

COPY

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

CINCINNATI NATURE CENTER, ET AL.	:	CASE NO. 2018 CVH 01675
Plaintiffs	:	Judge McBride
vs.	:	DECISION/ENTRY
UNION TOWNSHIP, CLERMONT COUNTY, OHIO, ET AL.	:	
Defendants	:	

2018 MAR 14 PM 11:33:36
 CLERK OF COURT
 CLERMONT COUNTY, OHIO

FILED

Strauss Troy, Co., LPA, Matthew W. Fellerhoff and Emily T. Supinger, counsel for the plaintiffs Cincinnati Nature Center, Committee to Protect Avey's Way, Maria Jo Keri, and Anne Robinson, 150 East Fourth Street, 4th Floor, Cincinnati, Ohio 45202.

Schroeder, Maundrell, Barbieri & Powers, Lawrence E. Barbieri and Katherine L. Barbieri, counsel for the defendants Union Township, Clermont County, Ohio and the Board of Trustees of Union Township, 5300 Socialville Foster Road, Suite 200, Mason, Ohio 45040.

Flagel & Papakirk, LLC, James Papakirk and Hallie S. Borellis, counsel for the defendant Angeleke Sansalone, 50 East Business Way, Suite 410, Cincinnati, Ohio 45241.

The complaint in this case was filed by the plaintiffs Cincinnati Nature Center, Committee to Protect Avey's Way, Maria Jo Keri, and Anne Robinson on November 27, 2018.

This cause is now before the court for consideration of the motions to dismiss the plaintiffs' complaint filed by the defendants Union Township, Clermont County, Ohio;

Board of Trustees of Union Township; and Angeleke Sansalone on December 21, 2018 and January 2, 2019.

The court heard oral argument on the motions on February 25, 2019. At the conclusion of the oral arguments of counsel, the court took the defendants' motions under advisement.

Upon consideration of the motions, 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

As stated above, the plaintiffs Cincinnati Nature Center, Committee to Protect Avey's Way, Maria Jo Keri, and Anne Robinson filed suit against the defendants Union Township, Clermont County, Ohio; Board of Trustees of Union Township (hereinafter referred to as "Board of Trustees"); and Angeleke Sansalone on November 27, 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 Cincinnati Nature Center owns property, known as Rowe Woods, in Union Township that is adjacent to the Property.² The plaintiffs Maria Jo Keri and Anne

¹ Compl., ¶ 1.
² Compl., ¶ 10.

Robinson own property in Union Township.³ The plaintiff Committee to Protect Avey's Way is a legislative campaign fund committee that is promoting a referendum petition challenging the rezoning of the Property, and its members own property in Union Township.⁴

The Property was initially owned by the Coolock Corporation before being transferred to the Sisters of Mercy of Clermont in 1997.⁵ In 1998 it was transferred to Anthony M. Sansalone, Trustee, and later to its current owner, the defendant Angeleke Tsiribas Sansalone, in 2009.⁶

In 1990, John Sansalone, a developer, sought to develop the Property.⁷ At the time, the Property was zoned as "R-1" and "S-1," which allows for single family detached homes.⁸ John Sansalone wanted to have the property rezoned as R-4 so as to allow for the development of townhouses, condominiums, and apartments.⁹

However, the Union Township Zoning Commission recommended against it, and the Board of Trustees rejected the proposed amendment.¹⁰ This led the Property owners to bring a lawsuit against Union Township challenging the denial in state court.¹¹ Both the trial and appellate courts affirmed Union Township's denial.¹²

³ Compl., ¶ 11.

⁴ Compl., ¶¶ 3 and 11.

⁵ Compl., ¶ 16.

⁶ Compl., ¶ 16.

⁷ Compl., ¶ 17.

⁸ Compl., ¶ 17.

⁹ Compl., ¶ 17.

¹⁰ Compl., ¶ 19.

¹¹ Compl., ¶ 21.

¹² Compl., ¶ 21.

The Property owners then again presented another development plan, which was likewise rejected and appealed. The trial and appellate courts affirmed Union Township's denial.¹³

The Property owners next presented a development plan to Union Township and sought a variance to allow for smaller minimum lot size requirements.¹⁴ The Union Township Board of Zoning Appeals denied the request, and the decision was appealed to the common pleas and appellate courts, which affirmed the board.¹⁵

In 1998, Anthony M. Sansalone, then the Property owner, and Rumpke Road Development Corporation filed a complaint for declaratory judgment and money damages in the United States District Court for the Southern District of Ohio.¹⁶ The suit challenged the zoning designation of the Property as unconstitutional and sought the right to develop the Property as a planned single family housing residential community.¹⁷

The parties to the 1998 case settled the lawsuit, and the court issued a consent decree ("the Consent Decree") in 2000.¹⁸ 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 * * *."¹⁹

The Consent Decree continues at Paragraph 4:

¹³ Compl., ¶ 21.

¹⁴ Compl., ¶ 22.

¹⁵ Compl., ¶ 22.

¹⁶ Compl., ¶ 23.

¹⁷ Compl., ¶¶ 24-25.

¹⁸ Compl., ¶¶ 24-26.

¹⁹ Consent Decree, ¶ 3. The Consent Decree is attached to the Complaint as Appendix B.

“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.”²⁰

The settlement plan attached to the Consent Decree provided for building not more than 575 detached units with lots of varying sizes, such as lots being no less than 20,000 square feet in some areas and not less than 30,000 square feet in others.²¹ The Consent Decree also included requirements for the development, such as lot sizes, installation of roads, installations of traffic signals, etc.²²

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.”²³

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 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.

²⁰ Consent Decree, ¶ 4.

²¹ Compl., ¶ 27.

²² Compl., ¶ 27.

²³ Consent Decree, ¶ 17.

16. Major changes to the Settlement Plan, Exhibit 'B' hereto, proposed by Plaintiff may be approved by Defendant in its reasonable discretion."²⁴

Finally, the Consent Decree provided: "In the event that either party reasonably believes that the provisions of this order have not properly been followed, then such party may file a motion to reopen this action and the court will retain jurisdiction herein."²⁵ The development agreed to in the Consent Decree was never built.²⁶

In 2014, Fischer Homes proposed a development of the Property.²⁷ Upon meeting opposition from the public, the plan was abandoned.²⁸ In 2017, Fischer Homes again proposed a development of the Property, which would include 1,445 units, including 875 multi-family units, 400 single family units, and 250 units that may either be single family or multi-family.²⁹

On July 24, 2018, the developer presented another plan to develop the Property.³⁰ Surrounding property owners submitted emails and comments to the Board of Trustees detailing their concerns with the proposed development.³¹ The concerns were numerous and included concerns about the septic system, loss in property value, roadway congestion, environmental matters, and more.³²

Township Trustee John McGraw represented in an email to a resident that the July 24, 2018 presentation was not a proposal but a concept plan.³³ McGraw indicated that,

²⁴ Consent Decree, ¶ 14-16.

²⁵ Consent Decree, ¶ 20.

²⁶ Compl., ¶ 35.

²⁷ Compl., ¶ 36.

²⁸ Compl., ¶ 37.

²⁹ Compl., ¶ 39.

³⁰ Compl., ¶ 41.

³¹ Compl., ¶ 41.

³² Compl., ¶ 42.

³³ Compl., ¶ 43.

to move forward, the developer would need to contact affected homeowners and present options, and the Clermont County Engineer and Township Planning Department would need to review and approve the plan too.³⁴ McGraw indicated that the revised plan would not be approved until all proper steps were taken.³⁵

Twenty-five residents submitted a petition to the Board of Trustees opposing the development on October 19, 2018.³⁶ However, on October 25, 2018, the Board of Trustees passed Resolution 2018-52, approving the proposed development, referred to as Miller Place Development.³⁷ There was no presentation to the public or Board of Trustees, and there was no formal public hearing.³⁸

Resolution 2018-52 purports to make major changes to the Consent Decree.³⁹ It allows for 1,445 total units including 875 multifamily residential units.⁴⁰

The plaintiffs' November 27, 2018 complaint against the defendants includes five counts for declaratory judgment, as follows: (1) declaration that the Resolution is in violation of the Union Township Zoning Resolution and Consent Decree, (2) declaration that the Board of Trustees improperly modified the Consent Decree to allow for the Miller Place Development, (3) declaration that the Board of Trustees improperly changed the zoning designation of the Property by failing to follow the procedures for notice and hearings set out under R.C. 519.12, (4) declaration that the Board of Trustees' actions deprived it of its 1st, 5th, and 14th Amendment rights, and (5) declaration that Resolution

³⁴ Compl., ¶ 43.

³⁵ Compl., ¶ 43.

³⁶ Compl., ¶ 44.

³⁷ Compl., ¶ 46. Resolution 2018-52 is attached to the complaint as Appendix E.

³⁸ Compl., ¶ 46.

³⁹ Resolution 2018-52.

⁴⁰ Resolution 2018-52.

2018-52 violates Section 6, Article VIII of the Ohio Constitution and is therefore unconstitutional, invalid, and of no effect and that any attempted use of eminent domain, being for a solely private purpose, is a violation of Section 19, Article I of the Ohio Constitution.

On December 21, 2018, the defendants Union Township, Clermont County, Ohio and the Board of Trustees of Union Township (hereinafter collectively referred to as "Union Township") filed a motion to dismiss. On January 1, 2019, the defendant Angeleke Sansalone filed a motion to dismiss as well, subscribing to the arguments Union Township made in its motion.

The plaintiffs filed a response in opposition to both motions on January 4th. Union Township filed a reply in support of its motion on January 11th, and Sansalone filed a reply that same day, again reiterating Union Township's reply. The court heard oral arguments on the motions on February 25th, after which it took the motions under advisement.

LEGAL STANDARD

The defendants' 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."⁴¹ "Thus, the movant may not rely on allegations or evidence outside the complaint; such matters must be excluded * * *."⁴² "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."⁴³ "It must appear beyond doubt that the plaintiff can prove no set of facts entitling him to relief."⁴⁴ Additionally, "[a] party may use a Civ.R. 12(B)(6) motion to dismiss to raise the defense of lack of standing."⁴⁵

I. STANDING

"Before a court can consider the merits of a legal claim, a litigant must prove that it has standing to sue."⁴⁶ "'Standing' is defined at its most basic as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'"⁴⁷ It is question of

⁴¹ *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).

⁴² *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 11, citing Civ.R. 12(B).

⁴³ *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).

⁴⁴ *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).

⁴⁵ *State ex rel. Hamilton Twp. Bd. of Trustees v. Warren Cty. Bd. of Commrs.*, 12th Dist. Warren No. CA2009-07-100, 2010-Ohio-738, ¶ 21, citing *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. Franklin No. 08AP-1067, 2009-Ohio-3230, ¶ 4.

⁴⁶ *State ex rel. Food & Water Watch v. State*, 153 Ohio St.3d 1, 2018-Ohio-555, 100 N.E.3d 391, ¶ 35 (2018), citing *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7.

⁴⁷ *Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 15 (2012), quoting *Ohio Pyro Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27.

whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy * * *."⁴⁸

"Traditional standing 'require[s] litigants to show, at minimum, that they have (1) suffered an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief."⁴⁹ A party's standing is not contingent upon the merits of its claims.⁵⁰ "Rather, standing depends upon whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case."⁵¹

Courts are "cautioned to remember, standing is not a technical rule intended to keep aggrieved parties out of court," but rather "it is a practical concept designed to insure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented."⁵²

This broad interpretation has been tempered by the Ohio Supreme Court's warnings that, "[c]ourts have the duty to ensure that plaintiffs plead these elements for

⁴⁸ *Federal Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 21, citing *Cleveland v. Sharker Hts.*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (1987).

⁴⁹ *State ex rel. Ullmann v. Husted*, 148 Ohio St.3d 255, 2016-Ohio-5584, 70 N.E.3d 502, ¶ 8, quoting *ProgressOhio.org, Inc.*, 2014-Ohio-2382 at ¶ 7. See *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 8, citing *Cuyahoga Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22 ("Standing exists only when (1) the complaining party has suffered or has been threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, (2) the law in question caused the injury, and (3) the relief requested will redress the injury.").

⁵⁰ *State ex rel. Ullmann*, 2016-Ohio-5584 at ¶ 8, quoting *ProgressOhio.org, Inc.*, 2014-Ohio-2382 at ¶ 7.

⁵¹ *State ex rel. Ullmann*, 2016-Ohio-5584 at ¶ 8, quoting *ProgressOhio.org, Inc.*, 2014-Ohio-2382 at ¶ 7.

⁵² (Internal quotations omitted.) *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 47, quoting *Fort Trumbull Conservancy, L.L.C. v. Alves*, 262 Conn. 480, 486, 815 A.2d 1188 (2003).

purposes of declaratory-judgment actions and that the complaint sufficiently avers injury, causation, and redressability."⁵³ If a party fails to establish injury, causation, or redressability, the court must dismiss the cause.⁵⁴

Standing "turns on the nature and source of the claim asserted."⁵⁵ Importantly, standing can be created by statute.⁵⁶ And when the legislature "has * * * provided by statute for judicial review * * *, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."⁵⁷

The declaratory-judgment chapter of the Ohio Revised Code broadly authorizes plaintiffs to bring actions for a declaration of "rights, status, and other legal relations whether or not further relief is or could be claimed."⁵⁸ Moreover, "[i]t is well settled that '[a]ctions for declaratory judgment may be predicated on constitutional or nonconstitutional grounds."⁵⁹ Further, under R.C. 2721.03:

"* * * any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it."⁶⁰

⁵³ *Moore*, 2012-Ohio-3897 at ¶ 49.

⁵⁴ *Id.*

⁵⁵ *Deutsche Bank Natl. Tr. Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 20 (2016), quoting *Moore*, 2012-Ohio-3897 at ¶ 23.

⁵⁶ *Moore*, 2012-Ohio-3897 at ¶ 48, citing *City of Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986).

⁵⁷ *Ferguson*, 25 Ohio St.3d at 75-76.

⁵⁸ *Moore*, 2012-Ohio-3897 at ¶ 45, citing R.C. 2721.02. See R.C. 2721.02(A): "* * * courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed."

⁵⁹ *Moore*, 2012-Ohio-3897 at ¶ 45, quoting *State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶ 13.

⁶⁰ R.C. 2721.03.

Thus, a declaratory judgment action “contemplates a written contract or other writing for the court to interpret as to the rights and obligations of the parties thereto.”⁶¹

In the instant case, the plaintiffs have prayed for five separate declaratory judgments. The defendants argue that the plaintiffs do not have standing to have a declaratory judgment in this action under R.C. 2721.03.⁶² They posit that the plaintiffs claim standing predicated upon the Consent Decree, which is a “writing” under R.C. 2721.03. However, the defendants argue that the plaintiffs have no standing to enforce it, as they are third parties.⁶³

The plaintiffs counter that they are not attempting to enforce the Consent Decree; instead, they argue that they are exercising statutory and constitutional rights.⁶⁴ Even so, the plaintiffs maintain that if they were seeking to enforce the Consent Decree, they have standing to do so as third party beneficiaries under Civ.R. 71. Beyond the Consent Decree, the plaintiffs argue that they have standing under R.C. 2721.03 and R.C. 519.24, which provides rights for adjacent and neighboring landowners to bring appropriate actions to prevent zoning violations.

A. STANDING UNDER THE CONSENT DECREE

The United States Supreme Court has held “that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even

⁶¹ *Haley v. Bank of Am. Corp.*, 8th Dist. Cuyahoga No. 98207, 2012-Ohio-4824, ¶ 17

⁶² Union Township's Mot., pg. 8.

⁶³ Union Township's Mot., pg. 8.

⁶⁴ Pls. Resp., pg. 6.

though they were intended to be benefited by it."⁶⁵ Subsequently, the Sixth Circuit Court of Appeals has consistently held that "that third parties, even intended third-party beneficiaries, lack standing to enforce their interpretations of agreed judgments."⁶⁶

This is so even though other circuits have found that intended beneficiaries have standing to enforce consent decrees to which they were not parties to.⁶⁷ Moreover, "whether a party is an intended or third-beneficiary, is generally a question of law for the Court."⁶⁸

The above precedent has been cited to and incorporated into Ohio law by state courts examining these issues. So too, Ohio courts have examined Civ.R. 71, which provides:

"When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."⁶⁹

⁶⁵ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975), citing *United States v. Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971) and *Buckeye Coal & R. Co. v. Hocking Valley Co.*, 269 U.S. 42, 46 S.Ct. 61, 70 L.Ed. 155 (1925).

⁶⁶ *Sanders v. Republic Services of Kentucky, LLC*, 113 Fed.Appx. 648, 650 (6th Cir.2004). See *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.1992) ("A consent decree 'is not enforceable * * * by those who are not parties to it. * * * It 'may be challenged only on the ground that its substantive provisions unlawfully infringe upon the rights of the complainant.'").

⁶⁷ *Aiken v. City of Memphis*, 37 F.3d 1155, 1167 (6th Cir.1994). See *Ragland v. City of Chillicothe*, S.D. Ohio No. 2:10-CV-879, 2012 WL 1389949, *5 (Apr. 20, 2012) ("Though other Circuits have distinguished *Blue Chip Stamps* and held that intended third-party beneficiaries of a consent decree have standing to enforce it in federal court, the Sixth Circuit has notably refused to follow suit."); *But see Hook v. Arizona Dep't of Corrections*, 972 F.2d 1012, 1015 (9th Cir.1992) (concluding that the holding of *Blue Chip* "does not apply to intended third party beneficiaries"); *Berger v. Heckler*, 771 F.2d 1556, 1565 (2d Cir.1985) ("we think that [*Blue Chip*] was not intended to preclude nonparties from intervening to enforce a consent decree where otherwise authorized by the federal rules of civil procedure").

⁶⁸ *JR Engineering, Inc. v. Akron General Medical Center*, Summit C.P. No. CV2014094418, 2016 WL 8849915, *7 (May 9, 2016), citing *Telxon Corp.*, 9th Dist. Nos. 22098, 22099, 2005-Ohio-4931, ¶40.

⁶⁹ Civ.R. 71.

The Staff Notes to Civ.R. 71 further explain its purpose:

"The rule is merely an enabling rule which allows orders in favor of and against persons not parties. It is intended to eliminate the necessity of making persons technical parties to suits in order to reach a just and proper result. No substantive rights are enlarged. The rule is intended to operate only in cases where the person not a party is entitled to an order or where there may be enforcement of an order against a person not a party."⁷⁰

Whether a plaintiff has standing under the provisions of Civ.R. 71 is a question of law.⁷¹

A third party beneficiary "is one for whose benefit a promise has been made in a contract but who is not a party to the contract."⁷² Furthermore, "Ohio contract law distinguishes between intended third-party beneficiaries and incidental third-party beneficiaries."⁷³ Although an intended third-party beneficiary "has enforceable rights under a contract, an incidental third-party beneficiary does not."⁷⁴

The Supreme Court of Ohio adopted "an 'intent to benefit' test * * * to decide whether a third party is an intended or incidental beneficiary."⁷⁵ Under this test:

"[I]f the promisee * * * intends that a third party should benefit from the contract, then that third party is an 'intended beneficiary' who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an 'incidental beneficiary,' who has no enforceable rights under the contract. * * * [T]he mere conferring of some benefit on the

⁷⁰ 1970 Staff Note, Civ.R. 71

⁷¹ *State ex rel. Atty. Gen. v. Mastergard*, 2016-Ohio-660, 60 N.E.3d 540, ¶ 9 (10th Dist.), citing *Save the Lake v. Hillsboro*, 158 Ohio App.3d 318, 2004-Ohio-4522, 815 N.E.2d 706, ¶ 9 (4th Dist.).

⁷² *Mastergard*, 2016-Ohio-660 at ¶ 10, quoting *Maghie & Savage, Inc. v. P.J. Dick, Inc.*, 10th Dist. No. 08AP-487, 2009-Ohio-2164, ¶ 40.

⁷³ *Mastergard*, 2016-Ohio-660 at ¶ 10.

⁷⁴ *Id.*, quoting *Maghie & Savage, Inc.*, 2009-Ohio-2164 at ¶ 40.

⁷⁵ *Mastergard*, 2016-Ohio-660 at ¶ 11, quoting *Fed. Ins. Co. v. Fredericks, Inc.*, 2015-Ohio-694, 29 N.E.3d 313, ¶ 39 (2d Dist.)

supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary."⁷⁶

Not many Ohio courts have examined and synthesized the above law, but the few that have are instructive. In *Save the Lake v. Hillsboro*, 158 Ohio App.3d 318, 2004-Ohio-4522, 815 N.E.2d 706, ¶ 9 (4th Dist.), the Fourth District Court of Appeals found that third party beneficiaries could not enforce a consent decree under Civ.R. 71. In that case, the attorney general filed a complaint against the city of Hillsboro for alleged violations of an Ohio EPA order, asserting that the city had violated the order by discharging sewage and industrial waste into a creek. In 1988, the city and attorney general entered into a consent decree, requiring the city to comply with state and federal laws designed to protect waters.

In 2003, *Save the Lake Association*, an Ohio non-profit corporation, filed a complaint to enforce the consent decree, alleging that its members were being adversely affected by the city's failure to comply with the consent decree. The city subsequently filed a motion to dismiss, asserting that *Save the Lake Association* lacked standing. *Save the Lake Association* responded that it had standing to enforce the consent decree pursuant to Civ.R. 71. The trial court granted the city's motion to dismiss, concluding that *Save the Lake Association* did not have standing under Civ.R. 71, and *Save the Lake Association* appealed the trial court's judgment.

The appellate court looked to federal law, including the United States Supreme Court case of *Blue Chip Stamps v. Manor Drug Stores*, regarding consent decrees in

⁷⁶ *Mastergard*, 2016-Ohio-660 at ¶ 11, quoting *Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1208 (6th Cir.1980). See *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 36 Ohio St.3d 36, 40, 521 N.E.2d 780 (1988) (setting forth the intent to benefit test).

determining whether Save the Lake Association had standing to enforce the consent order entered into between the attorney general and the city. The court also examined *Hook v. Arizona Department of Corrections*, 972 F.2d 1012 (9th Cir.1992), in which that court discussed the distinction between incidental and intended third-party beneficiaries of a consent decree.

In applying that distinction, the Fourth District Court of Appeals in *Save the Lake* found no “express manifestation of an intent to create intended third-party beneficiaries in the language of the agreement between the OEPA and the city.”⁷⁷ The court further cited Ohio Supreme Court case law holding that “where an agency is charged with enforcement of certain laws, these laws do not confer upon an individual the right to bring a private civil action absent a ‘clear implication’ that such a remedy was intended by the legislature.”⁷⁸ Applying those principles, the appellate court resolved that Save the Lake Association “cannot establish Civ.R. 71 standing so as to maintain this action and must explore other ways to air its grievances.”⁷⁹

By contrast, in *McDowell v. Toledo*, 6th Dist. No. L-10-1229, 2011-Ohio-1842, the Sixth District Court of Appeals did allow third party intended beneficiaries to enforce a consent decree they were not a party to under Civ.R. 71. In *McDowell*, the city of Toledo was a party to a consent decree in 1992 following a lawsuit initiated by four individuals who lived within the city and who claimed the city's failure to provide them with notice before shutting off their water had deprived them of a property interest. The consent decree obligated the city to provide certain rights to recipients of its water services,

⁷⁷ *Save the Lake*, 2004-Ohio-4522 at ¶ 16.

⁷⁸ *Id.* at ¶ 17, citing *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St.2d 245, 248-49, 348 N.E.2d 144 (1976).

⁷⁹ *Save the Lake*, 2004-Ohio-4522 at ¶ 17.

including non-property owners, and also included a permanent injunction in favor of Ruby McDowell.

Approximately 20 years later, Kyle Tate and the Toledo Fair Housing Center, both non-parties to the 1992 consent decree, filed an emergency motion to enforce the consent decree, pursuant to Civ.R. 71, alleging that the city's failure to provide notice prior to the termination of water services was in violation of the consent decree. Tate argued in part that, while one portion of the 1992 consent decree "provided limited injunctive relief specifically to Ruby McDowell, the overall intent of the entry was clearly to provide its benefits to all Toledo residents."⁸⁰ The trial court ruled that Tate was an intended third-party beneficiary of the 1992 consent decree, and ordered the city to restore water service to Tate's residence and provide the occupants of the residence with notice as required by the 1992 consent judgment.

The city appealed the trial court's ruling, arguing that Tate could not meet the burden of showing he was an intended third-party beneficiary. In *McDowell*, the court held that Tate was entitled to enforce the consent decree, citing language from the 1992 consent decree "that provides rights for persons other than the late Ruby McDowell and obligates the city to provide notice and options to continue water services to individuals such as Tate."⁸¹ The court further noted that the city, in order to comply with the consent decree, "adopted the terms of the judgment entry when it revised its administrative regulations shortly thereafter, essentially mirroring the terms of the [consent decree]."⁸² Thus, the court found, if the consent decree "had been intended to apply only to the

⁸⁰ *McDowell v. Toledo*, 6th Dist. No. L-10-1229, 2011-Ohio-1842, ¶ 14.

⁸¹ *Id.* at ¶ 22.

⁸² *Id.* at ¶ 27.

original parties to the lawsuit in 1992, the city would not have incorporated identical terms in the Toledo Municipal Code as it did.”⁸³

Finally, the Tenth District Court of Appeals found that third parties could not enforce a consent decree under Civ.R. 71 in *State ex rel. Attorney General v. Mastergard*, 10th Dist. No. 14AP-1024, 2016-Ohio-660, 60 N.E.3d 540. In *Mastergard*, the attorney general filed a civil lawsuit in 2007 against Daniel Sechrlest and two home improvement companies, Mastergard and Mastergard Remodeling, claiming violations of the Ohio Consumer Sales Practices Act, Ohio Home Solicitation Sales Act, and the Magnuson-Moss Warranty Act. In 2010, the parties entered into a consent decree, which enjoined the defendants from future violations of the CSPA and HSSA, and it enjoined Sechrlest from engaging in the home improvement industry and required him to give the attorney general advance notice before soliciting consumers or effecting consumer transactions. The consent decree also provided restitution to specific consumers.

In 2014, individuals who were not parties to the consent decree filed in the trial court under Civ.R. 71 to enforce it. The trial court found that the plaintiffs were not intended third party beneficiaries with standing to enforce the consent decree, reflecting that the provisions of the consent decree “do not give express enforcement authority to third-parties like the Movants,” nor is it “implied therein that non-parties may enforce it.”⁸⁴ Further, the individual plaintiffs “were not parties to that action or the Consent Judgment,” nor were they “identified, by name or specific class” in the consent decree.⁸⁵ And while various exhibits attached to the consent decree “identified over 40 individuals who were

⁸³ *Id.*

⁸⁴ *Mastergard*, 2016-Ohio-660 at ¶ 18.

⁸⁵ *Id.*

owed restitution or the release of mechanics' liens by Sechriest," none of the plaintiffs were among the consumers listed in those exhibits.⁸⁶ As such, the trial court held that "[t]he benefit conferred upon Ohio consumers generally by the Attorney General's exercise of police powers against Mr. Sechriest and his companies under the CSPA is incidental and indirect rather than intentional."⁸⁷

On appeal, the appellate court reviewed *Blue Chip Stamps*, *McDowell*, and *Save the Lake*, as well as other federal cases. It observed that the Sixth Circuit Court of Appeals strictly applied *Blue Chip Stamps*, and noted that, "[w]hile some federal courts have held that intended third-party beneficiaries may sue to enforce a consent decree, those same courts have been reluctant to apply this exception to consent decrees 'resulting from actions brought by the government.'"⁸⁸ Instead, the general rule is that "only the Government can seek enforcement of its consent decrees; therefore, even if the Government intended its consent decree to benefit a third party, that party could not enforce it unless the decree so provided."⁸⁹

The appellate court concluded that the individual plaintiffs did not have standing to enforce the consent decree as third party beneficiaries.⁹⁰ The court noted that the plaintiffs were not parties to the 2007 lawsuit or the subsequent consent judgment, and under the terms of the consent judgment, the defendants were liable to various individual consumers but not the individual plaintiffs.⁹¹ Moreover, the enforcement provisions of the

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at ¶ 22, quoting *Hodges by Hodges v. Pub. Bldg. Comm.*, 864 F.Supp. 1493, 1508 (N.D.Ill.1994).

⁸⁹ *Mastergard*, 2016-Ohio-660 at ¶ 22, quoting *Hodges by Hodges*, 864 F.Supp. at 1508.

⁹⁰ *Mastergard*, 2016-Ohio-660 at ¶ 23.

⁹¹ *Id.*

consent judgment did not give enforcement authority to third parties. Finally, portions of the relief the plaintiffs sought were available only to the attorney general under R.C. 1345.07.⁹² As such, the plaintiffs did not have standing.⁹³

In examining the present case, the court concludes that the plaintiffs do not have standing under the Consent Decree for several reasons. First, the United States Supreme Court and Sixth Circuit Court of Appeals have ruled that intended third-party beneficiaries lack standing to enforce their interpretations of agreed judgments. As illustrated above, this precedent has been cited by Ohio appellate courts.

Second, even if the court found that intended third party beneficiaries did have standing to enforce consent decrees to which they are not parties, the court finds here that the plaintiffs are not intended beneficiaries. As explained, under the intended beneficiary test, the mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract is insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary. The court cannot find any duty flowing from any of the defendants to any of the plaintiffs in the Consent Decree, nor have the plaintiffs identified any such provisions that provide for duties owed to them.

Instead, at multiple portions of the Consent Decree, it is clear that only the defendants in the present case are intended to enforce it. For instance, preceding the terms of the Consent Decree, the decree states: "IT IS, THEREFORE, hereby agreed by and between the parties for themselves and their successors, agents, employees, heirs

⁹² Id.

⁹³ Id.

and assigns as set forth below, and is thus decreed as follows * * *."⁹⁴ A similar provision is found at Paragraph 13:

"The terms and provisions shall survive the closing or closings of any sales or conveyances of the subject real estate or any portion thereof and shall not prevent or restrict any alienability of the subject real estate, and shall be binding upon and shall inure to the benefit of the parties, their successors, heirs, executors, administrators, assigns, affiliates, agents, officers, and employees in the same manner as upon the signatories hereto."⁹⁵

Again, there is no suggestion that any other parties have any rights under the Consent Decree.

Furthermore, the provisions that allow for the modification of the Consent Decree identify only the plaintiff and defendant named in the federal lawsuit (the defendants in this action), and the Director of Planning and Zoning.⁹⁶ And, perhaps most importantly, Paragraph 20 deals with violations of the Consent Decree, but makes no suggestion that other parties can have their grievances redressed under the Consent Decree: "In the event that either party reasonably believes that the provisions of this order have not properly been followed, then such party may file a motion to reopen this action and the court will retain jurisdiction herein."⁹⁷

Moreover, unlike *McDowell*, none of the provisions in the Consent Decree create obligations to the plaintiffs in this case. The only mention of the Cincinnati Nature Center is at Paragraph 5, which provides: "The area marked as 'Area F' on Exhibit 'B' shall be donated and conveyed to the Union Township Board of Trustees or the Cincinnati Nature

⁹⁴ (Emphasis added.) Consent Decree, pg. 2.

⁹⁵ (Emphasis added.) Consent Decree, ¶ 13.

⁹⁶ See Consent Decree, ¶¶ 14-16.

⁹⁷ (Emphasis added.) Consent Decree, ¶ 20.

Center, at the discretion of the Union Township Board of Trustees, as green area in its present natural and undisturbed state * * *."⁹⁸ This provision allows for the Union Township Board of Trustees to decide whether to donate Area F to itself or the Cincinnati Nature Center. Thus, it does not create a duty to donate Area F to the Cincinnati Nature Center. Furthermore, there has not been any allegation in the complaint that Area F will no longer be used as a green area.

One of the main provisions at issue is Paragraph 4, which provides: "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 forever unenforceable against the subject real estate."⁹⁹ Paragraph 4 allows for these modifications for the Property "due to the special characteristics and unique special features" of the Property, not for the benefit of adjacent or neighboring properties.

Finally, only the government can seek enforcement of its consent decrees. As such, even if Union Township intended to benefit the plaintiffs in the Consent Decree, the plaintiffs cannot enforce it unless the decree so provides.¹⁰⁰ There is no provision in the Consent Decree that empowers any of the plaintiffs to enforce it. Accordingly, the court resolves that overall intent of the Consent Decree does not allow the plaintiffs to enforce

⁹⁸ (Emphasis added.) Consent Decree, ¶ 5.

⁹⁹ (Emphasis added.) Consent Decree, ¶ 4.

¹⁰⁰ *Mastergard*, 2016-Ohio-660 at ¶ 22, quoting *Hodges by Hodges*, 864 F.Supp. at 1508.

it as intended beneficiaries, and therefore the plaintiffs do not have standing under Civ.R. 71.

Although the plaintiffs deny that they are attempting to enforce the Consent Decree, the express language of the declaratory judgments they have requested indicate otherwise. As to Count 1, the plaintiffs request an Order from this court, "declaring that the Resolution is in violation of the Union Township Zoning Resolution and Consent Decree."¹⁰¹ Insofar as Count 1 requests a declaration under the Consent Decree, the plaintiffs do not have standing for such relief. In Count 2, the plaintiffs request an order from the court "declaring that the Board of Trustees improperly modified the Consent Decree to allow for the Miller Place Development."¹⁰² The plaintiffs do not have standing for Count 2. As such, Count 2 is dismissed, as is the portion of Count 1 that requests a declaration under the Consent Decree.

B. STANDING TO CHALLENGE THE ZONING RESOLUTION

Although the court has resolved that the plaintiffs do not have standing for declaratory judgments solely predicated on the Consent Decree, the plaintiffs' requested declaratory judgment relief in Counts 3 and 4, and in the remainder of Count 1, is not predicated upon the Consent Decree. Instead, these counts are based upon the defendants' alleged failure to abide by Ohio zoning statutes, and in turn, the defendants' alleged constitutional violations that stemmed from that failure. Under R.C. 2721.03,

¹⁰¹ Pls. Compl., pg.¶ 66.

¹⁰² Pls. Compl., pg.¶ 71.

declaratory judgments can be had based on a variety of writings.¹⁰³ Indeed, R.C. 2721.03 allows for declaratory judgments by “* * * any person whose rights, status, or other legal relations are affected by a * * * township resolution * * *.”¹⁰⁴

“Zoning ordinances directly affect, and often limit, property owners’ rights. In most cases, those limitations are proper. But it must be remembered that a government’s authority to intrude on the individual’s right to property by enacting zoning ordinances is predicated on the proper use of police powers, for the public welfare.”¹⁰⁵ “Property owners in Ohio therefore have the right to bring cases contesting the constitutionality of a zoning ordinance * * *.”¹⁰⁶ The Ohio Supreme Court has observed that its “precedent already makes clear that when a municipality rezones a property, the owner of the adjacent property has standing to challenge the constitutionality of the zoning decision if the property owner lives in the municipality.”¹⁰⁷ Further, the Ohio Supreme Court has noted that both an administrative appeal and a declaratory judgment action are appropriate vehicles to challenge zoning resolutions.¹⁰⁸

Specifically, the plaintiffs have argued that they have statutory standing based upon R.C. 519.24,¹⁰⁹ which provides:

“In case any building is or is proposed to be located, erected, constructed, reconstructed, enlarged, changed, maintained, or used or any land is or is proposed to be used in violation of sections 519.01 to 519.99, inclusive, of the Revised Code, or of any regulation or provision adopted by any board of

¹⁰³ R.C. 2721.03.

¹⁰⁴ R.C. 2721.03.

¹⁰⁵ *Moore*, 2012-Ohio-3897 at ¶ 38, citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

¹⁰⁶ *Moore*, 2012-Ohio-3897 at ¶ 38, citing *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St.3d 207, 690 N.E.2d 510 (1998).

¹⁰⁷ *Moore*, 2012-Ohio-3897 at ¶ 33.

¹⁰⁸ *Id.* at ¶ 35.

¹⁰⁹ *Pls. Resp.*, pgs. 10-11.

township trustees under such sections, * * * any adjacent or neighboring property owner who would be especially damaged by such violation, in addition to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful location, erection, construction, reconstruction, enlargement, change, maintenance, or use. * * *"¹¹⁰

Thus, R.C. 519.24 enables adjacent and neighboring property owners who would be especially damaged by a violation of R.C. 519.12 (governing amendments to zoning resolutions and referendum), to institute appropriate actions or proceedings to prevent the unlawful action.¹¹¹ However, as R.C. 519.24 and the above case law highlight, only adjacent and neighboring property owners have standing to challenge the zoning of a property owned by another.

If the zoning challenge is not made by a neighboring or adjacent property owner, then the redressability requirement for standing is not met.¹¹² Ohio courts have examined the meaning of adjacent and neighboring in the context of zoning challenges. Adjacent is typically defined to mean: "Lying near or close to, but not necessarily touching."¹¹³ Neighboring "means situated or residing nearby; being in the vicinity adjacent.

¹¹⁰ R.C. 519.24.

¹¹¹ See *Loichot v. Allstate Dev. Corp.*, 33 Ohio App.2d 121, 292 N.E.2d 923 (5th Dist. 1963), paragraph one of the syllabus (finding that under R.C. 519.24, an action may be instituted by any adjacent or neighboring property owner who would be especially damaged by the violation of township zoning regulations).

¹¹² *Wilkins v. Harrisburg*, 2015-Ohio-5472, 56 N.E.3d 320, ¶¶ 35-36 (10th Dist.).

¹¹³ *Wilkins*, 2015-Ohio-5472 at ¶ 35, quoting Black's Law Dictionary 10th Ed.2014.) See *Structural Sales Corp. v. City Council of Village of Boston Hts., Ohio*, 9th Dist. No. 19020, 1999 WL 11264 (Jan. 13, 1999), quoting Black's Law Dictionary, 41 (1990). ("Adjacent' means 'near or in close proximity' and does not require that the residential zoned property actually be contiguous or touching, but would include property that is contiguous or touching. The term 'adjacent' when modified by the term 'immediately' means contiguous or touching.").

Neighboring has a broader meaning than adjacent, but a more restricted meaning than neighborhood.”¹¹⁴

The plaintiffs maintain that “[b]y virtue of this statute [R.C. 519.24], the Ohio legislature has explicitly granted the Nature Center, an adjacent property owner, and other neighboring owners, such as the Plaintiffs here, standing to enforce zoning in this case.”¹¹⁵ However, although the plaintiffs pled that Cincinnati Nature Center owns property adjacent to the Property, they did not plead that any of the other plaintiffs are property owners *neighboring* the property.¹¹⁶ Instead, the complaint avers that Keri, Robinson, and the members of the Committee to Protect Avey’s Way own property in Union Township.¹¹⁷ It is unknown where the members of the Committee to Protect Avey’s Way live in Union Township. The addresses for Keri and Robinson are included in the complaint, but their addresses are not shown on any of the surveys attached to the complaint that show the Property and Miller Place Development.

Moreover, the cases the plaintiffs have cited in support of the proposition that they have standing to challenge the Township’s latest zoning resolution all involve property owners who were challenging the zoning of their own property.¹¹⁸ They do not involve

¹¹⁴ *Loichot*, 33 Ohio App.2d at paragraph 3 of the syllabus.

¹¹⁵ Pls. Resp., pg. 9.

¹¹⁶ Compl., ¶¶ 10-11.

¹¹⁷ Compl., ¶ 11.

¹¹⁸ See *Perrico Property Sys. v. Indep.*, 96 Ohio App.3d 134, 644 N.E.2d 714 (8th Dist. 1994) (dealing with the zoning of the plaintiff’s property); *Flair Corp. v. City of Brecksville*, 49 Ohio App.2d 77, 359 N.E.2d 459 (8th Dist. 1976) (plaintiffs were owners of land or had the option to buy land that was the subject of a zoning dispute); *Std. Oil Co. v. City of Warrensville Hts.*, 48 Ohio App.2d 1, 355 N.E.2d 495 (8th Dist. 1976) (plaintiff challenged the rezoning of its own property); *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 526 N.E.2d 1350 (1988) (involving zoning of the plaintiff’s property).

property owners who live in a township or municipality that are an unknown distance from the property being rezoned.

As mentioned, courts have the duty to ensure that plaintiffs sufficiently aver redressability in their complaint.¹¹⁹ The complaint and its attachments satisfy standing under R.C. 519.24 and Ohio case law as to the Cincinnati Nature Center for challenging the zoning of the Property, but not as to the other plaintiffs. It is possible that some of the other plaintiffs may be neighboring or adjacent to the Property, but because that was not pled in the complaint, and the court cannot surmise it from the surveys in the attached documents, the court must conclude that Keri, Robinson, and the Committee to Protect Avey's Way lack standing.

The defendants also argue that the plaintiffs also lack standing under R.C. 2721.03 because Union Township's Resolution 2018-52 was not a legislative action by a legislative body, but it was instead an administrative action.¹²⁰ However, for the reasons set forth in the following sections, the court finds this argument unavailing because, assuming the facts pled in the complaint are true, Union Township's enactment of Resolution 2018-52 was legislative action. As such, the court finds that the Cincinnati Nature Center has standing to pursue the remaining portion of Count 1, as well as Counts 3 and 5.

C. STANDING FOR CLAIM OF LENDING CREDIT AND USE OF EMINENT DOMAIN FOR THE BENEFIT OF A PRIVATE DEVELOPER

¹¹⁹ *Moore*, 2012-Ohio-3897 at ¶ 49.

¹²⁰ Union Twp.'s Reply, pg. 8.

In the plaintiffs' final cause of action, Count 5, the plaintiffs request a declaration that Resolution 2018-52 violates Section 6, Article VIII of the Ohio Constitution and is therefore unconstitutional, invalid, and of no effect and that any attempted use of eminent domain, being for a solely private purpose, is a violation of Section 19, Article I of the Ohio Constitution. As the plaintiffs suggest in their reply, their claim for Count 5 is two-fold. One portion alleges that Union Township is engaging in lending credit to the benefit of a private developer, violating Section 6, Article VIII of the Ohio Constitution. The second portion alleges that Union Township is using eminent domain for a private purpose, in violation of Section 19, Article I of the Ohio Constitution.

In examining the eminent domain claim first, the complaint alleges that, as part of the Miller Place Development, "Union Township is planning to take private property owned by the residents of Union Township through eminent domain solely for the benefit of a private development."¹²¹ Specifically, the plaintiffs aver that Union Township will extend Melody Lane through taken private property in order to benefit the Miller Place Development.¹²²

As discussed, standing requires that the plaintiffs show, at minimum, that they have (1) suffered an injury that is (2) fairly traceable to the defendants' allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.¹²³ The injury suffered or threatened must be a "direct and concrete injury in a manner or degree different from that suffered by the public in general."¹²⁴ As mentioned, R.C. 2721.03 allows for declaratory

¹²¹ Compl., ¶ 86.

¹²² Compl., ¶ 87.

¹²³ *State ex rel. Ullmann*, 2016-Ohio-5584 at ¶ 8, quoting *ProgressOhio.org, Inc.*, 2014-Ohio-2382 at ¶ 7.

¹²⁴ *Beaver Excavating Co.*, 2012-Ohio-5776 at ¶ 8, citing *Cuyahoga Bd. of Commrs. v. State*, 2006-Ohio-6499 at ¶ 22.

judgments by “* * * any person whose rights, status, or other legal relations are affected by a * * * township resolution * * *.”¹²⁵

The court finds that none of the plaintiffs have standing as to the eminent domain claim. The complaint does not allege that any particular plaintiff's property would be subject to eminent domain. Instead, it alleges that property would be taken from some unnamed Union Township residents.¹²⁶ To this end, none of the plaintiffs have pled that they would suffer any harm that is unique to them and different from any injury suffered by the community at large.¹²⁷ For this reason, the court finds that none of plaintiffs have standing to bring the eminent domain portion of Count 5.

In the first part of the plaintiffs' Count 5, the plaintiffs desire a declaration that Union Township is lending its credit to the Property's developer. The case of *Battaglia v. City of Cleveland Heights*, 8th Dist. Cuyahoga No. 42963, 1981 WL 4917, *1 (May 7, 1981) is instructive. In *Battaglia* the plaintiffs were residents and owners of single family residential properties located adjacent to or nearby a vacant lot at 12560 Cedar Road, in Cleveland Heights, Ohio.¹²⁸ One of the plaintiffs' claims was that the city, through Resolution No. 106-1979, had lent and granted public aid to a private party in violation of Article VIII, Section 6, of the Ohio Constitution because the terms of the purchase contract were so favorable to the owner of the lot.¹²⁹ The resolution authorized the city to purchase

¹²⁵ R.C. 2721.03.

¹²⁶ Compl., ¶ 86.

¹²⁷ See *Willoughby Hills v. C. C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 591 N.E.2d 1203 (1992).

¹²⁸ *Battaglia v. City of Cleveland Hts.*, 8th Dist. Cuyahoga No. 42963, 1981 WL 4917, *1 (May 7, 1981).

¹²⁹ *Id.*

the vacant lot to build a fire station on it.¹³⁰ The city moved to dismiss the complaint for lack of standing.¹³¹

The appellate court first acknowledged general principles of standing, including the principle that individuals or groups of individuals do not have standing to bring a claim that is not peculiar to the individual or group.¹³² Then, the court observed: "Any injury conceivably suffered by the appellants, however, as a result of this alleged illegal conduct on the part of the City, would not have been peculiar to them as nearby residents to the site of the proposed fire station, but would instead have been shared with all citizens paying taxes to Cleveland Heights."¹³³ As such, the court concluded that the plaintiffs should have brought suit as "representative taxpayers," instead of "in their individual capacities."¹³⁴ The plaintiffs' failure to bring suit as representative taxpayers led the court to resolve that the plaintiffs lacked standing to bring suit on the lending credit claim.¹³⁵

The court must reach the same conclusion in the instant case. The plaintiffs here brought suit in their individual capacities, as property owners in Union Township. They did not file suit as representative taxpayers. Accordingly, the court finds that none of the plaintiffs have standing to pursue Count 5, and it is hereby dismissed without prejudice.

¹³⁰ Id. at *1 and *8.

¹³¹ Id. at *7.

¹³² Id. at *7.

¹³³ Id. at *8.

¹³⁴ Id.

¹³⁵ Id. Of note, the parties cite to *Citizens Word v. Canfield Twp.*, 152 Ohio App.3d 252, 2003-Ohio-1604, 787 N.E.2d 104 (7th Dist.). The appellate decision does not address standing, but the common pleas court decision *Citizens Word v. Canfield Twp.*, Mahoning C.P. No. 00 CV 1351, 2001 WL 36125458 (Oct. 9, 2001) notes that the suit was brought as a taxpayers lawsuit by residents, landowners, and taxpayers. So too, *C.I.V.I.C. Group v. Warren*, 88 Ohio St.3d 37, 2000-Ohio-265, 723 N.E.2d 106 (2000), also cited by the parties, was brought by "residents, taxpayers, and property owners," although the case did not deal with standing.

II. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In addition to arguing that the plaintiffs lack standing, the defendants also posit that the complaint must be dismissed under Civ.R. 12(B)(6) for failure to state claims upon which relief can be granted.

Since the Cincinnati Nature Center does not have standing to pursue Count 2, Count 5, or a portion of Count 1, there are three remaining requests for declaratory judgment. “[D]eclaratory relief is available to a plaintiff who can show that (1) a real controversy exists between the parties, (2) the controversy is justiciable, and (3) speedy relief is necessary to preserve the rights of the parties.”¹³⁶ Each of the Cincinnati Nature Center’s requests for declaratory judgment will be examined in turn.

A. COUNT 1: DECLARATION THAT THE RESOLUTION IS IN VIOLATION OF THE UNION TOWNSHIP ZONING RESOLUTION

In the Cincinnati Nature Center’s first cause of action, it requests that the court declare that Resolution 2018-52 is in violation of the Union Township Zoning Resolution.¹³⁷ The defendants argue that the Consent Decree supplants any previous zoning restrictions on the Property and that the Consent Decree now exclusively governs its zoning.¹³⁸ And because Union Township followed the amendment procedures set forth

¹³⁶ *Moore*, 2012-Ohio-3897 at ¶ 49, citing *Haig v. Ohio State Bd. of Edn.*, 62 Ohio St.3d 507, 511; 584 N.E.2d 704 (1992).

¹³⁷ Compl., ¶ 66. It also requested that the court declare that Resolution 2018-52 is in violation of the Union Township Zoning Resolution, but as discussed, the Cincinnati Nature Center does not have standing for that portion of its claim.

¹³⁸ Union Twp. Mot., pg. 11.

in the Consent Decree, the defendants posit that the Union Township Zoning Resolution has not been violated.¹³⁹

The Cincinnati Nature Center counters that the Consent Decree did not rezone the Property from R-1 and ER.¹⁴⁰ Therefore, the Cincinnati Nature Center reasons that Union Township was still required to follow the mandates for rezoning property under R.C. 519.12 in adopting Resolution 2018-52.¹⁴¹

To determine whether the Consent Decree rezoned the Property, 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 applicable” in a court’s analysis.¹⁴² When undertaking contractual interpretation, the court’s role is “to give effect to the intent of the parties to the agreement.”¹⁴³ Courts examine contracts “as a whole and presume that the intent of the parties is reflected in the language” of the contract.¹⁴⁴ 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.¹⁴⁵

¹³⁹ Union Twp. Mot., pg. 11.

¹⁴⁰ Pls. Resp., pg. 13.

¹⁴¹ Pls. Resp., pg. 14.

¹⁴² (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.

¹⁴³ *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.”).

¹⁴⁴ *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 (explaining 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.”).

¹⁴⁵ *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.

The court finds that the Consent Decree did not rezone the Property. 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 * * *."¹⁴⁶

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 the subject real estate, are set aside with respect thereto and shall be unenforceable against the subject real estate."¹⁴⁷

Based on this language, the Consent Decree does not supplant the current zoning on the Property, as 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."¹⁴⁸ 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.

¹⁴⁶ Consent Decree, ¶ 3.

¹⁴⁷ (Emphasis added.) Consent Decree, ¶ 4.

¹⁴⁸ Consent Decree, ¶ 6.

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.*"¹⁴⁹ This language acknowledges R.C. Chapter 519's applicability to the Property.¹⁵⁰

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 map, or to bind future elected officials of Union Township with respect to the zoning of the Property."¹⁵¹ Paragraph 17 would have no meaning or effect if, as the defendants argue, the Consent Decree itself rezoned the Property.

Given that the Consent Decree does not actually state that it is rezoning the Property, and due to the other provisions that suggest otherwise, the court finds the defendants' argument that Count 1 must be dismissed unavailing. In other words, it does not appear beyond doubt that the Cincinnati Nature Center can prove no set of facts entitling it to a declaration that Resolution 2018-52 is in violation of the Union Township Zoning Resolution.¹⁵²

¹⁴⁹ Consent Decree, ¶ 2.

¹⁵⁰ 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.

¹⁵¹ Consent Decree, ¶ 17.

¹⁵² *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).

B. COUNT III: THE BOARD OF TRUSTEES IMPROPERLY CHANGED THE ZONING DESIGNATION OF THE PROPERTY BY FAILING TO FOLLOW THE PROCEDURES FOR NOTICE AND HEARINGS SET OUT UNDER R.C. 519.12

In Count III, the Cincinnati Nature Center requests a declaration that the Board of Trustees improperly changed the zoning designation of the property by failing to follow the procedures for notice and hearings set out under R.C. 519.12. The defendants argue that Count III must be dismissed because, in amending the Consent Decree through issuing Resolution 2018-52, the Board of Trustees did not change the zoning of the Property and was therefore not required to follow the zoning procedures set forth in R.C. 519.12.¹⁵³ The defendants instead maintain that Union Township's action was a mere administrative action, not a legislative action, in which case the plaintiffs should have filed an administrative appeal under R.C. Chapter 2506.¹⁵⁴

The Cincinnati Nature Center responds that Union Township did rezone the Property because Resolution 2018-52 approved land use (e.g. multifamily dwellings), which was inconsistent with the zoning of the Property, that being R-1 and ER.¹⁵⁵ As mentioned, R-1 and ER zoning districts allow for single family dwellings of one single-family dwelling unit per lot.

"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

¹⁵³ Union Twp. Mot., pg. 13.

¹⁵⁴ Union Twp. Mot., pg. 14.

¹⁵⁵ Pls. Resp., pg. 17.

improvement within a zoning district must comply with the same legislative specifications, unless a variance is sought and granted.”¹⁵⁶

Understanding the process of how townships amend zoning plans is a necessary step in understanding the rights that the Cincinnati Nature Center claims Union Township violated in Count 3. The Ohio Supreme Court recently explained the process of amending zoning plans 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.*”¹⁵⁷

¹⁵⁶ *Gray v. Trustees, Monclova Twp.*, 38 Ohio St.2d 310, 311, 313 N.E.2d 366 (1974).

¹⁵⁷ *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).

If Resolution 2018-52 was an administrative act, as the defendants argue, then it was only subject to an administrative appeal under R.C. Chapter 2506,¹⁵⁸ and Union Township was not required to follow the above procedure. Importantly to this case, administrative actions are not subject to referendum,¹⁵⁹ such as the right to referendum secured in R.C. 519.12, described above.

The Cincinnati Nature Center argues that that it was entitled to a referendum under R.C. 519.12, and that Resolution 2018-52 was a legislative, not administrative, act.¹⁶⁰ Legislative actions are not appealable under R.C. Chapter 2506.¹⁶¹ "The enactment and amendment of zoning regulations constitute legislative action."¹⁶² Instead of appealing under R.C. Chapter 2506, zoning determinations are challenged by declaratory actions under R.C. Chapter 2721.¹⁶³ And when a board of township trustees adopts zoning resolutions, it is acting in a legislative capacity.¹⁶⁴ 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."¹⁶⁵ 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.

¹⁵⁸ *Tuber v. Perkins*, 6 Ohio St.2d 155, 156, 216 N.E.2d 877 (1966).

¹⁵⁹ *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.

¹⁶⁰ Pls. Resp., pg. 15.

¹⁶¹ *Auxier Trucking v. Tate Twp. Bd. of Trustees*, 12th Dist. Clermont No. CA2001-01-012, 2001 WL 1652078, *3 (Dec. 24, 2001).

¹⁶² *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).

¹⁶³ *Auxier Trucking*, 2001 WL 1652078 at *3, citing *Terry v. Strongsville*, 8th Dist. Nos. 7641, 77168, 2000 WL 1060646 (Aug. 3, 2000).

¹⁶⁴ *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.").

¹⁶⁵ *Kroeger*, 1989 WL 87837 at *3.

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."¹⁶⁶

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."¹⁶⁷

In examining the case at bar, the court finds that the Cincinnati Nature Center has adequately pled that Union Township effectively rezoned the Property when it enacted 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. 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 * * *."¹⁶⁸ 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 * * *."¹⁶⁹

¹⁶⁶ *State ex rel. Federle v. Warren Cty. Bd. of Elections*, Slip Opinion No. 2019-Ohio-84, ¶ 13, citing *State ex rel. Zonders v. Delaware Cty. Bd. of Elections*, 69 Ohio St.3d 5, 13, 630 N.E.2d 313 (1994).

¹⁶⁷ *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 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).

¹⁶⁸ Article 4, Section 621 of the Union Township Zoning Resolution.

¹⁶⁹ Article 6, Section 610 of the Union Township Zoning Resolution.

Resolution 2018-52, on the other hand, allows for 875 multifamily units.¹⁷⁰ Therefore, although the Property remains zoned as R-1 and ER in name, Union Township has effectively rezoned the Property.¹⁷¹ As pled, the Board of Trustees enacted law, as opposed to administering a previously established law, making its action legislative. As a legislative action, the defendants are incorrect that Count 3 must fail because Resolution 2018-52 was an administrative act that did not require Union Township to comply with the strictures of R.C. 519.12.

C. COUNT 4: 42 U.S.C. § 1983 VIOLATION OF THE 1ST, 5TH, AND 14TH AMENDMENTS

In Cincinnati Nature Center's Count 4, it requests a declaration that the Board of Trustees' actions deprived it of its 1st, 5th, and 14th Amendment rights. The defendants argue that the 42 U.S.C. § 1983 claim must fail because the Cincinnati Nature Center did not have any constitutional right infringed upon by Union Township.¹⁷² The Cincinnati Nature Center responds that it was deprived of its constitutionally protected right to referendum.¹⁷³ As to the right of referendum, the defendants respond that the Cincinnati Nature Center had no right to petition Resolution 2018-52 through referendum because

¹⁷⁰ Resolution 2018-52.

¹⁷¹ 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. Of note, under Civ.R. 44.1, the court can take judicial notice of the Union Township Zoning 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).

¹⁷² Union Twp. Mot., pg. 14.

¹⁷³ Pls. Resp., pg. 18.

its passage was accomplished administratively and therefore should have been petitioned through an R.C. Chapter 2506 appeal.¹⁷⁴

42 U.S.C. § 1983 states as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * [.]"¹⁷⁵

"As remedial legislation, § 1983 is to be construed generously to further its primary purpose."¹⁷⁶ That primary purpose is to "aid in the preservation of human liberty and human rights."¹⁷⁷ "To establish a claim under Section 1983, the party asserting such a claim must prove: (1) the violation of a right secured by the United States Constitution or federal law; and (2) that the alleged violation was committed by a person acting under color of state law."¹⁷⁸ "The first step in any such claim is to identify the specific constitutional right allegedly infringed."¹⁷⁹

The Ohio Constitution provides for the right of referendum: "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control

¹⁷⁴ Union Twp. Reply, pg. 18.

¹⁷⁵ 42 U.S.C. § 1983.

¹⁷⁶ *Gomez v. Toledo*, 446 U.S. 635, 639, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

¹⁷⁷ (Internal quotations omitted.) *Id.* at 638.

¹⁷⁸ *W. Chester Twp. Bd. of Trustees v. Speedway Superamerica, L.L.C.*, 12th Dist. Butler No. CA2006-05-104, 2007-Ohio-2844, ¶ 62, citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999).

¹⁷⁹ *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), citing *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

by legislative action * * *."¹⁸⁰ Referendum is "a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies."¹⁸¹ The United States Supreme Court has repeatedly noted the importance of referendum rights as a democratic tool.¹⁸²

And although there is no right of referendum so called in the United States Constitution, the First Amendment protects the right of people " * * * to petition the Government for a redress of grievances."¹⁸³ "The plain language of the First Amendment makes clear that a 'petition' triggers the amendment's protections."¹⁸⁴ Thus, the United States Supreme Court has found "that although the right to an initiative is not guaranteed by the federal Constitution, once an initiative procedure is created, the state may not place restrictions on the exercise of the initiative that unduly burden First Amendment rights."¹⁸⁵

In turning to the instant case, the right to referendum that the Cincinnati Nature Center has identified is a right secured by federal law. R.C. 519.12, as discussed, creates the right to referendum, which is protected by the Ohio Constitution, and in turn, the United States Constitution under the First Amendment. The defendants argue that Union Township "took no action" to quell the right of the plaintiffs to pursue an R.C. Chapter 2506 administrative appeal of Resolution 2018-52.¹⁸⁶ As previously determined though,

¹⁸⁰ Ohio Constitution, Article II, Section 1f.

¹⁸¹ *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673, 96 S.Ct. 2358, 2362, 49 L.Ed.2d 132 (1976).

¹⁸² See *City of Eastlake*, 426 U.S. at 678 ("A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.").

¹⁸³ U.S. Constitution, Amendment I.

¹⁸⁴ *Campbell v. PMI Food Equip. Group, Inc.*, 509 F.3d 776, 789 (6th Cir.2007), citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 387 (6th Cir.1999).

¹⁸⁵ *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir.1993), citing *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988).

¹⁸⁶ Union Twp. Mot., pg. 18

Union Township's issuance of Resolution 2018-52 was legislative, and therefore the procedures in R.C. 519.12 were triggered for enacting a zoning amendment. The Cincinnati Nature Center has pled that Union Township, in failing to follow the procedures set forth in R.C. 519.12, prevented the Cincinnati Nature Center from engaging in its right to vote on the zoning amendment via referendum.¹⁸⁷ Because the defendants' argument to dismiss the § 1983 claim is premised on the incorrect conclusion that the Cincinnati Nature Center could have administratively appealed Resolution 2018-52, the court finds the defendants' motion to dismiss Count 4 unavailing.

CONCLUSION

For the foregoing reasons, the court hereby grants in part and denies in part the defendants' motions to dismiss.

The defendants' motion is granted for lack of standing as to the plaintiffs' Counts 2 and 5, and as to Count 1 insofar as it seeks a declaratory judgment that Resolution 2018-52 violates the Consent Decree. Furthermore, the court finds that the defendants' motion should be granted for lack of standing on all counts as to Maria Jo Kerri, Anne Robinson, and the Committee to Protect Avey's Way. All dismissals are without prejudice. The balance of the defendants' motions is denied.

Therefore, the Cincinnati Nature Center may proceed with the remainder of Count 1, as well as Counts 3 and 4.

¹⁸⁷ Compl., ¶ 75.

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 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.

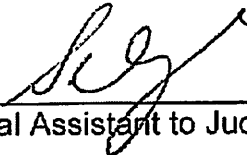
DATED: 3-14-19



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Entry were sent on this 14th day of March 2019 to Matthew W. Fellerhoff, at mwfellerhoff@strausstroy.com, and Emily T. Supinger, at etsupinger@straustroy.com, Attorneys for the Plaintiffs; Richard S. Wayne, at rswayne@strausstroy.com, and Jeffrey A. Levine, at jalevine@strausstroy.com, counsel for Strauss Troy, Co., LPA, Matthew W. Fellerhoff, and Emily T. Supinger; to James Papakirk, at jpapakirk@fp-legal.com, and Hallie S. Borellis, counsel for the defendant Angeleke Sansalone, at hborellis@fp-legal.com; and to Lawrence Barbieri, at lbarbieri@smbplaw.com, and Katherine L. Barbieri, at kbarbieri@smbplaw.com, Attorneys for the Defendants Union Township, Clermont County, Ohio and the Board of Trustees of Union Township.



Judicial Assistant to Judge McBride