

[Cite as *SuperValu Holdings, Inc. v. Jackson Ctr. Associates, LP*, 2004-Ohio-4314.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

SUPERVALU HOLDINGS, INC.,	:	
d.b.a. BIGGS, et al.,	:	
	:	CASE NOS. CA2003-12-108
Plaintiffs-Appellants/	:	CA2003-12-110
Cross-Appellees,	:	
	:	
-vs-	:	<u>O P I N I O N</u>
	:	8/16/2004
	:	
JACKSON CENTER ASSOCIATES, LP,	:	
et al.,	:	
	:	
Defendants-Appellees/	:	
Cross-Appellants.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2003CVH248

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Mart Stores, Inc. and Wal-Mart Real Estate Trust

POWELL, P.J.

{¶1} Plaintiff-appellant, SuperValu Holdings, Inc. ("SuperValu"), appeals the decision of the Clermont County Court of Common Pleas granting partial summary judgment in favor of defendant-appellee, Wal-Mart Stores, Inc. ("Wal-Mart"). Defendant/cross-appellant, Union Township, cross-appeals the common pleas court's decision granting partial summary judgment in favor of SuperValu.¹ We affirm the common pleas court's decisions.

{¶2} In August 2002, Wal-Mart informed Union Township officials of its intention to demolish its existing store located in a Planned Development ("PD") district in Union Township, Clermont County. Wal-Mart sought to construct a "super center" on the site of the demolished building. Wal-Mart submitted a PD site plan to the township, seeking the township's approval. Wal-Mart's site plan was reviewed by both the Clermont County Planning Commission and the Union Township Zoning Commission. The planning commission recommended approving the plan. After holding a public hearing on the matter, the zoning commission also recommended approving the plan. In November 2002, the township approved the plan.

{¶3} In February 2003, SuperValu filed suit against Wal-Mart in the common pleas court, seeking to enjoin Wal-Mart from using certain property for a "supermarket." According to SuperValu, part of the property proposed to be used for the super center was

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this case from the accelerated calendar.

subject to a restrictive covenant forbidding use for a "supermarket."

{¶4} In April 2003, Wal-Mart submitted a request to the township for a major amendment to the approved site plan. In the proposed amendment, Wal-Mart sought to decrease the number of parking spaces and landscaped islands in the parking lot, while increasing the square footage of the store. Under the new configuration, the store and parking lot would no longer be on the property subject to the restrictive covenant. In May 2003, the township approved Wal-Mart's amendment to its site plan.

{¶5} SuperValu then amended its complaint, adding Union Township as an additional defendant. SuperValu sought a declaration from the common pleas court that the major amendment to Wal-Mart's site plan was void because it was not properly approved by Union Township. SuperValu also sought a declaration that certain text amendments to the Union Township Zoning Resolution were not properly enacted by the township. Those text amendments decreased the required number of parking spaces for retail stores. The text amendments were enacted prior to the township's approval of Wal-Mart's major amendment, and were necessary for Wal-Mart to make the changes to the parking lot configuration.

{¶6} SuperValu, Wal-Mart, and Union Township filed motions for summary judgment. The common pleas court granted the motions of Wal-Mart and Union Township in part. The court found that the township's approval of Wal-Mart's major amendment was an

administrative act. Because SuperValu did not file an administrative appeal and thus failed to exhaust its administrative remedies, the court found that SuperValu could not seek a declaration as to the validity of the township's administrative act. Accordingly, the court found that the major amendment to Wal-Mart's site plan remained in full force and effect.

{¶7} The common pleas court granted SuperValu's summary judgment motion in part. The court found that the text amendments to the township zoning resolution were not properly enacted by Union Township. Therefore, the court ruled that the amendments were void, and enjoined the township from taking any further action with respect to those amendments.

{¶8} SuperValu appeals the common pleas court's decision. Union Township cross-appeals. In its appeal, SuperValu assigns one error as follows:

{¶9} "THE TRIAL COURT ERRED WHEN IT GRANTED PARTIAL SUMMARY JUDGMENT IN FAVOR OF APPELLEES AND DENIED APPELLANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, THEREBY ORDERING THAT WAL-MART'S MAJOR AMENDMENT OF APRIL 2003 TO THE APPLICATION FOR PLANNED DEVELOPMENT DISTRICT REMAINS IN FULL FORCE AND EFFECT."

{¶10} In this assignment of error, SuperValu argues that the township's approval of Wal-Mart's major amendment was a legislative act, not an administrative act as the common pleas court determined. Therefore, SuperValu argues, the major amendment is void because the township did not submit the amendment to the

planning and zoning commissions for review, or give notice to the public as required by R.C. 519.12.

{¶11} In evaluating a trial court's determination of a summary judgment motion, an appellate court engages in an independent review of the record, Prest v. Delta Delta Delta Sorority (1996), 115 Ohio App.3d 712, 715, applying the same standard used by the trial court. Midwest Ford, Inc. v. C.T. Taylor Co. (1997), 118 Ohio App.3d 798, 800. Pursuant to Civ.R. 56, a trial court may grant summary judgment when there is no genuine issue of material fact remaining to be litigated; the moving party is entitled to judgment as a matter of law; and reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 66. The nonmoving party is entitled to have the evidence construed most strongly in his favor. Id.

{¶12} "The test for determining whether the action of a legislative body 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." State ex rel. Commt. for the Referendum of Ordinance No. 3844-02 v. Norris, 99 Ohio St.3d 336, 2003-Ohio-3887, at ¶19, quoting Donnelly v. City of Fairview Park (1968), 13 Ohio St.2d 1, paragraph two of the syllabus.

{¶13} R.C. 519.021(A) provides in relevant part as follows:

{¶14} "The board of township trustees may adopt planned-unit development regulations that do not automatically apply to any

property in the township, but establish standards that will apply to property that becomes part of a planned-unit development as provided in this division. * * * Once property has been rezoned as a planned-unit development, subsequent development on that property shall comply with the planned-unit development regulations as determined by the board of township trustees or township zoning commission, as applicable. After the designation of the property as a planned-unit development on the zoning map, any approval or disapproval of subsequent use or development of property in a planned-unit development as being in compliance with regulations established as authorized by this division shall not be considered to be an amendment or supplement to a township zoning resolution for the purpose of section 519.12 of the Revised Code, but may be appealed pursuant to Chapter 2506 of the Revised Code."

{¶15} In this case, the property on which Wal-Mart intended to construct a super center had already been zoned as a PD district. Additionally, the township had already approved Wal-Mart's site plan. Wal-Mart then sought the amendment at issue, which proposed modifications to the store and parking lot size.

{¶16} As the Ohio Supreme Court held in State ex rel. Zonders v. Delaware Cty. Bd. of Elections (1994), 69 Ohio St.3d 5, 13, "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[.]" In this case, the township was determining whether the amendment to the

site plan complied with the existing PD standards set forth in sections 680 through 687 of the Union Township Zoning Resolution.

Pursuant to R.C. 519.021, the township was not legislating, but was regulating the "subsequent use or development of property" within the already established PD district. The township's decision to approve the amendment did not amount to a legislative rezoning of the property. Norris, 2003-Ohio-3887, at ¶32. The township was "executing or administering a law," not "enacting a law." See Donnelly, 13 Ohio St.2d at paragraph two of the syllabus.² Accordingly, we find that the township's approval of Wal-Mart's April 2003 amendment was an administrative act.

{¶17} Our decision is consistent with our recent case of More v. Bd. of Twp. Trustees of Batavia Twp., Clermont App. No. CA2002-07-0613, 2003-Ohio-1265. Citing Zonders, this court in More held that the act of a township in denying a proposed modification of a preliminary development plan for property located within an area already zoned as a planned unit development was an administrative act. More at ¶3. More is supported by further precedent, including Buckeye Community Hope Found. v. City of Cuyahoga Falls, 82 Ohio St.3d 539, 1998-Ohio-189, paragraph three of the syllabus, and King v. Village of Granville (Sept. 29, 1997), Licking App. Nos. 97CA29 and 97CA34.

2. Though not dispositive of the issue, we also note that section 686 of the Union Township Zoning Resolution specifically states that the approval of an amendment to a PD plan is an administrative act not subject to R.C. 519.12.

{¶18} SuperValu cites Gray v. Trustees, Monclova Twp. (1974), 38 Ohio St.2d 310, in support of its argument that the township acted legislatively. In that case, the Ohio Supreme Court held that an "[a]ction by a board of township trustees adopting an amendment to a previously approved planned unit development plat is legislative action." Gray at syllabus. However, Gray was decided prior to the 1997 amendment to R.C. 519.021. With the addition of the amendment, the statute states that the approval of subsequent use or development of property within a planned unit development as being in compliance with the existing standards for planned unit developments is an administrative act. Therefore, Gray is inapplicable to this case and the Ohio Supreme Court's more recent precedent is controlling.

{¶19} Because the township acted administratively, the requirements of R.C. 519.12 regarding review by the planning and zoning commissions and notice to the public did not apply. SuperValu could have filed an administrative appeal of the township's decision pursuant to R.C. 2506.01, but did not. Because SuperValu did not exhaust its administrative remedies before seeking a declaratory judgment, the common pleas court was correct in determining that SuperValu was barred from seeking a declaratory judgment as to the validity of the township's administrative act. See Karches v. City of Cincinnati (1988), 38 Ohio St.3d 12, 17; More, Clermont App. No. 2002CA-07-061, 2002-Ohio-7144, at ¶14.

{¶20} Unlike in More, both Union Township and Wal-Mart asserted in their answers to SuperValu's amended complaint the defense that SuperValu failed to exhaust its administrative remedies. Additionally, SuperValu failed to show that there was no administrative remedy available, or that an administrative appeal would have been onerous or unduly expensive. See Karches at 17 (discussing exceptions to the failure to exhaust administrative remedies defense). Therefore, the defense was valid and had not been waived. Accordingly, we overrule SuperValu's assignment of error. Wal-Mart and Union Township were entitled to judgment as a matter of law as determined by the common pleas court.

{¶21} In its cross-appeal, Union Township assigns the following error:

{¶22} "THE TRIAL COURT ERRED WHEN IT ENJOINED UNION TOWNSHIP AND ITS BOARD OF TRUSTEES FROM TAKING ANY FURTHER ACTION WITH RESPECT TO THE TEXT AMENDMENTS RELATING TO PARKING RATIOS IN §812(18) AND (19) OF THE UNION TOWNSHIP ZONING RESOLUTION."

{¶23} In its cross-assignment of error, Union Township argues that it "modified" the recommendation of the zoning commission in accordance with R.C. 519.12(H). Therefore, Union Township argues, the text amendments were validly enacted and should be enforceable.

{¶24} "The zoning authority possessed by townships in the state of Ohio is limited to that which is specifically conferred by the General Assembly." Board of Twp. Trustees of Bainbridge Twp. v. Funtime, Inc. (1990), 55 Ohio St.3d 106, paragraph one of

the syllabus. R.C. 519.12(H) provides in relevant part as follows:

{¶25} "Within twenty days after * * * [a] public hearing, the board [of township trustees] shall either adopt or deny the recommendations of the zoning commission or adopt some modification of them. If the board denies or modifies the recommendation of the township zoning commission, the unanimous vote of the board shall be required."

{¶26} In this case, the board of township trustees proposed numerous amendments to the township zoning resolution. In accordance with the procedure prescribed in R.C. 519.12, the board submitted the proposed amendments to the Clermont County Planning Commission and the Union Township Zoning Commission for review. The planning commission reviewed the changes and recommended their approval to the zoning commission. Pursuant to R.C. 519.12(A), the zoning commission held a public hearing on the matter. After the conclusion of the hearing, the zoning commission recommended to the board that it adopt the amendments.

{¶27} Prior to its May 2003 meeting, the board added an additional amendment to the amendments being considered for adoption. Specifically, the board proposed amending sections 812(18) and 812(19) of the zoning resolution. The amended sections, if adopted, would change the parking density requirements for retail stores and shopping centers from one parking space per 200 square feet of floor area, to one parking space per 250 square feet of floor area. Those changes would allow Wal-Mart to construct its

super center as shown in its amended site plan. The other amendments that were proposed did not involve commercial parking requirements. The board adopted all the proposed amendments, including the amendments to sections 812(18) and 812(19).

{¶28} Webster's Third New International Dictionary provides two relevant definitions of "modify" as follows:

{¶29} (1) "to make minor changes in the form or structure of: alter without transforming"

{¶30} (2) "to make a basic or important change in: alter"

{¶31} We find that Union Township did not "modify" the recommendation of the zoning commission within the meaning of R.C. 519.12(H). Union Township did not "make minor changes" to the zoning commission's recommendation. Rather, Union Township added entirely new amendments to the zoning resolution that were not discussed or considered by the zoning commission. Further, the new amendments were not related to the other proposed amendments reviewed by the zoning commission. The township created new legislation without subjecting that legislation to the requirements of R.C. 519.12.

{¶32} Accordingly, the common pleas court did not err in determining that the amendments to sections 812(18) and 812(19) were void, and enjoining Union Township from taking further action with respect to those amendments. SuperValu was entitled to judgment as a matter of law as determined by the common pleas court. Union Township's cross-assignment of error is overruled.

Judgment affirmed.

WALSH and VALEN, JJ., concur.