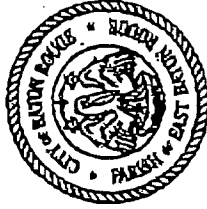


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SUPREME COURT  
STATE OF LOUISIANA

NUMBER 2013-CD-2036

A CIVIL MATTER

\*\*\*\*\*

CITY OF BATON ROUGE-PARISH OF EAST BATON ROUGE

VERSUS

STEPHEN C. MYERS

ORIGINAL APPLICATION FOR SUPERVISORY WRITS  
OF CERTIORARI, REVIEW AND MANDAMUS

SUBMITTED BY THE CITY OF BATON ROUGE AND  
PARISH OF EAST BATON ROUGE

TO BE DIRECTED TO THE 19<sup>TH</sup> JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
DIVISION D, SECTION 21  
THE HONORABLE JANICE CLARK, PRESIDING

NUMBER IN TRIAL COURT  
610,359

Respectfully Submitted by:

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### JURISDICTION

The trial court has ruled that a zoning ordinance of the City of Baton Rouge and Parish of East Baton Rouge is unconstitutional, and the City of Baton Rouge and Parish of East Baton Rouge (City/Parish hereinafter) desire to appeal that ruling. Article V Section 5 of the Louisiana Constitution of 1974 provides that original and exclusive appellate jurisdiction is with the Supreme Court where an ordinance has been declared to be unconstitutional.

The trial court has denied applicant's request for a suspensive appeal, insisting instead that the appeal be devolutive. Applicant seeks the issuance of supervisory writs to compel the trial court to authorize a suspensive appeal.

The Hon. Supreme Court has jurisdiction of an appeal of this matter by virtue of the provisions of Article V Section 5(D) of the Louisiana Constitution. The Court has jurisdiction of this writ application under the Court's supervisory jurisdiction of Article V Section 5(A) of the constitution, and Article V Section 2, the "needful writs" section.

### WRIT GRANT CONSIDERATIONS

The trial court has arbitrarily denied applicant's request for a suspensive appeal of that court's declaratory judgment declaring the ordinance's definition of family unconstitutional. That section of the UDC creates the A1 Single Family Residential zone.

The trial court's limiting the appeal to a devolutive appeal, effectively rendering the ordinance immediately invalid and unenforceable, is in conflict with the jurisprudence to the effect that a legislative act is not unconstitutional, and thus unenforceable, until it is held to be such in a final judgment. The trial court's arbitrarily denying a suspensive appeal in this matter is a gross departure from proper procedure and is an abuse of the trial court's powers. The sudden disappearance of a single family ordinance resulting from a devolutive appeal will significantly affect the public interest.

Applicant respectfully submits that the matter calls for exercise of the Supreme Court's supervisory authority.

### RELIEF REQUESTED

The only relief requested is an order to the trial court to permit a suspensive appeal or, alternatively, that the Hon. Supreme Court issue its order permitting a suspensive appeal.

MEMORANDUM IN SUPPORT OF WRIT APPLICATION

STATEMENT OF THE CASE

The ordinance in question is Chapter 2, "Definition of Family," and Chapter 8, Section 8.201 of the Uniform Development Code (UDC) of the City/Parish which is a zoning code and was adopted by the Metro Council several years ago.

The UDC creates an "A1 Single Family Residential" zone and provides the characteristics of that zone. The ordinance limits the number of dwellings per acre; the minimum size of lots; the permissible uses, among other details. Most importantly for present purposes, the code limits occupation of dwellings located in A1 Single Family Residential zones to a single family. Chapter 2 of the UDC defines family.

Family is an individual or two (2) or more persons who are related by blood, marriage or legal adoption living together and occupying a single housekeeping unit with single culinary facilities; or not more than two (2) persons, or not more than four (4) persons (provided the owner lives on the premises) living together by joint agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit, cost sharing basis.

Upon receiving information that Mr. Stephen Myers was leasing his house at 1977 Cherrydale, Baton Rouge, which was in an A1 Single Family Residential zone, to four unrelated young men in violation of the ordinance the City/Parish filed a petition seeking an injunction to prohibit Mr. Myers from continuing the violation.

That matter was tried to the Hon. Janice Clark, Section 21, Division D, 19<sup>th</sup> Judicial District Court, on January 29, 2013. On April 24, 2013 Judge Clark issued a minute entry advising that she found the definition of family to be unconstitutional because,

...there is no rational basis for the definition of family in the code that furthers a state objective of treating creative kinship networks and families such as same sex relationships, non marital child birth, cohabitation, foster homes, and the like. Being as common as they are today should have disparate treatment from the traditional nuclear family.

A True Extract of that minute entry is attached to this application in the appendix marked as Exhibit A. On May 6, 2013, Judge Clark signed a written judgment holding the definition of family to be unconstitutional. A certified copy of that judgment is attached to this application in the appendix marked as Exhibit B.

City/Parish seeks a suspensive appeal of the judgment signed on May 6, 2013. On May 14, 2013 the City/Parish filed a motion requesting the trial court's authorization to appeal suspensively and requesting a return date. Mr. Myers, through counsel, filed an objection to that request and Judge Clark set the matter for argument on June 17, 2013. No evidence was introduced at that hearing. Counsel had all submitted written memoranda, and argued the matter at the hearing. The trial judge took the matter under advisement.

On July 26, 2013, Judge Clark issued a minute entry to the effect that the good judge determined that the City/Parish was not entitled to a suspensive appeal in this matter, but that a devolutive appeal would be permitted. A judgment in conformity to the minute entry was signed on August 13, 2013. A True Extract of the minute entry is Exhibit C in the appendix, and a certified copy of the judgment is Exhibit D in the appendix.

Applicant objects to that ruling, and requests the Hon. Supreme Court of the State of Louisiana to grant writs of certiorari, review and mandamus to order the trial court to permit a suspensive appeal. Alternatively, applicant respectfully suggests that the Hon. Supreme Court should order that a suspensive appeal be permitted. City/Parish filed with the trial court a notice of intention to apply for supervisory writs requesting that a return date be fixed. The trial court set August 23, 2013 as the return date, and this application is timely filed. The trial court's order fixing the return date is attached as Exhibit E in the appendix.

#### **ASSIGNMENTS OF ERROR**

Applicant respectfully submits that the trial court erred in arbitrarily denying a suspensive appeal of its declaratory judgment holding the ordinance unconstitutional, and by ignoring the jurisprudence to the effect that an ordinance is not unconstitutional until ruled such in a final judgment.

#### **SUMMARY OF ARGUMENT**

Any party has a right to suspensively appeal a judgment absent some prohibition, none of which exist in this matter. The trial court's ruling is arbitrary. Even if the court, without acknowledging so, has adopted defendant Myers' argument that Code of Civil Procedure article 3612(B) prohibits a suspensive appeal in this matter, the trial court's ruling is still incorrect because that article has no application here.

#### **ARGUMENT**

In its judgment of May 6, 2013 the trial court denied the City/Parish's request for an injunction and ruled the definition of family contained in the ordinance to be unconstitutional. The relevant language of the trial court's judgment, and the only part of that judgment that applicant wishes to appeal suspensively is:

It is further ordered, adjudged and decreed that, in accordance with Myer's reconventional demand, the definition of "family" contained in and applied to the Unified Development Code for the City of Baton Rouge/Parish of East Baton Rouge is hereby declared unconstitutional, and thus, unenforceable.

The trial judge gave no reasons for her decision to deny a suspensive appeal, and because there is no logical reason, the decision is purely arbitrary.

It is possible that the trial court adopted the argument proposed by defendant Myers that Code of Civil Procedure article 3612(B) prohibits a suspensive appeal. But that article clearly has no application to this case. Article 3612 applies to an appeal from the issuance or denial of an injunction.

CCP article 3612 (B) provides:

An appeal may be taken as a matter of right from an order or judgment relating to a preliminary or final injunction, but such an order or judgment shall not be suspended during the pendency of an appeal unless the court in its discretion so orders.

Applicant does not wish to suspensively appeal the trial court's refusal to issue an injunction. Applicant wishes to suspensively appeal only the trial court's declaratory judgment issued on Myers' reconventional demand holding the ordinance unconstitutional. Suspending the trial court's denial of the injunction would be meaningless. A suspensive appeal will not cause the injunction to issue, and will cause no irreparable damage to Myers. A devolutive appeal, on the other hand, will likely cause damage to those residents of single family zones who do not wish to see unlimited occupancy permitted next door.

The ordinance in question provides that a dwelling located within an A1 Single Family zone may be occupied only by a single family. Basically the ordinance defines family as an individual, or two or more persons related by blood, marriage or legal adoption, or not more than two (unrelated) persons, or not more than four (unrelated) persons (provided the owner lives on the premises) living together.

Obviously, without a definition of family, the single family zone ordinance is meaningless. Thus the trial court's judgment has effectively rendered the entire A1 Single Family Residential ordinance unconstitutional. A devolutive appeal by definition means that the judgment is effective even though appealed. Obviously, if the judgment is not suspended the public will consider the ordinance ineffective and those who are of a mind to do so will undertake to lease or occupy their residences in violation of the ordinance.

In fact, the Advocate newspaper, on July 30, 2013, the day after the rendition of the judgment denying a suspensive appeal, published a banner headline reading "Zoning Restriction Ended." The lead sentence in the accompanying article stated that, "Effective immediately, more than three unrelated people can lease a home together in a Baton Rouge residential neighborhood."

In fact, the newspaper is incorrect because a devolutive appeal in this case conflicts directly with the rule that an ordinance, like a statute, is not unconstitutional until it is so held by a final decision of the courts.

The jurisprudence of this State is to the effect that legislative acts are presumed to be constitutional until declared unconstitutional by the final decisions of the courts. State ex rel Goudeau v. State Mineral Board, 141 So2d 32 (First Cir. 1962) citing Wall v. Close, 201 La. 986, 10 So2d 779 (La. 1942).

See also, Harris v. Jefferson Parish President, et al, — 12-715 (5<sup>th</sup> Cir. 5/23/13) --So. 3d—, 2013 WL 2249195; City of Kenner v. Kyle, 02-1262 (5<sup>th</sup> cir. 4/8/03, 846 So2d 34, 39.

In view of this rule, a devolutive appeal is simply illogical and will lead to considerable confusion and many lawsuits.

City/Parish submits that protection of the property interests of those citizens residing in single family zones can be accomplished during the appeal of this matter only through a suspensive appeal.

### CONCLUSION

City/Parish respectfully submits that the trial court's denial of a suspensive appeal is arbitrary and unreasonable, and should be reversed. Thus, applicant requests that the Court issue an order to the trial court to vacate its original judgment denying a suspensive appeal, and issue an order authorizing a suspensive appeal of the substantive judgment to the Honorable Supreme Court and fixing a return date.

Alternatively, applicant suggests that the Court has ample authority under Article V Section 2 of the Louisiana constitution of 1974, the "needful writs" article, to simply issue the Court's order authorizing a suspensive appeal and fixing a return date.

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VERIFICATION OF SERVICE

I certify that a copy of this writ application and the attached documents have been delivered by hand to the office of the Hon. Janice Clark, Judge, Division D, 19<sup>th</sup> Judicial District Court, this 3<sup>rd</sup> day of January, 2014.

I further certify that a copy of this application and the attached documents have been delivered to Mr. Grant Guillot, counsel for Mr. Stephen Myers, by placing same in the United States Mail, this 3<sup>rd</sup> day of January, 2014.

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\_\_\_\_\_  
MAIMUNA D. MAGEE

**Appendix**

April 24, 2013 Minute Entry ..... Exhibit A

May 6, 2013 Judgment. .... Exhibit B

July 26, 2013 Minute Entry ..... Exhibit C

August 13, 2013 Judgment. .... Exhibit D

Order fixing August 23, 2013 as the return date ..... Exhibit E