

***PLANNING LAW SEMINAR:  
Legal Implications of Zoning Decisions for  
Smart Planning and Development  
March 26, 2010  
Cleveland State University  
Cleveland, Ohio***

- I. Legal Influences on the Comprehensive Plan**
  - The Comprehensive Plan "Requirement" in Ohio
- II. Shifting Market Trends and Influence on Zoning Defensibility**
  - The Role of Zoning in Economic Development
  - *Shemo, Jaylin, and Central Motors, etc.* Cases and Their Impacts
- III. The Implications of "Over Zealous" Public Resistance on Private Development**
  - The Legal Avenues for Public Resistance and Their Legal Parameters

**By:**

**R. Todd Hunt, Partner  
(216) 928-2935**

**Email: [rthunt@walterhav.com](mailto:rthunt@walterhav.com)**

**Walter & Haverfield LLP  
The Tower at Erieview  
1301 East Ninth Street, Suite 3500  
Cleveland, Ohio 44114-1821**

**I. LEGAL INFLUENCES ON THE COMPREHENSIVE PLAN**

• **THE COMPREHENSIVE PLAN "REQUIREMENT" IN OHIO**

**A. City vs. County vs. Township**

As a general rule in Ohio, a separate document known as a “comprehensive plan” is not required to be adopted by local governments in order to promulgate and enforce planning and zoning regulations. However, certain charters and ordinances of municipal corporations (cities and villages) in Ohio may require a comprehensive plan to be adopted and periodically updated to serve as a basis for local planning and zoning regulations.

**1. Cities and Villages (Municipal Corporations)**

Municipal corporations (cities and villages) in Ohio derive their power to enact zoning and other land use regulations directly from the Ohio Constitution at Section 3 of Article XVIII. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 225; *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 71; and *Pritz v. Messer* (1925), 112 Ohio St. 628, 627. Section 3 of Article XVIII reads as follows: “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Zoning regulations are an exercise of the police power granted municipalities by the Ohio Constitution. *Garcia v. Siffrin* (1980), 63 Ohio St.2d 252, syl. 2. A municipal corporation need not have adopted a charter to exercise these home rule zoning powers. *See Northern Ohio Patrolmen’s Benev. Ass’n. v. Parma* (1980), 61 Ohio St.2d 375, and *Perrysburg v. Ridgway* (1923), 108 Ohio St. 245.

Municipal (city and village) zoning ordinances may deviate from state statutory provisions and requirements, provided the municipal regulations are not less stringent than state law or the particular state statute prescribes a rule of conduct upon citizens of the state generally and there is a direct conflict between the municipal law and the state statute. *City of Canton v. State of Ohio* (2002), 95 Ohio St.3d 149; *Garcia, supra*; *see also, City of Avon v. Samanich* (Lorain Cty. App. 1995), 1995 WL 500141 (home day care).

The statutory provisions of the Ohio Revised Code related to municipal zoning and land use powers state that whenever the planning commission of any municipal corporation or any board or officer with city planning powers certifies to the legislative authority of the municipal corporation any “plan” for the districting or zoning thereof according to the uses of buildings and lands, such legislative authority, in the interest of

the promotion of the public health, safety, convenience, comfort, prosperity, or general welfare, may regulate and restrict the location of buildings and other structures and of premises to be used for trade, industry, residence or other specified uses, and for such purposes, may divide the municipal corporation into districts to carry out this purpose. Ohio Revised Code Section 713.07. Although this section of the Revised Code would not be applicable to a municipal corporation which has adopted a conflicting procedure, it is significant to note that the term “comprehensive plan” has not been used in the state statute.

The Ohio Supreme Court and lower courts have consistently held that a specifically adopted “comprehensive plan” is not a prerequisite to a valid zoning ordinance. In *Columbia Oldsmobile, Inc. v. Montgomery* (1990), 56 Ohio St.3d 60, cert. denied, 111 S.Ct. 2854, 115 L.Ed.2d 1022 (1991), the Ohio Supreme Court held that the court of appeals had erred by requiring the City of Montgomery to enact a comprehensive community plan as a prerequisite to a valid zoning ordinance. The Court held that the city’s zoning ordinance, as applied, substantially advanced its legitimate interest in the health, safety, and welfare of the community and was therefore constitutionally valid. Eleven years earlier in the legendary case of *Central Motors Corp. v. Pepper Pike* (Cuyahoga Cty. 1979), 63 Ohio App.2d 34, the Court of Appeals for Cuyahoga County had held that a municipality has the discretion as to whether it will adopt a comprehensive zoning plan. Failure to have a zoning plan which is separate and distinct from a zoning ordinance does not render the zoning ordinance unconstitutional.

## **2. Counties and Townships**

Counties and townships in Ohio are statutory creatures whose powers are not derived from the Constitution, but from specific state statutes. Therefore, the zoning authority of counties and townships is much narrower than municipal corporations and must not deviate from state statute. *Bainbridge Twp. v. Funtime, Inc.* (1990), 55 Ohio St.3d 106 (hours of operation at Geauga Lake).

The statutory provisions in the Ohio Revised Code dealing with the zoning powers of counties and townships are virtually identical. The language of the statutes was somewhat archaic for many years but the statutes were amended in 2004 to reflect the more modern trend of case law that promoting the "general welfare" is a basis for zoning regulations<sup>1</sup>. Ohio Revised Code Section 303.02 with respect to county zoning powers states as follows:

---

<sup>1</sup> This language in O.R.C. 519.02 once again became the law of Ohio pursuant to the court's decision in *Akron Metro. Hous. Auth. v. State of Ohio* (6/12/08), Franklin App. No. 07 AP-738, which held an amendment to 519.02 to eliminate the "general welfare" language as being unconstitutionally enacted from a procedural standpoint.

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

Ohio Revised Code Section 519.02 also states as follows:

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

A close reading of the subsequent sections of Ohio Revised Code Chapters 303 and 519 with respect to both county and township zoning powers reveals, however, that a specific document known as a “comprehensive plan” need not be

adopted above and beyond a proposed comprehensive zoning resolution and zoning map for the political subdivision. See e.g., Ohio Revised Code Sections 303.06 and 519.06 which clearly state that at any public hearings held by the county planning commission or township zoning commission, the notice for the public hearing shall state the place and time at which the “text and maps of the proposed zoning resolution” may be examined. The seminal case in Ohio on this issue appears to be the old Ohio Supreme Court case of *Cassell v. Lexington Twp. Bd. of Zoning App.* (1955), 163 Ohio St. 340, in which the Court held that a township zoning regulation which provided that a section of a township, one square mile in area, shall be zoned for farming, residential, commercial and recreational uses is not specific enough to constitute regulation in accordance with a “comprehensive plan”. The opinion did not require a separately adopted “comprehensive plan” to serve as a basis for the zoning regulations. But see, *Columbia Oldsmobile, Inc.* 56 Ohio St.3d at 66, which uses Revised Code Sections 303.02 and 519.02 as a basis for distinguishing the obligations of municipal corporations versus counties and townships with respect to adoption of a comprehensive plan.

Some courts of appeals in Ohio have specifically held that a specific document called a “comprehensive plan” is not required of a township to have a valid zoning resolution. *Arendas v. Bd. of Trustees of Coitsville Twp.* (Mahoning) 2008 Ohio App. LEXIS 5493; *Reese v. Bd. of Trustees of Copley Twp.* (Summit 1998), 1998 Ohio App. LEXIS 2995; *BGC Properties v. Township of Bath* (Summit 1990), 1990 Ohio App. LEXIS 1026; *Midwest Fireworks Mfg. Co., Inc. v. Deerfield Township BZA* (Portage 2001), 2001 Ohio App. LEXIS 5861 (a separate, independently-adopted plan from the township zoning resolution is not required particularly where the zoning resolution sets forth the purpose of the district regulations, enumerates permitted and conditionally permitted uses, and is accompanied by a zoning districts map); and *Curtis v. Geneva Twp. Trustees* (Ashtabula 1996), 1996 Ohio App. LEXIS 2447. *Contra*, *Bd. of Trustees of Howland Twp. v. Dray* (Trumbull), 2006 Ohio App. LEXIS 3353.

In the case of *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals* (2009), 124 Ohio St.3d 1, the Ohio Supreme Court did not specifically answer the question of whether a separate and district comprehensive plan document is required by R.C. 519.02. The Court answered only the question of whether the “comprehensive plan” required by R.C. 519.02 must be a plan developed by a township itself or whether the township may rely on a comprehensive plan created at the county level. The Court held that a countywide comprehensive plan can fulfill the “comprehensive plan” requirement of R.C. 519.02 since the statute says “in accordance with *a* comprehensive plan” and not necessarily a plan created by the township. The Court went on to find that the countywide plan created by Wayne County sufficed as a plan for this particular township even though it was not specific as to this township but included land use recommendations for the entire county, including this township. The parties did not raise, and the Court did not decide, whether the township’s zoning resolution and zoning map alone

would constitute a "comprehensive plan" for purposes of the R.C. 519.02 requirement. The property owner had raised at the township BZA hearing level the additional issue that there was no "comprehensive" plan because the zoning resolution provided for two zoning districts in the township -- agricultural district and business/industry district -- but the zone map only had the agricultural district which encompassed the entire township area.

It is suggested, however, that townships adopt comprehensive plans to serve as a basis for their zoning resolutions and maps.

**B. Basis for Land Use Control; Policy, Map, or No Plan at All?**

Based on the foregoing discussion, it is apparent that the law of Ohio generally considers a comprehensive plan as a policy guide for the promulgation of a local government's planning, zoning, and other land use regulations. As the *Columbia Oldsmobile, Inc.* case, supra, demonstrates, local regulations which diverge from the local government's comprehensive plan still may advance the municipality's legitimate interests and meet the standard for constitutionality. As demonstrated by the case of *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, a local zoning regulation must be demonstrated to be arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community to be found to be unconstitutional. This means that the powers as exercised "need only bear a rational relation to the health, safety, morals, or general welfare". *Id.* at 214. In Cuyahoga County, the Court of Appeals in the unreported case of *Henry Meyer Associates, Inc. v. Village of Moreland Hills*, stated "substantial relation is synonymous with rational relation, which the U.S. Supreme Court has defined as the minimal scrutiny standard". Cuyahoga County Court of Appeals Case No. 72754, decided 8/20/98, citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.* (1978), 436 U.S. 59.

Even though the case law of Ohio generally indicates that a comprehensive plan is a policy guide for local governments, the Cuyahoga County Court of Appeals in *K-Mart Corp. v. City of Westlake* (July 10, 1997), Cuyahoga App. No. 69953, unreported, 1997 Ohio App. LEXIS 3025, held that the City of Westlake's "Guide Plan" had the force of law where the Guide Plan was incorporated by reference into the city's zoning code. This case, however, appears to be an aberration in Ohio law and a close reading of the City of Westlake's Zoning Code does not indicate the intent that the City's comprehensive plan have the force of law. Obviously, comprehensive plans are generally written based upon general land use principles and do not contain the details of regulation found in a zoning code. Neither land owners, developers, nor local government officials should be legally tied to the comprehensive plan with respect to land use, but more specifically they should be bound to the regulations in a properly adopted zoning code or zoning resolution that reflects the general principles in a comprehensive plan.

As the case of *Central Motors Corp. v. Pepper Pike*, supra, makes abundantly clear, the comprehensive zoning plan may consist of the zoning ordinances and a zoning map without a separately adopted document labeled a “comprehensive plan”. Nevertheless, a comprehensive plan serves as an important piece of evidence in both challenging and upholding a zoning regulation. Such comprehensive plan evidence is highly relevant to the issue of whether the community has a legitimate interest in promoting the health, safety and welfare of the community through the particular zoning regulation. This does not mean that the zoning regulation cannot deviate from the comprehensive plan, but if it does deviate from the comprehensive plan there should be evidence in the legislative record from the planning authority and the local legislative authority as to why this particular zoning regulation deviates from the comprehensive plan.

A concrete example of the importance of a comprehensive plan which has been followed by the municipality and its importance to the success of litigation is the case of *Schenck v. City of Hudson*, 114 F.3d 590 (6 Cir. 1997). In that case, City of Hudson adopted a growth management ordinance, which the Court called a “slow growth” ordinance, limiting the number of residential building permits that could be issued in any given year and a system for allocation of those limited permits among applicants. In upholding this land use regulation against a federal substantive due process challenge, the federal appeals court cited as a key piece of evidence in support of the City’s growth management ordinance the fact that the ordinance was grounded in a comprehensive plan adopted one year earlier. One of the goals of the comprehensive plan was to manage the City’s growth rate so that it did not exceed the capabilities of its infrastructure and to preserve the City’s unique character. Numerous studies, public meetings and other community input developed the comprehensive plan over a 2-year period.

Another example is found in *B.P. America, Inc. v. Avon City Council* (*Lorain 2001*), 142 Ohio App.3d 38, in which the court upheld a zoning regulation in the City of Avon’s central district which limited development in that area to residential and small retail businesses in order to preserve the area’s historically rural atmosphere, which was quickly vanishing. Although it may be considered *dictum* in the case opinion, it is significant that the first sentence in the court’s opinion states that the city ... “adopted a master plan that set the city’s official policy regarding its future growth and development, including land use” one year prior to passage of the restrictive “central district” zoning. *Id.* at 40. *See also, The Bryco Co. v. City of Milford*, 1999 WL 791532, No. CA99-04-033 (12<sup>th</sup> Dist. Ct. App., Clermont, 10-4-99) (court cites city’s comprehensive plan goal of more single-family, owner occupied homes in the city, rather than multi-family dwellings, as a basis to uphold city council’s denial of a request to rezone the property to multi-family use); and *State, ex rel. Farmakis v. City of Conneaut* (Ashtabula), 2008 Ohio App. LEXIS 5671 (denial of zoning change upheld as not consistent with the comprehensive plan).

See, also, *Baur v. Wadsworth* (Medina Cty. App. 2002), 2002 Ohio App. LEXIS 3944, (court cites to the city's comprehensive plan to uphold residential zoning against a request for rezoning to commercial uses where city had approved the rezoning and the voters restored the residential zoning by referendum).

Ohio case law reveals that municipalities often state in their zoning codes that one condition for the grant of a conditional use permit is that the proposed use not be incompatible with the provisions of a comprehensive plan. This condition has been upheld by the courts. E.g., *Oberer Development Company v. City of Fairborn* (Green Cty. App. 1999), 1999 Ohio App. LEXIS 1812; *Varhola v. City of Akron* (Summit Cty. App. 1999), 1999 Ohio App. LEXIS 3263; *Dingledine Basic Materials, Inc. v. Butler County Board of Zoning Appeals* (Butler Cty. App. 1999), 1999 Ohio App. LEXIS 1415. However, the zoning code should specifically refer to the comprehensive plan in its review standards. *Gross Bldrs. v. Tallmadge* (Summit) 2005 Ohio App. LEXIS 3865.

### **C. The Relevant Real Estate Market and Your Responsibility**

A local government's comprehensive plan should be updated periodically to comport with actual land use trends and land use needs of the local community. Many municipal charters require annual or other periodic updates of the comprehensive plan. A necessary corollary to the update of comprehensive plans should be amendments to the zoning regulations and zoning map to further the policies set forth in the updated comprehensive plan. Not only should it be the responsibility of the local government officials to reconsider and update comprehensive plans, but it should also be the responsibility of land owners and developers to inform local government officials of needed land use policy changes on a periodic basis.

One thing is certain, litigation over rezonings and other land use regulations is lengthy and expensive. Local governments continue to benefit from a presumption of validity of local regulations applied by the courts. *Goldberg Cos., Inc.*, 81 Ohio St.3d at 209; *Jaylin Invs., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 341. The landowner's/developer's burden of proof in such litigation continues to be significant. A key piece of evidence available to a municipality to defend a zoning challenge can be an up-to-date comprehensive plan coupled with an up-to-date zoning code and map.

## II. SHIFTING MARKET TRENDS AND INFLUENCE ON ZONING DEFENSIBILITY

### A. THE ROLE OF ZONING IN ECONOMIC DEVELOPMENT

1. Overview of Zoning Regulations and their Impact upon Economic Development – Clarity and Timing is Everything (Almost)
  - a. Tell me what you expect and what is the process to achieve it -- time = \$
  - b. Locational issues (freeway access, access to amenities, utilities, etc.)
  - c. Financial Incentives vs. Zoning
2. The Role of the Comprehensive Plan and its Legal Status in Zoning
  - a. Document is a Policy Statement and Guide
    - i. Legally Required in Ohio (?) and Not the Force of Law
    - ii. Competition with Other Communities
  - b. The Residential vs. Commercial Dilemma
    - i. Inner Ring vs. Outlying Communities
  - c. Zoning Map – Rezoning of Areas
  - d. Zoning Text – Modern Text
    - i. Description of Uses and Flexibility
    - ii. Density vs. Setbacks and Buffers
3. Adoption of and Amendments to Zoning Codes
  - a. Process
    - i. Charter Municipalities vs. State Law
    - ii. Timeframes: Weeks to Months
  - b. Voter Referendum / Initiative
    - i. Automatic
    - ii. Petitions
  - c. Legal Challenges to Zoning Regulations
    - i. Based on Comprehensive Plan
    - ii. Sound Planning and Economic Viability
    - iii. Legal Test: Regulation is clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals or general welfare of the community
4. Development Application Review
  - a. Timing and Simultaneous Review Considerations
  - b. Initial Administrative Review
  - c. Zoning Board of Appeals (Appeals and Variances)
  - d. Planning Commission Site Plan and/or Conditional Use Reviews
    - i. Objective Standards
    - ii. Eliminate Requirements for Conditional Use Permit Renewals
  - e. Architectural Review Board
  - f. Court Appeals of Local Administrative Action
    - i. Stays of Development
    - ii. Third-Party Standing to Oppose

5. Permitting Process
  - a. Financial Assurances for Improvements (Bonds, Escrows, Letters of Credit)
    - i. Use of Standard Local Government Forms
  - b. Inspections
    - i. Up Front Costs
    - ii. Certificate of Occupancy (Conditional)
6. Conclusion – Streamline the Process and Clarify the Regulations

**B. *SHEMO, JAYLIN AND CENTRAL MOTORS, ETC. CASES AND THEIR IMPACTS***

1. *State ex rel. Shemo, et al. v. Mayfield Hts.* (2002), 96 Ohio St.3d 379 (decided October 2, 2002). This was actually the fifth time Shemo had been reviewed by the Ohio Supreme Court:
  - a. *Shemo I.* (*Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7.) The first case involved an appeal of the initial zoning decision. The City stipulated at the trial level that the U-1 residential zoning classification as applied to the property was invalid. Over property owner’s objection, the City rezoned the property to a U-2-A residential Planned Unit Development. The trial court found that the U-2-A zoning classification was unconstitutional as applied to the property. After an appeal of that decision by the City, the Common Pleas Court held that the property owner’s proposed retail use of the property as described in its site plan was reasonable. (The property owners had requested multi-family zoning in their original complaint, but later refiled it in 1995 to request retail zoning.) The trial court ordered the property owners to make improvements to a roadway as specified in the site plan, for the City to facilitate the improvements and the City and municipal officers were enjoined from interfering with the property owner’s proposed retail use of the property and the installation of road improvements. This decision was appealed to the Court of Appeals which reversed and to the Ohio Supreme Court which again reversed and reinstated the decision of the Common Pleas Court.
  - b. *Shemo II.* (*State ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St.3d 324.) The property owners filed a petition for a writ of mandamus to compel the City to grant final approval of the road improvements and to compel the City to commence state court appropriation proceedings to determine the value of the taking of the property. The Court dismissed the action without prejudice to refile because the property owners failed to comply with affidavit requirements of the Court for a mandamus action.

- c. *Shemo III. (State ex rel. Shemo v. Mayfield Hts. (2001), 93 Ohio St.3d 1.)* The property owners refiled the mandamus action asking the Court to compel the City to commence state court appropriation proceedings, to grant final approval of the road improvements, including access, and to grant all other approvals and permits necessary for the retail development per the trial court's order. The Court granted the writ of mandamus to compel the City to approve all plans, but it did not rule on the request to compel state appropriation proceedings.
- d. *Shemo IV. (State ex rel. Shemo v. Mayfield Hts. (2002), 95 Ohio St.3d 59). (Decided April 10, 2002.)* The property owners again sought to compel the City to commence appropriation proceedings for the City's temporary taking of its property. The time period requested for the "temporary taking" was from March 19, 1992 (the date of the filing of the original complaint to declare the zoning unconstitutional) to August 20, 2001 (the date the City permitted street access to the property).

The Court held that because the City had stipulated that the initial U-1 residential zoning was unconstitutional and the trial court held that the U-2-A Planned Unit Development was unconstitutional, that the City was collaterally estopped from raising the first prong of the *Agins* test – whether the existing zoning substantially advanced a legitimate state interest. The Court also clarified its dicta in *Goldberg, supra*, by stating that "satisfaction of either prong of the *Agins* test establishes a taking" – either the ordinance does not substantially advance legitimate state interests or it denies an owner economically viable use of its land.

The Court rejected the City's claim that a taking could not have occurred because the property owners purchased the property knowing that the challenged U-1 single-family residential zoning existed on the property and the City did nothing to further restrict that use after plaintiffs' acquisition of it. The Court relied upon the U.S. Supreme Court's fractured holding in *Palazzolo, supra*, on this issue.

Concerning the "temporary takings" claim, the Ohio Supreme Court relied upon *First English Evangelical Lutheran Church, supra*.

. . . where the government's activities have already worked a taking of all use of the property, no subsequent action of the government can relieve it of the duty to provide compensation for the period during which the taking was effective. (Emphasis added.)

"The *First English* court stated that damages for 'temporary' takings, that is, resulting from interim ordinances, or presumably, from ordinances intended to be permanent but later invalidated by courts as a

taking and therefore effectively transformed into an interim ordinance, are to be ‘measured by the principles normally governing the taking of a right to use property temporarily’, that is, in the same way as in eminent domain actions for temporary use of the property.” 8 Rohan & Reskin, Nichols on Eminent Domain (3 Ed. 2001), Section 14E-23, quoting *First English*, 482 U.S. at 318.

The Ohio Supreme Court stated that the measure of damages was for the period from March 19, 1992 when the property owner filed its declaratory judgment action challenging the use to U-1 zoning classification until August 20, 2001 when the City Council enacted a resolution removing the emergency use restriction for one road providing access to the proposed retail development. The Ohio Supreme Court held that under the first prong of the *Agin*s test, the property owner established a temporary taking during the time that the U-1 and U-2-A zoning classifications were unconstitutionally applied to its property. The case was remanded to the trial court for a measure of the diminution in value of the use of the property during the period of the temporary take.<sup>2</sup>

- e. *Shemo V. (State ex rel. Shemo v. Mayfield Hts. (2002), 96 Ohio St.3d 379). (Decided October 2, 2002.)*

Immediately after the decision in *Shemo IV*, the City filed a motion for reconsideration in the Ohio Supreme Court raising several issues with the Court’s opinion in *Shemo IV*: 1) The opinion effectively overruled the case of *Superior Uptown, Inc. v. Cleveland* (1974), 39 Ohio St.2d 36, which held that “[a] cause of action for money damages can not be maintained against a municipality for losses sustained as a result of the adoption of a rezoning ordinance which is subsequently held invalid”; (2) the opinion did not use the proper analysis for a takings claim and take into consideration all factors related to the property, the economic effect and expectations of the owners, and the character of the City’s action; and (3) the length of the period for the compensable taking should be shortened to start after the road access issue was resolved and should not extend beyond the two-year statute of limitations in Ohio Rev. Code 2744.04.

The Court rejected all of the City’s arguments and on its own initiative found that the *Tahoe* case did not apply to the issues in this case. First, the Court summarily stated that its prior case of *Superior Uptown, Inc.* was distinguishable because it was a direct action for damages, not a mandamus action, and was an issue dealing with sovereign immunity.

Second, the Court in essence held that an analysis of all of the *Penn Central* case factors led to the conclusion that there was a taking.

---

<sup>2</sup> *Tahoe* was decided 13 days later.

Third, the Court said the *Tahoe* case is inapplicable because the moratorium in *Tahoe* substantially advanced a legitimate state interest, unlike the delay here.

Fourth, the Court did shorten the period of the compensable taking from June, 1995 to April, 2001 – i.e., from when the owners requested the retail zoning on the property in a refiled complaint up to the date of the rezoning by the City to retail.

Finally, the Court did not opine on the merits of the argument that the two-year statute of limitations limited damages in the case since the City failed to raise this defense and, therefore, waived it. It will be interesting to see in the future whether the two-year statute of limitations for 42 U.S.C. §1983 actions will apply in federal 5th Amendment “takings” cases. (See *R.T.G., Inc., supra*, re six-year statute of limitations for State Constitutional “takings” claims.)

The City later filed a Petition for Writ of Certiorari in the U.S. Supreme Court raising two issues for review:

- (1) Whether a land use restriction that does *not* substantially advance a legitimate public purpose can be deemed on that basis alone, to effect a taking of property requiring the payment of just compensation under the Fifth Amendment?
- (2) Whether the *sole* remedy available to an owner of property encumbered by a zoning restriction that does not substantially advance a legitimate public purpose is the invalidation of the restriction as a deprivation of property prohibited by the Due Process Clause of the Fourteenth Amendment (as opposed to the Fifth Amendment’s “taking” clause)?

The U.S. Supreme Court denied certiorari on March 10, 2003. 123 S.Ct. 1484; 155 L.Ed.2d 226.

f. Cuyahoga County Probate Court Case

The case to determine the amount of compensation for the takings was filed in Cuyahoga County Probate Court by the City as directed by the Ohio Supreme Court. A dispute arose as to whether all of the property owners were proper parties to the Probate Court case. The Probate Court ruled all plaintiff owners are proper parties in spite of the fact not all owners were plaintiffs in the takings case. An interlocutory appeal was filed by the City in the Court of Appeals with respect to the proper parties

to the Probate Court action which would, of course, affect the amount of damages. The Court of Appeals dismissed the City's appeal and the Ohio Supreme Court declined to hear the City's appeal. The case went back before the Probate Court for a jury trial on the issue of the amount of compensation. The parties settled for millions of dollars.

2. *Jaylin Investments, Inc. v. Moreland Hills* (2006), 107 Ohio St.3d 339. This most recent pronouncement of the Ohio Supreme Court with respect to the test for challenging the constitutionality of a zoning regulation holds true to the Court's prior precedent in *Goldberg, supra*. The Court further held that the challenge to the zoning regulation must focus on the constitutionality of the ordinance as applied to prohibit the proposed use, not the reasonableness of the proposed use. Jaylin had focused its case upon facts showing that the proposed residential subdivision consisting of twenty-nine homes on one-half acre lots, as opposed to the unconstitutionality of the permitted zoning of single-family homes on two-acre minimum lots. The Court stated: "If we were to modify this rule as Jaylin advocates, we would effectively eliminate the initial presumption that the zoning is constitutional. Opposing parties would merely argue over who presents the better use of the property."

An issue in the case that was not decided by the Supreme Court was the effect of development density on storm water management as a legitimate local government interest. Storm water management is a major issue to development and economic viability in the current development market.

3. *Central Motors, Inc. vs. Pepper Pike* (1995), 73 Ohio St.3d 581.

This older Ohio Supreme Court case was decided before *Goldberg Cos., Inc. v. Council of Richmond Heights* (1998), 81 Ohio St.3d 207, and relies on a now modified constitutional test in its holding. The Ohio Supreme Court's decision marked an end to 21 years of litigation in this case involving a challenge to the constitutionality of the City's single-family townhouse zoning of the property sought to be developed by the land owner for a mix of office, commercial, high-rise apartment and town-house uses. The property at issue mirrors the property in *Shemo, supra*, and is in fact just south of the *Shemo* property along Interstate 271.

The Supreme Court held that both the trial court and the court of appeals inappropriately second-guessed the City Council in determining whether the zoning substantially advanced a legitimate government interest and should not have determined whether the landowner's proposed zoning "better" advanced the stated governmental interest. (The City would likely have also won under the *Goldberg* test.) Also, the Supreme Court held that a substantial diminution in value of the property from \$34,210 per acre to \$14,900 per acre, assuming plaintiff's expert appraisal was accurate, did not establish beyond fair debate the lack of an economically viable use of the property.

As justification of the City's position in the case, the subject property was developed for housing under the City's zoning.

4. A Case Study -- *Urankar, et al. v. City of Richmond Heights*

This is an interesting case study of how market trends can shift, sometimes quite rapidly, and impact local zoning.

**III. THE IMPLICATIONS OF "OVER ZEALOUS" PUBLIC RESISTANCE ON PRIVATE DEVELOPMENT**

• **THE LEGAL AVENUES FOR PUBLIC RESISTANCE AND THEIR LEGAL PARAMETERS**

**A. Third-Party Challenges at Local Zoning and Planning Hearings**

1. The difference between adjudicative and legislative hearings and the "public hearing"/"public meeting" requirement.

In the case of *In re: Rocky Point Plaza Corp.* (1993), 86 Ohio App.3d 486, the court went into great detail in its analysis of the difference between an adjudicatory and a legislative "public hearing":

*This case epitomizes one of the common problems with administrative hearings conducted by local governmental agencies, especially in the zoning area and especially planning commissions and boards of zoning appeals. There seems to be a blurring of applications for zoning, applications for variances, and applications for conditional use permits, each of which requires a separate and distinct procedure and approach. Applications for rezoning are legislative in nature and are subject to a public hearing before a planning commission in most communities, with a recommendation of approval or disapproval based upon governmental, political and policy considerations. On the other hand, both applications for variances and applications for permits, such as conditional use permits, require adjudication hearings, not legislative hearings.*

*In other words, there is no public hearing upon an application for a variance or an application for a conditional use permit but, instead, an adjudication hearing, which is open to the public. A public hearing is one where members of the general public may speak and express their views on the question of governmental, political and policy considerations as to whether certain legislation should be adopted. Adjudication hearings, however, are not subject to such public comment but, instead, involve the determination of rights of specific persons and whether such rights should be granted based upon evidence (not public opinion) presented at the hearing. Therefore, different procedures are necessary and different rules apply. Only variances and conditional use permits (and some other permits) come*

*before a board of zoning appeals in the ordinary situation.*  
(emphasis added).

*Id.* at 491-492. *See, also, Heiney v. Sylvania Township Board of Zoning Appeals, supra*, at 396: “A hearing upon an application for a conditional use permit is an adjudicatory hearing, which, although open to the public, is not a public hearing where members of the general public may speak. . . . At adjudicatory hearings, the rights of specific persons are determined based upon the direct evidence presented, not public opinion.”; *Adelman Real Estate Co. v. Gabanic* (1996), 109 Ohio App.3d 689, 694: “The fact that adjudicatory hearings are to be open to the public does not result in their transformation into legislative public hearings with a corresponding right to receive input or public comment at that time.”; and, *Dutton v. Sylvania Twp. Bd. Of Zoning Appeals* (April 28, 2000, 6<sup>th</sup> Dist. Case No. L-99-1052), unreported, 2000 W.L. 491375, *citing In re: Rocky Point Plaza Corp., supra*.

2. Limit testimony to "parties in interest" (adjoining property owners/tenants or those within are influenced by application). (See B.1. below.)
3. Limit testimony to being under oath and as to relevant *facts*, not speculative, subjective comments and unsubstantial opinions.

While court decisions concerning the evidence to be considered and weighed by administrative bodies are not entirely consistent, it is clear that mere hearsay, unsworn and/or “opinion” testimony will not suffice to support the board’s decision.

In *Adelman Real Estate Co. v. Gabanic, supra*, the court held as follows:

The fact that *adjudicatory* hearings are to be open to the public does not result in their transformation into legislative public hearings with a corresponding right to receive input of public comment at that time. *The ploy of swearing in the members of the public does not alter the fact that the bulk of these witnesses are merely offering their subjective and speculative comments and unsubstantiated opinions. Such testimony cannot rise to a level of the reliable, probative, and substantial evidence required under Kisil and Dudukovich unless there are facts included as part of those opinions.*

"Direct evidence" is required and not subjective and speculative comments or unsubstantiated public opinion. *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals* (1993), 66 Ohio St.3d 452; *Adelman Real Estate Co. v. Gabanic* (Geauga 1996), 109 Ohio App.3d 689. Oral arguments at hearings are not evidence upon which to base a board

decision. *Kohrman v. Cincinnati Zoning Board* (Hamilton Cty. 2005), 165 Ohio App.3d 401.

4. A comment on public officials as "enablers" of over zealous public resistance. (Appointed vs. elected public officials)

## **B. Ohio Revised Code Chapter 2506 Appeals by Third Parties**

1. Standing to appeal or intervene in court appeal (owners/tenants of affected properties who appeared at local hearing, and opposed the application)

Neighboring property owners have standing as parties in Ohio Rev. Code § 2506 appeals if they appeared at the administrative hearing and testified in opposition to an application. *Roper v. Bd. of Zoning Apps. of Richfield Twp.* (1962), 173 Ohio St. 168. *In Alihassan v. Alliance Bd. of Zoning Appeals* (12/18/00), 2000 Ohio App. LEXIS 6024, the Stark County Court of Appeals held that a neighboring owner may have standing to appeal under Ohio Rev. Code § 2506 where it did not appear before the local administrative board due to inadequate notice of the nature of the variance being requested.

2. Lack of standing by nonprofit corporations and unincorporated associations.

It has been consistently held by courts of appeals in Ohio that neither a nonprofit corporation nor an unincorporated association may pursuant a R.C. 2506 appeal because it is not "within that class of persons whose rights have been directly affected by the administrative decision." *See, Noe Bixby Road Neighbors v. Columbus City Council*, 150 Ohio App.3d 305 (November 26, 2002), 10th Appellate District; *Women of the Old West End, Inc., et al. v. City of Toledo*, (6th Appellate District, Lucas County), 1998 Ohio App. LEXIS 2394; *Brady Area Residents Association, et al. v. Franklin Township Zoning Board of Appeals, et al.* (11th Appellate District, Portage County), 1992 Ohio App. LEXIS 6216; *Northern Woods Civil Association, et al. v. City of Columbus Graphics Commission, et al.*, 31 Ohio App.3d 46 (1986, 10th Appellate District, Franklin County). This statement assumes the nonprofit corporation is not an owner or lessee of property that may abut or be in the immediate vicinity of the subject property. This legal principle is based on R.C. Chapter 2506 expressly limiting the availability of an appeal thereunder to those whose rights, duties, privileges, benefits or legal relationships have been determined by the decision. *See, In re: Appeal of Bass Lake Community, Inc.* (1983), 5 Ohio St.3d 141, 144. The classic example of such groups not having standing to appeal are homeowners associations contesting a particular landowner's land use approval (and the group does not own contiguous property) and public interest groups contesting

approvals by local administrative boards, even when a contiguous property owner may be a member of the group.

3. Mootness of appeal if a stay of construction is not obtained.

If a stay of construction pursuant to a variance is not obtained from the court, and construction commences, the appeal of any grant of a variance may be rendered moot. *Gajewski v. BZA* (Cuyahoga Cty.), 2008 Ohio App. LEXIS 4446; *Smola v. Legeza* (Ashtabula Cty.), 2005 Ohio App. LEXIS 6353.

**C. Injunctive Relief in Court by Third Parties**

Injunctive relief is also available through Ohio Rev. Code § 713.13 but this remedy may be precluded if the person bringing the action under § 713.13 failed to appeal an administrative ruling pursuant to R.C. § 2506.01, *et seq. Murray Energy Corp. v. City of Pepper Pike* (Cuyahoga), 2008 Ohio App. LEXIS 2364. *See, Guttentag v. Etna Twp. BZA* (Licking), 2008 Ohio App. LEXIS 2232 (no standing by NIMBY because he did not contest the zoning permit or own land contiguous to the subject property).

**D. Taxpayer Actions by Third Parties**

Third parties opposing the approvals of land use applications by local governments have been known to bring what is known as "taxpayer action" against municipalities and their officials pursuant to Ohio Revised Code Section 733.59. That statutory provision in conjunction with R.C. § 733.56 provide for an injunction to be brought in the first instance either by the village solicitor or city director of law against the municipality and its public officials for "abuse of its corporate powers". Of course, a prerequisite to a third party bringing a taxpayer's action under 733.59 is that a demand must be made upon the village solicitor or city director of law to bring such an action and a refusal by the municipal attorney to do so, before such an action may be brought by a third party taxpayer in that municipal corporation. As a general matter, such actions to stop municipal land use decisions are rarely successful because the municipal corporation and its boards, commissions and public officials are usually given the authority and discretion to make the decisions that are at issue. Additionally, if a party has standing to oppose the application under an Ohio Revised Code Section 2506 appeal, a taxpayer action would not lie. Be advised, however, a successful taxpayer's action by a third party could lead to the court's discretionary award of attorneys' fees and costs to that third party pursuant to Ohio Revised Code Section 733.61. *See, City, ex rel. Freedman v. King* (Summit Cty. App. 2010), C.A. No. 24944 (failed attempt at a taxpayer's action to thwart BZA decision to permit the substitution of a nonconforming use).

**E. Referendum and Initiative by Third Parties**

Of course, the remedy of referendum is available for legislative action taken by a municipal council or township trustees with respect to zoning text and map amendments. The possibility of an initiative petition also exists where third parties wish to initiate an amendment to zoning text or the zoning map in order to thwart a particular development that may be proposed for a certain property or zoning district that would currently be permitted. Both the referendum and initiative petition issues would be placed on the ballot, if the petitions are done appropriately, for voter approval or rejection. Be advised that a zoning regulation or map amendment that is approved by the vote of the people does not insulate that voted-upon provision from constitutional attack in the courts. This is a common misunderstanding of lay persons. Of course, referendum petitions may not be used to thwart *administrative* actions by a boards, commissions, or councils. Only *legislative* actions are subject to referendum. *Buckeye Community Hope Foundation v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, syl. 2.

**F. "Takings" Claim Threats by Third Parties**

Third parties whose properties abut or are directly affected by zoning and land use decisions of local governments often make threats that such decisions will devalue or take all reasonable use of their properties and, therefore, constitute a "taking" of their properties under either the state or federal constitutions. Such a claim would be extremely difficult to prove, and there may be several defenses that the local community can assert prior to such a "takings" claim being made -- e.g. a failure to exhaust administrative remedies such as contesting local decisions at the board/commission level or in a Ohio Revised Code 2506 appeal.