

IN THE SUPREME COURT OF OHIO

George Martens et al Appellants

vs.

City of Findlay et al Appellees

Case No.

2017-1277

Motion for Reconsideration

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REQUEST to RECONSIDER ITS DENIAL TO HEAR THE APPEAL

For the reasons fully explained in the memorandum that follows, Appellants respectfully requests the Court to reconsider this Court's decision to not accept the Appellants' Appeal.

The purpose of a full hearing in the Hancock County Common Pleas Court under Ohio Law (ORC 2506 et seq. ), is not merely to get a zoning Order reversed or vacated, as it was, but to obtain a ruling on the Constitutionality of the zoning law/order. The purpose of the Appeal to the Third District Appeal Court was to establish and provide for that right under statutory law, ORC 2506 et seq. The Appellants well understood that the BZA decision was vacated and a new hearing was ordered, but they were nevertheless denied as part of the HCCPC hearing, a question of the Constitutionality of the order to begin with.

The Appellants right to such a hearing, as to the Constitutionality of the zoning order/rule, is a matter of law and due process rights shown in repeated Court cases cited below and in the Memorandum of Jurisdiction.

Pursuant to Supreme Court Practice Rule XI, Section 2(A)(1), Appellants moves the Court for reconsideration of its order, journalized on January 31, 2018, in which the Court declined jurisdiction to hear this discretionary appeal. The Appellants respectfully requests that the Court reconsider its decision and accept jurisdiction. The Appellants are mindful of the Court's admonition that its Rules of Practice do not permit motions for reconsideration to rehash arguments already advanced. This motion endeavors not to do so. Rather, this motion seeks to address facts of record and law which may have impacted upon the Court's decision to decline jurisdiction.

APPELLANTS MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

## I. INTRODUCTION

The Appellants ask this Court to notice that: 1. No opposition was ever filed by the Appellees; 2. Appellees never responded in any manner; 3. There are no remedies afforded to the Appellants to obtain a ruling of the Constitutionality of the zoning order/rule..4. The Appellants' Appeal to the Third District Court and its dismissal is in clear opposition to other Ohio District Appeal Court's acceptances and rulings.

This Court's refusal to hear this Appeal would establish a chilling effect upon all Ohio residents who wish to defend their property rights and due process rights. The Third District Appeal Court stands in stark contrast to its own precedent and indeed to the majority of other Ohio Appeal Court precedents.

## II. Statement of Facts and Proceeding

The Appellees never responded to the Appellants appeal and made no arguments as to jurisdiction. The HCCPC had before them the transcript of the zoning hearing and agreed that the zoning hearing was unlawful but refused to hold an evidentiary and Constitutional hearing, that was requested by the appellants, under ORC 2506.04. The HCCPC instead ordered the zoning board to rehear the original zoning appeal in light of the unlawful hearing but denied a ruling on the constitutionality of the zoning order/rule, as required and/or allowed under ORC 2506 et seq... The HCCPC in its order and judgment, as submitted, clearly agreed that the zoning board acted unlawfully which is grounds under ORC 2506.04 for a full evidentiary hearing. The request for a constitutional question of law by the Appellants was never provided or addressed by the HCCPC. The record shows the Constitutionality of the Zoning Ordinance was requested by the Appellants to the HCCPC. The Third District Court of Appeals dismissed the Appellants appeal on the grounds there was no final Appealable Order and its lacked jurisdiction. The Appellants filed an Appeal to this Court, in that such a ruling by the Third District is unsupported by law and precedent, citing many cases in the filed memorandum for jurisdiction. Also, the denial of a hearing

on the Constitutionality of the zoning order/rule is final and can not be provided for by the BZA under Ohio law. The Appellants objected to the ruling in all courts and obtained no redress. When the HCCP Court remanded the zoning appeal to the BZA, it finalized the closure of a hearing on the Constitutionality of the zoning order in its court, until the Appellants again go through BZA hearing and files a new appeal to the HCCPC. They have nowhere else to go but this Court to get a hearing in the HCCP to determine the Constitutionality of a zoning rule/order as allowed by law now.

### 111. Law and Argument for Reconsideration

A. The refusal of the Third District Court to support the Appellants' right to a ruling on the constitutionality of the zoning Order and/or to introduce further evidence flies in the face of the Third District Appellate Court's own rulings:

1. Third District Court of Appeals case law - Schellhardt v. Mercer Cty. Bd. of Zoning Appeals,

2008-Ohio-2116.

2. .Brenneman Bros. v. Allen Cty. Commrs., 2013-Ohio-4635 (page 12)

3. Haisley v. Mercer Cty. Bd. of Zoning Appeals, 3d Dist. No. 10-07-05, 2007-Ohio- 6021, ¶9, citing Briggs v. Dinsmore Twp. Bd. of Zoning Appeals, 161 Ohio App.3d 704, 707, 2005-Ohio-3077, 831 N.E.2d 1063;

4. Henley v. Youngstown Bd. of Zoning Appeals (2000), 90 Ohio St.3d 142, 147, 735 N.E.2d 433.

B. THe Third District Court exercised an Abuse of Discretion and ignored their own rulings under statutory law for a Constitutional review of the Hancock County Common Pleas Court's judgment when such a constitutional review was requested.(above A and Appellants ask this court to take judicial notice in filings)

The Appellants argue that the trial court's decision was unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. "Appellate courts must not substitute their judgment for those of the administrative agency or the trial court absent

the approved criteria for doing so." Haisley, 2007-Ohio-6021, at ¶10, citing Briggs, 161 Ohio App.3d at 707-708. This Court is being asked to allow the Appeal in their Court in light of the abuse of discretion by the HCCPC and the Third District Appeal Court. Both Courts should have allowed a hearing and ordered such a hearing respectively.

C. Other Ohio District Appeal Court Decisions that support a hearing by a Common Pleas Court of the Constitutionality of an ordinance when requested:

1. Seventh District's ruling in: Gonda v. Austintown Twp. Bd. of Zoning Appeals, 2006-Ohio-670,

which reverses the Common Pleas Court's judgment;

2. Fifth District in: Snee v. Jackson Twp., 5th Dist. No 2003CA 00109-2003-Ohio-5319 "the issue of the constitutionality of

zoning restrictions must be tried originally in the Court of Common Pleas"

3. Eight District's ruling in: Bencin v. Bd. of Bldg. & Zoning Appeals, 2009-Ohio-5570; Ziss Brothers Constr. Co., Inc. v. Indep. Planning Comm at ¶42, 43

4. Tenth District's ruling in: RIFE v. FRANKLIN CTY. BD. OF ZONING APPEALS 97 Ohio App.3d 73 (1994)

5. Eleventh District Ruling in: ;; Manning v. Straka (Lorain, 1962), 117 and Natural Health Found. v. Willoughby Bd. of Zoning Appeals, 2003-Ohio-5706; Pacific Financial Services of Am., Inc. v. Deerfield Twp. Bd. of Zoning Appeals (Nov. 17, 1989) 11th Dist. No. 1997, 1989 Ohio App.; RICKARD v. KNOPSNIDER 142 Ohio 142 Ohio App.3d 235 (2001)

6. Second District SMC, Inc. v. Laudi (1975), 44 Ohio App.2d 325, 73 O.O.2d 378, 338 N.E.2d 547; Ohio App. 55 (the issue of the constitutionality of zoning restrictions must be tried originally in the Court of Common Pleas.).

D. The Third District Court has wrongfully applied ORC 2505(B) in that a Judge Starns'

"vacate(d)" a judgment, which makes it a final judgment. (ORC 2505.02(B)(3)

1. R.C. 2505.02(B)(3) of the Ohio Revised Code provides that "[a]n order is a final order ....that vacates a judgment... that grants a new trial." Judge Starns "vacate(d) the BZA judgment and ordered a new trial, after vacating the BZA's judgment (see Conclusion of June, 2017 Judgment). The Timeline is: The first trial was held and the Appellants lost, that judgment was then vacated and a new trial is now ordered by Judge Starns. The Quasi-Judicial hearing by the BZA is a "trial" by precedent and statute, (i.e. 2506.03 Hearing. (A) The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action").

The Appellants contend that Judge Starns' order fit a final order in that it vacated a judgment and ordered a new trial by the BZA.

2. per ORC 2506.04 "The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure".

The Appellants contend that Third District Appeal court did not properly apply the substantive law to the facts of the case. Substantive law is found in ORC 2506 et seq and associated Ohio Court Opinion precedences. (above A and B), i.e. Appellants have the ability to contest the Constitutionality of a zoning rule in a Common Pleas Court appeal proceeding (hearing).

It appears that under the Third District Court thinking, all Common Pleas Court (ORC 2506) hearings can avoid the issue of Constitutionality. The Appellants believe that Common Pleas Courts in Ohio, when asked by an Appellants, are required to rule on the Constitutionality of a zoning order in order to save resources in new trials and new proceedings. The intent of the Ohio legislature was to provide for a Common Pleas hearing, that would at least rule on the Constitutionality of a zoning Ordinance to prevent repeated BZA unconstitutional orders by a municipalities. Also, The Appellants'

rights have a strong likelihood of being continually infringed upon by Appellees in future zoning orders and appeals.

OTHER CITES: Rule 18.02

### Conclusion

The Appellants respectfully ask this honorable Court to Reconsider the Appellants' appeal and reverse their decision. To not do so would open up the judicial process to perceived fundamental unfairness, as there is no other adequate remedy for Appellants to protect against Appellees' continual infringement upon Appellants' lawful processes afforded in ORC 2506 et seq , i.e. is the zoning Order Constitutional . A County Common Pleas Court can not disregard the clear process imposed upon it under ORC 2506. et seq.. The HCCPC is the only entity that can rule on the constitutionality of a zoning order/ rules, and therefore the the Appellants were denied such a ruling by the HCCPC.

If not here (this Court) then where and what court can Appellants go for redress that bas been assured him by Article 1,Section 16 of the Ohio Constitution and ORC 2506.

cite: Constitution, Article 1, Section 16, which states: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Therefore, Appellants pray this honorable Court to reconsider Appellants' Appeal to prevent Appellees and the HCCPC from abusing its discretion and exceeding its authority by denying local residents from a full evidentiary hearing, i.e. a constitutional ruling. When a motion for reconsideration is granted, the Court can go in a new direction( [State ex rel. Gross v. Indus. Comm.](#)), and the Appellants ask this court to reconsider their refusal to hear this case and go in the direction to establish the rights of Ohio citizens when a zoning board acted unlawfully with a unconstitutional zoning rule/order..

### CERTIFICATE OF SERVICE

I certify that a copy of this document was mailed to Donald Rasmussen counsel for the Appellees by

regular U.S. Mail and/or electronically and/or personally to 318 Dorney Plaza, Findlay Ohio on

02/01/2018

George Martens George Martens Thelma A. Martens Thelma Martens