

[Cite as *Thies v. Dayton*, 2019-Ohio-402.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

PAUL D. THIES

Plaintiff-Appellant

v.

CITY OF DAYTON, OHIO, et al.

Defendants-Appellees

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Appellate Case No. 28029

Trial Court Case No. 2018-CV-1541

(Civil Appeal from
Common Pleas Court)

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OPINION

Rendered on the 8th day of February, 2019.

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TUCKER, J.

{¶ 1} The City of Dayton (City), through the Dayton City Commission (Commission), took action to rezone certain real property. Appellant, Paul Thies, filed an administrative appeal of the rezoning decision under R.C. 2506.01. In response, the City filed a motion to dismiss, asserting that the trial court did not have subject matter jurisdiction over the administrative appeal. Upon the motion being fully briefed, the trial court, dismissed Thies's administrative appeal, finding that the rezoning decision was a legislative act, and, as such, it did not have subject matter jurisdiction to decide the attempted administrative appeal. We agree with the trial court's determination. The trial court's judgment will thus be affirmed.

Facts and Procedural History

{¶ 2} The City annexed 157.24 acres from Butler Township. The annexed real property initially, and automatically, became part of the SR-1 zoning district, with SR-1 being a suburban single family designation. Dayton Zoning Code 150.300.5 and 150.300.1. The City Plan Board, within twelve months of the annexation, may recommend to the Commission that the initial, automatic zoning designation be changed. Dayton Zoning Code 150.300.5.

{¶ 3} Based upon the annexed property being adjacent to the Dayton International Airport, the Plan Board timely requested that the Commission change the zoning designation to an AP (airport) designation. The Commission, in response, adopted Ordinance No. 31632-18 to accomplish the requested zoning change.

{¶ 4} Thies filed a timely administrative appeal under R.C. 2506.01 to contest the

zoning change. The City then filed a motion to dismiss under Civ.R. 12(B)(1), asserting that the passage of the Ordinance was a legislative, as opposed to an administrative, act, and that given this, the trial court was without subject matter jurisdiction to decide the appeal. The trial court, adopting the City's reasoning, sustained the motion to dismiss. This appeal followed.

Standard of Review

{¶ 5} When deciding a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction, a trial court must determine whether the pending action is one the court has "authority to decide." *Vinson v. Triumph Glass*, 149 Ohio App.3d 605, 2002-Ohio-5596, 778 N.E.2d 149, ¶ 7 (2d Dist.), citing *Crestmont Cleveland Partnership v. Ohio Dept. of Health*, 139 Ohio App.3d 928, 936, 746 N.E.2d 222 (10th Dist.). Appellate review of a trial court's subject matter jurisdiction determination is de novo. *Id.*

Analysis

{¶ 6} The presented issue is quite narrow: did the City's enactment of the Ordinance changing the zoning designation constitute a legislative or an administrative, quasi-judicial act? If, as conceded by Thies, it was a legislative act, the trial court did not have authority to decide the attempted R.C. 2506.01 administrative appeal.

{¶ 7} In *Berg v. City of Struthers*, 176 Ohio St. 146, 198 N.E.2d 48 (1964), The Supreme Court stated the following regarding the legislative character of a city council's decision to grant, or not, a requested zoning change:

The refusal of the city council, the legislative body of [Struthers], to grant

the requested zoning change was legislative action. The Administrative Appeals Act (Chapter 2506, Revised Code), providing for appeals of administrative officers, tribunals and commissions, does not permit appeals from acts of legislative bodies.

Id., at 146-147.

{¶ 8} In *Wolters v. Greenville Township Trustees*, 2d Dist. Darke No. 1296, 1992 WL 180144 (July 24, 1992), we stated the following concerning Wolters's attempt to file an administrative appeal from the township trustees' denial of his rezoning request:

The Supreme Court has consistently held that the adoption or amendment of a zoning regulation is a legislative, rather than an administrative, act.

Wolters at *2, citing *Berg*. (Other citations omitted.)

{¶ 9} In *Schropshire v. City of Englewood*, 92 Ohio App.3d 168, 634 N.E.2d 657 (2d Dist.1993), an analogous situation existed in which a city council rezoned real property, prompting adjacent landowners to file an administrative appeal under R.C. 2506.01; we ruled that the rezoning constituted legislative action that "may not be attacked in an appeal under [R.C. 2506.01]." *Id.* at 171, citing *Berg*. (Other citations omitted.) Thies, we further note, has not cited, nor have we found, any case that has determined that a zoning change made by a local government's legislative body is an administrative, quasi-judicial act, thereby making an administrative appeal under R.C. 2506.01 possible.

{¶ 10} We do acknowledge *Shaheen v. Cuyahoga Falls City Council*, 9th Dist. Summit No. 24472, 2010-Ohio-640, in which the court stated that the Supreme Court's "formal approach to the distinction between legislative and administrative action * * * has

been much criticized.” *Id.* at ¶ 34. The *Shaheen* court, nonetheless, concluded that the common pleas court did not have subject matter jurisdiction to decide the R.C. 2506.01 administrative appeal contesting the zoning change made by the Cuyahoga Falls City Council, stating that “any change in the formal approach followed by the Ohio Supreme Court * * * will have to come from that court.” *Id.*

Conclusion

{¶ 11} We, in short, conclude that the trial court properly dismissed Thies’s R.C. 2506.01 administrative appeal based upon a failure of subject matter jurisdiction. Having overruled Thies’s sole assignment of error, the trial court’s judgment is affirmed.

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DONOVAN, J. and HALL, J., concur.

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