

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

PRESERVE HYDE PARK,	:	APPEAL NOS. C-090734
		C-090755
Plaintiff-Appellee/Cross-	:	C-090756
Appellant	:	TRIAL NO. A-0704486
	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
	:	
ZONING BOARD OF APPEALS, CITY	:	
OF CINCINNATI,	:	
	:	
Defendant-Appellant/Cross-	:	
Appellee	:	
	:	
and	:	
	:	
HYDE PARK COMMUNITY UNITED	:	
METHODIST CHURCH,	:	
	:	
Intervenor-Defendant-	:	
Appellant/Cross-Appellee.	:	
	:	

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant/cross-appellee, Zoning Board of Appeals, City of Cincinnati (“the ZBA”), and intervenor-defendant-appellant/cross-appellee, Hyde Park Community United Methodist Church (“the Church”), appeal the judgment of the Hamilton County Court of Common Pleas reversing the decision of the ZBA and remanding the case to the ZBA for further proceedings. Plaintiff-appellee/cross-

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

appellant, Preserve Hyde Park (“PHP”), appeals the judgment to the extent that the trial court limited the scope of the administrative appeal and adopted the magistrate’s definition of the term “religious assembly.”

The Church applied to the city for a permit to make renovations to its property. PHP, a group comprised of citizens who lived near the Church, opposed the renovations. PHP contended that the renovations would permit the Church to expand the scope of its activities beyond the permitted uses of a “religious assembly” under the city’s zoning code. The allegedly improper uses included religious retreats and the temporary housing of impoverished families.

The ZBA approved the requested renovations, and PHP appealed that decision to the court of common pleas.

On appeal, a magistrate recommended that further proceedings be held to determine the permissible scope of the Church’s activities. In a written decision, the magistrate stated that “[t]he City of Cincinnati Zoning Board of Appeals Decision \* \* \* is VACATED and the appeal REMANDED to the City of Cincinnati Zoning Board of Appeals for action consistent with this decision. The scope of the conditional use permit shall be limited to only those issues directly pertaining to the Emmaus retreats and Interfaith Hospitality Network operations at the Erie Site.” (Capitals in original.)

The trial court accepted the recommendation of the magistrate and remanded the case to the ZBA. On appeal, each party now asserts a number of assignments of error. As a threshold matter, though, we must determine whether this court has jurisdiction to entertain their appeals.

A court of appeals has jurisdiction to review only final, appealable orders.<sup>2</sup> Where the judgment of a common pleas court requires a new hearing or the consideration of additional evidence by a zoning board, it is not a final order under R.C. 2505.02.<sup>3</sup> Only where the judgment of the court of common pleas determines the merits of an administrative appeal is it final and appealable.<sup>4</sup>

In other words, if the judgment of the common pleas court does not preclude the possibility that the landowner may use the land as it intends, the “substantial right to use the land, if existent” is not affected by the trial court’s decision.<sup>5</sup> Thus, where either party could still prevail following a conditional-use hearing before a zoning board, the judgment ordering the hearing is not final and appealable.<sup>6</sup>

In this case, the trial court’s order did not make a final determination of the merits of the appeal; it merely referred the case back to the ZBA for further proceedings. Nonetheless, the ZBA and the Church maintain that the judgment was final and appealable because a conditional-use hearing was simply not warranted. They argue that the Church’s requested renovations would not have changed the fundamental use of the property. Thus, they contend that the zoning code would not have been violated in any event and that further proceedings were not necessary.

This argument fails for two reasons. First, we cannot say on the state of the record before us that the factual assertions of the ZBA and the Church are correct. But more importantly, the trial court’s order left open the possibility that either side could prevail on the merits. The order did not foreclose the possibility that the Church’s intended use of its property would be permitted. And by the same token,

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<sup>2</sup> See, generally, *Icon Constr., Inc. v. Statman, Harris, Siegel & Eyrich, LLC*, 1st Dist. No. C-090458, 2010-Ohio-2457.

<sup>3</sup> *Wedgewood Ltd. Partnership I v. Liberty Twp. Bd. Of Zoning Appeals*, 169 Ohio App.3d 840, 2007-Ohio-62, 865 N.E.2d 123.

<sup>4</sup> Id. at ¶51, citing *Neary v. Bd. of Zoning Appeals* (June 30, 1999), 2nd Dist. No. 17428.

<sup>5</sup> *Neary*, supra.

<sup>6</sup> See *Route 20 Bowling Alley, Inc., v. Mentor* (Sept. 30, 1993), 11th Dist. No. 93-L-010.

there remained the possibility PHP would prevail and that the Church's application would be denied. Under these circumstances, the trial court's order was not final and appealable.

Accordingly, this court is without jurisdiction over the case, and we sua sponte dismiss the appeals.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**CUNNINGHAM, P.J., HILDEBRANDT and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on July 14, 2010

per order of the Court \_\_\_\_\_.  
Presiding Judge