SUPREME COURT OF LOUISIANA

NO. 2013-CD-2036

CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE
Plaintiff/Defendant-in-Reconvention/Applicant

VERSUS

STEPHEN C. MYERS
Defendant/Plaintiff-in-Reconvention/Respondent

ON APPLICATION OF PLAINTIFF/DEFENDANT-IN-RECONVENTION, THE CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE FOR A SUPERVISORY WRIT FROM THE AUGUST 13, 2013, JUDGMENT OF THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF BATON ROUGE, NO. 610359, SECTION "D", THE HONORABLE JANICE CLARK, PRESIDING

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR SUPERVISORY WRITS OF CERTIORARI, REVIEW AND MANDAMUS

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MAY IT PLEASE THE COURT:

I. SUMMARY OF THE ARGUMENT

Applicant, the CITY OF BATON ROUGE / PARISH OF EAST BATON ROUGE ("***the CITY-PARISH***") has not set forth a single applicable statute or case to support its contention that it is entitled to a suspensive appeal of the Nineteenth Judicial Court's Judgment in this matter. As set forth below, respondent, STEPHEN C. MYERS ("***MYERS***") asserts that this Honorable Court should affirm the trial court's Judgment denying the CITY-PARISH's Motion for a Suspensive Appeal because (1) the CITY-PARISH cannot circumvent La. Code Civ. Proc. art. 3612 by asserting that it is not appealing the part of the trial court's Judgment that denied the CITY-PARISH's Petition for a Permanent Injunction; (2) the trial court's denial of the CITY-PARISH's Motion for a Suspensive Appeal was neither arbitrary nor an abuse of the trial court's discretion; (3) the CITY-PARISH's contention that the trial court's ruling is not a final judgment is meritless; and (4) the CITY-PARISH's contention that MYERS will not suffer irreparable injury but that the CITY-PARISH will suffer irreparable injury if this Court does not grant its request for a suspensive appeal is without merit.

II. FACTUAL BACKGROUND

On or about September 2, 2011, the CITY-PARISH received a telephone call from a citizen complainant, Paul J. Naquin ("***Naquin***"), complaining that "the property owner of 1977 Cherrydale was renting out rooms to several college students." As indicated by the CITY-PARISH in its Answers to MYERS' First Set of Interrogatories, Requests for Production, and Requests for Production of Documents, Naquin's allegations were "inspected by Neal Bezet and Nicky Nichols of the Department Works. Photographs of 1977 Cherrydale were taken by Nicky Nichols on several occasions. Paul Naquin also provided the City/Parish with photographs of 1977 Cherrydale." Thereafter, on September 13, 2011, the CITY-PARISH, through its Complaint Manager, Neal Bezet, sent a letter to MYERS stating that an inspection of the premises located at 1977 Cherrydale Ave., Lot: 116 [sic], Sq: 11, in the subdivision of University Gardens ("***the Property***") revealed a violation of the Unified Development Code Title 7, Chapter 2, which defines family as follows:

> [A]n 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 nonprofit, cost-sharing basis.

The letter also indicated that "[n]on-related persons occupying a single family dwelling located in the A-1, A-2, or Rural zoning district is prohibited." Furthermore, the letter stated as follows:

> Whenever, the Building Official has cause to believe a violation iof [sic] Section 8.201, single family permissible uses and Chapter 2 definitions has occurred, the owner and/or occupants is required to furnish affidavits, executed before a Notary Public, under penalty of law attesting to the number of unrelated occupants of the house. Failure to do so shall constitute prima facie evidence that a violation of the single family zoning restriction has occurred.

Additionally, the letter instructed MYERS to remove the alleged violation by September 27, 2011.

On or about December 8, 2011, the CITY-PARISH, through Assistant Parish Attorney, Maimuna Magee, sent a letter to MYERS indicating that the Property was in violation of the Unified Development Code of the City of Baton Rouge and the Parish of East Baton Rouge, the "violations consist[ing] of having more than two (2) unrelated persons residing in an A-1 zone." The letter further stated that MYERS had ten (10) days to correct the violations or the CITY-PARISH would take legal action to force compliance.

III. PROCEEDINGS IN THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

A. ***Pre-trial***

On or about March 20, 2012, the CITY-PARISH filed a Petition for Preliminary Injunction and Permanent Injunction with the Nineteenth Judicial District Court ("***the trial court***") in which it asserted as follows:

1) MYERS is the owner/occupant of "a certain piece of property located at 1977 Cedardale [sic] Ave., more particularly referred to as Lot 16, Square 11, University Gardens Subdivision, in the Parish of East Baton Rouge;" and

2) MYERS is in violation of a certain ordinance, to wit, the Unified Development Code Title 7, Chapter 8, Section 8.201. Appendix H, Permissible Uses of the City of Baton Rouge and Parish of East Baton Rouge ("***the zoning regulation***"), "said violation consist[ing] of

> having more than two (2) unrelated persons residing in an A-1 zone on said premises."

In its Petition, the CITY-PARISH seeks the issuance of a permanent injunction and a preliminary injunction during the pendency of these proceedings, ordering MYERS to immediately cease his alleged violation of the zoning regulation, and it requests that MYERS be cast for all costs of these proceedings and for all general and equitable relief. On April 16, 2012, the CITY-PARISH filed an Amended Petition in order to change the street name of the property located on Lot 16, Square 11, University Gardens Subdivision, in the Parish of East Baton Rouge from "1977 Cedardale Ave." to the correct address of "1977 Cherrydale Ave."

On April 26, 2012, MYERS filed his Affirmative Defenses, Answer, and Reconventional Demand. On May 3, 2012, MYERS filed an Answer to the Amended Petition for Preliminary and Permanent Injunction, and on May 16, 2012, MYERS filed his Amended Affirmative Defenses, Answer, and Reconventional Demand. In addition, on June 14, 2012, MYERS filed a Motion for Leave to file his Second Amended Affirmative Defenses, Answer, and Reconventional Demand, which the Court granted on June 18, 2012. In these pleadings, MYERS submits that the zoning regulation which he is accused of violating is unconstitutional because it offends several provisions of the United States and Louisiana Constitutions, as will be more fully set forth in MYERS's appellee brief.

On May 9, 2012, in accordance with La. Code Civ. Proc. art. 1880 and La. Rev. Stat. § 13:5107, MYERS requested service of his Affirmative Defenses, Answer, and Reconventional Demand, on the Office of the Attorney General, State of Louisiana, so that the Attorney General would have the opportunity to be heard in this matter, which concerns the constitutionality of a municipal ordinance. The Office of the Attorney General was served via departmental service on May 31, 2012, as evidenced by the Notice of Service contained in the Record of this matter, and MYERS has since that time sent the Office of the Attorney General copies of the pleadings MYERS has filed in this matter.

At the June 25, 2012, hearing on the CITY-PARISH's Petition for Preliminary Injunction, the CITY-PARISH stated for the record that it would dismiss its Petition for Preliminary Injunction in this matter and, instead, seek only a permanent injunction.

On December 21, 2012, MYERS filed a Motion for Summary Judgment, along with a supporting Memorandum, in which he requested that the trial court declare the zoning regulation contrary to federal and state law and unconstitutional on its face and as applied. The trial court declined to grant MYERS's Motion for Summary Judgment and instead ordered the parties to submit briefs regarding whether the definition of "family" contained in the zoning regulation at issue reflects the reality of how the term "family" is viewed in today's society. In response, MYERS retained as an expert witness Dr. Dana Berkowitz, an expert in the Sociology of Families, who has published extensively in the area of sexual minority families, taught undergraduate and graduate courses in the Sociology of Families, and passed a doctoral comprehensive exam in the Sociology of Families. Dr. Berkowitz compiled a report demonstrating how the societal notion of "family" has changed since 1954, when the current definition of "family" contained in the CITY-PARISH's zoning regulation was written. MYERS included the contents of Dr. Berkowitz's report in the Pre-trial Memorandum he submitted to the trial court on January 24, 2013. The CITY-PARISH filed its Pre-trial Memorandum on the same day.

B. ***Trial***

Trial of this matter took place on January 29, 2013. After the CITY-PARISH rested its case, counsel for MYERS orally moved for an Involuntary Dismissal, which the trial court denied. After MYERS rested his case, the trial court took the matter under advisement and indicated that the parties would be allowed to file post-trial briefs within seven (7) days. Both parties submitted their post-trial briefs on February 5, 2013.

On April 24, 2013, the trial court issued Oral Reasons for Judgment as follows:

> This Court finds that the petitioner, City/Parish, has failed to establish that defendant is in violation of the definition of family contained in and applied to the Unified Development Code. The testimony by the tenants show that they are not conclusively related by blood, marriage, or adoption, that they are an interdependent fictive familiar unit having been together since they were 6-years-old. The Court further finds 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. No demonstrable state objective has been demonstrated by a preponderance of the evidence. Therefore, the defendant has proven that the Unified Development Code's

> definition of family is unconstitutionally vague. Moreover, the evidence is overwhelming that this non traditional family, these graduates and contractors have not caused a decrease in property value. Quite the contrary, it was conclusively shown that the property has increased in its value significantly. Accordingly, this Court hereby dismisses the City/Parish's Petition for a Permanent Injunction with prejudice at its costs. It further declares that the definition of family contained in and applied to the Unified Development Code for the City of Baton Rouge/Parish of East Baton is unconstitutional and, thus, unenforceable ordering the City/Parish to pay costs. Judgment to be signed accordingly upon presentation. Notify Counsel.

On May 6, 2013, the trial court signed a Judgment (1) dismissing the CITY-PARISH's Petition for a Permanent Injunction, with prejudice, at the CITY-PARISH's cost; (2) declaring, in accordance with MYERS's Reconventional Demand, that 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 unconstitutional, and thus, unenforceable; and (3) ordering the CITY-PARISH to pay all court costs and expert witness fees incurred by MYERS.

C. ***Post-trial***

On May 14, 2013, the CITY-PARISH filed a Motion for a Suspensive Appeal. The CITY-PARISH also sent the trial court a letter wherein it suggested that the Court should grant its request for a suspensive appeal because "there is no injunction in place and therefore Louisiana Code of Civil Procedure article 3612 does not apply." MYERS responded that same day by sending the trial court a letter wherein he (1) requested that the trial court set the matter for a contradictory hearing and (2) urged that because the trial court denied the CITY-PARISH's request for injunctive relief, La. Code Civ. Proc. art. 3612 governs the appeal of this matter, and thus, pursuant to the language of that statute, the trial court's Judgment shall not be suspended during the pendency of the appeal unless the Court in its discretion so orders.

On May 15, 2013, the CITY-PARISH responded by sending a letter to the trial court in which it indicated that "[t]he City/Parish is not appealing the failure to grant an injunction by the Court, but rather the finding by the Court that the City/Parish ordinance in question is unconstitutional." MYERS responded by sending another letter to the trial court wherein he suggested that the record on appeal should be limited to the trial court's finding that the definition of "family" contained in the Unified Development Code is unconstitutional because

the CITY-PARISH asserts that is not appealing the trial court's Judgment dismissing the City-Parish's Petition for a Permanent Injunction

On June 17, 2013, the trial court held a contradictory hearing on the CITY-PARISH's Motion for a Suspensive Appeal. The trial court then took the matter under advisement. On July 26, 2013, the trial court issued Oral Reasons for Judgment as follows:

> The Court has reviewed the application for a suspensive appeal herein demanded by plaintiff. The Court has considered the memorandum filed on behalf of both parties and impressed that the law and evidence militates in favor of defendant, Stephen C. Myers, and, therefore, will grant a devolutive appeal as opposed to a suspensive appeal upon presentation of pleadings by movers. Notify Counsel.

Thereafter, on August 13, 2013, the trial court issued a Judgment (1) denying the CITY-PARISH's Motion for a Suspensive Appeal and (2) granting the CITY-PARISH a devolutive appeal returnable to the Louisiana Supreme Court on August 22, 2013. That same day, the trial court entered a devolutive appeal from its May 6, 2013, and August 13, 2013, Judgments, and the trial court Clerk of Court issued a Notice of Appeal. On August 16, 2013, the Clerk of Court issued a Notice of Return date confirming that the return date of the Judgments to the Louisiana Supreme Court was August 22, 2013.

On August 15, 2013, the CITY-PARISH filed its Notice of Intent to Apply for Supervisory Writs seeking the issuance of supervisory writs of certiorari, mandamus, and review of the August 13, 2013, Judgment and requesting this Court to order the trial court to authorize a suspensive appeal in this matter. That same day, the trial court issued a return date of August 23, 2013, on which date the CITY-PARISH filed its Writ Application. On September 3, 2013, MYERS filed his Memorandum in Opposition to the Writ Application. On January 10, 2014, this Honorable Court granted the CITY-PARISH's Writ Application, and on February 3, 2014, the CITY-PARISH resubmitted its Writ Application in lieu of filing a Brief.

IV. LAW AND ARGUMENT

A. ***The trial court did not issue a ruling finding the entire zoning ordinance to be unconstitutional.***

At the outset, MYERS submits that the CITY-PARISH is either misconstruing the Court's Judgment in this matter or the CITY-PARISH simply fails to comprehend the contents of that Judgment. In the very first sentence on page 1 of its Writ Application, the CITY-PARISH

mistakenly states, "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…desire to appeal that ruling." Such a statement ignores or misinterprets the plain language contained in the Court's Judgment.

The Judgment from which the CITY-PARISH is attempting to take a suspensive appeal (1) dismissed, with prejudice and at the CITY-PARISH's cost, the CITY-PARISH's Petition for a Permanent Injunction to prohibit MYERS from leasing his property to persons not related by blood, marriage, or adoption, and (2) declared unconstitutional, and thus, unenforceable, in accordance with MYERS'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. The Judgment ***did not*** contain, as is contended by the CITY-PARISH on page 4 of its Writ Application, a "holding [that the] ordinance [is] unconstitutional." Rather, the Court unambiguously stated that it was the definition of "family" contained with the Unified Development Code that was unconstitutional, and thus, unenforceable – ***not*** the entire zoning ordinance. Therefore, the CITY-PARISH's assertion that it will be unable to enforce A1 zoning regulations unless the Court grants it a suspensive appeal is wholly without merit.

B. ***The record on appeal should be limited to the trial court's finding that the definition of "family" contained in the Unified Development Code is unconstitutional.***

In its May 15, 2013, letter to the trial court and on page 4 of its Writ Application, the CITY-PARISH indicates that it is not appealing the trial court's denial of the CITY-PARISH's request for an injunction; rather, the CITY-PARISH asserts that it is appealing the finding by the trial court that "ordinance" in question is unconstitutional. Given the CITY-PARISH's statement that it is not appealing the part of the trial court's Judgment dismissing its Petition for a Permanent Injunction, MYERS respectfully submits that the record on appeal should be limited to the trial court's finding that the definition of "family" contained in the Unified Development Code is unconstitutional, and thus, unenforceable.

C. ***The CITY-PARISH cannot circumvent La. Code Civ. Proc. art. 3612 by asserting that it is not appealing the part of the trial court's Judgment that denied the CITY-PARISH's Petition for a Permanent Injunction.***

Pursuant to Louisiana Code of Civil Procedure article 3612 (B), the CITY-PARISH is not entitled to a suspensive appeal of the trial court's Judgment as a matter of right and, instead, the Judgment would only be suspended during the pendency of the appeal ***if*** the trial court had in ***its discretion*** so ordered. 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.

On May 14, 2013, the CITY-PARISH sent the trial court a letter wherein it suggested that the trial court should grant its request for a suspensive appeal because "there is no injunction in place and therefore Louisiana Code of Civil Procedure article 3612 does not apply." The CITY-PARISH re-alleges the inapplicability of La. Code Civ. Proc. art. 3612 on pages 3 and 4 of its Writ Application. In essence, the CITY-PARISH is attempting to evade the language of Article 3612 (B) by stating that the CITY-PARISH is not seeking an appeal of the trial court's decision denying the CITY-PARISH's Petition for a Permanent Injunction, and therefore, it was not within the trial court's discretion to deny the CITY-PARISH's Motion for a Suspensive Appeal. However, the primary consequence of the trial court's Judgment is that the CITY-PARISH will no longer be able to continue prosecuting and issuing injunctions to individuals it believes are in violation of the zoning regulation. Thus, the two aspects of the Judgment – the denial of the CITY-PARISH's Petition for a Permanent Injunction and the trial court's declaration of the unconstitutionality of the zoning regulation – are irrefutably intertwined.

Furthermore, even if the CITY-PARISH is not specifically appealing the trial court's decision to not enjoin MYERS from renting to unrelated persons, the trial court indicated in its Judgment that it dismissed the CITY-PARISH's Petition for a Permanent Injunction based, at least in part, on the Court's finding that the definition of "family" contained in the Unified Development Code is unconstitutional, and thus, unenforceable. The effect of this Court granting the CITY-PARISH's Writ Application would be that the CITY-PARISH would be allowed to continue enforcing a definition of "family" that has been declared unconstitutional by a court of this state during the time which it takes this Court to rule on the appeal of this matter. There is no sound reason for this Court allowing the CITY-PARISH to continue engaging in

conduct which has been declared unconstitutional while the Judgment is under review by this Court.

D. ***The trial court's denial of the CITY-PARISH's Motion for a Suspensive Appeal was neither arbitrary nor an abuse of the trial court's discretion.***

On pages 1 and 3 of its Writ Application, the CITY-PARISH, without providing any statutory or jurisprudential support for its erroneous assertion, asserts that the trial court "arbitrarily denied" its request for a suspensive appeal, thus constituting a "gross departure from proper procedure" and an "abuse of the trial court's powers." Apparently, the CITY-PARISH has misinterpreted Louisiana Code of Civil Procedure article 3612 (B) to stand for the proposition that it would be an abuse of discretion for a court ***not*** to permit the taking of a suspensive appeal from an order or judgment relating to a final injunction. A plain reading of that code article suggests the exact opposite. 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**. (Emphasis added).

The code article expressly sets forth that it is the general rule that judgments relating to final injunctions ***shall not*** be suspensively appealed. Rather, the losing party ***may*** take a suspensive appeal from the judgment ***only*** if the court gives the party permission to do so. A court's allowing the losing party to take a suspensive appeal from a judgment relating to a final injunction is an exception – ***not*** the norm. See, *Louisiana State Board of Medical Examiners v. Tackett*, 70 So.2d 207 (2nd Cir. 1953), wherein the Second Circuit expressly stated that "the granting of [a suspensive] appeal is a ***favor*** from the court, lying within its proper judicial discretion." (Emphasis added.) Thus, whether to allow the losing party to suspensively appeal a judgment relating to an injunction is an ***exception*** that the judge ***may*** make to the general rule. Therefore, the CITY-PARISH's assertion that the refusal of the trial court to grant the CITY-PARISH's Motion for a Suspensive Appeal was an abuse of discretion is nonsensical.

See, *Walker Lands, Inc. v. East Carroll Parish Police Jury*, 38,376 (La. App. 2 Cir. 4/14/04), 871 So.2d 1258, *rehearing denied*, *writ denied*, 2004-1421 (La. 6/3/05), 903 So.2d 442, *reconsideration not considered*, 2004-1421 (La. 11/28/05), 916 So.2d 127, wherein the appellate court ruled that the trial court acted within its discretion in unilaterally converting the state's

Motion for a Suspensive Appeal into a devolutive appeal, in a lawsuit for injunctive and declaratory relief by a landowner claiming ownership over a lake and drainage ditch. See also, *Cantelli v. Hamlin*, 83 So.2d 563 (La. 1955), wherein the appellate court held that the trial court did not abuse its discretion in refusing to grant a suspensive appeal from a judgment granting a preliminary injunction under which the petitioner was required to cease and desist from using certain premises until zoning violations were corrected, even though the trial court's refusal to grant the suspensive appeal could result in the closing of the premises or a reduction of the number of tenants pending the appeal.

In addition, on page 3 of its Writ Application, the CITY-PARISH states, "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." However, an examination of the transcript from the June 17, 2013, hearing on the CITY-PARISH's Motion for a Suspensive Appeal reveals that Judge Clark afforded great consideration to the CITY-PARISH's request for a suspensive appeal. In addressing the seriousness of the issues involved in this matter, Judge Clark stated as follows:

> [L]egislators every day make decisions, make laws, and like in this matter, I presumed it was constitutional until the evidence suggested otherwise, and so it is incumbent upon courts, is it not, to interpret the law and make a ruling and a finding as to whether or not the act[s] of legislative bodies are indeed constitution[al] or do they offend some provision. Now, the right of association, First Amendment rights, equal protection rights, those matters are not just abstract philosophies. They happen in everyday life. You have situations where you can have one mother with eight children. She can live in an A-1 house in [Pollard Estates], but four adults cannot live is the same house without offending the ordinance…the Court took sufficient time. We had vigorous briefing. We had two or three hearings. All of that time, the legislative branch never indicated in any way that they were intend[ing] to even take up such an ordinance, take up such a manner that may need – obviously need some correction…

The transcript, which is incorporated herein and attached to the Supplemental Appendix as **Exhibit "1"**, reveals that Judge Clark seriously considered the merits of this case and that she was not arbitrary in exercising her vast discretion to deny the CITY-PARISH's Motion for a Suspensive Appeal. Therefore, the record does not support the CITY-PARISH's contention that the trial court was acting arbitrarily or abusing its discretion in denying the CITY-PARISH's request for a suspensive appeal.

E. ***The CITY-PARISH's contention that the trial court's ruling is not a final judgment is meritless.***

In its "Writ Grant Considerations" section on page 1 of its Writ Application, the CITY-PARISH states that the trial court's denial of the CITY-PARISH's request for a suspensive appeal "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." Furthermore, in the "Assignments of Error" and "Argument" sections on pages 3 and 4 of its Writ Application, the CITY-PARISH asserts that the zoning regulation at issue is not yet deemed unconstitutional because the courts have not issued a final judgment or decision.

The Judgment issued by the trial court on May 6, 2013, is a final judgment as that term is defined in La. Code Civ. Proc. art. 1841, which provides, "A judgment that determines the merits in whole or in part is a final judgment." The trial court's Judgment determined the entire merits of both parties' claims, and thus, it is a final judgment in accordance with La. Code Civ. Proc. art. 1841. Moreover, La. Code Civ. Proc. art. 2083(A) states, "A final judgment is appealable in all causes in which appeals are given by law, whether rendered after hearing, by default, or by reformation under Article 1814." Indeed, the trial court's May 6, 2013, must have been a final Judgment; otherwise, how would the CITY-PARISH have appealed the trial court's ruling to this Court?[1]

In a desperate attempt to support its argument that there has been no final judgment or decision issued by the courts in this matter, the CITY-PARISH offers several cases that actually support MYERS's position. On page 4 of its Writ Application, the CITY-PARISH notes that in the case of *Goudeau v. State Mineral Board*, 141 So.2d 32, 34 (La. App. 1 Cir. 1962),

> 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**. *Wall v. Close*, 201 La. 986, 10 So.2d 779. (Emphasis added.)

[1] MYERS notes that although this Court in *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978), held that there are certain circumstances in which this Court may review a trial court's actions despite the fact that the trial court has not rendered a final judgment, *i.e.*, instances where a law has been found unconstitutional and irreparable harm will be caused to the applicant, such is not the case in the instant matter because the trial court's May 6, 2013, Judgment is a final judgment.

In both *Goudeau* and *Wall*, the First Circuit and Louisiana Supreme Court respectively noted that the ordinances in question were presumed constitutional because there had been no final decisions of the courts declaring the ordinances unconstitutional. The facts of those cases are distinct from the facts of the instant matter because a court of this state has actually issued a final decision declaring the zoning regulation unconstitutional. Furthermore, in *Harris v. Jefferson Parish President & Parish Council*, 12-715 (La. App. 5 Cir. 5/23/13), 119 So. 3d 603, another case cited by the CITY-PARISH on page 4 of its Writ Application, the Louisiana Court of Appeal for the Fifth Circuit issued a statement that, in fact, supports MYERS's position – "Ordinances are presumed constitutional and, thus, are valid and enforceable until they are ***judicially*** held to be unconstitutional." *Id*. at 5 (Emphasis added). In *Harris*, the Fifth Circuit held that the Jefferson Parish Personnel Board did not have authority to rule on the constitutionality of an ordinance and that the ordinance would be presumed constitutional until there was a ***judicial*** determination to the contrary. *Id*. at 6 (Emphasis added). Furthermore, on page 4 of its Writ Application the CITY-PARISH cites the matter of *City of Kenner v. Kyle*, 02-1262 (La. App. 5 Cir. 4/8/03), 846 So. 2d 34, 39, in which the Fifth Circuit explained,

> The law is well settled that **the authority to determine the constitutionality of city ordinances** is **vested exclusively within the jurisdiction of the courts of this state**. The office of the legislative auditor is not a court, but is a creation of the legislative branch of government. The legislative auditor has no statutory or constitutional power or other authority to determine the unconstitutionality of the city ordinances, and absent a judicial determination regarding the legality of the ordinances, the auditor must accept their validity. Thus, the **ordinances are valid and enforceable until they are judicially held to be invalid**. (Citations omitted.)(Emphasis added.)

As in *Goudeau* and *Wall*, the fact that distinguishes the *Harris* and *City of Kenner* cases from the instant matter is that in those cases, no court had made a judicial determination regarding the unconstitutionality of the ordinances. Such is not the case in the instant matter, as the May 4, 2013, Judgment of the trial court was clearly and unequivocally a final judgment pursuant to La. Code Civ. Proc. art. 1841. After all, the CITY-PARISH would not have been able to appeal the matter as of right to this Honorable Court unless the trial court had issued a final judgment.

F. ***The CITY-PARISH's contention that MYERS will not suffer irreparable injury but that the CITY-PARISH will suffer irreparable injury if this Court does not grant its request for a suspensive appeal is without merit.***

Furthermore, the CITY-PARISH on pages 4 and 5 of its Writ Application asserts that it is entitled to a suspensive appeal because a suspensive appeal will not cause irreparable injury to MYERS and because a devolutive appeal will result in irreparable injury to the CITY-PARISH. The CITY-PARISH contends that a devolutive appeal "will likely cause damage to those residents of single family zones who do not wish to see unlimited occupancy permitted next door" and that it will "lead to considerable confusion and many lawsuits." The CITY-PARISH concludes its argument with the statement 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."

If the execution of the instant Judgment is suspended, the CITY-PARISH will be allowed to continue infringing upon the constitutional rights of landlords and numerous groups of tenants during the pendency of the appeal. In particular, landlords such as MYERS will be expected to inquire as to the familial status of prospective renters in violation of the Federal Fair Housing Act. In addition, non-traditional familial units, such as foster families, same sex couples, and other fictive kin arrangements will continue to be discriminated against in violation of the constitutions of the United States and Louisiana. Therefore, the CITY-PARISH's statement that no harm will occur if the Court grants its request for a suspensive appeal is simply false.

Moreover, the CITY-PARISH's contention that the residents of single family zones will suffer irreparable injury and diminished property rights if the CITY-PARISH is not allowed to take a suspensive appeal makes absolutely no sense. Even though the definition of "family" contained in and applied to the Unified Development Code has been struck down, the building restrictions contained within the Unified Development Code still protect A1 zones from overcrowding and other issues. For example, the Unified Development Code contains a provision restricting the density of dwellings located within A1 zones to 4.1 units per acre. Furthermore, although the CITY-PARISH expresses concern over non-related individuals "overcrowding" residences located within single family zones, the CITY-PARISH has failed to show how that concern will not remain even if the unconstitutional definition of "family" is upheld. Both before and during this litigation, an unlimited number of persons related by blood, marriage, or adoption have been able to inhabit residences located within single family zones,

thus potentially resulting in overcrowding. As such, the citizens of East Baton Rouge Parish residing in single family zones are already subjected to "unlimited occupancy permitted next door."

Finally, the CITY-PARISH's assertion that a devolutive appeal of this matter will "lead to considerable confusion and many lawsuits" is unfounded. The effect of the trial court's denial of the CITY-PARISH's request for a suspensive appeal is that the CITY-PARISH is presently enjoined from prosecuting and filing suit against individuals who it believes are in violation of the zoning regulation. Therefore, this Court's refusal to grant the CITY-PARISH's request for a suspensive appeal will not lead to "many lawsuits" and, in fact, it should lead to ***no*** lawsuits. In addition, this Court's denial of the CITY-PARISH's Writ Application will not lead to "considerable confusion" because landlords will no longer have to risk violating the Federal Fair Housing Act and the constitutional rights of prospective tenants by inquiring as to the relationships among the tenants. Therefore, the citizens of East Baton Rouge Parish will not suffer irreparable injury, a diminution of property rights, or confusion if this Court does not grant the CITY-PARISH's request for a suspensive appeal.

V. CONCLUSION

For the reasons set forth above, respondent, STEPHEN C. MYERS, respectfully requests that the Court affirm the trial court's Judgment denying the applicant, CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE's Motion for a Suspensive Appeal and that Court deny the CITY/PARISH'S Request for a Suspensive Appeal.

RESPECTFULLY SUBMITTED,

SHOWS, CALI & WALSH, L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on the CITY OF BATON ROUGE / PARISH OF EAST BATON ROUGE and the OFFICE OF THE ATTORNEY GENERAL, STATE OF LOUISIANA, through their counsel of record listed below, and to THE HONORABLE JANICE CLARK, by hand delivery, e-mail, facsimile transmission, and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 20th day of February, 2014:

The Honorable Janice Clark
19th Judicial District Court Courthouse
300 North Boulevard
Baton Rouge, LA 70801

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_____
GRANT J. GUILLOT

SUPREME COURT OF LOUISIANA

NO. 2013-CD-2036

CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE
Plaintiff/Defendant-in-Reconvention/Applicant

VERSUS

STEPHEN C. MYERS
Defendant/Plaintiff-in-Reconvention/Respondent

ON APPLICATION OF PLAINTIFF/DEFENDANT-IN-RECONVENTION, THE CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE FOR A SUPERVISORY WRIT FROM THE AUGUST 13, 2013, JUDGMENT OF THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF BATON ROUGE, NO. 610359, SECTION "D", THE HONORABLE JANICE CLARK, PRESIDING

SUPPLEMENTAL APPENDIX

Exhibit 1	Selected Pages of June 17, 2013, Hearing on the CITY-PARISH's Motion for a Suspensive Appeal