1851 CENTER FOR CONSTITUTIONAL LAW

June 29, 2009

Mr. Ted Shannon
Mayor
Village of Fairfax
5903 Hawthorne Street
Fairfax, Ohio 45227

Mr. John J. Hester
Building Official
Village of Fairfax
5903 Hawthorne Street
Fairfax, Ohio 45227

Mr. Shannon and Mr. Hester,

I represent Moto Verde and its proprietors, Tim Annett and Ryan Haines, and the owner of the space it occupies, Matthew Nickum. Your application of the Fairfax zoning code to Moto Verde, a start-up motor scooter shop in Fairfax, violates the Ohio Constitution, and if left unresolved, this application will result in litigation.

More specifically, on May 21, 2009, you determined that Moto Verde's business, a small retail motor-scooter shop, constitutes an "Automotive Sale Area," i.e. an automobile dealership, and therefore Tim and Ryan may not open for business in Fairfax, because their property resides in an area that prohibits automotive sales areas. As discussed below in greater deal, while an automotive sale area is defined as an open lot, Tim and Ryan maintain only a small interior retail space.

If you do not revisit your unlawful classification of Moto Verde, our clients will be deprived of the opportunity to open their motor scooter business, and will suffer significant economic losses. These include (1) the value of their lease agreement; (2) the value of the inventory (motor scooters and accessories) that they have acquired; and (3) the value of the thousands of dollars they have spent to submit the architectural plans that you wrongfully mandated. All of these expenditures were made in anticipation of dealing with a local government that our clients relied on to apply the plain language of its seemingly transparent zoning provisions.

As such, if this matter cannot be resolved, the Buckeye Institute's 1851 Center for Constitutional Law will file suit on behalf of Messrs Annett, Haines, and Nickum. You should look to avoid this litigation because (1) your conduct is plainly unconstitutional; (2) you will squander your taxpayers' dollars and resources in defending an unlawful (and otherwise unproductive) act; and (3) your anti-business and anti-employment stance, in today's economic climate, will result in rightfully negative publicity for your government and community.

Your Zoning Procedures Deny Due Process, both facially and as applied to Moto Verde.

You have violated our clients' entitlement to notice and an opportunity to be heard prior to being deprived of their significant property interests. Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests. The fundamental requirement of Due Process is the opportunity to be heard at a meaningful time and in a meaningful manner.[1]

Ohioans have a constitutionally protected property interest in running their * * * businesses free from unreasonable and arbitrary interference from the government. Therefore, Ohio courts consider whether the procedural safeguards provided by an ordinance like yours are sufficient to comply with the requirements of due process.[2]

To determine what process is due, courts apply the balancing test set forth in *Matthews v. Eldridge.* That test requires consideration of three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[3]

Here, the private interest is clear: Moto Verde's opportunity to exist, and its proprietor's right to earn an honest living. Your zoning misclassification has upended those rights. And it has done so in the midst of the summer, the season when a majority of Moto Verde's business would be done.

Further, this entirely erroneous deprivation could have been avoided by a simple appeals process, or even an initial hearing, where the honest application of the term "Automotive Sales Area" could have been adjudicated. No such opportunities exist in Fairfax. Nor do the opportunities for a stay or a conditional permit exist. As such, Fairfax offers too little to prevent erroneous deprivation of Moto Verde's property interests.

Finally, "due process generally requires some type of hearing prior to the deprivation of a significant property interest."[4]
Although in some circumstances, post-deprivation review can cure the lack of a predeprivation hearing, the failure to provide an avenue for *prompt* review of the governmental action would violate due process.[5] Also, the failure to provide adequate hardship relief can also violate due process.[6]

To review, on May 21, 2009, you, without a hearing, determined Moto Verde's occupancy as that of an "Automotive Sale Area."

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[1] *Mariemont Apartment Association v. Village of Mariemont*, 2007 -Ohio- 173; citing *Matthews v. Eldridge* (1976),424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18; *Morrisey v. Brewer* (1972), 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484; *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846.

[2] *Asher Investments, Inc. v. Cincinnati* (1997), 122 Ohio App.3d 126, 136, 701 N.E.2d 400; *State v. Hochhausler*, 76 Ohio St.3d 455, 459, 1996-Ohio-374, 668 N.E.2d 457.

[3] *Matthews*, supra, at 460, citing *Jones v. Cleveland*, 152 Ohio App.3d 278, 2003-Ohio-1534, 787 N.E.2d 666.

[4] *Asher*, supra, at 136, 701 N.E.2d 400.

[5] See *Hochhausler*, supra, at 461-462, 668 N.E.2d 457; *Jones v. Cleveland*, supra, *Cowan*, supra, at; *Hochhausler*, supra, at 466, 668 N.E.2d 457; *Mayfield Hts. v. Buckner* (Oct. 3, 1996), 8th Dist. No. 69221.

[6] *Hochhausler*, supra, at 461, 668 N.E.2d 457.

Next, you denied Moto Verde an opportunity to appeal this determination. Instead, when one of the proprietors requested the requisite paperwork from the village offices, you provided a form that, while labeled "Application for Appeal," in actuality only supplies the applicant an opportunity to apply for a variance.[7] This, of course, requires (1) yet another application fee; (2) notice requirements to adjacent property owners that greatly exceeds what is necessary for an appeal (notice oriented toward a variance); and (3) the proprietor's concession that their establishment is in fact an "Automobile Sale Area," even when it is not so.

Meanwhile, even your own zoning code, while purporting to grant the Fairfax BZA with jurisdiction over "administrative appeals" for "an error in any interpretation,"[8] requires the satisfaction of remarkably high hurdles (hurdles usually reserved only for variances) before a proprietor may appeal a wrongful determination by you: a proprietor must (1) research into record title holders of all adjacent properties; and (2) draw up plans demonstrating the location of the property, existing structures, locations of all right of ways, locations of all access points, locations of all easements, location of all parking areas and driveways.

Thus even if you were to offer an appeals process, which you do not, the Fairfax Zoning Code erects such draconian hurdles so as to effectively deprive a proprietor of the right to a meaningful appeal.

Finally, you have personally indicated to the proprietors of Moto Verde that it would take "several months" to hold a hearing on any variance or appeal of their designation. Given the seasonal nature of Moto Verde's business, this process, whether intentional or unintentional on your part, constitutes insufficiently prompt review.[9]

Your Application of FZC 2.008 to Moto Verde is Arbitrary and Unreasonable.

Your application of the Automotive Sales Area classification to Moto Verde's occupancy is unconstitutionally arbitrary and unreasonable.

Zoning regulations deprive the owners of real property of certain uses of it, and are in derogation of the common law. Therefore, zoning regulations must be strictly construed and not extended by implication.[10] Moreover, Ohio courts liberally construe language defining a "permitted use" so as to favor permitting the use proposed by the owner.[11]

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[7] Your "appeals" form contains, *inter alia*, the following prompts: "This appeal is requesting a variance for which of the following: * * * Describe how the proposed project does not comply with the current Zoning Code * * * Fill out an 'application for appeal' addressed to the Village of Fairfax, Board of Zoning Appeal *stating the basis for requesting the variance.* * * *"

[8] FZC 24.1(C)

[9] See *Mariemont*, supra. ("In this case, though the ordinance does provide for the filing of an appeal, it provides no time frame for deciding the appeal or for a stay of the commissioner's decision longer than 30 days. The village acknowledges that the Board of Building Appeals has no scheduled time for meetings. Instead, it meets on a case-by-case basis. Nothing in the ordinance requires the case to be heard before the expiration of the 30-day conditional permit. A delay in holding the hearing could cause a property owner to incur substantial expense in making the repairs required by the commissioner or in ceasing to rent the property. It could also open a property owner to lawsuits from tenants who have to vacate the premises. All of these consequences can occur with no determination by an objective body whether the violations are legitimate and the repairs justified. Thus, the ordinance provides no avenue for a property owner to be heard in a meaningful time and a meaningful manner.")

[10] *Lykins v. Dayton Motorcycle Club* (1972), 33 Ohio App.2d 269, 62 O.O.2d 382, 294 N.E.2d 227.

[11] *State, ex rel. Spiccia, v. Abate* (1964), 6 Ohio App.2d 233, 29 O.O.2d 310, 95 Ohio Law Abs. 94, 217 N.E.2d 709.

All analysis of the legitimacy of zoning regulations must be understood within this context. In applying the terms and definitions in a community's zoning code to existing business enterprises, zoning officials and bodies "act in the exercise of the police power, and their determination must be reasonable in order to be constitutionally valid."[12]

Stated a different way, a court may set aside or vacate a denial of approval by the authority if the application of the zoning code is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.[13]

You have chosen to characterize Moto Verde as an "Automotive Sales Area." This characterization is unreasonable, and therefore unconstitutional. As you know, Fairfax Zoning Code defines an "Automotive Sale Area" as "an open lot, other than a street, used for the display, sale, or rental of new or used motor vehicles or trailers in operable condition and where no repair work is done."[14] Lest there be any confusion, an "open lot" is one that "visible; exposed to the public view; * * * not closed."[15]

As you also know, Moto Verde does not occupy an open lot, and in fact, does not even rent a parcel that possesses an open lot. Instead, and again as you know, Moto Verde only occupies an indoor retail space.

Secondly, as the proprietors explained to you in the business plan that you demanded, their business is a retail business, more akin to a salon or art store, than to an automobile dealership. They occupy a 1,000 square foot retail space, and expect one to two customers per day.

Despite this knowledge, on May 21, 2009 you concluded that Moto Verde is an Automotive Sale Area, i.e. an open lot for the sale of motor scooters. Because Moto Verde occupies space located in an "E Business Mixed Use District," a district which, you note, prohibits Automotive Sales Areas, your inaccurate classification has prohibited Moto Verde from operating its retail scooter business.

Further, a review of all applicable portions of the Fairfax Zoning Code compels the conclusion that the code simply fails to address or include the use proposed by appellant Moto Verde. You have acknowledged this much to its proprietors. Even though you assert that Moto Verde's use may offer similar problems of traffic congestion and control (which it would not) offered by automobile dealerships, Courts have held that merely because a use may raise similar issues cannot make it something that it is not.[16] On this topic, Ohio courts have been clear:

> * * * [T]raffic regulation must remain a byproduct of zoning activities, and the primary product must always be to insure the greatest enjoyment of one's land, taking into account the rights of others and the needs of the community. Thus, if the present proposal is otherwise lawful and proper, the public authorities must find some manner of dealing with the traffic hazards * * *.[17]

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[12] *Rotellini v. West Carrollton Board of Zoning Appeals* (1989), 64 Ohio App.3d 17, 580 N.E. 2d 500, citing *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303.

[13] *Rotellini*, supra.

[14] Fairfax Zoning Code 2.008.

[15] Black's Law Dictionary (8th Ed. 2004).

[16] *Rotellini*, supra.

[17] *State, ex rel. Killeen Realty Co., v. East Cleveland* (1959), 169 Ohio St. 375, 386, 8 O.O.2d 409, 415, 160 N.E.2d 1, 8.

For these reasons, you have applied your zoning code in an unreasonable, and transitively unconstitutional, manner. This application must cease immediately.

Your Application of FZC 2.008 to Moto Verde Constitutes a Regulatory Taking.

Your unreasonable classification of Moto Verde's occupancy as that of an Automobile Sale Area has taken the proprietor's[18] use of the property without compensation. The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation.[19]

When government action deprives one of the use of his land for a temporary period of time, "the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period."[20] A landowner can establish a temporary taking from the imposition of a zoning scheme by establishing that the scheme amounted to a partial taking that deprived the landowner of less than 100 percent of his land's economically viable use.[21]

Meanwhile a regulatory-takings claim requires an examination of (1) the economic impact of the regulation on Moto Verde, (2) the extent to which the regulation has interfered with Moto Verde's distinct investment-backed expectations, and (3) the character of the government action.[22]

Here, the economic impact is devastating: your classification completely prohibits Moto Verde from operating. The interference with investment-backed expectations is blatant: Moto Verde's proprietors entered into a lease agreement and purchased significant inventory in the form of motor scooters and accessories. They did so under the seemingly safe assumption that you would not arbitrarily apply the "Automobile Sale Area" designation to their occupancy. Finally, the character of your action is without support: the designation simply does not apply, and is so unreasonable as to be unconstitutional.

It warrants notation that, due to your zoning misclassification, Tim and Ryan may not even sell their existing motor-scooter inventory. Under Ohio law, Tim and Ryan must be "dealers" to sell their inventory. And they cannot obtain a dealership license without a shop. Thus, if this matter is not resolved, the value of Moto Verde's entire inventory is destroyed.

Absent your efforts to immediately remedy this matter, we intend to file an action for declaratory and injunctive relief, which will include a Motion for a Temporary Restraining Order and Preliminary Injunction, in the Hamilton County Court of Common Pleas, asserting the following: (1) your application of the Automotive Sales Area designation to Moto Verde's occupancy is unconstitutionally unreasonable; (2) your application of the Automotive Sale Area designation to Moto Verde's Occupancy effectuates a

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[18] The taking of a leased interest may constitute a taking. See *United States v. General Motors Corp.* (1945), 323 U.S. 373.

[19] *State ex rel. Duncan v. Middlefield,* 120 Ohio St.3d 313, 2008-Ohio-6200, at ¶ 16, quoting *State ex rel. Shemo,* 95 Ohio St.3d at 63.

[20] *State ex rel. Shemo,* 95 Ohio St.3d at 67, quoting *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles* (1987), 482 U.S. 304, 319.

[21] *State ex rel. Gilmore Realty, Inc. v. Mayfield Hts.,* 119 Ohio St.3d 11, 2008-Ohio-3181, at ¶ 21; *State ex rel. Shemo,* 95 Ohio St.3d at 63-64.

[22] *Penn Cent. Transp. Co. v. New York City* (1978), 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631; *Gilmour Realty,* 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d 320, ¶ 21.

regulatory taking; and (3) your zoning code's procedural safeguards, as applied to Moto Verde are inadequate to provide due process of law.

Finally, please note that, in the event of litigation, we plan on recovering statutory attorneys fees. These fees are available to us when remedying unconstitutional conduct.

It is my intention to resolve this matter with you prior to instituting litigation against the village of Fairfax. However, time is of the essence, and we will act swiftly to remedy this matter if an agreement cannot be reached. Please contact me at immediately.

Sincerely,

Maurice A. Thompson
Director
1851 Center for Constitutional Law
Buckeye Institute