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.

REPLY BRIEF OF APPELLANT APPLE GROUP, LTD.

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I. INTRODUCTION

The Merit Brief ("Twp. Br.") of Appellees Granger Township, et al. ("Township") posits that the "real issue" in this appeal is whether Appellant Apple Group, Ltd. ("Apple") can develop its property "in violation of the **valid** Granger Township Zoning Resolution" ("Resolution" or "Res."). (Twp. Br. at 1, emphasis added.) The Propositions of Law set forth in Apple's Memorandum in Support of Jurisdiction and argued in Apple's Merit Brief ("Apple Br.") prove otherwise: the "real issue" before this Court is whether the Resolution is, in fact, "valid."

Apple argues that the Resolution is **not valid** because it is not "in accordance with a comprehensive plan" as required by R.C. 519.02.

The Township insists that its Resolution satisfies R.C. 519.02's "accordance" requirement, and offers tautology as its only proof:

> Granger Township...has enacted its Zoning Resolution **in accordance with** its comprehensive plan and R.C. §519.02. Contrary to Apple's assertion, R.C. §519.02 does not require a township's comprehensive plan to be a "separate" document. Consequently, Granger Township's Zoning Resolution has been enacted **to serve as** the comprehensive plan as well as the zoning regulations....

(Twp. Br. at 1, emphasis added.)

Longstanding statutory interpretation rules foreclose such arguments. *Richards v. The Market Exchange Bank Company*, 81 Ohio St. 348, 369, 90 N.E. 1000 (1910) ("We should be slow to ascribe careless and needless tautology to the lawmaking body."); *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333, 338 (1858) ("Unless we admit that the framers of this constitution were guilty of nonsensical tautology, the use, in this section of the constitution, of both words, 'taxation' and 'assessment,' is, by necessary implication, a recognition of the distinction between them * * *.").

That "comprehensive plans" can be the township zoning regulations which must be in accordance with them is also foreclosed by this Court's well-settled "duty...to give effect to the words used, not to delete words used or to insert words not used" in a statute. *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 524 N.E.2d 441 (1988), paragraph three of the syllabus. In *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals,* 124 Ohio St.3d 1, 2009-Ohio-5863, 918 N.E.2d 501, ¶13 ("*B.J. Alan II*"), this Court reiterated that duty in connection with the very language of R.C. 519.02 at issue here.

Moreover, the planning experts who testified at trial, for both Apple and the Township, established that the Resolution is no "comprehensive plan" as R.C. 519.02 uses that term. (R. 861-67, 925-26, and 931-32, testimony from the Township's land use expert Susan Hirsch, Esq.; R. 266, and 408, testimony from Apple's land use expert David Hartt; and P.Ex. 8, the 7/2/08 Staff Report of the Medina County Department of Planning Services ("MCDPS") at p. 2.)[1] The scant trial testimony on which the Township affirmatively relies to sustain the singular identity of its Resolution and "comprehensive plan" could scarcely have been less substantial. (Twp. Br. at 13, quoting from R. 797.)

The Township further departs R.C. 519.02's express language by inventing and relying on terminology not found there. In Section 103 of its Zoning Resolution, the Township's Board of Trustees claim to have "adopt[ed] these zoning regulations as a ***comprehensive plan of zoning***...." (Emphasis added.) In its Brief, the Township repeats this term "comprehensive plan of zoning" as if to prove the Township's compliance with R.C. 519.02. (Twp. Br. at 1, 17.) That hybrid term, however, is found nowhere in R.C. Chapter 519, and its use only blurs the germane

[1] "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. "P.Ex." refers to Apple's trial exhibits.

statutory interpretation issue.[2]

Without a "comprehensive plan" townships can do unchecked exactly what the Township, by its own admission, did here to Apple. When Apple bought its property, the Township had an R-2 Zoning District, which permitted higher density, cluster residential development on sewered properties. (Twp. Br. at 3.) While Apple was pursuing development alternatives for its property, the Township simply "eliminated its R-2 zoning district * * *." (Twp. Br. at 7.) The Township claims that "[t]his zoning change is consistent with Granger's stated vision and priorities." (*Id.*)

But one cannot test such "consistency" without a distinct "comprehensive plan" against which to evaluate these zoning changes. Thus, what happened here perfectly illustrates both the literal failure to satisfy R.C. 519.02's conditions to township zoning power and the practical difficulties associated with testing R.C. 519.02 compliance against a zoning resolution alone. The day ***before*** the Township "eliminated its R-2 zoning district" ("Day 1"), two-family cluster homes on sewered lots smaller than two acres must have been "consistent with Granger's stated vision and priorities," because the Zoning Resolution (aka its "comprehensive plan") contained regulations ***permitting*** such uses. But just one day later ("Day 2"), the ***elimination*** of such uses must have been "consistent with the Township's stated vision and priorities," because the Zoning Resolution (aka its "comprehensive plan") now contained regulations ***prohibiting*** such uses. Beyond this tautologous fiction, it also remains incontestable that prohibiting "two-family cluster homes on lots smaller than two acres" on Day 2 was manifestly ***not*** in accordance with the

[2] At several points in its Brief, the Township drops "of zoning" from references to its "comprehensive plan of zoning." (Twp. Br. at 23, 27, 31, 32, 38.) Such a semantic exercise cannot convert the zoning regulations which the Township says constitute its "comprehensive plan of zoning" into a "comprehensive plan" that satisfies R.C. 519.02.

Township's Zoning Resolution (aka its "comprehensive plan") as it existed on Day 1, which effectively renders the zoning change non-compliant with R.C. 519.02's accordance requirement.

Moreover, the Township omits from its narrative facts that fully expose the abuse of township land use policy which the lack of a "comprehensive plan" can produce, and did produce here. The Township eliminated its R-2 zoning district while Apple was working with the Township's hired land use planner, George Smerigan, on Planned Conservation Development District ("PCDD") regulations designed to replace the R-2 regulations. (Apple Br. at 4.) Indeed, Mr. Smerigan and the Township's retained land use attorney, R. Todd Hunt, Esq., both advised the Township not to eliminate the R-2 zoning without leaving either revised R-2 zoning or some substitute for it (e.g., the PCDD) in place. (Apple Br. at 5.) But the Township ignored its paid consultants' advice, eliminated its R-2 zoning, and rejected any PCDD substitute zoning for it. It is impossible to know if these decisions were consistent with and in furtherance of pre-existing deliberated "vision and priorities." More likely they merely expressed a spontaneous about-face as to the desirability of higher-density residential uses with sewer service.

The bottom line is clear. Without a "comprehensive plan" as required by R.C. 519.02, a township's "vision and priorities" boil down to the momentary will of township trustees, as expressed in zoning regulations that they adopt, and to nothing more. Townships can summarily reject new zoning proposals (e.g., PCDDs) and eliminate whole zoning districts (e.g., R-2). And they can claim that all such actions are consistent with an unwritten "comprehensive plan" that, in reality, consists only of their trustees' personally held "vision and priorities" for the township and evades all judicial review for the required "accordance." This effectively negates R.C. 519.02's mandatory condition to a township's exercise of its limited statutory zoning power. But

the elimination of such a condition is solely up to the General Assembly. Neither the Township nor the Courts have any such authority.

The Township credits Judge Belfance, the dissenting judge in the court of appeals decision below, with recognizing the apparent conflict between extant case law and her views about R.C. 519.02's conditions. (Twp. Br. at 16-17.) But Judge Belfance's observations about that conflict precisely frame the question this appeal is aimed to resolve. (See Apple Br. at 12-13, and fn. 7.) Reversal here will resolve the persistent semantic distortions of R.C. 519.02's express condition to township zoning. And it will also remedy the real-world impacts on township land use policy, and on township property owners' land use rights, which those distortions beget.

II. THE TOWNSHIP'S DEFENSE OF THE CONSTUTIONALITY OF ITS ZONING RESOLUTION IS IRRELEVANT TO THIS APPEAL.

The Township devotes several pages of its Merit Brief to defending against Apple's as-applied challenge to the constitutionality of the Resolution. (Twp. Br. at 17-22.) The citations and argument in this part of the Township's Brief, however, are irrelevant to this appeal. Apple raised no such issue in its memorandum in support of jurisdiction and this Court did not accept the appeal on such issue.[3] Nor does any such argument appear in Apple's Merit Brief.

This case involves the statutory construction of R.C. 519.02. In *B.J. Alan II*, this Court held that a township need not develop its own "comprehensive plan" in order to exercise R.C. 519.02 zoning authority so long as its zoning resolution is "in accordance with *a* comprehensive plan." (2009-Ohio-5863, ¶13, emphasis sic.) In confronting whether the Resolution in and of itself satisfied R.C. 519.02's "accordance" requirement in this case, the court of appeals concluded that *B.J. Alan II* "did not address whether a zoning ordinance itself

[3] As the Ninth District Court of Appeals has acknowledged, a finding that a zoning resolution is constitutional does not determine its compliance with R.C. 519.02's requirements. *B.J. Alan Company v. Congress Twp. BZA*, 9th Dist. No. 07CA0051, 2007-Ohio-7023, ¶ 16 ("*B.J. Alan I*").

could satisfy the comprehensive plan requirement." (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, ¶12.) This is the sole issue raised by Apple's two Propositions of Law, and does not implicate the constitutionality of the Resolution.

III. AS TO PROPOSITION OF LAW NO. 1, THE TOWNSHIP MISSTATES *B.J. ALAN II*'s IMPORT AND CITES ONLY CASES THAT MAKE CLARIFICATION OF THE R.C. 519.02 "COMPREHENSIVE PLAN" ISSUE NECESSARY.

In analyzing Proposition of Law No. 1, the Township states categorically that "[n]owhere in *B.J. Alan II* did this Court indicate that a comprehensive plan must be a 'separate' document from the zoning resolution." (Twp. Br. at 27.) But the following quotation from *B.J. Alan II* appears flatly to contradict that statement:

> The parties agree that Congress Township did not have its own comprehensive plan in place at the time it created its zoning resolution. But this is not a significant fact under R.C. 519.02, despite the appellate court's contrary determination. R.C. 519.02 does not require that a township create its own comprehensive plan – it requires only that a zoning resolution be "in accordance with *a* comprehensive plan." To require each township to create its own comprehensive plan is to read additional language into R.C. 519.02. (Emphasis sic.)

B.J. Alan II, at ¶ 13.

It cannot be doubted that the four "comprehensive plan" references in this passage from *B.J. Alan II* are all to a "comprehensive plan" that is not one and the same as the zoning resolution which must be in accordance with it. This Court plainly did not use the terms "comprehensive plan" and "zoning resolution" synonymously or interchangeably. Presumably, this Court's emphasis of the article "a" in the second sentence underscored the Court's observation in the third, i.e., that R.C. 519.02 does not, by its terms, require a township itself to compile and prepare its own "comprehensive plan." Regardless, the Township and the court of

appeals were wrong to infer from *B.J. Alan II* no directive concerning R.C. 519.02's requirement that a township's zoning resolution must be in accordance with something other than itself.

The bulk of the Township's Merit Brief on this point only repeats the error necessitating this appeal. (Twp. Br. at 28-31.) The Township cites again the many cases that have mistaken the "due process" vagueness test which this Court applied directly to a zoning resolution in *Cassell v. Lexington Twp. Bd. Of Zoning Appeals,* 165 Ohio St. 340, 127 N.E.2d 11 (1955), as the test for a township's compliance with the R.C. 519.02 condition requiring "accordance" between a township's zoning resolution and *a* "comprehensive plan" of someone's creation. (See e.g., Twp. Br. at 30, *quoting White Oak Property Dev., LLC v. Washington Twp.*, 12th Dist. No. CA 2011-015-011, 2012-Ohio-425, ¶22-25.) The Township also repeats the familiar but erroneously-derived *Cassell* litmus "test" for R.C. 519.02 compliance, i.e., that a township zoning resolution is "in accordance with a comprehensive plan" if "one is able to examine the resolution and ascertain to what use the property may be put * * *." (Twp. Br. at 30.) Mere intelligibility and coherence within and between a zoning resolution and a zoning map do not establish their "accordance" with a "comprehensive plan." But, as recognized in *Cassell* and 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*"), the absence of such intelligibility and coherence almost certainly precludes a finding of accordance.

The Township leaves most of Apple's argument completely undisturbed. The Township ignores the significance courts have ascribed to the General Assembly's use of the phrase "in accordance with," and the high degree of correspondence and conformity which that phrase denotes. (See Apple Br. at 17-18.) The Township also makes no attempt to square its commitment to precedent holding that zoning resolutions can double as the "comprehensive

plans" with which they must be in accordance, with this Court's directive in *B.J. Alan II* ascribing analytical and, therefore, statutory significance to ***testing*** the "accordance" between a "comprehensive plan" and the "zoning resolution" purportedly in accordance with it. *B.J. Alan II*, ¶ 43.

The Township also fails to address Apple's analysis of R.C. 519.02 *in pari materia* with all other related R.C. Chapter 519 provisions. (See Apple Br. at 17.) That analysis clarifies R.C. Chapter 519's distinct vocabulary (e.g., "comprehensive plan" versus "zoning plan" and "plan of zoning") and its linear process for a township's moving from a "comprehensive plan" for its future development to its adopted zoning regulations. And it discredits altogether the contrived, hybrid term "comprehensive plan of zoning" (Res. §103), to which the Township repeatedly turns as proof that its zoning regulations were adopted "in accordance with a comprehensive plan."

Had Resolution Section 103 recited that the Township adopted its "zoning regulations" as a "plan of zoning," it would match exactly the terminology used in R.C. 519.05, .06, .07, .08, .10, and .11, in which the terms "zoning plan" and "plan of zoning" refer to the specific set of regulations (and any map) that a township adopts "by resolution" to become its zoning resolution.[4] Here, however, the Township applied the modifier "comprehensive" in Section 103 to the phrase "plan of zoning" (consisting of the Township's zoning regulations), and to no other phrase or term. That contrasts with R.C. 519.02, in which "comprehensive" modifies only the term "plan," not "plan of zoning" or "zoning plan." And it is with this "comprehensive plan" that R.C. 519.02 requires a township's zoning regulations (aka its "zoning plan" or "plan of zoning") to be in accordance. Thus, the Township's interpretation of R.C. 519.02 is not helped at all by

[4] Indeed, the "zoning plan" is the only plan R.C. Chapter 519 is designed to produce.

Section 103's characterization of the Township's zoning regulations as a "comprehensive plan of zoning."

Most striking of all, the Township essentially ignores *B.J. Alan II*. That decision starts where R.C. 519.02 logically requires it to, i.e., by examining the "comprehensiveness" of the subject "comprehensive plan" at issue. The Township here offered no reconciliation between *Cassell*'s errant "can I tell by looking at the zoning resolution what I can do with my property" test for "accordance," upon which the Township relies, and this Court's and the 9th District Court of Appeals' analysis in the *B.J. Alan* cases concerning the "comprehensiveness" of "comprehensive plans" generally, and of the "comprehensive plan" there specifically at issue (i.e., the Wayne County "comprehensive plan"). (See Apple Br. at 18-20.) In ignoring *B.J. Alan II* and turning fully back to *Cassell*, the Township only repeats the error of those cases that mistake *Cassell* as authorizing, contrary to R.C. 519.02's plain language, a township's adoption of zoning regulations without guidance from any "comprehensive plan" whatsoever.

In short, the Township has not measurably engaged the contested issues now before this Court. Instead, it has merely repeated the cases illustrating the gap in R.C. 519.02 jurisprudence which, according to the Township and the court of appeals, this Court left open in *B.J. Alan II*.

IV. AS TO PROPOSITION OF LAW NO. 2, THE TOWNSHIP MISINTERPRETS *CASSELL*, AND FOCUSES UNDULY ON A CONTRIVED "SEPARATE DOCUMENT" ISSUE.

A. The Township's Complaint That R.C. 519.02 Does Not Require Zoning Resolutions To Be "Separate Documents" From Comprehensive Plans Elevates Form Over Substance.

The Township continues stirring confusion over whether Apple is insisting (or not) that R.C. 519.02 requires a township's "comprehensive plan" to be a "separate document" from its zoning resolution. (Twp. Br. at 1, 32.) This "separate document" ploy obscures an undisputed

and indisputable truth that has already been acknowledged by the Ninth District Court of Appeals, by the Township's and Apple's land use and planning trial experts, by recognized land use and planning scholars, and by this Court: the contents and purpose of a zoning resolution are not identical to the contents and purpose of a "comprehensive plan." See e.g., *B.J. Alan I*, ¶ 13; *B.J. Alan II*, ¶¶ 11, 40; S. Meck & K. Pearlman, Oh. Plan. & Zoning L. § 4:38 (2014 Ed.) This holds true whether they are separately or singularly bound, and whether they are drafted or compiled by one or by multiple parties. This should dispel further attention to the "separate document" issue.

B. **The Township Offers No Cogent Reconciliation Of This Court's Decisions In *Cassell* And *B.J. Alan II*.**

Of central importance to this dispute is how this Court will reconcile *B.J. Alan II* and *Cassell*. On this point, only Apple's proposed reconciliation accounts for the salient factual and legal distinctions the two cases exhibit.

In short, *Cassell* addresses *constitutional* level infirmities, within a zoning resolution itself, which, because they invalidate the zoning resolution, necessarily thereby preclude its compliance with R.C. 519.02's condition that it be adopted "in accordance with a comprehensive plan." *B.J. Alan II*, on the other hand, addresses R.C. 519.02's express dual *statutory* conditions directly to consider (1) whether the "comprehensive plan" a township relies upon to guide adoption and amendment of its zoning regulations qualifies as "comprehensive" for R.C. 519.02 purposes, and if so, then (2) whether the zoning regulations adopted are in fact "in accordance with [that] comprehensive plan."

The Township rightly recognizes that "*B.J. Alan II* * * * did not imply two different standards for defining a comprehensive plan." (Twp. Br. at 33.) This is true both legally and

factually. But it is true mainly because unlike *B.J. Alan II*, *Cassell* cannot be said to have established any standard for defining a comprehensive plan.

Factually, no "comprehensive plan" was before this Court in *Cassell*, which the Township plainly concedes. (Twp. Br. at 33.) Legally, although *Cassell* quotes the township zoning enabling statute (*Cassell*, 163 Ohio St. at 344), it analyzed Lexington Township's zoning resolution under hornbook "due process" concepts (*Id.* at 345-46). (See Apple Br. at 22-23.) Indeed, the two cases this Court cited for authority in *Cassell* underscore this point. Both involved municipalities (so R.C. 519.02 compliance was not at issue) and both turned on straightforward "due process" and traditional police power analyses. *Cassell*, at 345-46, *citing Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 148 N.E. 842 (1925), and *State, ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942) (involving the Village of Upper Arlington).

B.J. Alan II, on the other hand, identifies and confronts head on the *statutory* questions R.C. 519.02 explicitly poses: i.e., is the "comprehensive plan" at issue truly "comprehensive" for R.C. 519.02 purposes and, if so, is the zoning resolution "in accordance with" that plan. *B.J. Alan II*, 2009-Ohio-5863, ¶¶ 10, 43. *B.J. Alan II* addresses those statutory issues without citing *Cassell*, and without invoking the "due process" considerations (e.g., arbitrariness or unreasonableness) *Cassell* applied. *B.J. Alan II* confronted R.C. 519.02's "comprehensive plan" and "in accordance with" requirements directly, precisely because those question were squarely put to this Court in that case. *B.J. Alan II*, at ¶ 1.

The Township suggests that Apple, by implication, has requested that this Court "discount and disregard *Cassell*." (Twp. Br. at 32.) While Apple maintains that *Cassell* has no application in this case, that is simply because this case does not present the sort of "vagueness"

challenge *Cassell* addresses. Nevertheless, Apple acknowledges the continued vitality of *Cassell*'s treatment of a vagueness defect that fails due process scrutiny (i.e., the law is shown to be arbitrary and unreasonable). 163 Ohio St. at 345-46. This principle remains good law and is routinely and correctly applied under similar circumstances. *See e.g., Clegg v. BZA of Newton Twp.*, 11th Dist. No. 3668, 1987 Ohio App. LEXIS 6611 (May 1, 1987) (after a lengthy quote from *Cassell*, the court held that "the present form and substance of the R2 classification of the Newton Township zoning Ordinance is invalid and unconstitutional."); *Bd. Of Trustees of Ridgefield Twp. v. Ott,* 6th Dist. No. H.-93-16, 1994 WL 17542, *12 (Jan. 21, 1994) ("[I]n a case, such as the one before us, the failure to designate a specific business/commercial area is unreasonable and arbitrary and is not related to any comprehensive plan. * * * The court also erred in failing to find the Ridgefield Township Zoning Ordinance was invalid and unconstitutional.").[5]

Cassell holds that township zoning regulations which do not adequately inform landowners how they can use their property are not "adopted in accordance with a comprehensive plan." *Cassell*, paragraph two of the syllabus. There was no comprehensive plan for the Court to review in *Cassell*. Nevertheless, the result would have been no different even if a comprehensive plan had been before the Court in *Cassell.* Either way, the regulations themselves would fail to adequately inform landowners how they can use their land. Thus, neither scenario would have required comparing those regulations with a comprehensive plan.

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[5] On remand in *B.J. Alan Co. III*, after this Court had determined that the Wayne County Comprehensive Plan "constitutes a comprehensive plan for purposes of RC. 519.02," the court of appeals analyzed the Congress Township Zoning Resolution for accordance with that plan. After noting conflicts between the text of the township's zoning resolution and its zoning map, and the absence from the resolution of any explanation for those conflicts, the court of appeals held that there was nothing in the Comprehensive Plan "that would recommend internally inconsistent zoning as part of its comprehensive plan." 2010-Ohio-6449, ¶12.

These *Cassell* dynamics further undermine the Township's reasoning. The Township reasons that if the zoning regulations in *Cassell* ***did*** clearly inform landowners how they can use their land, then those regulations would ***constitute*** Lexington Township's comprehensive plan, thus obviating the need for accordance between those regulations and anything else. This is the genesis of the errant, so-called *Cassell* "test," i.e., if a township's zoning regulations adequately inform landowners how they can use their land, those regulations necessarily satisfy R.C. 519.02's "accordance" requirement. In truth, *Cassell* held only that if a township's zoning regulations do not adequately inform landowners how they can use their lands, then they could under no circumstances be deemed to be in accordance with a comprehensive plan, ***whether one exists or not***. By mistaking this *Cassell* dynamic, the Township, like many courts of appeals, has effectively negated the "in accordance with a comprehensive plan" requirement that has always been part of R.C. 519.02.

V. RESPONSE TO BRIEF OF AMICUS CURIAE OHIO TOWNSHIP ASSOCIATION.

Amicus Curiae Ohio Township Association ("OTA") has submitted a brief ("OTA Br.") in favor of the Township's position. In addition to promoting and preserving township government (OTA Br. at 1), OTA describes itself as "a strong advocate of private property rights." (OTA Br. at 2.) It warns that if R.C. 519.02 requires more than a showing that a township's zoning regulations are merely "in accordance with" themselves, then the zoning authority of the townships OTA promotes and preserves would be under attack by developers, home builders, businesses, and industries intent on exercising the private property rights for which OTA claims to be a strong advocate. (OTA Br. at 1-3.)

The apparent difficulty of its mission here is further complicated by the position it took in its amicus brief urging this Court to accept jurisdiction to hear *B. J. Alan II*:

> 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**....

Memorandum Of Amicus Curiae Ohio Township Association In Support Of Jurisdiction On Behalf Of The Appellant The Congress Township Board Of Zoning Appeals, *B.J. Alan Company v. Congress Township Board of Zoning Appeals*, Ohio S. Ct. Case No. 08-0306 (Feb. 11, 2008) at 1-2 (emphasis added). This Court's decision in *B.J. Alan II* was consistent with the OTA's formulation, but that case is discussed nowhere in OTA's Brief in this case.

In addition to completely ignoring *B.J. Alan II*, OTA's Brief misstates Apple's positions and, in the main, is appropriately directed only to the General Assembly.

A. ***B.J. Alan II* Addresses OTA's Principal Concern.**

OTA complains that a decision from this Court reversing the Court of Appeals' split decision below will impose on many townships a financial burden that they cannot carry:

> Many of these townships simply do not have the financial resources or the expertise to create detailed, rigid, separate comprehensive plans. More often than not, the creation of a comprehensive plan costs in the tens of thousands of dollars and may take months, or perhaps even years, to formulate.[6]

(OTA Br. at 6.) This lament is telling. The OTA's point at least implicitly acknowledges the existence of a known process for creating "comprehensive plans," which involves consulting experts and a community's investment of time and resources. The OTA neither suggests nor intimates that this process is interchangeable with or can be mistaken for the process for formulating zoning regulations. Indeed, the OTA does not even suggest that merely having a zoning resolution obviates either the comprehensive plan process, or the potential expense of preparing one. Its point underscores the obvious and only logical understanding of R.C. 519.02's

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[6] There is no evidence in the record as to the cost of formulating a comprehensive plan for a township.

accordance requirement: that "comprehensive plans" and the regulations adopted by resolution "in accordance with" them are not and cannot be one and the same.

Moreover, *B.J. Alan II* already eased these supposed burdens. It held that R.C. 519.02 does not require townships to adopt their own comprehensive plans, and that townships may adopt their zoning regulations "in accordance with" another entity's comprehensive plan. As this Court made clear in *B.J. Alan II*, R.C. 519.02 requires only that a township's zoning regulations be "in accordance with" some comprehensive plan. A comprehensive plan adopted by the county in which the township is located, a neighboring municipality, a regional agency, or even a neighboring township might suffice under *B.J. Alan II*, and might cost the township nothing.

B. <u>OTA Misstates Apple's Positions.</u>

According to OTA, Apple argues for an interpretation of R.C. 519.02 that requires Ohio's townships to adopt their own comprehensive plans. (OTA Br. at 8.) Apple asserts no such argument, and has repeatedly acknowledged *B.J. Alan II*'s explicit rejection of such a claim. 2009-Ohio-5863, ¶13.

OTA also says that Apple argues for "a rigid, detailed, and unrealistic definition of what actually constitutes a 'comprehensive plan'" that would impact every township in Ohio "in a manner that was never intended by the Ohio General Assembly." (OTA Br. at 3.) Of course, many Ohio townships do develop "comprehensive plans," in the sense that planners understand that term, revisit them cyclically, and rely on them when adopting and amending their zoning regulations. Regardless, the OTA neither quotes nor describes the "rigid, detailed, and unrealistic definition" for which Apple allegedly advocates.

In fact, Apple has not proffered a fixed definition of "comprehensive plan" and has not urged this Court to adopt one. Rather, Apple urged this Court to reject the Township's argument,

i.e., that it satisfied R.C. 519.02 by enacting its Resolution in accordance with its Resolution, based on "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.*" (Apple Br. at 21).

OTA also accuses Apple of misconstruing the position it staked in its amicus brief in support of jurisdiction in *B.J. Alan II.* (OTA Br. at 9.) Apple's Brief actually quotes the OTA's jurisdictional memorandum verbatim. (Apple Br. at 19, n. 12.) In that memorandum (at pages 1-2), OTA explained that R.C. 519.02 establishes two preliminary requirements must be met **before** a township can adopt a zoning resolution: first, a comprehensive plan must exist; and second, the resolution must be enacted "in accordance with the existing comprehensive plan."

This interpretation squares completely with R.C. 519.02's language and with Apple's contentions here. But in its amicus brief in this case, OTA proffers a "clarification" of its position: "nothing in R.C. 519.02 or subsequent precedent requires that the zoning resolution and comprehensive plan be separate, distinct documents." (OTA Br. at 9-10.) This "clarification" is contradicted by the clear logic of OTA's prior representations to this Court that a comprehensive plan must be in existence **before** a township zoning resolution can be adopted in accordance with it. And it is refuted by Apple's arguments in this Reply Brief and in its Merit Brief.

C. OTA's Arguments Are, In The Main, With The General Assembly.

The only burden on the Township at issue in this case is that imposed by the General Assembly in R.C. 519.02. It requires every township zoning resolution to be in accordance with a comprehensive plan. A township unwilling or unable to enact zoning regulations in accordance with a comprehensive plan cannot exercise the zoning authority conferred by the statute.

In response, the OTA argues circularly:

> It makes no sense from a statutory construction perspective, nor from a practical and common sense standpoint, that if a township unambiguously demonstrates commitment to a comprehensive plan by and in its zoning resolution, that the zoning resolution is nevertheless invalid because it is not in accordance with a separate, distinct comprehensive plan document.

(OTA Br. at 10.) The OTA's objections to the supposed "impracticality" or lack of "common sense" inherent in R.C. 519.02's conditions are of no weight here. This "policy" argument simply demands that this Court read "in accordance with a comprehensive plan" out of R.C. 519.02. As recognized in *B.J. Alan, II*, that is not something this Court can or should do. And as the OTA recognized, that is something that the General Assembly has declined to do since first enacting the statute.

VI. CONCLUSION

R.C. 519.02 has always required township zoning regulations to be "in accordance with a comprehensive plan." While the General Assembly has never defined "comprehensive plan" as the term is used in the statute, a holding that a "comprehensive plan" may consist of zoning regulations that adequately inform landowners how they can use their property, as the court below held, completely obviates the "accordance" always required by the General Assembly. It is not enough that a township's zoning regulations adequately inform how land in its unincorporated areas may be used. To satisfy R.C. 519.02, a township's zoning regulations must be in accordance with the product of a considered planning process that includes but is not confined to land use within the township.

If a township claims that its zoning resolution is in accordance with a comprehensive plan, a county planning official, an expert land planner, a property owner, and a court all ought to be able to compare the resolution to the plan to verify that accordance. If the plan and the resolution are one and the same, the comparison exercise is futile.

The tenacious, decades-old fissure in construing R.C. 519.02 presented here 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. *B.J. Alan II* requires a 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 ***Reply Brief of Appellant, Apple Group, Ltd.*** was served by e-mail on the following Attorneys for Appellees Board of Zoning Appeals of Granger Township, et al., and Amicus Curiae, Ohio Township Association this 13th day of September, 2014:

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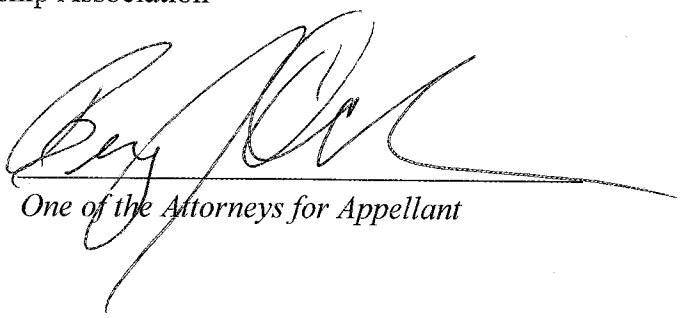

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