

DANIEL M. HARRIGAN
IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO ex rel. BOSTON HILLS
PROPERTY INVESTMENT L.L.C.

Relator/Plaintiff,

-vs-

VILLAGE OF BOSTON HEIGHTS, OHIO

Respondent/Defendant.

CASE NO. CV-2007-07-4696

JUDGE PATRICIA A. COSGROVE

**REPLY OF RAYMOND A.
KUCCHAR TO BOSTON HILLS
PROPERTY INVESTMENT
L.L.C.'S BRIEF IN OPPOSITION
TO MOTION TO INTERVENE**

Now comes Movant Raymond A. Kuchar, by and through counsel Kenneth J. Fisher, and hereby submits the following reply to Boston Hills Property Investment L.L.C.'s brief in opposition to motion to intervene. A Reply Brief is attached hereto and incorporated herein be reference.

Respectfully submitted,



KENNETH J. FISHER (0001507)
KENNETH J. FISHER CO., L.P.A.
2100 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
(216) 696-7661
(216) 696-0439 (facsimile)
kfisher@fisher-lpa.com

Attorney for Movant, Raymond A. Kuchar

REPLY BRIEF**I. CIVIL RULE 24(A)(2).**

Pursuant to Civil Rule 24(A)(2) of the Ohio Rules of Civil Procedure, the following elements must be met before a party may intervene: (1) the intervenor must claim an interest relating to the property or transaction that is the subject matter of the action; (2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect his or her interest; (3) the intervenor must demonstrate that his or her interest is not adequately represented by the existing parties; and (4) the motion to intervene must be timely. Peterman v. Village of Pataskala, (Ohio App. 5 Dist., 09-22-1997), 122 Ohio App.3d 758, 702 N.E.2d 965, citing Fairview Gen. Hosp. v. Fletcher, (1990), 69 Ohio App.3d 827, 591 N.E.2d 1312.

A. Intervenor Interest.

Contrary to the assertion of Boston Hills Property Investment, L.L.C. (hereinafter "BHPI"), Movant Kuchar does indeed have a legally protected interest. The Village's adoption of an emergency resolution, pursuant to the requirements of a statutorily organized municipality, that authorized the Village to enter into the Agreed Judgment Entry was defective on its face as Ohio Revised Code Section 731.30 requires that "****emergency ordinances or measures must, upon a ye or nay vote, receive two-thirds vote of all the members elected to the legislative authority, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure." The Ohio Supreme Court, in City of Youngstown v. Aiello, (1951), 156 Ohio St. 32, 100 N.E.2d 62, stated that: "[a] separate provision of an ordinance, 'that this ordinance is hereby declared to be an emergency measure necessary for the preservation of the public peace,

health and safety, and shall take effect upon its passage and approval by the mayor,' which ordinance was adopted by a vote of two-thirds of all the members elected to council, is ineffective to constitute the ordinance an emergency measure, where the reasons for the necessity are not announced and set forth in the emergency section of said ordinance***". Kuchar certainly has a legally protected interest in ensuring that any resolution adopted by the Village Council as an emergency measure meets the requirements of the Ohio Revised Code. Emergency Resolution No. 14-2008 states as follows: "[t]hat this Resolution is hereby declared to be an emergency measure necessary for the preservation of the public peace, health and welfare of the residents of the Village of Boston Heights and that this Resolution shall take immediate effect upon its passage." Resolution No. 14-2008 attached to Motion to Intervene as Exhibit "C". Said language clearly does not meet the requirements as delineated in City of Youngstown, supra, and Kuchar has a legally protected interest in ensuring that any resolution passed concerning the property at issue, or any property in the Village for that matter, complies with Ohio statutory law.

Further, Kuchar has a legally protected interest in ensuring that any agreement between the parties is not more permissive than the relief requested in the Complaint. Specifically, the Complaint requested that: (1) the Village's RES Residential Zoning classification be deemed arbitrary and unreasonable; (2) the Village's prohibition of retail structures in excess of 50,000 square feet be deemed arbitrary and unreasonable; (3) the Village's prohibition of RB Retail Business district uses be deemed arbitrary and unreasonable; and (4) the Village commence appropriation proceedings. In fact, the instant Complaint would never have been filed if not for the fact that Ordinances Nos. 11-2007 and 12-2007, which amended 65.9562 acres of the Property from RES Residential Zoning to RB Retail Zoning, were repealed by operation of

referendum petition procedures. See Ordinance Nos. 11-2007 and 12-2007 attached to Motion to Intervene as Exhibits "A and B", respectively. The Agreed Judgment Entry, however, goes far beyond what was contemplated by Ordinance Nos. 11-2007 and 12-2007 or the relief requested in the Complaint. The Agreed Judgment Entry rezones "****approximately \pm 100 acres situated in the northwest quadrant of the intersection of E. Hines Hill Rd. And SR 8****" from RES Residential Zoning to all permitted uses and conditionally permitted uses as provided for in Office/Professional District Zoning, General Business District Zoning and Retail Business District Zoning. See Agreed Judgment Entry attached to Motion to Intervene as Exhibit "D" at pages 4-5.

The case at bar is distinguishable from Driscoll v. Austintown Associates, et al., (1975), 42 Ohio St.2d 263, as Kuchar has identified legally protectable interests separate from a right to intervene based only upon his property's proximity to the Property at issue.

B. Timeliness.

BHPI's assertion that Kuchar's Motion to Intervene was not timely filed because Kuchar knew or should have known of the lawsuit is disingenuous. The mere fact that Kuchar did not file his Motion to Intervene until such time as the Agreed Judgment Entry was approved by this Court, which occurred one (1) working day after Village Council illegally authorized approval of the Agreed Judgment Entry, is not determinative. In fact, the Court in Peterman, supra, held that the filing of a motion to intervene was timely filed even though it was not filed until the settlement agreement and agreed judgment entry were discovered. Kuchar had no way of knowing that the Village and BHPI were involved in settlement talks that would permit uses on the Property that: (1) allows for broader permitted and accessory uses on a larger tract of the

Property; and (2) are much more expansive than those uses overturned by the voters at the November 2007 general election when Ordinance Nos. 11-2007 and 12-2007 were repealed. Kuchar was not privy to the Village's executive sessions to purportedly discuss pending litigation and had no indication that the Village would not protect his rights. Accordingly, said motion was filed in a timely manner upon Kuchar's discovery of the Agreed Judgment Entry.

C. Adequate Representation.

It is clear that Kuchar was not and cannot be adequately represented by the Village of Boston Heights. This is abundantly clear based on the fact that Village Council passed an emergency resolution on April 11, 2008, that was defective on its face and illegally entered into an Agreed Judgment Entry, journalized on April 14, 2008, that: (1) allows broader permitted and accessory uses on a larger tract of the Property; and (2) is much more expansive than the permitted uses overturned by the voters in November 2007 when Ordinance Nos. 11-2007 and 12-2007 were repealed.


D. Civ.R. 24(C).

The fact that no pleading accompanied the Motion to Intervene is a direct result of the Agreed Judgment Entry being approved by this Court. Kuchar had no opportunity to assert claims or defend the allegations contained in the Complaint as a final appealable order has been entered as a result of this Court's approval of the Agreed Judgment Entry. Kuchar is attempting to intervene in this matter in order to appeal procedural and substantive deficiencies resulting from approval of the Agreed Judgment Entry to the Ohio Ninth Appellate District. Accordingly, the fact that no pleading accompanied the Motion to Intervene is entirely reasonable under the circumstances and should not be the basis for the denial of Kuchar's Motion to Intervene.

II. CONCLUSION.

Accordingly, Movant Raymond A. Kuchar respectfully requests that this Court grant his Motion to Intervene as Movant has no other available method to protect his interests.

Respectfully submitted,



KENNETH J. FISHER (0001507)
KENNETH J. FISHER CO., L.P.A.
2100 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
(216) 696-7661
(216) 696-0439 (facsimile)
kfisher@fisher-lpa.com

Attorney for Movant, Raymond A. Kuchar

CERTIFICATE OF SERVICE

A copy of the foregoing Reply of Raymond A. Kuchar to Boston Hills Property Investment L.L.C.'s Brief in Opposition to Motion to Intervene has been served this 30th day of April, 2008, by regular U.S. Mail, postage prepaid, upon the following:

John T. McLandrich, Esq.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139

Attorney for Respondent/Defendant
Village of Boston Heights, Ohio

Stephen W. Funk, Esq.
Roetzel & Andress, L.P.A.
222 South Main Street
Akron, Ohio 44308

Attorney for Plaintiffs/Relator,
Boston Hills Property Investment, LLC

Sheldon I. Berns, Esq.
Gary F. Werner, Esq.
Berns, Ockner & Greenberger, LLC
37 Park, Suite 200
3733 Park East Drive
Beachwood, Ohio 44122

Attorneys for Plaintiffs/Relator,
Boston Hills Property Investment, LLC

Marc Dann, Esq.
Attorney General, State of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43215



KENNETH J. FISHER (0001507)

Attorney for Movant, Raymond A. Kuchar