

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPLE GROUP, LTD.,	:	SUPREME COURT OF OHIO
	:	CASE NO.: 2014-0301
Plaintiff-Appellant,	:	
v.	:	ON APPEAL FROM THE MEDINA
	:	COUNTY COURT OF APPEALS,
BOARD OF ZONING APPEALS OF	:	NINTH APPELLATE DISTRICT
GRANGER TOWNSHIP, et al.,	:	
	:	COURT OF APPEALS
Defendants-Appellees.	:	C. A. NOS. CA-12-CA 0068-M and
	:	CA-12-CA 0065-M

**BRIEF OF *AMICUS CURIAE* OHIO TOWNSHIP ASSOCIATION
ON BEHALF OF THE APPELLEE THE BOARD OF ZONING APPEALS OF
GRANGER TOWNSHIP**

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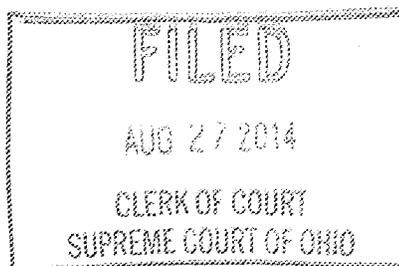


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I. STATEMENT OF AMICUS INTEREST

Amicus curiae Ohio Township Association (“OTA”) respectfully requests this Court to affirm the decision of the Ninth District Court of Appeals.

Amicus curiae OTA is a state-wide professional organization dedicated to the promotion and preservation of township government in Ohio. OTA, founded in 1928, is organized in eighty-seven (87) counties and has over 5,200 active members comprised of elected township trustees and township fiscal officers (clerks) from Ohio’s 1,308 townships. Additionally, OTA has over 4,000 associate members.

As the form of government closest to the citizens of Ohio, townships have significant statutory duties and responsibilities to their residents, which include providing adequate land use planning and zoning controls to their constituencies. Townships derive their zoning authority through a direct statutory enabling statute contained in R.C. Chapter 519. However, this authority to enact and enforce zoning regulations is not absolute, being restricted by various and certain statutory limitations and exceptions. The instant case calls for the interpretation and application of language contained in R.C. 519.02 which allows townships to create zoning resolutions “in accordance with a comprehensive plan.”

The Court of Appeals’ decision in this case interprets the provisions of R.C. 519.02, specifically the phrase “in accordance with a comprehensive plan,” and correctly holds that townships need not enact a separate and distinct document to meet statutory provisions. In this case, the Court of Appeals determined that Granger Township’s zoning resolution and map demonstrated accordance with an overarching comprehensive plan. To overturn this decision would invalidate many Ohio rural townships’ zoning resolutions and invite challenges from developers seeking to impose their own objectives against the stated intentions of Township

communities. *Amicus curiae* OTA is a strong advocate of private property rights and, therefore, has a vital interest in the outcome of this case.

The reasons for using a zoning resolution itself to show accordance with a comprehensive plan are simple. Approximately 88% of townships in Ohio (including Granger Township) have fewer than 5,000 residents. These smaller, rural townships simply do not have the resources to conduct the extensive research necessary to create separate and distinct comprehensive plans, and doing so would severely strain the already limited human and financial resources of rural townships. Mandating such an independent effort would prevent small rural townships from regulating growth and land use. Additionally, if this Court determines that Granger Township's thorough, detailed zoning resolution is insufficient and that R.C. 519.02 requires a separate, distinct comprehensive plan, Granger Township and other similarly situated Ohio townships will rush to comply with the Court's new mandate. This will entail significant time and expense, because townships need valid zoning resolutions, so they will have to do – and pay – anything necessary to meet this strict requirement, to the detriment of their already limited finances.

Furthermore, townships are communities comprised of families and individuals who chose to live in the township for many reasons, not the least of which is each township's unique character. Granger Township has chosen to maintain its rural character through its zoning resolution, a choice it states on the first page of the zoning resolution. The Court of Appeals' decision reaffirms the townships' ability to establish and maintain such choices by and for their residents. That ability would effectively be eviscerated if this Court adopts the interpretation proposed by the appellant.

The Court of Appeals' decision and established case law also recognizes the overarching concern for clarity and flexibility. Clarity regarding to what uses land may be put, and flexibility

recognizing that townships have varying resources at their disposal and many must do more with less. The appellant's definition, on the other hand, provides for a rigid, detailed, and unrealistic definition of what actually constitutes a "comprehensive plan." To adopt the definition promulgated by the appellant, in the breadth that it proposes in its merit brief, would immediately affect every township (and, quite possibly, many counties¹) in Ohio in a manner that was never intended by the Ohio General Assembly. The effect would be to impair the statutorily granted power of townships to enact and enforce zoning regulations. Under the appellant's proposal, every township would need to create an independent, written treatise in order to meet the appellant's definition of a comprehensive plan.

Those townships that have not adopted a plan that meets the detailed definition proposed by the appellant would face the risk of having their zoning resolutions invalidated by every home builder, business, or industry that does not receive its desired approval from a Board of Trustees, Zoning Commission, or Board of Zoning Appeals. Many of these zoning resolutions that have been in existence for years will now face challenges at every turn, similar to the challenge brought by the appellant in this case, even if a township has denied land use requests in accordance with its established zoning resolution.

This Court should affirm the decision of the Ninth District Court of Appeals, reinforcing over fifty-nine years of precedent holding that Ohio townships need not create a separate, written document when the unambiguous zoning resolution either constitutes a comprehensive plan or is in otherwise in accordance with a comprehensive plan and meets the requirements of R.C. 519.02.

¹ The statutory delegation of zoning powers to counties in Ohio is identical to that of townships, in that R.C. 303.02 provides that counties may only enact zoning "in accordance with a comprehensive plan."

II. STATEMENT OF THE CASE AND FACTS

For purposes of this brief, OTA hereby adopts the Statement of the Case and Facts as set forth by Appellees, Board of Zoning Appeals of Granger Township, et al., and incorporates the same by reference as if fully rewritten herein.

III. ARGUMENT

Proposition of Law:

The requirement set forth in R.C. 519.02 that a township zoning resolution be created “in accordance with a comprehensive plan” is met where the township’s zoning resolution and map unambiguously reflect a clear vision and overarching plan for the township.

R.C. 519.02 provides that,

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.

While the statute does not define “comprehensive plan,” Ohio courts have simply defined a comprehensive plan as “a specific plan which sets forth uniform standards in a given district or zone.” *Howland Twp. Bd. of Trustees v. Dray*, 11th Dist. Trumbull No. 2004-T-0137, 2006-Ohio-3402, ¶ 52. Furthermore, “[t]he purpose of the ‘comprehensive plan’ requirement is ‘to prevent “piecemeal” or “spot” zoning * * *.’” *Apple Group Ltd. v. Bd. of Zoning Appeals of Granger Twp.*, 9th Dist. Medina Nos. 12CA0065–M, 12CA0068–M, 2013-Ohio-4259, ¶ 11, quoting *Scioto Haulers, Inc. v. Circleville Twp. Zoning Bd. of Appeals*, 4th Dist. Pickaway No. 80 CA 7, 1981 WL 6022 (Sept. 18, 1981). Ohio case law precedent has established 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.’” *Id.* at ¶ 10, quoting *Reese v.*

Copley Twp. Bd. of Trustees, 129 Ohio App.3d 9, 15, 716 N.E.2d 1176 (9th Dist.1998); *BGC Props. v. Bath Twp.*, 9th Dist. Summit No. 14252, 1990 WL 31789 (Mar. 21, 1990).

Appellant correctly observes that the holdings in *Reese* and *BGC Properties* cite back to *Central Motors Corp. v. City of Pepper Pike*, 63 Ohio App.2d 34, 409 N.E.2d 258 (8th Dist.1979), a case regarding a city zoning ordinance, not a township zoning resolution. However, these cases are still precedential for two reasons. First, in holding that a separate and distinct comprehensive plan was not necessary to enact a zoning regulation, this Court, in *Central Motors*, cited both R.C. 713.06 and its township analogue, R.C. 519.02. *Id.* at 65. Second, this substantial and long-established line of cases has kept the issue in the attention of the Ohio General Assembly, which has elected not to amend R.C. 519.02 and change the fifty-nine-year holding of *Cassell v. Lexington Township Board of Zoning Appeals*, 163 Ohio St. 340, 345, 127 N.E.2d 11 (1955), on which all of Ohio's 1,308 townships have likely relied.

In this case, the Court of Appeals examined the zoning resolution of Granger Township, an exercise of the rights extended to the Township under R.C. Chapter 519, and determined that the Township's zoning resolution met the requirement of being "in accordance with a comprehensive plan." *Apple Group* at ¶ 31. The court held that the Township had a "vision of what constitutes a rural landscape," the maintenance of which was a legitimate zoning objective, and that the appellant's development plan conflicted with that vision. *Id.* at ¶¶ 27, 30.

The appellant proceeded with these two consolidated cases in order to challenge the Township's denial of its proposed land use and variance requests. The crux of this matter is that the appellant purchased land zoned R-1, which requires each residential lot to be at least two acres. The appellant, however, wanted to divide the property into less than one-acre parcels, build houses, and keep some land as open space. The Township zoning resolution states that the

purpose of the “R-1 Residential District” “is to manage low-density residential development that will preserve the rural residential character of Granger Township.” Granger Township Zoning Regulations, Art. III, Section 301 (Oct. 13, 2010). Ultimately, the appellant’s interpretation of R.C. 519.02 jeopardizes these township purposes and threatens to invalidate every township zoning resolution that has used and relied upon zoning resolutions themselves or unambiguous visions for their communities when drafting and implementing township zoning resolutions.

A. An unambiguous zoning resolution may evidence a “comprehensive plan” for the purposes of R.C. 519.02.

Many of Ohio’s small, rural townships rely on zoning resolutions to maintain some of the rural nature of their communities. 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. Instead, townships carefully craft zoning resolutions, which also take time to draft to ensure that contingencies are accounted for and, above all, that the resolution provides guidance to residents and property owners regarding how they may use their land.

The Ninth District Court of Appeals correctly interpreted R.C. 519.02 to mean that Granger Township’s zoning resolution was adopted in accordance with a comprehensive plan. *Apple Group* at ¶ 20. The court identified the facts that “the Township’s zoning resolution and map divides the Township into six different districts” and that the resolution “sets out use, height, and area restrictions” for each district as supportive of its holding. *Id.* at ¶ 19. Furthermore, the court held that 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.”

Id. at ¶ 20, quoting *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals*, 191 Ohio App.3d 552, 2010–Ohio–6449, ¶ 14 (9th Dist.). In addition to those components, each zoning district description contains a “purpose” or “purpose and intent” section, which detail the reasons particular to Granger Township for these districts. *See* Granger Township Zoning Regulations, Art. III, Section 301(A). Furthermore, the Granger Township Zoning Regulations provides the “general purpose” of and overarching plan for the resolution as the following:

[i]n 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 * * * *

Granger Township Zoning Regulations, Art. III, Section 301(A).

Numerous courts have held that R.C. 519.02 does not require that a comprehensive plan be independently adopted by a township in order to have a valid zoning resolution. *See Ketchel v. Bainbridge Twp.*, 79 Ohio App.3d 174, 607 N.E.2d 22 (11th Dist.1992); *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 11th Dist. Portage No. 98-P-0131, 2001 WL 1647228 (Dec. 21, 2001); *Reese v. Copley Twp. Bd. of Trustees*, 129 Ohio App.3d 9, 15, 716 N.E.2d 1176 (9th Dist.1998). The appellant’s definition is not only contrary to established case law but also has the practical effect of creating an unrealistic standard for many of Ohio’s small, rural townships that simply cannot afford to undertake the endeavor of creating such a comprehensive plan. Due to the diverse socio-economic and geographic nature of Ohio townships, it is critical that the term “comprehensive plan” remain a flexible term. This concept of flexibility was discussed in *East Fairfield Coal Co. v. Miller Zoning Inspector*, 71 Ohio L. Abs 490 (C.P.1955), where the court stated “what might be comprehensive in an agricultural

community in Mahoning County would not likely be comprehensive in the metropolitan area of Cleveland or Cuyahoga County.” *Id.* at 502. The rigid definition of what constitutes a comprehensive plan proffered by the appellant ignores this flexibility concept and will create a financial burden to small rural townships whose planning needs differ greatly from that of a large urban township consisting of 60,000 people.

Given this flexible standard and the case law in Ohio, the record before this Court clearly shows that the Granger Township Zoning Regulations are sufficient for the purposes of R.C. 519.02. As stated above, the Granger Township Zoning Regulations provide for:

- Purposes and objectives sought behind the Township’s zoning framework.
- Clear indication that the regulations serve the “unincorporated area of Granger Township, Medina County, Ohio,” as discussed in the “General Purpose” section.
- Specific, defined, and repeatable standards and procedures for determining what uses are permitted and how to seek a variance of those standards.

Amicus curiae submits to this Court that, should the Granger Township zoning resolution not be considered sufficient for the purposes of R.C. 519.02, then hundreds of township zoning resolutions throughout Ohio are subject to invalidation.

B. Nothing contained in R.C. 519.02 mandates that a township adopt and consider a separate and distinct comprehensive plan when implementing zoning.

The appellant’s contention that the Granger Township zoning resolution was not adopted in accordance with a comprehensive plan creates a judicially-expanded requirement not contained in R.C. 519.02, namely that comprehensive plans must be separate and distinct from the zoning resolution. In other words, the appellant construes R.C. 519.02 and the term “comprehensive plan” to require that every township must adopt a separate document called a “comprehensive plan” before the township can pass a zoning resolution. Simply stated, no such requirement exists in R.C. 519.02.

R.C. 519.02 provides that a board of trustees “may regulate by resolution, in accordance with a comprehensive plan ...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.” Despite the fact that there is no adjective or qualifier that precedes the term “comprehensive plan” in R.C. 519.02, the appellant asks the Court to create such a qualifier by requiring comprehensive plans to be separate and distinct from the zoning resolutions. The Court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged. *Wachendorf v. Shaver*, 149 Ohio St. 231, 236, 78 N.E.2d 370 (1948). *See also State ex rel. Smith v. Columbus*, 28 Ohio St.3d 94, 95, 502 N.E.2d 608 (1986); *State ex rel. McGraw v. Gorman*, 17 Ohio St.3d 147, 149, 478 N.E.2d 770 (1985). In *Cleveland Electric Illuminating Co. v. Cleveland*, 37 Ohio St.3d 50, 524 N.E.2d 441 (1988), paragraph three of the syllabus, the court held, “[i]n matters of construction, it is the duty of this court to give effect to the words used, *not to delete words used or to insert words not used.*” (Emphasis added.)

A long history of case precedent establishes that courts must not insert words into statutes, which is exactly what the appellant seeks here. R.C. 519.02 only requires that a comprehensive plan exists and does not specify exactly what must be made part of such plan or require that such a plan be township-specific. This is further evidenced by the lack of a statutory comprehensive plan adoption and approval process in R.C. 519.02. In its merit brief, the appellant seems to indicate that *amicus curiae* believes that R.C. 519.02 requires the zoning resolution and comprehensive plan to be two separate documents. (Merit Br. of Appellant, July 28, 2014, 19, fn. 12.) However, that is a misconstruction of *amicus curiae* OTA’s words, which were “two * * * requirements.” *Id.* (Emphasis added.) To be clear, it is *amicus curiae* OTA’s

position that nothing in R.C. 519.02 or subsequent precedent requires that the zoning resolution and comprehensive plan be separate, distinct documents. Furthermore, the Ohio General Assembly has had numerous opportunities to address the term “comprehensive plan” over the fifty-nine years since *Cassell*, and could have amended the statute to provide for required contents in a comprehensive plan, to implement an adoption and approval process or even to specify who may prepare such plans, but has failed to do so.

While a comprehensive plan may take several forms, whether it is a zoning resolution and accompanying map or a separate independent plan document, the main rationale for such a requirement is that local governments must show that their underlying zoning is based upon a coherent land use policy derived from rational consideration of the needs of a community. *See, e.g., Columbia Oldsmobile, Inc. v. City of Montgomery*, 56 Ohio St.3d 60, 67, 564 N.E.2d 455 (1990). 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.

There is no sound legal or policy reason for concluding that a township’s zoning resolution and map may not also function as its comprehensive plan. Therefore, the appellant’s proposed construction of R.C. 519.02 is improper, and *amicus curiae* requests that this Court affirm the Court of Appeals’ decision.

IV. CONCLUSION

Amicus curiae OTA respectfully requests this Court to affirm the decision of the Court of Appeals. R.C. 519.02 requires a township to enact a zoning resolution in accordance with a comprehensive plan, but the statute does not require that the comprehensive plan be a document

separate and distinct from the zoning resolution. It is clear from Granger Township's zoning resolution that the Township has in place a clearly established, overarching plan and vision for the community. Furthermore, to adopt the appellant's construction of R.C. 519.02 would be to invalidate hundreds of Ohio townships' zoning resolutions.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amicus Curiae Ohio Township Association is being e-mailed to all parties entitled to service under Rule 5 of the Ohio Rules of Civil Procedure on this 27th day of August, 2014.


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