

IN THE INDIANA COURT OF APPEALS
Appellate Court Cause No.: 18A-MI-02098

CARMEL BOARD OF ZONING APPEALS)
)
and)
)
AL-SALAM FOUNDATION, INC.,) Appeal from Hamilton County Superior
) Court
Appellant-Respondents,)
) Honorable Steven R. Nation
v.)
) Trial Court Cause No. 29D01-1803-MI-
DAVID BIDGOOD, SHEILA M. GRAVES,) 002761
SALVATORE PAPPALARDO, DAVID J.)
REEVES, and ANGELO R. STANCO,)
)
Appellee-Petitioners.)

**APPELLANT-RESPONDENT AL-SALAM FOUNDATION, INC.’S RESPONSE
IN SUPPORT OF CARMEL BOARD OF ZONING APPEALS’ VERIFIED MOTION TO
ACCEPT JURISDICTION OVER INTERLOCUTORY APPEAL**

Appellant-Respondent Al-Salam Foundation, Inc. (the “Foundation”) requests that the Court of Appeals accept jurisdiction of an interlocutory appeal in this case pursuant to Appellate Rule 14(B)(2). The Foundation’s motion is submitted in response to a Verified Motion from Appellant-Respondent Carmel Board of Zoning Appeals (“BZA”) to Accept Jurisdiction Over Interlocutory Appeal. For the reasons set forth in the BZA’s Verified Motion, and for the reasons set forth below, the Foundation requests that the Court of Appeals accept jurisdiction over the interlocutory appeal in this matter.

BACKGROUND & PROCEDURAL HISTORY

The Foundation is comprised of residents of Carmel, Indiana who have spent decades without a proper house of worship to serve their longtime Muslim community. Through this permit process, the Foundation seeks to establish an Islamic Life Center (“ILC”), a place of worship and community that will include a prayer hall and multi-use meeting space for worship,

youth groups, family gatherings, and interfaith projects. For years, the Foundation has tried to secure an appropriately zoned parcel of land to build the ILC. In late 2017, the Foundation finally purchased a parcel of land on 141st Street and Shelborne Road in Carmel, Indiana.

In December 2017, the Foundation submitted its application for a Special Use Permit for the ILC to the BZA. On January 22, 2018, the BZA held a public hearing to address the Foundation's Special Use Permit. Due to the unprecedented turnout, the BZA continued the public hearing until February 26, 2018.

At the February hearing—which was attended by hundreds of people from Carmel and the surrounding areas—the BZA heard hours of public comment about the ILC and questioned the Foundation thoroughly about the Special Use Permit. At the hearing's conclusion, the BZA granted the Foundation's Special Use Permit.

On March 28, 2018, Appellee-Petitioners, David Bidgood, Sheila Graves, Salvatore Pappalardo, David Reeves, and Angelo Stanco ("Petitioners"), filed a Verified Petition for Writ of Certiorari, Judicial Review and Declaratory Judgment ("Petition") with the Superior Court. This Petition sought to overturn the BZA's grant of the Special Use Permit to the Foundation.

Petitioners, however, failed to comply with the requirements for initiating an appeal of a BZA decision under I.C. §§ 36-4-7-1600, *et seq.* ("the 1600 Series"). The Petitioners instead sought review under a petition for writ of certiorari, a method outmoded under the 1600 Series. Moreover, in violation of I.C. § 36-7-4-1613, Petitioners failed to file the original or certified copy of the Board Record—or seek an extension from the Superior Court to do so—within 30 days of filing their Petition. Moreover, although the Foundation, as owner of the land at issue and the applicant before the BZA, is a necessary party to any petition for review of a BZA

decision, Petitioners, in contravention of I.C. § 36-7-4-1606(d)(1) and T.R. 24(A)(1), did not name the Foundation as a party to the Petition.

On April 4, 2018, the Superior Court, in response to the Petition for Writ of Certiorari, proceeded under an outdated method for BZA appeals by issuing an Order to Show Cause Why Writ of Certiorari Should Not Be Issued. *See* I.C. § 36-7-4-1006 (repealed 2011).

On May 23, 2018, the BZA filed a responsive pleading, which denied most of the Petition's allegations and raised, *inter alia*, the Petitioners' failure to file the original or certified copy of the Board Record—or seek an extension from the Superior Court for such filing—within 30 days of filing their Petition, in contravention of I.C. § 36-7-4-1613. The BZA requested that the Superior Court not issue a Writ of Certiorari and instead enter judgment in its favor.

On May 25, 2018, 58 days after they had originally submitted their Petition to the Superior Court—and long past the clear requirement under I.C. § 36-7-4-1613 to file the Board Record—the Petitioners moved for an extension of time to file the Board Record. On May 29, 2018, the Superior Court granted the Petitioners' motion, expanding their time to file the Board Record until June 20, 2018.

On June 1, 2018, the BZA filed a Motion to Reconsider the Order Granting an Extension of Time to File Record and Motion to Dismiss. The Petitioners filed their opposition on June 7, 2018. The Court heard argument on the Motion to Reconsider on June 11, 2018. Since the Foundation had not yet intervened in the case, it did not participate in the argument. On June 26, 2018, the Superior Court entered its June 26 Order denying BZA's Motion to Reconsider.

In response to the June 26 Order, the BZA filed a Motion to Certify Order for Interlocutory Appeal and Stay under A.R. 14(B) on July 16, 2018.

The BZA sought interlocutory appeal on (1) whether the Petitioners' failure to follow the exclusive means for seeking judicial review of a zoning decision as set forth in the 1600 Series required the dismissal of their Petition challenging the BZA's zoning decision; (2) whether the Superior Court has the authority to grant an extension of the time for filing the Board Record under I.C. § 36-7-4-1613(a) after the 30 day period has expired; and (3) whether the Petitioners' failure to file the Board Record, or seek an extension of time, within the required 30-day time period required by I.C. § 36-7-4-1613(a) mandated dismissal of their attempt to seek judicial review of the BZA's zoning decision.

On July 18, 2018, the Foundation filed a Motion for Intervention, which was granted on July 19, 2018. On July 26, 2018, the Foundation filed a Motion to Join Respondent's Motion to Certify Order for Interlocutory Appeal in the Superior Court. On August 3, 2018, the Superior Court entered an order certifying the June 26 Order for interlocutory appeal and staying further proceedings pending appeal.

On August 30, 2018, the BZA filed a Verified Petition to Accept Jurisdiction Over Interlocutory Appeal with this Court.

ARGUMENT

This Court should accept interlocutory appeal here because (1) the Appellant-Respondents, and particularly the Foundation, will suffer substantial expense, damage, and injury if the June 26 Order is erroneous and the determination of error is withheld until after judgment; and (2) the resolution of the issues surrounding the June 26 Order involves a substantial question of law that should be determined before trial in order to promote a more orderly disposition of the case. *See* A. R. 14(B)(1)(c).

A. The Foundation will suffer substantial expense, damage, and injury if this Court does not hear this interlocutory appeal.

The Foundation's unique position as both a nonprofit and as owner of the land at issue means it will suffer substantial damage, injury, and expense if determination on the Superior Court's error is withheld until after judgment. Requiring the Foundation to continue to litigate the case without determination of this threshold matter will result in substantial expense to the Foundation and harm to Carmel's Muslim community, who donate to the Foundation out of their own pockets. Hard-earned money will be directed towards litigation, increasing hardship on the local Muslim community that is trying to financially support the construction of their house of worship, when this interlocutory appeal could quickly resolve the matter.

Continued litigation in the trial court also places the Foundation and its future on a fault line. Protracted litigation jeopardizes the value of the Foundation's land purchase. Despite the grant of the Special Use Permit, the Foundation has not begun breaking ground on the ILC because of this litigation. Moreover, the Special Use Permit requires that construction commence within three years of the grant. Early resolution of this matter via interlocutory appeal ensures that the Foundation can begin building the ILC and serving their community as soon as possible and that they will not lose their permit because of litigation delay and have to recommence the process or otherwise be unduly delayed. Early resolution via interlocutory appeal will also allow efficient disposition on the case in its entirety and allow the Foundation to begin developing the land and serving Carmel's Muslim community in earnest.

Allowing this proceeding to continue needlessly in the trial court impedes not only development and investment in the land but also fundraising and community-building efforts for the duration of any litigation. Early disposition of this case will reassure Carmel's Muslim community that they have a future to worship freely in their hometown, which in turn will help

the Foundation meet its fundraising goals to finance the ILC itself. In other words, an expeditious resolution of the threshold questions at issue in this interlocutory appeal will ensure that the Foundation's ability to develop the land for the use of the Muslim community is not unduly delayed—particularly when the issue on appeal is one involving a bright-line rule, as is the case here.

Furthermore, the persisting doubt about the ILC's future prevents Carmel's Muslim community from exercising their religion in the same manner enjoyed by Carmel's other faith communities. The makeshift rented space the Carmel Muslim community presently uses is far too small and otherwise unsuitable to properly serve them—which is why the Foundation began its process to purchase the land at issue to build the ILC. Given the inadequacy of the current space the Muslim community is using, the size and scope of any events the Muslim community can hold is necessarily limited and insufficient for their needs. Because of these constraints, the Muslim community has not been able to adequately offer prayer services or Sunday school facilities for Muslim children. Moreover, the holy month of Ramadan and the community's main religious holidays have already passed this year without a sufficient facility for worship. Delaying this litigation process further by not hearing this interlocutory appeal will only further constrain and prolong the community's ability to exercise their religious beliefs in the same manner enjoyed by Carmel's other faith communities.

Finally, should this Court not hear this interlocutory appeal, the Foundation will be required to incur substantial attorney's fees not only in the trial court litigation but through any attendant appeals process. As noted, these fees are funded by donations to the Foundation—mainly from the local Muslim community—and consist of the same pool of money the Foundation depends upon to build the ILC itself. All parties stand to accrue steep costs due to the

extensive briefing required by the several thousand-page record and motion practice that will be involved as this proceeding moves forward. As a nonprofit, the Foundation is particularly vulnerable to the heavy costs incurred through such protracted litigation. These costs are only exacerbated when the litigation is unnecessary, as it is here, because Indiana courts have provided a “bright-line” rule requiring reversal of the Superior Court’s decision. Thus, early resolution of this matter on interlocutory appeal ensures efficiency for all parties while causing the Petitioners no harm.

B. The interlocutory appeal involves a substantial question of law.

As set forth in greater detail in the BZA’s Verified Motion to Accept Jurisdiction over Interlocutory Appeal, this interlocutory appeal involves a substantial question of law. As a result, the Foundation joins the BZA’s Verified Motion to Accept Jurisdiction over Interlocutory Appeal in full and in its response, only briefly adds to the argument on this issue.

First, accepting early appellate review on interlocutory issues that may dispose of the entire litigation, as is the case here, is routinely preferred by Indiana courts. *See, e.g., Board of Zoning Appeals of Porter Cnty. v. Lake Cnty. Trust Co.*, 783 N.E.2d 382 (Ind. Ct. App. 2003).

Second, the 1600 Series is unambiguously the exclusive means to challenge zoning decisions and all other methods, including certiorari, are outmoded and deficient. This Court has previously heard interlocutory appeals on substantially similar postures and ruled favorably for parties in the Appellant-Respondents position. *See, e.g., Town of Pittsboro Advisory Plan Com’n v. Ark Park, LLC*, 26 N.E.3d 110, 112 (Ind. Ct. App. 2015).

Third, the Superior Court erred when it did not grant the BZA’s Motion to Dismiss on the Petitioners’ failure to comply with the requirements of the 1600 Series. Indiana courts have uniformly held that dismissal of a petition to seek judicial review is the only remedy for a

petitioner's failure to timely file a zoning record or timely seek an extension of time to do so under I.C. § 36-7-4-1613. Indiana courts have construed meeting these deadlines as a "bright line rule." *See, e.g., Allen Cnty. Plan Comm'n v. Olde Canal Place Ass'n*, 61 N.E.3d 1266, 1270 (Ind. Ct. App. 2016). Accordingly, the Petitioners' failure to abide by the bright line rule of the 1600 Series renders them ineligible to seek judicial review.

Finally, the Petitioners violated I.C. § 36-7-4-1606(d)(1) by failing to make the Foundation a party to the judicial review proceeding. As the sole applicant before the zoning board, the Foundation was a necessary party to any judicial review proceeding under I.C. § 36-7-4-1606(d)(1) and T.R. 24(A)(1). As a result, the Petitioners' filing was deficient on this count as well. Thus, for these and all the reasons raised in the BZA's Verified Motion to Accept Jurisdiction over Interlocutory Appeal, accepting jurisdiction in this case allows this Court to resolve a substantial question of law in this case at an early juncture.

CONCLUSION

For the foregoing reasons and for the reasons stated in the BZA's Verified Motion to Accept Jurisdiction over Interlocutory Appeal, the Foundation respectfully requests in its response that this Court accept jurisdiction over its appeal of the trial court's Order dated June 26, 2018.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I verify that the Al-Salam Foundation, Inc.'s Response in Support of 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 2,662 words.

Respectfully submitted,

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PROOF OF SERVICE

Brian C. Heck, being first duly sworn upon oath, now states that he is counsel for the Appellant-Respondents Al-Salam Foundation, Inc. and he hereby certifies the Al-Salam Foundation, Inc.’s Response in Support of the BZA’s 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 September 6, 2018.

The undersigned further states that on the 6th day of September, 2018, he served upon the opposing party in this cause the Al-Salam Foundation, Inc.’s Verified Motion to Accept Jurisdiction over Interlocutory Appeal by the Court’s electronic filing system to:

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/s/ Brian C. Heck
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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.

Dated: September 6, 2018

/s/ Brian C. Heck
Brian C. Heck