

William M Gustavson 0016674  
Attorney for Plaintiff

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

LANDEIRA, LLC,

Plaintiff,

v.

CITY OF LOVELAND,

Defendant

Case No. A0502549

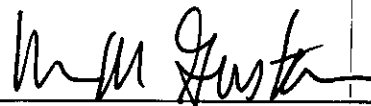
Judge

MOTION FOR TEMPORARY  
RESTRAINING ORDER,  
PRELIMINARY AND  
PERMANENT INJUNCTION

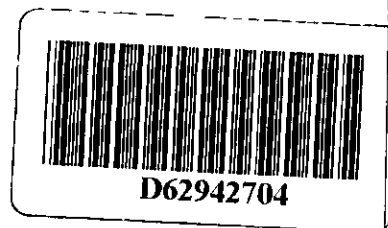
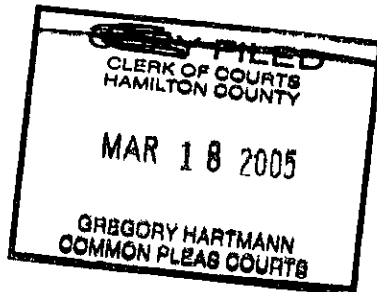
\* \* \* \* \*

Now comes the Plaintiff, and pursuant to Civ. R 65, hereby moves the Court to issue a temporary restraining order, preliminary and permanent injunction of a mandatory character, order the City of Loveland to issue a zoning permit to the Plaintiff under the Zoning Code of the City of Loveland The reason for this motion is set forth in the accompanying memorandum.

Respectfully Submitted,



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## MEMORANDUM

The Plaintiff has filed a complaint seeking a declaratory judgment, a temporary restraining order, a preliminary and permanent injunction, relating to the refusal of the Defendant to issue a zoning permit to the Plaintiff in accordance with the provisions of the Zoning Code of the City of Loveland. The pertinent facts to the foregoing request for relief are contained in the verified complaint.

1. The Plaintiff Landeira, LLC, is a limited liability company organized under the laws of the State of Ohio which owns certain real estate in the State of Ohio, Hamilton County, more commonly known as 1425 Loveland-Madeira Road, Loveland, Ohio 45140.

2. The Defendant City of Loveland is an Ohio Municipal Corporation. The property located at 1425 Loveland-Madeira Road is within the corporate limits of the Defendant City of Loveland, which property is subject to the laws of the State of Ohio, and the Charter and ordinances of the City of Loveland.

3. Prior to August 24, 2004, City of Loveland Ordinance §137.08 prohibited the discharge of firearms in the city limits except law enforcement officers and other persons engaged in the lawful defense of persons and property. A copy of Ordinance §137 08 as it existed before August 24, 2004 is attached hereto as Exhibit A.

4. On August 24, 2004, the Council of the City of Loveland amended Ordinance §137.08 to permit a lawful gun range and the discharge of firearms in said gun range in the City of Loveland. A copy of said ordinance is attached as Exhibit B. The property in which the gun range was intended to be placed is the property owned by the Plaintiff Landeira, LLC, located at 1425 Loveland-Madeira Road, Loveland, Ohio 45140.

5. Thereafter, a lawful referendum was pursued by certain citizens of the City of Loveland to set aside the amendment to Ordinance §137.08 which allowed a gun range and the discharge of firearms in said gun range in the City of Loveland at 1425 Loveland-Madeira Road, Loveland, Ohio 45140.

6. On February 8, 2005, the residents of the City of Loveland overwhelmingly defeated the referendum, thereby continuing the force and effect of the amendment to Ordinance §137.08, which allowed a gun range and the discharge of firearms in said gun range in the City of Loveland.

7 As a result of the defeat of the referendum, Plaintiff Landeira, LLC, submitted a zoning permit application to the Zoning Administrator of the City of Loveland to begin the renovations to the building at 1425 Loveland-Madeira Road, Loveland, Ohio 45140, for the purpose of a gun range, under the provisions of Loveland Zoning Code §§150.405 and 150.406. A copy of Loveland Zoning Code §§150.405 and 150 406 is attached as Exhibit C.

8. The zoning permit was submitted to the Zoning Administrator of the City of Loveland because Loveland Zoning Code §150.410 states that the Zoning Administrator shall have the responsibility and power to "Receive, review and make determinations of applications for zoning permits and certificates of occupancy." Pursuant to Loveland Zoning Code §150.410, the Zoning Administrator was the final policy maker for the City of Loveland in the determination of applications for zoning permits. A copy of Loveland Zoning Code §150.410 is attached as Exhibit D

9 The Council of the City of Loveland has divided the city into 11 zoning districts A copy of the Loveland Zoning Map is attached as Exhibit E

10 1425 Loveland-Madeira Road, Loveland, Ohio 45140 is located in a B-R District, one of the 11 zoning districts on the Loveland Zoning Map, Exhibit E, attached hereto. The location of 1425 Loveland-Madeira Road, Loveland, Ohio 45140, is identified on the Loveland Zoning Map, Exhibit E

11 Loveland Zoning Code §150.146 states the principally permitted uses of property within a B-R District. The operation of a gun range is "commercial recreation" under the Loveland Zoning Code. Loveland Zoning Code §150.146(f) states that commercial recreation is a principally permitted use in a B-R District as follows "Commercial recreation; provided it is at least 200 feet from any R-District " A copy of the Loveland Zoning Code §150.146 is attached as Exhibit F.

12. Loveland Zoning Code §150.005 is the definitional section In that section, the term "DISTRICT" is defined, in relevant part, as "The term R-District shall mean any R-LD, R-MD or R-MF District " The Districts R-LD, R-MD, and R-MF are three of the zoning districts set out in the Loveland Zoning Map, Exhibit E, attached hereto. A copy of Loveland Zoning Code §150 005 is attached as Exhibit G.

13. On March 2, 2005, Gerald L. Stoker, the Building & Zoning Administrator for the City of Loveland denied by letter the Plaintiff's application for a zoning permit. The letter, a copy of which is attached as Exhibit H, acknowledged that 1425 Loveland-Madeira Road, Loveland, Ohio 45140, which was intended to be renovated to become a gun range, was commercial recreation, located in a B-R zoning district. The letter further acknowledged that as commercial recreation, the gun range was a principally permitted use, "provided that they are located at a distance of 200 ft. from any R-District " The

letter further acknowledged that, although there were apartments across Loveland-Madeira Road, said development was in an SPD District. In spite of the definition of an "R-District," as set out in Loveland Zoning Code §150 005, Exhibit G, as any "R-LD, R-MD or R-MF District," and in spite of the admission that there was an SPD District, not an R-District, across the road and within 200 feet, Stoker, on behalf of the City of Loveland denied the zoning permit request of the Plaintiff claiming that the apartment complex across the street was a "residential subdistrict within the SPD#1" and that "therefore the 200 ft. distance rule does apply "

The issue is simple and clear. The City of Loveland City Council amended an ordinance to allow a gun range to be constructed at 1425 Loveland-Madeira Road, Loveland, Ohio 45140, in property owned by the Plaintiff. A referendum was sought, and in the vote of the people, the residents of the City of Loveland overwhelmingly approved the gun range at 1425 Loveland-Madeira Road, Loveland, Ohio 45140, in the property owned by the Plaintiff. But, a zoning official, Mr. Stoker, the person who has authority under the Zoning Code of the City of Loveland, refuses to issue the permit and is seeking to force the Plaintiff to participate in a zoning variance process that clearly, by the express terms of the Zoning Code of the City of Loveland, does not apply.

The law is simple and clear. "Statutes or ordinances . . . or which impose restrictions upon the use, management, control or alienation of private property, will be strictly construed **and their scope cannot be extended to include limitations not therein clearly prescribed;** exemptions from such restrictive provisions are for like reasons liberally construed." (Emphasis added). *State, ex rel Moore Oil Co , v. Dauben* (1919), 99 Ohio St. 406, 411, 124 N.E 232.

In *Saunders v Clark County Zoning Department* (1981) 66 Ohio St. 2d 259, 421 N.E 2d 152, the Supreme Court explained the full parameters of the law to be applied in balancing the rights of property owners against zoning codes:

All zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner *In re University Circle Inc* (1978), 56 Ohio St. 2d 180, 184; *Pepper Pike v Landskroner* (1977), 53 Ohio App. 2d 63, 76; 3 Anderson, *American Law of Zoning* (2d Ed.) 4, Section 16.02 Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed *Davis v. Miller* (1955), 163 Ohio St. 91, 95 (Taft, J, concurring); *State, ex rel Ice & Fuel Co, v. Kreuzweiser* (1929), 120 Ohio St 352; *State, ex rel Moore Oil, v. Dauben* (1919), 99 Ohio St 406, paragraph one of the syllabus.

The decision of the trial court herein does not do justice to these elementary principles of real property law which favor the property owner.

The First District has been confronted with similar issues. In *Kenkel v Hamilton County Board of Commissioners* (2001), Case No. C-010347, 2001 Ohio App LEXIS 5767, copy attached, the Court stated:

Because zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled, they are ordinarily strictly construed in favor of the property owner. **Ambiguities in zoning resolutions that restrict the use of land must be construed against the restriction** because the enforcement of such a provision is an exercise of power that constricts property rights. (Emphasis Added)

Here, the Zoning Code of the City of Loveland is clear. The building located at 1425 Loveland-Madeira Road, Loveland, Ohio 45140, is in a B-R District. Verified Complaint, par. 10. Loveland Zoning Code §150.146(f) states that commercial recreation is a principally permitted use in a B-R District as follows: “Commercial recreation, provided it is at least 200 feet from any R-District.” Verified Complaint, par. 11. Loveland Zoning Code §150 005 defines the term “DISTRICT,” as it pertains to an “R-District” as “The term R-District shall mean any

R-LD, R-MD or R-MF District ” Verified Complaint, par. 12 In spite of the fact that there is no “R-District,” as defined in the Loveland Zoning Code, within 200’ of the property in which the gun range will be constructed, Gerald Stoker, the zoning administrator and decision maker of the City of Loveland, denied the Plaintiff’s request for a zoning permit. Verified Complaint, par. 13. Stoker wants the Plaintiffs to seek a variance from Loveland Zoning Code §150.146(f) (which allows construction of commercial recreation in a B-R District, unless within 200’ of an R-District) because a residential building, which is in a SPD-District, not an R-District, is within 200’ of 1425 Loveland-Madeira Road In effect, the arbitrary, capricious, unreasonable, and unconstitutional application of the Loveland Zoning Code by Defendant to Plaintiff will delay the construction of the gun range on Plaintiff’s property for years in the courts.

The Plaintiff seeks a declaratory judgment that he is entitled to the issuance of a zoning permit, and Plaintiff requests the Court to order the issuance of the permit. “[C]itizens have a substantive due process right not to be subjected to arbitrary or irrational zoning decisions.” *Pearson v City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992), *see also Zinermon v Burch*, 494 U.S. 113, 115, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990) (explaining that “the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them’”) (quoting *Daniels v Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986)); *Richardson v Township of Brady*, 218 F.3d 508, 512 (6th Cir. 2000). The Plaintiffs may challenge by declaratory judgment the constitutionality of a zoning ordinance as applied to their property. *Driscoll v Austintown Associates* (1975), 42 Ohio St.2d 263, 328 N.E.2d 395, Syllabus 1. And, the arbitrary action of the City of Loveland may be challenged by declaratory

judgment, regardless of whether the Plaintiffs could also appeal the decision of Stoker and the City of Loveland in a Chapter 2506 appeal. *Id.*, Syllabus 2.

The Court may issue a temporary restraining order, preliminary and permanent injunction when the Plaintiffs are suffering immediate irreparable harm for which there is no adequate remedy at law “Where a property owner complies with all the legislative requirements for the procurement of a building permit and his proposed structure falls within the use classification of the area in which he proposes to build it, he has a right to such permit, and there is a duty on the part of the officer charged therewith to issue it” *Gibson v City of Oberlin* (1960), 171 Ohio St. 1, 6, 167 N.E.2d 651. Here, the Plaintiff has no way to compel Stoker and the City of Loveland to follow the express terms of the Loveland Zoning Code and issue the zoning permit. The Plaintiffs request the Court to issue a declaratory judgment that the Plaintiffs are entitled to their zoning permit, and request equitable relief to force the Defendant to issue said permit.



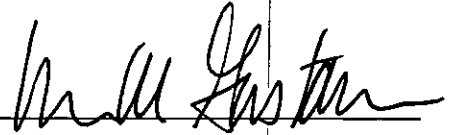
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William M. Gustavson

CERTIFICATE OF SERVICE

This is to certify that a copy of this motion was sent by U.S. mail, postage prepaid, on this \_\_\_ day of March, 2005, to the Solicitor for the City of Loveland as follows

Franklin A. Klaine, Jr  
Strauss & Troy, LPA  
The Federal Reserve Building  
150 East Fourth Street  
Cincinnati, OH 45202-4018



William M. Gustavson

**THOMAS J. KENKEL and KATHLEEN A. KENKEL, Plaintiffs-  
Appellants, vs. HAMILTON COUNTY BOARD OF COUNTY  
COMMISSIONERS, Defendant-Appellee.**

**APPEAL NO. C-010347**

**COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT,  
HAMILTON COUNTY**

**2001 Ohio 3917; 2001 Ohio App. LEXIS 5767**

**December 21, 2001, Decided**

**NOTICE:** [\*1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

**PRIOR HISTORY:** Civil Appeal From: Hamilton County Common Pleas Court. TRIAL NO. A-0004565

**DISPOSITION:** Reversed and cause remanded.

**LexisNexis(R) Headnotes**

**SYLLABUS:**

The trial court abused its discretion in affirming an administrative decision that had denied an application for the residential development of subdivision property: the map for the applicable zoning resolution provided a residential classification for the property in question, and the ambiguity in the zoning resolution and its incorporated development plan should have been construed in favor of the property owners.

**COUNSEL:** Keating, Muething & Klekamp, P L.L., Joseph L. Trauth, Jr., and Thomas M. Tepe, Jr., for Plaintiffs-Appellants.

Michael K Allen, Hamilton County Prosecuting Attorney, and John R. Meckstroth, Jr., Assistant Prosecuting Attorney, for Defendant-Appellee.

**OPINION: DECISION**

*Per Curiam*

In 1999, plaintiffs-appellants, Thomas J Kenkel and Kathleen A Kenkel, purchased approximately nine acres of land in western Hamilton County. The property ("the Kenkel property") is located [\*2] within the Kirkridge Acres subdivision, a residential development with a zoning history dating back to 1962. In 1962, the defendant-appellee, the Hamilton County Board of County Commissioners, approved a Community Unit Plan n1 ("CUP") for the development of the Kirkridge Acres subdivision. The plan provided for single-family lots, a swim club, a business district, and approximately 195 acres of greenspace. The Kenkel property was part of the area originally designated as greenspace. But no development actually occurred pursuant to the original plan, and, in 1968, all the land was conveyed to W L Harper Construction Company.

n1 The designation "Community Unit Plan" has been changed to "Planned Unit Development" in the current Hamilton County Zoning Resolution. See, also, *Peachtree Dev Co v Paul* (1981), 67 Ohio St. 2d 345, 423 N.E.2d 1087.

In 1968, the board approved certain modifications to the 1962 CUP. Among the terms and conditions of the board's approval were the creation of the Kirkridge [\*3] Acres Community Association and the designation of eighty-three acres for community use. The community-use acreage included fifty-two acres of greenspace property and two lake areas, all of which were to be conveyed to the community association. The one actual lake as it exists today was conveyed to the association as greenspace in 1973, and the proposed lake area and its adjacent property were conveyed to the association in 1980. Although the Kenkel property was part of the greenspace, it was never conveyed to the community association.

In August 1985, in order to create the Deer Run Country Club, developer Michael Macke requested a major modification of the 1968 CUP. His rezoning request included the Kenkel property. In December 1985, the board approved Macke's requested modification by Resolution No. 732. The resolution revised the existing CUP and approved a final development plan. The final development plan included single-family lots and ten estate lots, in addition to a golf course. The plan allowed the ten estate lots to be created on land that had previously been conveyed as greenspace to the community association. While some areas on the final development plan were designated [\*4] "greenbelt," there was no such designation on the Kenkel property, which was left undescribed without a lot number.

After purchasing the property in 1999, the Kenkels requested an amendment to the 1985 zoning resolution in order to build two single-family homes. In April 2000, the Hamilton County Rural Zoning Commission denied the Kenkels' request, finding that the Kenkel property had been designated greenspace by the zoning resolution. The commission's decision was upheld by the board of county commissioners.

The Kenkels appealed to the court of common pleas, pursuant to R.C. Chapter 2506. The matter was referred to a magistrate who reversed the board's decision. After objections were filed with the common pleas court, the court refused to adopt the decision of the magistrate and affirmed the decision of the board.

The Kenkels assign as error (1) the trial court's determination that the construction of two single-family homes was not consistent with the 1985 zoning resolution; and (2) the trial court's

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determination that the requested development should be restricted in the interests of health, safety, and general welfare.

In R.C. Chapter 2506 administrative appeals, the courts [\*5] of common pleas and the courts of appeals have different standards of review. A common pleas court must determine whether an administrative order is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." n2 Pursuant to R.C. 2506.04, the decision of the trial court may be appealed only on questions of law. In reviewing a trial court's judgment on the evidence in an administrative appeal, an appellate court's review is therefore more limited. n3 The appellate court is to determine only if the trial court has abused its discretion. n4 An abuse of discretion "\* \* \*" implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency " n5

n2 *Henley v Youngstown Bd of Zoning Appeals* (2000), 90 Ohio St 3d 142, 147, 735 N.E.2d 433, 438.

n3 See *id*

n4 See *Henley, supra; Lorain City School Dist Bd of Edn v State Emp Relations Bd* (1988), 40 Ohio St. 3d 257, 261, 533 N.E.2d 264, 267 [\*6]

n5 See *id*, citing *State ex rel Commercial Lovelace Motor Freight, Inc v Lancaster* (1986), 22 Ohio St. 3d 191, 193, 489 N.E.2d 288, 290.

In this case, the 1985 final development plan approved by the zoning resolution did not in any way label the Kenkel property. The trial court concluded that a notation in the lower corner of the final development plan incorporated an earlier CUP drawing done in August 1985. The notation on the final development plan provided as follows:

THIS DRAW'G IS A SUPPLEMENTAL DRAW'G TO BE USED IN CONJUNCTION WITH THE C U P. DRAW'G BY NIEMEIER & ASSOC. DATED AUG. 1985 OF KIRKRIDGE ACRES COMMUNITY

The court determined that the notation referred to Exhibit N, a drawing dated August 1985 that labeled the Kenkel property as park area. Accordingly, the court determined that the final development plan incorporated Exhibit N, and that, therefore, the Kenkel property was "properly designated as greenspace, greenbelt, or park area."

We note that the August 1985 CUP drawing designated Exhibit N was labeled "Revision Kirkridge Acres Community" and listed [\*7] the names and addresses of both the developer and Niemeier Associates. The drawing contained a "Deed of Acceptance," by which the developer was to "adopt and confirm the plan of development as shown hereon for the purposes indicated and agree to comply with all terms, restrictive covenants and conditions included as a part thereof." The drawing further provided for signatures of the developer, witnesses and a notary, but the drawing itself was not signed, witnessed or otherwise authenticated.

Macke's August 1985 rezoning application, which led to the current zoning resolution, contained a metes-and-bounds description of the entire area to be rezoned, which included the

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Kenkel property. Another exhibit, designated Exhibit R, was an August 1985 drawing of the same area that listed the names and addresses of both Macke and Niemeier Associates. The second drawing, which was labeled "Revision Kirkridge Acres Community Unit Plan 2-68 Green" and bore a surveyor's certification, outlined the area for which Macke proposed the zoning change, which included the Kenkel property

The record demonstrates that the 1985 zoning resolution called for the construction of homes, and that attached to [\*8] the resolution was a zoning map indicating that the Kenkel property was zoned "A," a residential designation. From this document, it seems clear that the intent of the resolution was to rezone the Kenkel property as residential. But the board argues that the trial court correctly found that Exhibit N's "park area" designation for the Kenkel property was incorporated by reference into the final development plan. We note, however, that it is not clear from the record whether the final development plan intended to incorporate Exhibit N, as the board argues, or another CUP drawing. Even if the final development plan actually incorporated Exhibit N by reference, that would not explain the zoning map attached to the resolution, which clearly identified the Kenkel property as being zoned residential.

The board recognized the problem with the final development plan's failure to explicitly designate the Kenkel property. At the hearing before the board, one of the commissioners commented, "It seems to me pretty clear that some mistakes or errors may have been made over the last 30 years," but concluded that "in my mind this location has always been intended to remain undeveloped and should [\*9] stay that way." Another commissioner admitted that the county zoning staff may have made a mistake because it "did not insist upon a greenbelt being marked there."

Because the zoning map attached to the 1985 zoning resolution designated the Kenkel property as being zoned "A," a residential classification, we hold that the trial court abused its discretion in concluding that the board's decision was supported by a preponderance of the evidence. Moreover, even if we were to determine that the zoning map was inconclusive as to the Kenkel property, an ambiguity arises when considering the zoning resolution and the attendant final development plan.

Because zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled, they are ordinarily strictly construed in favor of the property owner. n6 Ambiguities in zoning resolutions that restrict the use of land must be construed against the restriction because the enforcement of such a provision is an exercise of power that constricts property rights. n7 In this case, where the zoning resolution and the final development plan are ambiguous as to [\*10] the Kenkel property, we must construe the resolution in favor of the property owner.

n6 See *Saunders v Clark Cty Zoning Dept* (1981), 66 Ohio St. 2d 259, 260, 421 N.E.2d 152, 154.

n7 See *Freedom Twp Bd of Zoning Appeals v Portage Cty Bd of Mental Retardation & Developmental Disabilities* (1984), 16 Ohio App 3d 387, 390, 476 N.E.2d 360, 364.

Therefore, we sustain both assignments of error, reverse the judgment of the trial court, and remand this case for further proceedings consistent with law and this decision.

*Judgment reversed and cause remanded*

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**DOAN, P.J, HILDEBRANDT and WINKLER, JJ.**