

**IN THE
SUPREME COURT OF OHIO**

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

**MERIT BRIEF OF APPELLEES B.J. ALAN COMPANY,
PHANTOM FIREWORKS OF WEST SALEM, INC.,
AND ZOLDAN FAMILY PARTNERSHIP, LTD.**

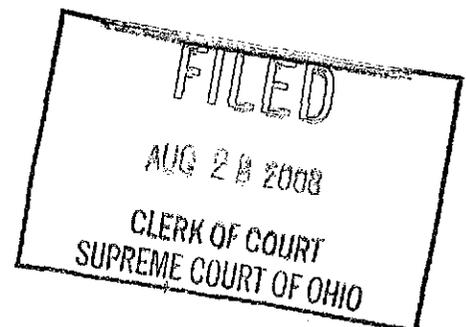
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF FACTS	4
A. Congress Township’s Zoning Resolution	4
B. The Proposed Use Of The Property	5
C. The Court of Appeals’ Opinion	8
ARGUMENT	9
I. <u>RESPONSE TO PROPOSITION OF LAW NO. 1:</u>	
Congress Township’s Zoning Resolution Is Invalid and Unenforceable Because It Fails To Follow Any Comprehensive Plan of Zoning In Determining Where To Permit Commercial Development Under The “B” Zoning Classification	9
A. A Township Fails to Zone in Accordance With A Comprehensive Plan If It Fails To Determine, In Advance And Based Upon Objective and Uniform Criteria, Where Each Of The Township’s Zoning Classifications And Permitted Uses Shall Apply	9
1. Origins and History of the Comprehensive Plan Requirement	11
2. Judicial Interpretation of the Comprehensive Plan Requirement By The Ohio Courts	15
3. Congress Township’s Zoning Scheme Is Invalid Because It Does Not Approve Business Uses and Implement The “B” Zoning Classification In Accordance With A Comprehensive Plan.....	19
B. The Court Should Reject The Township’s Argument That <i>Cassell</i> , <i>Clegg</i> , and <i>Ott</i> Are Not Applicable To This Case	23
C. The Court Should Reject The Township’s Argument That It Complied With R.C. 519.02 By Relying Upon The 1997 Wayne County Comprehensive Plan In Drafting The 1994 Congress Township Zoning Resolution	26

II. RESPONSE TO PROPOSITION OF LAW NO. 2:

The Court of Appeals’ Opinion Does Not Prohibit Townships
From Retaining The Flexibility To Limit Or Regulate Commercial
Development In Accordance With A Comprehensive Plan.....27

III. ADDITIONAL GROUNDS FOR AFFIRMING THE JUDGMENT:

A. The Township’s Enforcement of The 1994 Zoning
Resolution Against Appellees Was Arbitrary, Capricious,
And Unreasonable Under R.C. 2506.04 29

B. The Township’s Enforcement of The 1994 Zoning
Resolution Against Appellees Was Invalid and
Unenforceable Because It Wrongfully Prohibits The
Lawful Sale of Commercial Fireworks That Are Regulated
and Licensed By The State Fire Marshal Under State Law..... 30

CONCLUSION34

CERTIFICATE OF SERVICE.....35

APPENDIX

Apx. Page

B.J. Alan Co. v. Congress Twp. Bd. Of Zoning Appeals,
2007-Ohio-7023 (Ohio App. 9 Dist. Dec. 28, 2007) 1

Bd. of Twp. Trustees of Ridgefield Twp. v. Ott,
1994 WL 17542 (Ohio App. 6 Dist. 1994)6

Clegg v. Bd. of Zoning Appeals of Newton Twp.,
1987 WL 10755 (Ohio App. 11 Dist. 1987) 10

Armrose v. Kings Quarries, Inc., 1982 WL 5410
(Ohio App. 5 Dist. 1982) 15

Spears v. Board of Trustees of New London Township,
2002-Ohio-4948, 2002 WL 31108891 (Ohio App. 6 Dist. 2002)..... 24

Edinburg Twp. Trustees v. 14 & 76 Novelty Co., Inc.,
1992 WL 192377 (Ohio App. 11 Dist. 1992)25

R.C. 519.02 29

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>American Financial Services Ass'n v. City of Cleveland</i> (2006) 112 Ohio St.3d 170, 2006-Ohio-6043.....	30, 31
<i>Armrose v. Kings Quarries, Inc.</i> , 1982 WL 5410 (Ohio App. 5 Dist. 1982)	18
<i>B.J. Alan Co. v. Congress Twp. Bd. Of Zoning Appeals</i> , 2007-Ohio-7023 (Dec. 28, 2007)	1, <i>passim</i>
<i>Bd. Of Trustees of Howland Twp. v. Dray</i> , 2006-Ohio-3402, 2006 WL 1816941 <i>appeal not accepted for review</i> , 111 Ohio St.3d 1493, 2006-Ohio-6171 (Nov. 29, 2006).....	13
<i>Bd. of Twp. Trustees of Ridgefield Twp. v. Ott</i> 1994 WL 17542 (Ohio App. 6 Dist. 1994)	2, <i>passim</i>
<i>Board of Twp. Trustees of Bainbridge Twp. v. Funtime, Inc.</i> (1990), 55 Ohio St.3d 106	9
<i>Cassell v. Lexington Twp. Bd. of Zoning Appeals</i> (1955), 163 Ohio St. 340.....	2, <i>passim</i>
<i>Clegg v. Bd. of Zoning Appeals of Newton Twp.</i> , 1987 WL 10755 (Ohio App. 11 Dist. 1987)	2, <i>passim</i>
<i>Columbia Oldsmobile, Inc. v. City of Montgomery</i> (1990), 56 Ohio St.3d 60	10
<i>D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health</i> , 2002-Ohio-4172, 96 Ohio St. 3d 250 (2002)	10
<i>Edinburg Twp. Trustees v. 14 & 76 Novelty Co., Inc.</i> , 1992 WL 192377 (Ohio App. 11 Dist. 1992)	32, 33, 34
<i>Karches v. City of Cincinnati</i> (1988), 38 Ohio St.3d 12.....	7
<i>Kisil v. City of Sandusky</i> (1984), 12 Ohio St.3d 30	29
<i>Kruetz v. Lauderbaugh</i> , 74 Ohio Law Abs. 132, 60 O.O 48, 136 N.E.2d 627 (1956)	12
<i>Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio), Inc.</i> (1992), 62 Ohio St.3d 387.....	9, 30, 31
<i>Spears v. Board of Trustees of New London Township</i> , 2002-Ohio-4948, 2002 WL 31108891 (Ohio App. 6 Dist. 2002)	18
<i>Symmes Twp. Bd. of Trustees v. Smyth</i> (2000), 87 Ohio St.3d 549.....	9

Town of Rhine v. Bizzell, 751 N.W.2d 780 (Wis. July 1, 2008)12, 20

Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968) 13

Village of Sheffield v. Rowland (1999), 87 Ohio St.3d 930, 31, 33

Yorkavitz v. Columbia Twp. Bd. Of Trustees (1957), 166 Ohio St. 3499

Statutes

R.C. 519.02 1, *passim*

R.C. Chapter 2506.....1, 7, 16

R.C. 2506.04 29, 30

R.C. Chapter 3743 6, 31, 32

Other

A. G. Opinion No. 95-038, 1995 WL 752724 (Dec. 8, 1995)9

Dimento, Joseph F., “Comprehensive Plan Requirements and the Consistency Doctrine, 1 *Rathkopf’s the Law of Zoning and Planning*, § 14:1 (4th ed. June 2008) 13

Haar, Charles M., “In Accordance With A Comprehensive Plan” 68 Harv. L. Rev. 1154 (1955)..... 11, 13

Siemon, Charles L., “The Paradox of ‘In Accordance With A Comprehensive Plan’ and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations,” 16 Stetson L. Rev. 608 (1987)..... 14

INTRODUCTION

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

Here, it is undisputed that Congress Township's 1994 Zoning Resolution created two zoning classifications — "A" for Agricultural and "B" for Business. (Opinion, ¶ 2). In so doing, however, Congress Township did not implement the "B" zoning classification by determining, by resolution, where the "B" zoning classification would apply. (*Id.* at ¶ 2, 14). Rather, Congress Township Board of Trustees elected to delegate this legislative responsibility to the Board of Zoning Appeals, which reviews and approves business uses on a case-by-case basis through the granting of "business use variances." (Opinion, ¶ 2); (Twp. 9th Dist. Appeal Brief, pp. 15-16) (Joint Supplement to Briefs, pp. 133-134) ("Supp.") (admitting that "[b]usiness use is approved on a case by case basis by the Board of Zoning Appeals").

As this Court and other appellate courts have consistently held, this *ad hoc* method of zoning is invalid and unenforceable under Ohio law because it violates R.C. 519.02's requirement that townships zone property "in accordance with a comprehensive plan." *Cassell v. Lexington Twp. Bd. of Zoning Appeals* (1955), 163 Ohio St. 340, syllabus; *Bd. of Twp. Trustees of Ridgefield Twp. v. Ott*, 1994 WL 17542 (Ohio App. 6 Dist. 1994) (Apx. 6); *Clegg v. Bd. of Zoning Appeals of Newton Twp.*, 1987 WL 10755 (Ohio App. 11 Dist. 1987) (Apx. 10). As discussed more fully below, this long-standing statutory requirement was enacted by the General Assembly in order to ensure that townships regulate the use of property based upon sound land use planning and objective standards. By so doing, the General Assembly sought to ensure the uniform administration of township zoning laws and prevent the kind of *ad hoc* haphazard method of zoning that has wrongfully occurred in this case.

Here, Congress Township's zoning resolution violates R.C. 519.02 because it does not designate, in advance and based upon objective and uniform criteria, the specific areas where business uses shall be permitted under the "B" zoning classification. Instead, Congress Township wrongfully requires all property owners who seek to implement a proposed business use under the "B" zoning classification to request a use variance or a spot zoning change for their individual property. By so doing, Congress Township wrongfully encourages *ad hoc* and piecemeal implementation of the "B" zoning classification by local zoning officials who are able to discriminate and selectively pick-and-choose between proposed businesses in an arbitrary and inconsistent manner. Accordingly, as in *Cassell*, *Clegg*, and *Ott*, the Court should affirm the court of appeals' judgment and conclude that the Congress Township Zoning Resolution is invalid and unenforceable as a matter of law.

For these reasons, therefore, Congress Township's first proposition of law is based upon a legal issue that is not dispositive of this appeal. The Court of Appeals did not hold that Congress Township's Zoning Resolution was invalid because it relied upon a county (as opposed to a township) comprehensive plan. Rather, the problem arose because Congress Township did not actually follow the Wayne County Comprehensive Plan (or any comprehensive plan of zoning) in determining where to permit proposed business uses under the "B" zoning classification. (Opinion, ¶ 14-15). Indeed, contrary to Appellants' suggestion, neither the Wayne County Comprehensive Plan nor the 1994 Zoning Resolution ever provided that Congress Township should prohibit all business and industrial uses. Rather, with respect to commercial development, the Wayne County Comprehensive Plan merely stated that commercial development should occur by local initiative "within the context of a general conceptual plan." (Opinion, ¶ 14).

This is the crux of the legal issue presented. By its own admission, Congress Township did not follow any general conceptual plan of zoning (as required by R.C. 519.02 and as recommended by the Wayne County Comprehensive Plan) in determining where to permit commercial development within the unincorporated areas of the township. Rather, in violation of existing precedent, Congress Township has wrongfully delegated this responsibility to the Board of Zoning Appeals, which approves proposed business uses in an *ad hoc*, haphazard manner by selectively reacting to individual zoning requests on a case-by-case basis. Thus, the Court of Appeals was correct in concluding, with respect to commercial development, that Congress Township has failed to follow a comprehensive plan of zoning, as required by Ohio law. Accordingly, the Court should affirm the judgment and conclude that the 1994 Zoning Resolution cannot be enforced against Appellees in this case.

STATEMENT OF FACTS

A. Congress Township's Zoning Resolution

It is well-established that a township's power to zone property must comply with R.C. 519.02, which authorizes a township board of trustees to regulate the use of land and buildings "by resolution, in accordance with a comprehensive plan." *Id.* Here, Congress Township (the "Township") first enacted a zoning resolution in 1994. (Supp. 40). As set forth therein, the 1994 Zoning Resolution called for two zoning districts: "A" for Agricultural and "B" for Business. (Supp. 40-41, 78). In general, the permitted uses in the "A" zoning classification are residential and agricultural and do not include business or industrial uses. (Supp. 78). Although business and industrial uses are expressly permitted by the "B" zoning classification, Congress Township's Zoning Inspector, Chet Martin, has admitted that the Congress Township Zoning Resolution failed to designate any specific areas where business or industrial uses would be permitted under the "B" zoning classification. (Supp. 41). Rather, Congress Township reserved this option to the Congress Township Board of Zoning Appeals ("BZA"), which reviews and approves proposed business uses on a case-by-case basis through the granting of "business use variances." (Supp. 41, 132-133).

The existence of this *ad hoc* method of zoning is not in dispute and has been admitted by Congress Township in the administrative proceedings and in its briefs. In the administrative proceedings below, the Township Zoning Inspector, Chet Martin, readily admitted that the Township Zoning Resolution did not designate any land that has been zoned for business/industrial use and that the only way for a property owner to use property under the "B" zoning classification was "to apply for a use variance" from the BZA. (Testimony of Chet Martin, pg. 63) (Supp. 41). Moreover, both the zoning

inspector and a township trustee, William Cletzer, admitted that Congress Township has in fact granted a number of use variances for new businesses since 1994. (Testimony of Chet Martin, pg. 66) (Supp. 44); (Testimony of William Cletzer, pg. 76) (Supp. 50); (Congress Twp. 9th Dist. Appeal Brief, pg. 16) (Supp. 133) (admitting that “[t]here have been business uses approved in appropriate areas”).¹ Thus, in its appeal briefs, Congress Township admitted that it has not designated any areas for business use under the “B” zoning classification, but elected to “reserve the option to the Board of Zoning Appeals to review and approve business or industrial uses for conditional uses or variances” on a “case by case basis.” (Twp. 9th Dist. Appeal Brief, pp. 15-16) (Supp. 132-133). Thus, it is undisputed that Congress Township has wrongfully followed this method of zoning in determining where to approve proposed businesses since 1994. (*Id.*)

B. The Proposed Use Of The Property

As set forth in the Ninth District’s opinion, Appellees B.J. Alan Co., Phantom Fireworks of West Salem, and Zoldan Family Ltd. Partnership (“Appellees” or “B.J. Alan”) are seeking to construct and operate a state-licensed fireworks store at the intersection of Interstate 71 and State Route 539 in Congress Township, Wayne County, Ohio (the “Property”). (Supp. 7-8, 25-33). The developer of the new store is Appellee B.J. Alan Company. (Supp. 6-7). The Property is owned by Appellee Zoldan Family Limited Partnership, Ltd., and the proposed store will be owned and operated by Appellee Phantom Fireworks of West Salem, Inc. (Supp. 7). Thus, all three were parties to the administrative proceedings. (Supp. 70).

¹ *See also* Township’s Common Pleas Brief, at page 7, filed on March 1, 2007 (“Both the zoning inspector (AR 0066) and the previous Chair of the Rural Zoning Commission (AR 0076) testified to new businesses that were granted use variances under the current Resolution”).

The proposed business use will involve the sale and storage of commercial fireworks that are licensed and subject to state regulation under R.C. Chapter 3743 and the rules and regulations promulgated thereunder. (Testimony of William Weimer, pp. 26-37) (Supp. 24-35). In this regard, the construction and operation of the proposed fireworks store will be highly regulated by the State Fire Marshal who must review the proposed building plans to ensure compliance with the applicable state laws and regulations. (Supp. 32-34). As explained at the hearing, the current license from the State Fire Marshal authorizes the sale of commercial fireworks anywhere within Congress Township. (Supp. 31-32). Thus, it is undisputed that the construction of a new, commercial fireworks facility on the Property is a lawful and permitted use that has been licensed by the State Fire Marshal under state law. (*Id.*)

Presently, Phantom Fireworks of West Salem owns and operates a much smaller, 1500 sq. ft. store in Congress Township at 14700 Rickel Road. (Supp. 34). Although this older facility is located in an agricultural zoning district, it was grandfathered because it existed before the enactment of the Congress Township Zoning Resolution in 1994. (Supp. 35). The grand-fathered store is in a very poor location, however, and is very distant from I-71. (*Id.*). Moreover, it is a much smaller and older building that does not contain any of the fire suppression, burglary, fire alarm, and smoke evacuations systems that are required by the State Fire Marshal under Ohio law. (Supp. 27-35). Accordingly, B.J. Alan purchased the property at the intersection of S.R. 539 and I-71 in order to construct a new state-of-the-art facility that would allow customers to have immediate access to and from I-71 and would permit the installation of new safety equipment required by state law. (Supp. 25-35).

Although the proposed fireworks store is permitted by state law, the Congress Township Zoning Inspector refused to issue a zoning certificate because there was no property in Congress Township that was zoned for business use under the “B” zoning classification. (Supp. 41-43). Rather, like all other proposed business owners in Congress Township, the Zoning Inspector directed B.J. Alan to apply for a “business use variance” from the BZA. (Supp. 45). B.J. Alan then appealed this decision to the Board of Zoning Appeals and, in order to exhaust its administrative remedies, alternatively requested that the BZA grant a “business use variance,” as it had granted for other businesses. (Supp. 23, 131).

The BZA held an evidentiary hearing on November 20, 2006. (Transcript of Proceedings, dated 11/20/06) (Supp. 1-70). At the hearing, counsel for B.J. Alan specifically objected to the Township’s zoning practices and cited case law to explain that the Township’s resolution was invalid and unenforceable because it did not zone property in accordance with a comprehensive plan and was preempted by state law. (Supp. 1-24). Notwithstanding the case law supporting B.J. Alan’s position, however, the BZA voted to deny the request for a zoning certificate and/or a use variance at the conclusion of the hearing. (Supp. 68-69). Appellees then filed an administrative appeal under R.C. Chapter 2506 and, among other things, requested that the lower courts determine whether the 1994 Zoning Resolution was invalid and unenforceable under Ohio law.²

² In conducting judicial review under R.C. 2506, it is well-established that the courts have the authority to consider the validity of a local zoning ordinance or resolution, both on its face and as applied to the Property. *Karches v. City of Cincinnati* (1988), 38 Ohio St.3d 12, syllabus ¶ 1. Thus, the court of appeals conducted *de novo* review of this legal issue on appeal.

C. The Court of Appeals' Opinion.

After the trial court initially affirmed the Township's zoning resolution under R.C. 2506.04, the Ninth District Court of Appeals sustained B.J. Alan's First Assignment of Error and reversed the trial court's judgment as a matter of law. *See B.J. Alan Co. v. Congress Twp. Bd. Of Zoning Appeals*, Case No. 07CA00051 (Ohio App. 9 Dist. Dec. 28, 2007) ("Opinion") (Apx. 1). In this regard, the court of appeals did not hold that a township zoning resolution was invalid because it allegedly was drafted based upon a county comprehensive plan, as opposed to a township comprehensive plan. Rather, upon review of the undisputed evidence in the administrative record, the Court of Appeals sustained B.J. Alan's first assignment of error because it found that Congress Township failed to follow "any general conceptual plan" (including the Wayne County Comprehensive Plan) in determining where to permit commercial development under the "B" zoning classification. (Opinion, ¶ 7, 14-16) (Apx. 3).

In particular, the Court of Appeals specifically examined the details of the 1977 Wayne County Comprehensive Plan and found that it provided that commercial development should occur as a "result of local initiative *within a general conceptual plan.*" (Opinion, ¶ 14) (emphasis added). The Township never followed any general conceptual plan, however, in determining where to approve proposed business uses under the "B" zoning classification. Thus, with respect to commercial development, the Court of Appeals held that the Township failed to regulate the use of land in accordance with a comprehensive plan. Accordingly, the Court of Appeals sustained B.J. Alan's first assignment of error and reversed the trial court's judgment as a matter of law.

ARGUMENT

I. RESPONSE TO PROPOSITION OF LAW NO. 1:

Congress Township's Zoning Resolution Is Invalid and Unenforceable Because It Fails To Follow Any Comprehensive Plan of Zoning In Determining The Areas Where Proposed Business Uses Would Be Permitted Under The "B" Zoning Classification.

A. A Township Fails to Zone In Accordance With A Comprehensive Plan If It Fails To Determine, In Advance And Based upon Objective and Uniform Criteria, Where Each Of The Township's Zoning Classifications And Permitted Uses Shall Apply.

It is well-established that townships in Ohio "have no inherent or constitutionally granted police power." *Yorkavitz v. Columbia Twp. Bd. Of Trustees* (1957), 166 Ohio St. 349, 351. Rather, "the zoning authority possessed by townships in the state of Ohio is limited only to those powers specifically conferred by the General Assembly." *Symmes Twp. Bd. Of Trustees v. Smyth* (2000), 87 Ohio St.3d 549, 552, 2000-Ohio-470, ¶ 2; *Board of Twp. Trustees of Bainbridge Twp. v. Funtime, Inc.* (1990), 55 Ohio St.3d 106, 108. Accordingly, this Court has held that "[a] zoning ordinance, rule or resolution which violates an explicit statutory command of the General Assembly is clearly preempted and is therefore invalid and unenforceable" as a matter of law. *Newbury Twp. Bd. Of Trustees v. Lomak Petroleum (Ohio), Inc.* (1992), 62 Ohio St.3d 387, paragraph one of syllabus.

In this case, it is undisputed that R.C. 519.02 grants townships the power to regulate the use of land by adopting and enforcing a zoning resolution "in accordance with a comprehensive plan." *Cassell v. Lexington Twp. Bd. Of Zoning Appeals* (1955), 163 Ohio St. 340, paragraph one of the syllabus; *see also* Attorney General Opinion No. 95-038, 1995 WL 752724 (Ohio A.G. Dec. 8, 1995) (discussing the comprehensive plan requirement). This statutory requirement applies to townships and counties, but not to

municipalities. *Columbia Oldsmobile, Inc. v. City of Montgomery* (1990), 56 Ohio St.3d 60, 66. Under ordinary rules of statutory construction, all of the statutory language must be presumed to have meaning and cannot be disregarded or ignored by this Court. Rather, this Court must *enforce* the plain language of the statute as written and should not adopt an overly broad interpretation that renders the language meaningless or inoperative. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. Of Health*, 2002-Ohio-4172, 96 Ohio St.3d 250, 256 (2002) (“Statutory language ‘must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative’”) (citations omitted).

Here, a review of the statutory language, the legislative history, and the applicable case law confirms that the requirement to zone “in accordance with a comprehensive plan” is violated where, as here, a township fails to follow any general conceptual plan of zoning in determining, in advance, where the township’s zoning classifications and uses will be permitted under a township’s zoning resolution. Here, Congress Township violated this statutory requirement by adopting two (2) zoning classifications: “A” for agricultural and “B” for business, but then failing to designate, by resolution and in accordance with a comprehensive plan, any specific areas where the “B” zoning classification would apply. Instead, Congress Township wrongfully delegated this legislative responsibility to the BZA, which reviews and approves proposed business uses on a case by case basis through the granting of use variances. By so doing, Congress Township created an *ad hoc* zoning procedure that fails to provide property owners with advance notice of where business uses will be permitted, and opens the door to arbitrary

and inconsistent treatment of the “B” zoning classification by local township officials who can discriminate and selectively pick-and-choose between proposed businesses in an arbitrary and inconsistent manner. Accordingly, the Court should follow the existing case law to conclude that the Township has not implemented the “B” zoning classification in accordance with a comprehensive plan.

1. Origins and History of the Comprehensive Plan Requirement.

As previously discussed, the requirement for townships to exercise zoning powers “in accordance with a comprehensive plan” is set forth in R.C. 519.02, which was previously codified at G.C. § 3180-26. The statutory requirement is similar to other state laws and originated in the Standard Zoning Enabling Act (“SZE A”), which was drafted by an advisory committee of the U.S. Department of Commerce in 1926. See Haar, Charles M., “In Accordance With A Comprehensive Plan,” 68 *Harv. L. Rev.* 1154, 1155-1156 (1955). Section 3 of the SZE A provides that zoning ordinances shall be drawn “in accordance with a comprehensive plan.” *Id.* at 1156, 1170. Although the phrase, “comprehensive plan,” was not expressly defined, an explanatory note states: “This will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.” *Id.* at 1170.

Like the SZE A, R.C. 519.02 also does not define the meaning of a “comprehensive plan.” A review of the statute, however, confirms that the General Assembly did not intend for townships to zone property in a piecemeal or haphazard manner, but wanted to ensure that townships engaged in comprehensive land use planning in determining where to permit “uses of land for trade, industry, residence, recreation or other purposes.” *Id.* By so doing, the legislature clearly contemplated that townships would

not merely react to individual zoning applications on an *ad hoc* basis, but would adopt objective and uniform standards that would be consistently followed. Thus, for each zoning classification that may be established, R.C. 519.02 provides that all zoning regulations “shall be uniform for each class or kind of building or other structure or use throughout any district or zone.” *Id.*

This statutory framework is consistent with the standard approach to zoning that generally has been followed throughout the State of Ohio and throughout the United States since 1926. As another state supreme court recently observed, standard zoning practices contemplate that local jurisdictions shall establish, in advance, where particular types of land uses will be permitted “as-of-right subject to compliance with clear and objective standards for that particular use category or zoning district.” *See Town of Rhine v. Bizzell*, 751 N.W.2d 780, 797-798 (Wis. July 1, 2008) (citations omitted). By so doing, the township can provide property owners with advance notice of where particular uses will be permitted and thereby provide assurances to property owners and citizens alike that zoning classifications will be consistently enforced. *Id.*; *see also Cassell*, 163 Ohio St. at 345 (holding that the comprehensive plan requirement ensures that “anyone interested in purchasing property . . . for a particular use could determine in advance to what use that property would be put” and that there will “uniform administration” of the zoning regulations); *Kruetz v. Lauderbaugh*, 74 Ohio Law Abs. 132, 60 O.O. 48, 136 N.E.2d 627 (1956) (explaining that statutory requirements for county zoning resolutions are designed to ensure that “the average citizen would be able by looking at said plan to determine where he might build a residence, industry, a supermarket or any other business”).

Indeed, the very definition of a “plan” contemplates that townships will engage in “forethought” by determining, in advance, where particular uses will be permitted, and not simply react in an *ad hoc*, piecemeal manner to individualized zoning requests. As one leading zoning treatise has observed:

[The “in accordance” requirement means] that zoning should be the result of studied forethought, that the parts of the zoning scheme should relate to the whole, that the zoning ordinance should be free of gross irrationalities, inconsistencies and discrepancies, that it should not be done piecemeal . . .

Dimento, Joseph F., “Comprehensive Plan Requirements and the Consistency Doctrine, 1 *Rathkopf’s the Law of Zoning and Planning*, § 14:1 (4th ed. June 2008) (emphasis added). By so doing, the comprehensive plan requirement “protects the landowner from arbitrary restrictions on the use of his or her property.” *Udell v. Haas*, 21 N.Y.2d 463, 469-470, 235 N.E.2d 897, 288 N.Y.S.2d 888, 893-894 (1968). As the New York Supreme Court has explained:

Exercise of legislative power to zone should be governed by rules and standards as clearly defined as possible, so that it cannot operate in an arbitrary and discriminatory fashion, and will actually be directed to the health, safety, welfare and morals of the community. The more clarity and specificity required in the articulation of the premises under which a particular zoning regulation is based, the more effectively will courts be able to review the regulation, declaring it *ultra vires* if it is not in reality ‘in accordance with a comprehensive plan.’

Id. (citing Haar, In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. at 1157-58).

Indeed, if zoning is not based upon a comprehensive plan, “arbitrary enforcement of the zoning resolution is inevitable.” *Bd. Of Trustees of Howland Twp. v. Dray*, 2006-Ohio-3402, 2006 WL 1816941 (Ohio App. 11 Dist. June 30, 2006), *appeal not accepted for review*, 111 Ohio St.3d 1493, 2006-Ohio-6171 (Nov. 29. 2006) (emphasis added). As one land use commentator has observed:

In the absence of planning policies adopted in the abstract as a part of a serious planning effort, individual land use decisions become nothing more than *ad hoc* judgments influenced by the heat of the moment (a decision based on . . . impulse, prejudice, or just plain fatigue . . .)

Charles L. Siemon, “The Paradox of ‘In Accordance With A Comprehensive Plan’ and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations,” 16 *Stetson L. Rev.* 608, 616 (1987). Moreover, such decisions can be more easily influenced by political pressures and other improper considerations because the absence of a comprehensive plan opens the door to favoritism and discrimination by local zoning officials who can selectively pick-and-choose whether to approve a proposed business based upon political pressures, favoritism, or personal antagonism to a particular property owner or business. *Id.*, 16 *Stetson L. Rev.* at 627 (“One of the greatest failings of contemporary zoning law has been the vulnerability of the system to influence by politically powerful individuals, a vulnerability that can only be overcome by establishing a procedural and substantive framework for individual decisions — planning”).

Taken as a whole, therefore, it is clear that R.C. 519.02 requires townships to engage in advance planning to determine, based upon objective and uniform standards, where to implement each zoning classification and permitted use set forth in the township’s zoning resolution. It cannot delegate this task to the Board of Zoning Appeals. Otherwise, as discussed more fully below, the township’s zoning scheme is not related to a comprehensive plan and will be invalidated by the courts. We discuss the relevant case law more fully below.

2. Judicial Interpretation of the Comprehensive Plan Requirement By The Ohio Courts.

The leading Ohio case on the meaning of comprehensive plan requirement is this Court's 1955 decision in *Cassell v. Lexington Twp.* (1955) 163 Ohio St.3d 340. In that case, the Lexington Township Zoning Resolution provided that township land "shall be used for farming, residential, commercial and recreational purposes," but did not designate in advance which areas may be used for which purposes. *Id.* at 345. When the township proceeded to deny building permits that were filed under the zoning resolution, this Court reversed the township's actions because it held that the township's failure to designate the permitted uses of the property "in advance" did not constitute zoning "in accordance with a comprehensive plan" and "open[ed] the door to an arbitrary and unreasonable administration of the regulation" as a matter of law. *Id.* at 345-346, syllabus, ¶ 2 and 3. In particular, the Court stated:

[I]n the absence of any designation in the plan of the uses to which a particular area could be put, it is equally difficult for this court to see how there could be any uniform administration of the regulation . . . a zoning regulation such as that involved herein could easily leave the administration thereof solely within the unwarranted whim or caprice of the officials charged with its enforcement.

All zoning laws and regulations find their justification in their police power and it is well settled that the power to enact zoning regulations cannot be exercised in an arbitrary and unreasonable manner. The absence of any comprehensive plan in the regulation involved herein certainly opens the door to arbitrary and unreasonable enforcement.

Id. at 345-346 (internal citations omitted).

Since *Cassell*, there are a number of other appellate court decisions that have invalidated township zoning resolutions that, like the Congress Township Zoning Resolution, wrongfully failed to designate specific areas where each of the zoning classifications or uses would be permitted. One of the leading cases is *Clegg v. Bd. of*

Zoning Appeals of Newton Twp., 1987 WL 10755 (Ohio App. 11 Dist. 1987) (Apx. 10), which was decided by the Eleventh District Court of Appeals in 1987. In *Clegg*, the property owner applied for a use variance to allow the construction of R2 multi-family housing dwelling in a R1 district zoned for single-family housing. *Id.* Although the Newton Township Zoning Resolution provided for both R1 and R2 zoning classifications, the zoning inspector admitted that “the entire township has been zoned R1 and that there are no multi-family units [in the township under the R2 zoning classification] except in those areas where property owners have requested a variance or a zoning change for their property, from a R1 to an R2 classification.” *Id.* at *3. Thus, in order to build multi-family housing in the township, it was necessary for every property owner to seek a variance or a spot zoning change “since no specific area of the township had actually been designated under the R2 classification as an actual R2 district.” *Id.*

Upon judicial review of the township’s actions under R.C. Chapter 2506, the *Clegg* court held that the township’s zoning resolution was “invalid and unenforceable” because the township failed to designate any area where R2 uses would be permitted in accordance with a comprehensive plan. *Id.*, at *4. In reaching this conclusion, the *Clegg* court explained that the township’s zoning scheme was unlawful and invalid, in part, because it “inherently created a procedure which invited every application for an R2 use to specifically request either a variance or a zone change” and therefore resulted in the “arbitrary and unreasonable” enforcement by township zoning officials. *Id.*, at *5. In particular, the court stated:

A further exacerbation in constitutional infirmity with such a system is that it inherently creates a procedure which invites every application for an R2 use to specifically request either a variance or a zone change to implement such use. Under these circumstances, such requests implicitly become catalysts and conduits for what altogether too often can only be

described as an exercise in ‘spot zoning,’ an unlawful creature. There is simply a failure under this method of zoning to divide any of the area of the township into an R2 district in accordance with a comprehensive plan, *Cassell, supra*, and enhance exercises in spot zoning.

* * *

Again, this type of system simply promotes the sporadic grant of zoning variances and/or changes. There is no assurance that similarly situated land areas will be treated within the township zoning plan. Such treatment of the R2 classification is arbitrary and unreasonable in its nature and is not related to any comprehensive plan within the township.

Clegg, 1987 WL 10755, *5 (Apx. 13-14) .

The same legal conclusion was reached by the court of appeals in *Bd. of Twp. Trustees of Ridgefield Twp. v. Ott*, 1994 WL 17542 (Ohio App. 6 Dist. 1994) (Apx. 6). In *Ott*, Ridgefield Township’s zoning scheme was the same as Congress Township in that it created multiple zoning classifications, including a business zoning classification, but “the entire township was zoned ‘Agricultural.’” *Id.*, 1994 WL 17542, *4. Because the zoning resolution and map failed “to designate a specific business/commercial” area within the township, the *Ott* court held that the zoning resolution was “invalid and unconstitutional” because it failed to zone property in accordance with a comprehensive plan and therefore permitted the township to “administer the ordinance in an unreasonable and arbitrary manner.” *Id.* In this regard, the *Ott* court stated:

“[T]he system employed by appellees creates a procedure which requires every applicant who wishes to engage in a nonagricultural/nonresidential use on his or her land to seek a variance or an amendment to the township zoning ordinance.

* * *

An ordinance that purportedly provides for five different districts but actually consists of only one district promotes spot zoning because there is no assurance that similarly situated lands will be treated equally. Thus, in a case, such as the one before us, the failure to designate a specific business/commercial area is unreasonable and arbitrary and is not related to any comprehensive plan.”

Id. (Apx. 9).

There are at least two other appellate decisions that invalidated township zoning resolutions based upon the facts presented here. In *Armrose v. King Quarries, Inc.*, 1982 WL 5410 (Ohio App. 5 Dist. Mar. 11, 1982) (Apx. 15), for example, the Fifth District Court of Appeals held that the Wayne Township Zoning Resolution was an “invalid enactment” because it created three zoning classifications (“R”, “B”, “I”), but failed to define the areas of the township “which were in the “R”, “B” or “I” districts or in any agricultural district.” *Id.* at *5-7 (Apx. 20-21). Similarly, in *Spears v. Board of Trustees of New London Township*, 2002-Ohio-4948, 2002 WL 31108891 (Ohio App. 6 Dist. 2002) (Apx. 24), the Sixth District Court of Appeals, in a challenge to the denial of a use variance, found the New London Township Zoning Resolution was invalid because it was not based upon a comprehensive plan. As in *Ott*, the township zoning resolution provided that all land would be deemed “agricultural or residential” unless otherwise classified. Accordingly, the *Spears* court reversed the denial of a use variance and affirmed the trial court’s judgment in that case.

This is the relevant case law. The decisions in *Cassell*, *Clegg*, *Ott*, *Armrose*, and *Spears*, are consistent and based upon sound legal principles. In contrast, the Township has cited absolutely no cases where the courts have upheld a township zoning resolution when confronted with the factual circumstances presented here. Accordingly, the Court should follow *Cassell*, *Clegg*, *Ott*, *Armrose*, and *Spears*, and conclude that the Congress Township’s Zoning Resolution is invalid and unenforceable for the same reasons.

3. Congress Township's Zoning Scheme Is Invalid Because It Does Not Approve Business Uses and Implement The "B" Zoning Classification In Accordance With A Comprehensive Plan.

In light of this case law, therefore, this Court should affirm the Court of Appeals' judgment that the Congress Township Zoning Resolution is invalid and unenforceable as a matter of law. Like the townships in *Clegg* and *Ott*, the Congress Township Zoning Resolution provides for multiple zoning classifications ("A" and "B"), but fails to designate any property that is subject to the "B" zoning classification. Rather, as in *Clegg* and *Ott*, the Township requires property owners to apply to the Board of Zoning Appeals for a use variance in order to implement a proposed business use. As the Township Zoning Inspector admitted during the administrative proceedings:

Q. Okay. So Exhibit 2 is the current rural zoning resolution for Congress Township, effective November 23, 1994?

* * *

A. Yes.

Q. And under this zoning resolution, there are two zoning districts, correct? A is the agricultural district and B is the business/industry district. And that's on page 4, Article 3, Section 100?

A. That's correct.

Q. Okay. And, at the present time, all land in Congress Township falls into the A. agricultural district, correct?

A. Agricultural/residential, that's correct.

Q. So at the present time, there is no land that's zoned for business/industry [under the "B" zoning classification]?

A. That's correct.

Q. So the only way for a property owner who wants to use property for a business or industrial use, the only way for that to happen would be under the current zoning resolution, they'd have to apply for a use variance?

A. That's correct.

(Testimony of Chet Martin, pp. 62-63) (Supp. 40-41).

As previously discussed, this is an invalid and unlawful zoning practice under Ohio law. As in *Cassell*, *Clegg* and *Ott*, Congress Township's failure to designate, in advance and by resolution, where the "B" zoning classifications shall apply does not constitute zoning "in accordance with a comprehensive plan." By so doing, Congress Township wrongfully places the burden on the property owner to apply for a use variance or spot zoning change in order to implement a use permitted by the "B" zoning classification and therefore encourages *ad hoc* "piecemeal" zoning in violation of Ohio law. *Clegg*, 1987 WL 10755, *5; *Ott*, 1994 WL 17542, *3-4. Moreover, it opens the door to the "arbitrary and unreasonable" enforcement of the "B" zoning classification by local zoning officials who can selectively pick-and-choose whether to approve a proposed business use in a discriminatory manner. *Id.*³ Accordingly, as in *Cassell*, *Clegg* and *Ott*, this Court should declare that Congress Township is not implementing the "B" zoning classification in accordance with a comprehensive plan and conclude that the 1994 Zoning Resolution is invalid and unenforceable against B.J. Alan as a matter of law.

³ For this reason, the Wisconsin Supreme Court recently held that a local zoning ordinance is invalid and unconstitutional if it creates a zoning district that provides for "no permitted uses" and requires all applicants to apply for a conditional use permit. Although the town established generalized standards for deciding whether to grant a conditional use permit, the Court nevertheless held that the zoning scheme was invalid and unconstitutional on its face. "Precluding any use and then only providing generalized standards for obtaining a conditional use permit," the Supreme Court explained, "opens the door to favoritism and discrimination" and "could open the door to abuse." *Town of Rhine v. Bizzell*, 751 N.W.2d 780, 802 (Wis. July 1, 2008). The same reasoning applies equally here.

In its Merit Brief, Congress Township admits these undisputed facts, but seeks to change the subject by arguing that its zoning resolution is valid because “[t]he 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.” (Congress Twp. Merit Brief, pg. 10). In this regard, the Township seeks to blame B.J. Alan for alleging failing to seek “a zone change to the B District.” (*Id.*) This argument makes our point. As in *Clegg* and *Ott*, one of the main problems with the Township’s zoning scheme is that it does not define any “B district” and improperly places the burden on the property owner to apply for a use variance or a zoning change in order to implement a proposed business use. As the court explained in *Ott*, “this system employed by appellees here 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.” *Id.*, 1994 WL 17542, *4 (Apx. 9). By so doing, the court explained, the township wrongfully encourages “piecemeal” and “spot zoning” requests that are “not related to any comprehensive plan of zoning.” *Id.*

In its Brief, Congress Township argues that it does not encourage “spot zoning” because its zoning resolution provides a minimum lot size of three acres. (Merit Brief, pg. 10-11). This argument is not supported by any case law and misses the point. It does not matter the size of any individual parcel. “Spot zoning” arises where a township implements a zoning classification in an *ad hoc*, haphazard manner that is “not sufficiently related to the classification of similarly situated land.” *Clegg*, 1987 WL 10755, **5 (citations omitted). Here, Congress Township merely reacts to individualized

zoning requests, as they arise, on a case-by-case basis. This practice “implicitly becomes catalysts and conduits” for “spot zoning” because it provides “no assurance that similarly situated land will be equally treated.” *Ott*, 1994 WL 17542, *4; *Clegg*, 1987 WL 10755, **5. Rather, such a procedure wrongfully encourages the “arbitrary and unreasonable administration of the zoning regulation” by local township officials who can selectively pick-and-choose whether to approve a particular business in a discriminatory manner. *Cassell*, 163 Ohio St. at 346.

Congress Township’s argument, therefore, presents a false choice that is immaterial to the legal issue presented. It does not matter whether B.J. Alan applied for a use variance or a zoning change.⁴ Regardless of whether B.J. Alan applied for a use variance or a zoning change, the undisputed fact remains that the Township’s method for determining where to permit commercial development under the “B” zoning classification, by definition, is invalid and unlawful because it is not related to any comprehensive plan. Indeed, it is the validity of the Township’s zoning resolution — not the merits of B.J. Alan’s use variance application — that is at issue in this case. B.J. Alan only applied for a use variance in order to exhaust its administrative remedies, but it specifically objected to this unlawful zoning procedure and made clear from the outset that the Township’s zoning resolution was invalid and unenforceable as a matter of law.

⁴ We note that Congress Township itself has admitted that it has never rezoned any property to the “B” zoning classification and that it instead follows a process of approving business uses on a case-by-case basis through use variances granted by the Board of Zoning Appeals. (Congress Twp. 9th Dist. Appeal Brief, pp. 15-16) (Supp. 132-133). Indeed, when B.J. Alan first requested a zoning certificate from the zoning inspector, it was directed to apply for a “business use variance,” which was the zoning practice that has been followed by the Township for approving business uses since 1994.

Accordingly, the Court should reject the Township's arguments and conclude that Congress Township's zoning resolution is invalid and unenforceable as a matter of law.

B. The Court Should Reject The Township's Argument That *Cassell, Clegg, and Ott* Are Not Applicable To This Case.

Congress Township's Merit Brief fails to cite a single case that explains why its zoning methods are valid in light of the cases cited above. Instead, the Township merely attempts to distinguish *Cassell, Clegg, and Ott* based upon alleged distinctions that are not material to the outcome of each case. In particular, Congress Township argues that both *Clegg* and *Ott* are distinguishable because the alleged problems arose from defects in the township's zoning map, arguing that "in *Clegg*, the township did not have a zoning map at all," and that, in *Ott*, the zoning ordinance was "inconsistent" with the zoning map. (Congress Twp. Merit Brief, pp. 12-13). A review of both decisions, however, does not support the Township's argument at all. As previously discussed, the problem arose because the townships created multiple zoning classifications, but failed to designate, by resolution and in accordance with a comprehensive plan, where each of the zoning classifications actually applied. Instead, the townships wrongfully placed the burden on the property owner to apply for a use variance or a zoning change in order to implement a R2 use in *Clegg*, and a "B" business use in *Ott*. It was this zoning method – not the zoning map – that was the reason why the zoning resolutions were invalidated. *Id.*

In *Clegg*, for example, the court expressly noted that "the preparation of a township zoning map is not mandated" by the Ohio Revised Code and thus the court did not invalidate the zoning resolution based upon the alleged failure to create a zoning map. *Id.*, 1987 WL 10755, *4. Rather, in *Clegg*, the problem arose because the township

trustees adopted a zoning ordinance that provided for a R2 zoning classification for apartment houses and/or multi-family units, but the “failed to designate an area in the township to which this [R2] classification would apply, *either* in the ordinance or in any maps pertinent to the zoning plan.” *Id.* (emphasis added) (Apx. 13). Thus, it was this *ad hoc* method of zoning — not the absence of a zoning map — that the court of appeals declared was invalid, explaining that “[t]here is simply a failure under this method of zoning to divide any area of the township into an R2 district in accordance with a comprehensive plan.” *Id.* at *5. (emphasis added). Accordingly, the court invalidated the township’s zoning resolution because its “treatment of the R2 classification” was “arbitrary and unreasonable in its nature” and “not related to any comprehensive plan of zoning within the township.” *Id.* (Apx. 14).

Similarly, in *Ott*, the zoning resolution was not invalidated because of any alleged “conflicts” with the zoning map. Rather, the township zoning resolution was invalidated because it created five zoning classifications, but “[n]either the zoning ordinance nor the map designate[d] an area in the township to which any of the five named classifications will apply.” *Id.* 1994 WL 17542, *4 (Apx. 9). Although the court noted that the “zoning map entered into evidence” was not signed, attested or dated, such alleged defects were not material to the outcome. Rather, the court held that the zoning resolution was invalid because the township’s “failure to designate a specific business/commercial area is unreasonable and arbitrary and is not related to any comprehensive plan.” *Id.*, 1994 WL 17542, *4 (Apx. 9). As in *Clegg*, the court held that “this *system* [of zoning] employed by appellees here 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.” *Id.* (emphasis added).

By so doing, the court explained, the township's zoning wrongfully encouraged "piecemeal" and "spot zoning" requests and provided "no assurance that similarly situated land areas will be equally treated." *Id.* Thus, for the same reasons that were applicable in *Clegg* and fully applicable to Congress Township's zoning resolution in this case, the *Ott* court held that the "lower court erred in finding that Ridgefield Township had a comprehensive plan" and "in failing to find that the Ridgefield Township Zoning Ordinance was invalid and unconstitutional" as a matter of law. *Id.* (Apx. 9).

Finally, Congress Township is wrong in suggesting that *Cassell* is distinguishable because, unlike Lexington Township in *Cassell*, "Congress Township had a Zoning Map." (Twp. Merit Brief, pg. 16). Again, it was not the absence of a zoning map that compelled this Court to invalidate the Lexington Township Zoning Resolution. Rather, the zoning resolution was invalid because the zoning resolution "does not specify therein which portions" may be used for each of the purposes set forth in the township zoning resolution. It was this failure to decide, in advance, where each zoning use would apply — not the absence of a zoning map — that was the problem in *Cassell*, as it was in *Clegg* and *Ott*. By so doing, the Court held that the zoning resolution failed to provide advance notice to "anyone interested in purchasing property" as to "what use that property would be put" and failed to ensure that there would be "uniform administration" of the zoning regulations. *Id.*, 163 Ohio St.3d at 345. Accordingly, this Court should reject the Township's arguments and follow *Cassell*, *Clegg*, and *Ott* to conclude that Congress Township's zoning resolution is invalid and unenforceable as a matter of law.

C. The Court Should Reject The Township's Argument That It Complied With R.C. 519.02 By Relying Upon The 1977 Wayne County Comprehensive Plan In Drafting The 1994 Congress Township Zoning Resolution.

In its brief, Congress Township also argues that it complied with R.C. 519.02 because it allegedly relied upon the Wayne County Comprehensive Plan in drafting the 1994 Zoning Resolution. As previously discussed, however, this argument misses the point. The legal issue presented below was not whether the Township can rely upon a county comprehensive plan (as opposed to a township comprehensive plan) in drafting a township zoning resolution under R.C. 519.02. Rather, the key question is whether Congress Township violated R.C. 519.02 by failing to follow any comprehensive plan of zoning in determining where to permit commercial development under the "B" zoning classification. (Opinion, ¶ 14-15). It does not matter, therefore, whether the Congress Township Rural Zoning Commission actually relied upon the Wayne County Comprehensive Plan in *drafting* the 1994 Zoning Resolution. Rather, as set forth above, the Township's zoning resolution is invalid because it failed to follow the Wayne County Comprehensive Plan (or any comprehensive plan) in deciding where to permit proposed business uses under the "B" zoning classification. (Opinion, ¶ 14) . (Apx. 3).

Indeed, as the court of appeals correctly observed, the Wayne County Comprehensive Plan did not recommend that Congress Township should prohibit all business and industrial uses. Rather, with respect to commercial development, the Wayne County Comprehensive Plan provided that commercial development should occur as a result of local initiative within the context of a "*general conceptual plan.*" (Opinion, ¶ 14) (citing 1977 Wayne County Comprehensive Plan, pg. 31) (emphasis added). This is the problem. Rather than determine where to permit business uses in

accordance with a general conceptual plan, the Township, by its own admission, has elected to reserve the option for approving business uses to the Board of Zoning Appeals, which reviews and approves business uses on a case-by-case basis through the granting of use variances. (Supp. 132-133). Thus, the Court of Appeals was correct in concluding that, with respect to commercial development, Congress Township has not followed a comprehensive plan of zoning as a matter of law. (Opinion, ¶ 14).

II. RESPONSE TO PROPOSITION OF LAW NO. 2:

The Court of Appeals' Opinion Does Not Prohibit Townships From Retaining The Flexibility To Limit Or Regulate Commercial Development In Accordance With A Comprehensive Plan.

Contrary to Appellants' suggestions, the Court of Appeals' decision will not have an adverse impact upon other townships that seek to restrict commercial development in accordance with a comprehensive plan. As the Court of Appeals properly held, the issue in this case is not whether townships can lawfully seek to preserve the agricultural character of the township or to limit the expansion of commercial or industrial uses. (Opinion, ¶ 16) (explaining that a township zoning resolution may seek to advance legitimate governmental interests) (Apx. 4). Rather, the key question presented is whether a township may seek to regulate the zoning of proposed business uses in an *ad hoc* and piecemeal manner by granting "business use variances" on a case-by-case basis, without following any comprehensive plan of zoning *at all*. On this question, the law is clear and well-established. Townships must regulate the zoning of property in accordance with a comprehensive plan. Otherwise, this statutory language would become meaningless and inoperative in violation of the legislature's intent.

Indeed, by affirming the court of appeals' judgment, this Court will not be requiring townships to hire land use planning experts to write individualized, township-specific comprehensive plans. As with current land use planning and zoning practices, townships shall continue to have the flexibility to rely upon county land use planning resources in developing and amending township zoning resolutions. In so doing however, a township cannot completely disregard the statutory requirement to zone property in accordance with a comprehensive plan. Rather, where, as here, it establishes multiple zoning classifications and uses, the township must be able to establish that it is actually following some type of comprehensive plan in deciding where and how to implement each of the zoning classifications and uses within its jurisdiction.

This Court therefore should reject the Township's arguments and affirm judgment in this case. Although R.C. 519.02 can be broadly construed to permit townships to retain flexibility in exercising their delegated zoning powers, it cannot be read in a manner that eliminates the comprehensive plan requirement altogether. Here, by its own admission, Congress Township has failed to follow any comprehensive plan of zoning in determining where to permit business uses under the "B" zoning classification. Instead, in blatant disregard for existing precedent, the Township has engaged in an arbitrary and unlawful zoning practice that has been repeatedly declared invalid by Ohio courts. Thus, as in *Cassell*, *Clegg*, and *Ott*, the Court should declare that the Congress Township Zoning Resolution is invalid and unenforceable and affirm the Court of Appeals' judgment as a matter of law.

III. ADDITIONAL GROUNDS FOR AFFIRMING THE JUDGMENT

Under S. Ct. Prac. R. VI, Section 3(A), Appellees' Merit Brief are directed to answer "the appellant's contentions" and make "any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken." Here, there are two additional grounds for concluding that the 1994 Zoning Resolution cannot be lawfully enforced against Appellees, which provide an independent basis for affirming the judgment. One of the arguments relates to the arbitrary enforcement issue discussed above, and the second is based upon a statutory preemption issue relating to the state's regulation of commercial fireworks stores, which was fully briefed by the parties below, but was not decided by the Court of Appeals. We discuss each of these arguments below.

A. The Township's Enforcement of The 1994 Zoning Resolution Against Appellees Was Arbitrary, Capricious, and Unreasonable Under R.C. 2506.04.

This Court has held that "when a zoning ordinance is enforced in an unreasonable and arbitrary manner, as in this case, it is the responsibility of the trial court, reviewing the action pursuant to R.C. Chapter 2506, to reverse the board of zoning appeals." *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34. Here, as previously discussed, Congress Township has admitted that a property owner cannot use property for a business or commercial use under the "B" zoning classification unless it first applies for and receives a business use variance from the BZA. (Testimony of Chet Martin, pp. 62-63) (Supp. 40-41). In fact, during the proceedings below, the Township readily admitted that it has granted use variances for a number of other new businesses since 1994. (Supp. 44, 50, 133).

As the courts explained in *Cassell*, *Clegg*, and *Ott*, this zoning practice, by definition, results in the “arbitrary and unreasonable” enforcement of the township’s zoning resolution because it provides “no assurance that similarly situated land areas will be treated equally.” *Cassell*, 163 Ohio St.3d at 345-46; *Ott*, 1994 WL 17542, *4; *Clegg*, 1987 WL 10755, *5. Although both *Clegg* and *Ott* found that this township zoning practice violated the requirement to zone property “in accordance with a comprehensive plan,” it is equally clear that the BZA’s adherence to this invalid zoning practice constitutes “arbitrary, capricious, and unreasonable” action that must be reversed under R.C. 2506.04. *Cassell*, 163 Ohio St.3d at syllabus ¶ 3 (reversing township’s refusal to issue a building permit because it was based upon the arbitrary and unreasonable enforcement of an invalid zoning scheme); *Clegg*, 1987 WL 10755, *5 (reversing BZA’s denial of a use variance because the township’s “treatment of the R2 classification is arbitrary and unreasonable in its nature”) (Apx. 14). Thus, as in *Cassell*, *Clegg*, and *Ott*, this Court should declare that the Township’s enforcement of the zoning resolution against Appellees was “arbitrary, capricious, and unreasonable” and should be reversed under R.C. 2506.04 as a matter of law.

B. The Township’s Enforcement Of The 1994 Zoning Resolution Against Appellees Was Invalid And Unenforceable Because It Wrongfully Prohibits The Lawful Sale of Commercial Fireworks That Are Regulated and Licensed By The State Fire Marshal Under State Law.

It is well-established that local zoning ordinances may not conflict with state law. *Village of Sheffield v. Rowland* (1999), 87 Ohio St.3d 9, 11; *Newbury Twp. Bd. of Twp. Trustees v. Lomak Petroleum (Ohio), Inc.* (1992), 62 Ohio St.3d 387, 392. In determining whether a local ordinance or regulation conflicts with the general laws of the State of Ohio, this Court must examine “whether the ordinance permits or licenses

that which the statute forbids and prohibits, and vice versa.” *American Financial Services Ass’n v. City of Cleveland* (2006), 112 Ohio St.3d 170, 177, 2006-Ohio-6043, ¶ 40; *Village of Sheffield*, 87 Ohio St.3d at 11. In this regard, this Court has adopted a “conflict-by-implication” test, which seeks to determine whether the local ordinance makes “unlawful” any conduct that has been stamped “lawful” under state law. *American Financial Serv.*, 112 Ohio St.3d at 178.

In *Village of Sheffield*, for example, this Court examined whether a local zoning ordinance that prohibited all construction and demolition debris (C&D) facilities conflicted with a state statute that permitted such operations upon obtaining a license from either a local board of health or the state Environmental Protection Agency. In that case, the Village sought to prohibit all C&D facilities within its zoning jurisdiction, “despite the fact that the state had authorized them by way of a license to operate” within the Village. *See American Financial Serv.*, 112 Ohio St. 3d at 178 (discussing *Sheffield*, 87 Ohio St.3d at 11-12). Thus, the Court held that “the local ordinance conflicted with the state statute because it prohibited the operation of a state-authorized facility.” *Id.*, 112 Ohio St. at 178 (discussing *Sheffield*, 87 Ohio St.3d at 12).

Although *Sheffield* involves a municipality with home rule authority under Section 3, Article XVIII of the Ohio Constitution, the same reasoning applies equally to townships whose zoning authority is delegated, and even more circumscribed, by the General Assembly. Like municipalities, a township does not have the zoning authority under R.C. 519.02 to regulate the use of property in a manner that conflicts with state law. *Newbury Twp.*, 62 Ohio St.3d 387, 392. Here, it is undisputed that the manufacture, sale, possession, transportation, storage and use of fireworks are subject to extensive state regulation and licensing under R.C. Chapter 3743 and the regulations

promulgated thereunder. Although municipalities and townships are free to regulate fireworks devices that are exempted from the statutory scheme, Ohio courts have held that townships lack the zoning authority to prohibit the manufacture, storage, or sale of fireworks that are licensed to operate within Congress Township under R.C. Chapter 3743. *Edinburg Twp. Trustees v. 14 & 76 Novelty Co., Inc.*, Case No. 91-P-2366, 1992 WL 192377 (Ohio App. 1992) (Apx. 25). Thus, to the extent that the Congress Township Zoning Resolution operates, explicitly or implicitly, to prohibit the sale of fireworks that have been authorized by state law, it is preempted and cannot be enforced to bar the construction of a state-licensed facility as a matter of law. *Id.*

Here, the undisputed evidence in the record establishes that Appellee Phantom Fireworks of West Salem has been granted a license by the State Fire Marshal that would allow for the construction and operation of a new, commercial fireworks store in Congress Township in accordance with the requirements of R.C. Chapter 3743 and the regulations promulgated thereunder. (Supp. 30-33). As Congress Township does not designate any property that would allow for the construction of a new business within the Township's jurisdiction, the Township's Zoning Resolution is preempted and cannot be enforced against Appellees because it operates to prohibit a lawful use that is licensed and authorized by state law. *Edinburg Twp.*, 1992 WL 192377, *2-3 (Apx. 26-27).

In proceedings below, the Township argued that the 1994 Zoning Resolution does not seek to prohibit all commercial fireworks businesses within the Township because it permits Phantom Fireworks to continue operating an older, grand-fathered store as a non-conforming use. This argument is meritless and should be rejected by this Court. As in *Edinburg Twp.*, the legal question presented does not turn on whether there is an older, grand-fathered fireworks store that qualifies as a non-conforming use. Rather,

the question turns on whether Congress Township has the power and the authority under state law to enact a new Township Zoning Resolution that failed to designate any district or area where any state-licensed commercial fireworks store would be permitted. The fact that an older, grand-fathered store existed before the enactment of the 1994 Zoning Resolution does not mean that Congress Township is now exempt from the requirements of state law. Rather, like all other townships, Congress Township's zoning authority remains subject to state law, which requires that the Township, at a minimum, permit a state-licensed facility to operate in at least one of its zoning districts. *See Sheffield*, 87 Ohio St.3d at 12 (explaining that local jurisdictions can avoid a conflict with state law by enacting ordinances that "restrict state-authorized facilities to certain districts with appropriate zoning"); *Edinburg Twp.*, 1992 WL 192377, *3 (township's zoning was "overly broad" because it bans "fireworks in all districts") (Apx. 27).⁵

Here, Congress Township has clearly violated this well-established rule of law. It is undisputed that Congress Township has not created any "B" zoning district that would permit state-licensed fireworks stores on any property within the Township. Even if Appellants wanted to construct the new facility at the existing location or at any other location within the Township, such a proposed action would be prohibited by the Congress Township Zoning Resolution because no property has been zoned under the

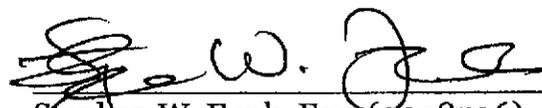
⁵ Although *Ott* did not involve the regulation of fireworks, its holding illustrates this principle of law. In *Ott*, the township also argued that it had the authority to designate "all of Ridgefield Township" as "Agricultural" because existing businesses "were 'grandfathered' in." *Id.*, 1994 WL 17542, *2. The court rejected this argument, however, because it concluded that the township did not have the authority to enact a zoning resolution that did not designate any areas where the business zoning classification would apply. *Id.* at *4. The existence of grand-fathered businesses therefore was irrelevant to which township resolution conflicted with adopted a zoning resolution the requirements of State law.

“B” zoning classification, and Section 306 of the Zoning Resolution makes it “unlawful” for any property owner to engage in any use of land or buildings that is not expressly permitted by the Zoning Resolution. (Supp. 86-87). Thus, as in *Edinburg Twp.*, the Court should declare that the Zoning Resolution is preempted by state law and cannot be enforced against Appellees to prohibit the construction and operation of this state-licensed fireworks store.

CONCLUSION

For these reasons, the Court should affirm the Court of Appeals’ judgment and conclude that the Congress Township Zoning Resolution is invalid and unenforceable as a matter of law. As in *Cassell, Clegg, Ott* and *Edinburg Twp.* the Court should conclude that the Congress Township has violated R.C. 519.02’s requirement to zone property in accordance with a comprehensive plan and wrongfully prohibited a lawful commercial activity that is permitted by state law. Accordingly, the Court should affirm the judgment and allow the lawful construction and operation of this state-licensed fireworks store to proceed in accordance with the requirements of state law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2008, a true and correct copy of the foregoing was served, via first-class mail, postage prepaid, on the following counsel:

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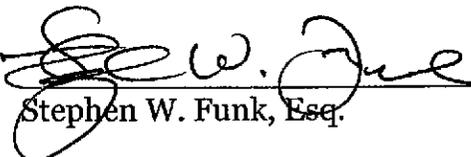
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APPENDIX



Slip Copy

Page 1

Slip Copy, 2007 WL 4554187 (Ohio App. 9 Dist.), 2007 -Ohio- 7023



B.J. Alan Co. v. Congress Tp. Bd. of Zoning Appeals
Ohio App. 9 Dist., 2007.

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

Court of Appeals of Ohio, Ninth District, Wayne
County.

B.J. ALAN COMPANY, dba PHANTOM FIRE-
WORKS, et al., Appellants

v.

CONGRESS TOWNSHIP BOARD OF ZONING
APPEALS, et al., Appellees.
No. 07CA0051.

Decided Dec. 28, 2007.

Appeal from Judgment Entered in the Court of
Common Pleas County of Wayne, Ohio, Case No.
06-CV-0821.

Stephen W. Funk and Paul W. Lombardi, Attorneys
at Law, for appellants.

Martin Frantz, Prosecuting Attorney, and Katherine
Gallagher, Assistant Prosecuting Attorney, for ap-
pellees.

DECISION AND JOURNAL ENTRY

*1 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" Ag-
ricultural District and "B" Business/Industry Dis-
trict. The township voters approved the resolution
in November, 1994, at which time it became effect-
ive. 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 res-
olution, 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 town-
ship. 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,^{FN1} but wished to relo-
cate to a prime location off the interstate.

FN1. Phantom's fireworks business was es-
tablished prior to the adoption of the 1994
zoning resolution and its authority to do
business within the township was, there-
fore, "grandfathered."

{¶ 4} Phantom applied to the township zoning in-
spector for a zoning certificate, so it could do busi-
ness on its purchased land. The zoning inspector re-
fused to issue a zoning certificate because the prop-
erty is not zoned for business use under the "B"
zoning classification. Phantom then appealed to the
BZA, seeking either a zoning certificate or a busi-
ness use variance. The BZA held a hearing on
November 20, 2006. At the conclusion of the hear-
ing, 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

*2 "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 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, be-

cause 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.

*3 {¶ 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.

*4 {¶ 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

Slip Copy
Slip Copy, 2007 WL 4554187 (Ohio App. 9 Dist.), 2007 -Ohio- 7023

Page 5

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.

***5** Costs taxed to appellees.

SLABY, P.J., and DICKINSON, J., concur.
Ohio App. 9 Dist., 2007.
B.J. Alan Co. v. Congress Tp. Bd. of Zoning Appeals
Slip Copy, 2007 WL 4554187 (Ohio App. 9 Dist.),
2007 -Ohio- 7023

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Page 1

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Board of Tp. Trustees Ridgefield Tp. v. Ott
 Ohio App. 6 Dist., 1994.
 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 RIDGE-
 FIELD 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, ap-
 peals that judgment and sets forth the following as-
 signments 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 DE-
 FENSE OF UNCONSTITUTIONALITY WAS RE-
 VERSIBLE 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 re-
 quest. Appellant appealed the denial to the Huron
 Court of Common Pleas, but he subsequently vol-
 untarily dismissed that appeal.

Appellant then proceeded to open an automobile re-
 pair shop on his property. In August 1990, ap-
 pellees 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. Ap-
 ellant 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 comprehens-
 ive zoning plan as required by R.C. 519.02. Appel-
 lant also argued that the manner in which the ordi-
 nance was applied constituted "spot zoning." The
 trial court granted the motion for summary judg-
 ment finding that on the evidence offered in support
 of and in 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 judg-
 ment 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 suspen-

ded 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 require-

ments. 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 compre-

hensive 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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Westlaw.

Not Reported in N.E.2d
 Not Reported in N.E.2d, 1987 WL 10755 (Ohio App. 11 Dist.)

Page 1

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Clegg v. Board of Zoning Appeals of Newton Twp.
 Ohio App., 1987.
 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, Eleventh District, Trum-
 bull 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, War-
 ren, for Plaintiff-Appellant.
 DENNIS WATKINS, PROSECUTING ATTOR-
 NEY, PAUL E. HELTZEL, ASSISTANT PRO-
 SECUTOR, 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 erred (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 erred (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 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

transcript 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 com-

prehensive 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 failure 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, supra, 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 exacerbation in constitutional infirmity with such a system is that it inherently creates a procedure which invites every application for an R2 use to specifically request either a variance or a zone change to implement such use. Under these circumstances, such requests implicitly become 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 de-

Not Reported in N.E.2d
Not Reported in N.E.2d, 1987 WL 10755 (Ohio App. 11 Dist.)

Page 5

scribe 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, *Wiltott 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 arbitrary 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, 1982 WL 5410 (Ohio App. 5 Dist.)

Page 1

C**ARMROSE v. KING QUARRIES, INC.**

Ohio App., 1982.

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, Fifth District, Musking-
um County.

JOHN W. ARMROSE, et al., Plaintiff-Appellants,
v.

KING QUARRIES, INC., Defendant-Appellee.

Case No. CA-81-3.

CA-81-3

March 11, 1982.

CARL GENBERG, SCHOTTENSTEIN, ZOX &
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43215 ATTORNEY FOR PLAINTIFFS-APPEL-
LANTS.

NEAL S. TOSTENSON, RLLWOOD & BROWN,
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JONES, THOMAS A. LEWIS, 47 North Fourth
Street, Zanesville, OH 43701 ATTORNEY FOR
DEFENDANT-APPELLEE.

OPINION

Before Hon. Robert E. Henderson, P. J., Hon. John
R. Milligan, J., Hon. William F. McKee, J.
PER CURIAM

*1 These first two counts pray for injunctive relief.

In the third and fourth counts, plaintiffs pray for
damages and exemplary damages. (These counts
have not been ruled upon, this being a Civil Rule
54(B) appeal, the trial court having determined that
there is no just reason for delay.)

Following a hearing and lengthy opinion, the trial

court denied temporary restraining order and tem-
porary injunction in February, 1981.

The judgment appealed from is attached and incor-
porated, as are the trial court's findings of fact.

The defendant admitted that the dynamite blasting,
at the time of the temporary hearing, was 1300 feet
from the nearest property owned by a plaintiff, and
would move to within 300 feet, with decreasing in-
tensity (T-47), within the anticipated 3-year play-
out of the mining. The evidence was that blasting
occurs daily for 2 1/2 week periods (T-42); children
were frightened (T-52, line 23, 25, T-66, line 17, T-
131, line 11); personal property was damaged
(T-131, line 4, T-66, line 24); and one witness de-
scribed the swaying of his chandelier. Water prob-
lems were described by a number of witnesses, al-
though there were serious questions of causation
(see T-236, 251, 155, 159, 172). Marvin J. Furman
testified that the activity caused no water draw-
down (T-172, 173). So also did the defendant's ex-
pert, D. T. Froedge (T-221). Froedge further testi-
fied as to seismography read-outs:

"Q. ...[D]id you find any blasts contained on those
records that were in violation of Ohio law?

A. ...[T]he highest reading we have received
through O.S.M. relative to actual blast is about .43
inches per second peak particle velocity, which is
very conservative and are within what we expect
from what the blasting - what's happening as far as
the blasting that's gone on." (T-300).

W. Charles Thomas, who lived close to the mining
area (T-243) testified:

"Q. ...[H]ave you had any disturbance in your fam-
ily life there at home because of this mining?

A. No, sir...No disturbance. There is blasting going
on and it does make a little noise and it does make a
little vibration but it hasn't bothered my house or
me or it hasn't bothered us.

Q. From your standpoint the mining operation both north and south of Clay Pike in that area adjacent to your home has not bothered you or your family

A. No, sir. (T-244, 245).

Plaintiff Morgan testified that the noise problem preceded the mining in question as mining was being done on another side of his property (T-51). He had no problem of his house shaking, but did corroborate the fear for children and water problems.

We consider the Assignments of Error in order.

I & II

The Nuisance Question.

The Findings of Fact contradict the first argument of the appellants that the trial court "failed to even consider the issue of nuisance and rested its entire judgment on its ruling concerning the validity of the Zoning Ordinance." (Appellant's brief, p. 8.)

The trial court did consider the issue of nuisance, and by its denial of injunctive relief ruled definitively upon the first count of the complaint.

*2 Is this determination on the question of nuisance against the manifest weight of the evidence?

Strip mining, employing explosives, is a lawful business. Louden v. Cincinnati, 90 Ohio St. 144 (1914). See also Revised Code Chapters 1513 and 1514.

However, on a case by case basis, equity courts may find that the operation of such lawful business constitutes a nuisance in a residential neighborhood, absent any consideration of zoning. Kane v. Kreiter, 195 N.E. 2d 829, Tuscarawas County Common Pleas Court (1963); Adams v. Snouffer, 87 N.E. 2d 484, Franklin County Court of Appeals (1949).

"...[A] court of equity will only interfere to restrain an alleged nuisance, when the mischief to the

plaintiff's property, or rights in his property, are irreparable, and there is no adequate remedy at law to make reparation."

Goodall v. Crofton, 33 Ohio St. Reports 271 at 275 (1877) (where the complaint alleged nuisance by operation of a steam-powered machine).

The nature of the neighborhood is a major factor the court must consider.

It is neither our function nor right to substitute our judgment for that of the trier of the fact. He has had the unique opportunity to "eyeball" the witnesses - to hear their voices and see their faces. We read the printed record. So it is that we can fault the fact-finder, be he jury or judge sitting as jury, only when the verdict is against the manifest weight of the evidence or contrary to law.

Here, it is neither.

The first and second Assignments of Error are overruled.

III.

The Zoning Question.

In their brief, the appellants argue:

"The trial court committed prejudicial error in holding that the Wayne Township Zoning Ordinance was an invalid enactment."

The case was re-briefed and re-argued upon the question of the impact of the action or inaction of the defendant before the zoning authorities, and defendant's failure to procure a variance or appeal its denial.

The trial court denied injunctive relief on the second count (violation of the Zoning Ordinance) on the ground that the Ordinance was invalid. The court said:

"CONCLUSIONS OF LAW

1. The Wayne Township zoning resolution having omitted either by text or map to delineate the boundaries of the districts in which the various uses are permitted or proscribed fails to meet the requirements of a comprehensive plan imposed by R. C. 519.02 and is therefore an invalid enactment.

2. For the Court to determine whether the electorate voted for either the text or the map to the exclusion of the other, or for the Court to attempt to divide the uncolored area of the map into the four zoning districts indicated by the color coding would constitute judicial legislation....”

Findings of Fact.^{FN1}

FN1 Curiously, the trial court ruled on the merits without an answer or responsive pleading being filed by the defendant-appellee. In other words, the defendant never pled any affirmative defenses, merely challenging the Ordinance in its memoranda. The plaintiffs took no exception to this procedure and the defect was cured by the ruling of the court.

*3 There are two levels to the zoning issue in this case:

1. Threshold Question. Is the defendant estopped from challenging the Zoning Ordinance by its procedure, or lack thereof, before the Zoning Board of Appeals, or other administrative tribunal?

2. If the threshold question is answered negatively, does the evidence support the finding by the trial court that the Zoning Ordinance is invalid?

Prior to this case being filed, the defendant applied to the Wayne Township Zoning Board of Appeals for a variance to permit strip mining. The minutes of the “Special Meeting Zoning Appeals Board” recite:

“The purpose of the meeting was for a variance to permit surface mining by King Quarries.

Dave Milligan of King Quarries presented seven pieces of property to be stripped along with maps of each parcel (sic).

John Snider of 975 Locust Lake Cir. voiced the residents opinion wanting the laws inforced (sic) (no stripping)

Glen Winters has a legal permit to strip on his land as long as he does some stripping every two years to keep his permit in force.

Ron Wilson was in favor of stripping. Perry Kallis, Don Toole, and Dave Skidmore were concerned on damages to their homes and loss of water wells.

The request for the variance was not presented in the correct chanel (sic).

The first step is the Trustees if denied it goes to the Zoning Board if denied to the appeals board.

Mr. Jenkins ask (sic) Mr. McCutcheon to resign as a member of the Zoning Appeals Board due to conflicting interest.

The land the variance being ask (sic) for are owned by McCutcheons, Robert Ellerman, Gus Snyder, Robert Pryor, Victor Wilson, Glen Winters and Blackford.

Due to the improper submitting of the variance the variance was denied. But the zoning board of Appeals voted and stated to Dave Milligan by Ralph Myers that there would be no more variances for stripmining issued in Wayne Township.

Mr. John Snider made the motion to ajurn (sic) seconded by Mr. Starrett.”

(Plaintiff's Exhibit 14.)

The Zoning Ordinance, Plaintiff's Exhibit 13, provides:

“The Township Board of Zoning Appeals shall have the following powers:

...

2. To authorize, 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 a special condition a literal enforcement of the provisions of the zoning resolution or any amendments thereto will result in unnecessary hardship, and so that the spirit of the zoning resolution shall be observed and substantial justice done.”

(Plaintiff's Exhibit 13.)

The chairman of the Zoning Commission testified that an application for variance for strip mining must be made to the Zoning commission (T-74).

The defendants took no further action following the meeting of the Zoning Board of Appeals. They proceeded with strip mining, which, in turn, spawned these proceedings.

Is defendant estopped to challenge the validity and applicability of the Zoning Ordinance? If they are, we must reverse. If they are not, we proceed to the second level of zoning consideration.

*4 A number of cases cited by both parties upon this issue of administrative review and collateral effect were presented. Digested, they suggest that the “frame” for zoning is always a question for the courts, independent of the administrative tribunal. Thus, the general validity and constitutionality of the Zoning Ordinance is always subject to attack in the courts. Stated differently, the administrative tribunal does not have authority to ultimately determine its own power, its own authority. Whether the Ordinance in this case was valid or constitutional is an issue to be determined by the judicial branch of government. Conversely, the specific application of the Ordinance, to specific applications, interpretations, permits, etc., is within the “frame” and is the unique prerogative of the administrative tribunal.

Thus, a property owner, who was a party to administrative proceedings involving a use variance, hav-

ing failed to appeal the administrative determination, may not raise the issue by declaratory judgment proceedings. Schomaeker v. First National Bank of Ottawa, 66 Ohio St. 24 304, 20 O.O. 3d 285 (1981). Conversely, the constitutionality of Zoning Ordinance, as it applies to specific property to prescribe the owner's proposed use, can be determined by declaratory judgment. His failure to exhaust his administrative remedies does not vitiate his right to collaterally attack the Ordinance as unconstitutional. Driscoll v. Austintown Associates, 42 Ohio St. 2d 263, 71 O.O. 2d 247 (1975). See Johnson's Island v. Bd. of Twp. Trustees (1982), 69 Ohio St. 2d 241, Syllabus 2 which reads:

2. A landowner against whom enforcement of a zoning law is sought may assert as a defense the unconstitutionality of the zoning law as applied to his land without the necessity of exhausting the available administrative remedies.

In the instant case, albeit without answer, the defendant did challenge the validity of the Ordinance, the “frame.” (A more difficult case would have been presented upon these procedural facts if the trial court had ruled the Ordinance valid. This rationale would then lead us to the conclusion that, if a permit (variance) was required by the Ordinance, an injunction would lie until the administrative mandate was met.) Query: Was the inaction of the Zoning Board of Appeals an appealable order about which the defendant, because of his failure to so appeal, is now estopped? If the ruling of the administrative tribunal instructed the applicant to proceed in another way, it would be difficult to argue that he was precluded from doing what he was told to do and is bound, rather, to take an administrative appeal.

We need not answer the postulated question because we find that the trial court did have jurisdiction and authority to rule on the validity of the Ordinance. The court did, in fact, so rule, finding the Ordinance invalid.

We thus examine the merit of the trial court's de-

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 Not Reported in N.E.2d, 1982 WL 5410 (Ohio App. 5 Dist.)

Page 5

termination that the Ordinance is invalid. This is in essence the appellants' third Assignment of Error.

*5 We have examined the testimony concerning the Ordinance, the text of the Ordinance, and the multi-colored maps.

Ohio Revised Code Section 519, authorizing comprehensive zoning, is an exercise of the police power. Yorkavitz, et al. v. Board of Township Trustees, 106 Ohio St. 349, 2 O.O. 2d 255 (1957); 58 Ohio Jur. 2d, Zoning, Section 29. Although strictly construed, State ex rel. Spiccia v. Abate, 2 Ohio St. 2d 129, 31 O.O. 2d 228 (1965), zoning ordinances or regulations are presumed valid. 58 Ohio Jur. 2d, Zoning, Section 38.

Examination of Exhibits 4 and 6, the original text and map, satisfy us that they are sufficiently vague that an elector, upon inspection of each, would not be adequately informed as to the use-area identification, particularly since the text makes no provision for agriculture and contains no prohibition against strip mining in an agricultural district. The area where the defendant is operating is not colored at all on the zoning map.

To meet the requirement of a "comprehensive zoning," the statute does not require that the entire unincorporated territory of a township be divided into districts and zones. Ohio Revised Code Section 519.02. However, in this case, the Zoning Ordinance purports to encompass the entire township. Cassel v. Lexington Township Board of Zoning Appeals, 163 Ohio St. 340, (1955), is helpful as it relates to this issue. In that case the court noted,

"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."

Cassell, supra.

The determination by the Court of Common Pleas

that the Zoning Ordinance in this case is invalid is neither contrary to law, against the manifest weight of the evidence, or an abuse of discretion.

We overrule the third Assignment of Error.

The judgment of the Court of Common Pleas of Muskingum County is affirmed, and the cause remanded for further proceedings according to law.

For whatever solace it may be to the appellants, the defendant is strictly liable for any and all damages caused by the mining and blasting operation. Defendant acknowledges this.

Kendorson, P.J., McKee, J., dissents separately.

Armrose et al., Plaintiffs,

v.

King Quarries, Inc., Defendant.

Case No. 80-1051.

Court of Appeals of Ohio, Muskingum County.

April 7, 1981.

JUDGMENT ENTRY

This cause came on for hearing on plaintiffs' motion for a permanent injunction. The Court ordered pursuant to Civil Rule 65(B)(2) that the evidence received at the previous hearings in this cause relative to the preliminary injunction, already denied, shall be and constitute the record on plaintiffs' motion except that each side shall be permitted to adduce such additional evidence as may be pertinent to the issues herein. Upon consideration of the record and all further evidence, the Court finds there is no reason to enjoin defendant's strip mining operation and that there is no just reason for delay in en-

tering final judgment upon plaintiffs' claims for injunctive relief.

*6 IT IS, THEREFORE, ORDERED AND DECREED that a permanent injunction is denied.

JOHN W. ARMROSE, ET AL., PLAINTIFFS,

v.

KING QUARRIES, INC., DEFENDANT.

CASE NO. 80-1051.

Court of Appeals of Ohio, Muskingum County.

FINDINGS OF FACT AND CONCLUSIONS OF
 LAW

FINDINGS OF FACT

1. Defendant King Quarries is and has been a corporation engaged in strip mining coal in Wayne Township, Muskingum County, Ohio, in an area south of Clay Pike. Strip mining is recognized by the State of Ohio as a legitimate business operation.

2. Pursuant to the enabling statutes relative to the adoption of zoning plans by township trustees, the Township Trustees of Wayne Township, Muskingum County, Ohio, did attempt to zone the township in various categories and limitations. In the absence of contrary evidence, of which there was none, the said trustees are presumed to have followed the statutory procedures necessary for the adoption of a zoning resolution for the township: a public hearing on the zoning resolution before the township planning commission with a published notice in advance of the hearing, which notice was required to state the plans and time at which the text and maps of the proposed zoning resolution might be ex-

amined, a similar public hearing, with 30 days advance published notice, before the township trustees on the adoption of the zoning resolution consisting of both text and maps, and the adoption of a zoning resolution.

3. The board of township trustees did cause the question of whether or not the proposed plan of zoning should be put into effect to be submitted to the electorate residing in the unincorporated area of the township included in a proposed plan of zoning for their approval or rejection. Such resolution was timely filed and a majority of the votecast on the issue was in favor of the proposed plan of zoning as certified by the board of elections.

4. At said time as well as now the enabling statutes did provide that all of the zoning should be "in accordance with a comprehensive plan".

5. Section 2 of the text of the ordinance or resolution provided that the unincorporated area of the township shall be divided into three districts, Residential or "R", Business and Commercial or "B", and Industrial and Manufacturing or "I". Paragraph 12 of Section 5 of the text prohibits any coal mining by the stripping method in any "R", "B", or "I" district. The text contains no provision for an agricultural district or any proscription of strip mining in such a district. Further, the text did not set forth by lot number, a metes and bounds description, or any method of description the portions of the township unincorporated area which were in the "R", "B", or "I" districts or in any agricultural district.

6. The zoning map for Wayne Township, as identified by the plaintiffs' testimony and admitted into evidence by the Court as the original map displayed to the electorate, is color coded for 4 zoning districts, Residential, Business, Industrial and Agricultural but very few portions of the township are colored at all and no area where the defendant is operating is colored.

*7 7. Plaintiffs' witnesses testified to annoyance from the noise of blasting and to being startled by

tremors emanating from the blasting site.

8. A number of the plaintiffs testified to periodic diminution in the water obtainable from their wells and to occasional incidence of cloudiness in their water and to some minor structural damages to a home or two. However no causal connection between the blasting on the stripping site and the matters complained of, other than the coincidence, was shown.

9. Defendant's expert witnesses, including a representative of the Bureau of Surface Mining which had conducted seismographic monitoring in response to a complaint from the residents, testified that the stripping operation including the blasting could have caused neither well damage nor structural damage.

CONCLUSIONS OF LAW

1. The Wayne Township zoning resolution having omitted either by text or map to delineate the boundaries of the districts in which the various uses are permitted or proscribed fails to meet the requirements of a comprehensive plan imposed by R. C. 519.02 and is therefore an invalid enactment.

2. For the Court to determine whether the electorate voted for either the text or the map to the exclusion of the other, or for the Court to attempt to divide the uncolored area of the map into the four zoning districts indicated by the color coding would constitute judicial legislation.

3. There is available to any plaintiff claimed to have suffered damage by reason of injury to a structure or a well the usual legal channels which provide redress for parties felt to be aggrieved.

4. Plaintiffs have failed to establish by the requisite degree of proof any grounds for injunctive relief sought.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, all Assignments of Error are overruled, the judgment of the Court of Common Pleas of Muskingum County is affirmed, and the cause remanded for further proceedings according to law.

Dissent: McKee, J., concurring in part and dissenting in part.

In dissenting from the majority position as to the judgment of this court, I must consider the two major areas addressed in the majority opinion.

With regard to the first area which involves the nuisance question, I must reluctantly concur. The trial court was in the unique position to judge credible facts, and it is not for a reviewing court to substitute its determination for that of the trial court based on the record alone.

As to the zoning question, I would reach a different result and sustain the assignment of error. I feel the threshold point is that the township zoning resolution is one which has been adopted by a majority of the electors of the township and as an expression of the will of the majority of the voters must be given all respect possible within the limits of the law.

A review of the zoning resolution, which is admitted in evidence as Plaintiff's Exhibit 4, reveals that the trial court erred as a matter of law in his Finding of Fact number 5 and his Conclusion of Law number 2.

*8 The court found as a fact that, "The text contains no provision for an agricultural district or any prescription of strip mining in such a district." The court in its conclusions of law referred to "four zoning districts."

Section 2 of the resolution establishes three zoning districts, to wit: Residential, Business and Industrial. The entire unincorporated area of the township is divided into one of these districts by the text. The property in question is in the unincorporated area. Section 5 of the resolution prohibits "any coal mining by the stripping method" in all three of such

districts.

Section 3 of the resolution complies with R. C. 519.21 in permitting agricultural uses in any district and in not requiring a zoning certificate for such use. It further complies with R. C. 519.01 in defining "agriculture." It is apparent that strip mining is not within that definition. Agriculture is not established as a district but is established in accordance with legislative authority as a permitted use in any district. While the map does show agriculture as "blue," such color is surplusage as "blue" would be superimposed on all established districts.

Section 19 of the resolution requires a zoning certificate for all uses but agricultural uses. This is permitted by R. C. 519.16. Proceeding without such a certificate is prohibited by Section 22 of the resolution in accordance with authority contained in R. C. 519.17. Appellee was clearly required to obtain a zoning certificate in whichever of the three districts in which it was located.

Section 20 of the resolution and R. C. 519.14 are in accord in authorizing an appeal to the Board of Zoning Appeals for an "error in any order, requirement, decision or determination made by an administrative official" and to authorize, in specific cases, a "variance." R. C. 2506.01, et seq, provides an appeal from a final order of the Board of Zoning Appeals.

Appellee did appeal to the Board of Zoning Appeals. He did not appeal to the Court of Common Pleas in accord with R. C. 2506.01, et seq. Appellant complained of such failure.

Appellant claims no final appealable order under authority of State ex rel v. Usher, 34 Ohio St. 2d 59, because the Board incorrectly found the variance should have been first submitted to the trustees. The cited case is not authority for such proposition.

In the cited case, the administrative agency refused to either issue a license or to issue a written order

denying the license. In the matter sub judice, the Board in its written minutes clearly states, "... the variance was denied." It is the context of the order, not the reason, which gives it finality. The Board did not refuse to act but plainly denied the variance and made a final appealable order.

Cassel v. Lexington Township Board of Zoning Appeals, 163 Ohio St. 340, has been cited as applicable to this situation. It is indeed. In that case an appeal was taken from a Board order denying a zoning certificate. The record there revealed that the zoning map and text were vague and it was impossible to determine the areas of use. The Supreme Court ordered a certificate because the defect "opens the door to an arbitrary and unreasonable administration of the regulation." It did not declare the resolution invalid and it did not permit direct or collateral attack on the resolution as a substitute for appeal.

*9 Appellee could not have filed a declaratory judgment action to obtain a variance without alleging and proving that the zoning resolution was invalid or unconstitutional. See Schomaeker v. First National Bank, 66 Ohio St. 2d 304 and cases cited therein. Can appellee forego an administrative appeal, pursue no legal remedy, commence strip mining in contravention of the zoning resolution and assert an unpleaded defect collaterally challenging the resolution when an injunction against the mining is sought based, in part, upon its failure to obtain a zoning certificate? I think not.

Under authority granted by the General Assembly, the electorate of myne Township voted for a zoning resolution establishing permitted uses and prohibited uses. Appellee seeks a prohibited use. If that use was arbitrarily or unreasonable denied to appellee there was available a the zoning resolution and the normal, available legal remedy.

I would sustain the third assignment of error and reverse the judgment of the trial court entering the judgment it should have entered, enjoining strip mining until a zoning certificate was obtained.

Not Reported in N.E.2d
Not Reported in N.E.2d, 1982 WL 5410 (Ohio App. 5 Dist.)

Page 9

Ohio App., 1982.
Armrose v. King Quarries, Inc
Not Reported in N.E.2d, 1982 WL 5410 (Ohio App.
5 Dist.)

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Not Reported in N.E.2d, 2002 WL 31108891 (Ohio App. 6 Dist.), 2002 -Ohio- 4948

Page 1

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Spears v. The Bd. of Trustees of New London Tp.
Ohio App. 6 Dist.,2002.

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

Court of Appeals of Ohio, Sixth District, Huron
County.

Adrian SPEARS, Appellee,

v.

THE BOARD OF TRUSTEES OF NEW LONDON
TOWNSHIP, Ohio, Appellant.

No. H-01-059.

Decided Sept. 20, 2002.

Robert W. Gentzel, for appellee.

Randal L. Strickler, for appellant.

RESNICK, M.L., J.

*1 {¶ 1} This is an administrative appeal brought pursuant to R.C. Chapter 2506. Appellant, The Board of Trustees of New London Township, Ohio, appeals the decision of the Huron County Court of Common Pleas vacating the Board's decision denying appellee, Adrian Spears, a use variance and finding the New London Township Zoning Ordinance to be unconstitutional. Appellant asserts the following assignment of error:

{¶ 2} "THE TRIAL COURT ERRED WHEN IT FOUND THE NEW LONDON TOWNSHIP ZONING RESOLUTION UNCONSTITUTIONAL BECAUSE IT IS NOT BASED UPON A COMPREHENSIVE PLAN."

{¶ 3} In considering appellant's assignment of error and arguments in support thereof, this court reviewed the record of this cause, the relevant case law and applied this law. After doing so, we conclude that the well-reasoned decision and judgment entry of the Honorable Earl R. McGimpsey properly determines and correctly disposes of the issue

appellant now raises in this appeal. We therefore adopt the judgment of the trial court as our own. See Appendix A. Appellant's assignment of error is found not well-taken.

{¶ 4} The judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

PETER M. HANDWORK, MELVIN L. RESNICK,
J.J., and MARK L. PIETRYKOWSKI, P.J., concur.

Ohio App. 6 Dist.,2002.

Spears v. The Bd. of Trustees of New London Tp.

Not Reported in N.E.2d, 2002 WL 31108891 (Ohio
App. 6 Dist.), 2002 -Ohio- 4948

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Not Reported in N.E.2d
 Not Reported in N.E.2d, 1992 WL 192377 (Ohio App. 11 Dist.)

Page 1

H

Edinburg Tp. Trustees v. 14 & 76 Novelty Co., Inc.
 Ohio App. 11 Dist., 1992.
 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, Eleventh District, Portage County.

EDINBURG TOWNSHIP TRUSTEES, Plaintiff-Appellee,

v.

14 & 76 NOVELTY CO., INC., Defendant-Appellant.

No. 91-P-2366.

June 30, 1992.

Civil Appeal from Common Pleas Court, Case No. 89 CV 0942.

David W. Norris, Portage County Prosecutor,
 Douglas M. Kehres, Asst. Prosecutor, Ravenna, for
 plaintiff-appellee.

W. Leo Keating, Warren, for defendant-appellant.

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

OPINION

FORD, Presiding Judge.

*1 This appeal comes from the Portage County Court of Common Pleas. Appellant, 14 & 76 Novelty Co., Inc., appeals from a trial court order which permanently enjoined it from the manufacture and storage of fireworks at its business premises.

On May 19, 1989, appellant applied for and received a permit from the Edinburg Township Zoning Inspector for the sale of legal items. After securing the permit, appellant began selling fire-

works. On June 23, 1989, the zoning inspector cited appellant for selling fireworks in violation of the zoning resolution. Appellant continued to sell fireworks and on June 28, 1989, appellee, Edinburg Township Trustees, and the zoning inspector filed a verified complaint for injunctive relief against appellant.

Appellee alleged that appellant was manufacturing, storing and selling explosives and/or fireworks in violation of a 1987 amendment to the zoning resolution which prohibits such use. Specifically, the relevant portion of the zoning resolution states: "the manufacture, storage and/or sale of explosives and/or fireworks is prohibited in Edinburg Township." It should be noted that Edinburg Township has three districts: R-1 residential; B-1 business and commercial; and I-1 industrial. Appellant's land is situated in the business and commercial district.

Appellant answered claiming that it had a nonconforming use since it sold fireworks before, during and after the enactment of the zoning resolution. The trial court determined that appellant did not have a prior existing nonconforming use, and that the sale of fireworks at the property in Edinburg Township was not a permitted use. The trial court also held that the 1987 amendment was a valid and constitutional enactment.

Appellant appeals raising the following assignments:

1. This Court must reverse the decision of the Court of Common Pleas because, Defendant 14 & 76 Novelty Co. has established a nonconforming use on the property at 4227 State Route 14, Ravenna, Ohio.

*2. This Court must reverse the decision of the Court of Common Pleas because Plaintiff Edinburg Township's Blanket Prohibition of the manufacture, storage and sale of fireworks is invalid and illegal.

*3. This Court must reverse the decision of the

Court of Common Pleas because Section E-4 of the Edinburg Township Zoning Code is unconstitutional as it applies to Defendant 14 & 76 Novelty Co., as it represents a taking of Defendant's property without due process of law."

In the first assignment, appellant asserts as an affirmative defense that it was in operation prior to the enactment of the applicable zoning amendment, and therefore has a valid nonconforming use. However, in order to establish such claim, it had to prove, by a preponderance of the evidence, that the use existed at the time that the zoning resolution became effective. *Smith v. Juillerat* (1954), 161 Ohio St. 424; *Francisco v. City of Columbus* (1938), 134 Ohio St. 526; and that the use when initiated was lawful and operated in a lawful manner prior to the date of the amendatory resolution. *Petti v. Richmond Heights* (1983), 5 Ohio St.3d 129, 131, fn. 1; *Peschang v. Terrace Park* (1983), 5 Ohio St.3d 47.

*2 In an action for a zoning violation, appellee here had the initial burden of establishing that appellant was the owner of the property at issue and that the local ordinance, as amended, prohibited the fireworks operation in the township. Thereafter, the burden of proof shifts to the person asserting the right to continuation of a nonconforming use. He must establish that the use existed prior to the effective date of the amended ordinance, and that the use was lawful. *Petti v. Richmond heights* (1983), *Supra*, at 131, fn. 1.

The record, while sparse at best, seems to illustrate that almost from the inception of appellant's purchase and operation of its business, its legality was contested by appellee as an unlawful operation. Appellant fails to bring to this court's attention any evidence which demonstrates that it was ever performing a legal use under the zoning resolution which was in effect prior to the amendment.

Thus, the record is devoid of any evidence demonstrating that the use, when initially commenced, was lawful. Accordingly appellant failed to meet its

burden of proof, by a preponderance of the evidence, that it had a valid nonconforming use. The first assignment is not well taken.

In the second assignment, appellant maintains that the portion of the zoning resolution under which it has been enjoined is invalid and illegal because appellee does not have the power to completely prohibit the manufacture, storage and sale of fireworks when the State of Ohio permits such activity.

R.C. 3743.01 to R.C. 3743.99 govern fireworks in the State of Ohio. For our purpose, we limit our discussion to R.C. 3743.01(F), definition of fireworks; R.C. 3743.80 exemptions from provisions; and R.C. 3743.19, additional rules for business operations.

R.C. 3743.01(F) defines fireworks as:

" * * *[a]ny composition or device prepared for the purpose of producing a visible or an audible effect by combustion, deflagration, or detonation, except ordinary matches and except as provided in section 3743.80 of the Revised Code."

R.C. 3743.80 then exempts several items from the application of Chapter 3743. Therefore, certain fireworks are controlled by Chapter 3743 while other low-powered fireworks are not. See, *Mr. Fireworks v. City of Dayton* (1983), 48 Ohio App.3d 161.

We are faced with a situation where Chapter 3743 applies. In addition to all the requirements of Chapter 3743, one wishing to sell, store or manufacture fireworks must also comply with local enactments. Specifically, R.C. 3743.19 provides in relevant part:

"In addition to conforming to the rules of the fire marshal adopted pursuant to section 3743.18 of the Revised Code, licensed wholesalers of fireworks shall conduct their business operations in accordance with the following: * * * (G) A wholesaler shall conform to all building, safety, and zoning statutes, ordinances, rules, or other enactments that apply to its premises." (Emphasis added.)

*3 Therefore, we must determine whether the blanket prohibition of the manufacture, storage and/or sale of explosives and/or fireworks is a valid enactment.

Generally, complete prohibitions are struck down by the courts as being either beyond the statutory grant of power or not reasonably related to health, safety and welfare. 2 Anderson, *American Law of Zoning* (3d Ed.1986) 147, 148, Section 9.16. This notion was embraced by The Ohio Supreme Court in *Coal Co. v. Booth* (1957), 166 Ohio St. 379, 382, where the court stated:

"The enabling statute permits the township to 'regulate' uses. The word, 'regulate,' does not ordinarily include 'prohibit' (although it may, as in *Smith v. Juillerat*, *supra* [161 Ohio St., 424 * * *]), and express authority to regulate as a general rule negatives by implication the power to prohibit. *Ex Parte Kelso*, 147 Cal., 609, 82 P., 241; *Frecker v. City of Dayton*, 88 Ohio App., 52, * * * affirmed, 153 Ohio St., 14, * --- (1950); *State, ex rel. Euverard, v. Miller*, 98 Ohio App., 283 * ---; Ohio Bar, Oct. 3, 1955."

Here, the prohibition bans fireworks in all districts including business and commercial as well as the industrial zoned areas. While courts do not generally look into the appropriateness of local zoning, *Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio) Inc.* (1992), 62 Ohio St.3d, 387, 390, citing *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560* * *, courts do have the power to evaluate whether the zoning regulation is motivated by health and safety concerns or whether it is an attempt to invoke a prohibition in the guise of health and safety. *Lomak Petroleum Inc., supra*, at 390. Additionally, the power to prohibit a use must not be considered in the abstract, but rather in connection with all the circumstances and locality of the land and its surroundings. *Coal Co., supra*, at 382, citing *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365,387.

Here, the total ban on fireworks was made in the

abstract and not in connection with all the circumstances and locality of the land itself and its surroundings. As previously stated, the portion of the zoning code under which the township chose to bring the injunction action prohibits the sale, storage and manufacture of fireworks in the entire Township. The prohibition is overly broad and demonstrates disdain for fireworks rather than legitimate safety concerns. Accordingly, the second assignment of error is with merit.

In the third assignment, appellant maintains that the prohibition of fireworks in this instance amounts to an unconstitutional taking of his property without due process of law. In his brief, appellant argues that he cannot be prevented from selling fireworks on his property because he had been selling fireworks there prior to the enactment of section E-4.

We note that because we decided in the second assignment that appellant may not be enjoined from the sale of fireworks pursuant to that portion of the zoning code under which the township chose to bring the injunction action, there is no taking. This tends to moot the third assignment. However, had we determined that section E-4 was valid, appellant would fail on this assignment because, as stated in the first assignment, it did not establish that it had a prior nonconforming use which is a necessary predicate for it to challenge the constitutionality of the ordinance. *Pschesang, supra*, at 50.

*4 Based on the foregoing, the trial court's judgment is affirmed as to the first and third assignments of error, but is reversed on the second assignment as the portion of the zoning code under which the trial court granted injunction is an invalid enactment.

CHRISTLEY and NADER, JJ., concur.

Ohio App. 11 Dist.,1992.

Edinburg Tp. Trustees v. 14 & 76 Novelty Co., Inc.
 Not Reported in N.E.2d, 1992 WL 192377 (Ohio App. 11 Dist.)

Not Reported in N.E.2d
Not Reported in N.E.2d, 1992 WL 192377 (Ohio App. 11 Dist.)

Page 4

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Baldwin's Ohio Revised Code Annotated Currentness

Title V. Townships

▣ Chapter 519. Township Zoning (Refs & Annos)

▣ Adoption of Zoning Plan

→ **519.02 Township trustees may regulate building and land use in unincorporated territory for public purpose and zoning procedures relating to adult entertainment establishments**

(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.

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