THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2017 TERM

Case No. 2017-0313

APPEAL OF Mary Allen & a.; Appeal of Fred Ward
Appeal by Petition Pursuant to RSA 541:6 (2007) and Rule 10 of the New Hampshire Rules of Supreme Court of a Decision of the Site Evaluation Committee

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REPLY BRIEF OF THE APPELLANTS, MARY ALLEN, BRUCE AND BARBARA BERWICK, RICHARD BLOCK, ROBERT CLELAND, KENNETH HENNINGER, JILL FISH, ANNIE LAW, JANICE LONGGOOD, MARK AND BRENDA SCHAEFER, THE STODDARD CONSERVATION COMMISSION, AND THE WINDACTION GROUP

Submitted by:

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ORAL ARGUMENT REQUESTED
To be argued by:

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Copies of non-New Hampshire cases listed above have been appended to this Reply Brief for the Court's convenience.

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IV. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE

All statutes and regulations are provided in full in the Appellants' Appendix to the Brief with the exception of RSA 273-A:2 and RSA 541-A:34, which is appended hereto.

V. STATEMENT OF THE FACTS

The facts and history pertinent to this appeal are set forth in the Appellants' Brief.

VI. ARGUMENT[1]

The Appellants file this Reply Brief in response to the Brief of Appellee Antrim Wind Energy, LLC. This Court should reject the arguments set forth in AWE's Brief.[2] For the reasons set forth in the Appellant's Brief and this Reply Brief, the decision of this subcommittee was unlawful and unreasonable because: (a) the consideration of AWE's 2015 Application was barred by the SEC's prior denial of AWE's 2012 Application in Antrim I under the doctrine of Fisher v. Dover, 120 N.H. 187 (1980); (b) the subcommittee was unlawfully constituted; (c) AWE's Sound Assessment did not follow the SEC's administrative rules and, if properly prepared, would have shown noise levels that exceed the permissible limits set forth in the SEC's administrative rules; and (d) there was insufficient evidence as to the feasibility and efficacy of various mitigation measures associated with the project.

a. The 2015 Application was barred by the Doctrine of Fisher v. Dover.

AWE's counter-arguments to the Appellants' claims of error associated with res judicata and the doctrine of Fisher v. Dover are comprised of a misstatement of the Appellants' arguments and misapplications of applicable law.

First, AWE is incorrect that, because AWE could not raise the changes in the 2015 Application in the Antrim I, res judicata does not apply. See AWE Brief at 31-32. AWE's argument ignores that AWE sought to modify the 2012 Application after the close of evidence,

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[1] The citations and abbreviations in this Reply Brief follow the format used by Appellants in their Brief.

[2] AWE's asserts that the Appellants only believe there is "one technical error" in the subcommittee's order. AWE Brief at 35. The Appellants' fifty-two page Motion for Rehearing in which the Appellants raised fifteen claims of error associated with the subcommittee says otherwise. See Vol. II, Bk. 7 at 7338-90; Jones v. Barnes, 463 U.S. 745, 751-52 (1983) (holding narrowing issues a necessary part of appellate advocacy).

multiple days of testimony, multiple days of deliberations, and the issuance of a written decision. See App. at 245, 257, 319. AWE could have sought to modify the 2012 Application when it received Ms. Vissering's suggested modifications, but AWE chose not to.[3]

Second, AWE frequently and incorrectly asserts that the Appellants' res judicata argument is predicated "on photographs alone."[4] AWE Brief at 32. This is not accurate. The Appellants' arguments focus on the de minimis changes to the project set forth in 2015 Application, i.e. the reduction of eight turbines by three feet, the reduction of another turbine by 45 feet (9.3%), the removal of one turbine, and the addition of off-site mitigation that the SEC previously found to be irrelevant for aesthetic mitigation. The Appellants use the photo simulations to demonstrate these de minimis changes.

That said, focus on photo simulations is appropriate here when the SEC in Antrim I denied the 2012 Application because of how the project would look from various scenic resources as reflected in photo simulations. App. at 386-95, 401-29. These photo simulations are not an analysis prepared by a paid expert; they are visual depictions of how the project will look. It was the photo simulations that stood front and center for much of the aesthetic analysis in the SEC's decision in Antrim I and subcommittee's deliberations in Antrim II. To determine

[3] AWE's argument is a misstatement of the Fisher doctrine. Fisher and its progeny do not stand for the proposition that any change to an application will allow for a subsequent application to be filed. Rather, the modification must be a change that meaningfully resolves the underlying concern of the first board. CBDA Dev. v. Town of Thornton, 168 N.H. 715, 724 (2016). To argue, as AWE does, that Fisher does not apply because an applicant could not present a modified application in the first instance would mean that the Fisher doctrine only applies when the same application is filed after a denial. This interpretation undermines the Fisher doctrine's purpose: avoiding capricious reasoning, and instilling trust and foreseeability in administrative processes. See id. at 721-22.

[4] AWE argues that the SEC's rule changes preclude the application of res judicata or the Fisher doctrine, stating that the new rules "required a far more detailed and refined analysis" than what was previously required. AWE Brief at 32. AWE's argument, however, ignores the applicable law: it is not merely that a change in law occurs; it is that the change in law must create the possibility of a different outcome from the prior decision. Brandt Dev. Co. v. City of Somersworth, 162 N.H. 553, 559-60 (2011). The SEC's analysis in Antrim I considered similar evidence and applied a similar analysis to what is now required by the SEC's rules. There is no credible argument that the change in the SEC's rules would have altered the outcome in the Antrim I case.

whether the SEC's prior concerns in Antrim I were "meaningfully resolved," one has to look at what led to those prior concerns; that means looking at photo simulations.

AWE incorrectly states that the Appellants focused on photo simulations in a vacuum and ignored that the subcommittee in Antrim II focused on matters such as "existing character of the area," "the significance of scenic resources," "the public's use of those resources," and "proposed mitigation." AWE Brief at 33. In reality, the Appellants' use photo simulations to demonstrate that the subcommittee in Antrim I ignored the SEC's prior concerns regarding impacts to scenic resources. The photo simulations were of scenic resources which the SEC in Antrim I used to determine that the project would have unreasonable adverse aesthetic impacts to scenic resources.[5] App. at 287. This determination was made after the SEC considered the character of the area, the significance of the resource, the public use of the resource, and AWE's proposed mitigation. App. at 287-89. The subcommittee here came to the opposite conclusions from the SEC in Antrim I as to the character, public use, and significance of various scenic resources, despite there being no assertion that any aspect of the scenic resources changed between the 2012 and 2015 Applications. The Appellants do not argue one matter in a vacuum; rather, they argue the subcommittee substituted the SEC's prior judgment for its own.

Third, the Court should reject AWE's claim that the Appellants' res judicata arguments ignore "the highly detailed, meticulous analysis of each site put forward by the experts," namely David Raphael.[6] AWE Brief at 33. The Fisher doctrine requires looking at whether a

[5] Specifically, the SEC found that the project would cause "significant qualitative impacts upon Willard Pond, Bald Mountain, Goodhue Hill, and Gregg Lake," and moderate impacts on Robb Reservoir, Island Pond, Highland Lake, Nubanusit Pond, Black Pond, Franklin Pierce Lake, Meadow Marsh, and Pitcher Mountain." Appd'x. at 287.

[6] Mr. Raphael's analysis contradicted the SEC's analysis in Antrim I as to the character, importance, and public use of various scenic resources. Other than the identification of scenic resources, the analysis gave no credit or consideration to the Antrim I decision.

subsequent application "has been modified so as to meaningfully resolve the board's initial concerns." CBDA Dev. v. Town of Thornton, 168 N.H. at 725. The focus is not the evidence presented in support of the new application, but the proposal itself. See CBDA, 168 N.H. at 725-26; Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529, 535-36 (2009) (noting proposal to construct house at lower elevation to address ZBA's concerns avoids application of Fisher Doctrine); Morgenstern v. Town of Rye, 147 N.H. 558, 566 (2002) (holding proposal to reduce house size in response to ZBA's concerns precludes Fisher doctrine). That AWE acquired an expert to prepare a new analysis does not preclude the application of the Fisher doctrine. See Ketchel v. Bainbridge Township, 607 N.E.2d 22, 27 (Ohio Ct. App. 1992) (holding new evidence is not a "change in the facts" which precludes application of res judicata).

Lastly, AWE is mistaken that subcommittee could consider AWE's offsite mitigation package in determining whether the 2015 Application meaningfully resolves the concerns of the SEC in Antrim I. AWE Brief at 34-35. The SEC in Antrim I was clear: off-site mitigation could not be considered in analyzing the project's aesthetic effects.[7] Both the subcommittee and AWE rely upon the phrases "the proposed Facility" and "in this case" to narrow the SEC's findings in Antrim I. See AWE Brief at 33-34; App. at 194. AWE and the subcommittee ignore the context of the SEC's statement. See Appeal of Lagenfeld, 160 N.H. 85, 89 (2010) (setting forth canons of construction for tribunal's orders). The context of this statement demonstrates

[7] Despite AWE's touting of its mitigation package as "preserving the ridgeline," AWE ignores that the conversation easements granted contain one large exception: AWE has reserved the right in the conservation deeds to install and operate up to thirteen wind turbines on the conservation land for fifty years from the effective date of the lease that AWE executed to obtain the necessary real estate interests to construct the project. See e.g. Vol. I, Bk. 4 at 2361-62.

AWE states that it adopted Ms. Vissering's suggested mitigation measures. AWE Brief at 10. Ms. Vissering suggested, in part, the removal of turbine 9 and 10 and the lowering of all remaining turbines. In the 2015 Application, turbine 9 remains, and the remaining eight turbines were lowered three feet. App. at 383-84. The Appellants disagree with AWE's representation.

that the SEC rejected the use of off-site mitigation to offset the aesthetic impacts associated with placing nearly 500 foot wind turbines on Tuttle Hill, which is what the 2015 Application seeks to do. AWE's argument and the subcommittee's decision result in an inconsistent determination, exactly the result to be avoided by the Fisher doctrine. CBDA, 168 N.H. at 721-22.

The subcommittee acted unlawfully and unreasonably in failing to find that the SEC's prior decision in Antrim I precluded consideration of the 2015 Application.

b. The subcommittee was unlawfully constituted.

This Court should hold that the subcommittee was unlawfully constituted in violation of RSA chapter 162-H and should reject AWE's arguments that: 1) Appellants' argument was waived; 2) Member Whitaker's absence did not trigger the obligation to replace her; 3) Appellants' argument is governed by Appeal of Keene State College Education Association, NHEA/NEA, 120 N.H. 32 (1980); and, 4) there were enough members for a quorum.

First, the Appellants did not waive the unlawful constitution argument because the Member Whitaker's absence could not have been known until after deliberations.[8] Up and until the close of deliberations, Member Whitaker could have participated by reviewing the record and participating in deliberations. See RSA 541-A:34 (2007). The claim of error, therefore, could not have been raised until the close of deliberations.[9]

Second, AWE is incorrect that there was no evidence that a "vacancy" existed on the subcommittee because Member Whitaker sat for matters associated with the SEC's dockets in

[8] The cases cited by AWE in support of waiver are inapposite. In Appeal of Cheney, 130 N.H. 589 (1988) and Fox v. Town of Greenland, 151 N.H. 600 (2004), addressed the issue of disqualification of members on a municipal body. This case does not involve disqualification, and the Appellants timely raised Member Whitaker's absence.
[9] The requirement that all subcommittees of the SEC have two public members exists to ensure that the public's interests are represented on the subcommittee. The Appellants cannot waive a right that exists for the entire public.

Northern Pass and Seacoast Reliability. AWE Brief at 27. It is not enough for compliance with RSA 162-H:4-a that a member was appointed to the subcommittee; RSA 162-H:4-a requires both public members to "serve" on each subcommittee. Member Whitaker at no time "served" on the subcommittee. Member Whitaker did not have to be so unavailable such that a vacancy existed on the SEC for the Chairperson's obligation to seek her replacement; RSA 162-H:3 is not so limited. Rather, the Chairperson is to seek the appointment of a replacement public member when that member recuses herself or is "not otherwise available." RSA 162-H:3, XI. Member Whitaker was not available for any portion of these hearings; her absence speaks for itself.

AWE's reliance upon Appeal of Keene is unpersuasive because the administrative body in that case, the PELRB, is subject to a different statutory scheme than the SEC. The statute at issue in Appeal of Keene was RSA 273-A:2. See Appeal of Keene, 120 N.H. at 35. That statute provided, in part, that the PELRB shall consist of five members, two of which shall represent labor, with three members constituting a quorum. Id. This Court held that RSA 273-A:2 did not require both labor representatives to be present for the PELRB to conduct business. Id. at 34-35.

Unlike RSA chapter 162-H, there is no statutory authority for the creation of subcommittees under RSA 273-A, nor is there an analogous provision of RSA 273-A which requires the replacement of public members who are absent. Compare RSA 162-H:3 with RSA chapter 273-A; see also, Schiavi v. City of Rochester, 152 N.H. 487, 489-90 (2005) (use of the word "shall" in a statutory provision is a command).[10] RSA 162-H:3 was enacted as part of a statutory overhaul of the SEC, a fundamental purpose of which was the protection of the public's interest. See RSA 162-H:1. Appeal of Keene is distinguishable in this instance, and the SEC

[10] In 1979, the Legislature amended RSA 273-A:2 to provide that one labor representative is needed for a quorum.

had an obligation to seek a replacement for Member Whitaker when it became clear through Member Whitaker's repeated absences that she was not available.

AWE conflates Appellants' argument with the requirement to have a quorum of five members. While a quorum may be sufficient for a subcommittee to meet on a particular day, this should not be construed as sanctioning the failure to address the absence of a public member when that public member has not attended a single day of hearings or deliberations. It would be one thing for a public member to be absent from one day of proceedings or deliberations, but for a public member to be absent from all hearing days and all days of deliberations is a violation of RSA 162-H:3 and is expressly contrary to the intent of the Legislature, see RSA 162-H:1.

AWE has not put forth any credible or persuasive argument to excuse the glaring absence of a public member from the subcommittee. As a result, the subcommittee adjudicated a matter impacting the health, safety and welfare of the entire region without the participation and perspective of a necessary public member and, in doing so, acted unlawfully and unreasonably.

c. AWE's arguments ignore the importance of predictive sound modeling.

AWE attempts to undermine the Appellants' arguments regarding the errors associated with Mr. O'Neal's Sound Assessment Report by stating that "predictive sound modeling is just one part of the Rules." AWE Brief at 38.[11] AWE's argument, in a nutshell, is that the SEC's rules regarding predictive sound modeling and the limits imposed therein may be disregarded because things might shake out differently once the project is constructed. AWE's argument ignores that the rules for predictive sound assessments exist to allow the subcommittee and parties the ability to gauge the impact of a project before the land and the health, safety and

[11] AWE incorrectly claims Appellants relied on Table 1 of ISO 9613-2 for the application of a g-factor. AWE Brief at 36. Table 1 does not apply to g-factors. App. at 466. Appellants relied on Table 5's accuracy adjustments.

welfare of residents of a community are disturbed. It is a necessary and vital part of the permitting process. It is not one that can be cast aside as flippantly as AWE suggests.[12]

AWE's argument also ignores that SEC rules require the analysis of noise levels under a worst-case scenario and that a certificate shall not issue if noise levels under these worst-case scenarios exceed maximum thresholds. N.H. CODE OF ADMIN. R. Site 301.18(c). ISO 9613-2 states that the adjustments in Table 5 may be higher based on meteorological conditions, which is confirmed by a Massachusetts Clean Energy Center study that reported manufacturer's guaranteed noise levels may be higher due to meteorological conditions. App. at 477; Vol. III, Bk. 3 at 1905. But see Vol. I, Bk. 5 at 3740; Vol. II, Bk. 3 at 2573 (O'Neal testifying that he used manufacturer's guarantee as noise emission input for Sound Assessment).

AWE's arguments abandon predictive modeling for vague promises of compliance, an untenable position in matters of such high public importance as siting energy facilities. The subcommittee acted unlawfully and unreasonably in relying upon AWE's Sound Assessment.

d. AWE's arguments fail to address the lack of evidence on the record.

The Court should not credit AWE's attempts to counter the Appellants' arguments regarding the lack of evidence on sound, shadow-flicker, and night-lighting mitigation. The SEC's rules required AWE to provide "a description and characterization of the potential visual impacts" of aircraft warning lighting and required the subcommittee to evaluate the nighttime visual impacts of the facility. N.H. CODE OF ADMIN. R. Site 301.05 (b) (9); 301.14 (a)(5). The subcommittee could not evaluate nighttime visual impacts without knowing how frequently and for what duration these lights would operate, and that evidence was not submitted.

[12]Contrary to AWE's assertions, post-construction studies of wind farms relied upon by Mr. O'Neal demonstrate that a 0.0 g-factor and an adjustment for limitations in ISO 9613-2 were necessary and track noise levels post-construction. Vol. III, Bk. 3 at 1908; Vol. III, Bk. 3 at 1750, 1755, 1765.

With regard to NRO, AWE does not contest that the implementation of NRO will impact the operations and generation capacity of the project. AWE Brief at 40-42. There is simply no evidence as to whether the implementation of NRO will impact AWE's financial capacity to operate the Project.[13] The subcommittee acted unlawfully and unreasonably in issuing a Certificate of Site and Facility in the absence of such evidence.

Finally, AWE's assertions regarding shadow flicker ignore the fact that the shadow control protocol proposed by the SEC was still being designed as of the adjudicative hearings and that there was no detail as to how the specific program to be employed here would work or when an exceedance would be deemed to occur. Vol. I, Bk. 3 at 2558-63; Vol. II, Bk. 3 at 3306-17; Vol. II, Bk. 4 at 3493-95. Again, the subcommittee and the public are reliant upon vague assurances from AWE that, even though shadow flicker was projected to exceed maximum permissible standards, AWE would not let such a thing happen. Such evidence is insufficient for AWE to carry its burden of proof to obtain a Certificate of Site and Facility.

The siting of energy infrastructure requires more than base assertions. It requires details that can be understood and vetted. AWE did not provide that level of detail and the subcommittee's decision, relying on AWE's promises, was not supported by evidence.

VII. CONCLUSION

The Appellants have been fighting this proposal since 2011. They have now participated in four regulatory dockets just on this project. When the SEC ruled as it did in Antrim I, the Appellants believed, finally, that the threat posed to their homes, their health, and their safety

[13] In Antrim I, the SEC refused to consider CFP's suggested changes because of the potential impact to other aspects of the project. App. at 290-91. If aesthetic mitigation measures could not be considered without fully understanding the impacts to other aspects of the project, i.e. financial and operational characteristics, the subcommittee should not have issued a Certificate based on NRO without fully analyzing NRO's impacts to other aspects of the project.

had come to an end. Unfortunately, they were wrong. AWE made de minimis changes to its 2012 Application and refiled in 2015. The only major change between the 2012 and 2015 Applications was the make-up of the adjudicative body considering the Applications.

It cannot be that critical decisions impacting the health, safety and welfare of the community and the environment can be made by re-litigating previously decided matters. It cannot be that such critical decisions can be made when a legislatively mandated representative of the public is absent from nearly every public hearing. And it cannot be that such critical decisions can be made when the SEC's own rules are circumvented and ignored for vague assurances of mitigation and compliance. The interests of administrative finality, consistency, and, most of all, justice exhort this Court to reverse the subcommittee's decision.

Respectfully submitted,

Mary Allen, Bruce Berwick, Barbara Berwick, Richard Block, Robert Cleland, Kenneth Henninger, Jill Fish, Annie Law, Janice Longgood, Brenda Schaefer, Mark Schaefer, the Stoddard Conservation Commission, and the Windaction Group
By their attorneys:

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Dated: December 20, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, Reply Brief of the Appellants has been mailed this 20th day of December, 2017 to all counsel and/or parties of record and the SEC.

_____
Eric A. Maher, Esq.

Jones v. Barnes

Supreme Court of the United States

February 22, 1983, Argued ; July 5, 1983, Decided

No. 81-1794

Reporter
463 U.S. 745 *; 103 S. Ct. 3308 **; 77 L. Ed. 2d 987 ***; 1983 U.S. LEXIS 105 ****; 51 U.S.L.W. 5151

JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. v. BARNES

Prior History: [****1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Disposition: 665 F.2d 427, reversed.

Syllabus

After respondent was convicted of robbery and assault in a jury trial in a New York state court, counsel was appointed to represent him on appeal. Respondent informed counsel of several claims that he felt should be raised, but counsel rejected most of the suggested claims, stating that they would not aid respondent in obtaining a new trial and that they could not be raised on appeal because they were not based on evidence in the record. Counsel then listed seven potential claims of error that he was considering including in his brief, and invited respondent's "reflections and suggestions" with regard to those claims. Counsel's brief to the Appellate Division of the New York Supreme Court concentrated on three of the claims, two of which had been originally suggested by respondent. In addition, respondent's own *pro se* briefs were filed. At oral argument, counsel argued the points presented in his own brief, but not the arguments raised in the *pro se* briefs. The Appellate Division affirmed the conviction. After respondent was unsuccessful in earlier collateral [****2] proceedings attacking his conviction, he filed this action in Federal District Court, seeking habeas corpus relief on the basis that his appellate counsel had provided ineffective assistance. The District Court denied relief, but the Court of Appeals reversed, concluding that under *Anders* v. *California*, 386 U.S. 738 -- which held that an appointed attorney must advocate his client's cause vigorously and may not withdraw from a nonfrivolous appeal -- appointed counsel must present on appeal all nonfrivolous arguments requested by his client. The Court of Appeals held that respondent's counsel had not met this standard in that he failed to present certain nonfrivolous claims.

Held: Defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant. The accused has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to take an appeal; and, with some limitations, he may elect to act as his own advocate. However, an indigent defendant has no constitutional right to compel appointed counsel [****3] to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. By promulgating a *per se* rule that the client must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermined the ability of counsel to present the client's case in accord with counsel's professional evaluation. Experienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance

in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed. The decision in *Anders*, far from giving support to the Court of Appeals' rule, is to the contrary; *Anders* recognized that the advocate's role "requires that he support his client's appeal to the best of his ability." 386 U.S., at 744. The appointed counsel in this case did just that. Pp. 750-754.

Counsel: Barbara D. Underwood argued the cause for petitioners. With her on the briefs was Elizabeth Holtzman.

[****4] Sheila Ginsberg Riesel argued the cause for respondent. With her on the brief was Alan Mansfield. *

Judges: BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, post, p. 754. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 755.

Opinion by: BURGER

Opinion

[*746] [**3310] [***990] CHIEF JUSTICE BURGER delivered the opinion of the Court.

[1A]We granted certiorari to consider whether defense counsel assigned to prosecute an appeal from a criminal conviction has a constitutional duty to raise every nonfrivolous issue requested by the defendant.

I

In 1976, Richard Butts was robbed at knifepoint by four men in the lobby of an apartment building; he was badly [*747] beaten and his watch and money were taken. Butts informed a Housing Authority [****5] detective that he recognized one of his assailants as a person known to him as "Froggy," and gave a physical description of the person to the detective. The following day the detective arrested respondent David Barnes, who is known as "Froggy."

Respondent was charged with first- and second-degree robbery, second-degree assault, and third-degree larceny. The prosecution rested primarily upon Butts' testimony and [***991] his identification of respondent. [1] During cross-examination, defense counsel asked Butts whether he had ever undergone psychiatric treatment; however, no offer of proof was made on the substance or relevance of the question after the trial judge *sua sponte* instructed Butts not to answer. At the close of trial, the trial judge declined to give an instruction on accessorial liability requested by the defense. The jury convicted respondent of first- and second-degree robbery and second-degree assault.

[****6] The Appellate Division of the Supreme Court of New York, Second Department, assigned Michael Melinger to represent respondent on appeal. Respondent sent Melinger a letter listing several claims that he felt should be raised. [2] Included were claims that Butts' identification testimony should have been suppressed, that the trial judge improperly excluded psychiatric evidence, and that respondent's trial counsel was

* Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey, Edwin S. Kneedler, and Deborah Watson filed a brief for the United States as amicus curiae urging reversal.

J. Vincent Aprile II filed a brief for the National Legal Aid and Defender Association as amicus curiae urging affirmance.

[1] This identification, which took place in a one-on-one meeting arranged by the police, was the subject of a pretrial hearing. The trial judge found it unnecessary to rule on the validity of that identification. He concluded that Butts' subsequent in-court identification was based upon an independent source, since Butts had known respondent for several years prior to the robbery.

[2] Respondent's letter is not in the record. Its contents may be inferred from Melinger's letter in response.

ineffective. Respondent also enclosed a copy of a *pro se* brief he had written.

In a return letter, Melinger accepted some but rejected most of the suggested [**3311] claims, stating that they would not aid [*748] respondent in obtaining a new trial and that they could not be raised on appeal because they were not based on evidence in the record. Melinger then listed seven potential claims of error that he was considering including in his brief, and invited respondent's "reflections and [****7] suggestions" with regard to those seven issues. The record does not reveal any response to this letter.

Melinger's brief to the Appellate Division concentrated on three of the seven points he had raised in his letter to respondent: improper exclusion of psychiatric evidence, failure to suppress Butts' identification testimony, and improper cross-examination of respondent by the trial judge. In addition, Melinger submitted respondent's own *pro se* brief. Thereafter, respondent filed two more *pro se* briefs, raising three more of the seven issues Melinger had identified.

At oral argument, Melinger argued the three points presented in his own brief, but not the arguments raised in the *pro se* briefs. On May 22, 1978, the Appellate Division affirmed by summary order, *New York* v. *Barnes*, 63 App. Div. 2d 865, 405 N. Y. S. 2d 621 (1978). The New York Court of Appeals denied leave to appeal, *New York* v. *Barnes*, 45 N. Y. 2d 786 (1978).

On August 8, 1978, respondent filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. Respondent raised five [****8] claims of error, including ineffective assistance of trial counsel. The District Court held the claims to be without merit and dismissed the petition. *United States ex rel. Barnes* v. *Jones*, No. 78-C-1717 (Nov. 27, 1978). The Court of Appeals for the Second Circuit affirmed, 607 F.2d 994, [***992] and we denied a petition for a writ of certiorari, 444 U.S. 853 (1979).

In 1980, respondent filed two more challenges in state court. On March 4, 1980, he filed a motion in the trial court for collateral review of his sentence. That motion was denied on April 28, and leave to appeal was denied on October 3. Meanwhile, on March 31, 1980, he filed a petition in the [*749] New York Court of Appeals for reconsideration of that court's denial of leave to appeal. In that petition, respondent for the first time claimed that his *appellate* counsel, Melinger, had provided ineffective assistance. The New York Court of Appeals denied the application on April 16, 1980, *New York* v. *Barnes*, 49 N. Y. 2d 1001.

Respondent then returned to United States District Court for the second time, with a petition for habeas corpus based on the claim [****9] of ineffective assistance by appellate counsel. The District Court concluded that respondent had exhausted his state remedies, but dismissed the petition, holding that the record gave no support to the claim of ineffective assistance of appellate counsel on "any . . . standard which could reasonably be applied." No. 80-C-2447 (EDNY, Jan. 30, 1981), reprinted in App. to Pet. for Cert. 28a. The District Court concluded:

"It is not required that an attorney argue every conceivable issue on appeal, especially when some may be without merit. Indeed, it is his professional duty to choose among potential issues, according to his judgment as to their merit and his tactical approach." *Id.*, at 28a-29a.

A divided panel of the Court of Appeals reversed, 665 F.2d 427 (1981). [3] Laying down a new standard, the majority held that when "the appellant requests that [his attorney] raise additional colorable points [on appeal], counsel *must argue the additional points to the full extent of his*

[3] By this time, at least 26 state and federal judges had considered respondent's claims that he was unjustly convicted for a crime committed five years earlier; and many of the judges had reviewed the case more than once. Until the latest foray, all courts had rejected his claims.

[**3312] *professional ability." Id.*, at 433 (emphasis added). In the view of the majority, this conclusion followed from *Anders* v. *California*, 386 U.S. 738 (1967). [****10] In *Anders*, this Court held that an appointed attorney must advocate his client's cause vigorously and may not withdraw from a nonfrivolous appeal. [*750] The Court of Appeals majority held that, since *Anders* bars counsel from abandoning a nonfrivolous appeal, it also bars counsel from abandoning a nonfrivolous issue on appeal.

"[Appointed] counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process . . . ." 665 F.2d, at 433.

The Court of Appeals went on to hold that, "[having] demonstrated that appointed counsel failed to argue colorable claims at his request, an appellant need not also demonstrate a likelihood of success on the merits of those claims." *Id.*, at 434.

[****11] The court concluded that Melinger [***993] had not met the above standard in that he had failed to press at least two nonfrivolous claims: the trial judge's failure to instruct on accessory liability and ineffective assistance of trial counsel. The fact that these issues had been raised in respondent's own *pro se* briefs did not cure the error, since "[a] pro se brief is no substitute for the advocacy of experienced counsel." *Ibid.* The court reversed and remanded, with instructions to grant the writ of habeas corpus unless the State assigned new counsel and granted a new appeal.

Circuit Judge Meskill dissented, stating that the majority had overextended *Anders*. In his view, *Anders* concerned only whether an attorney must pursue nonfrivolous *appeals*; it did not imply that attorneys must advance all nonfrivolous *issues*.

We granted certiorari, 457 U.S. 1104 (1982), and we reverse.

II

[2] [3] [4]In announcing a new *per se* rule that appellate counsel must raise every nonfrivolous issue requested by the client, [4] [*751] the Court of Appeals relied primarily upon *Anders* v. *California, supra*. There is, of course, no constitutional right [****12] to an appeal, but in *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956), and *Douglas* v. *California*, 372 U.S. 353 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent. It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal, see *Wainwright* v. *Sykes*, 433 U.S. 72, 93, n. 1 (1977) (BURGER, C. J., concurring); ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980). In addition, we have held that, with some limitations, a defendant may elect to act as his or her own advocate, *Faretta* v. *California*, 422 U.S. 806 (1975). Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.

[****13]

[**3313] [5]This Court, in holding that a state must provide counsel for an indigent appellant on his first appeal as of right, recognized the superior ability of trained counsel in the "examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf," *Douglas* v. *California, supra*, at 358. Yet by promulgating a *per se* rule that the client, not the professional advocate, must be allowed to decide what issues are

[4] The record is not without ambiguity as to what respondent requested. We assume, for purposes of our review, that the Court of Appeals majority correctly concluded that respondent insisted that Melinger raise the issues identified, and did not simply accept Melinger's decision not to press those issues.

to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation.

[***994] Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, [*752] or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:

"One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion [****14] that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [Experience] on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, Advocacy Before the United States Supreme Court, 25 Temple L. Q. 115, 119 (1951).

Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

"Most cases present only one, two, or three significant questions . . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." R. Stern, Appellate Practice in the United States 266 (1981). [5]

[****15] [6A] [7A]There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This [*753] has assumed a greater importance in an era when oral argument is strictly limited in most courts -- often to as little as 15 minutes -- and when page limits on briefs are widely imposed. See, *e. g.*, Fed. Rule App. Proc. 28(g); McKinney's New York Rules of Court §§ 670.17(g)(2), 670.22 (1982). Even in a court that imposes no time or page limits, however, the new *per se* rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments -- those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, The Argument of an Appeal, 26 A. B. A. J. 895, 897 (1940) -- in a verbal mound made up of strong and weak contentions. See generally, *e. g.*, Godbold, Twenty Pages and Twenty Minutes -- Effective Advocacy on Appeal, 30 Sw. L. J. 801 (1976). [6]

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[5] Similarly, a manual on practice before the Court of Appeals for the Second Circuit declares: "[A] brief which treats more than three or four matters runs serious risks of becoming too diffuse and giving the overall impression that no one claimed error can be serious." Committee on Federal Courts of the Association of the Bar of the City of New York, Appeals to the Second Circuit 38 (1980).

[6] [6B]The ABA Model Rules of Professional Conduct provide:

"A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, . . . *as to a plea to be entered, whether to waive jury trial and whether the client will testify.*" Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982) (emphasis added).

With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.

[7B]Respondent points to the ABA Standards for Criminal Appeals, which appear to indicate that counsel should accede to a client's insistence on pressing a particular contention on appeal, see ABA Standards for Criminal Justice 21-3.2, p. 21.42 (2d ed. 1980). The ABA Defense Function Standards provide, however, that, with the exceptions specified above, strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client. See *id.*, 4-5.2. See also ABA Project on Standards for Criminal Justice, The Prosecution Function and The Defense Function § 5.2 (Tent. Draft 1970). In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the

[****16]

[**3314] [***995] [1B]This Court's decision in *Anders*, far from giving support to the new *per se* rule announced by the Court of Appeals, is to [*754] the contrary. *Anders* recognized that the role of the advocate "requires that he support his client's appeal to the best of his ability." 386 U.S., at 744. Here the appointed counsel did just that. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the Constitution or our interpretation of that document requires such a standard. [7] The judgment of the Court of Appeals is accordingly

[****17] *Reversed.*

Concur by: BLACKMUN

Concur

JUSTICE BLACKMUN, concurring in the judgment.

I do not join the Court's opinion, because I need not decide in this case, *ante*, at 751, whether there is or is not a constitutional right to a first appeal of a criminal conviction, and because I agree with JUSTICE BRENNAN, and the American Bar Association, ABA Standards for Criminal Justice 21-3.2, Comment, p. 21.42 (2d ed. 1980), that, as an *ethical* matter, an attorney should argue on appeal all nonfrivolous claims upon which his client insists. Whether or not one agrees with the Court's view of legal strategy, it seems to me that the lawyer, after giving his client his best opinion as to the course most likely to succeed, should acquiesce in the client's choice of which nonfrivolous claims to pursue.

Certainly, *Anders* v. *California*, 386 U.S. 738 (1967), and *Faretta* v. *California*, 422 U.S. 806 (1975), indicate that the attorney's usurpation of certain fundamental decisions can [*755] violate the Constitution. I agree with the Court, however, that neither my view, nor the ABA's view, of the ideal allocation [***996] of decisionmaking authority between client [****18] and lawyer necessarily assumes constitutional status where counsel's performance is "within the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970), and "[assures] the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process," *Ross* v. *Moffitt*, 417 U.S. 600, 616 (1974). I agree that both these requirements were met here.

[**3315] But the attorney, by refusing to carry out his client's express wishes, cannot forever foreclose review of nonfrivolous constitutional claims. As I noted in *Faretta* v. *California*, 422 U.S., at 848 (dissenting opinion), "[for] such overbearing conduct by counsel, there is a remedy," citing *Brookhart* v. *Janis*, 384 U.S. 1 (1966), and *Fay* v. *Noia*, 372 U.S. 391, 439 (1963). The remedy, of course, is a writ of habeas corpus. Thus, while the Court does not reach the question, *ante*, at 754, n. 7, I state my view that counsel's failure to raise on appeal nonfrivolous constitutional claims upon which his client has insisted [****19] must constitute "cause and prejudice" for any resulting procedural default under state law. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Dissent by: BRENNAN

Dissent

Constitution.

[7] The only question presented by this case is whether a criminal defendant has a constitutional right to have appellate counsel raise every nonfrivolous issue that the defendant requests. The availability of federal habeas corpus to review claims that counsel declined to raise is not before us, and we have no occasion to decide whether counsel's refusal to raise requested claims would constitute "cause" for a petitioner's default within the meaning of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). See also *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982).

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Sixth Amendment provides that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to have the *Assistance* of Counsel for his defence" (emphasis added). I find myself in fundamental disagreement with the Court over what a right to "the assistance of counsel" means. The import of words like "assistance" and "counsel" seems inconsistent with a regime under which counsel appointed by the State to represent a criminal defendant can refuse to raise issues with arguable merit on appeal when his client, after hearing his assessment of the case and his advice, has directed [*756] him to raise them. I would remand for a determination whether respondent did in fact insist that his lawyer brief the issues that the Court of Appeals found were not frivolous.

It is clear that respondent had a right to the assistance of counsel in connection with his appeal. "As we have held again and again, an indigent defendant is entitled to the appointment [****20] of counsel to assist him on his first appeal . . . ." *Entsminger* v. *Iowa*, 386 U.S. 748, 751 (1967) (citations omitted). [1] [****22] In [**3316] recognizing [***997] the right to counsel on appeal, we [*757] have expressly relied not only on the Fourteenth Amendment's Equal Protection Clause, which in this context prohibits disadvantaging indigent defendants in comparison to those who can afford to hire counsel themselves, but also on its Due Process Clause and its incorporation of Sixth Amendment standards. See *Anders* v. *California*, 386 U.S. 738, 744 (1967); *Griffin* v. *Illinois*, 351 U.S. 12, 17 (1956); cf. *Johnson* v. *United States*, 352 U.S. 565, 566 (1957); *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). The two theories converge in this case also. Cf. *Bearden* v. *Georgia*, 461 U.S. 660, 665 (1983). A State may not incarcerate a person, whether he is indigent or not, if he has not had (or waived) the assistance of counsel at all stages of the criminal process at which his substantial rights may be affected. *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); [****21] *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967). In my view, that right to counsel extends to one appeal, provided the defendant decides to take an appeal and the appeal is not frivolous. [2]

The Constitution does not on its face define the phrase "assistance of counsel," but surely those

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[1] The Court surprisingly announces that "[there] is, of course, no constitutional right to an appeal." *Ante*, at 751. That statement, besides being unnecessary to its decision, is quite arguably wrong. In *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the fifth member of the majority, Justice Frankfurter, expressed doubt that there was a constitutional right to an appeal:

"[Neither] the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy. It is significant that no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again, with exceptions not now pertinent) until 1907. Thus, it is now settled that due process of law does not require a State to afford review of criminal judgments." *Id.*, at 20-21.

If the question were to come before us in a proper case, I have little doubt that the passage of nearly 30 years since *Griffin* and some 90 years since *McKane* v. *Durston*, 153 U.S. 684 (1894), upon which Justice Frankfurter relied, would lead us to reassess the significance of the factors upon which Justice Frankfurter based his conclusion. I also have little doubt that we would decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction. See Kagan, Cartwright, Friedman, & Wheeler, The Evolution of State Supreme Courts, 76 Mich. L. Rev. 961, 994 (1978); Project, 33 Stan. L. Rev. 951, 957, 962-964 (1981). Of course, a case presenting this question is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions.

[2] Both indigents and those who can afford lawyers have this right. However, with regard to issues involving the allocation of authority between lawyer and client, courts may well take account of paying clients' ability to specify at the outset of their relationship with their attorneys what degree of control they wish to exercise, and to avoid attorneys unwilling to accept client direction.

words are not empty of content. No one would doubt that counsel must be qualified to practice law in the courts of the State in question, [3] or that the representation afforded must meet minimum standards of effectiveness. See *Powell* v. *Alabama*, 287 U.S. 45, 71 [*758] (1932). To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court. *Anders* v. *California,* [***998] *supra*, at 744; *Entsminger* v. *Iowa, supra*, at 751. Admittedly, the question in this case requires us to look beyond those [****23] clear guarantees. What is at issue here is the relationship between lawyer and client -- who has ultimate authority to decide which nonfrivolous issues should be presented on appeal? I believe the right to "the assistance of counsel" carries with it a right, personal to the defendant, to make that decision, against the advice of counsel if he chooses.

If all the Sixth Amendment protected was the State's interest in substantial justice, it would not include such a right. However, in *Faretta* v. *California*, 422 U.S. 806 (1975), we decisively rejected that view of the Constitution, ably advanced by JUSTICE BLACKMUN in dissent. Holding that the Sixth Amendment requires that defendants be allowed to represent themselves, we observed:

"It is undeniable that in most criminal prosecutions [****24] defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. [**3317] And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' *Illinois* v. *Allen*, 397 U.S. 337, 350-351 (BRENNAN, J., concurring)." *Id.*, at 834.

[*759] *Faretta* establishes that the right to counsel is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function [****25] of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant. *Anders* v. *California* also reflects that view. Even when appointed counsel believes an appeal has no merit, he must furnish his client a brief covering all arguable grounds for appeal so that the client may "raise any points that he chooses." 386 U.S., at 744.

The right to counsel as *Faretta* and *Anders* conceive it is not an all-or-nothing right, under which a defendant must choose between forgoing the assistance of counsel altogether or relinquishing control over every aspect of his case beyond its most basic structure (*i. e.*, how to plead, whether to present a defense, whether to appeal). A defendant's interest in his case clearly extends to other matters. Absent exceptional circumstances, he is bound by the [***999] tactics used by his counsel at trial and on appeal. *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). He may want to press the [****26] argument that he is innocent, even if other stratagems are more likely to result in the dismissal of charges or in a reduction of punishment. He may want to insist on certain arguments for political reasons. He may want to protect third parties. This is just as true on appeal as at trial, and the proper role of counsel is

[3] Of course, a State may also allow properly supervised law students to represent indigent defendants. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 40-41 (1972) (BRENNAN, J., concurring).

to *assist* him in these efforts, insofar as that is possible consistent with the lawyer's conscience, the law, and his duties to the court.

I find further support for my position in the legal profession's own conception of its proper role. The American Bar Association has taken the position that

"when, in the estimate of counsel, the decision of the client to take an appeal, *or the client's decision to press a particular contention on appeal*, is incorrect[, counsel] [*760] has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. *Counsel's role, however, is to advise. The decision is made by the client.*" ABA Standards for Criminal Justice 21-3.2, Comment, p. 21.42 (2 ed. 1980) (emphasis added). [4] [****28]

The Court disregards this clear statement of how the profession defines the [****27] "assistance of counsel" at the appellate stage of a criminal defense by referring to standards governing the allocation of authority between attorney and client at trial. See *ante*, at 753, n. 6; ABA Standards for Criminal Justice 4-5.2 (2 ed. 1980). [5] In the course of a trial, however, decisions must often be made in a matter of hours, if not minutes or seconds. From the standpoint of effective administration of justice, the need to confer decisive authority on the attorney is paramount with regard to the hundreds of decisions that must be made [**3318] quickly in the course of a trial. Decisions regarding which issues to press on appeal, in contrast, can and should be made more deliberately, in the course of deciding whether to appeal at all.

[*761] The Court's opinion seems to rest entirely on two propositions. First, the Court observes that we have not yet decided this case. This is true in the sense that there is no square holding on point, but as I have explained [***1000] *supra*, at 758-759, *Anders* and *Faretta* describe the right to counsel [****29] in terms inconsistent with today's holding. Moreover, the mere fact that a constitutional question is open is no argument for deciding it one way or the other. Second, the Court argues that good appellate advocacy demands selectivity among arguments. That is certainly true -- the Court's advice is good. It ought to be taken to heart by every lawyer called upon to argue an appeal in this or any other court, and by his client. It should take little or no persuasion to get a wise client to understand that, if staying out of prison is what he values most, he should encourage his lawyer to raise only his two or three best arguments on appeal, and he should defer to his lawyer's advice as to which are the best arguments. The Constitution, however, does not require clients to be wise, and other policies should be weighed in the balance as well.

It is no secret that indigent clients often mistrust the lawyers appointed to represent them. See generally Burt, Conflict and Trust Between Attorney and Client, 69 Geo. L. J. 1015 (1981); Skolnick, Social Control in the Adversary System, 11 J. Conflict Res. 52 (1967). There are many reasons for this, some perhaps unavoidable [****30] even under perfect conditions -- differences in education, disposition, and socio-economic class -- and some that should (but may not always) be zealously avoided. A lawyer and his client do not always have the same interests. Even with paying clients,

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[4] Cf. ABA Model Code of Professional Responsibility EC 7-7 (1980) ("the authority to make decisions is exclusively that of the client" except for decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client"); *id.*, EC 7-8 ("the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client").

[5] See also ABA Commission on Professional Standards, Model Rules of Professional Conduct, Rule 1.2(a) (Final Draft 1982). Rule 1.2(a) requires that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation [if they are not illegal or unethical, or if, despite the fact that he considers them 'repugnant or imprudent,' the lawyer cannot withdraw without prejudicing the client], and shall consult with the client as to the means by which they are to be pursued." It is worth noting, however, that the commentary to Rule 1.2 discloses that its drafters' principal concern was the relationship between insurance company lawyers and insureds they represent, and that Rule 1.2 is intended to provide a basis for disciplinary action as well as general ethical guidance.

a lawyer may have a strong interest in having judges and prosecutors think well of him, and, if he is working for a flat fee -- a common arrangement for criminal defense attorneys -- or if his fees for court appointments are lower than he would receive for other work, he has an obvious financial incentive to conclude cases on his criminal docket swiftly. Good lawyers [*762] undoubtedly recognize these temptations and resist them, and they endeavor to convince their clients that they will. It would be naive, however, to suggest that they always succeed in either task. A constitutional rule that encourages lawyers to disregard their clients' wishes without compelling need can only exacerbate the clients' suspicion of their lawyers. As in *Faretta*, to force a lawyer's *decisions* on a defendant "can only lead him to believe that the law contrives against him." See 422 U.S., at 834. In the end, what the [****31] Court hopes to gain in effectiveness of appellate representation by the rule it imposes today may well be lost to decreased effectiveness in other areas of representation.

The Court's opinion also seems to overstate somewhat the lawyer's role in an appeal. While excellent presentation of issues, especially at the briefing stage, certainly serves the client's best interests, I do not share the Court's implicit pessimism about appellate judges' ability to recognize a meritorious argument, even if it is made less elegantly or in fewer pages than the lawyer would have liked, and even if less meritorious arguments accompany it. If the quality of justice in this country really depended on nice gradations in lawyers' rhetorical skills, we could no longer call it "justice." Especially at the appellate level, I believe that for the most part good claims will be vindicated and bad claims rejected, with truly skillful advocacy making [***1001] a difference only in a handful of cases. [6] In most of such cases -- in most cases generally -- clients ultimately will do the wise thing and take their lawyers' advice. I am not [**3319] willing to risk deepening the mistrust [*763] between clients and [****32] lawyers in all cases to ensure optimal presentation for that fraction of a handful in which presentation might really affect the result reached by the court of appeals.

Finally, today's ruling denigrates the values of individual autonomy and dignity central to many constitutional rights, especially those Fifth and Sixth Amendment rights that come into play in the criminal process. Certainly a person's life changes when he is charged with a crime and brought to trial. He must, if [****33] he harbors any hope of success, defend himself on terms -- often technical and hard to understand -- that are the State's, not his own. As a practical matter, the assistance of counsel is necessary to that defense. See *Johnson* v. *Zerbst*, 304 U.S., at 463. Yet, until his conviction becomes final and he has had an opportunity to appeal, any restrictions on individual autonomy and dignity should be limited to the minimum necessary to vindicate the State's interest in a speedy, effective prosecution. The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process.

As Justice Black wrote in *Von Moltke* v. *Gillies*, 332 U.S. 708, 725-726 (1948):

". . . The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. *Glasser* v. *United States*, 315 U.S. 60, 70. . . .

". . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment [****34] makes provision. And nowhere is this service deemed more honorable than in case of appointment to

[6] I do not mean to suggest that this "handful" of cases is not important -- it may well include many cases that shape the law. Furthermore, the relative skill of lawyers certainly makes a difference at the trial and pretrial stages, when a lawyer's strategy and ability to persuade may do his client a great deal of good in almost every case, and when his failure to investigate facts or to present them properly may result in their being excluded altogether from the legal system's official conception of what the "case" actually involves.

represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent" (footnote omitted).

[*764] The Court subtly but unmistakably adopts a different conception of the defense lawyer's role -- he need do nothing beyond what the State, not his client, considers most important. In many ways, having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system.

I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime. Clients, if they wish, are capable of making informed judgments about which issues to appeal, and when they exercise [***1002] that prerogative their choices should be respected unless they would require lawyers to violate their consciences, the law, or their duties to the court. On the other hand, I would not presume lightly that, in a particular case, a defendant has disregarded his lawyer's obviously sound advice. Cf. *Faretta* v. *California*, 422 U.S., at 835-836 [****35] (standards for waiver of right to counsel). The Court of Appeals, in reversing the District Court, did not address the factual question whether respondent, having been advised by his lawyer that it would not be wise to appeal on all the issues respondent had suggested, actually insisted in a timely fashion that his lawyer brief the nonfrivolous issues identified by the Court of Appeals. Cf. *ante*, at 750-751, n. 4. If he did not, or if he was content with filing his *pro se* brief, then there would be no deprivation of the right to the assistance of counsel. I would remand for a hearing on this question.

References

21A Am Jur 2d, Criminal Law 748, 751, 752, 809

9 Federal Procedure, L Ed, Criminal Procedure 22:397, 22:407, 22:410

USCS, Constitution, 6th Amendment

US L Ed Digest, Criminal Law 46.4

L Ed Index to Annos, Attorney and Client; Criminal Law

ALR Quick Index, Assistance of Counsel; Criminal Law

Federal Quick Index, Assistance of Counsel; Criminal Law

Annotation References:

Right under the Federal Constitution of indigent defendant in criminal case [****36] to aid of state as regards appeal or postconviction remedy. 6 L Ed 2d 1295.

Accused's right to counsel under the Federal Constitution. 2 L Ed 2d 1644; 9 L Ed 2d 1260; 18 L Ed 2d 1420.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution. 93 ALR2d 747.

Right of defendant in criminal case to conduct defense in person, or to participate with counsel. 77 ALR2d 1233.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal. 55 ALR2d 1072.

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Ketchel v. Bainbridge Township

Court of Appeals of Ohio, Eleventh Appellate District, Geauga County

April 2, 1992, Decided

No. 89-G-1530

Reporter
79 Ohio App. 3d 174 *; 607 N.E.2d 22 **; 1992 Ohio App. LEXIS 1628 ***

KETCHEL et al., Appellants, v. BAINBRIDGE TOWNSHIP et al., Appellees

Prior History: [***1] CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court. Case No. 87 M 485

Disposition: *Judgment affirmed.*

Counsel: *Stephen G. Thomas*, for appellants.

Alan E. Johnson and *Leo R. Ward*, for appellees.

Judges: Ford, Presiding Judge. Christley and Joseph E. Mahoney, JJ., concur.

Opinion by: FORD

Opinion

[*176] [**23] Appellants, Gaetana R. Ketchel et al., appeal from a judgment entry dated May 31, 1989, granting summary judgment to appellees, Bainbridge Township et al.

Certain statements contained in the parties' briefs are unsupported by the record. We will indicate such items where appropriate in our analysis.

By way of prologue, there was a previous case, *Ketchel I*, litigated between these parties culminating in a decision by the Ohio Supreme Court. *Ketchel v. Bainbridge Twp.* (1990), 52 Ohio St.3d 239, 557 N.E.2d 779. Essentially, in *Ketchel I*, appellants attempted to have the zoning of their land declared unconstitutional, but failed as the courts found that appellants had not carried their burden of proof.

The present case, *Ketchel II*, commenced with the filing of a complaint on June 30, 1987, in the Geauga County Court of Common Pleas. It was [***2] removed to United States District Court, but was remanded on June 14, 1988.

The complaint in *Ketchel II* seeks relief based upon findings of the trial judge in *Ketchel I* as attached to appellants' complaint in *Ketchel II*. Largely, the complaint in *Ketchel II* seeks damages for a taking without just compensation pursuant to the Fifth Amendment to the United States Constitution. Appellants claim that the zoning works an inverse condemnation and, as a result, they are entitled to compensation. Last, appellants assert a claim against various members of the Board of Trustees of Bainbridge Township pursuant to Sections 1983 and 1988, Title 42, U.S. Code.

As previously stated, the claims in *Ketchel II* were founded upon the findings of the trial judge in *Ketchel I*. Specifically, in *Ketchel I*, the trial judge found that it would be economically infeasible to develop the land by subdividing it into seventy-one separate three-acre lots in order to comply with present zoning.

Appellants raise the following assignments of error:

"1. The trial court erred in granting summary judgment against appellants' right to split their declaratory, coercive and damage causes [***3] of action.

"2. The trial court erred in holding as a matter of law that appellant's [*sic*] compensation claim is

premature because appellants never applied for a variance.

"3. The trial court erred in finding as a matter of law that appellants have suffered merely a diminution in profits, rather than the loss of all economically viable use of their property.

[*177] " [**24] 4. The trial court erred in failing to hold that the doctrine of changed circumstances, in the form of scientific studies of Bainbridge Township's water resources which were conducted after *Ketchel I* was decided and which demonstrated adequate water for two houses per acre on plaintiffs' lands, applied to the subject case to reopen the issue of whether the township's zoning lacks a logical nexus to the alleged public purpose underlying that zoning.

"5. The trial court erred in failing to allow appellants' motion for leave to amend their complaint to add a claim that the appellees' three-acre minimum lot size zoning was void *ab initio* for not having been adopted pursuant to a comprehensive plan.

"6. The trial court erred in granting summary judgment to the individual trustees where they [***4] presented no evidence to support their burden of production in support of their motions for summary judgment."

Turning to the first assignment of error, we must decide whether the trial court erred in granting summary judgment against appellants' coercive and damage causes of action based on *res judicata*.

Appellants cite the Restatement of the Law 2d, Judgments (1982), Section 33, Comment *c*, for the proposition that claim preclusion, as a branch of *res judicata*, does not apply where a party files a second action after litigating a claim for simple declaratory relief.

"When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. * * *

"* * *

"* * * [A] declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced." Restatement of the Law 2d, Judgments (1982) 337, Section 33, Comment *c*.

Of paramount importance to the discussion is the exact wording of appellants' complaint in *Ketchel I*. The complaint from *Ketchel I* is *not* in the record, but the following was gleaned from the [***5] brief of appellees in order to shed light on what was prayed for in the complaint in *Ketchel I:*

"G. That *this Court issue an order directed to the Trustees of Bainbridge Township*, that they may within a period of sixty (60) days rezone the Plaintiffs' lands so as to allow Plaintiffs the reasonable use of their property for all of the uses to which other properties within the Township situated north of U.S. Route 422 and west of State Route 300 are now being used or may be used under the present Zoning Resolution. Further, that *if the Trustees fail to so rezone* Plaintiffs' lands in a constitutionally permissible [*178] manner, within sixty (60) days, *Plaintiffs may use their lands in the manner recommended by the Geauga County Planning Commission;* to wit: as set forth in the Proposed Zoning Amendment attached as Exhibit D to the Complaint as modified by the modification set forth on Exhibit E attached to the Complaint and that *the Court will enjoin* the Township from interfering with such use by Plaintiffs or anyone claiming by, through or under Plaintiffs.

"H. That the Court grant judgment for *such other and further relief* in the premises *and* make [***6] *such other and further declaration of rights* as may be required." (Emphasis added.)

In *Union Oil Co. v. Worthington* (1980), 62 Ohio St.2d 263, 267, 16 O.O.3d 315, 317, 405 N.E.2d 277, 280, the court stated:

"[I]n a declaratory judgment action, upon finding existing zoning unconstitutional as applied to

specific real property, the trial court should give notice to the zoning authority that, within a reasonable time certain, it may, at its option, rezone the property. Further notice should be given that, if the property is not rezoned within such period of time, the court will authorize the property owner to proceed with the proposed use if, on the basis of the evidence before it, the court determines the proposed use to be reasonable. The court may enjoin the property owner from seeking a building permit, establishing a [**25] nonconforming use or otherwise changing the *status quo* during the interim. If necessary, the court may conduct further proceedings, including the hearing of additional evidence, to determine whether the new zoning restrictions may constitutionally proscribe the owner's proposed use.

"In the event the zoning authority either fails to [***7] rezone or fails to rezone the property in a constitutionally permissible manner, the court shall examine the reasonableness of the proposed use, and, upon finding that use to be reasonable, enjoin the city from interfering with it."

The prayer in Paragraphs G and H of appellants' complaint is strikingly similar to the language used in *Union Oil, supra*, and does not ask for anything more than what a trial court is permitted to grant in a declaratory judgment action should the court find existing zoning unconstitutional; therefore, following the Restatement of Judgments 2d, appellants' claim in *Ketchel II* would not be barred by claim preclusion. However, because the original complaint from *Ketchel I* is not part of the record before this court, the assignment cannot be properly addressed and appellants cannot, therefore, demonstrate this portion of the claimed error under this assignment.

Additionally, claim preclusion is not the only branch of *res judicata* that appellants need to argue. There is also the need to discuss issue preclusion.

[*179] In *Ketchel I*, appellants already litigated the issue of whether the zoning denied them the economically viable [***8] use of their land; in order to invalidate the zoning on constitutional grounds, appellants had to demonstrate that "the zoning classification denies them the economically viable use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community". *Id.*, 52 Ohio St.3d at 243, 557 N.E.2d at 783.

With regard to economic viability, the majority opinion stated:

"[T]he courts below concluded that appellants did not meet their burden of proof because they did not show that *all* possible uses were economically infeasible. We agree. A party challenging a zoning ordinance has, at all stages of the proceedings, the burden of showing the unconstitutionality or unreasonableness of the ordinance." (Emphasis *sic.*) *Id.* at 245, 557 N.E.2d at 785.

This determination precludes appellants from relitigating the issue of economic feasibility based on issue preclusion. 22A American Jurisprudence 2d (1988) 879, Declaratory Judgments, Section 238. To this extent, appellants cannot establish the necessary proof in *Ketchel II* to succeed on a federal taking claim because there they must establish that the zoning deprived them of [***9] all use of their property. *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, California* (1987), 482 U.S. 304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250, 267. Accordingly, the first assignment of error is without merit.

The second assignment of error states that the trial court erred in holding as a matter of law that appellants' compensation claims were premature because they never applied for a variance. Both parties agree that a variance was not requested nor was any application for rezoning made. Essentially, the trial judge ruled that appellants had to request an area variance for each lot within their two hundred seventy-one acres prior to bringing their compensation claim.

A federal claim for just compensation is premature

when filed before administrative remedies are exhausted. *Williamson Cty. Regional Planning Comm. v. Hamilton Bank* (1985), 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126. At issue is whether the zoning board is permitted to grant a variance for all lots within the two hundred seventy-one acres owned by appellants. Appellants contend that the zoning board cannot grant the variance, because of the magnitude that such a [***10] request would involve, while appellees argue that the zoning board can grant the variance.

[*180] Implicit in *Hamilton Bank, supra*, is the notion that some administrative remedy be available. If an administrative [**26] remedy does not exist, appellants need not seek it. *Kaufman v. Newburgh Hts.* (1971), 26 Ohio St.2d 217, 55 O.O.2d 462, 271 N.E.2d 280.

In determining whether an administrative remedy was available to appellants, we turn to our recent decision in *Town Investment, Inc. v. Mentor Bd. of Zoning Appeals* (Mar. 29, 1991), Lake App. No. 14-145, unreported, 1991 WL 45673, where we stated that "[t]he act of granting variances across the board to an entire subdivision would amount to a rezoning of the area. It is clear that a zoning board does not have the authority to rezone an area as that power is left to the legislature." *Id.* at 4.

"'A sound distinction exists in law between the act of zoning, or rezoning, and the act of granting or refusing a variance. * * * The former constitutes a legislative act and the exercise of a broad legislative discretion in adopting an ordinance or law. The latter constitutes an administrative or quasi-judicial [***11] act in applying the provisions of an existing ordinance or law and, in such application, the exercise of a discretion limited by the provisions of such legislation including such standards as are set forth therein. * * *' (Citations omitted.)" *Id.* at 4, quoting *State ex rel. Humble Oil & Refining Co. v. Marion* (1965), 4 Ohio App.2d 178, 180, 33 O.O.2d 234, 235, 211 N.E.2d 667, 668.

"'* * * [T]he distinguishing factor between a variance and an amendment is whether the conditions which create the hardship relate primarily to the particular property for which the variance is desired as distinguished from conditions which create hardships of a similar nature to all property owners in the same area. In the former case, the granting of a variance is proper; in the latter, relief must be by amendment to the zoning law.

"'* * *

"'The owner's plight must be due to unique hardships not to those suffered in common by other owners of property in the same area. * * *' (Citations omitted.)" *Id.* at 5, quoting *State ex rel. Killeen Realty Co. v. East Cleveland* (1958), 108 Ohio App. 99, 106-107, 9 O.O.2d 153, 157-158, 153 N.E.2d 177, 182-183.

Because in the case at bar the [***12] zoning board was without authority to grant a variance for each lot within the two-hundred-seventy-one-acre parcel, appellants were without an administrative remedy. Therefore, requesting a variance was not a prerequisite to bringing their federal taking claim. Appellants' argument is well taken; however, for the reasons previously and hereinafter stated, this assignment is without merit.

[*181] Turning to the third assignment of error, appellants assert that the trial judge erred in finding as a matter of law that appellants suffered merely a diminution in profits rather than the loss of all economically viable use of their property.

"A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial." *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. It is incumbent upon appellants to establish that appellees were not entitled to summary judgment.

What is at issue in the present case, *Ketchel II*, is whether the rezoning caused appellants a loss sufficient to rise to the level of a taking. In their

motion and brief opposing summary judgment, appellants [***13] rely on Finding of Fact No. 6 by Judge Inderlied in *Ketchel I.* The finding of fact is as follows:

"Plaintiffs' real property could be subdivided into 71 lots if Plaintiffs were to meet all applicable zining [*sic*] and Geauga County Planning Commission regulations. Such a subdivision would not be economically feasible."

While appellants have put forth evidence sufficient to establish that the development of three-acre lots is not economically feasible, they have not established that all permitted uses are economically infeasible. Appellants are required to put forth some evidence as prescribed by Civ.R. 56, on any issue for which they bear the burden of production at trial. *Wing, supra.* Because [**27] appellants did not put forth evidence on the issue that the zoning caused the land to be economically infeasible for all uses, they have not carried their burden as required by *Wing.* Additionally, appellants are precluded from relitigating this issue, as it was already decided in *Ketchel I.* See discussion concerning appellants' first assignment of error. Accordingly, the third assignment of error is without merit.

Turning to the fourth assignment of error, [***14] appellants argue that the doctrine of changed circumstances applies because after *Ketchel I* was decided, new scientific studies were conducted which demonstrate adequate water supplies for two houses per acre on appellants' land and that this is sufficient to reopen the subject of whether the township zoning lacks a logical nexus to the public purpose underlying the zoning.

After *Ketchel I,* and during discovery for *Ketchel II,* appellants learned that their land could possibly have a water recharge rate of up to eight hundred to a thousand gallons per acre per day based on a "Banks and Matisoff" study commissioned by the township. The deposition of Mr. Ripke expresses some doubt as to whether this study means that the appellants' land could support more than the minimum three-acre lots.

[*182] Appellants cite *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, 15 O.O.3d 53, 399 N.E.2d 81, paragraph two of the syllabus, for the proposition that a change in fact bars the application of *res judicata.* In *Bacon, supra,* forty-three acres were to be developed solely with townhouses. Zoning permits were obtained but not used within one [***15] year as required. Upon reapplication, Westchester's request was denied. Westchester appealed. The court of appeals reversed the trial court, finding the denial of the variance was arbitrary and capricious.

Subsequent to the court of appeals' decision, Westchester altered its plans for the forty-three acres in a way that called for twenty-eight acres of single family housing and fourteen acres of townhouses. The zoning board refused to issue permits based on this change.

Westchester then filed a writ of mandamus in the court of common pleas to compel the issuance of zoning certificates, contending that the judgment of the earlier court of appeals case was *res judicata* and entitled it to the certificates.

The common pleas court as well as the court of appeals concluded that the earlier case was *res judicata,* requiring the issuance of zoning certificates. On appeal, the Supreme Court of Ohio held:

"Where there has been a change in the facts since a decision was rendered in an action, which either raises a new material issue or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of *res judicata* nor [***16] the doctrine of collateral estoppel will bar litigation of that issue in a later action." *Id.* at paragraph two of the syllabus.

Appellants liken their situation to the case in *Bacon, supra.* We determine that appellants' situation is distinguishable. In *Bacon, supra,* there was a true change in facts. In *Ketchel II,* appellants

merely demonstrate that they have new evidence. In order for *Bacon, supra*, to apply, appellants have to demonstrate that, prior to *Ketchel I*, the land did not recharge at the rate that it presently does. Accordingly, the fourth assignment of error is without merit.

Turning to the fifth assignment of error, appellants claim that the trial court erred in failing to allow appellants to amend their complaint to add a claim that appellees have not adopted a comprehensive plan. Essentially, appellants argue that because there is nothing in the minutes of the trustee meetings indicating that the trustees independently adopted a comprehensive plan, the current zoning resolution is invalid.

R.C. 519.02 states in pertinent part:

[*183] "[T]he board of township trustees may in accordance with a comprehensive plan regulate * * * the [***17] uses of land for [**28] trade, industry, residence, recreation, or other purposes * * *."

The statute does not require that the comprehensive plan be independently adopted, and there is no case law supporting this proposition. Accordingly, the fifth assignment of error is without merit.

Turning to the sixth assignment of error, we conclude that the assignment is predicated upon the success of appellants' fifth assignment of error. Appellants assert that certain members of the township trustees are subject to individual liability for the reason that the present zoning scheme was not adopted pursuant to a comprehensive plan because a comprehensive plan was never independently adopted. Based on the analysis set forth concerning appellants' fifth assignment of error, the premise of appellants' sixth assignment of error is false. Accordingly, the sixth assignment of error is without merit.

Based on the foregoing, the judgment of the trial court is affirmed.

Judgment affirmed.

Christley and Joseph E. Mahoney, JJ., concur.

End of Document

TITLE XXIII
LABOR

CHAPTER 273-A
PUBLIC EMPLOYEE LABOR RELATIONS

Section 273-A:2

273-A:2 The Board. –

I. There is hereby created a public employee labor relations board consisting of 5 members, appointed by the governor and council. Two members shall be appointed who shall have extensive experience representing organized labor. Two members shall be appointed who shall have extensive experience in representing management interests. One member, who shall be the chairman, shall be appointed to represent the public at large, and shall not hold elective or appointive public office, or elective or appointive office, or membership in, organized labor at the time of his appointment or during his term. Members of the board may be removed by the governor and council for cause.

I-a. The governor and council shall appoint, in addition to the regular board members specified in paragraph I, 4 alternate board members. One member shall have extensive experience representing organized labor, one member shall have extensive experience in representing management interests, and 2 members shall represent the public at large. The members representing the public at large shall not hold elective or appointive public office, or elective or appointive office, or membership in, organized labor at the time of appointment or during their term. Alternate board members shall serve a 6-year term, and may be removed by the governor and council.

II. Each member of the board shall serve for a term of 6 years, except that of the members first appointed, one shall be appointed for 2 years, one for 3 years, one for 4 years, one for 5 years and one for 6 years. Each member shall serve until his successor is appointed and qualified. A person appointed to fill a vacancy shall be appointed for the unexpired term by the governor and council.

III. Three members of the board shall constitute a quorum; provided, however, that no meeting shall be held unless organized labor, management and the public at large are each represented by at least one board member. In the absence of the 2 regular board members representing organized labor, or the 2 regular board members representing management, their respective alternates shall act in their place so as to constitute a quorum representative of each interest. Alternate board members shall also serve when the respective regular board members do not participate in a meeting due to a conflict of interest.

IV. The board may appoint an executive director and such other staff, including counsel, as it deems necessary, who shall serve at the pleasure of the board.

V. The board shall maintain a list of neutral third parties but the parties to an impasse may agree upon other persons not on the list.

VI. The board may make, amend and rescind in the manner prescribed by RSA 541-A such rules, establish such procedures and conduct such studies as may be necessary to carry out the provisions of this chapter.

VII. The members of the public employee labor relations board shall be paid $50 a day and their necessary expenses while actually engaged in the performance of their duties.

VIII. All board decisions shall be indexed in a timely fashion.

IX. The board shall develop, post, and maintain on its website training to educate negotiating parties as to applicable laws and rules and the skills that contribute to effective collective bargaining.

Source. 1975, 490:2. 1979, 374:1, 2. 1985, 257:1. 1994, 356:1. 1999, 156:2, eff. Aug. 27, 1999. 2013, 36:1, eff. June 4, 2013.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A
ADMINISTRATIVE PROCEDURE ACT

Section 541-A:34

541-A:34 Examination of Evidence by Agency. – If a majority of the officials of the agency who are to render the final decision in a contested case have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the final decision. The proposal for decision shall contain a statement of the reasons for the decision and shall set forth each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

Source. 1994, 412:1, eff. Aug. 9, 1994.