

**IN THE SUPREME COURT OF OHIO**

<b>APPLE GROUP LTD.,</b>	)	<b>SUPREME COURT</b>
	)	<b>CASE NO. 2014-0301</b>
<b>Appellant</b>	)	
	)	<b>ON APPEAL FROM THE</b>
<b>vs.</b>	)	
	)	<b>COURT OF APPEALS</b>
	)	<b>NINTH APPELLATE DISTRICT</b>
<b>BOARD OF ZONING APPEALS,</b>	)	<b>MEDINA COUNTY, OHIO CASE NOS.</b>
<b>GRANGER TOWNSHIP, OHIO, et al.</b>	)	<b>12 CA 0068-M and</b>
	)	<b>12 CA 0065-M</b>
<b>Appellees</b>	)	

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**RESPONSE OF APPELLEES**  
**BOARD OF ZONING APPEALS GRANGER TOWNSHIP,**  
**OHIO, GRANGER TOWNSHIP BOARD OF TRUSTEES AND**  
**ZONING INSPECTOR TO MOTION FOR RECONSIDERATION**

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## RESPONSE

Supreme Court Rule of Practice 18.02 provides an avenue for Appellant's (hereinafter "Apple") Motion for Reconsideration. However, the motion "... shall not constitute a reargument of the case. ..." See, S. Ct. Prac. R. 18.02(B). Although the arguments that Apple puts forth in its motion are clearly a reargument of the case and one more attempt to manipulate the definition of a comprehensive plan to meet Apple's needs. In addition, Apple attempts to improperly introduce new evidence, as discussed on page 11 of the motion and attached to it at the end, in an effort to reargue the merits of its case. Simply, Apple is using this motion as an avenue to express its disagreement with the conclusions and/or logic used by this Court.

Apple's arguments and motion however, are disingenuous. Apple has changed its arguments throughout this process to serve its purpose. In the Court of Appeals Brief, Apple states, in part:

... however, the magistrate also misstated Apple's argument by saying that "[in] Apple Group's view Granger Township must have a comprehensive plan separate and apart from the Zoning Resolution" to comply with R.C. §519.02 (2/2/12 Mag. Dec., pp. 19-20). Rather, Apple contends that the apposite legal standard for assessing "comprehensive" which was not applied below, exposes the resolution as not "comprehensive" regardless of how the R.C. §519.02 "comprehensive plan" upon which Granger Township's Zoning relies is documented.

(See, Apple's Appellate Brief p. 17).

Before this Court, Apple has extensively argued in its memorandum in support of jurisdiction and its merit and reply briefs that the law provides for two separate and distinct documents. Apple again relies on that same tired argument in its motion for reconsideration, despite it having been rejected by this Court and having previously been denied by the trial court and the appeals court as well. The majority rightfully found that a comprehensive plan and township zoning

resolution need not be a separate and distinct document. See, Syllabus at 1. See, also, Decision at ¶ 28. Furthermore, Justice Kennedy, in her dissent also rejects Apple’s argument that there must be two separate documents to comply with R.C. §519.02. See, Decision, dissent at ¶’s 76, 78 & 79.

The Medina Court of Common Pleas, the Ninth District Court of Appeals and now this Honorable Court have consistently found that the Granger Township Zoning Resolution is constructed in accordance with a comprehensive plan as required in RC §519.02. Nonetheless, Apple’s haughty singular contention in its motion for reconsideration continues to be that each of the courts that have heard this matter is wrong; and that instead Apple is correct in asserting that a comprehensive plan must be a separate and distinct document.

Apple once again argues the merits of its case and now resorts to improperly providing evidence to this Court that has never been in the record. In doing so on page 11 of their motion, Apple indicates that; “In 2012-2013, the Ohio Lake Erie Commission and the Ohio Water Resources Council, both state agencies, adopted “Linking Land Use and Ohio’s Waters; Best Local Land Use Practices...” See, Motion p. 11. Apple attempts to use that document to bolster the testimony at the trial that occurred on November 16-19, 2009 and to persuade this Court that their definition of “comprehensive plan” is correct. Although the document in which Apple relies on was not created by Apple’s own admission until 2012-2013, approximately three (3) years after the trial. See, Motion p. 11.

Apple boldly asserts that this Court’s Decision, “... will no doubt bewilder the substantial portion of Ohio’s 1,308 townships which have adopted Zoning Resolutions under R.C. 519.” See, Motion p.2. Furthermore, Apple opines that the decision, “... presents a stunning about-

face from this Court’s well-reasoned precedents...” See, Motion p. 3. To the contrary, the Court’s Decision has clarified the law.

In Apple’s Memorandum in Support of Jurisdiction, Apple discusses how there is no definition of comprehensive plan in R.C. Chapter 519 and how case law has distorted the precedent of *Cassell v. Lexington Twp. BZA*, (1955) 163 Ohio St. 340, 127 N.E. 2d 11. In response this Court confirmed the age old precedent by utilizing the guidance set forth in the *Cassell* case, which was decided approximately 60 years ago. See, Decision at ¶’s 10 & 12. Instead of departing from precedent and the cases decided after *Cassell*, this Court used the principles of *Cassell* and affirms it. In confirming the principles set approximately sixty (60) years ago, this Court properly clarified and agreed;

... with those appellate courts that have considered the issue and have held that a comprehensive plan need not be set forth in a separate document and may be included in the township’s zoning plan.

See, Decision ¶ 28.

A clear reading of R.C. §519.02 reveals that this clarification is correct, as R.C. §519.02 does not include the word “separate” in it as Apple would like to interlineate into the statute. Neither R.C. §519.02 nor case law indicate in any way that a separate comprehensive plan is necessary. Inserting the word separate in R.C. §519.02, as Apple suggests, would ignore the legislative intent. This Court properly refrained from inserting “separate” therein to Chapter 519 of the Revised Code and correctly set forth a definition for comprehensive plan indicating that:

A comprehensive plan is defined as one that reflects current land uses within the townships, allows for change, promotes public health and safety, uniformly classifies similar areas, clearly defines district locations and boundaries, and identifies the use or uses to which each property may be put. Granger’s Zoning Resolution was enacted in accordance with such a comprehensive plan pursuant to R.C. 519.02.

See, Decision at ¶ 28.

Ironically, this Honorable Court, in its Decision, did exactly what Apple first requested in its Memorandum in Support of Jurisdiction: it defined the term comprehensive plan and what it means for a zoning resolution to be enacted in accordance with a comprehensive plan. Unfortunately for Apple, the Court's definition is not as Apple wants it to be defined. Now Apple is improperly rearguing this matter through a motion for reconsideration by attempting to once again propound, an incorrect definition of comprehensive plan.

Therefore, Appellee (hereinafter "Granger") respectfully requests that this Court deny Apple's Motion for Reconsideration.

### **ARGUMENT**

Apple argues that somehow "The Decision Distorts Ohio Township Zoning Authority and Creates Conflicts Among R.C. Chapter 519's Provisions." Yet nothing in its argument is anything new. Apple's Motion is simply a regurgitation of previous arguments put forth to this Court, to instead distort this Court's Decision in an attempt to create Apple's self serving vision of a comprehensive plan.

Apple initially argues that the Decision effectively construes the terms zoning resolution and comprehensive plan as synonymous. It conflicts with other operative terms of §519.02 and sets the stage for a dispute. Such a characterization is unfounded.

This Court carefully considered the meanings of the terms "comprehensive plan" and "zoning resolution." Contrary to Apple's argument, this Court recognizes that; "[t]here is no standard definition for "comprehensive plan" in the context of zoning law..." Yet, "... R.C. Chapter 519 offers detailed instructions on how townships are to adopt or amend zoning plans or resolutions..." See, Decision ¶ 9 & 10. Taking these detailed instructions into consideration,

this Court clearly defines the term comprehensive plan and how zoning resolutions are to be enacted to be “in accordance with a comprehensive plan.”

Apple absurdly claims that the Court’s Decision defines a properly enacted zoning resolution pursuant to R.C. §502.19 as being synonymous with a “comprehensive plan.” Apple’s assertion is without foundation as nowhere in the Court’s Decision is that expressed or even implied. To the contrary this Court states in its syllabus “[a] comprehensive plan pursuant to R.C. 519.02 may be included within a township zoning resolution and need not be a separate and distinct document.” See, Decision, Syllabus at 1 and ¶ 28. Furthermore, in the body of the Decision this Court indicated:

We agree with Granger that the plain meaning of the phrase “in accordance with a comprehensive plan” is that zoning regulations should be adopted pursuant to a plan that is comprehensive, or all-encompassing, in the sense that the plan addresses the specific goals and objectives for the entire township. This definition is implied in, and in keeping with *Cassell*, which emphasizes that comprehensive plans are essential to protecting against arbitrary enforcement of zoning regulations. Another court of appeals decision, however, is even more helpful in establishing a meaning of the contested phrase. *White Oak*

....

Thus, the zoning resolution is intended to be a comprehensive plan for the entire township. And all six *White Oak* points are met.

See, Decision at ¶’s 14 & 19.

Clearly the Court sees that the zoning resolution and the comprehensive plan are distinct things which are not synonymous.

Then Apple goes on, relying on its straw proposition, to disingenuously argue that the Court’s Decision is a distortion of the law, which “...transgresses the legislative prerogative” and which creates “...irreconcilable conflicts,” prompting further disputes and litigation. All of

Apple's arguments in Section II of the motion are without merit as they rely on the unsupportable assertion that the Court sees a comprehensive plan and a properly enacted zoning resolution as the same thing.

Apple argues further that this Court's comprehensive plan definition lacks any connection with the "Term's Technical Zoning Definition." Once again, this argument is another way of rearguing their case. While making that argument, Apple, without any basis, claims that; "The Decision leaves Ohio with a test for "accordance" and a "comprehensive plan" definition which for zoning purposes, will prove unrecognizable as such to land use professionals anywhere." See, Motion p. 7. Then goes on to support that comment by rearguing their case with testimony, some of which is a duplication of the testimony outlined on pages 7-11 of Apple's Merit Brief. Incorrectly, Appellant reargues its case presuming that this Court did not review the record as Apple indicates in part that "... the trial record, which the Decision does not consult, conclusively informed this definitional..." issue of the comprehensive plan. See, Motion p. 7. Then Apple inserts new evidence of which Granger objects to in support of Apple's planner's definition of comprehensive plan. Although nothing in R.C. Chapter 519 requires the use of planners in the creation of a comprehensive plan let alone their definition or in this matter Apple's definition. The Dissent also recognized that stating:

The statute did not require a comprehensive plan formulated by professional planners after completion of expensive studies. Instead, the statute requires a zoning commission, in the development of the zoning plan to make use of "information and counsel" from "public officials, departments and agencies," but it leaves to the discretion of the township and its financial health, whether to employ "planning consultants." See, *R.C. 519.05*.

See, Decision, dissent at ¶ 77.

Simply, the Townships will understand the definition of comprehensive plan set forth by this Court.

In support of its conclusions Apple again cites portions of the testimony as it has done in the various briefs. Granger certainly disagrees with Apple's characterization of the testimony as outlined on 7-11 of the motion and to avoid the reargument of this matter as Apple has done, asserts to this Court that this issue was addressed thoroughly on pages 9-13 of Granger's Merit Brief. Apple's recitation of the transcript and insertion of new evidence is simply a veiled attempt to reargue that its definition of comprehensive plan is better than this Court's. Yet, this Court correctly acknowledged that "[t]here is no standard definition for comprehensive plan" in the context of zoning law." See, Decision at ¶ 9. Therefore, there can be no categorical deficiencies, as there was nothing to compare with this Court's definition, other than Apple's self serving one that it proposes to dictate.

Apple drones on to argue that the "...Decision Violates Well-Settled Statutory Construction Principles and Apposite Precedent." Once again Apple utilizes this argument to reargue it's case as this is nothing they have not previously argued. Apple starts this argument by indicating that "[t]he Decision's innovated "comprehensive plan" definition plainly violates R.C. 1.42." See, Motion at p. 12.

This Court has already found that such an allegation has no merit. Apple has already argued that:

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 to its meaning. *Id* (citing R.C. 1.42).

See, Apple’s Merit Brief at p. 21.

This Court addressed the issues that Apple seeks to reargue and rightfully indicated that “[t]here is no standard definition for “comprehensive plan” in the context of zoning law.” See, Decision at ¶ 9. Then this Court clearly stated:

Apple argues that the term “comprehensive plan” is a term of art among zoning professionals and that the statutory language must be interpreted according to the meaning prevalent in that profession. This court, however, has never treated the term “comprehensive plan” as a term of art, and no court has found that the phrase “comprehensive plan” has acquired a technical or particular meaning pursuant to R.C. 1.42. We have emphasized that “the plain meaning of a statute is always preferred.” *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 40, citing *Lamie v. United States Trustee*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Furthermore, “[i]f a review of the statute conveys a meaning that is clear, unequivocal, and definite, the court need look no further.” *Columbus City School Dist. Bd. of Edn. v. Wilkins*, 101 Ohio St.3d 112, 2004-Ohio-296, 802 N.E.2d 637, ¶ 26.” *Id.* at ¶ 38. Our consideration of the statutory language leads us to conclude that no formally enacted comprehensive plan is required by R.C. 519.02.

See, Decision at ¶ 13.

Apple just does not agree with the Court’s clear and concise conclusions and logic and is using this motion to express the same old tired and failed arguments once again.

Another example of Apple’s attempt to reargue its case is the four (4) page dissertation of the *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals*, 124 Ohio St. 3d. 1, 2009-Ohio-5863, 918 N.E. 2d 501 case. The *B.J. Alan* case was discussed at length by both parties in the Merit Briefs as well as many other documents filed in the record. Yet, once again, Apple chooses to reargue its position on that matter. Despite Apple’s repetition of its argument on *B.J. Alan*, Granger asserts that this Court came to the correct conclusion that *B.J. Alan* provided principles

to aid this Court in answering the issue. See, Decision at ¶ 12. Clearly, this Court followed the principles outlined in the *Cassell* case and its prodigy, as well as the principles set forth in *B.J. Alan*. As such, Granger urges the Court to reject again Apple’s reargument of the *B.J. Alan* case and deny the Motion for Reconsideration.

Finally, Apple argues that the Decision damages the predictability and continuity of Ohio Law. Again, this argument is without merit.

The Decision in this matter is consistent with the Court’s previous cases that provided guidance to this Court in making the Decision. See, Decision at ¶ 12. Contrary to Apple’s narrow view, the Court indicated that the sixty (60) year old case of *Cassell v. Lexington Twp. Bd. of Zoning Appeals*, 163 Ohio St. 340, 127 N.E. 2d 11 (1955) and recent case *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals*, 124 Ohio St. 3d 1, 2009-Ohio-5863, 418 N.E. 2<sup>nd</sup> 501 each “... sets forth principles that aid us in our decision.” See, Decision ¶ 12.

As it has done throughout this matter Apple chooses to completely disregard the *Cassell* case and its prodigy. Apple simply wants this Court to discount and disregard *Cassell*, as well as this Court’s own elaboration of that case in *B.J. Alan*. However, the Decision outlines the Court’s guiding principles, which were followed. See, Decision at ¶ 12. Guided by those principles this Court also utilized the conclusions outlined in the Twelfth District Court of Appeals case *White Oak Property Dev., LLC v. Washington Township*, 12<sup>th</sup> Dist. Brown No. CA 2011-05-011, 2012 Ohio 425, which utilized the principles set forth in both *Cassell* and *B.J. Allan*. See, generally, Decision at ¶’s 14, 15 and 16. Specifically, this Court correctly adopted the factors considered by the 2012 *White Oak* court “... to be indicative of a comprehensive plan...”. See, Decision at ¶ 16. Relying on case law that has been in place for almost 60 years

and thereafter, does not promote the non-predictability or failure to have the continuity that Apple would suggest.

Apple would like the Court to look at this matter with blinders on and ignore the long standing case law in the *Cassell*, *White Oak* and *B.J. Alan* cases that this Court has relied on. Contrary to Apple's claim, this Court's decision bolsters continuity and allows Ohio townships to rely on case law which now provides a clear and unequivocal definition of a comprehensive plan, to guide them in preparation of the same. If the Court was to follow what Apple is asking it would promote what Apple argues it wants to prevent.

Contrary to Apple's belief this Decision clarifies and supplements the 60 years of case law that followed *Cassell*. In addition, the Decision provides clear guidance to townships in Ohio on what the definition of comprehensive plan is and more importantly that a comprehensive plan may be included within a zoning resolution, leaving no room for question.

### **CONCLUSION**

Upon review of Apple's Motion, it is quite clear that Apple is rearguing its case, which as this Court has noted in S. Ct. Practice R. 18.02 is inappropriate. Apple continues to argue the same things that were exhaustively argued throughout this matter, that a comprehensive plan and zoning resolution must be separate documents. The Motion for Reconsideration is nothing more than a regurgitation of Apple's prior arguments to promote its self serving definition of a comprehensive plan.

Apple, however, goes a little further and improperly attempts to put additional evidence in front of the Court by way of the attachment to the Motion of which Granger objects. This evidence again is used in an attempt to create its own self serving definition of "comprehensive

plan” that they insist should be the same as their own planner’s definition. Yet, Chapter 519 of the Revised Code does not even require a comprehensive plan to be formulated by a professional planner. See, Decision, dissent at ¶ 77.

The Decision utilizes various precedent set forth in the law, and solidifies the definition of comprehensive plan which will clearly prevent future problems. Furthermore, it provides guidance to all Ohio townships in their quest to create legal comprehensive plans and zoning resolutions which despite Apple’s contention may be one document of which the majority and dissent both agree. Therefore, for the foregoing reasons Granger respectfully requests that Apple’s Motion for Reconsideration be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing *Response of Appellees Board of Zoning Appeals, Granger Township, Ohio, Granger Township Board of Trustees and Zoning Inspector to Motion for Reconsideration*, was served by regular U.S. Mail, postage prepaid, on the following this 8th day of July, 2015:

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