

**BEFORE THE CITY COUNCIL  
CITY OF GAHANNA, OHIO**

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**BRIEF OF OPPONENTS TO #Z-0003-2018 AND #V-0021-2018**

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Michael C. Helbig, Denise A. Helbig, Callie M. McInturf, John A. Melaragno, Ann P. Melaragno, and Nikki K. Johnson (collectively, “Contiguous Owners”), by and through undersigned counsel, oppose the City of Gahanna Planning Commission (“Commission”)’s October 24, 2018 approval of Loreto Canini (“Canini”)’s applications for rezoning #Z-0003-2018 (“Zoning Application”) and variances, set forth in #V-0021-2018 (“Variance Application”) (together, “Applications”) and request this Council not approve those Applications. The Applications are inappropriate considering the surrounding area’s character, and, in any event, do not meet the high standards of passage required under Ohio law and Gahanna’s Code of Ordinances (GCO).

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On or about August 28, 2018, Canini made the Applications in connection with Franklin County Permanent Parcel #025-001930-00 located at 488 E. Johnstown Road Gahanna, Ohio (“Paulina Place”). Paulina Place is located within the Heartland Concept Plan (adopted in 1999), which recommends two land use designations for Paulina Place, residential and open space/parkland.

The Zoning Application requested rezoning for Paulina Place from Single Family (SF-2) to Two Family Residential (MR-1). In addressing the Land Use Plan’s promotion of the area for Parks/Recreation, the Zoning Application suggested: “[S]uch a use is not feasible or appropriate given the small size of the Property, its private ownership and its lack of access or connectivity.”

Canini also stated, among other reasons, in support of the rezoning:

The proposed development will be compatible with surrounding uses and zoning because it will continue residential zoning in this area, will have no adverse impact on the environment, is at a density permitted under the Land Use Plan and not materially more dense than adjacent or nearby neighborhoods.

Additionally, Canini's Variance Application requested variances of the following sections of the GCO:

1. § 1108.01, requiring: If a proposed development includes land that is zoned any of the districts established in this Zoning Code other than single-family residential, the developer will be required to submit a Final Development Plan for Planning Commission approval;
2. § 1145.05(a), requiring: Each dwelling structure or other building permitted herein shall be located on a lot having an area of not less than 7,200 square feet and each lot shall have a frontage of not less than 60 feet on a dedicated public street, provided the street on which the lot fronts is straight; and
3. § 1109.06, requiring: Every lot shall abut on a dedicated street ("Variances").

Essentially, the Variance Application requests: 1. Canini not have to submit a Final Development Plan for Paulina Place; and 2. That Paulina Place have a private road rather than a dedicated public road as required by the GCO.

The Variance Application made a "Required Statement of Reasons" which stated without detail and in a conclusory fashion "such circumstances constitute special circumstances or conditions for which a variance should be granted." The Variance Application shed no light on how these Variances meet the standards of Ohio law required for the granting of a variance. It appears the Variances are only requested to circumvent the time and expense of creating and getting approved a Final Development Plan and the requirement all lots be on a public road.

The Applications were discussed and approved by the Commission on Wednesday, October 24, 2018 ("Meeting"). At the Meeting, several of the Contiguous Owners and their legal counsel voiced their concern regarding the Applications as well as Canini's contemporaneous

conditional use application.<sup>1</sup> The Contiguous Owners cited loss of privacy, loss of peacefulness, loss of quietness, density issues, and loss of quality of life as a result of the Applications. The Contiguous Owners also pointed out the existence of proposed setbacks in some areas of Paulina Place of only five (5) feet. Canini also spoke briefly at the Meeting, citing random, unpersuasive, and unavailing “benefits” to having his Applications approved. It appears the basis for pursuing approval of the Variances is purely economic and profit based. These are not valid reasons under Ohio and Gahanna law to grant the Applications.

## **II. LAW & ARGUMENT**

### **A. The Zoning Application should not be approved.**

This Council should not approve the Zoning Application as the Commission failed to correctly consider the six factors required by the GCO for passage of a rezoning application. GCO § 1133.03(b) provides:

(b) In deciding on the change, the Planning Commission shall consider, among other criteria, the following elements of the application including but not limited to:

- (1) Consistency with the goals, policies and comprehensive land use plan of the City of Gahanna, including any corridor plans, or subarea plans.
- (2) Compatibility of the site's physical, geological, hydrological, and other environmental features with the potential uses allowed in the proposed zoning district.
- (3) Availability of sites elsewhere in the City that are already zoned for the proposed use.
- (4) The compatibility of all the potential uses allowed in the proposed zoning district with the surrounding uses and zoning in terms of land suitability, impacts on the environment, density, nature of use, traffic impacts, aesthetics, infrastructure, and potential influence (a five percent or more material reduction) in the value of existing abutting lands or approved developments.
- (5) The capacity of City infrastructure and services to accommodate the uses permitted in the requested district without compromising the "health, safety, and welfare" of its citizens.

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<sup>1</sup> The Contiguous Owners appealed the grant of Canini’s conditional use application on November 21, 2018 to the Board of Zoning and Building Appeals, which has yet to rule.

(6) The apparent demand for the types of uses permitted in the requested zoning district in the City in relation to the amount of land in the City currently zoned to accommodate the demand.

Contrary to what Canini proposed in his Zoning Application and at the Meeting, rezoning of Paulina Place from single family to multi-family, with a conditional use for small single-family lots, provides only one benefit: making development of Paulina Place more profitable. Canini is asking to cram more buildable lots into the same space, which affects the area's character by defeating privacy, neighborliness, and peacefulness. Further, the current concept plan, which although not final, makes clear the intent to pack small lots toward the rear of Paulina Place, while leaving much open space at the front of Paulina Place. This is contrary to the illusion created when Canini states that density for the project is similar to the neighboring developments. The reality is, the density for most of Paulina Place is much greater in the area located directly next to the Contiguous Owners.

The current Land Use Plan for the area anticipates, and a proposed new land use plan suggests, Paulina Place be low density residential. None of the surrounding zones are zoned for multi-residential and/or have requirements for larger lots sizes, which would make Paulina Place a visible exception to the character of the area. Therefore, the Zoning Application is not consistent with the comprehensive use plan and is incompatible with the surrounding areas, which dissuades against the remaining GCO § 1133.01(b) factors above. Increased profitability is not one of the factors listed for consideration in GCO § 1133.01(b). Therefore, this Council should not approve the Zoning Application.

**B. The Variance Application should not be approved.**

A variance is a deviation from the exact language provided for in the applicable zoning code. *Consol. Mgmt., Inc. v. City of Cleveland*, 6 Ohio St. 3d 238, 240, 452 N.E.2d 1287, 1289 (1983). Under both Ohio law and the GCO, the Variances should not be approved.

**1. The Variances cannot be granted under Ohio law.**

Under Ohio law, there are two types of variances, with separate tests for passage of each— "area" and "use." The Variances are not "area" variances and cannot meet the high threshold for passage of a "use" variance. The Variances are "use" variances because Canini is asking to use part of Paulina Place as a private road in lieu of a public road, contrary to the specific provisions in the GCO requiring a public road. Therefore, the Variance Application should not be approved by this Council.

*i. The Variances are not "area" variances.*

"Area" variances are requests for deviations from zoning requirements such as area, setbacks, and height, and can only be approved under Ohio law if they pass a "practical difficulty" standard. *Duncan v. Vill. of Middlefield*, 23 Ohio St. 3d 83, 86, 491 N.E.2d 692, 695 (1986). It is the duty of the applicant in its application for a variance to show practical difficulty. *Id.* Though no one factor controls, the *Duncan* court elaborated on a list of practical factors for the practical difficulty standard:

- (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;
- (2) whether the variance is substantial;
- (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance;
- (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage);
- (5) whether the property owner purchased the property with knowledge of the zoning restriction;

- (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance;
- (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

The Variances are not “area” variances because they do not affect area, setbacks, and height. However, even if they were “area” variances, Canini failed to establish practical difficulties if the Variances are not approved. Canini’s Variance Application simply stated: “such circumstances constitute special circumstances or conditions which a variance should be granted.” This is not even the correct standard under Ohio law. At the Meeting, Canini went on to cite random benefits also irrelevant to the factors above.

Even applying the *Duncan* factors to these non-area Variances, they do not support approval.<sup>2</sup> Paulina Place will still yield a return and have a benefit without the Variances, the Variances are substantial, the open character of the area would suffer if the Variances are approved, Canini bought Paulina Place with knowledge of the GCO sections he seeks to vary, and the spirit and intent behind the zoning would not be observed by granting the Variances. Even if the Variances were “area” variances, Canini did not attempt and the Variance Application did not pass the practical difficulty test above. Therefore, this Council should not approve the Variance Application.

***ii. The Variances are not acceptable “use” variances.***

“Use” variances, on the other hand, authorize uses not allowed on the property pursuant to the zoning code. *Kisil v. City of Sandusky*, 12 Ohio St. 3d 30, 33, 465 N.E.2d 848, 851 (1984). “Use” variances can only be approved if they meet the “unnecessary hardship” standard, which means, unless the variance is granted, the property owner will not be able to utilize the property

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<sup>2</sup> As the *Duncan* factors relate specifically to “area” type variances, some are simply logically inapplicable to our present “use” Variances.

for any economically viable use. *Id*; *Dsuban v. Union Twp. Bd. of Zoning Appeals*, 140 Ohio App. 3d 602, 606, 748 N.E.2d 597, 600 (12<sup>th</sup> Dist. 2000). A more profitable use will not justify a use variance. *Consol. Mgmt.*, 6 Ohio St. 3d 238, 238. It is the applicant's duty to establish the unnecessary hardship in their application. *Kisil* at 35.

Canini failed to give any reason why the Variances were necessary in the Variance Application or at the Meeting. Canini came nowhere near meeting his burden of establishing, without the Variances, he would be unable to utilize Paulina Place for any economically viable use. Again, his wanting to simply maximize profits at the expense of the neighborhood character does not meet the unnecessary hardship standard. In fact, the code sections he seeks to vary are important to maintain.

Final Development Plan approval is imperative to ensure the actual intentions of the applicant are conducive to the goals and plans of the City for a proposed rezoning. Also, having the lots on Paulina Place be on dedicated public roads is important, as use of a private road will allow Canini to ignore other requirements that serve the citizens under the GCO. Presumably, the benefit to the developer is it will not need to comply with public road specifications—such as width, radius requirements, setback requirements, materials, etc. This will further the ability to fit more lots into less space, all to the detriment of adjacent owners, including the Contiguous Owners. Fortunately for the Contiguous Owners, Ohio law does not support the granting of the Variances, since there are no conditions unique and/or exceptional to Paulina Place which differentiates it from other properties in Gahanna.

Therefore, because Canini did not meet the standard for approval of a “use” variance, this Council should not approve the Variance Application.

## **2. The Variances cannot be granted under Gahanna's City Ordinances.**

The GCO itself provides for certain heighten conditions to be met before the extreme granting of a variance. GCO § 1103.03 provides:

In cases where it is deemed that hardships, topography or other factual deterrent conditions prevail, variations and exceptions from the dimensional standards and improvement requirements as set forth in this Subdivision Ordinance may be recommended by the Planning Commission, but must be approved by Council.

According to GCO § 1131.04:

At such hearing the applicant shall present a statement and adequate evidence, in such form as the Planning Commission may require and the Planning Commission shall not grant a variance unless it finds that all of the following conditions apply to the case in questions:

- (a) There are special circumstances or conditions applying to the land, building or use referred to in the application.
- (b) The granting of the variance is necessary for the preservation and enjoyment of substantial property rights.
- (c) The granting of the application will not materially affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use and will not be materially detrimental to the public welfare or injurious to property or improvements in such neighborhood.

Again, the Variance Application made simple conclusions without more that, “such circumstances constitute special circumstances or conditions for which a variance should be granted.” Canini’s presentation at the Meeting fared little better, merely summarizing random benefits and unpersuasive reasoning, bearing little, if any, factual connection to the Variances themselves. In fact, most of the “benefits” cited can be chalked up to Canini appealing to the City’s financial interest in not having to maintain a public road. Of course, such reasoning is not validly considered under Ohio law or the GCO, which requires *all* conditions above to be met. It was Canini’s burden to meet these factors and he failed to meet them—because he cannot meet them. Therefore, under the GCO, Canini again failed to meet the test for passage of a variance, and the Variance Application should be denied.



### III. CONCLUSION

A rezoning or a variance cannot be granted simply because it is wanted, it must meet the factors established by legislation and interpreted by the courts. The Applications seek to crowd Paulina Place at the expense of the character of the surrounding area and the Contiguous Owners' privacy, and should be denied. Similarly, financial factors of Canini cannot and should not be a basis for granting a variance, which is why it is not a condition listed in the Ohio common law or the GCO. Canini's Applications and presentation at the Meeting did not even attempt to follow the strict guidelines for approval under Ohio law and the GCO, therefore, it would be contrary to law for this Council to approve the Zoning Application and the Variance Application.

Respectfully submitted,

**ONDA, LABUHN, RANKIN & BOGGS CO., LPA**

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