

ORIGINAL

Case No. 2014-0301

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
MEDINA COUNTY, OHIO
CASE NOS. CA-12-CA 0068-M
AND CA-12-CA 0065-M

APPLE GROUP, LTD,

Appellant,

v.

BOARD OF ZONING APPEALS OF GRANGER TOWNSHIP, *et al.*,

Appellees.

MERIT BRIEF OF APPELLANT APPLE GROUP, LTD.

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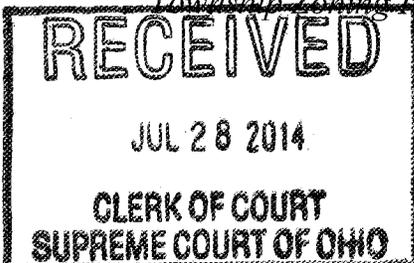


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I. INTRODUCTION

Ohio's Townships are authorized by R.C. 519.02 to "regulate by resolution, in accordance with a comprehensive plan," land uses within their unincorporated territories. This Court's precedents affirm that accordance between a township's zoning resolution and some "comprehensive plan" is mandatory. Here, however, believing that this Court's *B.J. Alan Co. v. Congress Twp. Board of Zoning Appeals*, 124 Ohio St.3d 1, 2009-Ohio-5863, 918 N.E.2d 501 ("*B.J. Alan II*"), decision did not address the issue, the lower court held that a zoning resolution and the "comprehensive plan" with which it must be in accordance can be one and the same.

Appellant Apple Group, Ltd. ("Apple") owns approximately 88 acres of land (the "Property") in Granger Township ("Township"). Apple wants to develop the Property for 44 single-family houses on lots ranging between three-quarters and one acre in size, and to preserve as open space more than half of the Property, including dense woodlands and stream features framing the Property's interior (the "Proposed Use"). The Township's Zoning Resolution ("Resolution" or "Res.") prohibits Apple's Proposed Use, even though the Resolution does allow up to 44 single-family houses, or 44 duplexes, on Apple's Property, and even though Apple's proposed lots meet or exceed the Resolution's required minimum front, rear, and side setbacks.

Both Apple's land use expert and the Township's agree that the Resolution is not a "comprehensive plan" as planners and practitioners in the zoning field understand that term, despite the Resolution's describing itself as "a comprehensive plan *of zoning*." (Res. §103, Appx. 87, emphasis added.)¹ The Township neither has a separate "comprehensive plan" of its own nor claims to regulate land use "in accordance with" any other entity's "comprehensive plan."

¹ "Appx." refers to the Appendix accompanying this Brief.

Nevertheless, the lower court held that because the Resolution itself functions as a “comprehensive plan” it therefore satisfies R.C. 519.02’s requirement that it be “in accordance with a comprehensive plan.” Misapplying *Cassell v. Lexington Twp. Bd. Of Zoning Appeals*, 165 Ohio St. 340, 127 N.E.2d 11 (1955), the lower court found the **Resolution** to be “comprehensive,” for R.C. 519.02 purposes, because it adequately informed land owners in the Township what uses can be made of their property. Decision and Journal Entry (“J.E.”), *Apple Group Ltd. v. Granger Twp. Bd. of Zoning Appeals*, 9th Dist. Nos. 12CA0065-M, 12CA0068-M, 2013-Ohio-4259, ¶20 (Appx. 13-14).

Cassell held only that if a township’s zoning resolution is too vague to adequately apprise land owners how their land within the township can be used, that resolution cannot be said to be “adopted in accordance with a comprehensive plan.” *Cassell*, paragraph two of the syllabus. *Cassell* did not hold for the inverse of that proposition, i.e., that if the resolution adequately informs land owners how they can use their property then it satisfies R.C. 519.02’s condition that it be adopted “in accordance with a comprehensive plan.” And *Cassell* plainly did not hold that townships whose zoning resolutions coherently assign land uses across the entire township are thereby excused from R.C. 519.02’s explicit condition to their exercise of those zoning powers.

Both Apple’s land use expert and the Township’s agree that zoning resolutions and the “comprehensive plans” with which those resolutions must be in accord are conceptually separate and serve distinct functions. When a property owner claims that a township’s zoning resolution is not in accordance with a comprehensive plan, a court cannot resolve that claim without comparing the zoning resolution and the comprehensive plan to determine if the resolution is indeed in accordance with the plan. If the zoning resolution and the comprehensive plan are one and the same, no such comparison is possible. If it is impossible to test accord between a zoning

resolution and a comprehensive plan, then R.C. 519.02's clear requirement is not satisfied. To be sure, when this Court last addressed R.C. 519.02's "comprehensive plan" requirement, it remanded to the Ninth District Court of Appeals the question of whether Congress Township's zoning resolution was "indeed 'in accordance with' the Wayne County Comprehensive Plan." *B.J. Alan II*, at ¶43. With no "comprehensive plan," however, this test cannot be performed.

The court of appeals' decision negates R.C. 519.02's plain terms, strains both their logic and language, conflates zoning resolutions and comprehensive plans, subverts Ohio's legislatively-determined township land use policies, and perpetuates a tenacious distortion of this Court's precedents. This Court alone can correct the lower courts' continuing misapplication of R.C. 519.02 and *Cassell*, and close the interpretative gap that the lower court perceived as remaining even after *B.J. Alan II*. This Court should adopt Proposition of Law Nos. 1 and 2 and reverse the lower court's judgment accordingly.

II. STATEMENT OF FACTS

A. The Township thwarted Apple's administrative and legislative efforts to facilitate the Proposed Use's development on the Property.

Apple's Property is in the Township's R-1 Residential zoning district. Two-thirds of the Property is also within the Township's Planned Development District ("PDD"), an overlay zoning district in which banks, hotels, dry cleaners, nail salons and other retail uses are allowed.

(R. 52-56, 93-95; PEx. 7.)²

Apple purchased the Property in May 2006. Apple knew then that the Property had previously been approved for the development of a school building and athletic complex for the

² "R" refers to the verbatim transcript of the trial below in Medina County Common Pleas Case Nos. 08 CIV 0090 and 09 CIV 0184 which occurred November 16 - 19, 2009. "PEx." refers to Apple's trial exhibits.

Medina County Christian Academy, with playing fields and substantial parking, to be served by central water and sanitary sewer services. (R. 58, 275.)

Apple also knew that the Township's R-2 Residential zoning district at that time permitted higher density residential development. According to Res. §3.2.1 (effective *May 17, 2006*), the R-2 district's purpose was:

to accommodate residential development at densities of two to three dwelling units per net acre in areas which are, or can be at the time of development, serviced by central water and sewer facilities, storm sewers, paved streets with curbs and gutters, in accordance with Medina County Regulations.

(Appx. 81-82.)³ The R-2 district allowed one-acre minimum lot sizes for single-family homes and duplexes serviced by central water and sanitary sewers, the "two to three dwelling units per net acre" density limit notwithstanding. (Res. §3.2.3A.2, Appx. 83; R. 64.)

The Township's Zoning Commission was at the time considering R-2 text revisions. (Trans. Tab No. 42 at 1.)⁴ To this end, the Township had retained George Smerigan, a highly-respected northeast Ohio planning consultant, and had also consulted with R. Todd Hunt, Esq., a preeminent land use and zoning attorney from the Walter & Haverfield law firm. Mr. Smerigan proposed text for a Planned Conservation Development District ("PCDD") to replace the R-2 use regulations. Working closely with him was Apple's consultant, Craig White, who helped review and refine those PCDD regulations. (Trans. Tab Nos. 4; 5; 6; 19; 29 at 39-43.)

³ A copy of the Resolution purportedly effective May 17, 2006 was attached to Apple's Assignments of Error and Brief filed on August 4, 2008 in its R.C. Ch. 2506 administrative appeal in Medina County Common Pleas Case No. 08 CIV 0090. Excerpts from that Resolution are in the Appendix at Appx. 73-84.

⁴ "Trans." refers to the statutory transcript of proceedings before the Township Board of Zoning Appeals ("BZA") that the Township filed in Apple's administrative appeal. References to specific items comprising the statutory transcript are by their Tab number.

Both Messrs. Smerigan and Hunt advised the Township that if it eliminated the R-2 regulations, it should adopt some alternative replacement residential zoning regulations. (Trans. Tab 18 at 4; Tab 42 at 4.) But in August 2007, while the Zoning Commission was considering Mr. Smerigan's proposed PCDD regulations, the Township amended its Zoning Resolution to prohibit the establishment of any new R-2 developments, to confine the R-2 district to a single "existing condominium style residential development" in the Township, and to proscribe the expansion of that development. As amended effective *August 8, 2007*, the R-2 district's stated Purpose and Intent was changed:

to accommodate an existing condominium style residential development which was developed with private central water and sewer facilities and with a private lake orientation. It is the intent of these provisions to allow the continuation of the existing homes within the Granger Lake Condominium development as permitted rather than non-conforming uses, but not to encourage or permit either expansion of the existing condominium development or the establishment of additional developments pursuant to these provisions. To that end, it is further intended that this zoning district apply only to the existing Granger Lake Condominium development and that the boundary of the zoning district be coterminous therewith.

(Res. §302A, Appx. 91).⁵

The Township declined to follow its consultants' recommendation to adopt an alternative to R-2 zoning. The Zoning Commission simply stopped considering the PCDD on which Mr. Smerigan and Mr. White had been working.

With R-2 zoning options foreclosed, Apple applied on September 20, 2007 for variances to facilitate its Proposed Use (Trans. Tab No. 8). But the BZA denied that application on December 17, 2007, concluding that the volume of variances Apple sought amounted to a zoning change for which the BZA lacked authority. (Trans. Tab No. 30 at 24-25.) On January 16, 2008,

⁵ A copy of the 2007 Resolution is in the record at Trans. Tab 34. Excerpts are in the Appendix at Appx. 85-93.

Apple filed an R.C. Ch. 2506 administrative appeal from the BZA's decision with which it included constitutional claims that the trial court later bifurcated.

On May 16, 2008, Apple submitted its own application to the Zoning Commission to adopt the PCDD regulations as new Section 308 to the Resolution. (PEX. 3.) Apple concurrently sought to amend the Township's Zoning Map to rezone the Property consistent with those PCDD regulations to allow the Proposed Use.

As required, the Township submitted Proposed Section 308 to the Medina County Department of Planning Services ("MCDPS") for review and comment. The MCDPS recommended approval of the PCDD (with modifications) after noting: "**Granger Township does not have a Comprehensive Plan for guidance for this proposed rezoning.**" (PEX. 8, 7/2/08 MCDPS Staff Rpt., p. 2, emphasis added.) The Township rejected the PCDD.

On October 3, 2008, after briefing, the trial court affirmed the BZA's denial of Apple's variance application leaving Apple's constitutional claim for trial. On January 29, 2009, Apple filed an R.C. Chapter 2721 declaratory judgment action in which it sought declarations (1) that the Resolution's prohibition of Apple's Proposed Use was ultra vires and exceeded the Township's delegated R.C. Chapter 519 zoning authority, and (2) that the zoning regulations were unconstitutional "as applied" to prohibit Apple's Proposed Use.

B. The courts below overlooked manifold evidence, including the Township's own, that proved that even were it permissible for a zoning resolution to double as a "comprehensive plan" under R.C. 519.02, the Township's Zoning Resolution lacked the hallmark features of a comprehensive plan.

The trial court consolidated for trial Apple's declaratory judgment action with the constitutional claim in its administrative appeal. A bench trial to the trial court's Magistrate occurred between November 16 and 19, 2009.

At trial, Apple's land use expert, David Hartt, testified that he and his firm have prepared approximately 30 comprehensive plans, including a dozen for townships, over the last 30 years. (R. 258-259.)⁶ Mr. Hartt explained that in addition to setting forth community goals and objectives, comprehensive plans should evaluate development trends within the community and in other communities and surrounding areas; account for traffic and public facilities such as schools, road improvements, infrastructure improvements, and other facilities required to support the development and land use desired by the community; and propose measures for implementing the plan. (R. 259-266.) He agreed with the MCDPS' observation that the Township has no comprehensive plan. (R. 266, 408.)

The Township's land use trial expert was Susan Hirsch, Esq., who was also the MCDPS' Deputy Director. (R. 790.) On direct examination by the Township's attorney, Ms. Hirsch testified that a zoning resolution "can function as" a comprehensive plan and that the Township's does so. (R. 797.)

But she dramatically reversed course during her very frank cross-examination testimony. No characterization of the following is nearly as forceful as her testimony itself is:

Q. Okay. The department of planning services tracks which townships in Medina County have comprehensive plans?

A. Uh-huh.

Q. According to the department of planning services, Granger Township does not have a comprehensive plan; isn't that true?

A. In the traditional sense, yes.

Q. Well, in the sense that you've defined a comprehensive plan, they do not have one?

⁶ Mr. Hartt was honored to receive the Outstanding Planner Award for 2009 from the Ohio Chapter of the American Planning Association. (R. 256.)

A. Correct.

(R. 863-64.) She distinguished comprehensive plans from zoning regulations.

Q. Can you tell us what is ordinarily in a comprehensive plan?

A. Let's see. It's a -- first of all, there will be a description of the, you know, current -- what it looks like now, both physically and the population, the land use and so forth.

Often there is a history. There is a process it goes through with meeting with the public and getting public input and that's usually part of it, and then there's elements like housing, economic development, parks and recreation, agriculture, those kinds of elements, public facilities, transportation, those kind of things and then also --

* * *

Usually a comprehensive plan is for 20 years, looking 20 years in to the future somewhere, you know, around 20 years.

* * *

Goals and objectives for the community and then the implementation portion, how you would implement those goals and objectives.

Q. Okay. The elements you've described are not typically those one finds in the zoning resolution, are they?

A. Most of them, no.

(R. 861-62.)

A. [Zoning] is a way to implement the plan.

Q. * * * [B]ut it is not itself the comprehensive plan?

A. Well, it could be.

Q. Well, it could be if it included a facilities plan, a future land use statement, demographics, transportation analysis, goals and objectives and implementation strategy, right?

A. Well, okay.

Q. Isn't that what you just said --

A. Yes.

Q. -- was a comprehensive plan?

A. Yes.

Q. So absent those elements then, it is not a comprehensive plan?

A. Yes.

THE COURT: You said yes to that?

THE WITNESS: I said yes.

THE COURT: I need to write that down.

(R. 863-64.)

Q. So you do not see listed among [the contents of the Granger Township Zoning Resolution] the various features that you say characterize your typical comprehensive plan?

A. Correct.

* * *

Q. Okay. Are the elements that you've described as characterizing a comprehensive plan in here in terms of demographics, transportation, survey, implementation strategy, future goals and objectives, are those in this zoning resolution?

A. In part in the purpose statement for the different districts, I think you get in to some of the goals and objectives of the -- or goals of the Township.

Q. Okay. But there is no survey of the transportation infrastructure of the Township or county in there, is there?

A. No.

Q. And there's no statements of goals and objectives in terms of where the Township wishes to see itself 20 years from now in the sense that you would normally see in the comprehensive plan?

A. That's correct.

Q. And there's no demographic data contained in the zoning resolution which you would normally find in a comprehensive plan; isn't that true?

A. That's true.

Q. And the same is true of the community facilities inventory. There's no community facilities inventory in this zoning resolution either?

A. Correct.

(R. 865-67.)

The Township's attempt on re-direct examination to rehabilitate Ms. Hirsch's candid testimony fell short. After acknowledging that the Resolution's "purpose statement" spells out goals (R. 923-924), she was willing to testify only that the Resolution "**could** function as a comprehensive plan," not that it **is** a comprehensive plan:

Q. The Granger Township zoning resolution also states on the first page that it does act like a comprehensive plan, correct?

A. I think the word is comprehensive plan for zoning.

Q. In fact, if you don't mind --

A. Wait a minute. I can tell you exactly. Adopt zoning regulations as a comprehensive plan of zoning.

Q. So why not establish an ideal method of a comprehensive plan, and certainly through your testimony, not your preference of a comprehensive plan, the zoning resolution **could** act as a comprehensive plan, couldn't it?

A. Yes.

Q. Okay.

THE COURT: But **you're not saying that these zoning regulations are a comprehensive plan, are you?**

THE WITNESS: I'm saying they **could** function as a comprehensive plan.

THE COURT: But you said in your report that Granger Township does not have a comprehensive plan?

THE WITNESS: Correct. They don't have a traditional comprehensive plan, a separate document.

(R. 925-926, emphasis added.)

Ms. Hirsch's conclusion that the Township's Zoning Resolution is not, in substance or content, a comprehensive plan, boiled down to this:

Q. * * * [L]et me ask you as a planner, as a professional land use planner, if I walked in off the street and said I am interested in having a comprehensive plan done for my community, would you hand me that resolution and say here's what they look like?

A. No.

(R. 931-32.)

On February 2, 2012, the Magistrate issued a Decision ("2/2/12 Decision," Appx. 30-58) recommending rejection of all of Apple's claims, including Apple's contention that the Resolution is ultra vires because it is not in accordance with a comprehensive plan as required by R.C. 519.02. In addressing that claim, the Magistrate relied extensively on *Cassell*, albeit for a supposed proposition for which the case does not stand, i.e., that a township's zoning resolution can double as its comprehensive plan for determining compliance with R.C. 519.02's requirement that townships may regulate land uses only "in accordance with a comprehensive plan." Apple timely filed objections to the Magistrate's decision, but the trial court overruled them all. (Appx. 59-69.) By Judgment Entry of July 25, 2012, the trial court declared that the Resolution "was adopted in accordance with the requirements of R.C. 519.02, and, in that regard, the application of its provisions to prohibit the Apple Group's proposed use was not ultra vires or in excess of the Township's zoning powers." (Appx. 70.)

On subsequent appeal to the Ninth District Court of Appeals, Apple argued that a township's zoning resolution, standing alone, cannot substantiate compliance with R.C. 519.02's express requirement that the township's zoning resolution be "in accordance with a comprehensive plan." In a split decision, and based once again on *Cassell* and its errant progeny, the court of appeals affirmed the trial court and concluded that the Resolution doubled as the

“comprehensive plan” with which it was to be “in accordance” for R.C. 519.02 purposes. (Appx. 4-25.)

In her well-reasoned dissent, Judge Belfance explained why such a construction of R.C. 519.02 must fail:

... [B]y eliminating any requirement of a separate comprehensive planning document, or at least evidence that a township actually engaged in a comprehensive, long-range planning process, townships can pass ordinances that technically pass constitutional muster but do not comport with the legislative directive that such ordinances be enacted “in accordance with a comprehensive plan.” R.C. 519.02.

While it would seem that the legislature envisioned a separate and comprehensive planning process culminating in a separate document called a comprehensive plan, I recognize the current state of this Court’s precedent. Nonetheless, I would hold that, in order for a zoning resolution or ordinance itself to constitute a comprehensive plan, there must be some demonstration that the zoning resolution or ordinance is based upon information that would evidence long-range, comprehensive planning and that the resulting zoning resolution or ordinance was *intended* to constitute *the* comprehensive plan of the township. Absent some evidence that the township intended the resolution to actually be the ultimate expression of the comprehensive plan and that it engaged in comprehensive planning in developing the resolution, townships could create resolutions without gathering any pertinent information or conducting any long-range planning. Nonetheless, in situations where a zoning resolution is automatically deemed synonymous with a comprehensive plan, such resolutions are deemed in compliance with R.C. 519.02 merely because the resolution *could* be viewed as a comprehensive plan. Just because a resolution could be a comprehensive plan does not mean that it was intended to be so when it was created. Likewise, just because a resolution *appears* comprehensive in that it provides for a variety of zoning, does not necessarily mean it was the product of thorough, comprehensive planning. Requiring evidence of the foregoing would help prevent townships from creating arbitrary, and piecemeal zoning – clearly at odds with the express directive of R.C. 519.02 – and would prevent townships from justifying their zoning after the fact.

(J.E., ¶¶ 37-38, Belfance, J., dissenting, Appx. 23-24, emphasis sic.)

Based on the evidence and the law, Judge Belfance then explained that the Resolution does not satisfy R.C. 519.02’s requirement and that she would reverse the trial court’s decision:

In the instant matter, I would conclude both facets are lacking. There is little discussion in the record concerning the development of the resolution at issue; thus, one cannot say the resolution was based upon information gathered from comprehensive planning. Moreover, while there is testimony that the zoning resolution

is “used” as the comprehensive plan and that the zoning resolution “could function” as a comprehensive plan, there does not appear to be any testimony stating that, when the zoning resolution was created, it was intended to be the township’s comprehensive plan. Instead, there is abundant testimony that Granger Township does not have a comprehensive plan and neither does Medina County. Additionally, I note that the zoning resolution at issue, which “function[s]” as a comprehensive plan, was adopted a little over a year after Granger Township adopted its prior zoning resolution.* The adoption of a new zoning resolution every year would tend, in my mind, to support the notion that the zoning resolution was not based on long-term planning and was not intended to be a comprehensive plan. *See* Meck and Pearlman at Section 4.29 (“The essential characteristics of a plan are that it is comprehensive, general and long range.”). Under these circumstances, I would conclude that Granger Township failed to follow R.C. 519.02 in enacting its zoning resolution and would reverse the judgment of the lower court. Accordingly, I dissent.

(J.E., ¶39, Belfance, J., dissenting, Appx. 24.)⁷

Apple timely filed an App. R. 26(A) motion for reconsideration on October 10, 2013. But on January 13, 2014, again in a split opinion (Judge Belfance dissenting), the lower court denied Apple’s motion. (Appx. 26-29.)

This dispute’s resolution hinges on a point of law which this Court appeared to have put to rest in *B.J. Alan II*.⁸ *B.J. Alan II* plainly states that there must be *some* existing

⁷ Judge Belfance’s misgivings about the court of appeals’ opinion below are now expressly approved by Messrs. Meck & Pearlman in the current edition of their seminal treatise “Ohio Planning and Zoning Law.” S. Meck & K. Pearlman, “Ohio Planning and Zoning Law,” § 4.39, fn. 1 (2014 ed. Thomson Reuters). Hailing her dissent as “an excellent and scholarly discussion of this problem,” Messrs. Meck and Pearlman opined: “The authors agree with Judge Belfance, who contended that the evidence presented by the township did not support the conclusion that the zoning resolution was adopted in accordance with a comprehensive plan as required by R.C. 591.02.” *Id.*

⁸ In *B.J. Alan Company v. Congress Twp. BZA*, 9th Dist. No. 07CA0051, 2007-Ohio-7023 (“*B.J. Alan I*”), the court of appeals held that Congress Township, which had no comprehensive plan of its own, could not enact its zoning regulations purportedly in accordance with a comprehensive plan prepared by Wayne County which addressed land use in areas of the county which included Congress but which set forth no goals or recommendations specific to Congress Township itself. In *B.J. Alan II*, this Court reversed, holding that a county comprehensive plan that sets forth county land-use goals and recommendations may constitute a “comprehensive plan” for purposes of R.C. 519.02. *B.J. Alan II*, ¶ 31. (Medina County does not have a comprehensive plan. (R. 266.)) This Court explained that by presenting “a thorough study of the region and ... [setting] forth comprehensive land-use goals for the county [while demonstrating] ... an intent to include

“comprehensive plan” with which a township’s zoning resolution must be in accord. *B.J. Alan II*, ¶13 (holding that a township need not develop its own “comprehensive plan” in order to exercise its zoning authority so long as its zoning resolution is “in accordance with a comprehensive plan.” (Emphasis sic)). The Township here has no comprehensive plan of its own, a point confirmed by the MCDPS and by the testimony of the land use experts who testified at trial for both Apple and the Township. The Township does not claim that its Resolution is in accordance with any other entity’s comprehensive plan. Nevertheless, in finding that the Resolution doubles as an R.C. 519.02 “comprehensive plan,” the court of appeals below perceived a gap left by *B.J.*

Alan II:

The Supreme Court did not address whether a zoning ordinance itself could satisfy the comprehensive plan requirement.

(JE, ¶ 12.) *B.J. Alan II* apparently did not settle this point of law. This, with the persistent misapplication of *Cassell*, requires a more definitive statement of Ohio law from this Court.

Hence this appeal.

III. ARGUMENT

The Township’s adoption of its Resolution “as a comprehensive plan of zoning” cannot satisfy the clear requirement in R.C. 519.02 that such regulations be adopted “in accordance with a comprehensive plan.”

Congress Township within its purview,” the Wayne County Comprehensive Plan “constitutes a comprehensive plan for purposes of R.C. 519.02.” *B.J. Alan II*, ¶ 42. This Court also pointed out that it had left unresolved the issue of whether “the Congress Township zoning ordinance is indeed ‘in accordance’ with the Wayne County Comprehensive Plan,” *B.J. Alan II*, ¶ 43, and remanded the case to the Court of Appeals for “further consideration consistent with [the] opinion.” No such inquiry can be undertaken with respect to the Granger Township Resolution because those regulations were not, and do not even purport to have been, adopted in accordance with any comprehensive plan other than the Resolution itself – i.e., the “comprehensive plan of zoning.”

A township zoning resolution that is not adopted in accordance with a comprehensive plan, as required by R.C. 519.02, is an invalid exercise of the township's authority, even if the zoning resolution is substantially related to governmental interests. *B.J. Alan I*, ¶¶12, 16.⁹

Having not been adopted in accordance with a comprehensive plan, the Township's Zoning Resolution is invalid and cannot be applied to proscribe Apple's Proposed Use. *Id.* See also *Cassell*, 163 Ohio St. at 345 ("The absence of any comprehensive plan in the regulation involved herein certainly opens the door to an arbitrary and unreasonable administration of the regulation.")

Two principal factors account for the persistent judicial neutering of R.C. 519.02's "comprehensive plan" condition to a township's exercise of its statutory zoning powers. First, too little regard is paid R.C. Chapter 519's terminology. The terms "zoning plan" (aka "plan of zoning") and "comprehensive plan" are not used interchangeably. And the terms "comprehensive plan of zoning" and "comprehensive zoning plan" appear nowhere in R.C. Chapter 519. Second, appellate courts have hardened in their misapplication of *Cassell*. The result has been a line of precedent facially contradictory of R.C. 519.02's explicit demand for "accordance" between a township's "zoning resolution" and the "comprehensive plan" to which the township looks for zoning and other development guidance.

By promulgating the Propositions of Law submitted here, this Court will restore uniformity, predictability, and rationality to land uses throughout Ohio's 1,300+ townships, and, importantly, will more closely conform the local exercise of township zoning powers to the General Assembly's clearly expressed intentions.

⁹ This holding by the Court of Appeals in *B.J. Alan I* was left undisturbed by the Ohio Supreme Court.

Proposition of Law No. 1

For purposes of a township’s exercise of its statutory zoning power, the “zoning plan” that R.C. Chapter 519 empowers townships to adopt by resolution, which includes the zoning regulations and a zoning map, is not identical to or a substitute for the “comprehensive plan” identified in R.C. 519.02, with which R.C. 519.02 requires the “zoning plan” to be “in accordance.”

Created by the State, townships have no inherent or constitutionally granted police power, which includes the power to zone. Their zoning power is strictly limited to that expressly delegated to them by statute, to wit, in R.C. Chapter 519. *Bd. of Bainbridge Twp. Trustees v. Funtime, Inc.*, 55 Ohio St.3d 106, 108, 563 N.E.2d 717 (1990), citing *Yorkavitz v. Twp. Trustees of Columbia Twp.*, 166 Ohio St. 349, 351, 142 N.E.2d 655 (1957).

R.C. Chapter 519’s terms enable and delimit township zoning powers. R.C. 519.02 empowers townships to:

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.

(Emphasis added.) This Court has long recognized that the “comprehensive plan” condition uniquely limits township (and county) zoning powers:

R.C. 303.02, regulating rural land use in counties, and R.C. 519.02, regulating land use in townships, *require* that zoning regulations promulgated by counties and townships be in accordance with a comprehensive plan. However, there is no statutory requirement that cities such as Montgomery enact a comprehensive community plan pursuant to its power to zone under R.C. 713.06 et seq. The court of appeals erred by implicitly requiring municipalities to enact a comprehensive community plan.

Columbia Oldsmobile v. Montgomery, 56 Ohio St. 3d 60, 66, 564 N.E.2d 455 (1990) (emphasis sic).

In defining the process townships must follow to adopt a zoning resolution, R.C. Chapter 519 denominates the object of that resolution to be a “**zoning plan**” (see R.C. 519.03, 519.05, 519.06, 519.08) or “**plan of zoning**” (see R.C. 519.11). Reading its provisions serially makes clear that the R.C. Chapter 519 process is designed to create and adopt only one “plan,” i.e., the township’s “zoning plan,” comprising proposed regulations and a map. After that “zoning plan” is reviewed during several public hearings by township and county agencies, the township’s trustees, “by resolution,” transform that “zoning plan” from a “**proposed zoning resolution**” (see R.C. 519.06, 519.07, 519.08) into the official “**zoning resolution**” (R.C. 519.10). Thus, a township’s “zoning resolution” is just its “zoning plan” after the trustees formally adopt it.

It is equally apparent on the face of R.C. Chapter 519 that a “comprehensive plan” and a township’s “zoning plan” are not a singular plan. R.C. 519.02 requires township “zoning plans” to be *in accordance with* a “comprehensive plan,” a term R.C. Chapter 519 uses only in this section:

(A) * * * Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board [of township trustees] 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, * * * and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township * * * (Emphasis added.)

B.J. Alan II, at ¶¶ 12-13.

The “accordance” requirement unambiguously signals an anticipated *comparison* between two things for their mutual consistency. “*Accordance*” means “[a]greement; harmony; concord; conformity,” with “*conformity*” further denoting a “[c]orrespondence in form, manner, or use; agreement; harmony; congruity.” (Black’s Law Dictionary, at 17, 300 respectively (6th ed. 1990).) The comparison thus denoted necessarily implies the separateness of the things compared, i.e., the “comprehensive plan” and the “zoning plan” that must be adopted “in

accordance with” it. The “accordance” requirement also implicitly suggests potential “discordance,” which could manifest only by such a comparison.

Indeed, the General Assembly’s use of “in accordance with” in R.C. 519.02 commands a rigid degree of interpretation and compliance for townships not equaled by other terms:

We believe that the Smith court's observation about the language of R.C. 2951.041(E) is correct. R.C. 2951.041(E) employs the unusual phrase "in the manner provided in" rather than "pursuant to." According to Black's Law Dictionary, "*pursuant to*" means "[i]n compliance with; in accordance with; * * * [a]s authorized by; under." Black's Law Dictionary 1356 (9th Ed.2009). "*In the manner provided in*" does not connote such rigid compliance. "Manner" is defined as "the mode or method in which something is done or happens: a mode of procedure or way of acting." Webster's Third New International Dictionary 1376 (1986).

* * *

The phrase "in the manner provided in" is less prescriptive and more in the nature of guidance than a command. It connotes only the "mode or method," i.e., the general procedure provided in those statutes. (Emphasis added.)

State v. Niesen-Pennycuff, 132 Ohio St. 3d 416, 418-421, 2012-Ohio-2730, 973 N.E.2d 221, ¶ 19 (emphasis added). Thus, by its terms R.C. 519.02’s “accordance” condition obliges a virtual pre-authorization of sorts by a “comprehensive plan” for a township’s adoption of and amendments to its “zoning plan,” a level of correspondence that well exceeds merely ascertaining a “zoning plan’s” internal consistency, breadth, and clarity.¹⁰

But for the lack of a statutory definition, little genuine disagreement exists regarding the distinct nature and functions of “comprehensive plans” versus “zoning plans.” These two “plans” in R.C. 519.02 denote distinctly different concepts. The elements which made a

¹⁰ Contradictions, ambiguities, or vagueness wholly *within* a single document may require rules of construction to clarify. But restoring a document’s coherence through its construction cannot even loosely be said to bring a document into “accordance” with itself. Indeed, determining the “itself-ness” of a document is the very result of its construction, and establishes only what the document itself is, but does not simultaneously determine its “agreement, harmony, concord, or conformity” with any other text, much less its authorization by such other text.

“comprehensive plan” comprehensive in *B.J. Alan II* are not those typically included in a “zoning plan”:

In developing the plan, the commission prepared separate reports titled 'Community Facilities and Land Use,' 'Land Use Plan,' 'Regional Housing,' and 'Land Use and Housing Implementation.'

B.J. Alan II at ¶ 34. To be sure, zoning was just one “comprehensive plan” element:

The plan states that in conjunction with the comprehensive plan, the regional planning commission has drafted a model zoning text for the townships

Id. at ¶ 40. *B.J. Alan II* also quotes R.C. 713.23, which details the powers of county planning commissions. *Id.* at ¶¶ 15-31. That statute reveals the General Assembly’s own distinct ideas about the planning issues that comprise “comprehensive” planning.

To the same effect, land use professionals both public and private understand this distinction. The court of appeals in *B.J. Alan I*, ¶13, cited a seminal zoning treatise to contrast “comprehensive plans” and “zoning plans” explicitly.¹¹ The Ohio Township Association has also agreed on the separate, twofold plan structure R.C. 519.02 establishes.¹² Indeed, the court of appeals here had previously appeared to grasp this distinction both functionally and terminologically. *B.J. Alan I*, supra, ¶ 16 (“The failure of the township to have a comprehensive

¹¹ “* * * 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). (Emphasis added.)” *B.J. Alan I* at ¶ 13.

¹² On 2/11/08, the Ohio Township Association (“OTA”) filed an amicus brief in support of jurisdiction respecting Congress Township’s initial appeal in *B.J. Alan II*. The OTA stated clearly its view that “R.C. 519.02 establishes **two preliminary requirements** before a township can adopt a zoning resolution: (1) that a comprehensive plan **exist**; and (2) that the township enact the zoning resolution **in accordance with the existing comprehensive plan.**” (Memo. Of Amicus Curiae of OTA in Support of Jurisdiction, pp. 2-3.) (Emphasis added.)

plan renders the zoning resolution invalid.”). And on remand from this Court, the court of appeals in *B.J. Alan Co. v. Congress Twp. BZA*, 191 Ohio App.3d 552, 2010-Ohio-6449, 946 N.E.2d 844 (9th Dist.) (“*B.J. Alan III*”) expressly tested *by comparison* the “accordance” R.C. 519.02 requires,¹³ and found it lacking. *B.J. Alan III*, ¶ 12. Nowhere does R.C. Chapter 519 equate a township’s “zoning plan” with R.C. 519.02’s “comprehensive plan.”

Likewise, all of the testifying trial planning experts below confirmed that a “zoning text” functions practically, i.e., as a means to an end or as “a way to implement the [comprehensive] plan.” (R. 862-863.) This was also the view of Harland Bartholomew, the nationally acclaimed planner who in 1922 proposed adding the term “comprehensive” to the nation’s first Standard Zoning Enabling Act, the template for most all states’ zoning enabling laws:

Zoning is but one element of a comprehensive city plan. It can neither be completely comprehensive nor permanently effective unless undertaken as part of a comprehensive plan.

Quoted at Meck & Pearlman, *Oh. Plan. & Zoning L.* § 4:38 (2014 Ed.).

And all of these related and widely-understood R.C. Chapter 519 terms and provisions must be read *in pari materia*. *Blair v. Sugarcreek Twp. Bd. of Trustees*, 132 Ohio St.3d 151, 2012-Ohio-2165, 970 N.E.2d 884, ¶ 18 (Construing a township’s Title 5 authority over its police chief, the court said, “All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously unless they are irreconcilable.”).

The Court of Appeals here indiscriminately interchanged the terms “comprehensive plan” and “zoning plan.” J.E., ¶ 16. And it compounded this error by relying on case law rooted not in

¹³ Although arguably dicta, the court of appeals invoked *Cassell* and its progeny on remand in noting certain “vagueness” defects it detected in Congress Twp.’s zoning resolution as well. *B.J. Alan III*, at ¶ 13. Vagueness, however, was not an issue here.

township but in *municipal* zoning powers. *Id.*, ¶ 10.¹⁴ Thus, Proposition of Law No. 1 resolves definitively an issue that continues disordering appellate interpretations of R.C. 519.02, and restores its statewide application to a manner consistent with the statute's plain terms.

Proposition of Law No. 2

A township's zoning plan, adopted by resolution under R.C. Chapter 519, is, standing alone, insufficient as a matter of law to establish that the regulations in such plan are "in accordance with a comprehensive plan," as R.C. 519.02 requires.

The collapsing of R.C. 519.02's distinct conditions for the exercise of township zoning powers has resulted primarily from determined misapplication of this Court's decision in *Cassell*. Courts of appeal have mistakenly and repeatedly taken the inverse of *Cassell*'s holding and made it a rule for excusing townships from R.C. 519.02's explicit requirement that their zoning plans be "in accordance with" a "comprehensive plan."

R.C. Chapter 519 does not define the term "comprehensive plan." Nor has this Court formulated a definition of its own. But the Court does regard "comprehensive plan" as among several "specialized terms" in the "unique vocabulary" of Ohio zoning law. *Symmes Township v. Smyth*, 87 Ohio St. 3d 549, 555, 721 N.E.2d 1057. "Specialized usage" of such terms by practitioners in the zoning field can be instructive as to its meaning. *Id.* (citing R.C. 1.42).

Given the testimony by the parties' land use experts, the analysis by Messrs. Meck and Pearlman, and the substance detailed in this Court's and the court of appeals' treatment of the issue in *B.J. Alan I, II, and III*, the lower court's decision here can be sustained only by a manifest misunderstanding of *Cassell*.

¹⁴ In contrast, Judge Belfance correctly pointed out: "[T]he analysis undertaken in the municipal zoning cases is limited to analyzing whether the zoning regulations comply with constitutional limitations; however, in the cases involving townships, courts must also determine whether the resolution complies with the statute." (J.E., ¶35.)

Cassell articulated a sort of vagueness “litmus test” to be applied directly to a township’s zoning regulations themselves. *Cassell* held that if those regulations create use categories without specifying where such uses are permitted, and a person consulting those regulations cannot ascertain how her property can be used, then such regulations cannot be shown to have been adopted “in accordance with a comprehensive plan.” *Cassell*, paragraph two of the syllabus.

Were *Cassell*, as purported, the established test for determining a township zoning resolution’s compliance with R.C. 519.02, one would have expected this Court to cite *Cassell* in *B.J. Alan II*. One might even have expected this Court to analyze Congress Township’s zoning resolution under *Cassell*, as a test for its R.C. 519.02 compliance, in the alternative to the actual comparison this Court mandated on remand.¹⁵ But this Court did not cite *Cassell* in *B.J. Alan II*. Indeed, to contrast *Cassell* with *B.J. Alan II*, brings *Cassell*’s manifest limits into focus and puts into sharp relief the error courts of appeals have made misapplying it to ascertain township compliance with R.C. 519.02.

No “comprehensive plan” of anyone’s creation was before this Court in *Cassell*, just Lexington Township’s zoning resolution. *Cassell*, at 344. In *B.J. Alan II* this Court actually had Wayne County’s “comprehensive plan” before it. *B.J. Alan II*, at ¶¶ 14, 32. Moreover, in *B.J. Alan II*, this Court examined Wayne County’s “comprehensive plan” precisely to determine whether for R.C. 519.02 purposes it was a “comprehensive plan” the “breadth [of which] includes Congress Township.” *B.J. Alan II*, at ¶¶ 33-42. In *Cassell*, focused as it was on the threshold intelligibility of Lexington Township’s zoning regulations themselves, this Court never reached that step in the R.C. 519.02 analysis.

Of special significance in *Cassell*, however, is its explicit “due process” rationale:

¹⁵ See, e.g., J.E., ¶36.

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. (Emphasis added.)

Cassell, at 346. *Cassell* underscored these constitutional due process concerns by basing its analysis on traditional police power terms, not on R.C. 519.02's explicit statutory conditions:

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. [citations omitted]

Cassell, at 345-46.

B.J. Alan II, on the other hand, focused instead on R.C. 519.02's explicit statutory requirements. After deeming Wayne County's "comprehensive plan" to be a "comprehensive plan" for R.C. 519.02 purposes, this Court remanded to the Ninth District Court of Appeals the question of whether Congress Township's zoning resolution was "in accordance with" that plan. *B.J. Alan II*, ¶ 43. *B.J. Alan II* contains no references to the constitutionality, arbitrariness, unreasonableness, or to any "due process" aspect of Congress Township's zoning regulations. For good reason, *Cassell* never reached the twofold inquiry this Court addressed in *B.J. Alan II*: there was no "comprehensive plan" of any kind before this Court in *Cassell*.

It appears that this Court has cited *Cassell* in just two decisions. In neither instance did this Court invoke *Cassell* as determinative of whether a township had in fact adopted its zoning resolution "in accordance with a comprehensive plan" for R.C. 519.02 purposes. Indeed, this Court cited *Cassell* only to underscore the unconstitutionality, unreasonableness, and invalidity of zoning regulations that lack sufficient clarity or standards for their administration.

This Court's first reference came less than one month after *Cassell* was decided. In *State ex rel. Selected Properties, Inc. v. Gottfried*, 163 Ohio St. 469, 127 N.E.2d 371 (1955), this Court examined a City of Parma zoning ordinance provision that empowered the City's board of

zoning appeals to determine whether gasoline and oil filling stations should be allowed in the City's retail business district. *Gottfried*, at 471. This Court cited *Cassell* to underscore the "arbitrary and unreasonable" nature of zoning powers that are delegated to boards without adequate administrative standards to guide them. *Gottfried*, at 473-73. As did *Cassell*, *Gottfried* turned on traditional constitutional "due process" infirmities in a zoning law furnishing inadequate guidance for its administration. The Court's holding in *Gottfried* makes this explicit:

Inasmuch as the questioned section of the ordinance fails to provide standards or criteria for the guidance of the Board of Appeals and the protection of the citizens of Parma, it therefore fails to meet the test of constitutionality and must be held invalid.

Gottfried, at 473.

Three years later, this Court again cited *Cassell* in *State ex rel. Associated Land & Investment Corp. v. City of Lyndhurst*, 168 Ohio St. 289, 154 N.E.2d 435 (1958). In *Lyndhurst*, this Court held that a Lyndhurst parking ordinance:

which requires that buildings, other than dwellings, churches, theatres, assembly halls, retail stores and shops, thereafter erected or remodeled or altered shall have "parking space reasonably adequate for commercial vehicles necessary to carry on the business of the occupants of the premises and for the normal volume of car parking by persons coming to the premises on matters incidental to the uses thereof," does not contain sufficient criteria or standards to guide the administrative officer or tribunal in the exercise of the discretion vested in it and is unconstitutional and invalid. (Paragraph one of the syllabus in *State, ex rel. Selected Properties, Inc., v. Gottfried*, 163 Ohio St., 469, approved and followed.)

Lyndhurst, paragraph two of the syllabus. String citing it with *Gottfried*, this Court cited *Cassell* in *Lyndhurst* to underscore the invalidity of zoning regulations that furnish constitutionally inadequate content or direction for their administration. *Lyndhurst*, at 296.

Notably, both *Lyndhurst* and *Gottfried* involved *municipal* zoning regulations, not township zoning regulations. This Court's reliance in both of these cases on *Cassell*, a case involving a township's zoning resolution, thus, certifies *Cassell*'s distinctly "due process"

oriented rationale. Were *Cassell* the test for township compliance with R.C. 519.02, as so many courts since *Cassell* have mistakenly perceived, *Cassell* would have been utterly inapposite to the questions in both *Lyndhurst* and *Gottfried*. That it was not inapposite in *Lyndhurst* and *Gottfried* explains why *Cassell* played no role in this Court's *B.J. Alan II* decision, which squarely addressed R.C. 519.02's statutory conditions to township zoning, and it exposes the appellate court error in crediting *Cassell* as establishing a test which it plainly does not establish.

Cassell has been correctly applied in cases involving township "zoning plans" exhibiting vagueness similar to that exhibited by Lexington Township's in *Cassell*. See, e.g., *Clegg v. BZA of Newton Twp.*, 11th Dist. No. 3668, 1987 Ohio App. LEXIS 6611 (May 1, 1987); *Board of Township Trustees Ridgefield Twp. v. Ott*, 6th Dist. No. H-93-16, 1994 Ohio App. LEXIS 114 (Jan. 21, 1994). But other decisions since *Cassell*, including the decision below here, have inverted *Cassell*'s syllabus law. *Cassell* set a vagueness threshold for minimally intelligible zoning. But subsequent decisions, invoking *Cassell* or its progeny, have erroneously made a township zoning plan's mere lack of vagueness a separate litmus test for satisfying R.C. 519.02's "in accordance with a comprehensive plan" requirement.

Some cases have misused *Cassell* to conflate the "zoning plan" with the "comprehensive plan" R.C. 519.02 identifies. See, e.g., *Rumpke Waste, Inc. v. Henderson*, 591 F.Supp. 521, 534 (U.S.D.C., S.D. Ohio 1984) ("We conclude that a zoning plan * * * is a comprehensive plan within the meaning of Ohio Rev. Code § 519.05."); *White Oak Property Dev., LLC v. Washington Twp.*, 12th Dist. No. CA 2011-015-011, 2012-Ohio-425, ¶ 16.

Many courts deem *Cassell*'s "can I tell what I may do with my property" standard to be the R.C. 519.02 "test for comprehensiveness." *Rumpke* at 534; see *White Oak*, ¶ 25; *Ryan v. Bd. of Trustees of Plain Twp.*, 10th Dist. No. 89 AP-1441, 1990 Ohio App. LEXIS 5519, *7 (Dec.

11, 1990) (stating that *Cassell* “equat[ed] ‘comprehensive plan’ with designation of ‘the use to which a particular area could be put’”); *Barnett v. Leshner*, 2nd Dist. No. 82-CA-50, 1983 Ohio App. LEXIS 12651, *11 (Apr. 26, 1983) (*Cassell* used to excuse county zoning resolution’s failure to satisfy R.C. 303.02’s identical “comprehensive plan” requirement). The court of appeals below repeated this error:

Upon review of the zoning resolution, we conclude that there is some competent credible evidence in the record from which the trial court could have found that it is “a comprehensive plan” under Section 519.02. * * * In addition, a person examining the “zoning resolution in its entirety [can] ascertain to what use property may be put.” [citation omitted]

(J.E., ¶ 20.)

Over time, *Cassell*’s misapplication by courts has morphed into express judicial repudiation of R.C. 519.02’s clear mandate that townships may adopt zoning only in “accordance” a “comprehensive plan”:

Ohio law does not require a township to adopt a comprehensive zoning plan as a condition precedent to the enactment of zoning legislation.

BGC Properties v. Twp. of Bath, 9th Dist. No. 14252, 1990 Ohio App. LEXIS 1026, *9 (Mar. 21, 1990) (township neither had nor borrowed a “comprehensive plan” in adopting its zoning).

[T]he language of R.C. 519.02 does not require a township to gather statistics or explicitly provide a foundation for its zoning plan.

White Oak, supra, ¶ 35 (township neither had nor borrowed a “comprehensive plan” in adopting its zoning).

[A] township zoning board’s decision to uphold a zoning ordinance cannot be invalidated merely because the township does not have a comprehensive zoning plan.

Reese v. Bd. of Trustees of Copley Twp., 129 Ohio App.3d 9, 15, 716 N.E.2d 1176 (9th Dist. 1998).

Many of these decisions negate R.C. 519.02's express "comprehensive plan" requirement by mistakenly relying in part on cases examining *municipal* zoning powers. As many of these decisions do, the court of appeals below invoked *Central Motors Corp. v. City of Pepper Pike* for the oft-quoted phrase, "although a comprehensive plan is usually separate and distinct from a zoning ordinance, it is possible for an ordinance in and of itself to be a comprehensive plan * * *." 63 Ohio App.2d 34, 65, 409 N.E. 2d 258 (8th Dist. 1979). (J.E., ¶ 10.) See also *Reese*, at 15; *White Oak*, ¶ 22; *BGC Properties*, at 9. But these courts uniformly omit the preceding *Central Motors* sentence, to wit:

Ohio law does not require a municipality to adopt a comprehensive plan as a condition precedent to the enactment of zoning legislation. See *R.C. 713.06*; *R.C. 519.02*.

Central Motors, at 65. Thus, the *Cassell*-based cases continue distorting Ohio's statutory enabling act as concerns township zoning power.

Misapplication of *Cassell* continues to compromise rational, long-range land use development in Ohio's 1,300 plus townships, and leaves land owners at the whim of local zoning officials. In her well-reasoned dissent in the decision below, Judge Belfance observed some of the broader consequences this judicial circumvention of R.C. 519.02's statutory mandate continues to cause:

Viewing the zoning regulation as the functional equivalent of the comprehensive plan without more essentially renders the requirement that townships zone in accordance with a comprehensive plan "symbolic at best." [citation omitted] * * * [B]y eliminating any requirement of a separate comprehensive planning document, or at least evidence that township actually engaged in a comprehensive, long-range planning process, townships can pass ordinances that technically pass constitutional muster but do not comport with the legislative directive that such ordinance be enacted "in accordance with a comprehensive plan." R.C. 519.02.

(J.E., ¶ 37, J. Belfance dissenting.)

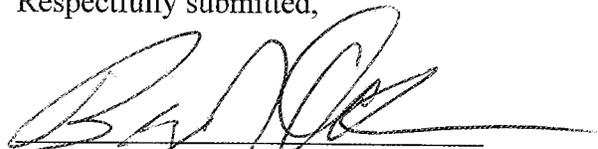
A corrected point of law from this Court is badly needed.

IV. CONCLUSION

This tenacious, decades-old fissure in construing R.C. Chapter 519 must finally be bridged. Until it is, Ohio's 1,300+ townships, their resident property owners, and Ohio courts generally will remain deprived of reasonable clarity and consistency in this major component of Ohio's land use policies and regulatory powers. This Court's fairly recent pronouncements in *B.J. Alan II* require a narrow but critical clarification, one which will quiet the substantial controversy persisting in R.C. 519.02's application. The Propositions of Law proposed here bridge this critical gap.

For the foregoing reasons, Apple respectfully urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that pursuant to S.Ct.Prac.R. 3.11(B)(1) a copy of the foregoing *Merit Brief of Appellant, Apple Group, Ltd.* was served by e-mail on the following counsel for Appellees Board of Zoning Appeals of Granger Township, Granger Township, Granger Township Board of Trustees, and Granger Township Zoning Inspector this 26th day of July, 2014:

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Granger Township Zoning Inspector, Nancy West



One of the Attorneys for Appellants

IN THE SUPREME COURT OF OHIO

14-0301

APPLE GROUP LTD.,)
)
 Appellant,)
)
 v.)
)
 BOARD OF ZONING APPEALS, et al.,)
)
 Appellees.)

On Appeal from the Medina County
 Court of Appeals,
 Ninth Appellate District

 Court of Appeals Case Nos.
 12 CA 0068-M and
 12 CA 0065-M

NOTICE OF APPEAL OF APPELLANT APPLE GROUP LTD.

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FILED
 FEB 27 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

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 SUPREME COURT OF OHIO

ATTORNEYS FOR APPELLEES, BOARD OF ZONING APPEALS OF
 GRANGER TOWNSHIP, GRANGER TOWNSHIP, GRANGER
 TOWNSHIP BOARD OF TRUSTEES, AND GRANGER TOWNSHIP
 ZONING INSPECTOR, NANCY WEST

NOTICE OF APPEAL OF APPELLANT APPLE GROUP LTD.

Appellant Apple Group Ltd. hereby gives notice of appeal to the Supreme Court of Ohio from the September 30, 2013 Decision and Journal Entry ("9/30/13 Decision") of the Medina County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case Nos. 12 CA 0068-M and 12 CA 0065-M.

On October 10, 2013, pursuant to App. R. 26(A)(1), Appellant timely filed a Motion for Reconsideration of the Court of Appeals' 9/30/13 Decision.

On January 13, 2014, the Court of Appeals denied Appellant's Motion for Reconsideration.

This case is one of public or great general interest.

Respectfully submitted,



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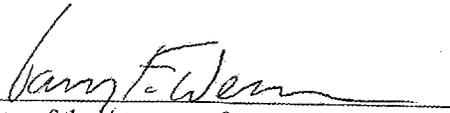
ATTORNEYS FOR APPELLANT, APPLE GROUP LTD.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Appellant Apple Group Ltd. was sent by regular U.S. Mail, postage prepaid, this 26~~th~~ day of February, 2014 to:

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STATE OF OHIO
COUNTY OF MEDINA

COURT OF APPEALS
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SEP 30 AM 9:56

APPLE GROUP LTD.

Appellant

v.

BOARD OF ZONING APPEALS
GRANGER TWP.

Appellee

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

C.A. No. 12CA0065-M
12CA0068-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08CIV0090

DECISION AND JOURNAL ENTRY

Dated: September 30, 2013

HENSAL, Judge.

{¶1} Apple Group Ltd. appeals a judgment of the Medina County Common Pleas Court that denied its appeal from a decision of the Granger Township board of zoning appeals and declared that the Township's zoning resolution was constitutional as applied to land that Apple owns in the township. For the following reasons, this Court affirms.

I.

{¶2} In 2006, Apple purchased two adjacent parcels of land in Granger Township that together formed a rectangle slightly more than 88 acres in size. The land is zoned R-1, which requires each residential lot to be at least two acres. Apple wants to maximize the number of houses it can build on the land, but does not want to simply divide the parcels into 44 two-acre lots. Instead, it wants to concentrate the 44 houses on one part of the property and surround them with undeveloped open space. According to Apple, its plan conserves resources and preserves

the natural features of the land. Under Apple's plan, each housing lot would be, on average, approximately 5/6 of an acre in size.

{¶3} In 2006 and 2007, Apple consulted with the township's zoning commission about developing the 88 acres according to its plan. In particular, they discussed rezoning the land to the less-restricted R-2 designation or creating a new planned conservation development district. After several meetings, however, the zoning commission tabled the issue. Apple, therefore, explored other ways of accomplishing its goal.

{¶4} In September 2007, Apple submitted an application to the Township's board of zoning appeals, seeking 176 zoning variances, four for each of its 44 proposed lots. Specifically, it asked for a variance of the R-1 district's two-acre lot minimum, 175-foot minimum street-side lot frontage, 175-foot minimum continuous front yard width, and 15-foot side-yard setback requirement. After holding several hearings on the application, the board of zoning appeals determined that what Apple was seeking was, essentially, rezoning of its property. Explaining that it did not have authority to rezone township property, the board of zoning appeals denied Apple's variance application.

{¶5} Apple appealed the denial of its variance application to the Medina County Common Pleas Court, arguing that the board of zoning appeals had incorrectly refused to consider its application. It also argued that it was unconstitutional for the Township to apply its zoning regulations to Apple's property. The common pleas court bifurcated the administrative and constitutional issues. In October 2008, the court upheld the board of zoning appeals' conclusion that the board did not have authority to consider the variance application because the application was, in essence, an attempt to rezone the property. The court set Apple's constitutional claims for an evidentiary hearing.

{¶6} Meanwhile, Apple continued to seek permission from the Township to develop its property in accordance with its plan. After the board of zoning appeals denied its variance application, Apple asked the zoning commission to reconsider whether the 88 acres could be rezoned as a planned conservation development district. Following several hearings, the zoning commission decided that it would not recommend the rezoning of Apple's land. The Township Board of Trustees subsequently denied Apple's request to rezone its property.

{¶7} After the Township refused to rezone Apple's land to accommodate its development plan, Apple sued the Township, seeking a declaratory judgment that the Township's zoning ordinance is unconstitutional as applied to its land. Upon request of the parties, the common pleas court consolidated the declaratory-judgment action with Apple's administrative appeal, which was still pending.

{¶8} In November 2009, a magistrate held a hearing regarding the constitutional claims Apple made in its administrative appeal and declaratory judgment action. Following the hearing, she recommended that the common pleas court rule in favor of the Township. Apple objected, but the common pleas court overruled its objections and entered judgment in favor of the Township. Apple has appealed the judgment entered in both cases, assigning four errors.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT'S FINDING THAT GRANGER TOWNSHIP COMPLIED WITH R.C. 519.02'S REQUIREMENT THAT ITS ZONING RESOLUTION BE ADOPTED "IN ACCORDANCE WITH A COMPREHENSIVE PLAN" WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AS A MATTER OF LAW BY DECLARING THAT GRANGER TOWNSHIP COMPLIED WITH R.C. 519.02'S REQUIREMENT THAT ITS ZONING RESOLUTION BE ADOPTED "IN ACCORDANCE WITH A COMPREHENSIVE PLAN."

{¶9} Apple argues that the Township's zoning resolution is invalid because it was not adopted in accordance with a comprehensive plan. Revised Code Section 519.02 provides:

[A] 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, * * * 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, * * * and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township."

Apple argues that, under Section 519.02, "a comprehensive plan" covers more than just zoning. Rather, it is a township's chief policy instrument which sets forth goals, policies, and objectives regarding zoning, streets, public facilities, public programs, and public lands. Apple argues that, because the Township does not have a comprehensive plan that is separate from its zoning resolution, the resolution is invalid. Whether a zoning resolution complies with Section 519.02 is a question of law that this Court reviews de novo. *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals*, 191 Ohio App.3d 552, 2010-Ohio-6449, ¶ 7 (9th Dist.) (*B.J. Alan III*).

{¶10} Contrary to Apple's argument, this Court has held that a township's failure to have a comprehensive plan "which is separate and distinct from a zoning ordinance does not render unconstitutional a zoning ordinance." *Reese v. Copley Twp. Bd. of Trustees*, 129 Ohio App.3d 9, 15 (9th Dist.1998); *BGC Props. v. Bath Twp.*, 9th Dist. Summit No. 14252, 1990 WL 31789 *4 (Mar. 21, 1990) ("Ohio law does not require a township to adopt a comprehensive zoning plan as a condition precedent to the enactment of zoning legislation."). In *Reese* and *BGC Properties*, this Court noted its agreement with the Eighth District Court of Appeal's

decision in *Central Motors Corp. v. City of Pepper Pike*, 63 Ohio App.2d 34, 65 (8th Dist.1979), in which the Eighth District explained that, “although a comprehensive plan is usually separate and distinct from a zoning ordinance, it is possible for an ordinance in and of itself to be a comprehensive plan * * *.” See also *Columbia Oldsmobile, Inc. v. City of Montgomery*, 56 Ohio St.3d 60, 67 (1990) (Brown, J., concurring) (“As many courts (including our own) have recognized, a well-drafted zoning ordinance can, by itself, constitute the ‘comprehensive plan.’”). Accordingly, the fact that the Township does not have a separately designated “comprehensive plan” does not mean that it did not have authority to create a zoning resolution.

{¶11} The purpose of the “comprehensive plan” requirement is “to prevent ‘piecemeal’ or ‘spot’ zoning * * *.” *Scioto Haulers, Inc. v. Circleville Twp. Zoning Bd. of Appeals*, 4th Dist. No. 80 CA 7, 1981 WL 6022 *1 (Sept. 18, 1981). A comprehensive plan allows someone purchasing property to “determine in advance to what use that property could be put.” *Cassell v. Lexington Twp. Bd. of Zoning Appeals*, 163 Ohio St. 340, 345 (1955). It also prevents zoning laws and regulations from being “exercised in an arbitrary or unreasonable manner.” *Id.* In *Cassell*, for example, the Ohio Supreme Court concluded that a zoning resolution that allowed one square mile of the township to be used for “farming, residential, commercial and recreational purposes,” but failed to designate which parts of the affected area could be used for each or any of those uses, did not constitute a comprehensive plan. *Id.* at 345-46. The Supreme Court also noted that, although the township denied a request for housing permits, in part, because the proposed lots were too small, the zoning resolution made “no provision for lot sizes, setback building lines, sizes of yard, courts, and other open spaces or any other of the items permitted to be regulated by [the predecessor to Section 519.02].” *Id.* at 346. According to the Court, “[t]here 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.” *Id.*

{¶12} Apple argues that the more recent decisions of this Court and the Ohio Supreme Court in *B.J. Alan Co. v. Congress Twp. Board of Zoning Appeals*, 124 Ohio St.3d 1, 2009-Ohio-5863 (*B.J. Alan II*), preclude a zoning ordinance from satisfying Section 519.02’s “comprehensive plan” requirement. The issue before the Supreme Court in *B.J. Alan II*, however, was whether “the comprehensive plan required by the statute must be a plan developed by the township itself or whether [a] township may rely on a comprehensive plan created at the county level.” *Id.* at ¶ 1. After determining that a township could rely on a countywide plan, the Supreme Court then considered whether the Wayne County plan that Congress Township had relied on was “a comprehensive plan and whether its breadth includes Congress Township.” *Id.* at ¶ 32. The Supreme Court did not address whether a zoning ordinance itself could satisfy the comprehensive plan requirement. On remand, this Court recognized that *B.J. Alan* involved a different issue, writing:

[T]he facts of *Cassell* and other cases cited by the parties are distinguishable from the facts of the case at bar. For example, in *Cassell* the Supreme Court examined whether a comprehensive plan existed within the zoning resolution itself and was not faced with the question of whether a regulation complied with a separate and distinct plan.

B.J. Alan III, 191 Ohio App.3d 552, 2010-Ohio-6449 at ¶ 13.

{¶13} Upon review of the decisions of this Court and the Supreme Court in *B.J. Alan II* and *III*, we conclude that they did not overrule this Court’s holdings in *Reese* and *BGC Properties*. The fact that the Supreme Court held that a zoning resolution satisfies the “comprehensive plan” requirement if it is adopted in accordance with a county’s master plan

does not mean that that is the only way that the requirement can be met. We, therefore, reject Apple's argument that a zoning ordinance cannot constitute a comprehensive plan.

{¶14} Apple next argues that the Township's zoning ordinance does not meet the requirements of a comprehensive plan and, therefore, it was not made "in accordance with a comprehensive plan" under Section 519.02. The definition of "comprehensive plan" has generated much debate.

The requirement that zoning decisions be made 'in accordance with a comprehensive plan' was contained in the original Standard Zoning Enabling Act (SZEА) issued by the United States Department of Commerce in 1922. Approximately three-quarters of the states [including Ohio] have adopted some form of the SZEА, and typically include the 'in accordance with a comprehensive plan' requirement. The term 'comprehensive plan' was not defined in the SZEА, and so both its purpose and confines of legal sufficiency have not been well understood or enforced.

Hirokawa, *Making Sense of a "Misunderstanding of the Planning Process": Examining the Relationship Between Zoning and Rezoning Under the Change-or-Mistake Rule*, 44 Urb. Law. 295, 299-300 (2012).

{¶15} Two years after the United States Department of Commerce issued the final version of the SZEА, it issued the Standard City Planning Enabling Act, which gave local governments "the discretion to develop substantive planning policies." Attkisson, *Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management*, 62 Vand. L.Rev. 979, 991 (2009); see R.C. 713.01 (allowing the creation of city planning commissions), R.C. 713.22 (allowing the creation of county planning commissions). The Standard Planning Act did not use the term "comprehensive plan" like the SZEА but did use the term "master plan." Sullivan & Bragar, *Recent Developments in Comprehensive Planning*, 44 Urb. Law. 615, 615 (2012). Because the Standard Planning Act makes planning optional, however, "most state courts [have been] reluctan[t] to require consistency between zoning regulations and a separately adopted land

use plan.” Attkisson, 62 Vand. L.Rev. at 991. Instead, the majority view “is that comprehensive planning requires some form of forethought and reasoned consideration, as opposed to a separate plan document that becomes an overarching constitution guiding development.” Sullivan & Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 Urb. Law. 449, 454 (2002). The minority view, on the other hand, requires “the comprehensive plan [to be] an independent document separate from the comprehensive zoning ordinance.” Benintendi, Comment, *The Role of the Comprehensive Plan in Ohio: Moving Away from the Traditional View*, 17 U. Dayton L. Rev. 207, 217 (1991).

{¶16} As explained earlier, this Court has followed the majority view that a zoning resolution itself can satisfy the comprehensive plan requirement. Under the majority view, “the term ‘comprehensive’ has three meanings: (1) comprehensive in terms of addressing an entire geographic area; (2) comprehensive in terms of having an ‘all-encompassing’ scope; and (3) comprehensive as in a separate long-term planning document” as opposed to a temporary duration. Sullivan & Richter, *Out of the Chaos* at 453-454. To be “all-encompassing” under the second prong, a zoning ordinance must address a number of factors such as use, height, and area. *Id.* at 454. This Court’s analysis is also guided “by the broad principles outlined by the Supreme Court of Ohio,” which includes “that a person should be able to examine a zoning resolution in its entirety and ascertain to what use property may be put.” *B.J. Alan III*, 191 Ohio App.3d 552, 2010-Ohio-6449 at ¶ 14. Accordingly, the resolution must “define with certainty the location, boundaries and areas of the * * * districts[.]” *White Oak Prop. Dev., L.L.C. v. Washington Twp.*, 12th Dist. Brown No. CA2011-05-011, 2012-Ohio-425, ¶ 16, quoting *Village of Westlake v. Elrick*, 52 Ohio Law Abs. 538, 541 (8th Dist.1948). In *White Oak*, the Twelfth District Court of Appeals determined that a township zoning resolution set forth a comprehensive plan because

the resolution and accompanying map: “(1) reflect current land uses; (2) allow for change; (3) promote public health and safety; (4) uniformly classify similar areas; (5) clearly define district locations and boundaries; and (6) identify the use(s) to which each property may be put.” *Id.* at ¶ 46.

{¶17} In the instant case, the trial court adopted the decision of the magistrate, who concluded that the Township’s zoning resolution had been made in accordance with a comprehensive plan. In her decision, the magistrate considered

1) whether an individual is able to examine the zoning resolution and ascertain to what use the property may be put; 2) whether the text of the zoning resolution is consistent with the zoning map which shows the location of the various zoning classifications, and 3) whether the zoning plan includes business or industrial zoning districts.

She found:

[T]he Granger Township zoning resolution functions as a comprehensive plan. A review of the resolution shows that it covers many factors, including, but not limited to land use, commercial development and conditional zoning terms. It sets forth specific goals and embodies the vision of the residents of the township for future development. The goal of the resolution is “to promote and protect the health, safety, morals and welfare of the residents of the unincorporated area of Granger Township * * * and to conserve and protect property and property values, and to provide for the maintenance of the rural character of [the] Township, and to manage orderly growth and development in said Township” while allowing for “reasonable flexibility for certain kinds of uses.”

She also found that the

resolution is general in nature but it also contains specific zoning districts to manage growth and ret[ain] the rural character of the township. The resolution provides the information needed for property owners to make decisions about public and private investment. It also provides a basis for zoning and conditional use decisions which will control spot zoning.”

The trial court adopted the magistrate’s findings, finding them to be “correct.”

{¶18} Apple argues that the trial court’s findings were against the manifest weight of the evidence. When reviewing the manifest weight of the evidence in a civil case, this Court

“weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115 (9th Dist.2001).

{¶19} The Township’s zoning resolution and map divides the Township into six different districts: two residential, three commercial, and one industrial. There is also a planned development district that overlays part of the R-1 residential and C-2 general commercial districts. For each district, the zoning resolution sets out use, height, and area restrictions. It defines with certainty the location and boundaries of each zone. The zoning resolution also provides separate regulations regarding the placement of signs and wireless telecommunication towers.

{¶20} Upon review of the zoning resolution, we conclude that there is some competent credible evidence in the record from which the trial court could have found that it is “a comprehensive plan” under Section 519.02. See *Carlton v. Riddell*, 72 Ohio Law Abs. 254, 256 (9th Dist.1955) (“The Brunswick Township zoning resolution is comprehensive, for it provides for agriculture in all zones (which is usually the predominant use of township lands), business and commercial uses (to provide food, drug and department stores, and other such uses), and residences.”). The zoning resolution addresses the entire geographic area of the Township, is all-encompassing in that it addresses use, height, and area, and it is intended to operate on a permanent basis to manage the long-term growth and development of the Township. In addition, a person examining the “zoning resolution in its entirety [can] ascertain to what use property may be put.” *B.J. Alan III*, 191 Ohio App.3d 552, 2010-Ohio-6449 at ¶ 14. Further, the

county's deputy planning director testified that, even though the township does not have a separate comprehensive plan, the zoning resolution functions as a comprehensive plan. We, therefore, conclude that the court's decision is not against the manifest weight of the evidence. The trial court correctly determined that the zoning resolution was adopted "in accordance with a comprehensive plan" under Section 519.02. Apple's first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AS A MATTER OF LAW BY DECLARING THAT THE GRANGER TOWNSHIP ZONING RESOLUTION, AS APPLIED TO PROHIBIT APPLE'S PROPOSED USE, WAS NOT ULTRA VIRES AND IN EXCESS OF THE TOWNSHIP'S STATUTORY ZONING POWERS UNDER R.C. 519.02.

{¶21} Apple next argues that the zoning resolution's R-1 district's area restrictions are not reasonably related to the two purposes that are allowed under Section 519.02. According to Apple, Section 519.02 allows townships to impose area restrictions only if they are "in the interest of the public health and safety." The magistrate determined that the area restrictions were permissible because they preserve the aesthetics of the community and, therefore, had "a substantial relationship to the general welfare of the public." Apple argues that, under Section 519.02, an area restriction is not allowed merely because it will promote the "general welfare" of the community. It, therefore, argues that the Township exceeded its statutory authority.

{¶22} Apple's argument fails because it cites language from an attempted amendment to Section 519.02 that was ruled unconstitutional. From 1957 to 2004, Section 519.02 provided that townships could enact zoning resolutions "[f]or the purpose of promoting the public health, safety, and morals" of its residents. In 2004, the General Assembly amended the section to allow zoning that is "in the interest of the public health, safety, convenience, comfort, prosperity, or

general welfare * * *.” Later that same year, the legislature attempted to amend the language of Section 519.02 again. Under Senate Bill 18, use and area restrictions would be allowed only if they were “in the interest of public health and safety[.]” The bill was determined to be unconstitutional, however, under the single subject clause. *Akron Metro. Hous. Auth. Bd. of Trustees v. State*, 10th Dist. No. 07AP-738, 2008-Ohio-2836, ¶ 28. See also *Riebe Living Trust v. Concord Twp.*, 11th Dist. Lake No. 2011-L-068, 2012-Ohio-981, ¶ 22, 25-29 (agreeing that Senate Bill 18 was unconstitutional and explaining that a 2006 amendment to Section 519.02 did not reenact the amendments that were attempted in the unconstitutional bill).

{¶23} Because Senate Bill 18 was unconstitutional, the trial court did not err when it determined that the Township had authority to zone in the interest of the “general welfare.” Apple’s third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED AS A MATTER OF LAW BY DECLARING THAT THE GRANGER TOWNSHIP ZONING RESOLUTION WAS CONSTITUTIONAL AS APPLIED TO PROHIBIT APPLE’S PROPOSED USE OF ITS PROPERTY.

{¶24} Apple also argues that the trial court incorrectly analyzed whether the Township’s lot size and frontage requirements substantially further any legitimate zoning objective. It contends that the prohibition of its proposed use of the 88 acres does not substantially advance the district’s “rural character” and “open space” objectives.

{¶25} “In an appeal * * * which challenges the constitutionality of a zoning ordinance as applied, the issue for determination is whether the ordinance, in proscribing a landowner’s proposed use of his land, has any reasonable relationship to the legitimate exercise of police power by the municipality.” *Mobil Oil Corp. v. City of Rocky River*, 38 Ohio St.2d 23 (1974), syllabus. While *Mobil Oil* involved a municipality, the parties agree that the same test applies in

this case. See *Valley Auto Lease of Chagrin Falls, Inc. v. Auburn Twp. Bd. of Zoning Appeals*, 38 Ohio St.3d 184, 185 (1988) (applying *Mobil Oil* in a case challenging the constitutionality of a township zoning resolution).

In a constitutional analysis, the object of scrutiny is the legislative action. The zoning ordinance is the focal point of the analysis, not the property owner's proposed use, and the analysis begins with a presumption that the ordinance is constitutional. The analysis focuses on the legislative judgment underlying the enactment, as it is applied to the particular property, not the municipality's failure to approve what the owner suggests may be a better use of the property. If application of the zoning ordinance prevents an owner from using the property in a particular way, the proposed use is relevant but only as one factor to be considered in analyzing the zoning ordinance's application to the particular property at issue."

Jaylin Investments, Inc. v. Moreland Hills, 107 Ohio St.3d 339, 2006-Ohio-4, ¶ 18. "The challenge must focus on the constitutionality of the ordinance as applied to prohibit the proposed use, not the reasonableness of the proposed use." *Id.* at ¶ 20. Accordingly, the question in this case is whether the zoning resolution, insofar as it prohibits Apple from constructing a development of 44 homes on lots ranging from 0.7551 to 1.0934 acres with less than the required frontage and setback requirements has any reasonable relationship to the Township's legitimate exercise of authority under Section 519.02. *Mobil Oil* at 29; *Jaylin* at ¶ 20; *BGC Props. v. Bath Twp.*, 9th Dist. Summit No. 14252, 1990 WL 31789, *3 (Mar. 21, 1990).

{¶26} In adopting the zoning resolution, the Township's board of trustees made the legislative judgment that they wanted to maintain the rural character of the township. According to the zoning resolution, the term "rural" means "[l]ow-density housing, country/agrarian uses, and green space." The trustees determined that for housing to be considered low-density, each lot would have to be at least two acres. The resolution defines green space as "[u]ndeveloped open space lacking a structure including but not limited to fields, pastures, forest, and mowed

and maintained grass.” Open space is defined as “[a]n area of land which is in its natural state, or is developed only for the raising of agricultural crops, or for outdoor recreation.”

{¶27} The United States Supreme Court has recognized that it is a legitimate goal of governments to regulate housing density to “discourage the ‘premature and unnecessary conversion of open-space land to urban uses’ * * * and protect * * * residents * * * from the ill effects of urbanization.” *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980), quoting Cal.Govt.Code 65561. Apple’s proposed plan, although providing for more open space than a plan that simply divides the 88 acres into 44 two-acre parcels, clusters 44 houses on one part of the property on lots averaging less than one-acre in size. All together, the 44 homes would be on less than 37 acres of land.

{¶28} Apple argues that Section 519.02 does not allow townships to regulate lot size, only population density. What Apple overlooks though is that it is by limiting the permissible number of homes per acre that a township regulates population density “as only a certain number of residents would live in each home.” *White Oak*, 2012-Ohio-425 at ¶ 26; *Ketchel v. Bainbridge Twp.*, 52 Ohio St.3d 239, 242 (1990) (explaining that establishing lot sizes is a commonly approved technique for limiting population density).

{¶29} Apple argues that its plan actually results in lower population density because the R-1 district allows duplexes while its plan does not. Under the R-1 district, however, the most duplexes that could be constructed on 37 acres is 18, resulting in a total of 36 households. That is less than the number of households that Apple proposed for the 37 acres. In addition, the two-acre lot and frontage requirements advance the Township’s aesthetic interest of preserving its rural character. *Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St.3d 28 (1987), paragraph two of the syllabus (“There is a legitimate governmental interest in maintaining the

aesthetics of the community and, as such, aesthetic considerations may be taken into account by the legislative body in enacting zoning legislation.”); *Smythe v. Butler Twp.*, 85 Ohio App.3d 616, 622 (2d Dist.1993) ([T]he appearance of a community is closely linked to its citizens’ happiness, comfort and general well-being.”). According to a Township trustee, under Apple’s plan, the houses would look just “too close” together. The county’s deputy planning director also testified that areas with one-acre lots are generally not considered “rural.”

{¶30} Upon review of the record, we conclude that the trial court correctly determined that the Township’s zoning resolution was constitutional as applied to Apple’s property. The lot size, frontage and setback requirements reasonably advance the Township’s legitimate goal of maintaining its rural character. Apple’s plan to cluster homes on less-than-one-acre lots conflicts with the Township’s vision of what constitutes low-density housing and its vision of what constitutes a rural landscape. Apple’s fourth assignment of error is overruled.

CONCLUSION

{¶31} The trial court correctly determined that the Township’s zoning resolution complies with Revised Code Section 519.02 and is not unconstitutional as applied to Apple’s property. The judgment of the Medina County Common Pleas Court is affirmed.

Judgment affirmed.

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 Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



JENNIFER HENSAL
FOR THE COURT

MOORE, P. J.
CONCURS.

BELFANCE, J.
DISSENTING.

{¶32} I respectfully dissent from the judgment of the majority as I would conclude that the evidence does not support the conclusion that the zoning resolution was adopted in accordance with a comprehensive plan as required by R.C. 519.02.

{¶33} The law in this area is far from clear, stemming in part from the lack of a definition of “comprehensive plan” in the statutory scheme. *See Meck and Pearlman, Ohio Planning & Zoning Law*, Section 4:39 (2013) (“Ohio courts remain uncertain about what a comprehensive plan is due to the lack of a precise definition in state statutes.”). The phrase “in accordance with a comprehensive plan” originated in Section 3 of the 1926 Standard State Zoning Enabling Act (“SZEAA”), which has been adopted by approximately 75% of the states. *See Sullivan, Recent Developments in Comprehensive Planning Law*, 43 *Urb. Law*. 823, 823

(2011); Meck and Pearlman at Section 4:38. The phrase is not defined in the SZEa either; however, a footnote to Section 3 attempts to clarify the phrase by providing that, “[t]his will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study[.]” (Emphasis omitted.) Meck and Pearlman at Section 4:38.

{¶34} Notably, the individual who coined the phrase, Harland Bartholomew, indicated that the following studies should be made in advance of drafting a zoning ordinance: “existing use of land and buildings; new buildings erected by five-year periods; building heights; lot widths; front yards; population density; population distribution; topography; and computation of areas for different land uses.” *Id.* Additionally, he believed that

there should be available a major street plan, a transit plan, a rail and water transportation plan and a park and recreation plan; in other words, a comprehensive city plan. Without such a comprehensive city plan, the framers of the zoning plan must make numerous assumptions regarding the future of the city in respect to all of these matters without the benefit of detailed information and study. Zoning is but one element of a comprehensive city plan. It can neither be completely comprehensive nor permanently effective unless undertaken as part of a comprehensive plan.¹

Id.

{¶35} Despite the above language, which would suggest that a comprehensive plan is a separate document apart from the zoning regulation, the trend in the past in Ohio has been to not require the existence of a separate document apart from the zoning regulations to satisfy R.C. 519.02. *See* Benintendi, *Comment: The Role of the Comprehensive Plan in Ohio: Moving Away from the Traditional View*, 17 U.Dayton L.Rev. 207, 220 (1991); *see also* *Columbia Oldsmobile, Inc. v. Montgomery*, 56 Ohio St.3d 60, 67 (1990) (Brown, J., concurring) (“As many courts (including our own) have recognized, a well-drafted zoning ordinance can, by itself,

¹ While Mr. Bartholomew was focused on city planning, which would likely involve elements that would not be involved in township planning due to the inherent differences between cities and townships, the underlying principles he articulates are equally applicable to township planning.

constitute the 'comprehensive plan.'"). This Court has even stated that "Ohio law does not require a township to adopt a comprehensive zoning plan as a condition precedent to the enactment of zoning legislation. Failure to have a zoning plan which is separate and distinct from a zoning ordinance does not render a zoning ordinance unconstitutional." (Internal citation omitted.) *BGC Properties, Inc. v. Twp. of Bath*, 9th Dist. Summit No. 14252, 1990 WL 31789, *4 (Mar. 21, 1990). Notably, *BGC Properties* and the cases like *Reese v. Copley Twp. Bd. of Trustees*, 129 Ohio App.3d 9 (9th Dist.1998), which rely on it, in turn rely on *Cent. Motors Corp. v. Pepper Pike*, 63 Ohio App.2d 34 (8th Dist.1979). The problem with relying on *Central Motors* in any case dealing with township zoning is that *Central Motors* involved a municipality. See *Central Motors*. Unlike townships, which are governed in part by R.C. 519.02, "[t]he legal power of Ohio municipal corporations to undertake activities which regulate land use is not dependent on the state legislature's enactment of enabling statutes." Benintendi at 214-215. Thus, there is no statutory requirement that municipalities zone in accordance with a comprehensive plan. See *Columbia Oldsmobile, Inc.* at 66. Therefore, the analysis undertaken in the municipal zoning cases is limited to analyzing whether the zoning regulations comply with constitutional limitations; however, in the cases involving townships, courts must also determine whether the resolution complies with the statute. Unfortunately, given the conflation of constitutional standards pertaining to municipalities and the separate statutory mandate pertaining to townships, Ohio jurisprudence has not truly focused upon the meaning of the plain language of R.C. 519.02 nor attempted to glean the legislative intent underlying its enactment.²

² For example, it is evident that in repeatedly employing the phrase "in accordance with a comprehensive plan" in R.C. 519.02, the legislature wished to avoid short-term, piecemeal development of Ohio townships. As such, the legislature, in mandating the "comprehensive plan" requirement, recognized that proper long-range planning is essential to fostering and

Nonetheless, irrespective of whether the comprehensive plan is a separate document, or is ultimately housed within the ordinance itself, R.C. 519.02 expressly states that township zoning regulations must be “in accordance with a comprehensive plan[.]”

{¶36} Moreover, recent case law from the Ohio Supreme Court suggests that townships are required, pursuant to R.C. 519.02, to engage in some form of planning and study that would form the basis for the creation and adoption of their zoning regulations. *See B.J. Alan Co. v. Congress Twp. Bd. of Zoning*, 124 Ohio St.3d 1, 2009-Ohio-5863, ¶ 32-42 (noting that Wayne County’s plan constituted a comprehensive plan as it “present[ed] a thorough study of the region and set[] forth comprehensive land-use goals for the county[]”). It would seem that, if the Supreme Court was inclined to take the position that a zoning regulation and a comprehensive plan were one and the same, it could have used *B.J. Alan* as an opportunity to clarify the law in this area. Thus, instead of examining whether the county’s plan was a comprehensive plan, the Court could have chosen to examine the zoning regulations to see if they constituted a comprehensive plan. Some commentators have even suggested that *B.J. Alan* indicates that R.C. 519.02 requires that “zoning must be consistent with an independently prepared comprehensive plan that is adopted separately.” Meck and Pearlman at Section 4:37.

{¶37} Even if a zoning regulation can still constitute the expression of a comprehensive plan, there are problems with taking this approach where there is no evidence that the township engaged in a thorough and long-range planning process. Viewing the zoning regulation as the functional equivalent of the comprehensive plan without more essentially renders the requirement that townships zone in accordance with a comprehensive plan “symbolic at best.” Benintendi, 17 U.Dayton L.Rev. at 227. This is so, because “[z]oning regulations which are not maximizing economic development as such entails identifying and maximizing regional strengths as well as developing supporting infrastructure.

required to conform to a sound, long-range comprehensive plan are neither truly comprehensive in nature, nor do they provide necessary limitations upon local governmental bodies or adequate protection from possible arbitrary and discriminatory action to landowners.” *Id.*

[Absent such a requirement], a zoning board in Ohio may enact a comprehensive zoning ordinance or zoning amendment, either through authorization from the state via enabling legislation or through the home rule provision of the Ohio Constitution, and be assured of its validity so long as the ordinance or amendment is not violative of the due process or equal protection clauses of the United States Constitution.

Id. at 224. In other words, by eliminating any requirement of a separate comprehensive planning document, or at least evidence that a township actually engaged in a comprehensive, long-range planning process, townships can pass ordinances that technically pass constitutional muster but do not comport with the legislative directive that such ordinances be enacted “in accordance with a comprehensive plan.” R.C. 519.02.

{¶38} While it would seem that the legislature envisioned a separate and comprehensive planning process culminating in a separate document called a comprehensive plan, I recognize the current state of this Court’s precedent. Nonetheless, I would hold that, in order for a zoning resolution or ordinance itself to constitute a comprehensive plan, there must be some demonstration that the zoning resolution or ordinance is based upon information that would evidence long-range, comprehensive planning and that the resulting zoning resolution or ordinance was *intended* to constitute *the* comprehensive plan of the township. Absent some evidence that the township intended the resolution to actually be the ultimate expression of the comprehensive plan and that it engaged in comprehensive planning in developing the resolution, townships could create resolutions without gathering any pertinent information or conducting any long-range planning. Nonetheless, in situations where a zoning resolution is automatically deemed synonymous with a comprehensive plan, such resolutions are deemed in compliance

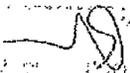
with R.C. 519.02 merely because the resolution *could* be viewed as a comprehensive plan. Just because a resolution could be a comprehensive plan does not mean that it was intended to be so when it was created. Likewise, just because a resolution *appears* comprehensive in that it provides for a variety of zoning, does not necessarily mean it was the product of thorough, comprehensive planning. Requiring evidence of the foregoing would help prevent townships from creating arbitrary, and piecemeal zoning – clearly at odds with the express directive of R.C. 519.02 – and would prevent townships from justifying their zoning after the fact.

{¶39} In the instant matter, I would conclude both facets are lacking. There is little discussion in the record concerning the development of the resolution at issue; thus, one cannot say the resolution was based upon information gathered from comprehensive planning. Moreover, while there is testimony that the zoning resolution is “used” as the comprehensive plan and that the zoning resolution “could function” as a comprehensive plan, there does not appear to be any testimony stating that, when the zoning resolution was created, it was intended to be the township’s comprehensive plan. Instead, there is abundant testimony that Granger Township does not have a comprehensive plan and neither does Medina County. Additionally, I note that the zoning resolution at issue, which “function[s]” as a comprehensive plan, was adopted a little over a year after Granger Township adopted its prior zoning resolution. The adoption of a new zoning resolution every year would tend, in my mind, to support the notion that the zoning resolution was not based on long-term planning and was not intended to be a comprehensive plan. *See* Meck and Pearlman at Section 4.29 (“The essential characteristics of a plan are that it is comprehensive, general and long range.”). Under these circumstances, I would conclude that Granger Township failed to follow R.C. 519.02 in enacting its zoning resolution and would reverse the judgment of the lower court. Accordingly, I dissent.

APPEARANCES:

SHELDON BERNS, BENJAMIN J. OCKNER, and GARY F. WERNER, Attorneys at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and WILLIAM L. THORNE and BRIAN M. RICHTER, Assistant Prosecuting Attorney, for Appellee.

BY: 
GARY F. WERNER
Attorney at Law
1000 ...

STATE OF OHIO)
COUNTY OF MEDINA)

)ss:)

COURT OF APPEALS IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
14 JAN 13 AM 11:32

APPLE GROUP LTD.

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

Appellant

C.A. No. 12CA0065-M
12CA0068-M

v.

BOARD OF ZONING APPEALS
GRANGER TWP.

JOURNAL ENTRY

Appellee

Apple Group Ltd. has applied for reconsideration of this Court's decision. We review the application to determine if it calls to our attention an obvious error in our decision or if it raises an issue that we did not properly consider. *Garfield Hts. City Sch. Dist. v. State Bd. of Educ.*, 85 Ohio App. 3d 117, 127 (1992).

Apple argues that this Court did not consider the framework of Revised Code Chapter 519 when determining how Section 519.02 should be interpreted. It asserts that this Court overlooked related provisions of Chapter 519 that demonstrate that the General Assembly did not intend for a township's zoning resolution to function as a comprehensive plan.

Revised Code Section 519.05 provides that the township rural zoning commission shall submit a proposed zoning plan to the board of township trustees. Sections 519.06 through 519.11 set forth the process under which a proposed zoning plan is adopted by the board of trustees as a resolution and the process under which the electorate determines whether the proposed plan of zoning shall be put into effect. Section 519.12 describes the process for amending a zoning resolution. Our determination that Section 519.02 requires a zoning plan

or resolution to be “comprehensive” is consistent with those sections. Accordingly, Apple has not demonstrated that this Court did not properly consider an issue.

Apple next argues that there was not competent credible evidence in the record to support the trial court’s finding that the zoning resolution is a comprehensive plan. As this Court explained in its opinion, however, the zoning resolution itself can satisfy the comprehensive plan requirement if it meets certain criteria. We also determined that the zoning resolution at issue in this case met those criteria. Apple has not contested our application of that test.

Apple next argues that this Court incorrectly focused on the effect its plan would have on only 37 acres of its proposed development instead of the entire 88 acres when it evaluated population density. It asserts that the undeveloped parts of its property must be considered when analyzing the affect its plan will have on population density. According to Apple, under its plan, the land that will remain undeveloped balances out the number of structures that will be built on the 37-acre part of its property.

The question under *Mobil Oil Corp. v. City of Rocky River*, 38 Ohio St.2d 23 (1974), and related cases is whether the township’s resolution, in proscribing Apple’s proposed use of its land, has any reasonable relationship to the legitimate exercise of its statutory authority. In adopting the zoning resolution, the board of trustees demonstrated its desire to keep all parts that are zoned R-1 rural in nature. The definition of rural includes, in part, low-density housing. To the township, low-density housing means homes on lots that are at least 2 acres. Just because the property-density math works out the same under Apple’s plan does not mean that the township’s regulation is not reasonably related to the legitimate exercise of its authority under Revised Code Chapter 519.

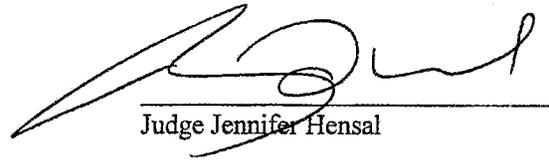
Apple next argues that its plan maintains the same spacing between structures as is allowed under the zoning resolution. It also argues that the zoning resolution's definition of rural does not include any restrictions on streetscapes, lot sizes, setbacks, or other visually-oriented aspects of township housing. The definition of rural, however, includes low-density housing, which is defined in terms of minimum lot size, frontage requirements, and yard depth and width requirements. Apple also does not contest that its plan does not comply with the zoning resolution's frontage requirement.

Apple next argues that this Court did not properly apply the test required by *Mobil Oil* and related cases. According to Apple, this Court failed to consider whether the prohibition of its proposed use on its particular property was unconstitutional. In *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, however, the Ohio Supreme Court explained that "[t]he zoning ordinance is the focal point of the analysis, not the property owner's proposed use * * *. The analysis focuses on the legislative judgment underlying the enactment, as it is applied to the particular property, not the [township's] failure to approve what the owner suggests may be a better use of the property." *Id.* at ¶ 18.

Apple argues that the zoning resolution is unconstitutional as applied to its property because its property is different than all other R-1 zoned property. It notes that its property is near residential homes that are on lots that are the size of the ones it has proposed, that its property is near a commercial development, that part of its property is in a planned development district, and that its property is served by a central sanitary sewer. According to Apple, in light of the fact that these circumstances do not apply to any other R-1 property, it was not appropriate for the township to include its property in the classification. Apple,

however, did not advance this argument in its appellate brief, so it cannot establish that this Court failed to properly consider it.

Upon review of Apple's application, we conclude that it has not called to our attention an obvious error in our decision or identified an issue that we did not properly consider. The application for reconsideration is denied.



Judge Jennifer Hensal

Concur:
Moore, J.

Dissent:
Belfance, J.

MEDINA COUNTY COURT OF COMMON PLEAS-STATE OF OHIO, MEDINA COUNTY S.S. I hereby certify that this is a true copy of the original on file in said court. Witness my hand and the seal of said court at Medina, Ohio this: 15 day of May 2012
By David B. Wadsworth Deputy Clerk of Courts

COMMON PLEAS COURT

2012 FEB -2 PM 1:02

DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO**

Apple Group, Ltd.

Case No. 08CIV0090

Plaintiff

vs.

Judge James L. Kimbler

**Board of Zoning Appeals
of Granger Township**

Defendant

**MAGISTRATE'S DECISION with
INSTRUCTIONS TO CLERK**

This action was filed by Plaintiff/Appellant Apple Group, Ltd. a developer seeking judicial review of the decision of Granger Township Board of Zoning Appeals (BZA) which denied Apple's application for zoning variances. In a separate action, Apple Group filed for a declaratory judgment that the township's prohibition of Apple's proposed use of its property is unconstitutional and in excess of the zoning authority of the township as determined by Chapter 519 of the Ohio Revised Code. The two cases were consolidated and are now before the Court for a ruling on the issue of constitutional law raised in both cases.

This matter was referred to Magistrate Barbara Porzio by Judge James L. Kimbler under the provisions of Civil Rule 53.

Apple Group was represented by Sheldon Berns, Benjamin Ockner and Gary Werner. Granger Township was represented by Katharina Devanney. The Magistrate heard testimony from four witnesses on behalf of Plaintiff/Appellant, i.e., Tom Simich (Apple Group's managing member), Ed Janoviak (an engineer),

Page 1 of 29

Tracy Engle (a wetland scientist) and David Hartt (a planning expert). The Township called three witnesses: John Ginley, Jr. (a Granger Township trustee), Nancy West (the Granger Township zoning inspector) and Susan Hirsch (the Deputy Director of the Medina County Department of Planning Services). Apple Group offered Exhibits 1 through 14. Granger Township offered Exhibits A through L. All of the exhibits were admitted into evidence with the exception of Defendant's Exhibit J.

BACKGROUND

Plaintiff-appellant, Apple Group owns approximately 88 acres of undeveloped land in Granger Township. The land is located in an R-1 residential zone for single-family and two-family homes, which requires a minimum lot size of two acres. Apple Group developed plans to build a subdivision on its property to be named Beachwood Estates, consisting of 44 homes on lots ranging in size from $\frac{3}{4}$ of an acre to one acre.

Apple Group applied to the Granger Township BZA for 176 zoning variances, four for each of the 44 lots. After a public hearing, which took place over three different dates, the BZA denied Apple Group's application.

Apple Group filed an administrative appeal pursuant to R.C. Chapter 2506 and asked that the Court reverse the BZA's decision to deny the area variances for which Apple had applied. Apple argued that the decision of the BZA was illegal, arbitrary, capricious, unreasonable and unsupported by the preponderance of substantial, reliable and probative evidence. On October 3, 2008, the Court ruled on Apple Group's appeal from the decision of the Granger Township BZA which denied the property owner's application for 176 variances in its plan to develop 44

parcels. In the judgment entry, the Court affirmed the decision of the Granger Township BZA and found that the request for variances was, in reality an attempt to re-zone the property. A township board of zoning appeals does not have the power to re-zone land inside the township; that responsibility lies with the township's zoning commission. Apple Group also filed a complaint for declaratory judgment under R.C. 2721.03 seeking a declaration that the "R-1 zoning classification is, as applied to the property, not substantially related to the health, safety, morals, public convenience, comfort, prosperity or general welfare of the township and that it is clearly arbitrary, capricious and unreasonable, and that it is therefore, unconstitutional and in excess of the zoning authority delegated to the township under Chapter 519 of the Ohio Revised Code." Apple Group asked the Court for an order requiring the township to permit Apple Group to develop its property as proposed.

The issue before the Court is whether the township's zoning resolution which requires a two acre minimum lot for all future residential development in the township, and which prohibits Apple Group's proposed use, has any reasonable or substantial relationship to the township's legitimate exercise of its zoning authority.

For the reasons set forth below, the Magistrate finds that Apple Group did not satisfy its burden of proof to show the existing zoning classification, as applied to the proposed use, is unconstitutional. The Magistrate recommends that the Court dismiss Apple Group's complaint for declaratory judgment and deny its request for a court order to permit development of its property.

In making this finding, the Magistrate has considered the Amended Transcript of Proceedings before the Granger Township BZA filed May 1, 2008, the Appellant's Bench Brief Regarding Constitutional Claims filed November 16, 2009, the Appellant's Bench Brief Regarding *B.J. Alan Company v. Congress Township BZA* filed November 16, 2009, the Closing Argument of Plaintiff/Appellant Apple Group filed on December 21, 2009, and the Defendant/Appellee's Post Hearing Brief filed December 21, 2009.

CONCLUSIONS OF LAW

A township zoning resolution is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without a substantial relation to a legitimate governmental goal.

The party challenging the constitutionality of a zoning resolution has the burden of establishing, beyond fair debate, that the resolution is unconstitutional as applied to the proposed use of the property. *Goldberg Companies v. Richmond Heights City Council* (1998), 81 Ohio St.3d 207, 210, 1998-Ohio-456, 690 N.E.2d 510.

When faced with a challenge to the constitutionality of a zoning resolution, the issue before the court is whether the resolution, in proscribing an owner's proposed use of his land, has any reasonable relationship to the legitimate exercise of police power. The focus is on the constitutionality of the resolution "as applied" to prohibit the proposed use, not the reasonableness of the proposed use. *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St.2d 23, 67 O.O.2d 38, 309 N.E.2d 900,

The power of a governing body to determine land-use policy is a legislative function which will not be interfered with by the courts, unless this power is

exercised in such an arbitrary, confiscatory or unreasonable manner as to be in violation of constitutional guaranties. *Willott v. Beachwood*, 175 Ohio St. 557, 26 O.O.2d 249, 197 N.E.2d 201, paragraph three of the syllabus.

Granger Township's desire to maintain the rural character of its land is a legitimate governmental goal, which may be regulated by its zoning resolution.

The zoning resolution of Granger Township is a comprehensive plan which is a valid exercise of the township's legislative authority pursuant to R.C. 519.02.

Granger Township's failure to have a comprehensive zoning plan, which is separate and distinct from its zoning resolution, does not mandate a conclusion that the zoning resolution is unconstitutional. The zoning resolution itself meets the statutory requirement of a comprehensive plan, because it has the essential characteristics of a comprehensive plan; it encompasses all geographic parts of the community and integrates all functional elements.

FINDINGS OF FACT

Apple Group owns just over 88 acres of land in Granger Township which is zoned R-1 residential for single-family and two-family homes on two-acre lots. The southern part of the parcel is also in an area of the township which has been approved for commercial use under the township's Planned Development District regulations. (Plaintiff's Trial Exhibit 7). When Apple Group purchased the property in question, it knew that the land was zoned R-1 residential.

The property is located on the east side of Beach Road, approximately 1,000 feet north of State Route 18. A portion of the land is densely wooded and includes five acres of wetlands and a stream which cuts through the northwest corner of the property. The remainder of the property consists of fields which are farmed.

Apple Group has developed plans to build a subdivision to be known as Beachwood Estates. Apple's proposed use of the property provides for 44 single family homes. It would preserve fifty acres of the total acreage as open space. Except for the minimum lot size and width requirements of the zoning resolution, Apple's proposed use complies with the other requirements for homes built in the R-1 residential district set forth in the township's zoning resolution.

In September of 2007, Apple Group applied for four variances for each of the 44 lots in its proposed use of the property. The variances, if allowed, would permit Apple to build the homes on smaller lots, (approximately one acre per home, rather than two); the lot frontage on the street and the lot width would be reduced, (an average of 108 feet rather than 175 feet) and the side yard set-back would be only 15 feet.

The Granger Township Board of Zoning Appeals conducted public hearings on October 30, 2007, November 27, 2007 and December 17, 2007 to consider Apple's variance application.

On December 17, 2007, the BZA denied Apple's application for the variances it had sought (BZA Exhibit 30). The board found that the number of requested variances was so great, that Apple Group's application for variance was in reality an attempt to re-zone the property, for which the BZA lacked authority. The board also found that the street view of the proposed subdivision would not be in keeping with the rural character of the township, because there is only 30 feet between the homes.

Apple Group's proposed use is not the only plan which would allow for the profitable development of the property. Apple Group could develop the property

profitably on two-acre lots as required by the Granger Township regulations for the R-1 zoning district.

The Granger Township zoning resolution which establishes a two-acre minimum lot size in the R-1 residential district advances a legitimate goal of the township, which is to maintain the rural character of Granger Township.

The Granger Township Revised Zoning Resolution, effective August 8, 2007, in section 103, states the general purpose of the Resolution. It provides:

"In order to promote and protect the health, safety, morals and welfare of the residents of the unincorporated area of Granger Township, Medina County, Ohio, and to conserve and protect property and property values, and to provide for the maintenance of the rural character of Granger Township, and to manage orderly growth and development in said Township, the Board of Trustees has found it necessary and advisable to adopt these zoning regulations *as a comprehensive plan of zoning* which will regulate the location, height, bulk, number of stories and size of buildings and other structures, percentages of lot areas which may be occupied, building setback lines, size of yards, and other open spaces and density of population, the uses of buildings and other structures and the uses of the land for trade, industry, residence, recreation or other purposes; and for such purposes to divide the unincorporated area of Granger Township into zoning districts and to provide for the administration and enforcement of such regulations. . . ." (Emphasis added.)

Section 102 of the Resolution states, "The authority for establishing the Granger Township Revised Zoning Resolution is derived from sections 519.01 to 519.99 inclusive, of the Ohio Revised Code."

The resolution establishes seven different kinds of zoning districts (Section 201). The zoning districts and their boundary lines are indicated on the "Zoning

Districts Map of Granger Township, Medina County, Ohio” which is part of the resolution by reference (Section 202). The resolution also states the purpose of each of the seven zoning districts and contains regulations for each district (Article III: District Regulations).

The purpose of the R-1 residential district, as stated in the zoning resolution, is to “manage low-density residential development that will preserve the rural residential character of Granger Township.” Section 301(A).

Township Zoning Authority

Townships do not have any inherent or constitutional power to enact zoning resolutions. A township's authority to adopt zoning resolutions is granted to it by the General Assembly through R.C. Chapter 519. Zoning is a valid legislative function of a township's police powers. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303.

Because zoning is a legislative function, the judicial branch should not interfere with zoning decisions unless the township exercises its power in an arbitrary and unreasonable manner. *Valley Auto Lease of Chagrin Falls, Inc. v. Auburn Twp. Bd. of Zoning Appeals* (1988), 38 Ohio St.3d 184, 185, 527 N.E.2d 825; *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560, 197 N.E.2d 201.

The party challenging the constitutionality of a zoning resolution bears the burden of proof and must establish, beyond fair debate, that the zoning classification denies the owner an economically viable use of the zoned property or that the zoning classification fails to advance a legitimate governmental interest. *Goldberg Companies v. Richmond Heights City Council* (1998), 81 Ohio St. 3d 207, 209, 1998-Ohio-456, 690 N.E.2d 510. “There is little difference between the

'beyond fair debate' standard and the 'beyond a reasonable doubt' standard.”
Central Motors Corp. v. Pepper Pike, (1995), 73 Ohio St. 3d 581, 1995-Ohio-289,
653 N.E.2d 639 and *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d
339, 2006 Ohio 4, ¶13, 839 N.E.2d 903.

A mere difference of opinion is not sufficient to make the validity of a zoning resolution fairly debatable. When litigating the constitutionality of a zoning resolution, the property owner and the township can easily find expert witnesses who will have differing opinions as to the validity of a zoning resolution. The fairly debatable rule concerns itself, not with words or expressions of opinion, but with the basic physical facts of the property and how it is impacted by the zoning resolution. “Where it appears from all the facts that room exists for a difference of opinion concerning the reasonableness of a zoning classification, the legislative judgment is conclusive. The court should not attempt to decide what ought to be done or not done by presumably rational zoning authorities. Only where illegality is clearly demonstrated or where the ordinance is arbitrary, unreasonable or discriminatory is judicial interference warranted.” *Osborne Pros. Enterprises v. City of Mentor*, (April 29, 1983) Lake App. No. 9-015, unreported.

In the case now before the Court, Apple Group is arguing that the Granger Township zoning resolution which establishes a two-acre minimum lot size is not reasonable or substantially related to the township’s legitimate exercise of its zoning authority as it is applied to Apple’s proposed use. As previously discussed, Apple Group must establish the zoning resolution is unconstitutional beyond fair debate, the equivalent of beyond a reasonable doubt. *Jaylin*, supra.

In a constitutional analysis, the object of scrutiny is the legislative action. The local law or regulation is the focal point of the analysis, not the property owner's proposed use. The court's focus is on the legislative judgment underlying the resolution, not the township's failure to approve what the property owner believes may be a better use of the property. If the application of the zoning resolution prevents an owner from using the property in a particular way, the proposed use is relevant, but only as one factor to be considered. However, the owner must also present evidence to overcome the presumption that the zoning resolution is a valid exercise of the township's police powers, as it applies to the property at issue.

Apple Group presented testimony that its proposed subdivision would include unique features that would meet or exceed the goals of Granger Township's Zoning Resolution, which is to "to conserve and protect property and property values, and to provide for the maintenance of the rural character of Granger Township and to manage orderly growth and development in the Township." (See section 103 of the Zoning Resolution.) The purpose of the R-1 Residential District, as stated in section 301(A) of the Zoning Resolution, is "to manage low-density residential development that will preserve the rural residential character of Granger Township."

Apple's plan proposes the construction of 44 single houses on 88 acres. The plan would have the same density provided for in the R-1 residential zoning district. (Density in this context refers to the number of dwelling units per acre of land, not population density.) Apple's plan would preserve approximately fifty acres of open spaces and woodlands by setting aside more than half the land by

deed restriction or other means so that the land would never be developed; it would protect the existing natural features. If the land were to be developed in accordance with the existing zoning resolution so that each home is built on two acres, (Plaintiff's Exhibit 2A) there would be more roads and impervious surfaces causing greater run off; ten houses would border onto Beach Road and eight would border onto the commercial district on the southern border of the parcel. In all likelihood, the wet lands and stream would be impacted because they would be under the control of an individual property owner.

But whether Apple's proposed use might better advance the stated governmental goals does not address the issue of whether the zoning resolution at issue advances a legitimate government interest. *Central Motors Corp. v. Pepper Pike*, 73 Ohio St.3d at 586, 653 N.E.2d 639.

In this case, the township trustee, John Ginley, Jr., testified that the BZA considered the plan proposed by Apple Group and whether it fit into the vision for the township. He explained that when the BZA held hearings on Apple Group's application for a variance, an unusually large number of people attended the hearings and that the majority of the residents were totally against the development.

Mr. Ginley also testified that a committee of township citizens circulated a Petition to the Zoning Committee and Trustees of Granger Township on election day in 2007 (Defendant's Exhibit D.) The petition was signed by 581 voters and it asked that

[T]he proposal submitted by the Apple Group, LTD, to amend section 301(B)(1), Permitted uses in R-1 Residential by adding

a section g which reads "g. Planned Conservation Development Districts, subject to the provision of Section 308 of this zoning resolution", be rejected by any and all governing bodies in Granger Township.

Ginley stated that the total population of Granger Township is only 4400, so the number of residents signing the petition (581) was substantial. To his knowledge, usually only 25 to 30 people express an opinion about zoning issues.

Mr. Ginley further testified that Apple Group's proposed plan was not in the vision of what Granger Township should look like because it would not have a "rural look." He stated that to have a rural appearance, the spaces between the houses must be more open than shown in Apple Group's plan, which would allow only 30 feet between the homes. In his view, the proposed plan does not conform with the rural character sought to be preserved by the zoning resolution. He held this view, even though there would be open fields and wetlands in the plan, because the houses would be too close together; a rural character has more space between the houses. According to Ginley, the subdivision, with its tightly packed houses, would be seen by those driving along Beach Road, even if Apple installed a landscaping mound along Beach Road.

The planning expert, David Hartt, testified that the land owned by Apple has scattered wetlands and open fields. A sanitary sewer line comes into the property on its southern border and it would have sufficient capacity to service the proposed 44 homes. If sewers are not available for a housing subdivision, it is necessary to have a two acre minimum lot size to allow for the installation of a septic system.

But given the availability of a sewer line for this property, the two acre minimum lot size is not necessary.

The evidence showed that Apple Group's property is zoned R-1 residential, but there is a Planned Development District (PDD) overlay on the southern portion of the land. A PDD is not residential; it is a zone for office, commercial or industrial use. A PDD does not have the character of a rural setting. In this case, the land owned by Apple is zoned residential, but it also falls within a PDD, which allows only for commercial development. Hartt testified that given the conflicting designations, the township's intent for the use of Apple's property is unclear.

Hartt further testified that there is no demand for commercial development in Granger Township off Route 18. In his opinion, there is already an over-abundance of property devoted to commercial development, so it is inconceivable that Apple Group's land could be developed as a PDD.

Hartt also stated that the cluster development proposed by Apple Group would lessen the adverse impact of the commercial property located to the south of the parcel, because it allows for open space behind the homes to protect them from the impact of the commercial property (noise, lights, privacy, litter, etc.). There would also be greater distance between the homes and the commercial district. If the houses were built as shown on Plaintiff's Exhibit 2A, eight lots would share a border with the C-2 commercial district to the south. Under Apple's plan, the closest lot is 350 feet away from the commercial district. Furthermore, landscaping mounds would be installed along the border shared with the commercial C-2 zone to create an additional barrier.

As to the rural character of the township, Mr. Hartt testified that if the township follows the present zoning resolution so that all of the land zoned as R-1 is developed into subdivisions with two acre lots, the rural character of the township would not be preserved. He explained that communities create "ruralness" by borrowing from the open spaces around them. A rural character is achieved by preserving natural features (such as woods and streams), preserving open spaces and preserving the view along the streets, using landscaping which includes vegetation, stone walls and old barns. He concluded that the denial of Apple Group's proposed plan is not reasonably related to the goal of Granger Township.

The Deputy Director of the Medina County Department of Planning Services, Susan Hirsch, testified that the plan proposed by Apple is a workable, even desirable, development plan for the site. Nevertheless, the property could be developed under the existing R-1 residential district zoning as a 2-acre lot subdivision. "From a planning standpoint it may not be the most desirable use of the site, but it can be developed. Current planning philosophy encourages more compact development or cluster development that allows for preservation of open space. There is less infra-structure and consequently less impervious surface with a cluster development but it is not the only way to develop the site." (Defendant's Exhibit K, page 4). She concluded by saying that a two-acre subdivision would be more in keeping with Granger Township's goal of keeping the area rural in character.

Apple Group contends that there is no evidence showing that the two acre minimum lot requirement in the R-1 zoning classification supports the public

health and safety of the township. The Magistrate agrees that the two acre lot requirement is not related to public health because the availability of the sanitary sewer line removes the need to install a septic system for each home. However, the zoning resolution of the township does serve to preserve the aesthetics of community by creating a rural character for the township, as that concept is defined by the township itself. The street view of Apple Group's proposed plan would have a very different appearance than homes situated on two-acre lots. Ohio courts have long recognized that zoning legislation may take into account aesthetics, because there is a legitimate governmental interest in maintaining the aesthetics of a community. *Girard v. Rodomsky* (Dec. 31, 1998), 11th Dist. No. 97-T-0107, unreported, citing *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 9 Ohio B. 273, 458 N.E.2d 852, paragraph one of the syllabus.

Regulation designed to protect and preserve the character of a neighborhood bears a substantial relationship to the general welfare of the public. *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 33, 30 Ohio B. 33, 505 N.E.2d 966; *Toledo v. Finn* (Jan. 29, 1993), 6th Dist. No. L-92-168, unreported. Given that there is a legitimate governmental interest in maintaining the aesthetics of the community, it follows that aesthetic considerations may be taken into account by the legislative body when enacting zoning regulations. *City of Columbus v. Bahgat*, 2011 Ohio 3315; *Pecchio v. Saum*, 2010 Ohio 5930, 11th Dist. No. 2010-T-0030; *Foster v. City of Wickliffe*, 175 Ohio App. 3d 526, 2007 Ohio 7132.

The Magistrate finds that the Granger Township zoning resolution which requires a two acre minimum lot size advances a legitimate government goal

because it preserves the rural residential character of the community. It is apparent from the record that the legislative judgment underlying the denial of Apple Group's request for 176 variances was precipitated by the desire of township officials to follow the two acre minimum lot size for residential development in its R-1 zoning district. The Magistrate finds that the zoning resolution at issue is consistent with the township's goals of maintaining its rural character and controlling the aesthetics of the street views of residential development.

Based on the foregoing, the Magistrate concludes that Apple Group failed to demonstrate, beyond fair debate, that the zoning resolution which requires a two acre minimum lot size, as applied to prohibit Apple Group's proposed use, was arbitrary, unreasonable or that it lacked a rational relationship to a legitimate governmental function.

Public Opinion

The township trustee, John Ginley, testified that there was a public outcry against Apple Group's proposal to add a planned conservation development district as a permitted use in a R-1 residential district. More than 500 registered voters signed the petition asking that the proposal for a conservation district submitted by Apple be rejected.

On this issue, the Magistrate notes that the opinion of the voters of Granger Township does not control this court's determination of the constitutionality of the zoning resolution. In *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676; 96 S. Ct. 2358; 49 L. Ed. 2d 132 (1976), the United States Supreme Court stated:

“[A] property owner can challenge a zoning restriction if the measure is ‘clearly arbitrary and unreasonable, having no substantial relation to the public

health, safety, morals, or general welfare.’ If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of [the city] wish it so would not save the restriction. As this Court held in invalidating a charter amendment enacted by referendum: ‘The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.’” Citations omitted. *Visconsi-Royalton v. City of Strongsville*, 2004 Ohio 4908, 8th Dist. No. 83128.

In this case, although the voters of Granger Township may have expressed their opposition to Apple Group’s proposed use, the voters’ petition (Defendant’s Exhibit D) was not considered when determining the constitutionality of the existing zoning. The court always retains the power to review the validity of zoning decisions in the context of constitutional principles. As stated by the United States Supreme Court, “[a] citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.” *Lucas v. The Forty-Fourth General Assembly of the State of Colorado* (1964), 377 U.S. 713, 736, 12 L. Ed. 2d 632, 84 S. Ct. 1459. Regulation of land must be based on reason, not on the whim of the people. *Forest City Enterprises v. City of Eastlake* (1975), 41 Ohio St.2d 187, 324 N.E.2d 740.

Under the holding in the *Eastlake* decision, *supra*, voter action does not grant any immunity from the constitutional limitations on the sovereign power to determine the zoning classification of property. Zoning ordinances, whether resulting from initiative, referendum, or a vote of a legislative body, are all subject to the same constitutional standards. The legislation must not be arbitrary or unreasonable, and must bear a substantial relationship to the public health, safety,

morals, and general welfare. *City of Eastlake v. Forest City Enterprises*, (1976) 426 U.S. 668, at 676, 677.

Comprehensive Plan

R.C. 519.02 authorizes township trustees, in the interest of the public health and safety, to adopt resolutions to regulate, among other things, the size of a buildable lot. It allows for zoning in unincorporated areas of townships and provides:

“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. . . .” (Emphasis added.)

R.C. 519.02 is the enabling statute which grants townships the authority to establish zoning classifications *in accordance with a comprehensive plan* to control the use of land for trade, industry, residence, recreation, or other purposes. *Cassell v. Lexington Township Board of Zoning Appeals*, (1955) 163 Ohio St. 340, 127 N.E.2d 11. The statute requires a general plan to control the development of property in a political subdivision by dividing the territory into districts according to its use. This requirement for a comprehensive plan was imposed upon zoning authorities to prevent "piecemeal" or "spot" zoning. 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.

The purpose of a comprehensive development plan is to provide a blueprint for a township's development. It must be comprehensive in three ways: (1) area- it must cover the entire region, (2) time- it must cover the short and long term future, and (3) subject - it must cover urban, rural, agricultural and natural resource aspects.

Although the Revised Code does not define the term "comprehensive plan" the Ninth District explained the concept this way.

"[T]hey 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 . . ." *B. J. Alan Company v. Congress Township Board of Zoning Appeals*, 2007 Ohio 7023, reversed on other grounds.

At issue in this case is whether the Granger Township zoning resolution was adopted "in accordance with a comprehensive plan" as required by the statute.

Apple Group argues that Granger Township lacks a comprehensive zoning plan as required by R.C. 519.02, thus making the zoning resolution which establishes the two acre minimum lot size invalid. In Apple Group's view Granger Township must have a comprehensive plan, separate and apart from the zoning

resolution, in order to comply with the statutory requirement of a comprehensive plan, relying on the Supreme Court's ruling in *B.J. Alan Company v. Congress Township Board of Zoning Appeals*, 124 Ohio St.3d 1; 2009-Ohio-5863; 918 N.E.2d 501. (Plaintiff filed a Bench Brief on this issue on November 16, 2009.)

The township responds by saying that the zoning resolution itself acts as the comprehensive plan because it states the goals for the township into the future and meets the criteria of a comprehensive plan as established by case law.

The Magistrate finds that the *B.J. Alan* case does not stand for the proposition of law espoused by the Appellant because the facts of *B.J. Alan* are distinguishable from the facts in this case. In *B.J. Alan*, Congress Township relied on a county comprehensive plan when it drafted its zoning resolution. In this case, Granger Township is not relying on the county comprehensive plan to inform its zoning decisions, but is relying on its own zoning resolution as its comprehensive plan. In *B.J. Alan* the Supreme Court stated that the issue before the Court was "whether the comprehensive plan required by the statute must be a plan developed by the township itself or whether the township may rely on a comprehensive plan created at the county level" *Id.* ¶1. It was not faced with the question of whether a comprehensive plan existed within the zoning resolution itself. Moreover, the Court held "Our decision today is limited. We have determined that a countywide comprehensive plan can meet the comprehensive-plan requirement of R.C. 519.02 and that pursuant to that statute the Wayne County Comprehensive Plan qualifies as a comprehensive plan encompassing Congress Township." *Id.* ¶43.

In *Cassell v. Lexington Twp. Bd. of Zoning Appeals* (1955), 163 Ohio St. 340, 127 N.E.2d 11, the Ohio Supreme Court outlined broad principles to consider

when deciding whether a comprehensive plan is part of a zoning resolution. The court should examine 1) whether an individual is able to examine the zoning resolution and ascertain to what use the property may be put; 2) whether the text of the zoning resolution is consistent with the zoning map which shows the location of the various zoning classifications, and 3) whether the zoning plan includes business or industrial zoning districts. The absence of commercial zoning districts could likely result in piecemeal, non-uniform zoning because a property owner who plans to use his property for commercial activity would be required to request a variance or a change of zoning. "This individualized approach to determining which property should and should not be used for business or industry is the epitome of non-uniform zoning." *B.J. Alan Company v. Congress Township Board of Zoning Appeals*, 191 Ohio App. 3d 552; 2010-Ohio-6449; 946 N.E.2d 844 at ¶14.

In this case, the evidence showed that Granger Township does not have a comprehensive plan, separate from the zoning resolution. The Magistrate finds, however, that the Granger Township zoning resolution meets the criteria of a comprehensive plan as articulated by the Supreme Court in the *B.J. Alan* case. An individual can easily ascertain the allowable use of any parcel of property in the township by examining the zoning resolution and the zoning map; the text of the zoning resolution is consistent with the zoning map; the zoning map shows the location of the various zoning classifications; and the resolution contains commercial and business zoning districts, which reduces the likelihood of piecemeal or non-uniform zoning.

A review of Ohio law on this issue shows that a majority of appellate districts which have considered this issue have ruled that a township's failure to have a comprehensive zoning plan, separate and distinct from the zoning resolution, does not compel a conclusion that the zoning resolution is unconstitutional.

In *Reese v. Board of Trustees*, (1998) 129 Ohio App. 3d 9,716 N.E.2d 1176, the Ninth District Court of Appeals held that a township's zoning resolution may also serve as its comprehensive plan.

In *Board of Township Trustees v. Ott* (January 21, 1994), Huron App. No. H-93-16, unreported, the Sixth District held that a township zoning resolution can constitute a comprehensive plan within the meaning of R.C. 519.02.

In *Midwest Fireworks Mfg. Co. v. Deerfield Township Board of Zoning Appeals*, 2001 Ohio 8834, Portage App. No. 98-P-0131, the Eleventh District held that "R.C. 519 does not require that the comprehensive plan be independently adopted and there is no case law supporting this proposition." citing *Ketchel v. Bainbridge Township*, (1992) 79 Ohio App. 3d 174; 607 N.E.2d 22.

In *Ryan v. Board of Township Trustees of Plain Township* (December 11, 1990) Franklin App. No. 89AP-1441, unreported, the Tenth District held that "Ohio cases have held that the zoning resolution itself can constitute the comprehensive plan. See *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34, 65; *Rumpke Waste, Inc. v. Henderson* (S.D. Ohio 1984), 591 F. Supp. 521, 534-535.

In *Barnett v. Leshner* (April 26, 1983), Miami App. No. 82-CA-50, unreported, the Second District held that "This interpretation [that a comprehensive

plan may be found in a zoning resolution] accords with the other provisions of R.C. Chapter 519, which do not refer to a 'plan' separate from the zoning resolution.”

In *Scioto Haulers v. Circleville Township Zoning Board of Appeal* (September 18, 1981), Pickaway App. No. 80CA7, unreported, the Fourth District held that a zoning resolution that included a map which provided for land uses for the entire township constitutes a comprehensive plan as contemplated by R.C. 519.02.

Here, the Granger Township zoning resolution covers all of the land of the township; it establishes seven separate land-use districts, and each is described by its purpose and use. The zoning districts and their boundary lines are indicated on the “Zoning Districts Map of Granger Township, Medina County, Ohio” which is maintained in the office of the township Clerk (Plaintiff’s Trial Exhibit 7) and which is incorporated by reference into the zoning resolution (Section 202).

The zoning resolution contains provisions for obtaining conditional zoning permits. It recognizes the need “to provide controllable and reasonable flexibility in requirements for certain kinds of land use that will allow profitable latitude for the investor, but that will at the same time maintain adequate provision of the security of the health, safety, convenience and general welfare of the community’s inhabitants.” (Section 501)

The resolution in section 501(B) sets forth the criteria the BZA must use when ruling on an applications for a proposed conditional zoning certificate. The BZA is required to review the particular facts and circumstances of each proposed use and must make its decision upon evidence of the following factors:

- a. "Will be harmonious with and in accordance with the general objectives, or with any specific objective of the Township comprehensive zoning plan of current adoption.
- b. Will be designed, constructed, operated, maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity, and that such a use will not change the essential character of the same area.
- c. Will not be hazardous or disturbing to existing or future neighboring uses.
- d. Will be served adequately by essential public facilities and service such as highway, streets, police and fire protection, drainage structures, refuse disposal, or schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such service.
- e. Will not create excessive additional requirements at public cost for public facilities and services and will not be detrimental to the economic welfare of the community.
- f. Will not involve uses, activities, processes, materials, and equipment, and conditions of operation that will be detrimental to the general welfare.
- g. Will be consistent with the intent and purpose of this Resolution..."

The Magistrate finds that Granger Township zoning resolution is a comprehensive plan because it has provisions which meet the requirements of a comprehensive plan. The Magistrate makes this finding because the resolution sets forth goals and objectives for the entire township. The resolution is general in nature but it also contains specific zoning districts to manage growth and retention

the rural character of the township. The resolution provides the information needed for property owners to make decisions about public and private investment. It also provides a basis for zoning and conditional use decisions which will control spot zoning.

Susan Hirsch, the Deputy Director of the Medina County Department of Planning Services, testified that the term "comprehensive plan" can have more than one definition. Generally it is a guide for the community's development, usually containing a map of the political subdivision, showing the zoning classifications of the land. She stated that although Granger Township does not have a separate document for its comprehensive plan, the township's zoning resolution itself functions as its comprehensive plan.

Ms. Hirsch further testified that Apple Group's proposed use is a reasonable way to develop the land and preserve natural resources. She expressed her opinion that Apple's plans for the Beachwood Estates subdivision is good because it preserves environmental features such as the wetlands in the northwest corner of the property and the surrounding trees. She favors cluster housing such as that proposed by Apple Group because it is good to have diverse types of residential development in a community. Apple's plan preserves many environmental features on the property. She further testified that the Department of Planning Services favors conservation planning and a more diverse housing stock, such as that proposed by Apple, because there is a significant amount of concentrated open space, the roadways are smaller, with less paving, less impervious surfaces such as driveways and sidewalks, the lots are smaller and the natural features of the land are left undisturbed.

Ms. Hirsch acknowledged that Granger Township can create its own vision of how future development should proceed in the township; that the current zoning resolution with requires two-acre minimum lot size for residential development conforms with Granger's stated goal to manage low-density housing and to preserve the rural residential character of the township. However, she also stated that prohibiting the development of the Beachwood Estates subdivision according to Apple Group's proposal does not further Granger Township's interest in promoting low density housing or in preserving the rural residential character of the Township.

The Magistrate finds that the Granger Township zoning resolution functions as a comprehensive plan. A review of the resolution shows that it covers many factors, including, but not limited to land use, commercial development and conditional zoning terms. It sets forth specific goals and embodies the vision of the residents of the township for future development. The goal of the resolution is "to promote and protect the health, safety, morals and welfare of the residents of the unincorporated area of Granger Township, Medina County, Ohio, and to conserve and protect property and property values, and to provide for the maintenance of the rural character of Granger Township, and to manage orderly growth and development in said Township" (section 103) while allowing for "reasonable flexibility for certain kinds of uses." (section 501).

The zoning resolution includes a zoning map, which shows the location of the various zoning classifications; the zoning map covers all of the land in the township; the zoning resolution covers residential, commercial and planned development; the resolution prevents spot zoning because it allows for both

commercial and residential development; a person is able to examine the zoning resolution and ascertain the permitted use of his/her property; and the text of the zoning resolution is consistent with the zoning map. The clear intent of the R-1 resolution is to limit residential construction to a minimum lot size of two-acres because in the view of the township this area requirement preserves and enhances the rural character of the township.

The Magistrate concludes that the Granger Township zoning resolution was adopted in accordance with a comprehensive plan that meets the requirements of R.C. 519.02. The Magistrate further finds that the R-1 zoning classification, as applied to Apple Group's proposed use of its land is constitutional because it advances a legitimate governmental interest in preserving the aesthetics of the community. The BZA's refusal to grant the variances requested by Apple Group has not denied it the beneficial use of its property.

Based on the foregoing, the Magistrate concludes that Apple Group has not met its burden to prove, beyond fair debate, that the zoning resolution which requires a two acre minimum lot for future residential development, applied to Apple Group's proposed use, fails to advance a legitimate governmental interest. The record in this case has established that the two-acre lot requirement is rationally related to the township's goal to preserve the rural character of the community.

THE MAGISTRATE'S DECISION IS TO ORDER that the complaint of Apple Group for declaratory judgment is dismissed with prejudice. The decision of the Granger Township BZA denying Apple Group's application for a variance is upheld.

Any and all pending motions are denied.

Court costs shall be paid by Plaintiff-Appellant, Apple Group, Inc.


Magistrate Barbara B. Porzio

Counsel and parties will take notice that under the provisions of Rule 53 of the Ohio Rules of Civil Procedure this matter will be held fourteen (14) days from the date on which this decision is filed. If no objections to this decision are filed prior to said date, the preceding decision will be adopted by the Court, subject to Civil Rule 53(E)(4)(a).

A party shall not assign as error on appeal the court's adoption of any findings of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as required by Civil Rule 53(E)(3).

Instructions to the Clerk

Pursuant to Civil Rule 53, the Clerk is instructed to serve the foregoing Magistrate's Decision by ordinary U.S. mail to the following parties or their counsel of record:

Sheldon Berns, Attorney for Appellant
3733 Park East Drive, Suite 200
Beachwood, OH 44122

Gary F. Werner, Attorney for Appellant
3733 Park East Drive, Suite 200
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William Thorne, Attorney for Appellee
Assistant County Prosecutor
72 Public Square
Medina, OH 44256

Notice was sent by ordinary U.S. mail on Feb. 3, 2012.

Dorinda M. Lucas
DEPUTY CLERK OF COURT

COMMON PLEAS COURT
12 APR 25 AM 9:09

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

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|---------------------------------------------|---|------------------------|
| Apple Group Ltd. |) | CASE NO. 08CIV0090 |
| |) | |
| Plaintiff |) | |
| vs. |) | JUDGE JAMES L. KIMBLER |
| |) | |
| Board of Zoning Appeals for Granger Twp. |) | |
| |) | |
| Defendant |) | Journal Entry |

Case History

The Apple Group, Ltd. (Apple) filed an appeal from a decision of the Board of Zoning Appeals for Granger Township (Board) denying its request for variances from the Township's Zoning Resolution. This Court assigned the appeal to its Magistrate. The Magistrate issued her decision on February 2, 2012. Apple then filed objections to the Magistrate's decision. This journal entry contains the Court's ruling on the objections.

In undertaking a review of Apple's objections, this Court has acted independently of its Magistrate and has reviewed all the evidentiary material submitted as well as the briefs and arguments of counsel. This review is made pursuant to Civ. R. 53.

In undertaking its review, this Court hereby sets forth Apple's objections and its response to the objections. Each objection will be ruled on separately.

Objection No. (A) (1)

In its first objection, Apple argues that the Magistrate misapplied Ohio law to the controversy in front of her with respect to the standard to be applied when a common pleas court is ruling on the argument that a zoning resolution is unconstitutional as applied to the landowner's property.

The Ohio Supreme Court in *Mobil Oil Corp. v. Rocky River*, 1974, 38 Ohio St. 2d 23, held the following in the opinion syllabus: "In an appeal, pursuant to R. C. Chapter 2506, which challenges the constitutionality of a zoning ordinance as **applied**, the issue for determination is

whether the ordinance, in proscribing a landowner's proposed use of his land, has any reasonable relationship to the legitimate exercise of police power by the municipality." (Emphasis added)

Thus, the constitutional challenge to the way the Board applied the Township Zoning Resolution does not raise a challenge to the Resolution in general, but to the way it was applied by the Board to Apple's property.

Consequently the issue before this Court is whether the Board's application of the Zoning Resolution to Apple's property bore any reasonable relationship to the legitimate exercise of the Township's police power under R.C. §519.02. This is exactly what the Magistrate determined in her decision. Therefore, the objection is not well taken and is overruled.

Objection No (A) (2)

In her decision the Magistrate found that Ohio law is as follows:

- (1) the party challenging the constitutionality of a zoning resolution as applied to a particular parcel of land bears the burden of proof;
- (2) that the burden of proof is "beyond fair debate"; and
- (3) that the party challenging the application of the zoning resolution must establish "beyond fair debate" whether the resolution deprives the owner of an economically viable use of the land or that the zoning legislation fails to advance a legitimate governmental interest.

Apple is objecting to what it claims is the Magistrate's reliance on the Ohio Supreme Court decision of *Goldberg Cos. v. Council of Richmond Heights*, (1998), 81 Ohio St. 3d 207. In that decision, the Ohio Supreme Court wrote the following at 81 Ohio St. 3d 210:

There is a difference between a constitutional challenge to an ordinance as applied to a parcel of land and a constitutional challenge that also alleges that a taking of the property has occurred. The first seeks only a prohibition against the application of the ordinance to the property, whereas with the second, the landowner seeks compensation for a taking of the affected property. Although both types of cases allege the unconstitutionality of a zoning ordinance, in order for the landowner to prove a taking, he or she must prove that the application of the ordinance has infringed upon the landowner's rights to the point that there is no economically viable use of the land and, consequently, a taking has occurred for which he or she is entitled to compensation. A court may

determine that a zoning ordinance is constitutional; however, the ordinance may nevertheless constitute a taking as applied to a particular piece of property, entitling the landowner to compensation.

The Ohio Supreme Court's decision regarding the law in this area has been questioned by at least two appellate courts. See *Haisley v. Mercer County Bd. of Zoning Appeals*, 3rd Dist. No. 10-07-05, 2007-Ohio-6021, and *Boice v. Village of Ottawa Hills*, 6th Dist. No. L-06-1208, 2007-Ohio-4471. In those cases, the appellate courts held that *Goldberg* had been superseded by later decisions of the United States Supreme Court.

The problem that this Court has with those two appellate cases is that neither is from the Court of Appeals for the Ninth Appellate District. Therefore, while they are regarded as persuasive, they are not opinions that this Court must follow under the doctrine of stare decisis. Further, this Court is not aware of any subsequent decision of the Ohio Supreme Court overruling its decision in *Goldberg*.

Therefore, this Court and its Magistrate face a situation where the Ohio Supreme Court has issued a decision and that decision, while questioned by two appellate courts, has not been overruled by the Ohio Supreme Court nor has the Court of Appeals for this jurisdiction held that it is no longer applicable. Therefore, this Court cannot say that the Magistrate erred in using the test set forth in *Goldberg*. Consequently Objection No. 2 is overruled.

Objection No. (A)(3)

In its third objection Apple lists nine paragraphs in the Magistrate's decision that, according to Apple, shows that the Magistrate didn't properly consider the "integral role" of Apple's proposed use. The Court is not sure what exactly Apple means when it states that the focus should be on the "integral role" of its proposed use. Interestingly Apple cites no cases in this part of its objections that supports the proposition that the Court should consider the "integral role" of Apple's proposed use.

In this case, Apple is arguing that the Zoning Resolution, as applied to its property, is unconstitutional. Thus, the focus is not on the proposed use but on whether or not the denial of the Apple's requested variances was a proper use of the Township's police power under R.C. §519.02.

It is important for trial courts to understand that their role is not to substitute their judgment for that of a township's legislative authority. This is shown by the following quote from *Valley Auto Lease, Inc. v. Auburn Township Bd. of Zoning Appeals*, (1988), 38 Ohio St. 3d 184, 185:

It is a fundamental principle of Ohio zoning law that the party challenging the validity of a zoning classification has the burden of demonstrating the unconstitutionality or unreasonableness of the zoning resolution. *Leslie v. Toledo* (1981), 66 Ohio St. 2d 488, 489, 20 O.O. 3d 406, 407, 423 N.E. 2d 123, 124; *Brown v. Cleveland* (1981), 66 Ohio St. 2d 93, 95, 20 O.O. 3d 88, 89, 420 N.E. 2d 103, 105. "The legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable." *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560, 26 O.O. 2d 249, 251, 197 N.E. 2d 201, 204. In an appeal that challenges the constitutionality of a zoning ordinance as applied, the issue for determination is whether the ordinance, in proscribing a landowner's proposed use of his land, has any reasonable relationship to the legitimate exercise of police power by the municipality. *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23, 67 O.O. 2d 38, 309 N.E. 2d 900, syllabus.

This Court finds that the Apple's Objection (A) (3) seems to be an attempt to change the focus of the Court's analysis from whether the zoning resolution in question is a proper use of the Township's police power to whether it is desirable that Apple's proposed variances be granted. The Court finds that such an analysis is improper. Therefore, the objection is overruled.

Objection No. (A) (4)

In this objection Apple again complains about the Magistrate's application of the law to the facts of the case. The law that Apple believes was inappropriately applied is found in the decision of *Osborne Pros. Enterprises, Inc. v. City of Mentor*, 11th Dist. No. 9-015, (April 29, 1983). What the Court finds intriguing about this objection is that Apple is objecting to the Magistrate applying case law from a case that this Court has no obligation to follow.

Prior to 2002 this Court was required to follow the decisions of the Ohio Supreme Court and to follow the **published** opinions of the Court of Appeals for the Ninth Appellate District.

Such opinions were considered controlling authority. Unpublished opinions of the Court of Appeals for the Ninth Appellate District and all other appellate opinions, whether published or not, were, at best, persuasive authority.

In 2002 the Rules for the Reporting of Opinions were changed to reflect that all opinions of the Ninth Appellate District are controlling authority for this Court, but were not changed in regard to how this Court is to treat appellate opinions from other districts. Such opinions are still persuasive and not controlling.

Therefore this Court finds that the Apple's objection to an incorrect application of a decision that neither this Court nor its Magistrate is required to follow is without merit. Therefore, it is overruled.

Objection No (A) (5)

This objection deals with this quote from the Magistrate's Decision found on page 10:

"In a constitutional analysis, the object of scrutiny is the legislative action. The local law or regulation is the focal point of the analysis, not the property owner's proposed use. The court's focus is on the legislative judgment underlying the resolution, not the township's failure to approve what the property owner believes may be a better use of the property. If the application of the zoning resolution prevents an owner from using the property in a particular way, the proposed use is relevant, but only as one factor to be considered. However, the owner must also present evidence to overcome the presumption that the zoning resolution is a valid exercise of the township's police powers, as it applies to the property at issue."

The above quote is based on the Ohio Supreme Court decision of *Jaylin Invs., Inc. v. Vill. of Moreland Hills* (2002), 107 Ohio St. 3d 339, which contains the following quote at P2:

We hold that, in a constitutional analysis, the object of scrutiny is the government's action; therefore, the state or local law or regulation is the focal point of the analysis, not the property owner's proposed use. In an "as applied" challenge, the proposed use may be a relevant factor to be considered; however, the owner must also present evidence to overcome the presumption that the zoning is a valid exercise of the municipality's police powers, as it is applied to the property at issue.

Since the *Jaylin* decision has not been overruled by the Ohio Supreme Court, at least to this Court's knowledge, and since the decision was issued without a syllabus, this Court believes

that the paragraph quoted above is the law in Ohio. Since it was applied by the Magistrate in her decision, this objection is overruled.

Objection No. (A) (6)

This objection is based on Apple's argument that the Magistrate improperly considered aesthetic considerations when she wrote her Decision. The problem that the Court has with this argument is that such considerations are proper if a local zoning authority is taking into account a request for a zoning variance.

The question of aesthetics in relation to zoning was considered in the case of *Hudson v. Albrecht, Inc.*, (1984), 9 Ohio St. 3d 69. The first paragraph of the opinion syllabus reads as follows: "There is a legitimate governmental interest in maintaining the aesthetics of the community and, as such, aesthetic considerations may be taken into account by the legislative body in enacting zoning legislation."

The concept that a local governmental body may consider aesthetical factors when passing zoning regulations was also upheld by the Court of Appeals for the Ninth Appellate District in *BP America, Inc. v. Council of Avon*, 142 Ohio App. 3d 38, 43 753 N.E.2d 947 (9th Dist. 2001) and *Castella v. Stepak*, 9th Dist. No. 96CA0057 (May 14, 1997).

The following quote from the *Castella* opinion is particularly pertinent: "We find, however, that even if aesthetics was a key motivator, the Ohio Supreme Court has held, "There is a legitimate governmental interest in maintaining the aesthetics of the community and, as such, aesthetic considerations may be taken into account by the legislative body in enacting zoning legislation." *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St. 3d 69, 458 N.E.2d 852, paragraph one of the syllabus." *Castella v. Stepak*.

As the quote above shows, the Court of Appeals for the appellate district which has jurisdiction over Medina County has indicated that aesthetics can be a "key motivator" in enacting zoning legislation. Therefore, the Court finds that this objection is not well taken.

Objection No. (B) (1)

This objection has three sub-parts, labeled (a), (b), and (c). All of them, however, suffer from the same defect in their analysis. That defect is that this Court does not review requests for zoning variances purely from the standpoint of whether granting the zoning variance would, in the abstract, be "better" for a township than not granting such a variance. Rather it has to review the request for a zoning variance with the presumption that the zoning resolution of a township is

constitutional. See *Jaylin* supra at P2. A reviewing court must look at the zoning resolution to determine whether it is "clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." See *Jaylin* supra at P13. In applying this analysis a trial court must keep in mind that the "burden of proof remains with the party challenging an ordinance's constitutionality, and the standard of proof remains 'beyond fair debate.'" *Jaylin* supra at P13.

The objections in Objection No. (B)(1) relate to the two acre minimum lot size. In particular it is Apple's position that the two acre minimum lot size does not substantially advance the purposes articulated in the Township Zoning Resolution for an R-1 District and that it does not relate to the Township's goal of protecting the rural character of the Township. Protecting the rural character of the township, however, is not the only permitted basis for the Township's two acre minimum.

The power of the Township to regulate land use in a township comes from R.C. § 519.02. Subsection (A) of that statute reads, in part, as follows:

"(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."

Although R.C. 519.02 (A) does not mention lot size restrictions, it is clear from the language quoted above that a township may consider factors such as preserving the "rural character" of the township when enacting zoning resolutions provided that preserving such character relates to the health and safety of the public. In this particular case it does since sanitary sewers are not available in all parts of R-1 Districts in Granger Township.

Since most of the residential lots in the Township are served by septic tank systems, and since the two acre minimum allows for such systems, then the requirement for a two acre minimum has a reasonable relationship between the public health and safety and the zoning regulation. Since the two acre minimum lot size does bear a relationship between public health and the zoning regulation, these objections are overruled.

Objection No. (B) (2)

This objection is based on the theory that the Township cannot zone for aesthetics. As shown above, however, in the discussion concerning Objection No. (A) (6), the Court finds that a township can properly consider aesthetics. Therefore, this objection is overruled.

Objection No. (B) (3)

In this objection Apple argues that the Magistrate erred when she concluded that the street view of Apple's proposed use would be very different from the street view of the rest of the Township. The Court agrees with the Magistrate's conclusion. Obviously allowing 44 homes on 44 acres creates a much different street view than allowing 44 homes on 88 acres. Therefore this objection is overruled.

Objection No. (B) (4)

This Court finds that this objection is not detailed enough to allow the Court to consider whether or not it is well taken. Civ. R. 53 (D)(3)(b)(ii).

Objection No. (B) (5)

This Court finds that this objection is not detailed enough to allow the Court to consider whether or not it is well taken. Civ. R. 53 (D) (3) (b) (ii).

Objection No. (B) (6)

This Court finds that this objection is not detailed enough to allow the Court to consider whether or not it is well taken. Civ. R. 53 (D) (3) (b) (ii).

Objection No. (B) (7)

This Court finds that this objection is not detailed enough to allow the Court to consider whether or not it is well taken. Civ. R. 53 (D) (3) (b) (ii).

Objection No. (C) (1) through (7)

These objections are based on the Magistrate's conclusion that the Granger Township Zoning Resolution functions as a "comprehensive plan" as that term is used in R.C. § 519.02. Specifically the Magistrate made the following finding:

"Granger Township's failure to have a comprehensive zoning plan, which is separate and distinct from its zoning resolution, does not mandate a conclusion that the zoning resolution is unconstitutional. The zoning resolution itself meets the statutory requirement of a comprehensive plan, because it has the essential characteristics of a comprehensive plan; it encompasses all geographic parts of the community and integrates all functional elements."

In objecting to this conclusion, Apple is relying on the relatively recent case of *B.J. Alan Company v. Congress Township Board of Zoning Appeals*, 124 Ohio St.3d 1; 2009-Ohio-5863. As the Magistrate pointed out in her decision, however, this reliance is misplaced.

In the *B.J. Alan* situation Congress Township did not have a comprehensive plan of its own, but was, instead, relying on the comprehensive plan developed by the County. In this case, however, Granger Township is relying on its own zoning resolution as its comprehensive plan.

Further, the Ohio Supreme Court noted in the *B.J. Alan* decision, that the holding in that case is limited. "Our decision today is limited. We have determined that a countywide comprehensive plan can meet the comprehensive-plan requirement of R.C. 519.02 and that pursuant to that statute the Wayne County Comprehensive Plan qualifies as a comprehensive plan encompassing Congress Township." *Id.* ¶43.

In her opinion the Magistrate noted the following:

"In *Cassell v. Lexington Twp. Bd. of Zoning Appeals* (1955), 163 Ohio St. 340, 127 N.E.2d 11, the Ohio Supreme Court outlined broad principles to consider when deciding whether

a comprehensive plan is part of a zoning resolution. The court should examine 1) whether an individual is able to examine the zoning resolution and ascertain to what use the property may be put; 2) whether the text of the zoning resolution is consistent with the zoning map which shows the location of the various zoning classifications, and 3) whether the zoning plan includes business or industrial zoning districts."

She then concluded that the Zoning Resolution of Granger Township met those three criteria. She also pointed out that the Granger Township Zoning Resolution itself stated that it is to be considered as such a plan because of the language used in Section 103 of the Zoning Resolution adopted in 2007: "... the Board of Trustees has found it necessary and advisable to adopt these zoning regulations *as a comprehensive plan of zoning...*"

There have been several Court of Appeals decisions that have held that a township zoning resolution may serve as a comprehensive zoning plan for the township and they are cited by the Magistrate in her decision at pages 22-23. Basically, the Magistrate came to the conclusion that if it "looks like a duck, quacks like a duck, and walks like a duck, then it is a duck." That approach is also the approach taken by the various appellate decisions she cites in her Decision.

In this case, this Court finds that the approach taken by the Magistrate is one that exalts function over form and not form over function. This Court finds that this approach is correct and therefore these objections are overruled.

Objections No. (C) (8)

This objection was covered in the Court's discussion of the objection set forth in (A) (6) and therefore it is denied.

Objection No. (C) (9)

This Court finds that this objection is not detailed enough to allow the Court to consider whether or not it is well taken. Civ. R. 53 (D) (3) (b) (ii).

Objection No. (D)

This objection is based on the arguments that (1) a trial court in deciding whether to uphold the actions of a township zoning board cannot consider whether there are other profitable uses for the property other than the use for which a landowner is seeking a variance and (2) there was no evidence in the record to establish that there is such other use.

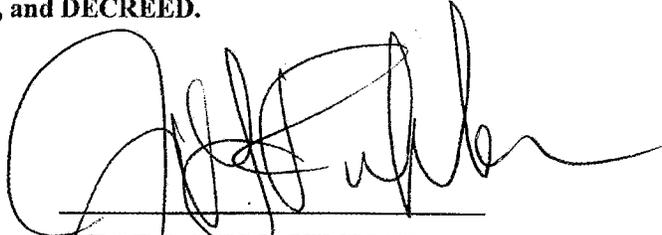
With regard to the first issue raised, this Court finds that *Goldberg Companies v. Richmond Heights City Council* (1998), 81 Ohio St. 3d 207, 209, 1998-Ohio-456, allows a trial court to consider such other profitable uses.

With regard to the second issue the Court finds that the statements of Apple's counsel to the Magistrate constituted an admission that such profitable uses exist and an admission by Apple's counsel is binding on Apple.

Any other motions not expressly ruled on are hereby overruled.

This Court hereby overrules the objections to the Magistrate's Decision and hereby adopts said Decision finding that Apple's appeal of the decision of the Granger Township Board of Zoning Appeals is not well taken and should be dismissed. Costs taxed to the Plaintiff.

SO ORDERED, ADJUDGED, and DECREED.



JUDGE JAMES L. KIMBLER

Instructions to the Clerk

The Clerk is instructed to send notice of the foregoing entry to the following parties or their counsel of record:

Sheldon Berns
3733 Park East Drive, Suite 200
Beachwood, OH 44122

Brian Richter
Medina County Prosecutor's Office
72 Public Square
Medina, OH 44256

Notice was sent by ordinary U.S. mail on April 26, 2012.

Dorinda M. Lucas
DEPUTY CLERK OF COURTS

COMMON PLEAS COURT

2012 JUL 25 PM 3:46

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

| | | |
|--------------------------------|---|-----------------------------------------|
| Apple Group Ltd. |) | CASE NO. 08CIV0090 |
| |) | |
| Plaintiff |) | |
| vs. |) | JUDGE JAMES L. KIMBLER |
| |) | |
| Board of Zoning Appeals |) | |
| Granger Twp. |) | |
| |) | Judgment Entry with Instructions |
| Defendant |) | to the Clerk |

This case is before the court on remand from the court of appeals in case numbers 12CA0039-M and 12CA0040-M.

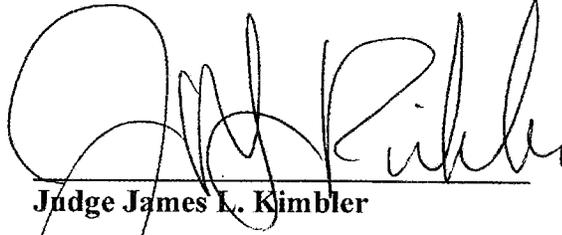
The court reaffirms its entry overruling plaintiff's objections and adopting the magistrate's decision in its entirety.

IT IS THEREFORE ORDERED that the complaint of Apple Group for declaratory judgment is denied. The court declares that the Granger Township Zoning Resolution is constitutional as applied to prohibit plaintiff's proposed use of the property. The decision of the Granger Township BZA denying Apple Group's application for a variance is upheld. The BZA's decision is not illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record.

The Court further declares that the Granger Township Zoning Resolution was adopted in accordance with the requirements of R.C. 519.02, and, in that regard, the application of its provisions to prohibit the Apple Group's proposed use was not ultra vires or in excess of the Township's zoning powers.

IT IS FURTHER ORDERED that any and all pending motions are denied.

IT IS FURTHER ORDERED that court costs shall be paid by Plaintiff-Appellant, Apple Group, Inc.



Judge James L. Kimbler

INSTRUCTIONS TO THE CLERK

Pursuant to Civil Rule 58, the Clerk is hereby directed to serve upon the following parties, notice of this judgment and its date of entry upon the journal:

Sheldon Berns
3733 Park East Drive, Suite 200
Beachwood, OH 44122

Brian Richter
Medina County Prosecutor's Office
72 Public Square
Medina, OH 44256

Notice was mailed by the Clerk of Court on July 27, 2012.

Dorinda M. Lucas
DEPUTY CLERK OF COURT

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

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

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

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

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

**GRANGER TOWNSHIP
ZONING REGULATIONS**

Last Revised May 17, 2006

8/8/07

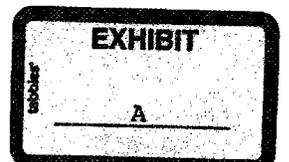


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GRANGER TOWNSHIP ZONING RESOLUTION

ARTICLE I: TITLE, AUTHORIZATION, PURPOSE

1.1 TITLE

This Resolution shall be known as the Granger Township Revised Zoning Resolution, hereafter referred to as "Resolution".

1.2 AUTHORIZATION

The authority for establishing "The Granger Township Revised Zoning Resolution" is derived from Sections 519.01 to 519.99 inclusive, of the Ohio Revised Code.

1.3 GENERAL PURPOSE

In order to promote and protect the health, safety, morals, and welfare of the residents of the unincorporated area of Granger Township, Medina County, Ohio, and to conserve and protect property and property values, and to provide for the maintenance of the rural character of Granger Township, and to manage orderly growth and development in said Township, the Board of Trustees has found it necessary and advisable to adopt these zoning regulations as a comprehensive plan of zoning which will regulate the location, height, bulk, number of stories, and size of buildings and other structures, percentages of lot areas which may be occupied, building setback lines, size of yards, and other open spaces and density of population, the uses of buildings and other structures and the uses of the land for trade, industry, residence, recreation, or other purposes; and for such purposes to divide the unincorporated area of Granger Township into zoning districts and to provide for the administration and enforcement of such regulations. All 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 and zones.

ARTICLE III: DISTRICT REGULATIONS

3.1 R-1 RESIDENTIAL DISTRICT

3.1.1 PURPOSE

The purpose of this district is to manage low-density residential development that will preserve the rural residential character of Granger Township.

3.1.2 USES

Within a R-1 Residential District, no building, structure, or premises shall be used, arranged to be used, or designed to be used, except for one or more of the following uses, and each shall require a zoning certificate:

.2A PERMITTED USES

- .1 Single Family Dwelling, excluding trailers and manufactured homes which do not meet the requirements of Section 3.1.3 and in addition are not: a. Set on a full foundation; b. constructed with a full frame.
- .2 Two-family dwelling (2 dwelling) see Section 3.1.5A
- .3 Manufactured homes are single family dwelling units which meet the requirements of Section 3.1.3.
- .4 Only roadside stands, where fifty percent or more of the gross income received from the market is derived from produce raised on farms owned or operated by the market operator in a normal crop year shall be permitted.
- .5 Home Occupation
 - .a The use shall be secondary in importance to the use of the dwelling for dwelling purposes.
 - .b The use shall be conducted by the occupant.
 - .c The use shall be carried on entirely within the dwelling and not in an accessory building.
 - .d The home occupation shall not occupy more than 25 percent of the floor area of the dwelling unit.

- .e An accessory building shall not constitute primary or incidental storage for a home occupation.
 - .f The use shall not involve any extension or exterior modifications of the dwelling in which the home occupation is located.
 - .g No outward evidence of materials, goods, or equipment indicative of the home occupation shall be permitted outside the dwelling.
- .6 Accessory buildings, structures, and uses incidental to the principal use.

.2B CONDITIONALLY PERMITTED USES

The Board of Zoning Appeals may authorize the issuance of Conditional Zoning Certificates for uses listed herein, subject to Sections 5.1.1 through 5.1.2A, inclusive of Article V and other sections of Article V as listed below:

- .1 Public, private and parochial schools subject to the provisions of Section 5.1.2B, subsection 7
- .2 Churches and other buildings for the purpose of religious worship.
- .3 Governmentally owned and/or operated parks, golf courses (except miniature), and subject to Section 5.1.2B, subsection 1.
- .4 Privately owned and/or operated golf courses (except miniature) and subject to Section 5.1.2B, subsection 1.
- .5 Cemeteries.
- .6 Publicly owned and/or operated buildings and facilities other than those listed and subject to Section 5.1.2B, subsection 1.
- .7 The provisions of Section 2.3.3A notwithstanding, the Board of Zoning Appeals may authorize the issuance of Conditional Zoning Certificates for lots located on the bulb of cul-de-sac streets, provided that the lot width at the set-

back line shall be no less than one hundred seventy-five (175) feet.

3.1.3 AREA, YARD, AND HEIGHT REGULATIONS

.3A MINIMUM LOT SIZE

The minimum lot area shall be two (2) acres. Each lot shall have a minimum of one hundred seventy-five (175) feet continuous frontage on a public or approved private street, and a minimum of one hundred seventy-five (175) feet of continuous lot width on and from the street right-of-way to the setback line. At no time shall the minimum lot depth from the right-of-way be less than required by the Health Department.

.3B MINIMUM FRONT YARD DEPTH

The distance of set-back from street right-of-way shall not be less than seventy (70) feet.

.3C MINIMUM SIDE YARD WIDTH ON EACH SIDE

Fifteen (15) feet.

.3D MINIMUM REAR YARD DEPTH

There shall be a rear yard not less than thirty (30) feet deep.

.3E MINIMUM LIVING FLOOR AREA PER DWELLING UNIT

.1 Each single-family dwelling and each dwelling unit in a two-family dwelling shall have the following minimum living floor area:

- .a One (1) and two (2) bedroom dwelling units, twelve hundred forty (1240) square feet minimum.
- .b Three (3) bedroom dwelling unit, fifteen hundred (1500) square feet minimum.
- .c Four (4) bedroom dwelling unit, eighteen hundred (1800) square feet minimum.
- .d Five (5) or more bedroom dwelling unit, twenty-one hundred (2100) square feet minimum.

.e The area of the dwelling shall be the sum of the gross floor areas above the basement level, and not more than three (3) feet below finished grade, including these rooms (and closets) having a minimum ceiling height of seven (7) feet six (6) inches (7'6"), and having the natural light and ventilation as required by the Medina County Building Code: 1975. Rooms above the first floor may be included which are directly connected by a permanent stairs and hall, and spaces under pitched roofs having a minimum knee wall height of four (4) feet if one-half (½) of the room area has a minimum ceiling height of seven feet six inches (7'6").

.2 Minimum living floor area per family shall not include porches, steps, terraces, breezeways, attached or built-in garages, basements or other attached structures not intended for human occupancy.

.3F HEIGHT OF BUILDINGS

No Structure shall exceed thirty-five (35) feet in height.

3.1.4 PARKING REQUIREMENTS - MINIMUM NUMBER OF OFF-STREET PARKING SPACES REQUIRED

All dwellings shall provide parking space off the nearest street or road and outside of the public right-of-way, together with means of ingress and egress thereto, for not less than two (2) motor vehicles per dwelling unit.

3.1.5 SUPPLEMENTARY REGULATIONS

.5A PRINCIPAL BUILDING

No more than one dwelling unit shall be permitted on any lot unless otherwise specifically stated in this Resolution, and every dwelling unit shall be located on a lot having required frontage on a public or private street.

3.2 R-2 RESIDENTIAL DISTRICT

3.2.1 PURPOSES

The purpose of this district is to accommodate residential development at densities of two to three dwelling units per net acre in areas which are, or

can be at the time of development, serviced by central water and sewer facilities, storm sewers, paved streets with curbs and gutters, in accordance with Medina County Regulations.

3.2.2 USES

Within an R-2 Residential District, no building, structure or premises shall be used, arranged to be used, or designed to be used except for one or more of the following uses:

.2A PERMITTED USES

All R-1 Residential Permitted uses (3.1.2A) with all regulations established for Area, Yard and Height Regulations (3.1.3), Parking Requirements (3.1.4), and Supplementary Requirements (3.1.5) when applicable.

.2B CONDITIONALLY PERMITTED USES

The Board of Zoning Appeals may authorize the issuance of Conditional Zoning Certificates for uses listed herein, subject to Section 5.1.1 through Section 5.1.2, inclusive of Article V as listed below:

- .1 Private, public and parochial schools.
- .2 Churches and other buildings for the purpose of religious worship.
- .3 Privately or governmentally owned and/or operated parks, playgrounds, golf courses (except miniature), riding stables, and swim clubs, subject to Section 5.1.2B, subsection 1.
- .4 Institutions for medical care-convalescent homes, nursing homes for the aged, and philanthropic institutions subject to Section 5.1.2B, subsection 1.
- .5 Cemeteries.
- .6 Publicly owned and/or operated buildings and facilities other than those listed and subject to Section 5.1.2B, subsection 1.

- .7 Planned unit residential development subject to Section 5.1.2A and Section 5.1.2B.
- .8 Mobile Home Parks aka House Trailer Parks.

3.2.3 AREA, YARD, AND HEIGHT REGULATIONS

.3A MINIMUM LOT SIZE

- .1 All dwellings not serviced by central sanitary sewer and water facilities within this district shall conform to the minimum lot size requirements of Section 2.3.4A.
- .2 All single family or 2 family dwellings serviced by central sanitary sewer and water facilities within this district shall be built on lots with a minimum lot width of one hundred and twenty five (125) feet at the set-back line and a total lot area shall not be less than one (1) acre.

.3B MINIMUM FRONT YARD DEPTH

- .1 The distance of set-back from street right-of-way shall not be less than seventy (70) feet.
- .2 If there is no established right-of-way line for any road or street, said line shall be deemed to be thirty (30) feet from center of the roadway.

.3C MINIMUM SIDE AND REAR YARD WIDTH

Each rear and side yard width shall equal at least twice (two times) the height of the tallest structure located thereon unless such structure conforms to all established requirements for said structure under Article III, Sections 3.1.3C and D of this Resolution.

3.3 C-1 LOCAL COMMERCIAL DISTRICT

3.3.1 PURPOSE

The purpose of the C-1 Local Commercial District is to provide for retail and service businesses serving the daily needs of Township residents for goods and services. C-1 Districts are strategically located to provide accessibility to Township residents. Uses in this district shall be compatible with surrounding residential uses in order to minimize impacts on surrounding neighborhoods and are intended to be limited in scale.

ZONING REGULATIONS

Granger Township

Effective Revised Date: August 8, 2007

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ARTICLE I: TITLE, AUTHORIZATION, PURPOSE

101 Title

This Resolution shall be known as the Granger Township Revised Zoning Resolution, hereafter referred to as "Resolution".

102 Authorization

The authority for establishing "The Granger Township Revised Zoning Resolution" is derived from Sections 519.01 to 519.99 inclusive, of the Ohio Revised Code.

103 General Purpose

In order to promote and protect the health, safety, morals, and welfare of the residents of the unincorporated area of Granger Township, Medina County, Ohio, and to conserve and protect property and property values, and to provide for the maintenance of the rural character of Granger Township, and to manage orderly growth and development in said Township, the Board of Trustees has found it necessary and advisable to adopt these zoning regulations as a comprehensive plan of zoning which will regulate the location, height, bulk, number of stories, and size of buildings and other structures, percentages of lot areas which may be occupied, building setback lines, size of yards, and other open spaces and density of population, the uses of buildings and other structures and the uses of the land for trade, industry, residence, recreation, or other purposes; and for such purposes to divide the unincorporated area of Granger Township into zoning districts and to provide for the administration and enforcement of such regulations. All 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 and zones.

ARTICLE III: DISTRICT REGULATIONS

301 R-1 Residential District

A. Purpose

The purpose of this district is to manage low-density residential development that will preserve the rural residential character of Granger Township.

B. Uses

Within a R-1 Residential District, no building, structure, or premises shall be used, arranged to be used, or designed to be used, except for one or more of the following uses, and each shall require a zoning certificate:

1. Permitted Uses

- a. **Single Family Dwelling, excluding trailers and manufactured homes** which do not meet the requirements of Section 301.C. and in addition are not: a. Set on a full foundation; b. constructed with a full frame.
- b. **Two-family dwelling (2 dwelling) see Section 301.E.1.**
- c. **Manufactured homes are single family dwelling units which meet the requirements of Section 301.C.**
- d. **Only roadside stands**, where fifty percent or more of the gross income received from the market is derived from produce raised on farms owned or operated by the market operator in a normal crop year shall be permitted.
- e. **Home Occupation**
 - 1) The use shall be secondary in importance to the use of the dwelling for dwelling purposes.
 - 2) The use shall be conducted by the occupant.
 - 3) The use shall be carried on entirely within the dwelling and not in an accessory building.
 - 4) The home occupation shall not occupy more than 25 percent of the floor area of the dwelling unit.
 - 5) An accessory building shall not constitute primary or incidental storage for a home occupation.
 - 6) The use shall not involve any extension or exterior modifications of the dwelling in which the home occupation is located.
 - 7) No outward evidence of materials, goods, or equipment indicative of the home occupation shall be permitted outside the dwelling.

f. Accessory buildings, structures, and uses incidental to the principal use.

2. Conditionally Permitted Uses

- a. Public, private and parochial schools subject to the provisions of Section 501.B.2.g.
- b. Churches and other buildings for the purpose of religious worship.
- c. Governmentally owned and/or operated parks, golf courses (except miniature), and subject to Section 501.B.1.
- d. Privately owned and/or operated golf courses (except miniature) and subject to Section 501.B.1.
- e. Cemeteries.
- f. Publicly owned and/or operated buildings and facilities other than those listed and subject to Section 501.B.1.
- g. The provisions of Section 203.C. not withstanding, the Board of Zoning Appeals may authorize the issuance of Conditional Zoning Certificates for lots located on the bulb of cul-de-sac streets, provided that the lot width at the set-back line shall be no less than one hundred seventy-five (175) feet.

C. Area, Yard, and Height Regulations

1. Minimum Lot Size

The minimum lot area shall be two (2) acres. Each lot shall have a minimum of one hundred seventy-five (175) feet continuous frontage on a public or approved private street, and a minimum of one hundred seventy-five (175) feet of continuous lot width on and from the street right-of-way to the setback line. At no time shall the minimum lot depth from the right-of-way be less than required by the Health Department.

2. Minimum Front Yard Depth

The distance of set-back from street right-of-way shall not be less than seventy (70) feet.

3. Minimum Side Yard Width on Each Side

Fifteen (15) feet.

4. Minimum Rear Yard Depth

There shall be a rear yard not less than thirty (30) feet deep.

5. Minimum Living Floor Area Per Dwelling Unit

- a. Each single-family dwelling and each dwelling unit in a two-family dwelling shall have the following minimum living floor area:

- 1) One (1) and two (2) bedroom dwelling units, twelve hundred forty (1240) square feet minimum.
- 2) Three (3) bedroom dwelling unit, fifteen hundred (1500) square feet minimum.
- 3) Four (4) bedroom dwelling unit, eighteen hundred (1800) square feet minimum.
- 4) Five (5) or more bedroom dwelling unit, twenty-one hundred (2100) square feet minimum.
- 5) The area of the dwelling shall be the sum of the gross floor areas above the basement level, and not more than three (3) feet below finished grade, including these rooms (and closets) having a minimum ceiling height of seven (7) feet six (6) inches (7'6"), and having the natural light and ventilation as required by the Medina County Building Code: 1975. Rooms above the first floor may be included which are directly connected by a permanent stairs and hall, and spaces under pitched roofs having a minimum knee wall height of four (4) feet if one-half (1/2) of the room area has a minimum ceiling height of seven feet six inches (7'6").

b. Minimum living floor area per family shall not include porches, steps, terraces, breezeways, attached or built-in garages, basements or other attached structures not intended for human occupancy.

6. Height of Buildings

No Structure shall exceed thirty-five (35) feet in height.

D. Parking Requirements – Minimum Number of Off-Street Parking Spaces Required

All dwellings shall provide parking space off the nearest street or road and outside of the public right-of-way, together with means of ingress and egress thereto, for not less than two (2) motor vehicles per dwelling unit.

E. Supplementary Regulations

1. Principal Building

No more than one dwelling unit shall be permitted on any lot unless otherwise specifically stated in this Resolution, and every dwelling unit shall be located on a lot having required frontage on a public or private street.

302 R-2 Residential District

A. Purpose And Intent

The purpose of this district is to accommodate an existing condominium style residential development which was developed with private central water and sewer facilities and with a private lake orientation. It is the intent of these provisions to allow the continuation of the existing homes within the Granger Lake Condominium development as permitted rather than non-conforming uses, but not to encourage or permit either expansion of the existing condominium development or the establishment of additional developments pursuant to these provisions. To that end, it is further intended that this zoning district apply only to the existing Granger Lake Condominium development and that the boundary of the zoning district be coterminous therewith.

B. Uses

Within an R-2 Residential District, no building, structure or premises shall be used, arranged to be used, or designed to be used except for one or more of the following uses:

1. Permitted Uses

- a. **Single Family Dwellings subject to the minimum floor area requirements of Section 301.C.5**
- b. **Two Family Dwellings subject to the minimum floor area requirements of Section 301.C.5**
- c. **Single Family Attached Dwellings subject to the provisions of Section 302.D.3 and subject to the minimum floor area requirements of Section 301.C.5**
- d. **Home Occupations subject to the provisions of Section 301.B.1.e**

2. Conditionally Permitted Uses

The Board of Zoning Appeals may authorize the issuance of Conditional Zoning Certificates for uses listed herein, subject to the provisions of Article V as listed below:

- a. **Private, public and parochial schools**
- b. **Churches and other buildings for the purpose of religious worship.**
- c. **Privately or governmentally owned and/or operated parks, playgrounds, golf courses (except miniature), riding stables, and swim clubs .**
- d. **Publicly owned and/or operated buildings and facilities.**

C. Building Setbacks, Separations And Height

Dwellings and other buildings shall be located in conformance with the approved development plans for the R-2 District and the condominium development. In no instance shall the building setbacks and separations be less than the following:

- 1. Minimum Front Setback**
The minimum building setback from the edge of the private street or roadway shall be twenty-five (25) feet.
- 2. Minimum Building Separation**
The minimum separation between buildings shall be twenty-five (25) feet measured at the foundation walls.
- 3. Property Line Setback**
No building shall be located closer than thirty (30) feet to any property boundary line of the condominium project.
- 4. Height Of Buildings**
No Structure shall exceed thirty-five (35) feet in height.

D. Development Standards

- 1. Density Of Dwelling Units**
The maximum number of dwelling units shall not exceed a total of One Hundred Ninety-One (191).
- 2. Condominium Ownership**
All dwellings within the district shall be part of a condominium arrangement in conformance with Chapter 5311 of the Ohio Revised Code.
- 3. Single Family Attached Dwellings**
The maximum number of single family dwellings which may be attached or included within a single building or structure shall be six (6).
- 4. Private Improvements**
All streets, water production and distribution facilities, sanitary sewer collection and treatment systems, storm drainage facilities and other common improvements serving the condominium development are intended to be privately owned, operated, and maintained by the condominium association or its designee. Granger Township shall have no responsibility for maintenance or repair of any of the privately owned and operated infrastructure located within the condominium development, nor shall the Township be required to assume ownership or responsibility for such facilities.
- 5. District Boundary**
The boundary of the R-2 District shall be coterminous with the boundary of Granger Lake Condominiums existing as of the effective date of this provision.

ARTICLE X: EFFECTIVE DATE

This Revised Resolution shall take effect and be in full force and effect from and after the earliest period allowed by law.

Recommended by the Township Zoning Commission

Date: June 5, 2007
Chairman: Stephen Hummel

Adopted by the Granger Township Trustees

Date: July 9, 2007
Trustees: Teri A. Berry, Chp.
John H. Ginley Jr.
William F. Riebau Jr.

Effective Date: August 8, 2007

Attested to by the Fiscal Officer of the Township

Fiscal Officer: Barbara L. Beach

Granger Township Trustees:

Teri A. Berry
John H. Ginley Jr.
William F. Riebau Jr.

Granger Township Fiscal Officer:

Barbara L. Beach

Granger Township Zoning Commission:

Stephen Hummel, Chp.
Carol Kraus
Karen Howard
Ronald Alber
Daniel Kalka

Granger Township Board of Appeals:

Joseph DeNardi, Chp.
Edward Kraus
Nancy Bloom
Brian Roy
J. Roger Feess
Richard Pace, Alternate

Granger Township Zoning Secretary:

Annamarie George

Granger Township Zoning Inspector:

Nancy West