**COURT OF COMMON PLEAS**
**CLERMONT COUNTY, OHIO**

| | | |
|---|---|---|
| **STATE OF OHIO EX REL. COMMITTEE TO PROTECT AVEY'S WAY** | : | **CASE NO. 2018 CVH 01744** |
| | : | **Judge McBride** |
| Plaintiff-Relator | : | **DECISION/ENTRY** |
| vs. | : | |
| **BOARD OF TRUSTEES OF UNION TOWNSHIP, OHIO** | : | |
| Defendant-Respondent | : | |



Strauss Troy, Co., LPA, Matthew W. Fellerhoff, Emily T. Supinger, and Jeffrey A. Levine, counsel for the plaintiff-relator Committee to Protect Avey's Way, 150 East Fourth Street, 4th Floor, Cincinnati, Ohio 45202.

Schroeder, Maundrell, Barbiere & Powers, Lawrence E. Barbiere and Katherine L. Barbiere, counsel for the defendant-respondent Board of Trustees of Union Township, 5300 Socialville Foster Road, Suite 200, Mason, Ohio 45040.

This cause is before the court for consideration of the defendant-respondent Board of Trustees of Union Township's motion to dismiss the plaintiff-relator State of Ohio ex rel. Committee to Protect Avey's Way verified petition for writ of mandamus, which the defendant-respondent filed on January 16, 2019.

The court heard oral argument on the motion on February 25, 2019. At the conclusion of the oral argument, the court took the defendant-respondent's motion under advisement.

Upon consideration of the motion, the record of the proceedings, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The plaintiff-relator State of Ohio ex rel. Committee to Protect Avey's Way filed a verified petition for writ of mandamus against the Board of Trustees of Union Township on December 14, 2018.

The complaint concerns the proposed development of real property consisting of approximately 271 acres located on the east and west sides of Rumpke Road and north of Deervalley Drive and Surrey Trail in Union Township, Clermont County, Ohio ("the Property").[1] The plaintiff-relator Committee to Protect Avey's Way is a legislative campaign fund committee that is registered with the Clermont County Board of Elections and is comprised of individuals organized in an effort to oppose the rezoning approved by the Board of Trustees.[2] The relator was formed to promote the referendum sought in this petition and is brought on behalf of its members and the citizens of Union Township.[3]

In 1998, the Property owners filed a complaint for declaratory judgment and money damages against Union Township, the Board of Trustees, and the Union Township Board of Zoning Appeals in the United States District Court for the Southern District of Ohio.[4]

---

[1] Compl., ¶ 1.
[2] Compl., ¶ 5.
[3] Compl., ¶ 5.
[4] Compl., ¶ 8.

The suit challenged the zoning designation of the Property.[5] The parties to the 1998 case settled their dispute, and the court approved a consent decree ("the Consent Decree") in 2000.[6] Paragraph 3 of the Consent Decree indicates:

> "Defendant [Union Township] has adopted the 'Zoning Resolution for Union Township' which includes the 'Union Township District Map,' pursuant to which Defendant has zoned the subject real estate 'R-1' Single Family Detached Residential Structure Zone and 'A-1' Agricultural Conservation Zone, now known as 'ER' Estate Residential District * * *."[7]

The Consent Decree continues at Paragraph 4:

> "Due to the special characteristics and unique special features of the subject real estate, certain limitations on lot area, lot width and setbacks contained in the 'R-1' Single Family Detached Residential Structure Zone and 'ER' Estate Residential District zoning regulations, shall not be applied to the subject real estate, are set aside with respect thereto and shall be unenforceable against the subject real estate."[8]

Paragraph 17 states: "Nothing herein shall affect or impair Defendant's right to zone or rezone property, to amend its zoning text or zoning map, or to bind future elected officials of Union Township with respect to the zoning of the Property."[9]

The Consent Decree also provides for how it can be modified:

> "14. Any changes, amendments, or revisions to the terms and provisions hereof shall be in writing and shall be subject to the approval of both Plaintiff and Defendant, neither of whom shall unreasonably withhold its consent.
>
> 15. Notwithstanding the foregoing, any minor modifications to the Settlement Plan, Exhibit 'B' hereto, can be approved by Defendant's Director of Planning and Zoning, said minor modifications being anything that does not increase the

---

[5] Compl., ¶ 8.
[6] Compl., ¶ 9; Consent Decree (attached to the Compl. as Ex. A).
[7] Consent Decree, ¶ 3.
[8] Consent Decree, ¶ 4.
[9] Consent Decree, ¶ 17.

> number of approved dwelling units, materially decrease any required setback, materially change the layout shown on Exhibit 'B' attached hereto, or eliminate any of the open space shown on Exhibit 'B' hereto.
>
> 16. Major changes to the Settlement Plan, Exhibit 'B' hereto, proposed by Plaintiff may be approved by Defendant in its reasonable discretion."[10]

The development agreed to in the Consent Decree was never built.[11]

In 2017, Fischer Homes proposed a development of the Property.[12] On July 24, 2018, the developer presented another plan to develop the Property.[13] Union Township residents strongly opposed the proposed development.[14]

On October 25, 2018, the Board of Trustees passed Resolution 2018-52, approving the proposed development, referred to as Miller Place Development.[15] Resolution 2018-52 purports to make major changes to the Consent Decree.[16] It allows for 1,445 total units including 875 multifamily residential units.[17]

As a result, on November 21, 2018, the relator filed a petition for a Township Zoning Referendum requesting that the Union Township Board of Trustees submit an amendment of the Union Township Zoning Resolution to the electors of Union Township residing within the unincorporated area of Union Township included in the Union Township Zoning Resolution for approval or rejection at a special election to be held on

---

[10] Consent Decree, ¶ 14-16.
[11] Compl., ¶ 13.
[12] Compl., ¶ 14.
[13] Compl., ¶ 15.
[14] Compl., ¶ 16.
[15] Compl., ¶ 27.
[16] Resolution 2018-52. Of note, under Civ.R. 44.1, the court can take judicial notice of the resolution. See *Board of Trustees of Union Twp. v. Keith*, 12th Dist. No. CA93-08-060, 1994 WL 117767, *2 (Mar. 28, 1994) and Civ.R. 44.1(A)(2).
[17] Resolution 2018-52.

the day of the next primary or general election on May 7, 2019.[18] The petition consisted of 299 separate petitions and contained 3,879 signatures from electors in Union Township.[19]

On December 3, 2018, Ronald B. Campbell, the Union Township Fiscal Officer, submitted a letter to the Clermont County Board of Elections confirming that he was not forwarding the petition to the Clermont County Board of Elections.[20] The Union Township Board of Trustees did not forward the relator's petition for a Township Zoning Referendum to the Clermont County Board of Elections.[21]

The relator's December 14, 2018 verified petition for writ of mandamus against the respondent requests as follows: (1) that the court issue a writ of mandamus directing the Union Township Board of Trustees to certify the petition to the Clermont County Board of Elections, (2) reasonable costs associated with this action in accordance with R.C. 2731.11, (3) attorney fees associated with this action, and (4) such other relief, both legal and equitable, as the court deems appropriate.

On January 16, 2019, the respondent filed a motion to dismiss the petition for writ of mandamus. The relator filed a response in opposition to the motion on January 29th. The respondent filed a reply in support of the motion on February 1st. The court heard oral argument on the motion on February 25th, after which it took the motion under advisement.

---

[18] Compl., ¶¶ 3, 29.
[19] Compl., ¶ 29.
[20] Compl., ¶ 30.
[21] Compl., ¶ 4.

## LEGAL STANDARD

The respondent's motion to dismiss is made pursuant to Civ.R. 12(B)(6), which provides that a party may move to dismiss an action on the basis of failure to state a claim upon which relief can be granted. "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint."[22] "A trial court may take judicial notice of 'appropriate matters' in considering a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim."[23] "Thus, the movant may not rely on allegations or evidence outside the complaint; such matters must be excluded * * *."[24] "'The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom.'"[25] "It must appear beyond doubt that the plaintiff can prove no set of facts entitling him to relief."[26]

## LEGAL ANALYSIS

"To be entitled to a writ of mandamus, a party must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty

---

[22] *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11, citing, *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989).
[23] *Charles v. Conrad*, 10th Dist. Franklin No. 05AP-410, 2005-Ohio-6106, ¶ 26, quoting *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 16, 661 N.E.2d 170 (1996).
[24] *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 11, citing Civ.R. 12(B).
[25] *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 12, quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756 (1988).
[26] *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 12, citing *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182 (1995).

on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law."[27] "An appeal is generally considered an adequate remedy in the ordinary course of law sufficient to preclude a writ."[28]

The respondent argues that the relator's petition must be dismissed because it cannot satisfy any of the three requirements for a writ of mandamus. First, the respondent argues that the relator cannot establish a clear legal right to a referendum, nor can it establish the respondent's clear legal duty to allow a referendum. This argument is based upon the proposition that Resolution 2018-52 did not rezone the Property, and therefore the respondent was not subject to the requirements for amending zoning in R.C. 519.12(H), which include referendum rights. Additionally, the respondent argues that the relator had an adequate remedy at law, which is the relator should have pursued an administrative appeal of Resolution 2018-52 under R.C. Chapter 2506.

To begin with the respondent's first argument, the respondent posits that the Consent Decree exclusively governs the Property's zoning and that it removed the previous zoning of the Property as R-1 and ER. To determine whether the Consent Decree rezoned the Property or entirely removed all zoning of its zoning designations, the court must examine it.

"Courts have noted that consent decrees are essentially contractual agreements that are given the status of a judicial decree; as such [c]ontract principles are generally

---

[27] *State ex rel. Quinn v. Delaware County Board of Elections*, 152 Ohio St.3d 568, 2018-Ohio-966, 99 N.E.3d 362, ¶ 17, citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶¶ 6, 13.

[28] *Shoop v. State*, 144 Ohio St.3d 374, 2015-Ohio-2068, 43 N.E.3d 432, ¶ 8, citing *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus.

applicable" in a court's analysis.[29] When undertaking contractual interpretation, the court's role is "to give effect to the intent of the parties to the agreement."[30] Courts examine contracts "as a whole and presume that the intent of the parties is reflected in the language" of the contract.[31] Unless a different meaning "is clearly apparent from the contents" of the contract, the court relies on the plain and ordinary meaning of the contract's language.[32]

The court finds that the Consent Decree did not rezone the Property or remove its zoning designations of R-1 and ER. Paragraph 3 of the Consent Decree indicates:

> "Defendant [Union Township] has adopted the 'Zoning Resolution for Union Township' which includes the 'Union Township District Map,' pursuant to which Defendant has zoned the subject real estate 'R-1' Single Family Detached Residential Structure Zone and 'A-1' Agricultural Conservation Zone, now known as 'ER' Estate Residential District * * *."[33]

Thus, at the time the Consent Decree went into effect in 2000, the Property was zoned as R-1 and ER. The Consent Decree continues at Paragraph 4:

> "Due to the special characteristics and unique special features of the subject real estate, certain limitations on lot area, lot width and setbacks contained in the 'R-1' Single Family Detached Residential Structure Zone and 'ER' Estate Residential District zoning regulations, shall not be applied to

---

[29] (Internal quotations omitted.) *State ex rel. Cordray v. R.J. Reynolds Tobacco Co.*, 10th Dist. Franklin No. 09AP-259, 2010-Ohio-86, ¶ 16, quoting *Save the Lake*, 2004-Ohio-4522 at ¶ 14.
[30] *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11, citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). *See Kelly v. Med Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987), citing *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974) ("The purpose of contract construction is to effectuate the intent of the parties.").
[31] *Westfield Ins. Co.*, 2003-Ohio-5849 at ¶ 11, citing *Kelly*, 31 Ohio St.3d at paragraph one of the syllabus. *See Cox*, 2011-Ohio-1635 at ¶ 15, citing *Kelly*, 31 Ohio St.3d at paragraph one of the syllabus (stating that a contract "must be examined as a whole and presume that the intent of the parties is reflected in the language used in the policy.").
[32] *Westfield Ins. Co.*, 2003-Ohio-5849 at ¶ 11, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus.
[33] Consent Decree, ¶ 3.

> the subject real estate, are set aside with respect thereto and shall be unenforceable against the subject real estate."[34]

Based on this language, the Consent Decree did not supplant the zoning designations on the Property that were set forth in the Union Township Zoning Resolution. Instead, the Consent Decree merely allows the Property owner more latitude with respect to the lot area, width, and setback limitations for R-1 and ER zoning districts.

Under Paragraph 6, the Property owner is allowed to "develop and use the subject real estate as a single family detached housing residential community, recreational facilities, and open space, and provided herein."[35] Again, this provision does not state that the Property would no longer be zoned as R-1 or ER or that R.C. Chapter 519 would no longer apply.

In fact, other portions of the Consent Decree imply otherwise. Paragraph 2 indicates: "Defendant Union Township through the Defendant Board of Trustees has the authority to regulate the zoning of the unincorporated area of Union Township, Clermont County, Ohio, of which the subject real estate is a part, pursuant to Chapter 519 of the Ohio Revised Code, R.C. 519.01 *et seq.*"[36] This language acknowledges R.C. Chapter 519's applicability to the Property.[37]

Perhaps most significantly, Paragraph 17 states: "Nothing herein shall affect or impair Defendant's right to zone or rezone property, to amend its zoning text or zoning

---

[34] (Emphasis added.) Consent Decree, ¶ 4.
[35] Consent Decree, ¶ 6.
[36] Consent Decree, ¶ 2.
[37] Of note, R.C. 505.07 (which was enacted four years after the Consent Decree was entered and therefore is inapplicable) states that a consent decree may settle court actions without following R.C. 529.12, and it "may include an agreement to rezone any property involved in the action * * *." Thus, even under R.C. 505.07, it is not the case that a consent decree automatically rezones a property. Instead, it "may" rezone a property.

map, or to bind future elected officials of Union Township with respect to the zoning of the Property."[38] Paragraph 17 would have no meaning or effect if, as the respondent argues, the Consent Decree itself rezoned the Property. Given that the Consent Decree does not actually state that it is rezoning the Property or removing its zoning designations, and due to the other provisions that suggest otherwise, the court finds the respondent's argument that the Consent Decree rezoned the Property or removed the zoning designations unavailing.

The respondent argues that, because the Consent Decree controls the zoning of the Property, Resolution 2018-52 was an administrative act, not a legislative act. As such, the respondent posits that it did not need to follow the requirements in R.C. 519.12, including the referendum requirements. Since the court has already determined that the Consent Decree did not rezone the Property or remove the zoning designations that apply to it, the court will now determine if Resolution 2018-52 rezoned the property. If that is the case, as will be explained, then Resolution 2018-52 was a legislative act, and R.C. 519.12 applies. If Resolution 2018-52 was an administrative act, then R.C. 519.12 does not apply, including its referendum requirements.

"Under traditional concepts of zoning, a political subdivision is divided into a number of zoning districts by the local legislative body, which also establishes uniform rules concerning allowable type, size and location of buildings within a given district. Each improvement within a zoning district must comply with the same legislative specifications, unless a variance is sought and granted."[39]

---

[38] Consent Decree, ¶ 17.
[39] *Gray v. Trustees, Monclova Twp.*, 38 Ohio St.2d 310, 311, 313 N.E.2d 366 (1974).

The Ohio Supreme Court recently explained the process of amending zoning plans in accordance with R.C. 519.12 in *State ex rel. Quinn v. Delaware County Board of Elections*, 152 Ohio St.3d 568, 2018-Ohio-966, 99 N.E.3d 362 (2018):

> "* * * [A] proposed amendment to the plan may be initiated in any one of three ways: (1) by a motion of the township zoning commission, (2) by the passage of a resolution by the township trustees, or (3) by the submission of an application by an owner or lessee of property within the area proposed to be changed. R.C. 519.12(A)(1). After notice and a hearing, the township zoning commission has 30 days in which to recommend that the amendment be approved, denied, or approved with modifications. R.C. 519.12(E). The township trustees then conduct their own hearing and vote on whether to accept, reject, or modify the commission's recommendation. R.C. 519.12(H).
>
> If the trustees approve a resolution adopting the proposed amendment, then the amendment will become effective 30 days later unless within that time period, the trustees receive a petition, signed by the requisite number of eligible electors in the relevant area of the township, asking the trustees to submit the amendment to the electors of that area for approval or rejection. Id. Upon receiving a zoning-amendment-referendum petition, the township trustees 'shall certify the petition to the board of elections' within 14 days. Id. The elections board must then determine 'the sufficiency and validity of [the] petition.' Id.
>
> 'If the board of elections determines that a petition is sufficient and valid, the question shall be voted upon at a special election * * *.' Id."[40]

If Resolution 2018-52 was an administrative act, as the respondent argues, then it was only subject to an administrative appeal under R.C. Chapter 2506,[41] and the respondent was not required to follow the above procedure. Importantly to this case,

---

[40] (Emphasis added.) *State ex rel. Quinn v. Delaware County Board of Elections*, 152 Ohio St.3d 568, 2018-Ohio-966, 99 N.E.3d 362, ¶¶ 3-5 (2018).
[41] *Tuber v. Perkins*, 6 Ohio St.2d 155, 156, 216 N.E.2d 877 (1966).

administrative actions are not subject to referendum,[42] such as the right to referendum secured in R.C. 519.12, described above.

On the other hand, legislative actions are not appealable under R.C. Chapter 2506.[43] "The enactment and amendment of zoning regulations constitute legislative action."[44] And when a board of township trustees adopts zoning resolutions, it is acting in a legislative capacity.[45] In order to adopt a zoning resolution, a board of trustees "must follow the explicit procedures set out in R.C. 519.03-519.11."[46] As the Ohio Supreme Court recently explained: "A township's action that effects a rezoning of property is a legislative act that is subject to referendum under R.C. 519.12(H), but an action that merely approves development as being in compliance with existing zoning standards is an administrative act that is not subject to referendum."[47]

To determine whether a legislative body has taken administrative or legislative action, courts ask "whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence."[48]

---

[42] *State ex rel. Federle v. Warren Cty. Bd. of Elections*, Slip Opinion No. 2019-Ohio-84, ¶ 13, quoting *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, ¶ 30. *See State ex rel. Sensible Norwood v. Hamilton Cty. Bd. of Elections*, 148 Ohio St.3d 176, 2016-Ohio-5919, 69 N.E.3d 696, ¶ 13 (2016), quoting *N. Main St. Coalition*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 34 (holding same).

[43] *Auxier Trucking v. Tate Twp. Bd. of Trustees*, 12th Dist. Clermont No. CA2001-01-012, 2001 WL 1652078, *3 (Dec. 24, 2001).

[44] *Tuber*, 6 Ohio St.2d at 157, citing *Berg v. City of Struthers*, 176 Ohio St. 146, 198 N.E.2d 48 (1964). *See Auxier Trucking*, 2001 WL 1652078 at *3, citing *Tuber*, 6 Ohio St.2d at 157 (holding same).

[45] *Tuber*, 6 Ohio St.2d at 157, citing *Randall v. Twp. Bd. of Meridian Twp., Ingham Cty.*, 342 Mich. 605, 70 N.W.2d 728 (1955). *See Kroeger v. Std. Oil Co. of Ohio*, 12th Dist. Clermont No. CA88-11-086, 1989 WL 87837, *3 (Aug. 7, 1989), citing *Tuber*, 6 Ohio St.2d at the syllabus ("The board of trustees acts as a legislative body when adopting zoning resolutions.").

[46] *Kroeger*, 1989 WL 87837 at *3.

[47] *State ex rel. Federle*, 2019-Ohio-84 at ¶ 13, citing *State ex rel. Zonders v. Delaware Cty. Bd. of Elections*, 69 Ohio St.3d 5, 13, 630 N.E.2d 313 (1994).

[48] *State ex rel. Sensible Norwood*, 2016-Ohio-5919 at ¶ 13, quoting *Donnelly v. Fairview Park*, 13 Ohio St.2d 1, 233 N.E.2d 500 (1968), paragraph two of the syllabus. *See Myers v. Schiering*, 27

In examining the case at bar, the court finds that the relator has adequately pled that the respondent rezoned the Property when it passed Resolution 2018-52, thus taking legislative action. As previously explained, the Consent Decree did not change the zoning of the Property from R-1 and ER to another zoning designation or to none at all. Although the Consent Decree removed certain limitations on lot area, lot width, and setbacks for the Property, the complaint and Consent Decree indicate that the Property was still zoned as R-1 and ER. The principal permitted uses for R-1 Single Family Detached Structure Residential Zones includes "[s]ingle family detached dwellings such that there shall be a restriction of one single family detached dwelling unit per lot * * *."[49] Similarly, ER Estate Residential Districts allow for "[s]ingle family detached dwellings such that there shall be a restriction of one single-family detached dwelling unit per lot * * *."[50]

Resolution 2018-52, on the other hand, allows for 875 multifamily units.[51] Therefore, although the Property remains zoned as R-1 and ER in name, the respondent has effectively rezoned the Property.[52] As pled, the respondent enacted law, as opposed to administering a previously established law, making its action legislative. As a

---

Ohio St.2d 11, 13-14, 271 N.E.2d 864 (1971) (holding same); *Shaheen v. Cuyahoga Falls City Council*, 9th Dist. Summit No. 24472, 2010-Ohio-640, ¶ 16, quoting *Donnelly*, 13 Ohio St.2d at paragraph two of the syllabus (holding same).

[49] Article 4, Section 621 of the Union Township Zoning Resolution. Of note, under Civ.R. 44.1, the court can take judicial notice of the Union Township Zoning Resolution. *See Keith*, 1994 WL 117767 at *2 and Civ.R. 44.1(A)(2).

[50] Article 6, Section 610 of the Union Township Zoning Resolution.

[51] Resolution 2018-52.

[52] In some ways, Union Township's actions are akin to granting a non-conforming use variance, which too would be a legislative action instead of an administrative one. *See Fakas v. City of Cleveland*, 8th Dist. Cuyahoga No. 45446, 1983 WL 2978, *2 (May 12, 1983). Article 4, Section 430 of the Union Township Zoning Resolution states: "The Board of Zoning Appeals shall have no authority to grant variances * * * or authorize uses which are not otherwise permitted within the district in which the subject property is located." So it seems that, even under a variance, the Property could not be used for multifamily dwellings since that is a different use than permitted in R-1 and ER districts.

legislative action, the respondent is incorrect that the relator's petition must be dismissed because Resolution 2018-52 was an administrative act that did not require the respondent to comply with the strictures of R.C. 519.12.

Lastly, a "writ of mandamus is not available if the relator has an adequate remedy in the ordinary course of the law."[53] The respondent argues that the relator had an adequate remedy at law, that being an administrative appeal under R.C. Chapter 2506. However, as discussed, Resolution 2018-52 was not an administrative action, and therefore the relator did not have the option of an administrative appeal as a remedy. Therefore, when accepting the allegations in the complaint as true, the court finds that it does not appear beyond doubt that the relator can prove no set of facts entitling it to relief.

## CONCLUSION

For the foregoing reasons, the defendant-respondent's motion to dismiss is not well-taken and is hereby denied.

Counsel shall conference and call the Assignment Commissioner (513-732-7108) within three business days of the date of this Decision/Entry in order to schedule a case management conference for the purpose of scheduling, among other things, deadlines for the completion of all discovery and for the filing of motions for summary judgment and for the trial of any remaining issues which remain for trial. The case management

---

[53] *State ex rel. Langhenry v. Britt*, 151 Ohio St.3d 227, 2017-Ohio-7172, 87 N.E.3d 1216, ¶ 11 (2017), citing *State ex rel. JobsOhio v. Goodman*, 133 Ohio St.3d 297, 2012-Ohio-4425, 978 N.E.2d 153, ¶ 15.

conference shall be scheduled and held within ten business days of the date of this Decision/Entry unless otherwise approved by the court.

**IT IS SO ORDERED.**

DATED: 3-14-19

Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Decision/Entry were sent on this 14th day of March 2019 by e-mail to Matthew W. Fellerhoff, at mwfellerhoff@strausstroy.com, Emily T. Supinger, at etsupinger@strausstroy.com, and Jeffrey A. Levine, at jalevine@strausstroy.com, attorneys for the plaintiff, and to Lawrence L. Barbiere, at lbarbiere@smbplaw.com, and Katherine L. Barbiere, at kbarbiere@smplaw.com, attorneys for the defendants.

Judicial Assistant to Judge McBride