IN THE
INDIANA COURT OF APPEALS
CAUSE NO. 18A-MI-02098

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

APPELLANTS' JOINT REPLY BRIEF

PATRICK R. HESS, I.D. #19395-02
BRIAN C. HECK, I.D. #22389-02
BECKMAN LAWSON, LLP
201 WEST WAYNE STREET
FORT WAYNE, INDIANA 46802
TELEPHONE: (260) 422-0800
FAX: (260) 420-1013

JOHNATHAN J. SMITH,
I.D. #6580-954-TA
JUVARIA KHAN, I.D. #6581-95-TA
NIMRA H. AZMI, I.D. #6578-95-TA
P.O. BOX 34440
WASHINGTON, D.C. 20043
TELEPHONE: (202) 897-1896

ATTORNEYS FOR AL-SALAM FOUNDATION, INC.

ROBERT W. EHERENMAN,
I.D. #16703-53
MELANIE L. FARR, I.D. # 20951-02
HALLER & COLVIN, P.C.
444 EAST MAIN STREET
FORT WAYNE, INDIANA 46802
TELEPHONE: (260) 426-0444
FAX: (260) 422-0274

JOHN R. MOLITOR, I.D. #9313-49
9465 COUNSELORS ROW, STE. 200
INDIANAPOLIS, IN 46240
TELEPHONE: (317) 843-5511
FAX: (317) 805-4273

ATTORNEYS FOR CARMEL BOARD OF ZONING APPEALS

Joint Reply Brief of Appellants' Carmel Board of Zoning Appeals and Al-Salam Foundation, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

SUMMARY OF ARGUMENT

The Appellees' Brief filed by the Remonstrators lacks citations to the record and fails to make a cogent argument that is supported by any case law whatsoever. The Remonstrators' response is based entirely on the faulty premise that the trial court's erroneously issued Show Cause Order established a deadline to file the record when the plain language of the order did no such thing. The Remonstrators' defense for not timely filing the board record is based on error they invited the trial court to commit. The Remonstrators do not discuss, distinguish, rebut - - or even cite - - most of the relevant case law that requires the dismissal of their petition for judicial review. The trial court could not construe its Show Cause Order to say something that it simply did not. The dispositive fact is that the Remonstrators did not file the board record or an extension within thirty (30) days of the filing of their petition for judicial review, and their petition should have been dismissed with prejudice.

A. The Trial Court's April 4, 2018, Show Cause Order Did Not Schedule a Date for Filing the Board Record under IND. CODE § 36-7-4-1613.

The Remonstrators' argument relies on a misstatement of the trial court's April 4, 2018 Order to Show Cause ("Show Cause Order"). The Remonstrators repeatedly mischaracterize this Show Cause Order as setting the date "for Return of the Writ for the 25th day of May, 2018." (Appellees' Brief, p. 6). *See also* Appellees' Br., pp. 6-7 (stating that "the Court had fixed this time for the Return of the Writ"); p. 7 (claiming that the trial court "in fact did establish a Brightline [sic] filing date of the 25th of May, 2018" for the filing of the board record); p. 8 (arguing that the trial court set "a Return of the Writ date for May 25, 2018 . . . for the filing of the Board Record"); p. 9 (contending that "the Court's order setting the date for May 25 to submit the record was entered prior to the expiration of the thirty (30) day Brightline [sic] requirement"); p. 10 (stating that the trial court set "this matter down for May 25 for a Return to the Writ").

First, the Remonstrators invite this Court to go down the same procedural rabbit hole that they dug in the trial court by using statutory terminology that no longer exists. There is no such thing as a "Return of the Writ" under the 1600 Series, and it is nonsensical to argue that a trial court would interpret its order in accordance with a statutory scheme that was repealed in 2011. Second, and more importantly, the trial court's April 4 Show Cause Order, on its face, does not state what the Remonstrators have argued to this Court. The Show Cause Order stated:

> 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.

(Appellants' App., p. 37) (emphasis added). The only deadline that was established in the Show Cause Order was a hearing date for the BZA to show cause why a writ of certiorari should not issue. No deadline was set for the filing of the "Return of the Writ" or the Board Record under I.C.

§ 36-7-4-1613(a). There is absolutely no factual basis to support the Remonstrators' argument.

Under the now repealed certiorari process, after the filing of a petition for writ of certiorari, the trial court would direct the zoning board, within twenty (20) days of the filing, to show cause why a writ of certiorari should not issue. I.C. § 36-7-4-1006 (2010). If the zoning board failed to show cause, the trial court would then issue a "writ of certiorari" to the zoning board and set a later time when the zoning board would file its return on the writ. *Id.* The "return on the writ" was the closest analogue to filing the zoning record under the 1600 Series because the return would "concisely set forth such facts and data as may be pertinent and present material to show the grounds of the decision on appeal." I.C. § 36-7-4-1008(a) (2010). In summary, even under the certiorari process, the deadline for submitting the "record" was established when the trial court issued the writ of certiorari; it was not established when the trial court issued the order to show cause.

As noted, it was the responsibility of the trial court under the certiorari process to issue a show cause order, and the Indiana Supreme Court encouraged zoning attorneys to tender to trial courts proposed orders to show cause to assist trial courts in complying with the statutory process. *Shipshewana Convenience Corp. v. Board of Zoning Appeals of LaGrange County*, 656 N.E.2d 812, 815 (Ind.1995). That is what exactly happened in this case. The Remonstrators invoked the repealed statute and erroneously tendered a proposed show cause order to the trial court. The trial court filled in and signed the Remonstrators' proposed order and, now, the Remonstrators are using their very own tendered order to excuse their failure to timely file the board record.

As this Court has recognized in other zoning cases: "A party may not take advantage of an error which he commits, invites, or which is the natural consequence of his own neglect or misconduct. Invited error is not subject to review by this court." *Ad Craft, Inc. v. Area Plan Com'n of Evansville and Vanderburgh County*, 716 N.E.2d 6, 19 (Ind. Ct. App. 1999) (quoting *Stolberg v. Stolberg*, 528 N.E.2d 1, 5 (Ind. Ct. App. 1989), *reh'g*

denied). The Remonstrators tendered a proposed order as recommended by the *Shipshewana* court, which erroneously invited the trial court to issue the Show Cause Order. However, even under the repealed certiorari statutes, the show cause hearing would not have resulted in the record being filed with the trial court on May 25, 2018. Therefore, the trial court's April 4, 2018, Show Cause Order did not set a deadline for submission of the "return" on the writ, and the Show Cause Order did not set a deadline for the Remonstrators to submit the board record under the 1600 Series.

B. The Remonstrators' Failure to Comply with the "Bright Line" Rule for Filing of the Board Record Requires Dismissal.

The Remonstrators ask this Court to overlook their failure to comply with the requirements under I.C. § 36-7-4-1613 by arguing that since the BZA had not finished preparing the board record within the 30-day statutory deadline, the Remonstrators could not file it in a timely manner. (Appellees' Br., p. 6.) Yet the Remonstrators fail to acknowledge that the 1600 Series provides a clear requirement for precisely such a situation; to seek a timely extension with the court. I.C. § 36-7-4-1316(b). The

Remonstrators failed to do so here. Thus, under the 1600 Series – and as affirmed by every Court of Appeals decision construing this provision – their petition must be dismissed.

Nonetheless, Remonstrators assert that this case law, cited by the BZA and Foundation in their Joint Appeal Brief, is "distinguishable" (Appellees' Br., pp. 8-9) – without providing a single case to support their conclusory statement. *See* Ind. Appellate Rules 46(A)(8)(a), 46(B)(2) (stating that argument section of appellee's brief must "contain the contentions of the [appellees] on the issues presented, supported by cogent reasoning[]" and "[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on. . ."). The facts here are simple. The Remonstrators did not file the board record within 30 days (i.e., by April 27, 2018), nor did they request a timely extension. Thus – as every court has held when construing this situation – the only remedy is dismissal. *See, e.g., Howard v. Allen County Bd. of Zoning Appeals*, 991 N.E.2d 128, 131 (Ind. Ct. App. 2013) (affirming dismissal for failure to file record per the 1600 Series

within thirty days); *Town of Pittsboro Advisory Plan Com'n v. Ark Park, LLC*, 26 N.E.3d 110, 119 (Ind. Ct. App. 2015) (same); *Allen County Plan Com'n v. Olde Canal Place Ass'n*, 61 N.E.3d 1266, 1267, 1269-70 (Ind. Ct. App. 2016) (finding that even where an extension has been sought, a board record cannot be filed past the time of the extension); *First American Title Ins. Co. v. Robertson*, 19 N.E.3d 757, 762-763 (Ind. 2014) (affirming the existence of a "bright line" thirty day rule for filing a record under AOPA); *Teaching Our Posterity Success, Inc. v. Indiana Dept. of Educ.*, 20 N.E.3d 149, 155 (Ind. 2014) (same).

The *Howard* case (to which the Remonstrators make no reference) is particularly salient here. There, this Court underscored that under I.C. § 36-7-4-1613, the relevant inquiry for evaluating dismissal is on the actions of the petitioner, not the status of the board record. *Howard*, 991 N.E.2d at 131. In *Howard*, the board record was not assembled and produced until nearly a month after the statutory deadline, leading to petitioners' late filing. *Id.* at 129. Petitioners – like the Remonstrators here – failed to seek a timely extension from the trial court. *Id.* The trial

court dismissed the petition and this Court affirmed, finding that even though the record was not ready, the petitioner had failed to avail himself of the appropriate statutory remedy by seeking an extension for more time to file the record. *Id.* at 130, 131.

Far from being "distinguishable," *Howard* provides clear precedent for the proper disposition of this case. The Remonstrators cannot rely on the May 25, 2018 date set in the trial court's Show Cause Order[1] to circumvent the Bright Line rules under I.C. § 36-7-4-1613.[2] The deadline was April 27, 2018. (Appellants' Br., p. 20). The Remonstrators filed their first Motion for Extension of Time to File the Board Record on May 25, 2018 – almost a full month after this thirty-day window had lapsed. (Appellants' Br., p. 9). As *Howard* highlights, the proper disposition

[1]As noted in Part A, *supra*, the only deadline the Show Cause Order established was for a hearing date for the BZA to show why a writ of certiorari should not issue – *not* for the Remonstrators to file the board record.

[2]Notably, the Remonstrators concede this error, acknowledging in their brief that "[u]pon reflection and with the benefit of hindsight, petitioner could have been more clear in the terms of what it was asking the Court to set." (Appellees' Br., p. 9).

following such a failure to follow the bright-line rules is dismissal. *Howard*, 991 N.E.2d at 129.

Finally, the Remonstrators' contention that these statutory requirements will create "procedural landmines" for petitioners when the record is not ready is without merit. (Appellees' Br., p. 8.) As the Remonstrators concede, "[I.C. § 36-7-4-1613(a)] clearly places the burden on the petitioner seeking judicial review [with] the responsibility to file the agency record in a timely manner[.]" (Appellees' Br., p. 6.) The 1600 Series takes into account the reality that compiling a record can be a time-consuming enterprise for a board of zoning appeals, as demonstrated by the remedy it provides petitioners to avoid being prejudiced; the filing of a timely extension. The Remonstrators chose not to avail themselves to that statutory remedy, and as a result, dismissal is required.

C. The Trial Court's Discretion to Manage Its Docket Does Not Allow It to Abrogate the Bright Line Requirements under I.C. § 36-7-4-1613.

With no citation to any case law, the Remonstrators argue that it was well within the trial court's discretion to "properly manage its own docket" when it excused the Remonstrators' failure to follow the 1600 Series' Bright Line requirements. (Appellees' Br., p. 9.) That conclusory argument, like all the others advanced by the Remonstrators, has been consistently rejected by this Court.

While trial courts "may exercise a reasonable discretion in the management of their dockets," *State ex rel. Wooten v. Abrams*, 36 N.E.2d 764, 764 (Ind. 1941), the requirements set forth under I.C. § 36-7-4-1613 are not matters of docketing preference or judicial discretion: they are binding and mandatory requirements set by the Indiana legislature. This Court has expressly found that a trial court's discretion does not permit it to accept untimely filings of a board record. *Howard*, 991 N.E.2d at 131. In addition, there is nothing in the record of this case to suggest that the trial court was acting out of a desire to manage its docket. As the

Remonstrators themselves concede, any such discretion the trial court was trying to exercise was "not elaborat[ed] as such." (Appellees' Br., p. 9). Rather, the record shows that the Remonstrators invoked a repealed statute for seeking review of the BZA's decision and induced the trial court to issue an order under this outdated procedure, eventually resulting in a violation of the Bright Line rules under I.C. § 36-7-4-1613. Put simply, the trial court's discretion – to the extent it was even exercised – cannot excuse the Remonstrators' failure to timely file the board record.

CONCLUSION

The trial court's June 26, 2018, certified interlocutory order denying the BZA's motion to dismiss should be reversed, and the Remonstrators' petition to seek judicial review of the BZA's zoning decision should be dismissed, with prejudice.

Respectfully submitted,

/s/ Patrick R. Hess
PATRICK R. HESS, I.D. #19395-02
BRIAN C. HECK, I.D. #22389-02
BECKMAN LAWSON, LLP
201 WEST WAYNE STREET
FORT WAYNE, IN 46802
TELEPHONE: (260) 422-0800
FAX: (260) 420-1013

/s/ Juvaria Khan
JUVARIA KHAN, I.D. #6581-95-TA
JOHNATHAN J. SMITH,
I.D. #6580-954-TA
NIMRA H. AZMI, I.D. #6578-95-TA
P.O. BOX 34440
WASHINGTON, D.C. 20043
TELEPHONE: (202) 897-1896
ATTORNEYS FOR AL-SALAM FOUNDATION, INC.

Respectfully submitted,

/s/ Robert W. Eherenman
ROBERT W. EHERENMAN,
I.D. #16703-53
HALLER & COLVIN, P.C.
444 EAST MAIN STREET
FORT WAYNE, INDIANA 46802
TELEPHONE: (260) 426-0444
FAX: (260) 422-0274

/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
ATTORNEYS FOR CARMEL BOARD OF ZONING APPEALS

WORD COUNT CERTIFICATE

I verify that this Joint Reply Brief of Appellants Carmel Board of Zoning Appeals and Al-Salam Foundation, Inc. contains no more than 7,000 words. Pursuant to the word count feature of WordPerfect X6, I verify that this Joint Reply Brief contains 2,246 words.

Respectfully submitted,

/s/ Robert W. Eherenman
ROBERT W. EHERENMAN,
I.D. #16703-53
HALLER & COLVIN, P.C.
444 EAST MAIN STREET
FORT WAYNE, INDIANA 46802
TELEPHONE: (260) 426-0444
FAX: (260) 422-0274

CERTIFICATE OF SERVICE

Robert W. Eherenman, being first duly sworn upon oath, now states that he is counsel for Appellant Carmel Board of Zoning Appeals and he hereby certifies the Appellants' Joint Reply Brief has been filed via the Court's electronic filing system with the Court of Appeals of Indiana on December 28, 2018, to Mr. Greg Pachmayr, Clerk, Court of Appeals of Indiana, 216 State House, 200 West Washington Street, Indianapolis, Indiana 46204-3419.

The undersigned further states that on the 28th day of December, 2018, he served the Appellants' Joint Reply Brief by the Court's electronic filing system to:

Michael J Andreoli, Esq.
1393 West Oak Street
Zionsville, Indiana 46077
mandreoli@datlaw.com

/s/ Robert W. Eherenman
ROBERT W. EHERENMAN