, 1993, the lower court overruled these objections and approved and adopted the recommendations of the referee. This appeal followed.

In his second assignment of error, appellant asserts that the trial court's failure to exercise jurisdiction over the issue of the validity of the Ridgefield Township Zoning Ordinance was reversible error.

The referee decided that appellant could not argue that the Ridgefield Township Zoning Ordinance was invalid because the denial of appellant's application for a zoning change was not legislative action, *i.e.,* the trustees did not engage in any affirmative act. The referee also pointed to the fact that appellant failed to appeal the denial of his request for a variance as a basis for rejecting appellant's constitutional arguments. For some unknown reason, the referee was of the opinion that the foregoing facts deprived the trial court of the jurisdiction to consider those arguments. There is no jurisdictional question in this case. Appellees stated a claim, pursuant to R.C. 519.24, in the proper forum. Thus, while the referee's reasoning is unclear, it appears that he believed the doctrine of *res judicata* barred appellant's contentions. This doctrine was first raised by appellees in their trial brief *after* our remand of this case for a trial on the questions of fact related to the issues advanced both in the proceedings below and on appeal. It was much too late at this point to attempt to insert the doctrine of *res judicata* into the ensuing proceedings. Accordingly, we find that it was error to hold that the trial court lacked the jurisdiction to entertain appellant's assertions. Appellant's second assignment of error is found well-taken.

In his first assignment of error, appellant contends that the trial court erred in finding the comprehensive zoning plan of Ridgefield Township is that part of the ordinance which deems all property in Ridgefield Township to be zoned "Agricultural".

The power of a board of township trustees to enact zoning regulations is a legislative function delegated to townships by the General Assembly. *Tuber v. Perkins* (1966) 6 Ohio St.2d 155. Under Ohio law, township zoning classifications must be based upon a comprehensive plan. R.C. 519.02; *Cassel v. Lexington Township Bd. of Zoning Appeals* (1955) 163 Ohio St. 340, paragraph one of the syllabus. This limitation requires a general plan to control and direct the use and development of property in the township or a large portion of it by dividing the township into districts according to its present and potential use. *East Fairfield Coal Co. v. Miller* (1955), 71 Ohio Law Abs. 490, 501. This requirement is imposed upon townships to prevent "piecemeal" or "spot zoning." *Scioto Haulers v. Circleville Zoning Bd.* (Sept. 18, 1981), Pickaway App. No. 80-CA-7, unreported. Nonetheless, a township zoning resolution or ordinance can constitute a comprehensive plan within the meaning of R.C. 519.02. *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App.2d 34, 65; *Ryan v. Bd. of Twp. Trustees of Plain Twp.* (Dec. 11, 1990), Franklin App. No. 89AP-1441, unreported. Additionally, the preparation of a township zoning map is not mandated; however, "the failure to define with certainty, the location, the boundaries and the areas of the * * * districts" renders the zoning ordinance invalid. *Westlake v. Elrick* (1948), 52 Ohio Law Abs. 538, at 541; *Clegg v. Bd. of Zoning Appeals of Newton Twp.* (May 1, 1987), Trumbull App. No. 3668, unreported.

***4** Here, appellees testified that Section 201 of the Ridgefield Township Zoning Ordinance was the comprehensive plan for the township. They indicated that the entire township was zoned "Agricultural." Nevertheless, the ordinance itself establishes five separate districts which were to be shown on an Official Zoning Map. The Official Zoning Map is incorporated by reference into the ordinance. Furthermore, the Official Zoning Map is required to meet specific identification requirements. The ordinance further provides that any zoning change requires amendment of the map and an entry indicating the resolution number and date of adoption. The zoning map entered into evidence in this case does not identify the districts and does not comport with the requirements of appellees' own ordinance. The map is not signed by the trustees, attested to by the township clerk, and is not dated.

As to districts, this map contains only several individual "B's" which, presumably, identify the Business/Commercial Zones. Neither the zoning ordinance nor the map designate an area in the township to which any of the five named classifications will apply. Such an ordinance easily leaves "the administration thereof solely within the whim or caprice of the officials charged with its enforcement." *Cassell, supra,* at 345. We therefore conclude that the evidence offered below established the absence of a comprehensive plan that allowed appellees to administer the ordinance in an unreasonable and arbitrary manner. *Id.,* at 345-346.

Moreover, the 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 requiring these types of requests acts as a stimulus for "spot zoning", an unlawful creature. *Clegg, supra.* "Spot zoning" describes an ordinance which is invalid because it singles out a lot or small area for different treatment than similar surrounding land. *Willott v. Beachwood* (1964), 175 Ohio St. 557, paragraph two of the syllabus. 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 land areas will be equally treated. *Clegg, supra.* 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.

For the foregoing reasons, the lower court erred in finding that Ridgefield Township had a comprehensive plan. The court also erred in failing to find the Ridgefield Township Zoning Ordinance was invalid and unconstitutional. Appellant's first assignment of error is found well-taken.

In his third assignment of error, appellant maintains that the trial court's judgment on the issue of "spot zoning" is against the manifest weight of the evidence. The lower court never reached this issue. In addition, the fact that appellees may have engaged in "spot zoning" in the past does not allow appellant to argue that their failure to "spot zone" in his case renders the Ridgefield Township Zoning Ordinance invalid. Accordingly, appellant's third assignment of error is found not well-taken.

***5** On consideration whereof, this court finds that substantial justice was not done the party complaining. The judgment of the Huron County Court of Common Pleas is reversed. Pursuant to App.R. 12(B), this court renders judgment in favor of appellant, Kevin Ott. The Ridgefield Township Zoning Ordinance of 1953, as amended in 1980, is found invalid. Costs of this appeal are assessed against the Board of Trustees of Ridgefield Township.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/80.

HANDWORK, GLASSER and MELVIN L. RESNICK, JJ., concur.

Ohio App. 6 Dist.,1994.
Board of Tp. Trustees Ridgefield Tp. v. Ott
Not Reported in N.E.2d, 1994 WL 17542 (Ohio App. 6 Dist.)

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Not Reported in N.E.2d, 1999 WL 771605 (Ohio App. 9 Dist.)

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Wayne County.
CASTLE MANUFACTURED HOMES, INC., et al.,
v.
Harold TEGTMEIER, et al., Appellants.
No. 98CA0065.
Sept. 29, 1999.

Appeal from Judgment Entered in the Appellees Court of Common Pleas County of Wayne, Ohio, Case No. 98-CV-0046.
J. Alan Smith, Attorney at Law, Lima, Ohio, for Appellants.

Jack R. Baker and James F. Mathews, Attorneys at Law, Canton, Ohio, for Appellees.

Martin Frantz, Wayne County Prosecuting Attorney, Wooster, Ohio, for Appellees.

DECISION AND JOURNAL ENTRY

BATCHELDER.
*1 Appellants, Castle Manufactured Homes, Inc. and Andrew and Sheryl De La Rosa (collectively, "Castle Homes"), appeal from the judgment of the Wayne County Court of Common Pleas, affirming a decision of the Congress Township Board of Zoning Appeals to deny a variance and granting summary judgment in favor of appellees.[FN1] We affirm.

FN1. The appellees are: Harold Tegtmeier, Dale Forbes, and Dave Knight, the members of the Congress Township Board of Trustees (collectively, "the Trustees"); Jay Catteau, Dave Rathbone, Barbara Calihan, Patricia Grube, and Miles Crumley, the members of the Congress Township Board of Zoning Appeals (collectively, "the Zoning Board"); and Don Castella, the Congress Township Zoning Inspector ("the Zoning Inspector").

I.

Castle Homes operates a business that sells new and used manufactured homes and assists some buyers in obtaining property on which to locate the manufactured home sold. In September 1994, Castle Homes negotiated a lease of a two acre parcel of land at the intersection of Interstate 71 and State Route 539 (Congress Road) in Congress Township, Wayne County, Ohio. In November 1994, Castle Homes was incorporated, and a contractor was hired to prepare the parcel for Castle Homes' business; however, work was delayed until January 1995.

On November 8, 1994, the voters of Congress Township approved the adoption of a zoning resolution

Exhibit 9

for the unincorporated areas of the township. The Congress Township Zoning Resolution ("the Zoning Resolution") became effective November 23, 1994. The Zoning Resolution provided for two zoning districts, agricultural and business/industrial, but the entire unincorporated area of the township was zoned agricultural.

On January 17, 1995, the Zoning Inspector notified Castle Homes that the construction work that was taking place on the leased parcel violated the Zoning Resolution and ordered the work to cease. Castle Homes appealed to the Zoning Board and applied for a variance under the Zoning Resolution. On February 13, 1995, the Zoning Board approved the requested variance ("the 1995 variance"), but with several conditions. One condition was that the variance was only for a three year period (the duration of Castle Homes' lease), after which the variance would expire and Castle Homes could reapply for a variance.

Over the next three years, a degree of friction developed between Castle Homes and township officials. Castle Homes chafed under some of the restrictions placed on its business by the variance and did not comply with all of them. Some township officials voiced the opinion that they did not approve of Castle Homes' business. The Zoning Inspector was a frequent visitor to Castle Homes and allegedly imposed even further restrictions on the business, above and beyond those already required by the variance.

In a letter dated November 7, 1997, the clerk of the Zoning Board notified Castle Homes that the variance was to expire on January 30, 1998, and that a new variance must be obtained to continue doing business at that location. Castle Homes submitted an application for this new variance ("the 1998 variance request") on November 17, 1998. A hearing was held before the Zoning Board on January 19, 1998. Sworn testimony was taken, and arguments were presented by Castle Homes. The Zoning Board rejected Castle Homes' argument that the conditions placed on the 1995 variance were invalid and therefore the variance did not terminate after three years. The Zoning Board then voted unanimously to deny the 1998 variance request.

***2** On January 28, 1998, Castle Homes filed a combined notice of appeal and complaint in the Wayne County Court of Common Pleas. The notice of appeal was from the Zoning Board's decision denying the 1998 variance request. The complaint named appellees as defendants and sought declaratory judgments and injunctive relief on several issues relating to the 1995 variance and the 1998 variance request. Castle Homes also set forth a claim for damages against appellees. Appellees answered.

On August 14, 1998, Castle Homes moved for partial summary judgment, and appellees moved for summary judgment. Each side then responded to the other's motion. On November 18, 1998, the trial court issued its decision. On Castle Homes' administrative appeal, the trial court affirmed the Zoning Board. The trial court further granted summary judgment in favor of appellees on all claims in Castle Homes' complaint. Castle Homes now appeals to this court.

II.

Castle Homes asserts two assignments of error:

First Assignment of Error

The Trial Court Erred in overruling Appellants' Motion For Partial Summary Judgement [*sic*].

Second Assignment of Error

The Trial Court erred in sustaining Defendants/Appellees [*sic*] Motion For Summary Judgement [*sic*] when genuine issues of material fact existed and the decision was based upon a mistake of law.

These assignments of error raise several issues, relating to both the administrative appeal and the trial court's decision granting summary judgment in favor of appellees on Castle Homes' complaint. We will address each of the various issues in turn.

A. Standards of Review

We first note the respective standards of review of a trial court's resolution of an administrative appeal and the trial court's decision on a motion for summary judgment.

1. Administrative appeals

Administrative appeals undertaken from a township board of zoning appeals are governed by R.C. Chapter 2506. See R.C. 2506.01. The appeal is first addressed to the court of common pleas of that county. *Id.* The common pleas court's standard of review is set forth in R.C. 2506.04:

The court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from[.]

Our standard of review is even more limited; we must affirm the court of common pleas unless that court's decision " 'is not supported by a preponderance of reliable, probative and substantial evidence.' " *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 613, 693 N.E.2d 219, quoting *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 465 N.E.2d 848. In making this determination, we apply an abuse of discretion standard. *Nauth v. Sharon Twp. Bd. of Zoning Appeals* (Sept. 2, 1998), Medina App. No. 2754-M, unreported, at 4. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

2. Summary judgment

***3** Pursuant to Civ.R. 56(C), summary judgment is proper if:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. Appellate review of a lower court's entry of summary judgment is *de novo,* applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491, 609 N.E.2d 1272. The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264, limiting *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. The

movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.* The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that shows a genuine dispute over the material facts exists. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

B. The 1995 Variance

We first address Castle Homes' various assertions regarding the 1995 variance. Castle Homes argues that the conditions placed on the 1995 variance, including the three year time limit, are not permitted under the Zoning Resolution or the Revised Code. However, these matters may not be raised in this appeal. If Castle Homes had any objection to the 1995 variance, it should have appealed to the trial court within thirty days, as required by R.C. 2505.07. Because no appeal was taken, Castle Homes is barred from raising issues relating to the 1995 variance. See *Cleveland v. Sun Oil Co.* (1989), 62 Ohio App.3d 732, 736, 577 N.E.2d 431.

C. The 1998 Variance Request

Castle Homes has appealed from the denial of the 1998 variance request. Castle Homes argues that the trial court erred by affirming the Zoning Board. We disagree.

R.C. 519.14(B) provides:

The township board of zoning appeals may * * * [a]uthorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done[.]

*4 Section 402(3)(c) of the Zoning Resolution specifically empowers the Zoning Board to

[a]uthorize upon appeal-whenever a property owner can show that a strict application of the terms of the Resolution relating to the use, construction or alterations of buildings or structures or the use of land will impose upon him unusual and practical difficulties or particular hardship-such variations of the strict application of the terms of this Resolution as are in harmony with its general purpose and intent; but only when the [Zoning] Board is satisfied that a granting of such variation will not merely serve as a convenience to the applicant, but will alleviate some demonstrable and unusual hardship or difficult [*sic*] so great as to warrant a variation from the zoning plan as established by this Resolution, and at the same time, the surrounding property will be properly protected.

Section 402(5) gives additional issues that the Zoning Board must consider before granting any variance.

A variance is for the purpose of alleviating the burden of strict compliance with a zoning regulation placed upon a property owner, not to change zoning schemes or alter the character and use of the zoning district. *Consolidated Mgmt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238, 240, 452 N.E.2d 1287. The denial of a variance request "is presumed to be valid, and the burden of showing the claimed invalidity rests upon the party contesting the determination." *Id.*

We conclude that the trial court did not abuse its discretion by affirming the decision of the Zoning Board. In the proceedings relating to the 1998 variance request, Castle Homes claimed unusual hardship

was wrought by its need to continue to do business at its present location and that a forced relocation would be expensive. These arguments fail to demonstrate unusual hardship. Castle Homes made no effort during the three year time period of the 1995 variance to have the area rezoned by the Trustees. Castle Homes entered into a second three year lease for the property where it does business, but the lease was specifically made contingent on the approval of the zoning authorities of Congress Township. Furthermore, Castle Homes entered into the lease, knowing that the property was not zoned for commercial use. When property is acquired with knowledge of zoning restrictions, the party "must accept the limitations on the usage of such property, and may not demand a variance based upon the claimed hardship due to such limitations." *Id.* at paragraph one of the syllabus. Castle Homes did not overcome the presumption in favor of affirming the decision of the Zoning Board.

The trial court did not act with partiality, prejudice, perversity of will, or the like. Therefore, we cannot say that the trial court abused its discretion by affirming the Zoning Board's denial of the 1998 variance request.

D. Constitutionality of the Zoning Resolution

***5** Castle Homes argues that the Zoning Resolution is unconstitutional as applied. At the time of the events concerned in the case at bar, the Zoning Resolution provided for two zoning classifications: agricultural, and business/ industry. However, the entire area subject to the Zoning Resolution was zoned agricultural. Castle Homes contends that this zoning scheme prohibits all commercial or industrial development and is therefore arbitrary and unreasonable. We disagree.

"A zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 690 N.E.2d 510, syllabus. A party challenging the constitutionality of a zoning regulation must prove beyond fair debate that the regulation is unconstitutional. *Id.* at 209, 690 N.E.2d 510.

We conclude that Castle Homes has not demonstrated beyond fair debate that the zoning classification is unconstitutional. Under Section 100 of the Zoning Resolution, the agricultural district is characterized by "areas of productive soils which are normally removed from urban development." A valid purpose for zoning restrictions is to preserve the character of a neighborhood. See, generally, *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 394, 47 S.Ct. 114, 71 L.Ed. 303, 313. Thus, a valid purpose for the Zoning Resolution is to preserve the agricultural character of the township and limit the expansion of commerce and industry onto agriculturally productive soils.[FN2] Thus, the Zoning Resolution is not clearly arbitrary and is substantially related to legitimate governmental ends. Castle Homes has failed to carry its heavy burden to demonstrate unconstitutionality.

FN2. We also note that nothing forbids the township from creating business/industry zones, after conforming to the procedures outlined in the Revised Code and the Congress Township Zoning Resolution.

E. Open Meetings Law

Castle Homes contends that the Zoning Board violated R.C. 121.22, Ohio's open meetings law, when the Zoning Board considered the 1998 variance request. Castle Homes contends that, in considering the 1995 variance request, the Zoning Board met in executive session and decided what conditions to place on the 1995 variance. Castle Homes also argues that, because two members of the Zoning Board testified in depositions that such was their regular practice in considering variances, it should be presumed that a similar violation took place when considering the 1998 variance request. These

contentions are not well taken.

The objective of R.C. 121.22 is to require meetings of public bodies, and any official action of those bodies, to take place in a public meeting. See R.C. 121.22(A). Any action taken by a public body that violates R.C. 121.22 may be invalidated. R.C. 121.22(H). However, an exception exists for quasi-judicial proceedings. In *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision* (1998), 81 Ohio St.3d 58, 689 N.E.2d 32, the appellants argued that the Board of Tax Appeals was subject to R.C. 121.22. The Ohio Supreme Court held that the Board of Tax Appeals was not subject to the open meetings law because it was acting in a quasi-judicial capacity. *Id.* at 62, 689 N.E.2d 32. The court stated that the characteristics of a quasi-judicial proceedings were: (1) notice of hearing and an opportunity to introduce testimony of witnesses, (2) the decision may be appealed to the courts, and (3) the public body's decision involves the exercise of discretion. *Id.* See, also, *Angerman v. Ohio State Med. Bd.* (1990), 70 Ohio App.3d 346, 352, 591 N.E.2d 3; *In re Petition for Annexation of 162.631 Acres* (1988), 52 Ohio App.3d 8, 12, 556 N.E.2d 200.

***6** Turning to the case at bar, we conclude that the Zoning Board was acting in a quasi-judicial capacity when it acted upon the 1998 variance request. First, due process required that Castle Homes be given notice and an opportunity to be heard, and a hearing was held on the matter. Second, pursuant to R.C. 2506.01, the decision of the Zoning Board may be appealed to the common pleas court. Third, the decisions of the Zoning Board involve a degree of discretion, as demonstrated by the standard of review employed by the common pleas court in reviewing the decisions of the Zoning Board under R.C. 2506.04. Because the Zoning Board was acting in a quasi-judicial capacity, R.C. 121.22 did not apply to its deliberations regarding the 1998 variance request.

F. Section 1983 Claim

In its complaint, Castle Homes set forth a claim for damages for violation of civil and constitutional rights. While no specific theory of recovery is fully discussed, there are clear references to violation of constitutional rights and actions under color of law. Therefore, we construe the claim as one for damages under Section 1983, Title 42, U.S.Code. Furthermore, on appeal, Castle Homes only contends that the members of the Zoning Board should be held liable under this cause of action.

Section 1983 states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Some defendants to a Section 1983 action are entitled to assert an immunity to suit. One such immunity is an absolute immunity for judges. *Butz v. Economou* (1978), 438 U.S. 478, 512, 98 S.Ct. 2894, 57 L.Ed.2d 895, 919. This absolute immunity has been extended to persons acting in a capacity that shares certain "characteristics of the judicial process." *Id.* at 513, 57 L.Ed.2d at 920. See, also, *Watts v. Burkhart* (C.A.6, 1992), 978 F.2d 269, 273. If these characteristics of the judicial process [FN3] are present, the adjudicators are entitled to quasi-judicial immunity.

FN3. Some of these characteristics are: the adjudicator does not serve at the pleasure of an appointing authority, thereby insulating the adjudicator from the political process; the adjudicatory process is adversarial in nature; and procedural safeguards in the adjudicatory process exist, including the possibility of appeal to correct error. See *Butz*, 438 U.S. at 512,

57 L.Ed.2d at 920; *Watts*, 978 F.2d at 273-74.

In the case at bar, the trial court granted summary judgment on this claim based on quasi-judicial immunity for the members of the Zoning Board. We agree. When acting upon the 1995 variance and the 1998 variance request, the Zoning Board acted in a quasi-judicial capacity, as discussed above regarding Castle Homes' open meetings law claim. We also note that the process before a zoning appeals board shares one other notable characteristic of the judicial process: matters before a zoning appeals board are "sufficiently intense" to prompt a losing party to seek another forum, "charging the participants in the first [forum] with unconstitutional animus." *Butz*, 438 U.S. at 512, 57 L.Ed.2d at 919.

***7** We conclude that the members of the Zoning Board are entitled to quasi-judicial immunity from Castle Homes' claims under Section 1983. Therefore, the trial court did not err by granting summary judgment in favor of appellees on this issue.

G. Summary

The trial court did not abuse its discretion by affirming the Zoning Board's decision. In addition, the trial court did not err by granting summary judgment in favor of appellees on all claims in Castle Homes' complaint for declaratory judgment, injunctive relief, and damages under Section 1983. Finding no error, we overrule Castle Homes' first and second assignments of error.

III.

Castle Homes' assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

BAIRD, P.J. and WHITMORE, J., concur.

Ohio App. 9 Dist.,1999.
Castle Manufactured Homes, Inc. v. Tegtmeier
Not Reported in N.E.2d, 1999 WL 771605 (Ohio App. 9 Dist.)

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