

IN THE
INDIANA COURT OF APPEALS
CAUSE NO. _____

CARMEL BOARD OF ZONING)	Appeal from the Hamilton Superior
APPEALS, and AL-SALAM)	Court
FOUNDATION, INC.)	
Appellants,)	
(Respondent and)	Trial Court
Respondent-Intervenor)	Case No.: 29D01-1803-MI-002761
below),)	
)	
v.)	
)	
DAVID BIDGOOD, SHEILA M.)	The Honorable Steven R. Nation,
GRAVES, SALVATORE)	Judge
PAPPALARDO, DAVID J. REEVES,)	
and ANGELO R. STANCO,)	
Appellees,)	
(Petitioners below).)	

**CARMEL BOARD OF ZONING APPEALS' VERIFIED MOTION TO
ACCEPT JURISDICTION OVER INTERLOCUTORY APPEAL**

The Indiana Supreme Court and this Court have established a bright-line, thirty (30) day rule for the filing of a board record, or an extension to do so, and have held that the failure to follow this rule requires the dismissal of a petition for judicial review of a zoning decision. The trial court excused Petitioners' failure to abide by this bright-line rule and allowed their challenge to a zoning decision to proceed on its merits. As a result, the Carmel Board of Zoning Appeals (the "BZA"), by counsel, respectfully moves this Court to accept jurisdiction over this certified interlocutory appeal pursuant to Ind. Appellate Rule 14(B)(2).

I. APP. R. 14(B)(2)(b)(i)-(iii) REQUIREMENTS.

A. Date of the Interlocutory Order. The BZA seeks this Court's acceptance of the interlocutory appeal from the Hamilton Superior Court's June 26, 2018 Order ("June 26 Order"), which is attached hereto as **Exhibit A**.

B. Date Motion for Certification Was Filed. The BZA filed its Motion to Certify with the trial court on July 16, 2018.

C. Date of Trial Court's Certification. The trial court certified its June 26 Order on August 3, 2018, which certification is attached hereto as **Exhibit B**, and the certification of the interlocutory order was noted in the Chronological Case Summary on the same date.

II. REASONS THE COURT OF APPEALS SHOULD ACCEPT THIS INTERLOCUTORY APPEAL.

Since the enactment of IND. CODE § 36-7-4-1600, *et seq.* (the "1600 Series") in 2011, both this Court and the Indiana Supreme Court have uniformly determined that the failure to timely file the board record, or to timely seek an extension of time to file, within the statutory thirty (30) day time period set forth in I.C. § 36-7-4-1613(a) is fatal to a claim for judicial review. This bright-line rule has been repeatedly tested by a number of well-developed procedural arguments, and repeatedly, our appellate courts have held this line. This case presents another novel approach by Petitioners to extricate themselves from the inextricable. Much like those that have gone before them, their approach must also fail. The BZA submits that appellate review of the trial court's certified June 26 Order is appropriate to address this

substantial question of law, and the BZA asks this Court to accept jurisdiction over this interlocutory appeal.

A. PROCEDURAL HISTORY

Petitioners David Bidgood, Sheila Graves, Salvatore Pappalardo, David Reeves, and Angelo Stanco (collectively, “Petitioners”) filed their Verified Petition for Writ of Certiorari, Judicial Review and Declaratory Judgment on March 28, 2018 (the “Petition”). On the same day, Petitioners filed their Notice of Filing for Verified Petition for Writ of Certiorari, Judicial Review and Declaratory Judgment and Fixing Time for Return of the Writ. Within this notice, Petitioners requested that the trial court issue an “Order to Show Cause why a Writ of Certiorari should not be issued.”¹

Consistent with Petitioners’ request, the trial court erroneously issued an Order to Show Cause Why Writ of Certiorari Should Not Issue on April 4, 2018. The order set a “show cause” hearing for May 25, 2018. (April 4, 2018 Order, p. 1, which is attached hereto as **Exhibit C**).

On May 25, 2018, the date of the scheduled “show cause” hearing, Petitioners filed a Motion for Extension of Time to File Record of Proceedings. Essentially, the Motion for Extension argued that Petitioners had not received adequate responses to their inquiries regarding the status of the board record, and, therefore, good cause

¹ The process for seeking “certiorari” review of a zoning decision under I.C. § 36-7-4-1003 (2010) was removed from the Indiana Code effective as of July 1, 2011, and was replaced by the 1600 Series. Therefore, the notice under I.C § 36-7-4-1005 (2010) and the requirement for a trial court to issue an order to show cause under I.C. § 36-7-4-1006 (2010) no longer statutorily exist for seeking judicial review of a zoning decision.

existed to extend the deadline for submitting the board record up to and including June 20, 2018. Petitioners' Motion for Extension was filed fifty-eight (58) days after their Petition was filed, well outside of the thirty (30) day deadline in I.C. § 36-7-4-1613(a). Nonetheless, the trial court granted their Motion for Extension on May 29, 2018.

On June 1, 2018, the BZA filed its Motion to Reconsider Order Granting Extension of Time to File Record, and Motion to Dismiss with its Brief in support. In those filings, the BZA argued that, under the precedents of this Court and the Indiana Supreme Court, Petitioners' petition for judicial review was subject to mandatory dismissal for their failure to timely file the board record or seek an extension of time to do so.

Petitioners filed their Response on June 7, 2018. The thrust of Petitioners' response with respect to the timeliness of their extension request was that the trial court's April 4, 2018 Order to Show Cause scheduling a "show cause" hearing was "tantamount to setting a date for making a Return of the Writ² and filing the Record of Proceedings." (June 7, 2018 Response, p. 1, which is attached hereto as Exhibit D).

Following Petitioners' filing of a second belated Motion for Extension of Time to File Record of Proceedings on June 20, 2018, the trial court issued the June 26 Order. That order largely adopted Petitioners' arguments relating to the timeliness of the board record. The trial court stated that it "issued an *ORDER TO SHOW*

² Like the rest of the certiorari process, the requirement for the BZA to file a "Return to the Writ" under I.C. § 36-7-4-1008 (2010) was removed from the Indiana Code.

CAUSE WHY WRIT OF CERTIORARI SHOULD NOT ISSUE on April 4, 2018 which fixed the time for return of the Writ for the 25th day of May, 2018 and also set at such time a Telephonic Pre-Trial Conference.” (June 26, 2018 Order, p. 2) (emphasis in original). This statement was not correct since, as noted above, the April 4, 2018 Order set only the date for the show cause hearing, not for the filing of the “Return to Writ” or the board record. In any event, the trial court granted Petitioners an extension to file the board record well-beyond the 30-day period required in I.C. § 36-7-4-1613(a).

B. THE ISSUE PRESENTED HERE, WHICH IS DISPOSITIVE OF THE ENTIRE LITIGATION, IS PARTICULARLY APPROPRIATE FOR INTERLOCUTORY REVIEW

The mandatory dismissal of petitions for judicial review, where neither the record is timely filed nor a timely extension is requested, has been one of the few bright-line, inescapable procedural rules in Indiana law. The trial court’s June 26 Order seeks to create an exception to this bright-line rule, contrary to the precedents of this Court and the Supreme Court, and the trial court refused to dismiss the Petitioners’ Petition. The apparent exception appears to rely on the misuse of a statutory process that was repealed by the General Assembly seven (7) years ago. The trial court’s June 26 Order is clear error, and that error has prevented the final, early disposition of this case.

This interlocutory appeal presents the dictionary definition of a substantial question of law, the early determination of which will promote a more orderly

disposition of this case under App. R. 14(B)(1)(c)(ii). There is a clear preference, in the zoning area and otherwise, to accept early appellate review of interlocutory issues that dispose entirely of the subject litigation. *See, e.g., Board of Zoning Appeals of Porter County v. Lake County Trust Co.*, 783 N.E.2d 382, 383-84 (Ind. Ct. App. 2003), *trans. denied* (accepting interlocutory appeal from the denial of a motion to dismiss regarding proper verification of a petition); *Bright PCS/SBA Communications v. Seely*, 753 N.E.2d 757, 758 (Ind. Ct. App. 2001), *reh'g denied* (accepting interlocutory appeal from the dismissal of a motion to dismiss regarding the timeliness of a petition); *Dvorak v. City of Bloomington*, 702 N.E.2d 1121, 1122 (Ind. Ct. App. 1998) (accepting interlocutory appeal and reversing the denial of summary judgment regarding the validity of a zoning ordinance); *Darlage v. Eastern Bartholomew Water Corp.*, 379 N.E.2d 1018, 1019 (Ind. Ct. App. 1978), *reh'g denied* (accepting interlocutory appeal from the denial of a motion to dismiss regarding utility preemption of local zoning). These cases, as well as the present case, “present[] a threshold question concerning the court’s power to act” that will be dispositive of the entire case if the appeal is granted and the trial court reversed. *Group Dekko Services, LLC v. Miller*, 717 N.E.2d 967, 968 (Ind. Ct. App. 1999), *reh'g denied* (citing *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. Ct. App. 1994)).

Only three years ago, this Court accepted an interlocutory appeal in *Town of Pittsboro Advisory Plan Com’n v. Ark Park, LLC*, 26 N.E.3d 110 (Ind. Ct. App. 2015), a case that presented substantially the same issue as this case. In *Ark Park*, the issue

presented was whether “the trial court should have dismissed Ark Park's claim for judicial review because Ark Park failed to timely file the board record or request an extension of time to file that record[.]” *Id.* at 112. This Court ultimately reversed the trial court’s denial of the motion to dismiss, holding that the result of the Petitioner’s failure to file the record or request an extension within thirty (30) days was the loss of its right to judicial review. *Id.* at 119.

The Supreme Court has also held that “a petitioner for [judicial] review cannot receive consideration of its petition where the statutorily-defined agency record has not been filed.” *Teaching Our Posterity Success, Inc. v. Indiana Dept. of Educ.*, 20 N.E.3d 149, 155 (Ind. 2014). The Supreme Court explained that this “bright-line approach best serves the goals of accuracy, efficiency, and judicial economy.” *Id.* Therefore, whether or not Petitioners properly followed the 1600 Series in seeking judicial review of the BZA’s decision is the ultimate threshold question concerning the trial court’s ability to hear the merits of Petitioners’ zoning case. With very little separating the issue in this case from the issue presented in *Ark Park*, the BZA requests that this Court reach the same procedural conclusion and accept jurisdiction over the interlocutory appeal of the trial court’s June 26 Order excusing Petitioners’ late filing of the board record in this case.

C. THE TRIAL COURT'S DECISION IS IN IRRECONCILABLE CONFLICT WITH INDIANA PRECEDENT

1. THE USE OF THE CERTIORARI PROCESS, IN AND OF ITSELF, SHOULD BE SUFFICIENT FOR DISMISSAL

In enacting the 1600 Series in 2011, the General Assembly made a clear and unambiguous legislative statement regarding the use of other means to challenge zoning decisions. I.C. § 36-7-4-1601(a) provides that “[t]his series establishes the exclusive means for judicial review of zoning decisions...made by a board of zoning appeals” (Emphasis added). All other methods for obtaining judicial review, including other statutory methods, have been deemed deficient following the 2011 enactment of the 1600 Series. *See, Ark Park*, 26 N.E.3d at 119-21 (holding that judicial review could not be obtained via the Declaratory Judgment Act). Petitioners’ odd choice to utilize the former certiorari process in I.C. § 36-7-4-1000, *et seq.* (2010) is plainly outside of the 1600 Series’ exclusive means of seeking judicial review.

Petitioners’ reliance on the repealed certiorari framework, and the trial court’s mistaken, concomitant use of that framework, has started this case on a flawed path from which it has never recovered. Absent Petitioners’ improper invocation of a repealed statute, they would have had no basis to excuse their failure to file the record or request an extension of time to do so. The Legislature could not have been clearer when it made the 1600 Series the exclusive means of seeking judicial review of a zoning decision. By failing to utilize this process, Petitioners lost their right to seek

judicial review, their Petition should have been dismissed, and the case should have been over.

2. PETITIONERS' FAILURE TO TIMELY FILE THE RECORD OR SEEK AN EXTENSION OF TIME TO DO SO FOREVER FORECLOSED THEIR RIGHT TO JUDICIAL REVIEW

The language of I.C. § 36-7-4-1613 is clear and unambiguous. This statute requires a petitioner to do one of two things within thirty (30) days of filing the petition: either (1) file the board record with the Court; or (2) timely seek an extension of time to do so. The failure to do either of these two acts within thirty (30) days requires dismissal. This is the very interpretation that has been reached by every appellate court that has reviewed this issue. In *Indiana Family and Social Services Admin. v. Meyer*, 927 N.E.2d 367 (Ind. 2010), our Supreme Court, in interpreting substantially similar language in the Administrative Orders and Procedures Act, I.C. § 4-21.5-5-13, stated that “the statute does not excuse untimely filing or allow *nunc pro tunc* extensions.” *Id.* at 370 (citing I.C. § 4-21.5-5-13(b)). Similarly, in *Howard v. Allen County Bd. of Zoning Appeals*, 991 N.E.2d 128 (Ind. Ct. App 2013), this Court held that “an extension may be granted ‘only if the request is made during the initial thirty days following the filing of the petition for review or within any previously granted extension.’” *Id.* at 131 (quoting *Wayne Cnty. Prop. Tax Assessment Bd. Of Appeals v. United Ancient Order of Druids – Grove No. 29*, 847 N.E.2d 924, 927 (Ind. 2006)). This language from *Howard* was cited with approval by the Court of Appeals in *Ark Park. Ark Park*, 26 N.E.3d at 119.

The Supreme Court would eventually create the “bright line” rule in *First American Title Ins. Co. v. Robertson*, 19 N.E.3d 757 (Ind. 2014), amended on reh’g on other grounds, 27 N.E.3d 768 (Ind. 2015), and *Teaching Our Posterity Success, Inc. v. Indiana Dept. of Educ.*, 20 N.E.3d 149 (Ind. 2014)³, both of which held that “a petitioner for review cannot receive consideration of its petition where the statutorily-defined agency record has not been filed.” *Robertson*, 19 N.E.3d at 762-63 (quoting *Teaching Our Posterity Success*, 20 N.E.3d at 155).

This Court has subsequently applied the “bright line” rule to prohibit trial courts from resurrecting cases where the zoning record was not timely filed. In *Allen County Plan Com’n v. Olde Canal Place Ass’n*, 61 N.E.3d 1266 (Ind. Ct. App. 2016), a remonstrator filed a petition for judicial review of a zoning decision and timely requested an extension within the initial 30-day period; however, the remonstrator failed to file the board record within the extended time period. *Id.* at 1267-68. When the board record was not timely filed within the extension period, the plan commission and the developer filed a motion to dismiss. *Id.* at 1267. At the hearing on the motion to dismiss, the remonstrator agreed that Indiana law required dismissal of its petition. *Id.* at 1268. However, the remonstrator then asked the trial court to set aside the dismissal under Ind. Trial Rule 60(B)(1), claiming the failure to

³ While *Robertson* and *Teaching Our Posterity Success* were decided under I.C. § 4-21.5-5-13, this Court noted in *Howard* that this statute and I.C. § 36-7-4-1613 were “analogs” and that “we are compelled to conclude that the legislature had the same intent in enacting both. We therefore interpret these respective provisions in the same manner and rely on AOPA case law below.” *Howard*, 991 N.E.2d at 130.

file the board record was the result of a mistake and the petition for judicial review presented a meritorious claim. *Id.* The trial court agreed and granted the motion to set aside the dismissal to allow the remonstrator to proceed with its petition. *Id.*

This Court reversed the trial court and likened the thirty (30) day deadline in I.C. § 36-7-4-1613 to the summary judgment response deadline in T.R. 56(C). *Id.* at 1270 (*quoting Welton v. Midland Funding, LLC*, 17 N.E.3d 353, 355 (Ind. Ct. App. 2014)). Just as a party cannot file a belated response to a motion for summary judgment after the T.R. 56(C) deadline has expired, a petitioner under the 1600 Series cannot belatedly file the board record or a request for an extension of time to do so. *Id.* Accordingly, “[b]ecause [petitioner] is not permitted to belatedly file the Record, the Record is not, and will never be, properly before the trial court. Without the Record, [the] petition cannot be considered. The trial court’s order setting aside the dismissal of [the] petition was therefore an empty exercise.” *Id.* (citations omitted).

Here, Petitioners’ Petition was filed on March 28, 2018. Pursuant to I.C. § 36-7-4-1613, Petitioners had to either file the board record or seek an extension to file the board record within thirty (30) days (which was April 27, 2018). It is undisputed that Petitioners did neither. The June 26 Order relies heavily on the fact that the record was not available on April 27, 2018, noting that “it would be an impossibility for the Petitioners to comply with the statutory requirements to file the Record of Proceedings without the Court providing an extension of time.” (June 26, 2018 Order,

pp. 2-3, ¶8.) However, the status of the record on the thirtieth (30th) day is wholly irrelevant.

In *Howard*, the petition for judicial review was filed on August 17, 2012. *Howard*, 991 N.E.2d at 129. On August 27, 2012, petitioner's counsel requested that the record be assembled and produced. *Id.* The record was not prepared until October 12, 2012, nearly a full month after the thirty (30) day deadline had expired, and it was then filed by the petitioner (although the petitioner had not timely requested an extension of time to do so). *Id.* at 130. Despite the "impossibility" of the petitioner in *Howard* to file the record within the thirty (30) day time period established by I.C. § 36-7-4-1613, the case was nonetheless dismissed because the petitioner failed to avail himself of the appropriate statutory remedy: a timely motion for extension of time to file the record. *Id.* at 131. So it is here: while Petitioners may not have been able to file the record on April 27, 2018, they could have easily moved for an extension of time to file the board record on or before that date in order to comply with I.C. § 36-7-4-1613(a). Petitioners' failure to comply with I.C. § 36-7-4-1613(a) is fatal to their attempt to seek judicial review of the BZA's decision.

III. CONCLUSION.

Petitioners' failure to file the board record, or to seek a timely extension to do so, presents a straightforward case regarding the trial court's ability to hear Petitioners' lawsuit. This Court should accept jurisdiction over this interlocutory appeal, enforce this Court's and the Indiana Supreme Court's bright-line rule, and

reverse the trial court's June 26 Order denying the BZA's motion to dismiss
Petitioners' Petition.

Respectfully submitted,

**HALLER & COLVIN, P.C.
ATTORNEYS FOR CARMEL BOARD OF
ZONING APPEALS
444 EAST MAIN STREET
FORT WAYNE, INDIANA 46802
TELEPHONE: (260) 426-0444
FAX: (260) 422-0274
EMAIL: rwe@hallercolvin.com**

**BY: /s/ Robert W. Eherenman _____
ROBERT W. EHERENMAN
I.D. #16703-53**

**BY: /s/ John R. Molitor _____
JOHN R. MOLITOR, I.D. #9313-49
9465 COUNSELORS ROW, STE. 200
INDIANAPOLIS, IN 46240
TELEPHONE: (317) 843-5511
FAX: (317) 805-4273
EMAIL: jmolitor@prodigy.net**

VERIFICATION

I affirm, under the penalties for perjury, that the above and foregoing statements and representations are true this 31st day of August, 2018.

Respectfully submitted,

HALLER & COLVIN, P.C.
ATTORNEYS FOR CARMEL BOARD
OF ZONING APPEALS
444 EAST MAIN STREET
FORT WAYNE, INDIANA 46802
TELEPHONE: (260) 426-0444
FAX: (260) 422-0274
EMAIL: rwe@hallercolvin.com

BY: /s/ Robert W. Eherenman
ROBERT W. EHERENMAN
I.D. #16703-53

WORD COUNT CERTIFICATION

I verify that the Carmel Board of Zoning Appeals' Verified Motion to Accept Jurisdiction Over Interlocutory Appeal contains no more than 4,200 words. Pursuant to the word count feature of Word, I verify that this Motion contains 3,107 words.

Respectfully submitted,

HALLER & COLVIN, P.C.
ATTORNEYS FOR CARMEL BOARD
OF ZONING APPEALS
444 EAST MAIN STREET
FORT WAYNE, INDIANA 46802
TELEPHONE: (260) 426-0444
FAX: (260) 422-0274
EMAIL: rwe@hallercolvin.com

BY: /s/ Robert W. Eherenman
ROBERT W. EHERENMAN
I.D. #16703-53

PROOF OF SERVICE

Robert W. Eherenman, being first duly sworn upon oath, now states that he is counsel for the Appellant and he hereby certifies the Carmel Board of Zoning Appeals' Verified Motion to Accept Jurisdiction Over Interlocutory Appeal has been filed via the Court's electronic filing system with the Court of Appeals of Indiana on August 31, 2018, to Mr. Greg Pachmayr, Clerk, Court of Appeals of Indiana, 216 State House, 200 West Washington Street, Indianapolis, Indiana 46204.

The undersigned further states that on the 31st day of August, 2018, he served upon the opposing party in this cause the Carmel Board of Zoning Appeals' Verified Motion to Accept Jurisdiction Over Interlocutory Appeal by the Court's electronic filing system to:

Patrick R. Hess, Esq.
Brian C. Heck, Esq.
Beckman Lawson LLP
201 West Wayne Street
Fort Wayne, Indiana 46802

Michael J Andreoli, Esq.
1393 West Oak Street
Zionsville, Indiana 46077

Juvaria Khan, Esq.
Nimra H. Azmi, Esq.
Johnathan J. Smith, Esq.
Muslim Advocates
PO Box 66408
Washington, DC 20035

/s/ Robert W. Eherenman
Robert W. Eherenman

I hereby affirm, under the pains and penalties of perjury, that the above and foregoing representations are true and correct to the best of my knowledge and belief.

/s/ Robert W. Eherenman
Robert W. Eherenman

mjm

FILED

June 26, 2018

CLERK OF THE HAMILTON
CIRCUIT COURT

Exhibit A

STATE OF INDIANA) IN THE HAMILTON SUPERIOR COURT NO. 1
) SS:
COUNTY OF HAMILTON) CAUSE NO. 29D01-1803-MI-2761

DAVID BIDGOOD, SHEILA GRAVES,)
SALVATORE PAPPALARDO, DAVID J.)
REEVES and ANGELO R. STANCO,)
) Petitioners,)
Vs.)
CARMEL BOARD OF ZONING)
APPEALS,)
) Respondent.)

ORDER

A hearing was held on June 11, 2018 concerning *RESPONDENT'S MOTION TO RECONSIDER ORDER GRANTING AN EXTENSION OF TIME TO FILE RECORD, AND MOTION TO DISMISS* filed June 1, 2018. Arguments were presented. Court took under advisement. Parties requested and the Court granted the filing of Proposed Orders. Petitioners submitted on June 13, 2018 a proposed *ORDER*. Respondents also submitted on the same date an *ORDER RESCINDING THE COURT'S MAY 29, 2018 ORDER GRANTING PETITIONERS AN EXTENSION OF TIME TO FILE RECORD OF PROCEEDINGS, AND DISMISSING THE VERIFIED PETITION FOR WRIT OF CERTIORARI, JUDICIAL REVIEW AND DECLARATORY JUDGMENT.*

Court being duly advised does now FIND and ORDER as follows:

1. That the Petitioners must file, pursuant to statute, the Record of Proceedings within 30 days of the filing of their *VERIFIED PETITION FOR WRIT OF CERTIORARI, JUDICIAL REVIEW, AND DECLARATORY JUDGMENT* ("Petition"). The Petition in this cause was filed on March 28, 2018.

✓

2. That the Court issued an *ORDER TO SHOW CAUSE WHY WRIT OF CERTIORARI SHOULD NOT ISSUE* on April 4, 2018 which fixed the time for return of the Writ for the 25th day of May, 2018 and also set at such time a Telephonic Pre-Trial Conference.
3. That the Respondent filed on May 23, 2018 *RESPONDENT'S RESPONSE TO THE VERIFIED PETITION FOR WRIT OF CERTIORARI, JUDICIAL REVIEW, AND DECLARATORY JUDGMENT*.
4. That the Court, on May 24, 2018, notified the parties that the phone Pre-Trial Conference that had been set for May 25, 2018 would need to be continued due to a jury trial in progress.
5. That the Petitioners filed on May 25, 2018 a Motion for Extension of Time to File Record of Proceedings. The Court granted such Motion by the Order filed on May 30, 2018 and extended the filing of the Record of Proceedings to June 20, 2018.
6. That the Respondent filed on June 1, 2018 *RESPONDENT'S MOTION TO RECONSIDER ORDER GRANTING AN EXTENSION OF TIME TO FILE RECORD, AND MOTION TO DISMISS*. Petitioners filed on June 7, 2018 *PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO RECONSIDER ORDER GRANTING AN EXTENSION OF TIME TO FILE RECORD AND MOTION TO DISMISS*. Court set on June 8, 2018 a hearing to hear argument on June 11, 2018.
7. That the statute I.C. 36-7-4-1613 (a) provides "within 30 days after filing of the Petition, or within further time allowed by the court".
8. That as of the hearing on June 11, 2018, the Record of Proceedings had not been completed and in fact, at that time it had not been determined

when the Record of Proceedings could be completed or the possible costs. Thus, it would be an impossibility for the Petitioners to comply with the statutory requirements to file the Record of Proceedings without the Court providing an extension of time to file. The Petitioners were not late but properly asked for the Court to extend the time set as provided by statute. As set forth above, and prior to the date which was set by the Court, the Petitioners have requested an extension of time to file the Record of Proceedings.

9. That therefore, the Court finds that *RESPONDENT'S MOTION TO RECONSIDER ORDER GRANTING AN EXTENSION OF TIME TO FILE RECORD ...* should be and is hereby DENIED.
10. That further, the Respondent argued in their ... *MOTION TO DISMISS* that the Petition was improper and should be dismissed for the reason that the Al-Salam Foundation, Inc. ("Foundation") was not added as a party. The Respondent contended that if the Foundation is not added as a party, the Respondent may negotiate with the Petitioners for the resolution of this cause which could possibly interfere with the rights of the Foundation. The Court finds that although the Foundation has been served with the pleadings in this cause, to date no one has entered an appearance, nor have they sought to intervene, be joined as a party, or otherwise participate in this action. The Respondent did not cite any part of the statute that required the Foundation to be added as a party. Therefore, the Court is bound by the Trial Rules and dismissal of the cause is an improper remedy and Respondent's ... *MOTION TO DISMISS* should be and is hereby DENIED.

11. The Court finds that if the Foundation wishes to intervene, be joined as a party, or otherwise participate, they shall file such request for the Court's determination.

12. The after the June 11, 2018 hearing the Petitioners filed *MOTION FOR ADDITIONAL EXTENSION OF TIME TO FILE RECORD OF PROCEEDINGS* which was GRANTED on the same date. The Court now sets this matter for an Attorney Telephonic Pre-Trial Conference for the 19 day of July, 2018 at 8:30 am/~~pm~~. Parties are directed to call into the conference line at (317) 776-9656 and use code 59951. Parties shall be prepared to discuss when the Record of Proceedings shall be prepared so that it may be filed and the setting of any and all other deadlines and/or hearing dates.

SO ORDERED this 26 day of June, 2018.



JUDGE

Hamilton Superior Court No. 1

DISTRIBUTION:
Michael Andreoli
John Molitor
Al-Salam Foundation Inc.

Exhibit B

STATE OF INDIANA)
) SS:
COUNTY OF HAMILTON)

IN THE HAMILTON SUPERIOR COURT
CAUSE NO. 29D01-1803-MI-002761

DAVID BIDGOOD,)
SHEILA M. GRAVES,)
SALVATORE PAPPALARDO et al.,)
)
Petitioners,)
)
vs.)
)
CARMEL BOARD OF ZONING)
APPEALS,)
)
Respondent.)

FILED


AUG 03 2018

Jammy Baitz
CLERK OF THE
HAMILTON SUPERIOR COURT

ORDER CERTIFYING INTERLOCUTORY ORDER FOR APPEAL AND STAYING FURTHER PROCEDURES PENDING APPEAL

This cause came before the Court on Respondent, Carmel Board of Zoning Appeals' ("BZA") motion, pursuant to Ind. Appellate Rules 14(B) and 14(H), to certify for appeal the Court's interlocutory order, dated June 26, 2018, which denied the BZA's Motion to Reconsider Order Granting an Extension of Time to File Record and Motion to Dismiss, and to stay any further proceedings until the conclusion of the interlocutory appeal. The Court, having reviewed the BZA's motion and being duly advised, now **FINDS, CONCLUDES, and CERTIFIES** with respect to the Court's June 26, 2018 Order, that:

1. The parties will suffer substantial expense, damage and injury if the Court's order is erroneous and the determination thereof is withheld until after final judgment; and
2. The order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case.

29D01-1803-MI-002761
ORD
Order Issued
2060348


It is accordingly,

ORDERED that the Court's interlocutory order, dated June 26, 2018, which denied the BZA's Motion to Reconsider Order Granting an Extension of Time to File Record and Motion to Dismiss is hereby **CERTIFIED** under App.R. 14(B) for interlocutory appeal to the Indiana Court of Appeals.

FURTHER ORDERED that all proceedings in this Court be stayed under App.R. 14(H) pending a final disposition of the interlocutory appeal.

Dated this 2 day of Aug, 2018.



STEVEN R. NATION
Judge, Hamilton Superior Court I

CLERK OF THE HAMILTON
CIRCUIT COURT

Exhibit C

STATE OF INDIANA)
) SS: IN THE HAMILTON SUPERIOR COURT I
COUNTY OF HAMILTON) CAUSE NO. _____

DAVID BIDGOOD, SHEILA M. GRAVES,)
 SALVATORE PAPPALARDO, DAVID J.)
 REEVES and ANGELO R. STANCO,)
 Petitioners,)
)
 vs.)
)
 CARMEL BOARD OF ZONING APPEALS,)
 Respondent.)

**ORDER TO SHOW CAUSE WHY WRIT
OF CERTIORARI SHOULD NOT ISSUE**

The Petitioner, having filed and presented a Verified Petition for Writ of Certiorari, Judicial Review and Declaratory Judgment and Fixing Time for Return of the Writ, the Court hereby directs the Carmel Board of Zoning Appeals to show cause why a writ of certiorari should not issue. The Court hereby sets a hearing to show cause for the 25 day of May, 2018, at 8:30 o'clock a. m. in the Hamilton Superior Court 1, Carmel, Hamilton County, Indiana. Parties are directed to call (317) 776-9656 and code 59951.

IT IS THEREFORE, CONSIDERED, OREDERED, ADJUDGED AND DECREED by the Court that a copy of this Order be served on Alan Potasnik, President, Carmel Board of Zoning Appeals; Joe Shestak, Secretary/Administrative Assistant, Carmel Board of Zoning Appeals; and Al-Salam Foundation, Inc. (original Applicant), c/o Registered Agent Nadeem Ikhlague.

Dated April 4, 2018

Judge, Hamilton Superior Court I

Distribution to:

Michael J. Andreoli, #2412-06
Attorney at Law
1393 West Oak Street
Zionsville, Indiana 46077
(317) 873-6266
mandreoli@datlaw.com

Alan Potasnik, President
Carmel Board of Zoning Appeals
One Civic Square
Carmel, IN 46032

Joe Shestak, Secretary/Administrative Assistant
Carmel Board of Zoning Appeals
One Civic Square
Carmel, IN 46032

Al-Salam Foundation, Inc.
(original Applicant)
c/o Registered Agent
Nadeem Ikhlague
10542 Iron Horse Lane
Carmel, IN 46032

Exhibit D

STATE OF INDIANA)
) SS: IN THE HAMILTON SUPERIOR COURT I
COUNTY OF HAMILTON) CAUSE NO. 29D01-1803-MI-2761

DAVID BIDGOOD, SHEILA M. GRAVES,)
SALVATORE PAPPALARDO, DAVID J.)
REEVES and ANGELO R. STANCO,)
Petitioners,)
)
vs.)
)
CARMEL BOARD OF ZONING APPEALS,)
Respondent.)

**PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION
TO RECONSIDER ORDER GRANTING AN EXTENSION
OF TIME TO FILE RECORD AND MOTION TO DISMISS**

Come now the Petitioners, by counsel, and for their opposition to the Respondent's Motion to Reconsider Order Granting an Extension of Time to File Record and Motion to Dismiss, would show the Court the following:

1. That on the 20th day of March, 2018, the Petitioners timely filed their Verified Writ of Certiorari, Judicial Review and Declaratory Judgment. No challenge has been made by the Respondent to the timeliness of the filing of the Verified Petition.
2. That on April 4, 2018, the Court issued its Order to Show Cause Why the Writ of Certiorari Should Not Issue and scheduled a Show Cause date for the 25th day of May, 2018, at 8:30 a.m. The date is tantamount to setting a date for making a Return of the Writ and filing the Record of Proceedings. In fact, the Notice served on the Respondent and Foundation is titled "Notice of Filing for Verified Petition for Writ of Certiorari, Judicial Review and Declaratory Judgment and Fixing Time for Return of the Writ. (Emphasis ours)

3. That the Court's Order of April 4, 2018, setting a show cause date for the 25th day of May at 8:30 by conference call was not a Nun Pro Tunc entry and was done prior to the 30 days required by statute to file the Record of Proceedings. No objection was filed to the date and time for Return of the Writ.
4. On April 5, 2018, counsel directed a letter to Joe Shestak, Administrative Assistant for the Carmel Board of Zoning Appeals, inquiring as to the status of the record. This letter was attached to the Petitioner's Motion for Extension of Time filed with this Court on Friday, May 25, 2018. This letter was dictated prior to the Order to Show Cause Why the Writ of Certiorari Should not Issue in this matter as the Petitioner had no idea when the Court might order Return of the Writ and filing of the Record.
5. That on the 24th day of May, 2018, the Parties were advised that the Court was in jury trial and the Conference Call date would have to be reset. As the Petitioner was prepared to discuss the status of the Record at the Conference Call, the Petitioner then filed a Motion to Extend Time to File Record of Proceeding to extend the May 25, 2018, date set by the Court. This Motion was timely filed. The Court thereafter granted an Order extending the time to file the Record of Proceeding to and including the 20th day of June, 2018.
6. Prior to the May 25th date, the Respondents filed their Respondent's Response to the Verified Petition for Writ of Certiorari, Judicial Review and Declaratory Judgment and raised certain Affirmative Defenses. No Motion to Dismiss was filed at that time and thereafter, the Respondent's filed their Respondent's Motion to Reconsider Order Granting an Extension of Time to File Record and Motion to Dismiss.

ARGUMENT

The Petitioners assert that the Respondent's reliance on Indiana Code 36-7-4-1613 and the cases that discuss the filing of the Record of Proceedings is misplaced and should be denied. While the Respondent sites cases that deal with the "bright light" timeline established for the filing of the Record of Proceedings, the Respondents failed to distinguish what actually occurred in this case verses those cases sited. In this case, the Petitioners submitted, and the Court entered an Order to Show Cause Why Writ of Certiorari Should Not Issue and established show cause for the 25th day of May, 2018, at 8:30 a.m. with the Parties to conduct that by conference call. This in essence established a "bright light" timeline for the filing of the Record of Proceedings. It surely was not lost on this Court that the allegations raised in the Verified Petition, extensive remonstrance and Public Hearing process would require some time to compile the Record of Proceedings for filing with the Court. Hence, this Court's issuance of the April 5, 2018 Order was not a fact present in the Town of Pittsboro Advisory Plan Commission vs. ARK PARK, LLC., 26 NE 3rd 100 (Ind. App. 2015) as the first involvement of the Court, in this cited case, with regard to establishing any "bright light" timeline in the case were requested after the 30-day requirement to file the Record of Proceedings, not before. IC 36-7-4-13 states as follows, "Within 30 days after the filing of the Petition, or within further time allowed by the Court, the Petitioner shall transmit to the Court the original or certified copy of the Board record for Judicial Review of the Zoning decision,....". In essence, the Court had jurisdiction to, and did, establish a timeline that could be relied upon by the Petitioner in this case. Notably, when the parties were advised that the Conference Call could not take place and would have to be reset, the Petitioners properly and timely filed their Motion for Extension of Time which was

granted by this Court. Respondent's arguments wholly fail to distinguish actions taken by this Court clearly prior to the 30-day transcript filing deadline.

In referencing the case of *Teaching our Posterity Success, Inc., vs. Ind. Dep't. of Educ.*, 20 Northeast 3rd 149 (IND 214), the Court, in citing the Myer case, stated, "The purpose of AOPA Section 13 is to ensure that the review of agency action proceeds in an efficient and speedy manner, in that the review in Trial Court has access to the record before rendering its decision... The filing requirement also insures that no relevant evidence or materials are hidden, and no "new" or "secret" evidence is introduced to either contradict or support an agency decision". In the case at hand, this Court had the ability and responsibility to manage its own docket and timelines and did so by setting a Return of the Writ date for May 25, 2018.

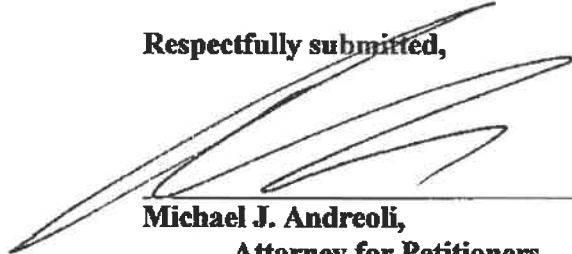
Thereafter, without the Conference Call being conducted, the Petitioners were required and did file their Motion for Extension of Time to File the Record of Proceedings. The facts in this case are completely in opposite to a *Nun Pro Tunc* Order. The Court acted on April 4 to establish a "bright light" timeline and when the Petitioners were not provided with the status of the Record or costs contained therein, a Motion for Extension of Time was properly filed. Simply put, the facts of this case as to filing of the Record of Proceedings are quite different and remarkably distinguished from the analysis of the cases cited in the Respondent's motion.

The Respondent's request for dismissal as it relates to the status of The Al-Salam Foundation, Inc. is not supported by Statute, cases or Trial Rules 17 and 19. At best, it is a form over substance argument and can be cured, if the Court believes it worthy, without risk to dismissal of the underlying action. First, The Al-Salam Foundation was a notified party, pursuant to the Notices as well as the Order Fixing Time for Return of the Writ, and was served by Certified Mail. A copy of the return receipts are attached hereto. (Exhibit "A"). This

notification to The Al-Salam Foundation, Inc., given the fact that the Petitioner is appealing a ruling of the Respondent, Carmel Board of Zoning Appeals, fully and completely complies with the 1600 Series dealing with designated parties. They were served in the same manner and with the same documents as was the Respondent, Carmel Board of Zoning Appeals. To date, no one has entered an Appearance for The Al-Salam Foundation, Inc., nor have they sought to intervene, be joined as a party, or otherwise participate in the action. The Respondent raises the argument of failure to name the Real Party in Interest and perhaps other Trial Rules dealing with this subject. In fact, Trial Rule 17, Real Party in Interest, provides as follows: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time after objection has been allowed for the Real Party in Interest to ratify the action, or be Joined or substituted in the action. Such ratification, Joiner or substitution shall have the same effect as if the action had been commenced originally in the name of the Real Party in Interest". The Foundation has already been served with Notice of the existence of the appeal as well as the Order Fixing Time for Writ. The Respondent has not cited one legal authority for granting dismissal and the requirements of Joinder, if feasible under Trial Rule 19, have not been made to any specificity to allow the Court to take action thereon. Furthermore, intervention under Trial Rule 24 of the Indiana Rules of Trial Procedure may be made upon a timely motion to intervene and the Petitioner would not oppose intervention if it is sought for and on behalf of The Foundation. At worst, The Foundation can be named as a Respondent and Joined as such if the Court believes that the necessity or requirement for Joinder so dictate. Again, having already been served pursuant to statute, and thereafter notified as to all relevant proceedings, this is more of a form over substance argument.

This appeal deserves to be heard on its merits and should be allowed to proceed. The Respondents have protected their record, but dismissal should be denied.


Respectfully submitted,



**Michael J. Andreoli,
Attorney for Petitioners**

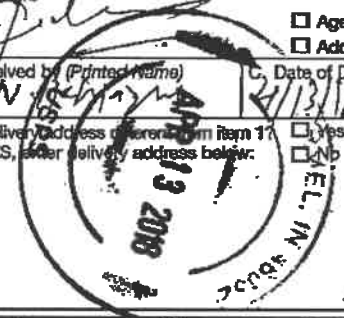

CERTIFICATE OF SERVICE

Comes now Michael J. Andreoli, Counsel herein for Petitioners, and does certify that he did on the 7th day of June, 2018, electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that the foregoing document was served via IEFS upon John R. Molitor, Attorney at Law.



**Michael J. Andreoli,
Attorney for Petitioners**

**Michael J. Andreoli, #2412-06
Attorney at Law
1393 West Oak Street
Zionsville, Indiana 46077
(317) 873-6266
mandreoli@datlaw.com**

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> ■ Complete items 2, and 3. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece or on the front if space permits. 	<p>A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>1. Al-Salam Foundation, Inc. (original Applicant) c/o Registered Agent Nadeem Ikhlauque 10542 Iron Horse Lane Carmel, IN 46032</p>	
 9590 9402 3854 8032 2564 35	<p>3. Service Type</p> <p><input type="checkbox"/> Adult Signature <input type="checkbox"/> Adult Signature Restricted Delivery <input type="checkbox"/> Certified Mail® <input type="checkbox"/> Certified Mail Restricted Delivery</p> <p><input type="checkbox"/> Priority Mail Express® <input type="checkbox"/> Registered Mail™ <input type="checkbox"/> Registered Mail Restricted Delivery <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Signature Confirmation™ <input type="checkbox"/> Signature Confirmation Restricted Delivery</p>

2. Article Number
701A

PS Form 381

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
 Domestic Mail Only

For delivery information, visit our website at www.usps.com

OFFICIAL USE


<p>Certified Mail Fee \$ _____</p> <p>Extra Services & Fees (check box, add fee as appropriate)</p> <p><input type="checkbox"/> Return Receipt (hardcopy) \$ _____</p> <p><input type="checkbox"/> Return Receipt (electronic) \$ _____</p> <p><input type="checkbox"/> Certified Mail Restricted Delivery \$ _____</p> <p><input type="checkbox"/> Adult Signature Required \$ _____</p> <p><input type="checkbox"/> Adult Signature Restricted Delivery \$ _____</p> <p>Postage \$ _____</p> <p>Total Postage and _____</p> <p>Sent To _____</p> <p>Street and Apt. No. _____</p> <p>City, State, ZIP+4® _____</p>	<p style="font-size: 1.5em; font-style: italic;">Mailed 4-5-18</p> <p style="text-align: center;">Postmark Here</p>
<p>Sent To Al-Salam Foundation, Inc. (original Applicant) c/o Registered Agent Nadeem Ikhlauque 10542 Iron Horse Lane Carmel, IN 46032</p>	

PS Form 3800, April 2013

701A 0960 0001 1442 7233

EXHIBIT

A

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY												
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>[Signature]</i> C. Date of Delivery</p>												
<p>1. Article Description</p> <p>Al-Salam Foundation, Inc. (original Applicant) c/o Registered Agent Nadeem Ikhtiaque 10542 Iron Horse Lane Carmel, IN 46032</p>  <p>9590 9402 3854 8032 2561 83</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type</p> <table border="0"> <tr> <td><input type="checkbox"/> Adult Signature</td> <td><input type="checkbox"/> Priority Mail Express®</td> </tr> <tr> <td><input type="checkbox"/> Adult Signature Restricted Delivery</td> <td><input type="checkbox"/> Registered Mail™</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail®</td> <td><input type="checkbox"/> Registered Mail Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail Restricted Delivery</td> <td><input type="checkbox"/> Return Receipt for Merchandise</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery</td> <td><input type="checkbox"/> Signature Confirmation™</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td> </tr> </table>	<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®	<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™	<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery	<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™	<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery
<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®												
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™												
<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery												
<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise												
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™												
<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery												
<p>2. Article Number (Transfer from service label)</p> <p>7018 0360 0001 1442 6601</p>	<p>Mail Restricted Delivery (R)</p>												
<p>Form 3811, July 2015 PSN 7530-02-000-9053 Carmel B2A Domestic Return Receipt</p>													

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com

OFFICIAL USE

<p>Certified Mail Fee \$ _____</p> <p>Extra Services & Fees (check box, add fee as appropriate)</p> <p><input type="checkbox"/> Return Receipt (hardcopy) \$ _____</p> <p><input type="checkbox"/> Return Receipt (electronic) \$ _____</p> <p><input type="checkbox"/> Certified Mail Restricted Delivery \$ _____</p> <p><input type="checkbox"/> Adult Signature Required \$ _____</p> <p><input type="checkbox"/> Adult Signature Restricted Delivery \$ _____</p>	<p style="font-size: large; font-weight: bold;">Mailed 3/30/18</p> <p style="text-align: center;">Postmark Here</p>
--	---

Postage \$ _____

Total Postage: **Al-Salam Foundation, Inc.**
(original Applicant)
c/o Registered Agent
Nadeem Ikhtiaque
10542 Iron Horse Lane
Carmel, IN 46032

Sent To: _____
Street and Apt: _____
City, State, ZIP: _____

PS Form 3800, April 2013 PSN 7530-02-000-9047 See Reverse for Instructions

EXHIBIT