NOTICE OF INTERVENTION AS AN INTERESTED PARTY IN GAHANNA BZBA CASE NUMBER 0003-2017 AND BRIEF OF ARGUMENTS IN SUPPORT OF UPHOLDING THE APPROVAL IN GAHANNA PLANNING COMMISSION CASE NUMBER FDP 0001-2017

I. Background

On May 10, 2017, the City of Gahanna Planning Commission (the "Commission") approved a final development plan application that was filed on behalf of Gallas Zadeh Development, LLC ("GZD") in Case Number FDP 0001-2017. The application was approved by a vote of 6 to 1 and concerned 4.524+/- acres of real property located to the northeast of the intersection of Hamilton Road and Beecher Road.[1] *See Planning Commission's final order per City records.* On or about June 9, 2017, an appeal of the Commission's decision was filed by "THE ACADEMY RIDGE COMMUNITY ASSOCIATION, Inc., TO INCLUDE CONTIGUOUS AND NON-CONTIGUOUS PROPERTY OWNERS." *See Notice of Appeal dated June 9, 2017, filed of record with the City of Gahanna.* GZD and its legal counsel, Aaron L. Underhill and David L. Hodge of the law firm of Underhill & Hodge LLC, received a copy of the appeal on or about June 13, 2017.

On June 14, 2017, a letter was delivered to the Gahanna City Attorney on behalf of GZD. *See Exhibit A.* It details the technical and procedural flaws associated with the appeal as filed by the appellant(s). More specifically, the letter cites Ohio case law from the Tenth District Court of Appeals holding that property owners' associations do not have standing to file an administrative appeal pursuant to Ohio Revised Code Chapter 2506. Furthermore, the letter states that the Academy Ridge Community Association's broad listing in its notice of appeal of "contiguous and non-contiguous property owners" as appellants in the appeal was impermissible. And finally, the letter points out that the appeal was filed against GZD, which was not the proper appellee. An administrative appeal under the Gahanna Codified Ordinances (the "City Code") and Chapter 2506 of the Ohio Revised Code must be filed against the decision-maker in the administrative proceeding. That was the City's Planning Commission, not GZD. For all of these reasons, the appeal was invalidly filed and should have been void upon the City's receipt. Since the notice of appeal was filed on the 30th day after the Commission issued its decision, the only way to timely file a proper appeal would have been to resubmit another notice of appeal on the same day. That did not happen.

Rather than dismissing the appeal based on these fatal technical and procedural deficiencies, the City improperly provided the Academy Ridge Community Association, Inc. (the "Association") with additional time to (1) amend the appeal to identify specific individuals that may properly be appellants in this matter, and (2) substitute the Commission as the appellee. On June 22, 2017, a new notice of appeal of the decision in Case Number FDP 0001-2017 was filed by the Association and a number of other individuals, but it was labeled as an "amended" notice of appeal. The individuals listed in the amended notice of appeal were not parties to the original appeal. So the effect of the extension of time was to allow these individuals 43 days to file an appeal, well more time than the 30-day appeal period permitted

[1] At the same meeting, the Commission approved a Certificate of Appropriateness application by a vote of 4-3 for the same development project.

by Section 147.03(a) of the City Code. And again, the Association is not a proper party to the appeal. Therefore, the appeal in BZBA Case Number 0003-2017 must be dismissed.

To the extent that the BZBA does not reach the conclusion that the technical and procedural aspects of the notice of appeal require dismissal of this case, GZD asserts that the Commission reached the proper conclusion to approve the final development plan in this matter. The final development plan application, combined with the testimony of the City's representatives and GZD's legal counsel and other representatives at the hearing on the application, demonstrated compliance with the requirements of the City Code and therefore the Commission's approval of the same was both appropriate and legally justified.

II. Notice of Intervention

Section 147.03(b) of the Gahanna City Code provides that "[t]he City official, employee or body whose decision is under appeal is deemed the appellee and is a party to the appeal." Furthermore, Section 147.03(c) of the Code provides that "[a]ny other person or organization wishing to intervene in the appeal as an interested party, shall place the Board on notice of the proposed intervention. The notice shall be in writing, or shall be in person and on the record, and shall identify the interested party, the specific interest of the party in the action, and provide a name, mailing address, and telephone number where the party or the party's agent may be contacted." GZD hereby provides notice to the BZBA that it seeks to intervene in BZA Case Number 0003-2017. It is interested based on a written contract to which it is a party which provides it with the right to purchase the property that is the subject of this case, and due to the fact that it is the proposed developer of the property at issue. Ohio law provides that a prospective buyer under contract to purchase property is a party that has standing to participate in an administrative appeal. *Dayton Hudson Corp.-Target Store Div. v. Washington Twp. Bd. Of Trustees*, 1998 WL 46668 (Ohio Ct. App. 2d Dist. Montgomery County 1998); *Schomaeker v. First Nat. Bank of Ottawa* (1981), 66 Ohio St.2d 304.

GZD's agents in this matter are Aaron L. Underhill and David L. Hodge, attorneys with the law firm of Underhill & Hodge LLC, 8000 Walton Parkway, Suite 260, New Albany, Ohio 43054, Telephone Number (614) 335-9320. GZD respectfully requests the BZBA to approve its request to intervene and to allow its agents with the opportunity to present arguments at the hearing in this matter which support the conclusion that the Commission acted properly in approving GZD's final development plan application. GZD's contractual rights in the property and the economic impact of the Commission's and BZBA's decision in this matter provide it with a direct interest in these proceedings.

III. Motion for Recusal of BZBA Member Timothy Pack

According to the City's website, one of the members of the BZBA is Mr. Timothy Pack. Mr. Pack is listed as an appellant in this matter as detailed in the new (amended) notice of appeal dated June 22, 2017. As such, Mr. Pack cannot be deemed to be an impartial decision-maker when reviewing this appeal. GZD hereby requests a formal motion be voted upon by the BZBA to require Mr. Pack to recuse himself from any participation in this case as a member of the BZBA.

IV. Motion to Dismiss Appeal

A. Lack of Standing and Failure to Timely File

As an interested party, GZD hereby requests that at the outset of the hearing on BZBA Case Number 0003-2017, the BZBA should entertain and approve a motion to dismiss the appeal based on the Association's lack of standing to file an administrative appeal, the failure of the Association and other appellants to timely file a legally valid notice of appeal in accordance with applicable law, and the improper extension of time granted by the City administration to allow new parties to be added to the appellate proceedings.

Gahanna City Code Section 147.03(a) requires that "[a]ppeals shall be in writing, in the form prescribed by law, and shall be filed with the Clerk of Council within 30 days from the date of the action being appealed." As noted earlier in this brief, the original notice of appeal was filed on the 30th day following the Commission's decision in FDP Case Number 0001-2017. This original notice of appeal was timely filed; however, the Code also requires that appeals must be "in the form prescribed by law." For the reasons discussed below, the notice of appeal filed on June 9, 2017 did not meet the form prescribed by law.

Administrative appeals at the municipal level are governed by Ohio Revised Code Chapter 2506. *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26, 1992 Ohio 111, 591 N.E.2d 1203 (1992). A property owners' association does not have standing to file an administrative appeal under Chapter 2506. A case from Ohio's Tenth District Court of Appeals (the court with jurisdiction over the City of Gahanna) speaks directly to the issue of whether or not a property owners' association has standing to file an administrative appeal. In *Northern Woods Civic Association v. City of Columbus Graphics Commission* (1986), 31 Ohio App.3d 46, the court of appeals held that non-profit corporations, including homeowners' associations, do not have the right to file an administrative appeal. More specifically, the court held that "[t]he right of appeal is conferred only upon the person so affected" by the administrative action. *Id.* at Page 47. "There is no provision by statute, or otherwise, whereby another may file the appeal in a representative capacity on behalf of the person who is affected." *Id.* The court could not have been clearer in its conclusion that "a representative appeal is not available to an association on behalf of its members in the absence of specific statutory authority of which there is none." *Id.* at Page 48. Just as in the *Northern Woods* case, the appeal of GZD's final development plan was made on June 9, 2017 by an association on behalf of some or all of its members. This was not permissible and therefore the appeal should have been (and now should be) dismissed.

The Association is likely to argue that it included "contiguous and non-contiguous property owners" as other parties in the original appeal, and therefore the original notice of appeal was valid. But if it was, why did the City's administration have to grant leave to amend the notice? The law provides that a general listing of non-specific parties also is not permitted. The holding in the *Northern Woods* case was confirmed by the same court in *Noe Bixby Rd. Neighbors v. Columbus City Council* (2002), 150 Ohio App.3d 305. The *Noe Bixby* case also speaks to the legality of broadly listing a group of individuals as parties to an administrative appeal without including actual names of individual appellants:

> " * * * The existence of an identifiable complainant is essential to the existence of an action. Particularly, as here, where an unidentified group is involved, there is no assurance that the

individual components of the group may not drift in and out of the lawsuit with no one ultimately responsible for it, and no one set of facts determinative of it. *Group of Tenants v. Mar-Len Realty, Inc.* (1974), 40 Ohio App.2d 449, 450, 69 O.O.2d 389, 321 N.E.2d 241.

This problem of the 'amorphous party' is illustrated in the pleadings before us by the fact that, at different times, different persons and groups have purported to be members of the association, and that within at least one of the groups there is disagreement about whether to oppose the facility. Where individuals, in their own right and on their own behalf, bring the appeal, such confusion is avoided." *Id.* at Page 308.

In the case of the GZD matter, the first page of the initial notice of appeal lists the property owners' association as the appellant, "to include contiguous and non-contiguous property owners." At that point in time, how was GZD to identify the individual parties that may be appealing the Commission's decision? Does this mean that the association filed the appeal for all contiguous and non-contiguous property owners that are members of the association? Did the term "appellants" include the property owner contiguous to GZD's site on the north (i.e., the owner of the apartment development)? Who were the interested "non-contiguous" property owners? The list of property owners that this might include could stretch throughout Gahanna. The *Noe Bixby* case prohibits the use of as general list of property owners for good reason. The original notice of appeal in this case was null and void upon its filing with the City and should have been dismissed since it directly conflicts with case law generated by the court that has jurisdiction over the City of Gahanna.

Despite the many errors in the original notice of appeal in this matter, the City determined that it would grant an extension for the appellants to correct these problems. The City had no legal authority to do so. Again, Gahanna City Code Section 147.03(a) requires that "[a]ppeals shall be in writing, *in the form prescribed by law, and shall be filed with the Clerk of Council within 30 days from the date of the action being appealed*." (Emphasis added.) The BZBA should be mindful that when the original notice of appeal was filed on the 30th day after the Commission's decision, not a single party which had standing to file an appeal was listed in that notice. By granting leave until June 22, 2017 to file an "amended" appeal, this provided entirely new parties with 43 days from the date of the Commission's decision to file an appeal. This is in direct conflict with the 30-day limitation for filing appeals as provided in Section 147.03(a). The amended notice of appeal that was filed on June 22, 2017 lists 11 individuals as appellants, none of which were included in the original notice of appeal. They had the good fortune of gaining extra time to get involved because neither they nor the Association made the time or took the effort to research the law and file the notice properly. Within the additional 13 days that were provided for an appeal to be filed, the new appellants hired an attorney. This would have been the prudent course of action before Day 30, but somehow these individuals decided not to get serious until 13 days later.

The Code-required timeframe for filing an administrative appeal is meant to protect an applicant that seeks approval of a final development plan or other administrative application. Without such a deadline, the applicant forever would be wondering if an appeal is imminent. Investment decisions depend on the ability to have a certainty of result. The applicant in this case was deprived of procedural due process, as it was unable to rely on the fact that the Code requires an appeal to be filed within 30 days of the Commission's decision. The arbitrary extension of time has left the applicant in limbo.

As another technical matter, this appeal was filed with the wrong party as the appellee. The original notice of appeal listed GZD as the appellee. The applicant in this case was GZD, but it was not the decision-maker. An administrative appeal is made with respect to a decision of a public administrative body. The City's Planning Commission would have been the proper appellee here. Again, by Day 43 the new appellants determined that this was an error. Their new (amended) notice of appeal listed the Commission as the appellee. This would have been a proper revision if made before the 30-day appeal period expired, but allowing a correction to made on the 43rd day after the Commission's vote by individuals who were not parties to the original appeal was improper. This appeal should be dismissed for the additional reason that the appellee was not properly and timely identified in the original notice of appeal.

B. Failure to Actively Participate and/or Allege Adverse Effect

None of the individual defendants listed in the new (amended) notice of appeal, except Mr. Ronald Stahl, Mr. Roger Albers, and Ms. Tracie Clay, made a formal appearance at any of the three Commission meetings on the final development plan application (*see approved minutes of the April 26, 2017 and May 10, 2017 Commission meetings, and the May 3, 2017 Commission workshop meeting*). Additionally, in the new (amended) notice of appeal not one of the appellants indicated the particular harm, injury, or adverse impact that he or she has or will experience as a result of the Commission's decision to approve GZD's final development plan. The failure to allege particular harm presents a problem for the appellants.

In *City of Willoughby Hills v. C.C. Bar's Sahara Inc.*, 64 Ohio St.3d 24, 26, the court held that "[a]djacent or contiguous property owners who oppose and participate in the administrative proceedings concerning the issuance of a variance are equally entitled to seek appellate review under R.C. 2506.01." See, also, *Alihassan v. Alliance Board of Zoning Appeals* (Dec. 18, 2000), Stark App. No. 1999CA00402 ("an adjacent or contiguous property owner, in addition to being 'directly affected' by the decision *** also must have actively participated in the administrative hearing").

In *Schomaeker v. First Natl. Bank* (1981), 66 Ohio St.2d 304, the Ohio Supreme Court stated: "In order to bring a R.C. Chapter 2506 direct appeal of an administrative order, plaintiff must be a person directly affected by the decision of the planning commission." An adjacent or contiguous property owner must be "directly affected" by the decision of the administrative agency and must actively participate in the administrative proceedings in order to have standing to appeal the administrative decision. *Route 20 Bowling Alley, Inc. v. Mentor* (Dec. 22, 1995), Lake App. No. 94-L-141, unreported, 1995 WL 869959, at 7. Mere participation in the hearing process without a showing of adverse effect is not enough to establish the right to bring an appeal. *Zelnick*.

To summarize, to be a proper appellant in an administrative appeal, a person must show that he or she is directly affected by the administrative decision and must have actively participated in the hearing process that preceded the decision. The individual appellants in the new/amended notice of appeal fail to provide any statement indicating how any or each of them are harmed or adversely impacted by the Commission's decision. Appellants in an administrative appeal must assert an argument that is better than "not in my backyard" in order to have standing to challenge the Commission's decision. No such arguments have been presented here.

Furthermore, of the individual appellants listed in the new/amended notice of appeal only Mr. Ronald Stahl, Mr. Roger Albers, and Ms. Tracie Clay are noted in the Commission's minutes as having actively participated in the hearings before the Commission. However, Mr. Stahl did not appear in a capacity to represent his individual interests. At the April 26, 2017 hearing before the Commission, it is noted that Mr. Stahl is appearing in his capacity as "president of the Academy Ridge Homeowners Association". His testimony gives clear indications that he was there represent the Association. The appellants even state as much at the bottom of page 1 of the new (amended) notice of appeal. However, as noted earlier in this brief, the Association is not a proper party to this appeal. Because Mr. Stahl did not present testimony in his individual capacity at the Commission hearings, he does not have standing in this matter. Mr. Albers and Ms. Clay appeared before the Commission in their individual capacities, but as discussed above they do not allege a particular harm to them as individuals in the new (amended) notice of appeal.

V. Argument in Support of Commission's Decision

Even if the BZBA does not agree that there have been numerous technical and procedural flaws with respect to the notice of appeal in this matter and arising from the unwarranted extension of time to file the notice as granted by the City, it still must find that the appeal has no merit. City Code Section 147.03(g) provides that "[t]he appellant or proponent of a position which shall be before the Board has the burden of proof by a preponderance of the evidence." Each of the appellants' arguments raised in their notice of appeal will be addressed in turn.

Appellants initially argue that "[m]any of the information requirements of PCC (Planned Commercial Center District) as outlined within COG 1153.06(c)" were not provided by the applicant in advance of the Commission's decision on the final development plan application and therefore was not subjected to public review. City Code Section 1153.06(c) reads as follows:

> "(c) *Requirements and Fee of the Plan of Development.* The fee for filing a Plan of Development shall be as established in the Building and Zoning Fee Schedule set forth in Section 135.10 in Part One of these Codified Ordinances. The Plan of Development shall contain the following information in map or text form:
>
> (1) The land included in the Plan of Development shall be five acres or more, except the size may be reduced if the proposed development is to be in association with other planned development districts.
>
> (2) Property description, including property boundaries, area, topography in detail suitable to determine terrain character and potential development problems, wooded areas or other surface features, easements on the property.
>
> (3) The proposed location and size of structures and ancillary uses, indicating tenant types (uses) and maximum square feet in buildings.
>
> (4) The proposed size, location and use of other portions of the tract, including landscaped parking, loading service, maintenance and other areas or spaces.

(5) The proposed provision of water, sanitary sewer, and surface drainage facilities, including engineering feasibility studies or other evidence of reasonableness.

(6) The proposed traffic circulation pattern, including access drives, parking arrangement, and the relationship to existing and proposed external streets and traffic patterns with evidence of reasonableness.

(7) The proposed site development, construction of structures and associated facilities, including sketches and other materials indicating design principles and concepts to be followed in site development, construction, landscaping and other features. Such proposal shall include the proposed use or reuse of existing features such as topography, structures, streets and easements.

(8) The relationship of the proposed development to existing land use in the surrounding area, the street system, community facilities, services and other public improvements and plans for such streets, facilities and services.

(9) Evidence that the applicant has sufficient control over the land to effectuate the proposed rights and the engineering feasibility data which may be necessary and the economic feasibility studies (market analysis) or other data justifying the proposed development."

As an initial matter, it must be understood that the City's planning and zoning staff members as well as the City Engineer are tasked with determining the adequacy of the information submitted with a final development application. These individuals undertake thorough reviews of applications and related supporting materials that are filed with the City. The City staff reports prepared for the hearing on the GZD project make no mention of missing or inadequate information with respect to the final development plan application.

The appellants' arguments as to the lack of documentation provided to the City with this application center on a permit to fill a portion of the stream located on the site, storm water management plans, and engineering plans. However, testimony of the City Engineer, Rob Priestas, at the hearing before the Commission gave no indication that any information was lacking. *See Commission meeting minutes related to this application.* Determinations as to the sufficiency of technical information that has been filed are clearly within the City Engineer's reasonable discretion. Appellants also allege that the permit to fill a portion of the intermittent stream on the site somehow was not a public record. In fact, the permit was received from the U.S. Army Corps of Engineers in August 2016, some seven months before the first public hearing on GZD's application. *See Copy of Permit attached hereto as Exhibit B.* A copy of the permit was available for inspection by anyone requesting it from the Army Corps. Appellants' failure to take the initiative to request these public records should not be counted against GZD or the City.

In addition, a substantial and complete traffic impact study for this project was filed with the City in October 2016. That traffic study was prepared assuming approximately double the proposed square footage of development would be constructed when compared to that which was ultimately approved by the Commission. The study concluded, and the City's review confirmed, that a project with the higher density was fine from a traffic impact standpoint and did not trigger the need for major public street improvements. It stands to reason that the revised study, which was in the process of being revised

during the Commission's review to reflect approximately 50% of the proposed development that was the subject of the original study, would not reach a contrary result. The original study remained on file as part of the approved application and was always available for public review. Again, it appears that no appellant ever took the step of asking to review it. The applicant and the City could have delivered hard copies of the study to all of the residents in the adjacent neighborhood, but that would have been unprecedented. Instead, the City fulfilled its duty by allowing the traffic impact study to be reviewed upon the request of any interested party.

The Commission's action on the application contained a condition that its approval was subject to final review and approval of the revised traffic impact study by the City Engineer. Such conditions are commonplace. In this instance that condition requires the application to come back to the Commission for review if the approved study reveals any result that demonstrates a more substantial impact on traffic than was revealed by the original study. The revisions to the study have been submitted to the City per the condition of approval. A traffic impact study was on file with the City but needed to be updated to reflect a density of development that was much less than that contained in the originally filed study. It was reviewed by the City's Engineer ahead of the Commission's hearings. Clearly the filing requirement under the City Code was met.

Finally, appellants argue that no economic feasibility study was filed with the application and therefore it was not complete. However, no argument questioning the economic feasibility of GZD's proposal was made by any of the appellants who actually testified at the hearings before the Commission. In addition, a closer look at City Code Section 1153.06(c)(9) indicates that economic feasibility studies are not always required, stating that an application shall include:

> "Evidence that the applicant has sufficient control over the land to effectuate the proposed rights and the engineering feasibility data which may be necessary and the economic feasibility studies (market analysis) or other data justifying the proposed development."

This Code provision gives the City staff (and presumably, the Commission) the clear authority to accept other information or data justifying the proposed development in lieu of an economic feasibility study. That was the case here.

In the notice of appeal, appellants move on to a separate argument concerning "excessive cut and fill of the very large ravine" proposed with respect to the development of the property. Additionally, they cite an alleged violation of the provisions of City Code Section 1108.01(d), which provides:

> "The development shall be laid out to reduce cut and fill; to avoid unnecessary impervious cover; to prevent flooding; and to mitigate adverse effects of shadow, noise, odor, traffic, drainage and utilities on neighboring properties."

The Commission correctly concluded that this requirement had been met. The amount of the site that could be legally disturbed pursuant to the approved zoning of the site was greatly minimized. Several more buildings and much more impervious surface could have been provided than what was proposed by GZD. Improvements on the site were set back a significant distance from neighboring owners to the west: Approximately 164 feet for pavement, 233 feet for buildings. Major tree stands on the rear of the site are completely undisturbed. Impervious lot coverage will be approximately 36%, well less than the 80% maximum impervious surface lot coverage allowed by the approved zoning for the site. The relevant permit for cutting and filling a portion of the stream on the site was obtained from the Army

Corps. The Commission had more than enough information to conclude that this Code provision had been met.

Likewise, the Commission reached the proper conclusion with respect to traffic impacts. As detailed above, a traffic impact study filed with the City assumed much more density on this site than what was approved in this final development plan application. Its conclusions were was supported by the City Engineer. It was prepared in accordance with customary transportation engineering principles by an engineer that is highly regarded. The City Engineer was peppered with questions from the Commission on this topic, and agreed that the curbcut on Beecher Road is appropriate and safe.

In conclusion, the BZBA is compelled to uphold the decision of the Commission to approve the final development plan for GZD's proposed development project. The procedural and technical problems with the notice of appeal alone should require the BZBA to pass on a review of the merits of the Commission's decision. But if it gets that far, the BZBA should recognize that the Commission was presented with all relevant information necessary to make an informed decision. The application requested no zoning variances from the requirements of City Code. Two public hearings were provided on the application and a Commission workshop also was held. Interested citizens were provided many opportunities to voice concerns. The reality is that the property has been zoned for the proposed uses for over two decades, and the development adheres to and exceeds all zoning requirements. The City Engineer and other members of City staff addressed the questions of the Commissioners at hearings on the application. Based on all of the information before it, the Commission made the correct decision to approve the application and the appellants have not demonstrated that the decision was improper.

Submitted on July 18, 2017.

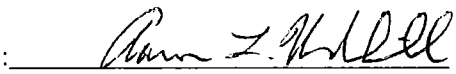
By: 

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EXHIBIT A

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June 14, 2017

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Re: Appeal of City of Gahanna Planning Commission Case No. FDP-001-2017 (Hamilton Commerce Center)

Dear Shane:

This letter is being provided on behalf of my client, Gallas Zadeh Development, LLC (GZD), the applicant in the above-referenced case which was approved by the City of Gahanna Planning Commission on May 10, 2017. Yesterday we were made aware of an administrative appeal that was filed by "THE ACADEMY RIDGE COMMUNITY ASSOCIATION, INC., TO INCLUDE CONTIGUOUS AND NON-CONTIGUOUS PROPERTY ONWERS." The appeal requests a hearing before the City's Board of Zoning Appeals (BZA) and names my client as the appellee. For the reasons provided below, please accept this letter as a formal request for the City to decline to present this matter to the BZA for appeal.

The primary reason that this matter cannot and should not be heard by the BZA is that a property owners' association does not have standing to file an administrative appeal under Chapter 2506 of the Ohio Revised Code. In fact, there is a case from Ohio's Tenth District Court of Appeals (the court with jurisdiction over Gahanna) that speaks directly to this point. In *Northern Woods Civic Association v. City of Columbus Graphics Commission* (1986), 31 Ohio App.3d 46, the court of appeals held that non-profit corporations, including homeowners' associations, do not have the right to file an administrative appeal. More specifically, the court held that "[t]he right of appeal is conferred only upon the person so affected" by the administrative action. *Id.* at Page 47. Moreover, "[t]here is no provision by statute, or otherwise, whereby another may file the appeal in a representative capacity on behalf of the person who is affected." *Id.* The court could not have been clearer in its conclusion that "a representative appeal is not available to an association on behalf of its members in the absence of specific statutory authority of which there is none." *Id.* at Page 48. Just as in the *Northern Woods* case, the appeal of GZD's final

development plan is being made by an association on behalf of some or all of its members and therefore should be dismissed.

It should be noted that the holding in *Northern Woods* was confirmed by the same court again in *Noe Bixby Rd. Neighbors v. Columbus City Council* (2002), 150 Ohio App.3d 305. The *Noe Bixby* case also makes another point that is relevant to the appeal of the GZD application approval. The court in that case stated that:

> " * * * The existence of an identifiable complainant is essential to the existence of an action. Particularly, as here, where an unidentified group is involved, there is no assurance that the individual components of the group may not drift in and out of the lawsuit with no one ultimately [sic] responsible for it, and no one set of facts determinative of it." *Group of Tenants v. Mar-Len Realty, Inc.* (1974), 40 Ohio App.2d 449, 450, 69 O.O.2d 389, 321 N.E.2d 241.
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> This problem of the "amorphous party" is illustrated in the pleadings before us by the fact that, at different times, different persons and groups have purported to be members of the association, and that within at least one of the groups there is disagreement about whether to oppose the facility. Where individuals, in their own right and on their own behalf, bring the appeal, such confusion is avoided." *Id.* at Page 308.

In the case of the GZD matter, the very first page of the appeal lists the property owners' association as the appellant, "to include contiguous and non-contiguous property owners." Does this mean that the association has filed the appeal for only those contiguous and non-contiguous property owners that are members of the association? Or would these parties include the property owner contiguous to GZD's site on the north (i.e., the owner of the apartment development)? Are all non-contiguous owners who are members of the association parties to this appeal? How about non-contiguous property owners that do not belong to the association, like the owners of the office buildings across Hamilton Road? And at what point is a non-contiguous property owner too far from the site at issue to have standing?

The bottom line is, the cases cited above demonstrate that the appeal must be dismissed as a matter of law. But even if that argument is not conceded, GZD (and the City, for that matter), cannot identify all of the adverse parties in this matter since the parties are broadly named. The language cited above from the *Noe Bixby* case details the problems that this causes.

As a final technical matter, this appeal was filed with the wrong party as the appellee. The applicant in this case was GZD; it was not the decision-maker. An administrative appeal is made with respect to a decision of a public administrative body. The City's Planning Commission would have been the proper appellee here. This appeal should be dismissed for the additional reason that the appellee was not properly identified.

While we believe that the applicable law as detailed above leads to no other option but for the City to dismiss this appeal, should it reach another conclusion then GZD will defend the appeal

on its merits (although this would be in the role of an interested party rather than an appellee). However, the appellants and the City should be advised that there is a loan closing for the purchase of the property which is scheduled for the end of this month. Therefore, the appeal must be heard by the BZA as soon as possible in order to ensure that the parties are not exposing themselves to the possibility of damages should GZD's position on the dismissal of this matter prove to be affirmed. Accordingly, should the City decide to proceed with a hearing on this appeal, we request that the hearing occur on Thursday, June 22, 2017 or such later date that is the earliest permitted by law for a hearing on this matter. A decision should be issued by the BZA on the same date as the hearing.

Lastly, please note that Mr. Tim Pack is listed on the City's website as a member of the BZA. Mr. Pack has appeared at many meetings on the case at hand to voice his concerns with the development that is the subject of the appeal. Therefore, if he remains a member of the BZA when a hearing is held, he must recuse himself from the proceedings due to a conflict of interest.

In closing, the City should act immediately to dismiss the appeal for the reasons stated above. The appeal is null and void as of its filing. Since the 30-day administrative appeal period has expired, no other parties may file a separate appeal and the decision to approve GZD's final development plan is now legally effective.

Sincerely,

Aaron L. Underhill

cc: Jason Zadeh
Gregg Gallas

Exhibit B

DEPARTMENT OF THE ARMY
HUNTINGTON DISTRICT, CORPS OF ENGINEERS
502 EIGHTH STREET
HUNTINGTON, WEST VIRGINIA 25701-2070

RECEIVED AUG 31 2016

REPLY TO
ATTENTION OF

AUG 26 2016

Regulatory Division
North Branch
LRH-2016-459-SCR-Unnamed Tributary to Big Walnut Creek

APPROVED & PRELIMINARY JURISDICTIONAL DETERMINATIONS AND
NATIONWIDE PERMIT NO. 39 VERIFICATION

Jason Esmailzadeh
GZD Investments, LLC
245 E. 1st Avenue
Columbus, Ohio 43215

Dear Mr. Esmailzadeh:

I refer to the pre-construction notification (PCN) received in this office on May 18, 2016 concerning a commercial development project, known as the Viking Commerce Center. You have requested a Department of the Army permit authorization to discharge dredged and/or fill material into 299 linear feet of one (1) intermittent stream for the commercial development project. The project site is located along Hamilton Road, City of Gahanna, Franklin County, Ohio. Your PCN has been assigned the following file number: LRH-2016-459-SCR-Unnamed Tributary to Big Walnut Creek. Please reference this file number on all future correspondence related to this project.

The United States Army Corps of Engineers' (Corps) authority to regulate waters of the United States is based, in part, on the definitions and limits of jurisdiction contained in 33 CFR 328 and 33 CFR 329. Section 404 of the Clean Water Act (Section 404) requires that a Department of the Army permit be obtained prior to the discharge of dredged or fill material into waters of the United States, including wetlands. Section 10 of the Rivers and Harbors Act of 1899 (Section 10) requires that a Department of the Army permit be obtained for any work in, on, over or under a navigable water of the United States.

Preliminary Jurisdictional Determination

You have chosen to accept a preliminary jurisdictional determination (PJD) regarding the waters on the proposed project site in accordance with the Regulatory Guidance Letter for Jurisdictional Determinations (JDs) issued by the Corps on June 26, 2008 (Regulatory Guidance Letter No. 08-02). Based upon a review of the submitted information there is approximately 525 linear feet of one (1) perennial stream and 451 linear feet of one (1) intermittent stream channel are located within the proposed project area. The streams within this project site will be evaluated as if they are water of the United States.

Enclosed please find two (2) copies of the PJD form. If you agree with the findings of this PJD and understand your options regarding the same, please sign and date one copy of the PJD form and return it to this office within 30 days of receipt of this letter. You should submit the signed copy to the following address:

United States Army Corps of Engineers
Huntington District
Attn: North Branch
502 Eighth Street
Huntington, West Virginia 25701.

Approved Jurisdictional Determination

Our December 2, 2008 headquarters guidance entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* was followed in the final verification of Clean Water Act jurisdiction. Based on a review of the information provided, and other information available to us,
Swale 1 does not exhibit an ordinary high water mark, defined bed and bank, or wetland characteristics. The drainage swale was likely created as a result of transportation activities and the development of the surrounding area. Drainage Swale 1 is not a jurisdictional water of the United States.

This jurisdictional verification is valid for a period of five (5) years from the date of this letter unless new information warrants revision of the delineation prior to the expiration date. This letter contains an approved JD for the subject site within the approved JD boundary. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 CFR 331. Enclosed you will find a Notification of Appeal Process (NAP) fact sheet and Request for Appeal (RFA) form. If you request to appeal this determination you must submit a completed RFA form to the Great Lakes and Ohio River Division Office at the following address:

Appeal Review Officer
United States Army Corps of Engineers
Great Lakes and Ohio River Division
550 Main Street, Room 10524
Cincinnati, Ohio 45202-3222
Phone: (513) 684-7261
Fax: (513) 684-2460.

In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 CFR 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by October 25, 2016. It is not necessary to submit an RFA form to the Division office if you do not object to the determination in this letter.

Nationwide Permit

The proposed project, as described in the submitted information, has been reviewed in accordance with Section 404 and Section 10. Based on your description of the proposed work, and other information available to us, it has been determined that this project will not involve activities subject to the requirements of Section 10. However, this project will include the discharge of dredged or fill material into waters of the United States subject to the requirements of Section 404.

In the submitted PCN materials received in this office on May 18, 2016, you have requested a Department of the Army authorization to discharge dredged and/or fill material into a total of

approximately 299 linear feet of one intermittent stream. All work will take place in accordance with the PCN dated May 18, 2016.

Based on your description of the proposed work, and other information available to us, it has been determined the proposed discharge of dredged or fill material into waters of the United States in conjunction with the commercial development project meets the criteria for Nationwide Permit (NWP) 39 under the February 21, 2012 Federal Register, Notice of Reissuance of NWPs (77 FR 10184) provided you comply with all terms and conditions of the enclosed material, the enclosed special conditions. Please be aware this NWP authorization does not obviate the requirement to obtain other Federal, state or local authorizations required by law.

This verification is valid until the expiration date of the NWPs, unless the NWP authorization is modified, suspended, or revoked. The verification will remain valid if the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. All of the existing NWPs are scheduled to be modified, reissued, or revoked on March 18, 2017. Prior to this date, it is not necessary to contact this office for re-verification of your project unless the plans for the proposed activity are modified. Furthermore, if you commence or under contract to commence this activity before March 18, 2017, you will have twelve (12) months from the date of the modification or revocation of the NWP to complete the activity under the present terms and conditions of this NWP.

Enclosed is a copy of the NWPs to be kept at the project site during construction. Upon completion of the work, the enclosed certification must be signed and returned to this office. A copy of this letter is being furnished to your agent Mr. Andrew Kielaszek with CEC, Inc., at 250 Old Wilson Bridge Road, Suite 250, Worthington, Ohio43085. If you have any questions concerning the above, please contact Mr. Cecil Cox of the North Branch at 304-399-5274, by mail at the above address, or by email at: cecil.m.cox@usace.army.mil.

Sincerely,

Teresa D. Spagna
Chief, North Branch

Enclosures

Special Conditions for Nationwide Permit
City of Gahanna Viking Commerce Center
LRH-2016-459-SCR-Unnamed Tributary to Big Walnut Creek
1 of 2

1. All work will be conducted in accordance with the final plans provided by CEC, on behalf of GZD Investments, LLC, dated 16 May 2016.

2. Enclosed is a copy of Nationwide Permit 39, which will be kept at the site during construction. A copy of the nationwide permit verification, special conditions, and the enclosed construction plans must be kept at the site during construction. The permittee will supply a copy of these documents to their project engineer responsible for construction activities.

3. Upon completion of the activity authorized by this nationwide permit verification, the enclosed certification must be signed and returned to this office along with as-built drawings showing the location and configuration, as well as all pertinent dimensions and elevations of the activity authorized under this nationwide permit verification.

4. Construction activities will be performed during low flow conditions. Additionally, appropriate site specific best management practices for sediment and erosion control will be fully implemented during construction activities at the site.

5. No area for which grading has been completed will be unseeded or un-mulched for longer than 14 days. All disturbed areas will be seeded and/or re-vegetated with native species and approved seed mixes (where practicable) after completion of construction activities for stabilization and to help preclude the establishment of non-native invasive species.

6. Should new information regarding the scope and/or impacts of the project become available that was not submitted to this office during our review of the proposal, the permittee will submit written information concerning proposed modification(s) to this office for review and evaluation, as soon as practicable.

7. In the event any previously unknown historic or archaeological sites or human remains are uncovered while accomplishing the activity authorized by this nationwide permit authorization, the permittee must cease all work in waters of the United States immediately and contact local, state and county law enforcement offices (only contact law enforcement on findings of human remains), the Corps at 304-399-5210 and Ohio Historic Preservation Office at 614-298-2000. The Corps will initiate the Federal, state and tribal coordination required to comply with the National Historic Preservation Act and applicable state and local laws and regulations. Federally recognized tribes are afforded a government-to-government status as sovereign nations and consultation is required under Executive Order 13175 and 36 CFR Part 800.

Special Conditions for Nationwide Permit
City of Gahanna Viking Commerce Center
LRH-2016-459-SCR-Unnamed Tributary to Big Walnut Creek
2 of 2

8. The project site lies within the range of the Indiana bat (*Myotis sodalis*), a federally listed endangered species and the northern long-eared bat (*Myotis septentrionalis*), a federally threatened species. Several factors have contributed to the two species decline, including habitat loss, fragmentation of habitat and the disease White Nose Syndrome. During winter, the two bat species hibernate in caves and abandoned mines. Suitable summer habitat for Indiana bats and northern long-eared bats consists of a wide variety of forested/wooded habitats where they roost, forage, and travel and may also include some adjacent and interspersed non-forested habitats such as emergent wetlands and adjacent edges of agricultural fields, old fields and pastures. This includes forests and woodlots containing potential roosts (i.e., live trees and/or snags ≥3 inches diameter at breast height (dbh) that have any exfoliating bark, cracks, crevices, hollows and/or cavities), as well as linear features such as fencerows, riparian forests, and other wooded corridors. These wooded areas may be dense or loose aggregates of trees with variable amounts of canopy closure. Individual trees may be considered suitable habitat when they exhibit the characteristics of a potential roost tree and are located within 1,000 feet (305 meters) of other forested/wooded habitat. The permittee will preserve wooded/forested habitats exhibiting any of the characteristics listed above wherever possible. Should suitable habitat be present that cannot be saved during construction activities, any trees ≥3 inches dbh will only be cut between October 1 – March 31."

9. Section 7 obligations under Endangered Species Act must be reconsidered if new information reveals impacts of the project that may affect federally listed species or critical habitat in a manner not previously considered, the proposed project is subsequently modified to include activities which were not considered during Section 7 consultation with the United States Fish and Wildlife Service, or new species are listed or critical habitat designated that might be affected by the subject project.