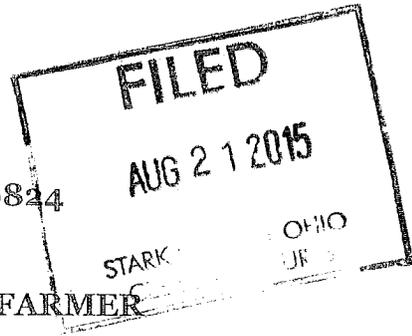


IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO



CHARLES OSBORNE, et al.

CASE NO. 2015CV00824

Appellants,

JUDGE KRISTIN G. FARMER

v.

JUDGMENT ENTRY

CITY OF NORTH CANTON, et al.

Appellees.

This matter came before the Court upon a motion from Appellees, The City of North Canton and North Canton Planning Commission (collectively “North Canton”), to dismiss the Administrative Appeal filed on May 29, 2015, by the Appellants, Charles Osborne (“Osborne”), Rita Palmer (“Palmer”), and Maria Harris (“Harris”)(collectively referred to as “Appellants”). Appellants filed a response to the motion to dismiss, to which North Canton has replied. Upon review of the briefs submitted, the Court finds as follows.

FACTS

The administrative appeal in this case concerns the conditional use permit issued to Maple Street Commerce, LLC for its proposed Hoover District south parking lot expansion (“the expansion”). Maple Street Commerce, LLC submitted an application for a site plan and conditional use permit for the expansion to North Canton’s Department of Permits on April 11, 2014. The Planning Commission held a public hearing regarding the application on May 7, 2014, wherein the Planning Commission took testimony from Maple Street's consultants, property manager, and architect; the City's Engineer and its Director of Permits, and 16 residents, three of which included Appellants. The Planning Commission tabled the matter so that Maple Street Commerce, LLC could meet with City residents and provide them with additional information regarding their plans, prepare

additional information regarding the proposed property-line buffer, together with addressing questions of prior mining on the property, lighting, and storm water detention.

The Planning Commission held a second public hearing on September 3, 2014, wherein it took testimony from the developer's vice president for facility management, the City's Engineer, the developer's engineer and civil engineer for the project, and residents, two of which were Palmer and Osborne. All Appellants were present for such meeting. Thereafter, the Planning Commission voted unanimously to approve the site plan. However, the Planning Commission erroneously failed to vote on the conditional use permit during its September 3, 2014, meeting. On October 8, 2014, the Commission reconvened to address the conditional use permit. Osborne was present at the October 8, 2014, meeting and attempted to comment. However, because the issue had been fully presented and the public was given the opportunity to speak at the September 3, 2014, Osborne was not permitted to comment. The Planning Commission approved the conditional use permit by a unanimous vote.

On October 10, 2014, North Canton City Council received a letter signed by Osborne stating that he was appealing the Planning Commission's approval of the conditional use permit on October 8, 2014.¹ Although "Chuck and Rita Osborne" appeared under the signature block of the letter, the letter was signed only by Osborne and used "I," as opposed to "we" when indicating who the letter is from (e.g., "I am writing to appeal," and "I make this request. . ."). See "Exhibit A" in the Record of Proceedings filed May 29, 2015 (hereinafter "the record"). Osborne's appeal letter,

¹ Throughout this entry, this appeal may be referred to as "Osborne's appeal" for ease of reference only.

however, made no mention of the site plan that was approved on September 3, 2014. Although the bottom of Osborne's letter indicated that the letter was copied (i.e., "cc") to Attorney Robert Cyperski, who is counsel for Appellants in the instant matter, counsel did not accompany any of the Appellants to either the September 3, 2014, or October 8, 2014, meetings.

Osborne sent a letter to Eric Bowles, North Canton Superintendent of Permits and Inspection, on November 7, 2014, stating he was appealing the "Planning Commission's approval of a Conditional Use Permit for expansion of the Hoover District Parking Lot." See "Exhibit B" in record. Said letter set forth numerous bases for such appeal. "Chuck and Rita Osborne" appeared under the signature block of the letter, although the letter was signed only by Osborne.² As with his letter received on October 10, 2014, Osborne used "I," as opposed to "we" when indicating who the letter is from (e.g., "I am writing to appeal," and "I make this request. . ."), and indicated that it was copied (i.e., "cc") to Attorney Robert Cyperski. Attached to the November 7, 2014, letter are signed statements from other individuals wishing to join in Osborne's appeal, including Harris. Palmer did not sign such a statement.

North Canton's Charter provides that its Zoning and Building Standards Board of Appeals (its "ZBOA") shall hear and decide appeals for exceptions to and variations in the applications of ordinances, orders, or regulations of administrative officials or agencies governing building and zoning. See "Exhibit C" in the record. However, at the time of

² The Court notes that the copy of the letter attached to Appellant's brief contains the signature of "Rita Palmer." However, such signature does not appear in the copy of the letter provided in the record. The Court will consider only those exhibits contained in the record when rendering its ruling in this matter.

Osborne's appeal, North Canton also had in effect Ordinance 1177.11, which provided as follows:

Any person who is adversely affected by a decision made by the Planning Commission according to procedures set forth in this Chapter may appeal such decision to Council within 30 days of the Planning Commission's decision. Council shall establish appropriate rules and procedures to hear and decide such appeals.

See "Exhibit D" in the record. At its meeting on December 1, 2014, North Canton City Council unanimously passed Resolution No. 94-2014 which provided:

A resolution transferring from North Canton City Council to North Canton's Zoning and Building Standards Board of Appeals ("ZBOA") a November 7, 2014, appeal of North Canton's Planning Commission's approval of a conditional use permit for the expansion of the Hoover District's south parking lot, PC403-14CU, and declaring same to be an emergency.

In response, Osborne sent a "tax payer demand letter," pursuant to R.C. 733.59, to North Canton's Law Director, received by Council on December 15, 2014, notifying same that Osborne intended to sue North Canton for Council's failure to hear his appeal pursuant to North Canton Zoning Code Section 1177.11. See "Exhibit AA" in the record.

Upon reconsideration at its January 12, 2015, meeting, North Canton City Council unanimously voted to approve Resolution 1-2015, which provided:

A resolution repealing North Canton Resolution 94-2014, which transferred from North Canton City Council to North Canton's Zoning and Building Standards Boards of Appeals ("ZBOA") a November 7, 2014, appeal of North Canton's Planning Commission's approval of a conditional use permit for the expansion of the Hoover District's south parking lot, PC403-14CU, and declaring the same to be an emergency . . .

See "Exhibit EE" in the record. The passage of Resolution 1-2015 meant that North Canton City Council would, in fact, handle Osborne's appeal. At a Special Meeting of Council on February 17, 2015, Council agreed to put forth Resolution 2-2015, which dismissed Osborne's appeal on the basis of lack of standing to make such appeal, for three

separate readings before Council. In making such decision, Council used the test set forth in case law from the Ohio Supreme Court and the Fifth District Court of Appeal (as discussed infra) regarding a third-party property owner's standing in a court to challenge the action of an administrative board or agency. Resolution 2-2015 specifically provided as follows:

A resolution dismissing the appeal of North Canton's Planning Commission's approval of a conditional use permit, Hoover District South Parking Lot, PC403-14CU.

See "Exhibit GG" in the record. At Council's meeting on February 23, 2015, public comment was made on Resolution 2-2015 by Osborne, Palmer, and others. Resolution 2-2015 was voted on by Council and unanimously passed. *Id.* A second reading of Resolution 2-2015 was held at Council's meeting on March 9, 2015, and a third reading occurred at the March 23, 2015, meeting. At both readings, Resolution 2-2015 passed unanimously. See "Exhibit HH" and "Exhibit GG" in the record. Additionally, on March 23, 2015, Council passed Resolution 17-2015 which repealed and deleted North Canton Ordinance 1177.11 ("Appeal to City Council"), the same section under which Osborne had filed his appeal of the conditional use permit issued by the Planning Commission on October 8, 2014.

On April 22, 2015, Appellants filed a notice of appeal that stated as follows:

[Appellants] hereby give Notice of their Appeal on questions of law and fact, to the Stark County Common Pleas Court from the March 23, 2015 decision of the North Canton City Council denying the appeal and upholding the decision of the North Canton Planning Commission dated March 23, 2015 (sic) to grant a conditional use and site plan application for the Maple Commerce Hoover District South Parking Lot Expansion.

North Canton filed a motion to dismiss the appeal on June 1, 2015.

LAW & ANALYSIS

North Canton has filed a three-fold motion to dismiss the Appellants' appeal filed April 22, 2015, arguing lack of standing; failure to exhaust administrative remedies; and failure to demonstrate actual harm. Upon a review of the briefs submitted by both parties, the Court finds that North Canton and the Appellants have missed the essential issue presented by this appeal.

The Court has thoroughly gone through the entire record in this matter and finds that neither North Canton City Council nor the BZOA have ever approved of or affirmed the conditional use permit issued by the Planning Commission on October 8, 2014, to Maple Street Commerce, LLC. Therefore, an appeal of the conditional use permit, itself, is not properly before this Court.

Rather, the issue properly before this Court is the dismissal of Osborne's appeal by North Canton City Council for lack of standing. Although perhaps unartfully written, the Court finds that the Appellant's "Notice of Appeal" filed April 22, 2015, is sufficient to put such issue before the Court as it provides adequate notice that the appeal concerns the decision by North Canton City Council on March 23, 2015, regarding the appeal of the conditional use permit. The Court finds that such decision was a decision by North Canton City Council to dismiss Osborne's appeal to Council of the granting of the conditional use permit issued to Maple Street Commerce, LLC. It is clear from the record, especially from the minutes of the Special Meeting of Council on February 17, 2015, that such dismissal was based upon a belief that case law from the Supreme Court of Ohio and the Fifth District Court of Appeals provided that the Appellants did not have standing to assert such an appeal to Council. Since that is clearly the basis of Council's decision to dismiss the appeal at issue, the Court finds that both parties have fully briefed their positions as it relates to standing and that such briefing, coupled with a review of the

record, is sufficient for this Court to render a decision without the need of additional briefing.

R.C. 2506.01 provides, in part, that “every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located.” When reviewing an appeal filed pursuant to R.C. 2506.01, the Court of Common Pleas acts as a reviewing court and must determine if such decision, upon review of the record, is “unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.” R.C. 2506.04. Further, “consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court.” *Id.*

Standing determines "whether a litigant is entitled to have a court determine the merits of the issue presented." *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 1994-Ohio-183. As it relates to third-party property owners seeking to challenge *in court* a zoning change requested by an adjacent or contiguous property owner, the Supreme Court of Ohio has held that “A resident, elector and property owner of a township, who appears before a township Board of Zoning Appeals, is represented by an attorney, opposes and protests the changing of a zoned area from residential to commercial, and advises the board, on the record, that if the decision of the board is adverse to him he intends to appeal from the decision to a court, has a right of appeal to the Common Pleas Court if the appeal is properly and timely made pursuant to Sections 519.15 and 2506.01

to 2506.04, inclusive, and Chapter 2505, Revised Code.” *Alihassan v. Alliance Board of Zoning Appeals* (Dec. 18, 2000), 5th Dist. No. 1999CA00402, citing *Roper v. Board of Zoning Appeals* (1962), 173 Ohio St. 168, syllabus. More recently, the Fifth District Court of Appeals had the opportunity to address standing in an appeal brought pursuant to R.C. 2506.01 and stated as follows:

To reiterate, in [*Schomaeker v. First Natl. Bank of Ottawa* (1981), 66 Ohio St.2d 304, which affirmed the *Roper*, supra, holding], the Ohio Supreme Court held, “A *person owning property contiguous to the proposed use* who has previously indicated an interest in the matter * * * and who attends a hearing on the variance together with counsel, **is within that class of persons directly affected by the administrative decision and is entitled to appeal under R.C. Chapter 2506.**”

Dempsy v. Village of Shawnee Hills, 5th Dist. No. 14 CAH 03 0015, 2015-Ohio-257, emphasis in original. This Court finds that the rationale behind the *Roper/Schomaeker/Dempsy* standing requirement is to limit the class of individuals who may appeal to the court an administrative action, which does not directly affect those individuals’ property rights, to those who have actively participated in the underlying administrative proceedings.

From a review of the briefing and minutes of Council meetings, it is apparent to this Court that, from the above holdings, North Canton City Council has concluded that standing necessary to bring an appeal to Council pursuant to former North Canton Ordinance 1177.11 is equivalent to that required to appeal to the Court of Common Pleas pursuant to R.C. 2506. This Court disagrees. It is clear from the case law that the *Roper/Schomaeker/Dempsy* standing requirement applies to appeals brought to the Court pursuant to R.C. 2506. The cases cited make no mention of extending the requirement to administrative agencies and political subdivisions. As such, the Court finds that Council improperly applied the *Roper/Schomaeker/Dempsy* standing

requirement to Osborne's appeal to Council on October 10, 2014, of the Planning Commission's issuance of the conditional use permit at issue.

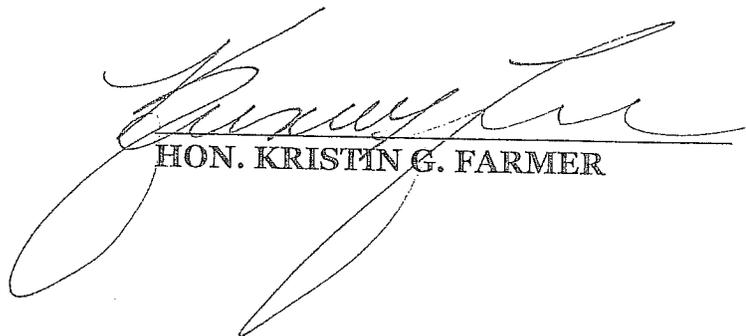
Having so found, the Court must still determine whether the Appellants had standing to appeal the issuance of the conditional use permit to Council. Former North Canton Ordinance 1177.11 provided that "*any person* who is adversely affected by a decision made by the Planning Commission" may appeal that decision to Council. Emphasis added. The Court finds that all of the Appellants had a property interest that was adversely affected by the issuance of the conditional use permit. Palmer and Harris, as owners of contiguous property, clearly had interests that were affected by the issuance of the permit. Further, this Court finds that Osborne, as the husband of Palmer, had, at a minimum, a dower interest in Palmer's property and that interest was adversely affected by the issuance of the permit. As such, the Court finds that the Appellants had standing to bring an appeal of the conditional use permit before Council pursuant to Ordinance 1177.11.

CONCLUSION

Accordingly, because the Court finds that the *Roper/Schomaeker/Dempsy* standing requirement did not apply to the Appellant's appeal to Council pursuant to North Canton Ordinance 1177.11 and because this Court further finds the Appellants were adversely affected by the issuance of the conditional use permit issued by the Planning Commission on October 8, 2014, the Court finds that North Canton City Council's dismissal of the Appellants appeal pursuant to Ordinance 1177.11 was unconstitutional, illegal, arbitrary, capricious, and unreasonable. As such, this Court **REVERSES** the

decision of North Canton City Council and REMANDS the matter to North Canton City Council for full consideration of and hearing on the Appellants' appeal.³

IT IS SO ORDERED.



HON. KRISTIN G. FARMER

**c: Timothy L. Fox
Robert Cyperski
James R. Vaughn**

³ The Court realizes that North Canton may attempt to argue that the Appellants' appeal should be heard by the BZOA as North Canton Ordinance 1177.11 was repealed and deleted by Council at the March 23, 2015, Council Meeting. However, the Court finds that the Appellants properly appealed to Council at the time when the Ordinance was valid and in effect and, but for Council's error in dismissing the Appellants' appeal, it would have been heard by Council. As such, to fully correct the error by Council, the Court finds that the matter should, in fact, be heard by the body to whom it was originally appealed-that being North Canton City Council.