

MEMORANDUM IN SUPPORT

I. BACKGROUND

Although the record in this matter appears to be a weighty tome, the facts relevant to this motion are straightforward and brief. Appellants, Charles Osborne, Rita Palmer, and Maria Harris, had no standing to appeal North Canton's Planning Commission's decision to grant a conditional use permit. In addition, Appellants failed to exhaust their administrative remedies for relief prior to appealing to this Court by refusing to appeal to the City's Zoning and Building Standards of Appeals. Moreover, Appellants' comments at the Planning Commission's adjudicatory/public hearings were mere speculations, observations, "concerns of potential harms," which are not sufficient to confer standing to appeal the approval of a conditional use permit. As a result, this Court should dismiss Appellants' appeal.

Maple Street Commerce, LLC, submitted to North Canton's Department of Permits an application for a site plan and a conditional use permit for its proposed Hoover District south parking lot expansion. Exhibit "E" is attached hereto and is incorporated herein, as are the remaining exhibits referenced herein. North Canton's Planning Commission held an adjudicatory/public hearing regarding the application on May 7, 2014, and therein tabled the matter so that Maple Street Commerce could meet with City residents and provide them with additional information regarding their plans, prepare additional information regarding the proposed property-line buffer, together with addressing questions of prior mining on the property, lighting, and storm water detention. Exhibit "H" 21. During this hearing, the Planning Commission took testimony from Maple Street's consultant, and senior property manager for IRG Realty Advisors (which operates Maple Street Commerce), Frank Lanterman; Mike

Wellman, architect from TDA Architecture; City Engineer, James Benekos; City Director of Permits, Eric Bowles; and 16 residents, three of which included Appellants. Exhibit "H" 3-21.

The Planning Commission held a second adjudicatory/public hearing on September 3, 2014, wherein it took testimony from Carol Smith, vice president for facility management at Industry Realty Group; City Engineer, James Benekos; John Urbanick, Greenland Engineering, the civil engineer for the project; and 12 residents, two of which were Appellants Palmer and Osborne. Exhibit "M" 7-21.

After having the above-mentioned issues addressed to their satisfaction, the Planning Commission voted unanimously to approve the site plan. Exhibit "M" 21. Having inadvertently not voted on the conditional use permit during its September 3, 2014 meeting, however, the Planning Commission met again on October 8, 2014, for that very purpose, and resolved the forgotten vote by approving the conditional use permit with a unanimous vote. Exhibit "P" 2.

With no mention of his basis, Osborne alone sent a letter to City Council on October 10, 2014, stating he appealed the Planning Commission's approval of the conditional use permit; he made no mention, however, of the approved site plan. Exhibit "A."

Osborne sent a second appeal letter to City Council on November 7, 2014. Exhibit "B." In this second letter, (1) he again appealed the conditional use permit; (2) again made no mention of the site plan; and (3), perhaps having realized he failed to state the basis for appeal in his letter, he overcompensated and appealed every action the Planning Commission could have taken. Indeed, Osborne listed each section of North Canton's codified ordinances regarding conditional use permits and after each stated "*the Planning Commission failed to 'fill in the*

section of the codified ordinance.” A cursory count—because several of Appellants’ issues appear to overlap—reveals Appellants’ presented 58 issues for appeal.

With the knowledge that his lack of ownership of North Canton real property prevented him from having standing to appeal the conditional use permit, Osborne canvassed North Canton with a self-made form seeking additional residents to join his appeal; he was not selective in his search. Osborne solicited residents that did not own real property in North Canton, residents that did not live near the Hoover south parking lot, and residents that did not appear at any of the Planning Commission’s hearings. And although an additional 14 individuals signed Osborne’s form to join his appeal, including Appellant Maria Harris, oddly, Rita Palmer, Osborne’s spouse, neither signed his form to join his appeal nor signed his appeal as an applicant. Exhibit “B”.

Because North Canton’s charter provides that its Zoning and Building Standards Board of Appeals (its “ZBA”) shall hear and decide appeals for exceptions to and variations in the applications of ordinances, orders or regulations of administrative officials or agencies governing building and zoning, Exhibit “C”, and noting that its charter assigns this responsibility to no other, Council transferred the appeal to the proper City administrative agency, its ZBA, to lawfully hear and decide Appellants’ appeal. Exhibit “JJ”. Osborne, however, threatened the City with a lawsuit in a taxpayer’s demand letter, insisting therein, that only City Council, *not the ZBA*, hear his appeal, the failure of which he claimed would lead to “needless legal action.” Exhibit “AA”.

In its efforts to prevent Osborne’s threatened lawsuit, City Council acquiesced; it analyzed the entire record before the Planning Commission, together with its transcripts, and deliberated on his appeal during its February 17, 23, March 9, and 23, 2015, Council meetings.

Exhibits “BB-II”. As a result of their analysis, research, and deliberations, City Council determined that Appellants did not meet the minimum threshold requirements to continue an appeal because not a single appellant demonstrated standing.

Indeed, by simply analyzing the Planning Commission’s May 7 and September 3, 2014, transcripts, together with Appellants’ home addresses, through the Stark County Auditor and Recorder’s databases, Exhibits “X-Z”, City Council was able determine, beyond doubt, that: (1) Osborne did not own real property in North Canton; (2) Rita Palmer did not sign Osborne’s appeal or his form to join the appeal; and (3) none of the Appellants appeared at the Planning Commission’s adjudicatory/public hearings on the matter, *with legal counsel*, and objected, on the record, to the conditional use permit, by stating a harm that was unique and immediate to them. Because Appellants failed to meet the threshold issue of demonstrating standing to pursue an appeal, City Council lawfully dismissed the appeal without further action. Exhibit “LL”.

Appellants filed a notice of appeal of City Council’s decision with this Court on April 22, 2015, raising for the first time their appeal of the site plan together with the conditional use permit.

II. STANDARD OF REVIEW

Appellants seek an administrative appeal, pursuant to Ohio Revised Code chapters 2505 and 2506, regarding City Council’s denial of their appeal of the Planning Commission’s decision to issue conditional use permit 403-14. R.C. 2506.04 provides that the Court’s standard of review for this matter is whether there is a preponderance of substantial, reliable, and probative evidence in the record to support City Council’s decision to deny the appeal. *Dudukovich v. Lorain Metropolitan Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979). As both a legislative and

administrative body, City Council's decisions are presumed valid, and the burden of demonstrating otherwise rests upon Appellants together with demonstrating the record supports their claim of standing. *Consol. Mgt., Inc. v. City of Cleveland*, 6 Ohio St.3d 238, 240 (1983).

Pursuant to Ohio's common law, the Court must give due deference to City Council's resolution of evidentiary conflicts, *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, (1980), and the Court may not substitute its judgment for that of Council, especially in regards to its administrative experience and expertise. *Dudukovich* at 207. The Court also is "bound by the nature of the administrative proceedings to presume that the decision of [City Council] is reasonable and valid." *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St.3d 452, 456, 1993-Ohio-115.

III. LAW AND ARGUMENT

A. Appellants had no standing to appeal the conditional use permit.

Standing determines "whether a litigant is entitled to have a court determine the merits of the issue presented." *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183. R.C. 2506.01 limits the right to appeal administrative decisions that determine "rights, duties, privileges, benefits, or legal relationships of a person * * *." Indeed, only those demonstrating both a present interest in the matter, and having been prejudiced by the decision at issue, are entitled—*have standing*—to appeal the same. *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26, 1992-Ohio-111; *Dempsey v. Village of Shawnee Hills*, 5th Dist. No. 14 CAH 03 0015, 2015-Ohio-257, ¶ 8. "A cardinal principle which applies alike to every person desiring to appeal, whether a party to the record or not, is that he must have an interest in the subject-matter of the litigation. His interest must be immediate and pecuniary, and not a remote consequence of the

judgment; a future, contingent or speculative interest is not sufficient.” *Ohio Contract Carriers Ass'n v. Pub. Utilities Commission*, 140 Ohio St. 160, 161 (1942).

In 1962, the Ohio Supreme Court promulgated the basic test for standing to appeal a municipal administrative decision. *Roper v. Bd. of Zoning Appeals, Richfield Tp., Summit Cty.*, 173 Ohio St. 168, 168-69, (1962). In *Roper*, the Court found that because the applicant: (1) appeared at the administrative hearing as a person whose interest was adversely affected; (2) *with his lawyer*; and (3) in opposition to a zoning change, which he alleged would damage him and his property, he was a person “directly affected” by the proceeding and therefore, was entitled to be a party to the proceedings.

The Court reaffirmed its *Roper* test nearly 20 years later in *Schomaeker v. First Natl. Bank of Ottawa*. 66 Ohio St.2d 304 (1981), stating therein that a party must be “a person directly affected” by the administrative decision to have standing to appeal pursuant to R.C. Chapter 2506. The Court found that since the issue affected and determined the applicant’s rights as: (1) a property owner; (2) she indicated her interest by challenging the grant of a certificate of occupancy; and (3) by her presence at the hearing on the issue, *together with legal counsel*, she was properly within the class of persons with standing to bring an R.C. Chapter 2506 appeal. *Schomaeker* at 311-12.

Earlier this year, while considering the same R.C. Chapter 2506 issue of standing to appeal the approval of a conditional use permit, the Fifth District Court of Appeals quoted *Roper* and *Schomaeker*:

A person owning property contiguous to the proposed use who has previously indicated an interest in the matter by a prior court action challenging the use, and who *attends a hearing on the variance together with counsel*, is within that class

of persons directly affected by the administrative decision and is entitled to appeal under R.C. Chapter 2506.

(Emphasis added.) *Dempsey*, 2015-Ohio-257, ¶ 11. In *Dempsey*, a practicing attorney licensed in the State of Ohio, attended a BZA hearing and verbally opposed a conditional use application. *Id.* at ¶ 3. The trial court ruled, however, that the applicant lacked standing to bring the appeal. *Id.* at ¶ 14. The 5th District Court of Appeals held otherwise and tersely stated:

To reiterate, in *Schomaeker*, the Ohio Supreme Court held: A person **owning property contiguous to the proposed use** who has previously indicated an interest in the matter * * * and who attends a hearing on the variance together with counsel, **is within that class of persons directly affected** by the administrative decision and **is entitled to appeal** under R.C. Chapter 2506. *Schomaeker* at Headnote 11.

(Emphasis in original.) *Id.* ¶ 15. Utilizing the *Roper* and *Schomaeker* test, the Court found that because the applicant appeared before the BZA, represented himself as a practicing attorney licensed in the State of Ohio, and because he advised the BZA, on the record that he opposed the conditional use permit, he reached threshold to appeal under R.C. 2506. *Id.* ¶ 16.

Courts and municipalities throughout the State of Ohio have relied upon the *Roper/Schomaeker* test for decades to determine standing in administrative appeals. Relying on the precedential value of that Supreme Court test for standing and having the 5th District Court of Appeals recently affirm the test in *Dempsey*, North Canton City Council believed this Court would be precedent-bound to apply the same test to Appellants circumstances. Therefore, Council believed it should not vary and apply anything other than that same genuine test to the issues before it.

Utilizing the Planning Commission's hearing transcripts and the Stark County Auditor and Recorder's public data bases, City Council was able to determine that of the 16 persons who signed on to Osborne's appeal, two of them, one of which includes Chuck Osborne, did not own

real property in North Canton; 10 applicants did not attend either one of the two Planning Commission's adjudicatory/public hearings regarding the permit and object on the record; and of the four applicants that owned real property in North Canton and attended one of the two hearings and objected on the record, none of them appeared and objected on the record *together with legal counsel*. Exhibit "X".

One of the Appellants, Rita Palmer, did not even sign an application to appeal. Exhibit "B". Moreover, Appellants challenged the Planning Commission's approval of the accompanying site plan for the first time in their appeal to this Court. It is a well-settled legal premise, however, that appellants may not raise for the first time on appeal a theory not presented at trial or before the applicable administrative agency. Issues not raised to Council and which are inconsistent with Appellants' appeal cannot be raised for the first time to this Court. *Republic Steel Corp. v. Bd. of Revision of Cuyahoga Cty.*, 175 Ohio St. 179 (1963), syllabus; *GVH Corp. v. Bd. of Cty. Commrs., Muskingum Cty.*, 5th Dist. Muskingum No. CA 92-27, 1993 WL 135692, *2 (Apr. 27, 1993).

Thus, after analyzing the Planning Commission's meeting minutes, and applying the Supreme Court's straightforward *Roper/Schomaeker* standing test thereto, Council determined Osborne did not own property in North Canton, and that none of the Appellants met their burden of complying with all of the Supreme Court's mandatory, threshold requirements to demonstrate standing. Indeed, none of Appellants: (1) appeared at one of the Planning Commission's hearings on the matter; (2) objected to the conditional use permit; (3) on the record; (4) *together with legal counsel*. As a result, and pursuant to R.C. Chapter 2506 and the Ohio Supreme Court's holding in *Roper* and *Schomaeker*, reinforced by the 5th District Court of Appeals' recent holding in *Dempsey*, City Council lawfully dismissed Appellants' appeal for lack of

standing; indeed, none of the Appellants met their burden of demonstrating they were “directly affected” by the Planning Commission’s decision to approve the conditional use permit. Therefore, none of the Appellants had standing to participate in a R.C. Chapter 2506 appeal.

B. Appellants failed to exhaust their administrative remedies for relief prior to appealing to this Court.

Exhaustion of administrative remedies is a well-settled legal doctrine. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938); *Noernberg v. Brook Park*, 63 Ohio St.2d 26, 29 (1980) (prior to seeking court action in an administrative manner, the party must exhaust the available avenues of administrative relief); *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 415-16 (1951). In Ohio, the doctrine is a judge-made rule of judicial economy. *G.S.T. v. Avon Lake*, 48 Ohio St.2d 63, 65 (1976). Exhaustion of administrative remedies is a condition precedent that must be fulfilled before one may resort to the courts to compel the issuance of a permit. *State ex rel. Foreman v. City Council of Bellefontaine*, 1 Ohio St.2d 132 (1965) (per curiam).

“Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.” *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). The doctrine’s purpose is “to permit an administrative agency to apply its special expertise * * * and in developing a factual record without premature judicial intervention.” *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 702 (C.A. 6, 1985). The litigant should allow the municipality to exercise its discretion or apply its expertise, not needlessly invoke the court where the municipality, through its BZA, could

grant every relief for which the party is entitled. *McKart v. U.S.*, 395 U.S. 185, 193 (1969). The court also affords such judicial deference to administrative agencies so that they may prepare a proper record should litigation result, which should lead to a more well-reasoned and informed decision. *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 306, (1973).

In the present matter, North Canton's charter provides that its BZA is the only administrative agency permitted "to hear and decide appeals for exceptions to and variations in the application of ordinances, orders or regulations of administrative officials or agencies governing building and zoning in the municipality." Charter. 3.07(2) Boards and Commissions, Planning Commission. Exhibit "C". And although North Canton's City Council attempted to transfer Appellants' appeal to the BZA for a proper hearing, Exhibit "JJ", Osborne threatened litigation through a tax-payer's demand letter if it did not transfer Appellants' appeal from the BZA back to Council. Exhibit "AA". Because Osborne's threats of litigation thwarted North Canton from having its BZA hear and decide Appellants' appeal, he shamelessly burdens the Court's docket with additional and unnecessary—if not at least premature—litigation, and prevents North Canton from resolving this appeal at the local level.

Because Appellants failed to comply with Ohio's long-held exhaustion of local remedies doctrine, thereby permitting North Canton to resolve a zoning issue at the local level and relieve the Court of additional and unnecessary litigation, this Court should dismiss Appellants' appeal.

C. Appellants present no evidence demonstrating an immediate and pecuniary interest in the conditional use permit.

R.C. 2506.01 *limits* the right to appeal administrative decision that determine "rights, duties, privileges, benefits, or legal relationships of a person * * *." Only those individuals demonstrating both a present interest in the matter, and having been prejudiced by the decision at issue, are

entitled—*have standing*—to appeal the same. *Willoughby Hills*, 64 Ohio St.3d at 26; *Dempsey*, 2015-Ohio-257, at ¶ 8. Indeed, each person desiring to appeal must demonstrate “an immediate and pecuniary interest,” “not a remote consequence,” or “a future, contingent or speculative interest * * *.” *Ohio Contract Carriers Ass’n*, 140 Ohio St. at 161.

In the present matter, Osborne does not own real property in North Canton and none of the Appellants made comments at the Planning Commission’s adjudicatory/public hearings demonstrating “an immediate and pecuniary interest” to themselves if the Planning Commission approved the conditional use permit. Appellants’ comments were concerns of “potential harm,” statements that “common sense and decency tells us that * * * additional parking spaces at Hoover’s south parking area would overburden the City’s infrastructure, roads, and storm sewers,” that “parking spots on the north side * * * would result in a shorter walking distances,” or concerns of “potential” safety, issues, or that “other parking spots could be used,” and concerns that there “may be more noise, more lights.” Exhibits “H” 3-21; “M” 7-21.

Appellants did not make comments demonstrating “immediate and pecuniary interests” to themselves if the Planning Commission approved the conditional use permit. Appellants’ comments were of “possibilities” and concerns that “may” affect the City at large, comments concerning “remote consequences” that may be of a “future concern,” not comments demonstrating concerns of immediate and pecuniary consequences to themselves. *Id.*

Because Appellants failed to state anything but future, speculative interests regarding the award of the conditional use permit, they have not demonstrated standing to participate in an appeal. Having failed to meet their burden of demonstrating standing, this Court should dismiss Appellants’ appeal.

IV. CONCLUSION

This Court should dismiss Appellants' appeal because: (1) they did not meet their burden of demonstrating standing to appeal the Planning Commission's decision to approve a conditional use permit; (2) they refused to exhaust their administrative remedies before appealing to this Court, and (3) Appellants' comments at the Planning Commission's adjudicatory/public hearings were simply speculation of potential harm—not comments demonstrating concerns of immediate and pecuniary consequence—which therefore do not provide the basis for denying a conditional use permit.

WHEREFORE, for all of the reasons stated above, Appellees, City of North Canton and the North Canton Planning Commission, respectfully request this Court dismiss Appellants' appeal at Appellants' cost.

Respectfully submitted,

By: 

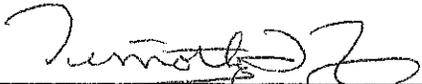
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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent by ordinary mail this 1st day of June, 2015, to

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