

[Cite as *Rockford Homes, Inc. v. Canal Winchester*, 2010-Ohio-873.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Rockford Homes, Inc., :
Appellant-Appellee, :
v. : No. 09AP-827
(M.C. No. 2009 EVA 060060)
[Village of Canal Winchester, : (REGULAR CALENDAR)
Appellee-Appellant]. :

D E C I S I O N

Rendered on March 9, 2010

Plank & Brahm, Richard C. Brahm, and Catherine A. Cunningham, for appellee.

Wiles, Boyle, Burkholder & Bringardner Co. LPA, Eugene L. Hollins, and Brian M. Zets, for appellant.

APPEAL from the Franklin County Municipal Court,
Environmental Division.

FRENCH, J.

{¶1} Appellant, Village of Canal Winchester (the "Village"), appeals the judgment of the Franklin County Municipal Court, Environmental Division, reversing the Village's denial of an Application for Site Development Plan, filed by appellee, Rockford Homes, Inc. ("Rockford"). For the following reasons, we affirm.

{¶2} This action arises out of attempts to develop a planned district within the Village. On August 28, 1990, the Council of the Village of Canal Winchester ("Council") enacted Ordinance No. 59-90, changing the zoning of certain, described property from Residential (R-2) to Planned Unit Development ("PUD"), subject to 32 staff-recommended conditions, and changing the Village zoning map accordingly. The rezoned property was directly associated with a development known as the Villages at Westchester, which was to include single family residential, multi-family residential, and commercial uses. The 9.112 acres that are the subject of this appeal are located within the property rezoned by Ordinance No. 59-90. It is undisputed that the staff-recommended conditions incorporated into Ordinance No. 59-90, which refer to an existing preliminary development plan for the Villages at Westchester, established the development standards text for the PUD.

{¶3} On April 2, 2001, Council enacted Ordinance No. 17-01 in response to a request for modifications to the preliminary development plan associated with the Villages at Westchester. Ordinance No. 17-01 changed an 11.06-acre parcel within the PUD from multi-family residential use to open space and park use and changed an 11-acre portion of a larger parcel within the PUD from single-family residential use to multi-family residential use. The ordinance imposed five supplemental conditions, but stated that "all other provisions of Ordinance No. 59-90 and [its] accompanying preliminary development plan and development text shall remain in full force and effect." The property at issue here is located within the parcel reclassified for multi-family residential use by Ordinance No. 17-01.

{¶4} On August 20, 2001, the Village amended Chapter 1173 of the Canal Winchester Zoning Code (the "Code"), which governs planned districts, including PUDs. Chapter 1173 contains specific requirements for submission and approval of a preliminary plan, development standards text, and development plan as part of the process for rezoning and developing property as a PUD.

{¶5} In February 2003, pursuant to the development standards text set forth in Ordinance Nos. 59-90 and 17-01, the Village Planning and Zoning Commission ("P&Z") approved Rockford's Application for Site Plan for a 112-unit multi-family apartment development, known as Canal Crossing, and for a 60-unit multi-family condominium development, known as Eagle Ridge, within the Villages at Westchester. Rockford constructed the Eagle Ridge condominiums, commencing in 2003, but it did not construct the Canal Crossing apartments.

{¶6} In 2005, Rockford requested approval to amend its plans for Canal Crossing from a 112-unit apartment development to a 48-unit condominium development. P&Z approved Rockford's request on December 12, 2005. Again, Rockford did not build the Canal Crossing project, and its 2005 development plan lapsed pursuant to Canal Winchester Codified Ordinance 1173.06(c), which states that if construction site improvements are not commenced within two years after P&Z approval, a new development plan must be approved before development may begin.

{¶7} In October 2008, Rockford submitted an Application for Site Development Plan (the "2008 application"), again requesting approval to develop Canal Crossing as a 112-unit apartment development, as originally approved in February 2003. At a November 10, 2008 meeting, P&Z considered the 2008 application, which is described

in the meeting minutes as a request to amend the development plan previously approved on December 12, 2005. Despite a staff recommendation that the 2008 application be approved, P&Z unanimously denied Rockford's application. In a letter dated November 12, 2008, P&Z notified Rockford of the denial and of its right to appeal to Council.

{¶8} Rockford appealed P&Z's denial of the 2008 application to Council, which held a public hearing on the appeal. Before opening the hearing for public comment, Council President Rick Deeds established that "this is not a re-zoning issue." Council then heard arguments from residents who opposed Rockford's 2008 application, primarily because they preferred the development of condominiums over the development of apartments on the property. After the public comments, Allan Neimayer, the P&Z Administrator, reiterated that the staff recommendation was for approval of the 2008 application because the accompanying development plan "met the code."

{¶9} On January 5, 2009, Council issued Findings of Fact and Conclusions of Law, denying Rockford's 2008 application. Council described Rockford's 2005 and 2008 applications regarding the Canal Crossing development as requests to amend the preliminary plan and development text for the Villages at Westchester and rejected Rockford's argument that approval (or disapproval) of the 2008 application involved an administrative, rather than a legislative, action. Council treated the 2008 application as "an amalgamation of a new Preliminary Plan, Development Plan, and Development Text," requiring Council approval, because it found that Rockford "no longer had a Preliminary Plan and Development Text incorporated into the zoning text for Canal

Crossing." Alternatively, Council found that the 2008 application was a "request to amend the previously approved PUD Plan and Development Text." Under both theories, Council stated that it was acting legislatively and denied the 2008 application.

{¶10} Rockford appealed to the Franklin County Municipal Court, Environmental Division, pursuant to R.C. Chapter 2506. Rockford argued that Council erred by holding that the 2008 application sought legislative action rather than administrative action and also argued that Council's denial of the 2008 application was illegal, arbitrary, capricious, unreasonable, and unsupported by a preponderance of the substantial, reliable, and probative evidence. In response, the Village argued that the court lacked subject-matter jurisdiction because Council's denial of the 2008 application was a legislative action, not subject to appeal under R.C. Chapter 2506. The Village alternatively argued that Council's decision was supported by a preponderance of substantial, reliable, and probative evidence and should be affirmed.

{¶11} The municipal court rejected the Village's jurisdictional argument, determining that Council's denial of the 2008 application was an administrative act, appealable under R.C. Chapter 2506. The court went on to conclude that Council's denial was capricious, arbitrary, and unsupported by a preponderance of the evidence. Accordingly, the court reversed Council's decision and remanded the matter for further proceedings.

{¶12} In its timely appeal to this court, the Village sets forth the following assignments of error:

1. The Trial Court erred in its decision finding that it had jurisdiction to hear [Rockford's] R.C. 2506 administrative appeal.

2. The Trial court erred in its decision reversing * * * Council's Findings of Fact and Conclusion of Law and thereby remanding the case for further proceedings.

{¶13} By its first assignment of error, the Village reiterates its jurisdictional argument and contends that the municipal court erred by determining that it had subject-matter jurisdiction to hear Rockford's administrative appeal. Subject-matter jurisdiction is a question of law, which we review de novo. *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-261, 2007-Ohio-5802, ¶11, citing *Hills & Dales v. Ohio Dept. of Edn.*, 10th Dist. No. 06AP-1249, 2007-Ohio-5156, ¶16.

{¶14} Although there is no dispute that the environmental division of the municipal court has subject-matter jurisdiction to hear R.C. 2506.01 zoning appeals, see *Athenry Shoppers Ltd. v. Dublin Planning & Zoning Comm.*, 10th Dist. No. 08AP-742, 2009-Ohio-2230, ¶14, the parties dispute whether Council's denial of Rockford's 2008 application is subject to the administrative appeal process. Only a decision or order that resulted from the exercise of administrative power is subject to appeal under R.C. 2506.01. *Ohio Multi-Use Trails Assn. v. Vinton Cty. Commrs.*, 182 Ohio App.3d 32, 2009-Ohio-2061, ¶9. That statute "does not provide for appeals from legislative bodies or from resolutions of administrative bodies promulgated in a delegated legislative capacity," and a court accordingly lacks subject-matter jurisdiction over appeals based on legislative acts, which are subject to referendum. *Tuber v. Perkins* (1966), 6 Ohio St.2d 155, 156; *Moraine v. Bd. of Cty. Commrs.* (1981), 67 Ohio St.2d 139; Section 1f, Article II, Ohio Constitution. Thus, the municipal court's jurisdiction turns on whether Council's denial of Rockford's 2008 application involved the exercise of administrative or legislative authority

{¶15} The benchmark test for determining whether a government body's action is legislative or administrative is "whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence." *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, paragraph two of the syllabus. It is undisputed that the adoption or amendment of a zoning regulation or ordinance is a legislative act. *Donnelly* at 3-4. The distinction between legislative and administrative acts in the context of planned developments, including PUDs, however, is less evident and has been the subject of several opinions by the Supreme Court of Ohio. See, e.g., *Gray v. Trustees, Monclova Twp.* (1974), 38 Ohio St.2d 310; *Peachtree Dev. Co. v. Paul* (1981), 67 Ohio St.2d 345; *State ex rel. Zonders v. Delaware Cty. Bd. of Elections* (1994), 69 Ohio St.3d 5; *State ex rel. Commt. for the Referendum of Ordinance No. 3844-02 v. Norris*, 99 Ohio St.3d 336, 2003-Ohio-3887. It is within the context of that precedent that we consider the characterization of Council's action in this case.

{¶16} In *Gray*, the Supreme Court considered whether an action by a board of township trustees, amending a previously approved PUD plat, was legislative action under Monclova Township's zoning laws, which required that specific development plans be disclosed on a plat submitted to the board for approval and that those plans be filed with the county recorder and become part of the zoning regulations. The court observed that the overall zoning of the property as a PUD could be termed "nominal" because "it [did] not, by itself, indicate the specific zoning restrictions in the area," which were ascertainable only upon approval of the plat. *Id.* at 314, fn. 4. Under Moncolva's zoning laws, an amendment to a previously approved plat required an amendment to

the zoning regulations, even though the overall nominal zoning designation remained unchanged. The court held that, under those zoning laws, both the approval of a plat and the amendment of a plat constitute legislative acts because they, in effect, rezone the property.

{¶17} In *Peachtree*, the Supreme Court recognized that the implementation of a Community Unit Plan ("CUP"), as well as its creation, is a legislative act.¹ The court held that the Hamilton County Board of Commissioners acted legislatively when it created the CUP zoning classification by incorporating the CUP concept into the county zoning resolution. The court went on to state that the board similarly acted in a legislative capacity when it implemented the CUP concept through a resolution approving a request to develop land, zoned Residence A-2, as a CUP. Under the applicable zoning resolution, the board's approval of the CUP request did not change the zoning on the property from Residence A-2, even though the CUP contemplated uses inconsistent with the Residence A-2 zoning. The court concluded that the board's attempt to implement the CUP was "tantamount to rezoning" because it changed the permitted uses applicable to the property and, as a practical matter, effected a rezoning of the area. *Peachtree* at 351. As the Supreme Court later explained in *Norris*, at ¶35, both *Gray* and *Peachtree* involved legislative acts because they "effected a zoning change to the [subject] properties."

{¶18} In *Zonders*, at 13, the Supreme Court described three scenarios involving PUD zoning and whether they involved legislative or administrative actions. First, the

¹ Although the zoning classification at issue in *Peachtree* was a "Community Unit Plan" rather than a "Planned Unit Development," the Supreme Court recognized that these were the same zoning device, as authorized by R.C. 303.022.

court stated that the "enactment of a new PUD classification that is not tied to any specific piece of property is a legislative act." Thus, the incorporation of the PUD zoning classification into a zoning code is a legislative act. See *Peachtree* at 351. The *Zonders* court also held that "the application of preexisting PUD regulations to a specific piece of property which is zoned under a non-PUD classification * * * effects a rezoning of the property and is thus a legislative act subject to referendum." That was the situation before the court in *Zonders* and *Peachtree*. Finally, the court held that, "where specific property is already zoned as a PUD area, approval of subsequent development as being in compliance with the existing PUD standards is an administrative act which is not subject to referendum." *Id.*

{¶19} More recently, in *Norris*, the Supreme Court reviewed the foregoing cases in its consideration of two ordinances enacted by the North Ridgeville City Council, adopting the final development plans and final plats for two portions of a planned community development ("PCD") district known as Waterbury.² After the relators circulated petitions for referenda on those ordinances and filed an action for a writ of mandamus to compel the placement of the ordinances on the ballot, the Supreme Court was called upon to determine whether the ordinances were the result of legislative action, subject to referendum or administrative action, subject to an administrative appeal. Ultimately, the court concluded that the challenged ordinances merely executed or administered PCD ordinances already in existence and were, therefore, administrative acts.

² The Supreme Court noted, at ¶21, that the PCD zoning classification is the same as a PUD classification.

{¶20} The court held that the North Ridgeville City Council established the PCD classification in 1999 and implemented the PCD classification in 2000, applying it to the Waterbury property through ordinances to change the zoning from R-1 to PCD and to approve a preliminary development plan. Pursuant to *Zonders*, both of those acts were legislative and subject to referendum. The court went on, however, to hold that the North Ridgeville City Council's subsequent enactment of ordinances adopting final development plans and final plats simply "applied the preexisting PUD regulations and the previously approved preliminary development plan to the property to determine whether the final development plan and plat complied with these requirements." *Norris* at ¶33. Unlike in *Gray* and *Peachtree*, where the acts found to be legislative effected a zoning change to the properties, "the zoning change to the property [in *Norris*] was made in 2000 when the PCD classification was applied to the Waterbury property." *Id.* at ¶35.

{¶21} Despite the similarities between this case and *Norris*, the Village argues that Rockford's 2008 application did not simply involve the application of pre-existing PUD regulations and was, therefore, legislative. The Village maintains that the 2008 application presented an amalgamation of the various PUD development steps, requiring Council approval, and that the application requested the functional equivalent of traditional zoning. The Village's argument, however, is not supported by the Code or the Supreme Court precedent discussed above and is belied by the Village's actions throughout the approval process relating to the Villages at Westchester PUD.

{¶22} The Code establishes a two-step process for rezoning and developing property as a PUD. First, "[a]s part of the request for rezoning to a Planned District, a

Preliminary Plan must be submitted to [P&Z] along with the text of all applicable development standards text." Codified Ordinance 1173.04(a). (Emphasis added.)

"The Preliminary Plan is a conceptual plan submitted at the time of a request for rezoning generally describing the proposed uses for the site to be rezoned and their relationship with surrounding properties and uses." Codified Ordinance 1173.04(a)(1).

The development standards text details the development standards to be applied to the development and must identify and justify any standard that is less than the general standards established in Chapter 1173. A completed application for rezoning to a planned district is forwarded to P&Z, which has a duty to review the preliminary plan, determine whether it complies with Chapter 1173, and forward a recommendation to Council. See Codified Ordinance 1173.06(a)(3). Council approval is required for a zoning change. See Codified Ordinance 1173.06(a)(4). Under the present version of the Code, a preliminary plan lapses five years after Council approval if construction of any phase of the development has not begun. Id.

{¶23} Following approval of a preliminary plan and a change in zoning to PUD, the Code requires submission of a development plan, which is a detailed site plan that adheres to the approved development standards text for part of the PUD area. It is P&Z's duty to determine if the development plan complies with the regulations of Chapter 1173. Codified Ordinance 1173.06(b)(3). If the development plan complies with Chapter 1173, the previously approved preliminary plan, and the development standards text, P&Z "shall approve the plan." Id. Further action by Council is not required unless P&Z determines that the development plan proposes major changes that significantly alter the preliminary plan, in which case the plan must be resubmitted

to Council for approval. Id. If P&Z does not approve a development plan, its decision is appealable to Council. Codified Ordinance 1173.06(b)(4). Additionally, if P&Z approves a development plan, but construction site improvements are not commenced within two years after the approval, a new development plan must be approved before development may commence. Codified Ordinance 1773.06(c).

{¶24} This case is analogous to *Norris*. Based on that case, we conclude that Council's action on Rockford's 2008 application was administrative, subject to an appeal under R.C. Chapter 2506. As in *Norris*, the Code here contained a PUD zoning classification prior to any request to develop the Villages at Westchester as a PUD. Council then executed or implemented the PUD classification when it applied the zoning classification to the Villages at Westchester in Ordinance No. 59-90, which adopted the preliminary development plan for the PUD, established the development standards text for the PUD, changed the zoning of the property from R-2 to PUD, and amended the zoning map. Ordinance No. 17-01, titled "AN ORDINANCE TO AMEND ORDINANCE NO. 59-90 BY MODIFYING THE PRELIMINARY DEVELOPMENT PLAN AND CONDITIONS OF APPROVAL WITH REGARD TO THE VILLAGES AT WESTCHESTER PLANNED UNIT DEVELOPMENT," modified the PUD and supplemented the development standards text, but left all other provisions of Ordinance No. 59-90 and its accompanying preliminary development plan and development text in full force and effect. Since the approval of Ordinance No. 17-01, the property at issue has been approved for multi-family residential use. Any zoning change occurred when the PUD classification was applied to the Villages at Westchester property by Ordinance

No. 59-90, or when the permitted uses within the PUD were amended by Ordinance No. 17-01. The trial court aptly concluded that both ordinances constituted legislative acts.

{¶25} In January 2003, Rockford first requested approval of its plans regarding the PUD parcel designated for multi-family residential use. Rockford submitted an Application for Site Plan, setting forth a development plan for the Eagle Ridge condominiums and the Canal Crossing apartments within the Villages at Westchester. P&Z unilaterally approved Rockford's 2003 application, and Rockford constructed the Eagle Ridge condominiums, undisputedly within five years of Ordinance No. 17-01, which set forth the modified, approved preliminary development plan and development standards text for the PUD. By approving Rockford's 2003 application itself, instead of formulating a recommendation for Council, P&Z treated the 2003 application as a development plan and not as a request to amend the preliminary plan or development standards text or as a request to rezone the property, because those actions would have required Council approval. Additionally, P&Z did not question the existence of a preliminary plan and development standards text for the PUD despite the intervening 2001 amendment to the Code.

{¶26} In 2005, when Rockford requested approval to develop Canal Crossing as condominiums, it did not seek to amend the PUD, the preliminary plan or the development standards text, and it did not request rezoning. Rather, Rockford sought approval based on compliance with the existing preliminary plan, development standards text, and Chapter 1173. P&Z again treated the request as a development plan and approved it. Because Rockford did not begin construction on Canal Crossing within two years after the 2005 approval, however, the development plan lapsed, and

Rockford was required to submit a new development plan. P&Z's action on the 2005 application directly contradicts Council's statement in its Findings of Fact and Conclusions of Law that the 2005 application was a request to amend the preliminary plan and development standards text for the Villages at Westchester. It also contradicts the Village's position on appeal that no preliminary plan existed with respect to the PUD.

{¶27} When Rockford filed its 2008 application, requesting approval to develop Canal Crossing as a 112-unit apartment development, as originally approved in 2003, P&Z again treated the application as a development plan. At the meeting in which it considered the 2008 application, P&Z stated that Rockford "is requesting to amend the previously approved PUD *development plan* approved on December 12, 2005 * * * from condominiums to apartments, the later use originally approved on February 10, 2003." (Emphasis added.) Despite a staff recommendation that it approve the 2008 application, P&Z unilaterally and unanimously denied the application.

{¶28} Only upon Rockford's appeal to Council was there any suggestion that no preliminary plan remained in place for the Villages at Westchester PUD or that the 2008 application required an amendment to the preliminary plan. Council concluded that Rockford's 2005 and 2008 applications constituted requests to amend the preliminary plan and development standards text for the PUD and stated that Rockford did not submit a new preliminary plan and development standards text with its 2008 application. Council stated that P&Z "should have considered [the 2008 application] a new combined preliminary site plan / development plan / development standards text under Codified Ordinance 1173.06(a) and (b) that required Council's approval" or as "an

amendment to the previously approved PUD development." Under either scenario, Council concluded that Ohio law rendered action on the 2008 application legislative.

{¶29} Council's conclusion that it acted legislatively in denying Rockford's 2008 application runs afowl of the Supreme Court of Ohio cases addressing the distinctions between legislative and administrative acts in the context of PUD zoning and development. Rockford's 2008 application did not request or require a rezoning of the property. Since 2001, the property has not only been zoned PUD, but also has been identified as a site for multi-family residential purposes, which encompasses both condominiums and apartments. Rockford's 2008 application did not request or require any amendment to the preliminary plan or development standards text amended and affirmed by Ordinance No. 17-01, which remained in effect. Rather, the application required only the implementation of the already approved PUD standards to ensure the development plan's compliance. Like Rockford's 2003 and 2005 applications, the 2008 application required P&Z, and, on appeal, Council, only to determine if the proposed plan complied with the requirements of Chapter 1173 and the preliminary plan and development standards text applicable to the Villages at Westchester PUD, as set forth in Ordinance Nos. 59-90 and 17-01, and, if so, to approve the plan.

{¶30} Ultimately, we agree with the trial court's conclusion that, when Rockford filed its 2008 application, it was not required to file a new preliminary plan and development standards text. Rockford's 2008 application was a request for P&Z to apply the existing preliminary plan and development standards text for the Villages at Westchester PUD; P&Z lacked discretion to deny the application if it conformed to the applicable requirements. Similarly, Council's duty on appeal was to determine only

whether the proposed development plan complied with Chapter 1173 and the existing preliminary plan and development standards text. Where specific property, like that at issue here, has already been zoned PUD, the approval of subsequent development as being in compliance with the existing PUD standards is an administrative act, subject to appeal under R.C. Chapter 2506. *Zonders* at 13; *Norris* at ¶35. Accordingly, despite its statement to the contrary, Council's action on the 2008 application was administrative. As a result, the municipal court possessed subject-matter jurisdiction over this appeal, and we overrule the Village's first assignment of error.

{¶31} Having rejected the Village's argument that the municipal court lacked jurisdiction to hear and decide Rockford's appeal, we proceed to a brief discussion of the Village's second assignment of error, by which it argues that the court erred by reversing Council's decision. The Village argues that it was entitled to deny the 2008 application because Rockford was required, but failed, to submit a new preliminary plan. The Village also states that the municipal court summarily disregarded Rockford's concession "that its plan had lapsed."

{¶32} When reviewing a decision in an administrative appeal under R.C. Chapter 2506, this court's review is more limited in scope than the trial court's review, and we are required to affirm the trial court's decision unless we find, as a matter of law, that the decision is not supported by a preponderance of reliable, probative, and substantial evidence. See *Smith v. Granville Twp. Bd. of Trustees*, 81 Ohio St.3d 608, 613, 1998-Ohio-340. An appellate court may not substitute its judgment for the trial court in an R.C. Chapter 2506 appeal absent the approved criteria for doing so. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493.

{¶33} First, we reject the Village's assertion that Rockford conceded the lack of a preliminary plan. Although Rockford did admit that its 2005 development plan had lapsed, pursuant to Codified Ordinance 1173.06(c), because it did not commence construction of Canal Crossing within two years, it did not admit and, in fact, adamantly disputed the Village's suggestion that no preliminary plan remained in effect for the PUD. Further, as discussed in relation to the Village's first assignment of error, Rockford was not required to submit a new preliminary plan, nor did its 2008 application request an amendment to the existing preliminary plan.

{¶34} The municipal court concluded that there was no evidence to support the denial of Rockford's 2008 application. The court stated that the only possible evidence supporting a denial of Rockford's 2008 application stemmed from the testimony and statements of citizens at hearings before P&Z and Council, but the court concluded that P&Z and Council lacked authority to consider that evidence because Codified Ordinance 1173.06(b)(3) mandated approval of the development plan if it comported with Chapter 1173 and the preliminary plan and development standards text approved for the PUD. Because the sole question before P&Z and Council was whether Rockford's plan complied with those requirements, the public comments were irrelevant. Additionally, we note that the P&Z Administrator stated to Council, at the hearing on Rockford's appeal, that Rockford's 2008 application, in fact, complied with all applicable requirements. Accordingly, we agree with the municipal court that the record lacks any evidence supporting Council's denial of the 2008 application. Because we cannot find that the municipal court's decision is unsupported by a preponderance of reliable,

probative, and substantial evidence, we affirm that decision and overrule the Village's second assignment of error.

{¶35} Having overruled both of the Village's assignments of error, we affirm the decision of the Franklin County Municipal Court, Environmental Division.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
