State of Indiana)		In The Lake Superior Court
)	ss:	Sitting at East Chicago, Indiana
County of Lake)		
Rodney and Zena Logal,)		
Husband and Wife,)		
Plaintiffs,)		
)		Cause No. 45 D02-0911-PL-00172
-vs-)		
)		
The Town of Schererville, et al.,)		
Defendants.)		

Plaintiffs' Indiana T.R. 60 (B) (8) Motion To Set Aside
Dismissal Order Due To Their Intervening, First Amended Complaint

Come now the plaintiffs, *pro se*, pursuant to Indiana Trial Rule 60 (B)(8), and move on the following grounds to set aside the Court's Order of October 15, 2010, dismissing the above captioned case:

1. On Wednesday – October 20, 2010, the plaintiffs received this Court's Order of October 15, 2010, dismissing the above captioned case;

2. As of October 14, 2010, the plaintiffs filed their First Amended Complaint in this matter, essentially mooting the Defendants' Motion To Dismiss which said Order grants;

3. In granting the defendants' motion, the Court notes that "(t)he Plaintiffs should have at least requested a hearing before the Board of Zoning Appeals and perhaps they could have obtained a waiver of any ordinance which they were violating, or persuade the Board of Appeals that the ordinances were invalid". *Order of 10/15/10, p 2, ¶ 9*;

4. Perhaps the Court indicates as much because the plaintiffs' federal constitution claims have been dismissed. *See, Logal et. al. v. Town of Schererville,* et. al, formerly Cause No. 2:10 CV 11 PPS before the U.S. District Court for the N. Dist. of Indiana at Hammond – Order of September 21, 2010;

5. The plaintiffs are uncertain as to whether this Court has jurisdiction over some, all, or no aspects of their 42 U.S.C. §1983 claim;

6. In any event, their amended complaint asserts violations of their state constitutional rights based on the operative facts of this case;

7. Of course the Court provides that "(t)he Plaintiffs ***should have*** at least requested a hearing before the Board of Zoning Appeals . . ." without insisting they ***must*** do so. *See, Order of 10/15/10*. (emphasis added);

8. Neither plaintiff is ***required*** to appeal or otherwise challenge said "Official Code Violation Warning" pursuant to zoning regulations and / or any other administrative provision(s) as the underlying ordinance is "charged to be void on its face" to the extent it purports to "require the demolition of a sound, secure, and remote 'secondary structure' upon the demolition of its adjacent primary structure" *See, Pltfs' Cmplt, ¶ 10, p 2; Bowen v. Sonnenburg,* Ind. App., 411 N.E.2d 390 at 403 (1980); *Wright v. Georgia,* 373 U.S. 284 at 292 (1963) *("a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and the constitutionally impermissible applications of the statute"*); and *Bouie v. City of Columbia,* 378 U.S. 347 at 352 (1964) (*"There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise language."*);

9. Moreover, the plaintiffs contend this case was precipitated by "deliberate misconduct undertaken for the sole purpose of annoying and harassing them in contravention of their constitutional right to be left alone". *See, Pltfs' Amd Cmplt, ¶ 11, p 2.* Such matters are beyond the expertise and redressability of any town board;

10. "The rule requiring exhaustion of administrative remedies 'is not without exceptions'; . . . such exceptions occur when the administrative process is incapable of answering the question presented by a claim. *Padgett v. Buss,* 857 N.E.2d 27, 28 (Ind. Ct. App. 2006). A party is excepted from the exhaustion requirement when the remedy is inadequate or would be futile, or when some equitable consideration precludes application of the rule. To prevail upon a claim of futility, 'one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances'." *Johnson v. Patriotic Fireworks, Inc.*, 871 N.E.2d 989 (Ind. App. 2007);

11. There may not be a court prepared to declare the plaintiffs' federal rights as an incident of this case. But the defendants' prerogative is no less limited by such matters of national concern. *See,* Article VI, clause 2 of the U.S. Constitution *(Supremacy Clause)* and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 at 613 (1979);

12. Presumably the Court is not addressing the plaintiffs' state constitutional claims in concluding "since the Town of Schererville has taken no action against the Plaintiffs, they have not been damaged in any way." *See, Order of 10/15/10, p 3, ¶ 11*;

13. "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. . ." Article 1, Section 12 of the Indiana Constitution;

14. As this case is neither the prosecution of a town ordinance nor a corresponding defense, the Schererville Town Court does not have exclusive jurisdiction over the matter at hand. *See, I.C. §33-35-2-8.*

Wherefore the plaintiffs pray that the Court set aside its Order of dismissal herein of October 15, 2010 and allow this matter to proceed to jury trial in accord with the Plaintiffs' First Amended Complaint, state and local rules of civil procedure, as well as applicable common law.

Respectfully Submitted,

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Plaintiffs' Certificate of Service

Comes now the undersigned and certifies that on the 21st day of October, 2010, the foregoing motion, corresponding CCS, and proposed order were served on defense counsel of record by placing a true and accurate copy of the same in the U.S. Mail with adequate first class postage, addressed as follows:

David M. Austgen and Joseph C. Svetanoff
AUSTGEN KUIPER & ASSOCIATES, P.C.
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Zena Logal, Plaintiff *Pro Se*