[Cite as *Lofino's, Inc. v. Beavercreek City Council*, 2009-Ohio-4404.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

LOFINO'S, INC., et al. :

Plaintiffs-Appellants : C.A. CASE NO. 2008 CA 61

v. : T.C. NO. 2007 CV 0710

CITY OF BEAVERCREEK, OHIO CITY COUNCIL, et al. : (Civil appeal from Common Pleas Court)

:

Defendants-Appellees

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O P I N I O N

Rendered on the 28th day of August, 2009.

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FRENCH, J. (by assignment)

{¶ 1} Appellants-appellants, Lofino's, Inc., Michael D. Lofino, and Michael D. Lofino, Trustee ("appellants"), appeal the judgment of the Greene County Court

of Common Pleas, which dismissed appellants' administrative appeal for lack of standing. Because we conclude that appellants did not present evidence that they are directly affected by the administrative decision at issue, we affirm.

{¶ 2} In November 2006, Wal-Mart Stores, Inc. filed a Planned United Development ("PUD") Application with the City of Beavercreek, Ohio. The application proposed an expansion to the Wal-Mart store located on New Germany Trebein Road. Specifically, Wal-Mart proposed to add about 60,000 square feet to the west and south sides of the existing store to add a grocery component.

{¶ 3} Wal-Mart characterized the proposed expansion as a major modification to a PUD approved by the City in 1991. That PUD included the existing Wal-Mart and Sam's Club stores and the surrounding retail center.

{¶ 4} The law firm of Manley Burke submitted to the Beavercreek Planning Commission a document entitled "Why the Wal-Mart Major Modification Should Be Denied." Included within that document was a May 2, 2007 letter to commission members from Attorney Timothy M. Burke, on behalf of "Lofino Food Stores," opposing "the favored status treatment proposed to be given to Wal-Mart in violation of the conditions which were attached to its past approval and the Beavercreek Zoning Code." The letter contended that the proposed expansion would do the following: (1) eliminate density and development limitations; (2) exceed original retail space limits; (3) reduce the overall land area, but increase the under-roof square footage; (4) change office space to retail space; (5) reduce the green space and landscaping at the site; (6) change Sam's Club parking spaces to Wal-Mart spaces; and (7) allow erroneous parking calculations. According to Mr.

Burke, the proposal gave "an enormous benefit to Wal-Mart, unlike any other ever provided to major retail developments in Beavercreek." If approved, the expansion would "establish[ ] a precedent that all other retailers in Beavercreek, though obviously smaller and of less economic clout than Wal-Mart, would properly expect."

{¶ 5} In a letter dated June 6, 2007, Mr. Lofino asked the planning commission to disapprove the request "on the grounds it fails to comply with the established PUD requirements in the Zoning Code." In his view, the extent of the proposed changes required a PUD amendment, not a major modification.

{¶ 6} The planning commission passed a resolution recommending to the city council approval of the PUD major modification request and included within its recommendation 31 conditions for approval. Thereafter, the City issued notice of a public hearing.

{¶ 7} The Manley Burke law firm submitted to city council a document entitled "Letter in Opposition to Fairfield Crossing, PUD 92-1 Major Modification." Contained within that document was a July 5, 2007 letter from Attorney Burke, on behalf of "Lofino Food Stores," contending that approval of the Wal-Mart proposal "would both violate Beavercreek's Zoning Code and constitute bad public policy granting benefits and exceptions to Wal-Mart not granted to others."

{¶ 8} A public hearing on the application occurred on July 9, 2007, and members of the public presented comments. Attorney Burke appeared on behalf of "Lofino Food Stores." (Tr. 19.) His client's concern was that Wal-Mart was "being given benefits that have not typically been given to other developers in this

community; and the process that's being followed tonight * * * does not comply with your zoning code." (Tr. 19.) As to the latter point, Mr. Burke contended that treating the request as a major modification, rather than a zoning amendment, avoided procedural protections and the possibility of a referendum. He noted that the change in retail space reflected a change from prior approval of the space for office purposes.

{¶ 9} Mr. Burke's client' s "second major concern" was " the parking issue on the site." (Tr. 24.) By his calculation, the proposal allowed 21 percent less area for parking than the zoning code typically allowed. Then he stated:

{¶ 10} “That's what I meant earlier when I say: Wal-Mart is seeking benefits that have not been previously given to other developers, other retailers in your community. They're being granted benefits that haven't been granted to other communities.

{¶ 11} “In the end, all Lofino - - Lofino Food Stores is asking for is that Wal-Mart be treated the way others have been treated and the zoning code be fairly applied.” (Tr. 25.)

{¶ 12} Mr. Lofino also spoke at the hearing. Mr. Lofino raised concerns about the removal of landscaping islands, parking calculations, and the process being used.

{¶ 13} Following closure of the public input portion of the hearing, a city council member asked Mr. Burke if he had presented the same position to the planning commission. Mr. Burke responded that he had not gone into detail about the process issue and had "focused on the parking issue at that time." (Tr. 36.)

{¶ 14} By a 5-2 vote, the city council approved the application, with some changes to the conditions recommended by the planning commission.

{¶ 15} Appellants appealed the city council's approval to the trial court pursuant to R.C. Chapter 2506. Wal-Mart moved to dismiss the appeal for lack of standing.

{¶ 16} Wal-Mart argued that appellants had not suffered any unique harm and were not directly affected by the approval, as required for standing to appeal under R.C. Chapter 2506. Wal-Mart also argued that appellant Lofino's Inc. had not appeared in the administrative proceedings. In response, appellants contended that they had standing because they (1) objected to the procedural process used to approve the expansion, and (2) raised the unfair competitive advantage the expansion gave to Wal-Mart.

{¶ 17} On December 14, 2007, the trial court issued a judgment granting Wal-Mart's motion to dismiss. The court concluded that appellants had made no showing that they are directly affected by the approval of the Wal-Mart expansion.

{¶ 18} Appellants filed a timely appeal, and they raise the following assignment of error:

{¶ 19} "The trial court erred in finding appellants lacked standing to appeal the City of Beavercreek City Council's administrative decision approving a major modification to the Specific Site Plan PUD 92-1 SSP #1, as subsequently amended."

{¶ 20} With some exceptions not relevant here, R.C. Chapter 2506 authorizes appeals to the common pleas courts from every final order issued by

any political subdivision in the state. See R.C. 2506.01(A). No statute identifies the persons or entities that may take an appeal under that chapter, however. Instead, we look to the common law, as established in case precedent, to determine whether appellants had standing to appeal the city council's approval of the Wal-Mart expansion.

{¶ 21} In *Schomaeker v. First Natl. Bank* (1981), 66 Ohio St.2d 304, 311-12, the Supreme Court of Ohio held that in order to appeal an administrative order pursuant to R.C. Chapter 2506, the complaining party must be "directly affected" by that decision. Id. at 312. Specifically, in *Schomaeker*, the court held that a person owning property contiguous to a proposed use who has previously indicated an interest in the matter by challenging the use in a prior court action, and who attends hearings with counsel, is "directly affected" by a planning commission's order and has standing to appeal that order under Chapter 2506. Id., paragraph two of the syllabus.

{¶ 22} In *Willoughby Hills v. C. C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 27, 1992-Ohio-111, the Supreme Court explained that the " 'directly affected' language in *Schomaeker* merely serves to clarify the basis upon which a private property owner, as distinguished from the public at large, could challenge the board of zoning appeals' approval of the variance." A private litigant has standing to complain of harm that is "unique to himself." Id. A "private property owner across town, who seeks reversal of the granting of a variance because of its effect on the character of the city as a whole," in contrast, would lack standing because the injury "does not differ from that suffered by the community at large. The latter litigant

would, therefore, be unable to demonstrate the necessary unique prejudice" that resulted from the board's approval of the requested variance. Id.

{¶ 23} Here, appellants contend that they participated in the proceedings below and that they are directly affected by the council's approval of the proposed expansion. Because the latter issue is dispositive, we address it first.

{¶ 24} While appellants contend that the proposed expansion will increase business competition for them, they concede that this generalized concern is not adequate to grant them standing. See *Westgate Shopping Village v. Toledo* (1994), 93 Ohio App.3d 507, 514, quoting *American Aggregates Corp. v. Columbus* (1990), 66 Ohio App.3d 318, 322 (stating that increased business competition is not a proper basis for conferring standing). Instead, appellants argue that the basis for their complaints in the administrative proceedings was the deviation from normal zoning proceedings, a deviation that "effectively reduced the value and usefulness of Lofino's property. " (Appellants' Brief at 6.) "[M]ore than a generalized grievance among the community," appellants argue, the expansion "created direct harm to those specific grocers and retail developers like Lofino that are prevented by law from using their property to the same extent as their direct competition," Wal-Mart. (Appellants' Brief at 6.)

{¶ 25} In making these arguments on appeal, appellants correctly note that they challenged (1) the parking space requirements, which were contrary to the requirements typically imposed under the zoning code, and (2) the process, which allowed approval of the expansion as a major modification to the PUD. Mr. Lofino also raised the issue of green space. Appellants did not, however, link any of

these challenges to their specific business or property. To be sure, appellants presented lengthy and detailed challenges to the proposal, both before the planning commission and the city council. Their challenges prompted discussion with city council members, and city officials clearly considered the issues they raised. At no point, however, did appellants present evidence concerning their business or property—what it is, where it is located or how the Wal-Mart expansion would affect it. Instead, appellants and their counsel made only generalized arguments concerning the expansion and its impact on developers and retailers who may have been subject to different, more onerous procedures and standards.

{¶ 26} Appellants did not, for example, present evidence that the expansion would decrease the value of their property. Compare *Westgate* (affirming trial court's finding of standing where shopping center presented evidence that proposed mall would reduce the value of its property). Nor did appellants present evidence that the expansion would diminish access to their business. Compare *Dinks II Co., Inc. v. Chagrin Falls Village Council*, 8th Dist. No. 84939, 2005-Ohio-2317 (affirming trial court's finding of standing to appeal zoning decision where business owners showed impact from decreased parking). Because appellants failed to present evidence that they are directly affected by the approval of the proposed expansion, the trial court correctly determined that they lacked standing to appeal that approval. Accordingly, we overrule appellants' sole assignment of error. Having overruled the assignment of error, we affirm the judgment of the Greene County Court of Common Pleas.

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BROGAN and FAIN, JJ., concur.

(Hon. Judith L. French, from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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