

COUNCIL PUBLIC HEARING  
June 28, 2016  
MINUTES

The Council Public Hearing of the Village of Moreland Hills was called to order by Mayor Renda at 7:00pm, in the Village Council Chambers.

PRESENT AT ROLL CALL: Mr. Fritz, Mr. Richman, Mr. Sherck, Mr. Stanard, Ms. Sturgis  
ABSENT: Mr. Buczek

Also Present: Aimee Lane, Law Director, Jeff Filarski, Village Engineer, Sherri Arrietta, Clerk of Council, Mark Majewski, Zoning Consultant.

Mayor Renda asked if there were any additions or corrections to last month's meeting minutes. Mr. Stanard noted that on page 3, in the BZA report it stated that Mr. Rick Rule-Hoffman was previously denied for his variance request, which is not correct. He stated that the minutes should reflect that Mr. Rick Rule-Hoffman's variance request was tabled and that he subsequently revised it and resubmitted, which the board voted in favor of.

Mr. Richman made a motion seconded by Mr. Stanard to approve the minutes of the Regular Council Meeting of June 8, 2016, as amended.

ROLL CALL:

AYES: Mr. Richman, Mr. Sherck, Mr. Stanard, Ms. Sturgis

NAYS: None

ABSTENTIONS: Mr. Fritz

MOTION CARRIED

**Public Hearing**

**Ordinance 2016-19– Introduced by Mr. Fritz**

AN ORDINANCE SUBMITTING THE QUESTION TO THE ELECTORS OF WHETHER THE PLANNING AND ZONING CODE OF THE VILLAGE OF MORELAND HILLS SHOULD BE AMENDED TO ENACT NEW CHAPTER 1159, "CHAGRIN NORTHWEST RESIDENTIAL & PLANNED DEVELOPMENT CONSERVATION DISTRICT," AND THE ZONING MAP OF THE VILLAGE OF MORELAND HILLS AMENDED TO CHANGE THE ZONING CLASSIFICATION OF CERTAIN PARCELS FROM U-1 DWELLING HOUSE DISTRICT TO U-5, CHAGRIN NORTHWEST RESIDENTIAL & PLANNED DEVELOPMENT CONSERVATION DISTRICT, AND DECLARING AN EMERGENCY.

Mayor Renda stated that Mr. Majewski will first review proposed Chapter 1159 and discuss what modifications were made and then she will open the public hearing.

Mr. Majewski stated that this is a new chapter that will create a new zoning district; U-5 Chagrin Northwest Residential and Planned Development Conservation District. It only pertains to one specific part of the Village, on the north side of Chagrin Blvd, east of the School Board Building, and near the commercial district. This will not affect any other area in the Village. This portion

of land will remain under the current U-1 zoning classification, if and until a group of property owners/developers acquire the acreage to which they can propose a PUD.

Mr. Majewski stated that there are numerous standards for this proposed district. The general standards are as follows: vehicular access to and from properties with limited access of roads intersecting with Chagrin Blvd.; direct access to and from Chagrin Blvd. on a lot with frontage thereon shall only be permitted where it is found that it is not feasible to provide access for that lot from the approved new access roads; all structures shall be set back at least 100' from the Chagrin Blvd. right-of-way; all parking, drives, and other vehicular facilities shall be set back at least 75' from the Chagrin Blvd. right-of-way; a landscaped area shall be designed, installed, and maintained along the entire Chagrin Blvd. area and a detailed plan of the landscaped area shall be provided by the applicant as part of the review process.

The common open space minimum requirement is 20% and it includes maintenance requirements. The requirements in this chapter for landscaping and buffers and environmental regulations are the same as required throughout the Village currently. The infrastructure improvements include public utilities, public streets, and pathways. Vehicular and pedestrian access should minimize traffic hazards and congestion. The homeowner's association is required to maintain the properties including the common open space, common drives, etc.

The specific standards for uses permitted in this district are the same as the uses already permitted in the residential district.

The dwelling standards for the maximum number of units is calculated by taking the total area of the development in acres and subtracting the acres that exist in the proposed right-of-way and then multiply the difference by 4, or whatever the maximum units permitted will ultimately be based on what Council decides.

Mr. Majewski explained that architectural design is an important part of a PUD. Applicants will have to submit plans to make sure units are not excessively similar or dissimilar and it may also require minimum and maximum floor areas, minimum and maximum dwelling widths, maximum lot coverage, and policies for the orientation and relationships among dwellings, particularly in attached and cluster configurations.

Mr. Majewski reviewed the procedures for application, review, and approval of planned development. The applicant shall submit a preliminary development plan to the Planning Commission which shall include a plan for an entire neighborhood, open space, how to maintain it, environmental protections, and a tree survey, as part of a pre-application process. Planning Commission will hold a public hearing and inform neighboring property owners about the plan. They will make their recommendation to Council and Council then has sixty days to hold a public hearing. If Council approves the preliminary development plan, the applicant can then submit the final development plan to the Planning Commission, which will also include a pre-application process. Once the Planning Commission determines that it is consistent with the preliminary plan, the applicant can proceed with construction.

Mr. Majewski informed everyone that after initial discussions, it was agreed that no commercial uses will be permitted and that recently, the Planning Commission recommended a number of minor changes to the chapter, including a tree survey

Mayor Renda asked if anyone had a question for Mr. Majewski, before she opened the public hearing.

A resident asked if these units could be rented or owned. Mr. Majewski stated that there was no restriction on that in the chapter. Mrs. Lane further explained that the homeowner's association could put a restriction on that.

A resident asked if the green space was included in the maximum density of 4 units per acre. Mr. Majewski stated that was correct. The resident stated that you could end up with more than 40 units per acre because it is not removed from the formula. Mr. Majewski stated that 10,000 square feet is allocated for every dwelling but 4 dwellings can be put on one acre. If they are detached units, they are required to be 10,000 square feet, but it could be less if they are attached (like a condominium).

A resident asked what the definition of "open" was as it relates to open space. Mr. Majewski stated that "common open space" is defined in the chapter (p.4) as "an area of land designed and intended for the perpetual use and enjoyment of the users of the development and/or the general public." There are also a number of requirements for common open space, which Mr. Majewski read from the chapter (p.4, (b)(2) – see attachment).

Mayor Renda declared the Public Hearing open at 7:17pm

Mr. Ron Janke, Moreland Hills resident, spoke in opposition and read from a document which was provided to Council members. (see attached document).

Mrs. Maryann Janke, Moreland Hills resident, spoke in opposition and read from a document which was provided to Council Members. (see attached document).

Mr. David Groth, co-owner of three (3) properties within the area being discussed, thanked Council for considering this issue. He stated that change is scary but that it is scarier not to change. Mr. Groth stated that he believes that this property is unique; it is not across the street from Hiram House Camp. He stated that it is across the street from a football field, surrounded by Pepper Pike, and near the school administration building and the senior center; it is an urban looking area. Mr. Groth stated that he thinks a zoning change here will have little to no effect on the rest of Moreland Hills, meaning that he does not think that this change will expand into the rest of the Village. He encouraged residents to vote for the ordinance.

Mr. Bob Amjad, Pepper Pike resident, stated that he disagrees with Mr. Groth. He stated that his property borders Mr. Groth's property. Mr. Amjad stated that he believes that this is a special area and still has a lot of questions about the proposed rezoning. He stated that he is surprised that there is not a site plan because there is almost always a site plan provided for rezoning,

which would clarify questions; but without it, it begs for more questions and makes one think negatively. Mr. Amjad stated that he does not believe this is being approached in the right way.

Mr. John Kehres, Moreland Hills resident, referred to the Jaylin Investments case, as Mr. Janke had previously mentioned. He stated that Mayor DeGross fought vigorously, former Law Director Leonard Spremulli defended the Village, and Mr. Filarski gave compelling testimony in that case. The outcome was favorable to Moreland Hills; The Supreme Court of Ohio ruled that the Village had the power to regulate the development of their properties. There has been a gradual diminishment of their accomplishments, which he first noticed in the spring of last year when the Village spent \$23,000 to hire McKenna Associates. In December 2015, The Master Plan Review Committee attempted to develop properties on either side of 91, near the junction of Hiram that was discontinued due to lack of interest. Mr. Kehres stated that residents have all seen what Larry Bloch has done to the Anderson estate on Chagrin Blvd. and what the Orange Village Mayor has done with the Pinecrest development. He stated that he suggests that if this legislation passes, we will see a deliberate de-greening of the hills and that Village government officials will profit monetarily. If that is the case, he feels Village officials should resign.

Mr. Groth asked Council for clarification that the Bloch property (551 Chagrin Blvd.) is being built per the current Code. Mrs. Lane stated that it was developed under the U-1 Zoning classification (2-acre zoning) and therefore no variances were granted.

Mr. Sam Steinhouse, resident of 75 Winterberry Lane, stated that he was a member of the Master Plan Review Committee; one of eight selected from the Village. He stated that none of the members knew each other previously, lived in different parts of the Village and were not compensated. The committee worked from July of 2015 through this spring. Mr. Steinhouse stated that the Master Plan helped them through two goals; to survey the Village residents regarding what they would like to see over the next 20-30 years and what the current trends as far as the legal aspect of zoning. He stated that a lot of residents wanted to keep the Village as it is and the committee honored that as best they could. The committee did dig into the zoning and were advised by Mayor Renda and Law Director Aimee Lane about the Solon Case. This was an example of how the courts have changed and are now inserting themselves into the zoning process. The Committee was also given an education about how a PUD can give the Village proactive involvement as it relates to something that could come up down the road; it gives the Village a reasonable template to control the development process. Mr. Steinhouse stated that this "group of eight" from around the Village, came to the conclusion that they would recommend the issue of rezoning on Chagrin Blvd. He stated that any inference that money is to be made, is ridiculous. This committee had civil discussions in an open and transparent process.

Mr. Dan Groth, Moreland Hills resident of one of the properties in question, stated that he thinks it is a great idea. He stated that he would like to stay in Moreland Hills for rest of his life but would not always be able to maintain 2 acres. Mr. Groth stated that he is in favor of this proposal.

Ms. Martha Ring, resident on Ellendale, stated that she is a recent homeowner and moved into the Village because of the 2-acre zoning. She stated that she is against changing it.

Mr. Larry Kadis, resident on West Juniper, stated that he is in favor of the proposal. He stated that at the end of the day, it should come down to what the residents want and they will have a chance to vote on it in November if Council puts it on the ballot. This is underutilized property and the tax benefits of a development that will meet all requirements as stated earlier by the zoning consultant will benefit the Village. The Community will gain from this. Mr. Kadis stated that while he appreciates "greening the hills," at end of day it really is what the future is and can you create something that will benefit the community but not destroy the core values. He stated that he thinks that what has been proposed should be put forward to vote on and he stated that he hopes it will go forward.

Mr. Adam Diamond, resident on Fairway, stated that he is in favor of it and agrees with both Mr. Groth and Mr. Kadis.

Mr. Esben Vogielius, Moreland Hills resident, stated that he is a new resident of Moreland Hills and the zoning was the reason he moved here. He asked what the benefit would be to changing it. Mayor Renda replied that this being a public hearing, Council's role is to listen and not respond.

Mrs. Janet Marshall, Moreland Hills resident, stated that she has been a resident for 47 years. She stated that she does not understand why the rezoning is necessary and feels that 20 homes could be put on 40 acres without it having to be rezoned.

Ms. Lynn DeGeronimo-House, owner of property within the area being discussed, is favor of the rezoning. She stated that her parents bought 6 acres in 1951 and always said that the area was unique.

Ms. Reggi Bennetts, Moreland Hills resident, stated that she can see both sides of this situation. She stated that she is concerned that there is no site plan. Living on Ellendale she understands what one unit per half acre looks like. She is concerned about the density allowed by four units per acre.

Ms. Monk Schendel, Moreland Hills resident, stated that she believes that 4 units per acre is too much and she objects to the rezoning.

Mayor Renda closed the public hearing at 7:50pm.

Mr. Richman made a motion seconded by Mr. Stanard to adjourn the Council Public Hearing at 7:51pm.

ROLL CALL:

AYES: Mr. Fritz, Mr. Richman, Mr. Sherck, Mr. Stanard, Ms. Sturgis

NAYS: None

MOTION CARRIED

The meeting was adjourned at 7:51pm.

Attest:

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Sherri Arrietta, Clerk of Council

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Steve Richman, Council President

**JUNE 28. 2016 STATEMENT OF RONALD R. JANKE, 105 EASTON LANE, WITH RESPECT TO PROPOSED CHAPTER 1159 – U-5 NORTHWEST RESIDENTIAL AND PLANNED DEVELOPMENT DISTRICT**

My name is Ronald R. Janke. My wife and I have lived in Moreland Hills for over 40 years and currently reside at 105 Easton Lane.

I speak in opposition to adopting proposed chapter 1159 and placing it on the ballot. I will not repeat my testimony at the May 11 public hearing in which I summarized how the current 2-acre zoning requirement, which governs most residential areas in the Village, preserves our distinctive semi-rural nature, protects the environment and continues to serve us well in promoting the addition of fine new homes and the improvement and renovation of existing homes. I further summarized how having 8 residential units per 2 acres, rather than one, would destroy those values and benefits.

I also will not repeat my remarks in a recent letter to the Chagrin Valley Times in which I note that this proposal is contrary to the overwhelming opinion of Moreland Hills residents who were surveyed as part of the Master Planning process. Over 70 % said that they wanted more or the same number of single family homes on lots with two-acres or more. I submit a copy of that letter and this portion of the survey for the hearing record.

I wish to make two additional points based on my study since the last hearing. The first is that 14 lots comprising the 40 acres subject to the proposed rezoning are not, as some Village officials have stated, unique and a special case when it comes to rezoning.

**FOUR OF THE 14 LOTS ARE SURROUNDED ENTIRELY BY LOTS ZONED FOR ONE RESIDENCE PER TWO ACRES OR MORE. Thus, these three lots are like the large majority of residential lots in Moreland Hills. Lots 91201004, -8, -9, -11 .**

**EIGHT OF THE REMAINING 11 LOTS ARE SURROUNDED ON THREE SIDES BY LARGE RESIDENTIAL LOTS. These lots all front on Chagrin Boulevard and are across the street from the athletic fields of Orange Schools. We have many other lots in the Village that are surrounded by large residential lots and have athletic fields across the street. These are the houses on Chagrin River Road across from the Polo Field; the house on SOM Center across from the Country Club and the houses on Hiram Trail across from Hiram House's athletic field and basketball court. Lots 91201002, -3, -5 to -8, -10 and -12.**

**That leaves two lots. ONE, WHICH FRONTS CHAGRIN BOULEVARD ACROSS FROM THE ATHLETIC FIELDS, HAS LARGE RESIDENTIAL LOTS ON TWO SIDES AND THE ORANGE BOARD OF EDUCATION OFFICE BULDING ON THE REMAINING SIDE. Notably, there is nothing but open land behind Board's building, and that open space comprises over 3/4ths of the common lot line between the Board's property and this lot. We have other homes that are adjacent to office buildings. These are homes next to the Developers Diversified building on Chagrin and Riverstone; a home next to the Village Hall on SOM Center , and a home next to the Western Reserve Land Conservancy on Chagrin River Road. Lot 91201001**

THE LAST LOT IS SURROUNDED ON THREE SIDES BY LARGE RESIDENTIAL LOTS. HALF OF ITS FOURTH SIDE FRONTS CHAGRIN BOULEVARD ACROSS FROM THE SCHOOL ATHLETIC FIELDS; THE OTHER HALF IS ADJACENT TO THE NORTH OR BACK SIDE OF THE COMMERCIAL STRIP KNOWN AS THE MORELAND TOWNE CENTER. Lot 912022013. There are two lots, both in Twin Acres, that are also adjacent to this same side of the commercial strip, and these lots have even longer lot boundaries adjacent to this commercial strip than does this last lot. Lots 91202025 and -6.

In sum, each of the 14 lots to be rezoned is similar to other lots in the Village and the zoning decisions on these lots should not be considered as irrelevant to other parts of the Village because these 14 lots are unique.

My second point is that, in my opinion the Village has strong legal position to defeat attempts to break the two-acre zoning requirement for these parcels. This opinion is based on my review of two cases cited by Village officials and a third case referenced in a recent Chagrin Valley Times editorial.

The case referenced by the newspaper is Village's successful defense of its two-acre zoning requirement in 2004 - 05 against an attempt by Jaylin Investments to 29 homes on one-half acre parcels on an 18-acre parcel off of Berkeley and Ellendale Lanes. The 8<sup>th</sup> District Court of Appeals, in ruling in favor of the Village, cited with approval the Village expert's' testimony, one of whom was the current Village Engineer, that "the current two-acre, low-density development contributes to protecting public health, safety, and welfare of the community by preserving topographic vegetation, drainage patterns and wildlife" and that "lower density development preserves resources that contribute to protecting water quality, air quality, and preventing hazards or environmental problems, such as flooding or erosion, and is the predominant tool being used by communities to protect environmental resources." 157 Ohio App 3d 277 at 282.

The case that caused three lots on the SE corner of SOM Center and Miles to be rezoned from single family to two-family residential relied on circumstances far different from those of the 40 acres. Reading the Solon case, it is clear that the chief factors was that these properties were across the street from two gas stations (the Marathon and former BP stations) and that the driveways on two of the lots would be less than the 250 foot distance from the corner which was recommended in the Solon ordinance. Interestingly, the BP station was torn down shortly after this decision and the driveway to the recently constructed two family residence facing Miles Road is considerably less than 250 feet from the intersection.

The third case related to the Moreland Mews behind the former Lee Road Nursery on Chagrin Boulevard. The Village initially received a favorable decision from the trial court, but following an appeal, a judgment in favor of the developer, Myers Associates was ultimately entered. As a result detached homes on one-third of an acre have been constructed. I could not locate the trial court decision, so I do not know why the case ended as it did. However, it is clear that one of Myers' chief arguments was that the "use of the property for single family development is severely limited due to the topography of the property and its limited access." These factors do not apply to the 40 acres which are

the subject of this hearing, which, of course, have already been developed as single family residences, unlike the undeveloped property in each of these three cases.

Thank you for your attention.

# Letters to the Editor

## Rezoning message missed

I urge residents of Moreland Hills to attend the 7 p.m. June 28 public hearing at Village Hall on the proposed rezoning ordinance which would drastically change the zoning requirements for 40 acres. Among other changes, this ordinance would change the present zoning requirements from one home per two acres to four homes per one acre.

Residents should review the proposed ordinance and related materials that are available on the village website to understand the extent of these changes. Statements that have been made by village officials tend to obscure the nature of and the reason for these changes.

Village officials have contended that the changes are motivated by the 25 to 35 (16 percent to 23 percent) of residents who responded to the master plan survey who expressed an interest in more senior residential facilities. However, over 70 percent of the residents surveyed said that they wanted the same or more single-family homes on two-acre minimum lot sizes. Clearly, reducing lot size cannot be based on this survey.

Also, the proposal allows as many as four townhouses to be attached, but only 20 percent of the residents surveyed favored more detached townhouses, and 62 percent of the residents wanted none or fewer detached townhouses. Of the respondents, over 82 percent said that they wanted no rental apartments.

I believe that the village officials, who have spent much time and village funds to develop this proposal against the results of their own survey, should be told at the public hearing not to go forward and not to spend any more money on this proposal. Please join me in conveying that message on June 28.

*Ronald R. Janke  
Moreland Hills*

JAYLIN INVESTMENTS, INC., APPELLANT, v. VILLAGE  
OF MORELAND HILLS, APPELLEE.

[Cite as *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4.]

*Real property—Zoning—Restriction of residential lot size to two-acre minimum—Constitutionality of restriction as applied to deny proposed use of half-acre lots in residential subdivision—Test is whether owner has demonstrated beyond fair debate that restriction, as applied to proposed use, is arbitrary, unreasonable, and without substantial relation to public health, safety, and welfare.*

(No. 2004-1145—Submitted June 15, 2005—Decided January 11, 2006.)

APPEAL from the Court of Appeals for Cuyahoga County,  
No. 82739, 157 Ohio App.3d 277, 2004-Ohio-2689.

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LUNDBERG STRATTON, J.

{¶ 1} This is an appeal from an action seeking a declaratory judgment that a zoning ordinance, as applied to a landowner's proposed use of property, is unconstitutional. Specifically, the question before us involves the extent to which a court's analysis must focus on the owner's proposed use of the property that is prohibited by the zoning regulation.

{¶ 2} We hold that, in a constitutional analysis, the object of scrutiny is the government's action; therefore, the state or local law or regulation is the focal point of the analysis, not the property owner's proposed use. In an "as applied" challenge, the proposed use may be a relevant factor to be considered; however, the owner must also present evidence to overcome the presumption that the zoning is a valid exercise of the municipality's police powers, as it is applied to the property at issue.

{¶ 3} During the years 2000 and 2001, plaintiff-appellant, Jaylin Investments, Inc. ("Jaylin"), purchased 18 acres of undeveloped land in the village of Moreland Hills, Ohio, appellee. The land is an irregularly shaped tract on a hillside isolated between steep ravines to the south and east and older, modest homes on Ellendale Road and Berkeley Avenue to the north and west.

{¶ 4} Jaylin's property is zoned U1 for single-family homes and subject to area regulations on subdivision lots. Moreland Hills Planning and Zoning Code

1129.02 establishes a two-acre minimum lot size<sup>1</sup> and 1129.03 and 1129.04 of the code establish minimum setbacks and side-yard widths for homes throughout the U1 zoned area.

{¶ 5} Jaylin developed plans to build a subdivision on its property to be named Owl Ridge, consisting of 29 homes on lots approximately one-half acre.<sup>2</sup> Jaylin submitted its proposal to the village's planning commission, but the village refused to approve Jaylin's proposal because it violated the area regulations in the Planning and Zoning Code, in particular, the two-acre minimum lot size.

{¶ 6} Jaylin did not formally apply for a variance or seek rezoning of its property, but rather filed a complaint for declaratory judgment under R.C. 2721.03 seeking a declaration that the "prohibition of the Proposed Use by the Village's Planning and Zoning Code does not advance the health, safety, morals or general welfare of the Village, is arbitrary, capricious and unreasonable and is, therefore, unconstitutional as applied to the Property." Jaylin asked for an order requiring the village to permit Jaylin to develop its property as proposed.

{¶ 7} Following a bench trial, the court declared that Jaylin had "demonstrated beyond fair debate that, as applied to the Property, the prohibition in the Village's zoning regulations of the Proposed Use is arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community" and therefore unconstitutional as applied to the property. The court said that Jaylin's proposed use of the property "will have no more adverse impact on the environment than would a development of two acre lots on the Property." The court ordered that Jaylin was entitled to develop its property as it had proposed.

{¶ 8} The appellate court, however, concluded that the trial court had erroneously focused on what Jaylin would do to the property to accommodate the village's environmental concerns and the economic impact upon Jaylin if required to build homes on two-acre lots. However, Jaylin had not alleged a taking of its property. Thus, the testimony about the economic feasibility of the proposed plan, without more, did not invalidate the village's environmental concerns or prove beyond fair debate that the two-acre lot minimum, as applied to Jaylin's property, was unconstitutional. The court of appeals concluded that Jaylin failed to meet its burden of proof. The court reversed the judgment of the trial court.

{¶ 9} This cause is before this court upon our acceptance of a discretionary appeal upon reconsideration of our initial denial.

1. The zoning ordinance actually requires lots of 87,000 square feet, which is somewhat less than two acres.
2. The lot size was approximately 20,000 square feet, which is a little less than one-half acre.

Opinion, per Lundberg Stratton, J.

{¶ 10} Zoning is a valid legislative function of a municipality's police powers. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303; Section 19, Article I, Ohio Constitution ("Private property shall ever be held inviolate, but subservient to the public welfare"). Courts should not interfere with zoning decisions unless the municipality exercised its power in an arbitrary and unreasonable manner and the decision has no substantial relation to the public health, safety, morals, or general welfare. *Id.* at 394, 47 S.Ct. 114, 71 L.Ed. 303; *Valley Auto Lease of Chagrin Falls, Inc. v. Auburn Twp. Bd. of Zoning Appeals* (1988), 38 Ohio St.3d 184, 185, 527 N.E.2d 825; *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560, 26 O.O.2d 249, 197 N.E.2d 201.

{¶ 11} A zoning ordinance may be challenged as unconstitutional on its face or as applied to a particular set of facts. *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, 28 O.O. 295, 55 N.E.2d 629, paragraph four of the syllabus. In a facial challenge to a zoning ordinance, the challenger alleges that the overall ordinance, on its face, has no rational relationship to a legitimate governmental purpose and it may not constitutionally be applied under any circumstances. *State ex rel. Bray v. Russell* (2000), 89 Ohio St.3d 132, 137, 729 N.E.2d 359. See, also, *State v. Beckley* (1983), 5 Ohio St.3d 4, 7, 5 OBR 66, 448 N.E.2d 1147.

{¶ 12} In an "as applied" challenge to a zoning ordinance, the landowner questions the validity of the ordinance only as it applies to a particular parcel of property. If the ordinance is unconstitutional as applied under those limited circumstances, it nevertheless will continue to be enforced in all other instances. *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 14. A landowner may also allege that the ordinance so interferes with the use of the property that, in effect, it constitutes a taking of the property. *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 210, 690 N.E.2d 510. Jaylin does not allege that the village's zoning effects a taking of its property.

{¶ 13} In *Goldberg*, we reaffirmed the standard in *Euclid v. Ambler Realty Co.* as the appropriate test in a constitutional challenge to zoning regulation in Ohio when the landowner does not allege a taking. *Goldberg* at 210, 690 N.E.2d 510. *Goldberg* held that "[a] zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Id.* at syllabus. "The burden of proof remains with the party challenging an ordinance's constitutionality, and the standard of proof remains 'beyond fair debate.'" *Id.*, 81 Ohio St.3d at 214, 690 N.E.2d 510. See *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018; *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d 581, 584, 653 N.E.2d 639. The parties do not

dispute these basic legal principles. Nor do they advocate revisiting *Goldberg*, and we see no reason to do so.

{¶ 14} In a constitutional analysis, courts must strive to balance the benefits to the public against the disadvantages to the private interests of the landowner. *C. Miller Chevrolet, Inc. v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 303, 67 O.O.2d 358, 313 N.E.2d 400. Each case is judged on its own unique facts.

{¶ 15} Jaylin does not assert a facial challenge to the zoning or allege a taking of its property. The essence of Jaylin's case is that the court of appeals should have focused its analysis on Jaylin's proposed use of the property and whether it was unconstitutional for the village to prohibit Jaylin from building on the one-half-acre lots. Jaylin contends that its proposed use meets or exceeds the environmental goals underlying the zoning ordinances; therefore, it was unconstitutional for the city to prohibit Jaylin from building Owl Ridge as proposed.

{¶ 16} The court of appeals, however, narrowly articulated the issue as "whether the village's ordinance is unconstitutional as applied to the particular parcel of property at issue," citing *Goldberg*, 81 Ohio St.3d at 213, 690 N.E.2d 510. In a lengthy footnote, the court clarified that the focal point of the constitutional analysis is the ordinance at issue, not the owner's proposed use of the property. The substance of this footnote is central to Jaylin's appeal:

{¶ 17} "We note parenthetically that the trial court, as well as Jaylin, obfuscates the analysis that must be undertaken when a party seeks declaratory relief as to the constitutionality of an ordinance. R.C. 2721.03 is specific in its directive—it is the constitutionality of the ordinance that is subject to review. Whether the ordinance is constitutional on its face or as applied is the issue. An [as] applied challenge may include a discussion of the prohibition against proposed use, but it is not the prohibition against proposed use that must be analyzed in terms of whether it is arbitrary, unreasonable, and without substantial relation to the public health, safety, and welfare of the community. It is the ordinance as applied to the particular property that must be so analyzed. Consequently, the focus is on the ordinance at issue, not the property owner's proposed use of that property. The trial court in its opinion interchangeably addresses not only the prohibition against proposed use but the ordinance as applied to the property. Because one subsumes the other, we will construe not only Jaylin's arguments, but the court's interpretation, as an applied challenge to the ordinance's constitutionality." (Citations omitted and emphasis sic.) 157 Ohio App.3d 277, 2004-Ohio-2689, 811 N.E.2d 113, ¶ 10, fn. 1.

{¶ 18} Jaylin advocates an inverse analysis, i.e., that if the proposed use meets the government's legitimate goals underlying the zoning, a municipality may not prohibit it. This does not accurately state the issue. In a constitutional analysis, the object of scrutiny is the legislative action. The zoning ordinance is the focal

point of the analysis, not the property owner's proposed use, and the analysis begins with a presumption that the ordinance is constitutional. The analysis focuses on the legislative judgment underlying the enactment, as it is applied to the particular property, not the municipality's failure to approve what the owner suggests may be a better use of the property. If application of the zoning ordinance prevents an owner from using the property in a particular way, the proposed use is relevant but only as one factor to be considered in analyzing the zoning ordinance's application to the particular property at issue.

{¶ 19} For example, in *Goldberg Cos., Inc. v. Richmond Hts.*, the city refused to issue a variance to permit the property owner to build 372 parking spaces adjacent to its retail space instead of the 554 spaces required by the city's zoning code. Goldberg challenged the constitutionality of the ordinance that regulated parking spaces as applied to its property. We stated that in such a case, the "court's only inquiry need be whether the ordinance was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'" as applied to the owner's property. *Id.*, 81 Ohio St.3d at 213, 690 N.E.2d 510, quoting *Euclid v. Ambler Realty Co.*, 272 U.S. at 395, 47 S.Ct. 114, 71 L.Ed. 303.

{¶ 20} In *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St.2d 23, 67 O.O.2d 38, 309 N.E.2d 900, Mobil's proposal to build a gas station at a particular location was prohibited because the property in question was zoned for single-family residential use. We held that the issue should be "whether the ordinance, in proscribing a landowner's proposed use of his land, has any reasonable relationship to the legitimate exercise of police power by the municipality." *Id.* at syllabus. The challenge must focus on the constitutionality of the ordinance as applied to prohibit the proposed use, not the reasonableness of the proposed use.

{¶ 21} If we were to modify this rule as Jaylin advocates, we would effectively eliminate the initial presumption that the zoning is constitutional. Opposing parties would merely argue over who presents the better use of the property. "The power of a municipality to \* \* \* determine land-use policy is a legislative function which will not be interfered with by the courts, unless such power is exercised in such an arbitrary, confiscatory or unreasonable manner as to be in violation of constitutional guaranties." *Willott v. Beachwood*, 175 Ohio St. 557, 26 O.O.2d 249, 197 N.E.2d 201, paragraph three of the syllabus. "Municipal governing bodies are better qualified, because of their knowledge of the situation, to act upon these matters than are the courts." *Id.* at 560, 26 O.O.2d 249, 197 N.E.2d 201.

{¶ 22} The appellate court correctly stated the law and applied it to the facts. We agree with the appellate court that, applying the *Goldberg* test, Jaylin failed

to meet its burden of proof that the village's zoning ordinance was unconstitutional as applied, prohibiting Jaylin from building homes on one-half acre lots.

{¶ 23} Jaylin concedes that the village may enact ordinances to establish minimum residential lot sizes and that municipalities have a legitimate interest in protecting the environment. Jaylin presented testimony that the proposed subdivision would include unique features that meet or exceed the village's environmental goals concerning density, erosion, sediment control, and other factors. These features include a sewer system, storm-water management, and protection against hillside erosion. But whether "proposed zoning might 'better' advance the stated governmental interest does not address the issue of whether [the] zoning ordinance [at issue] advances a legitimate government interest." *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d at 586, 653 N.E.2d 639.

{¶ 24} Jaylin's owner testified that he had originally considered a plan to build homes on two-acre lots, but determined that it would not be marketable or economically feasible. An expert witness for Jaylin testified that building homes on two-acre lots would be inharmonious with the older homes on lots half that size or smaller on Berkeley Avenue and Ellendale Road. He testified that new homes on such large lots would be difficult to market surrounded by houses that are older, much less expensive, and built on smaller lots. With two-acre lots, the Owl Ridge homes would be impractical from a financial and marketing aspect. He agreed that the subdivision could and should be developed with two-acre lots were it not separated by a large, steep ravine from the upscale Quail Hollow subdivision, where homes meet or exceed the two-acre minimum lot size.

{¶ 25} In an appeal from a denial of a zoning variance, we held that "[e]vidence that the removal of a zoning restriction would result in an increase in the value of the affected land is relevant \* \* \*, but as a general rule such evidence does not, of itself, render the board's denial unreasonable, arbitrary, capricious or unconstitutional." *C. Miller Chevrolet*, 38 Ohio St.2d at 302-303, 67 O.O.2d 358, 313 N.E.2d 400. This principle equally applies in an action for declaratory judgment that challenges the constitutionality of a zoning ordinance, as applied.

{¶ 26} Therefore, we agree with the appellate court that Jaylin failed to demonstrate, beyond fair debate, that the two-acre-minimum zoning ordinance was arbitrary and unreasonable or substantially unrelated to the public health, safety, morals, or general welfare of the community, as applied to prohibit Jaylin's proposed use. We affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., RESNICK, O'CONNOR and LANZINGER, JJ., concur.

PFEIFER and O'DONNELL, JJ., dissent.

**O'DONNELL, J., dissenting.**

{¶ 27} My approach to this case recognizes that a trial court hearing a case without a jury serves as the fact-finder and inter alia assesses the credibility of the witnesses who testify in the proceeding. It is the duty of the court to decide all disputed questions of fact and to assign such weight to the testimony of the various witnesses as the court, in its sole discretion, determines that testimony is entitled to receive. Further, the trial court may believe all, part, or none of the testimony of any of the witnesses. Here, the trial court did as required.

{¶ 28} In its written opinion, the trial court found the testimony of Jaylin's witnesses to be credible and persuasive, and it also found the testimony of the Village's witnesses unsupported by the evidence and not credible.

{¶ 29} In this instance, it is noteworthy that the trial court not only made specific findings, but also cited portions of the testimony in support of its conclusions. Despite this careful attention to detail, the appellate court challenged the trial court's findings and, in my view, substituted its judgment for that of the trial court.

{¶ 30} In its opinion, the appellate court stated, "[I]n the absence of testimony to the contrary, the balance of DeYoung's testimony need not be discounted merely because her conclusions regarding any potential violation of the Village's hillside ordinance were based on a faulty premise." 157 Ohio App.3d 277, 2004-Ohio-2689, 811 N.E.2d 113, ¶ 19. The appellate court also considered Jaylin's witnesses—in particular, Terrence Gerson, stating that he "merely testified that the impact on the Chagrin River Basin would be 'very small.' Without more, it cannot be said that Jaylin proved beyond fair debate that the village's environmental concerns were not valid or the ordinance was otherwise unconstitutional." *Id.* The appellate court then, in series, reviewed Jaylin's economic-impact testimony, that of Jaylin's owner, and the appraisal testimony of Roger Ritley. The appellate court concluded that Jaylin's testimony "regarding economic feasibility, however, does not invalidate the village's environmental concerns or otherwise prove beyond fair debate that the village's two-acre lot requirement bears no substantial relationship to the public health, safety, or welfare of the community." *Id.* at ¶ 25.

{¶ 31} The law of appellate review in Ohio leaves no doubt that a reviewing court "must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court." *Myers v. Garson* (1993), 66 Ohio St.3d 610, 616, 614 N.E.2d 742. Here, the appellate court invaded the province of the trial court with regard to the expert witnesses who testified before the trial

court and superseded the trial court findings regarding the experts who testified for Moreland Hills.

{¶ 32} While this court had settled the law in *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 690 N.E.2d 510, today's majority decision, for all practical purposes, renders trials on proposed developments meaningless. Consider the impact of today's decision as an affirmation of the appellate court's view of the law: i.e., to consider only whether the ordinance in question satisfies the government's concern for the environment, not whether the proposed development can meet that goal. On these facts, a two-acre, three-acre, four-acre, or even five-acre minimum would meet the government's objective of environmental protection.

{¶ 33} As this court has recently stated, "In an 'as applied' challenge, the party challenging the constitutionality of the statute contends that the 'application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional "as applied" is to prevent its future application in a similar context, but not to render it utterly inoperative.'" *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 14, quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists* (1992), 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (Scalia, J., dissenting). In considering an as-applied constitutional challenge, such a trial should most certainly involve whether or not a proposed development meets or satisfies legitimate governmental concerns. And where a trial court has determined the credibility of the witnesses, an appellate court should not substitute its judgment on those matters.

{¶ 34} Excising consideration of the developer's proposed development from consideration by the fact finder shifts the focus of a trial to a determination only of whether the local government zoning meets its objective and thereby effectively omits any meaningful consideration of how or whether a proposed plan also meets those objectives. It therefore renders trials all but meaningless. Accordingly, I dissent.

PFEIFER, J., concurs in the foregoing opinion.

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Berns, Ockner & Greenberger, L.L.C., Sheldon Berns, and Benjamin J. Ockner, for appellant.

Leonard A. Spremulli and Santo T. Incorvaia, for appellee.

Byron & Byron Co., L.P.A., Barry M. Byron, and Stephen L. Byron, urging affirmance for amici curiae Ohio Municipal League and Cuyahoga County Law Directors Association.

Frost Brown Todd, L.L.C., Scott D. Phillips, and Matthew C. Blickensderfer, urging affirmance for amicus curiae village of Indian Hill.

David M. Benjamin, Solon City Law Director, urging affirmance for amicus curiae city of Solon, Ohio.

Walter & Haverfield, L.L.P., R. Todd Hunt, and Frederick W. Whatley, urging affirmance for amici curiae Chagrin River Watershed Partners, Inc. and Cuyahoga Soil and Water Conservation District.

McDonald Hopkins Co., L.P.A., Michael W. Wise, and Richard W. Cline, Shumaker, Loop & Kendrick, L.L.P., and Louis E. Tosi, Aronoff, Rosen & Hunt, Stanley J. Aronoff, and Richard A. Paolo, Keating, Muething & Klekamp, P.L.L., Joseph L. Trauth Jr., and Thomas M. Tepe Jr., urging reversal for amici curiae Associated Estates Realty Corporation, First Interstate Properties, Ltd., Forest City Enterprises, Inc., Goldberg Companies, Inc., Home Builders Association of Greater Cincinnati, Home Builders Association of Greater Cleveland, Home Builders Association of Greater Toledo, Ohio Home Builders Association, Inc., and Visconsi Companies, Ltd.

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THE STATE EX REL. DOWNS, APPELLEE, v. PANIOTO, JUDGE, ET AL., APPELLANTS.

[Cite as *State ex rel. Downs v. Panioto*,  
107 Ohio St.3d 347, 2006-Ohio-8.]

*Prohibition—Alternative writ defined—Final orders—Lack of jurisdiction over incompetent party alleged—Service of process on incompetent—Capacity of incompetent to sue for divorce—Adequate remedy in ordinary course of law—Writ denied.*

(No. 2005-0447—Submitted September 20, 2005—Decided January 11, 2006.)

APPEAL from the Court of Appeals for Hamilton  
County, No. C-040784, 2005-Ohio-778.

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**Per Curiam.**

{¶ 1} This is an appeal from a judgment granting a writ of prohibition preventing a domestic relations court from proceeding in a divorce case.

{¶ 2} In June 1959, appellee, David Downs, and Linda Downs married in Lawrenceburg, Indiana. David and Linda have one child born as issue of their

My name is Mary Ann Janke, and I live at 105 Easton Lane.

I oppose the adoption of Chapter 1159, as a resident and as one of the developers and homeowners who for the past 43 years have complied with the two-acre residential zoning requirement, which until recently has been vigorously defended by Moreland Hills Mayors, Councilmen and Councilwomen, and Planning Commission members.

In 1985, yes 31 years ago, I along with 5 neighbors purchased 20 acres on the corner of SOM Center and Easton Lane and developed that parcel into 10 2-acre lots. We converted Easton Lane from a private street to a dedicated public street. Although the Village Engineer at the time wanted the street to be straight and level, we were successful in maintaining the gentle bends and ups and downs of the street. We routed street improvements and utility lines to spare as many mature trees as humanly possible. Those trees and the substantial homes that were subsequently built still grace our Village.

20 acres or more in what it called the Northwest Residential and Planned Development District can be redeveloped in this same environmentally sensitive way, as was done on Easton Lane, if redevelopment is what the owner(s) desire.

In contrast, the proposed ordinance would permit 4 homes per acre on any contiguous 20 acres within this 40-acre parcel. If you want to get an idea of what this density would look like, walk or drive down Easton Lane and image 80 homes instead of ten homes on the south side of the street.

Putting this ordinance on the ballot will be a dog whistle to developers to come to Moreland Hills and see what rezoning they can get to build more homes on less land, using this proposal as precedent. Denser and denser development on these and other parcels will destroy the very nature of the land which others hope to find, but find destroyed by the very buildings themselves.

I ask you to remember the love that first prompted you to aspire to live in this beautiful Village. Remember and realize what is at stake. Please do not place this proposal on the ballot, and if that occurs, please do everything you can to defeat it.

### (b) Common Open Space Requirements

- (1) Common Open Space. For purposes of the Planned Development requirements, "common open space" is defined as an area of land designed and intended for the perpetual use and enjoyment of the users of the development and/or the general public. Common open space may contain accessory structures and improvements necessary or desirable for educational, noncommercial, recreational or cultural uses.
- (2) General Standards. Common open space shall be located and designed to the satisfaction of the Planning Commission and shall:
  - A. Be sufficiently aggregated to create large areas of planned open space;
  - B. Conserve significant topographic and landscape natural features to the extent practicable;
  - C. Be accessible to residents of the Planned Development;
  - D. Be not less than fifty (50) feet in width at any point;
  - E. Be interconnected with open space areas on abutting parcels wherever possible, by open space corridors.
  - F. The preferred features of required open space, as appropriate for the conditions of a specific Planned Development include: centrally located; along the street frontage of the development to protect or enhance views as set forth in Section 1159.04(a) (5); located to preserve significant natural features; and/or located to interconnect other open spaces throughout the development or on contiguous properties.
  - G. Required open space areas shall be of sufficient size and dimension and located, configured, or designed in such a way as to achieve the applicable purposes of these regulations and enhance the quality of the development. The open space shall neither be perceived nor function simply as an extension of the rear yards of those lots abutting it.
  - H. If the site contains a lake, stream or other body of water, the Planning Commission may require that a portion of the required open space shall abut the body of water.
  - I. All required open space areas shall be configured so the open space is reasonably accessible to and usable by residents of the Planned Development, visitors and other users of the development.
- (3) Minimum Required Open Space Area. At least twenty percent (20%) of the total land area of the planned development shall be designated and used as common open space. The required area of common open space may include all or part of the minimum landscaped area required on the Chagrin Boulevard frontage (see section 1159.04(a)(5)) provided that it shall not constitute more than 25% of the total required common open space.
- (4) Land area devoted to the following shall not be included as meeting the open space requirement:
  - A. Proposed new or existing public rights-of-way.
  - B. Parking areas, access drives, common drives and driveways, except as otherwise permitted by the Planning Commission when providing access to the open space.
  - C. Required setbacks for buildings and parking areas from the project boundaries, and public streets, unless the required setback is contiguous to and part of a larger area of restricted open space; except that the minimum landscaped area required on the Chagrin Boulevard frontage (see section 1159.04(a)(5)) may be included as up to 25% of the total required common open space.
  - D. Required spacing between buildings, such as in clustered areas without lots or condominiums, and parking areas.
  - E. Private yards within subdivided lots.