

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

TREBEIN LIMITED ADK, LLC, et al.	:	
	:	
Plaintiffs-Appellants	:	Appellate Case No. 2014-CA-23
	:	
v.	:	Trial Court Case No. 13-CV-222
	:	
CITY OF FAIRBORN, OHIO, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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OPINION

Rendered on the 26th day of June, 2015.

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HALL, J.

{¶ 1} Trebein Limited ADK, LLC, Trebein Limited ADK II, LLC, and Trebein Limited ADK III, LLC (collectively “Trebein appellants”) appeal from the trial court’s judgment entry affirming a municipal zoning decision. At issue is appellee City of Fairborn’s approval of an application filed by appellee Vectren Energy Delivery of Ohio to operate a public natural-gas fueling station on its property.

{¶ 2} The Trebein appellants advance two assignments of error. First, they contend the trial court erred in finding that the City properly processed Vectren’s application as a “minor modification” under Fairborn’s zoning code. Second, they claim the trial court erred in concluding that particular sections of the zoning code did not apply to Vectren’s application.

{¶ 3} The facts underlying the parties’ dispute are summarized in the trial court’s opinion as follows:

Appellants Trebein own property in Fairborn near Interstate 675’s interchange with Dayton-Yellow Springs Road. Trebein’s property includes the Channingway Apartments, an apartment complex with 432 units and over 1,000 residents. The Channingway Apartments are located on Channingway Drive off Trebein Road, north of Trebein’s intersection with East Dayton-Yellow Springs Road and east of I-675.

Appellee Vectren Energy Delivery of Ohio, Inc. (“Vectren”) and the Indiana Gas Company, as tenants in common, own approximately 11.2

acres near the northwest corner of the intersection of Trebein Road and E. Dayton-Yellow Springs Road, south of and adjoining Trebein's property and the Channingway Apartments. Vectren's property at 1335 E. Dayton-Yellow Springs Road includes an office building as well as a private compressed natural gas (CNG) fueling station serving Vectren's own small fleet of CNG fueled vehicles.

The properties surrounding the Vectren facility, in addition to the Channingway Apartments to the north, include a Speedway gasoline station and vacant undeveloped land to the east; a retail automotive service center, Grismer Tire, on the west; and vacant undeveloped land and a department store warehouse and distribution facility to the south.

In 2012, Vectren submitted an application requesting Fairborn's approval of preliminary and final planned unit development plans to expand the private CNG fueling station at its Fairborn facility to a public CNG fueling station with one pump, accessible to any person with a natural gas fueled vehicle and an eligible credit card, and open 24 hours a day, seven days a week.

The City of Fairborn Planning Board staff investigated the application and recommended Planning Board approval. The City of Fairborn Board held public meetings on December 11, 2012 and January 8, 2013 attended by proponents and opponents of the application. On January 2013, the Planning Board unanimously approved Vectren's application for preliminary and final planned unit development modification to permit establishment

and operation of the public single pump CNG fueling station at the Vectren property. The Planning Board referred the matter to the City of Fairborn City Council with a recommendation that Council approve the application.

The City Council held public meetings on January 22, 2013, February 4, 2013 and February 18, 2013 attended by proponents and opponents of the application. On February 18, 2013, the City Council voted 5-2 to adopt Resolution No. 12-13 approving the preliminary and final planned unit development plans for the establishment and operation of the single-pump public CNG fueling station at the Vectren property on East Dayton-Yellow Springs Road in Fairborn. Resolution No. 12-13 states that the preliminary and final development plans had “been found to conform with all requirements of law and regulations of said Board and the Council.”

(Doc. #63 at 1-3).

{¶ 4} The Trebein appellants challenged the City’s approval in the trial court pursuant to R.C. Chapter 2506. In an April 24, 2014 decision and entry, the trial court upheld the decision of the Fairborn City Council. Among other things, the trial court found that Vectren’s application properly had been processed and approved as a request for a “minor modification” to an existing development plan. This appeal followed.

{¶ 5} Having reviewed all briefs and the full record, we begin our analysis with the applicable standard of review. “[I]n an administrative appeal pursuant to R.C. Chapter 2506, the common pleas court considers the whole record, including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or

unsupported by the preponderance of substantial, reliable, and probative evidence.” (Citations omitted.). *Durell v. Spring Valley Twp. Bd. of Zoning Appeals*, 2d Dist. Greene No.2012 CA 23, 2012-Ohio-5098, ¶ 21. An appellate court’s review is more limited. Under R.C. 2506.04, an appellate court reviews a common pleas court’s judgment only on “questions of law.” *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000). This includes reviewing the trial court’s application of law to undisputed facts. *Id.* at 148. It also includes reviewing the trial court’s decision to determine whether, as a matter of law, the decision is unsupported “by a preponderance of reliable, probative and substantial evidence,” *Kisil v. City of Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984), or whether the decision constitutes an abuse of discretion. *Henley* at 148.

{¶ 6} In their first assignment of error, the Trebein appellants challenge the trial court’s finding that the City properly treated Vectren’s application as one seeking a “minor modification” to an existing development plan. They advance three arguments in support. First, they assert that the record is devoid of an approved development plan authorizing Vectren’s existing private natural-gas facility and that, as a matter of law and logic, the City could not approve Vectren’s application for permission to operate a public natural-gas facility as a “minor modification” to a non-existent plan. Second, they maintain that, in any event, the City actually processed Vectren’s application as a major modification, not a minor one. Third, they insist that the proposed change in use from a private to a public fueling facility was so fundamental that it could not reasonably be deemed minor.

{¶ 7} Upon review, we find the foregoing arguments unpersuasive. The record

reflects that in May 1990 the Fairborn City Council passed Ordinance No. 17-90, authorizing a change in zoning for the subject area from agricultural to a “PD-2” planned commercial development district. Thereafter, in July 1990, the Fairborn Planning Board passed Resolution No. 87-90, which approved a preliminary development plan submitted by the Dayton Power & Light Company (DP&L) for construction of a utility service center and office building on the property at issue. DP&L later submitted a final development plan with detailed construction drawings for the service center and office. The plan proposed a 10,397 square foot service center and a 5,792 square foot office building. In August 1990, the City passed Resolution No. 92-90, which approved DP&L’s final development plan for the service center and office building. In January 1991, the City issued a certificate of occupancy for the service center and office building. In October 2000, Vectren obtained the property from DP&L. The record does not make clear when the private natural-gas fueling equipment was made part of the property.¹

{¶ 8} In any event, the foregoing history makes clear that a prior, approved development plan does exist. We are unpersuaded that the existing private natural-gas fueling station is inconsistent with that plan, which specifically authorized a “service center” and an ancillary office. In this regard, we agree with the appellees that fueling stations are permitted in PD-2 districts and that utility “service centers” such as the one at issue reasonably may contain a fueling component, particularly where the adjacent property is a commercial Speedway gas station.² We are unpersuaded that the City was required explicitly to authorize the existing private natural-gas equipment when it

¹ The historical facts set forth above appear to be undisputed and are taken from the Trebein appellants’ own merit brief and supporting exhibits filed below. (Doc. #43).

² See *infra* at ¶15-17.

approved DP&L's final development plan in 1990. The City's approval of the final plan need not have mentioned every amenity that was allowed to be placed on the property. Rather, the record supports a finding that the existing private natural-gas facility was permitted because fueling stations are allowed in PD-2 districts, a utility service center such as the one at issue reasonably may have a fueling component, and nothing in the City's approval of the final development plan or the applicable zoning provisions precluded installation of natural-gas fueling equipment. Therefore, we are unpersuaded by the Trebein appellants' argument that the City could not approve Vectren's application for permission to operate a public natural-gas facility as a "minor modification" to a non-existent plan authorizing the operation of a private natural-gas facility. In short, the record persuades us that a prior, approved development plan does exist and that the private natural-gas facility is authorized.

{¶ 9} The Trebein appellants next argue that the City actually processed Vectren's application as one seeking a major modification, not a minor one. The Trebein appellants note that only Planning Board approval is required for minor modifications to a development plan, whereas major modifications require City Council approval. Because Vectren sought and obtained City Council approval of its application, the Trebein appellants reason that the application necessarily involved a major modification. The Trebein appellants suggest that Vectren's application only now in hindsight is being characterized as one seeking a minor modification because Vectren failed to meet the requirements for a major modification.

{¶ 10} Upon review, we do not agree that Vectren's application sought a major modification to a development plan or that the application necessarily was processed as

one seeking a major modification. Nor do we agree that Vectren only now seeks to characterize its application as one seeking a minor modification. Fairborn Codified Ordinance 1145.15 addresses minor modifications and provides: "Minor plan changes altering the number, size or use of land, buildings, parking space, curb cut, public improvement, private amenities or any other substantive changes may be authorized by the Planning Board if it deems the changes are consistent with the purpose and general character o[f] the approved development plan." The record reflects that the Planning Board addressed Vectren's application in a January 8, 2013 session. During that meeting, City Planner Keith Brane opined that the Planning Board had authority to approve Vectren's application as a minor modification under Fairborn Codified Ordinance 1145.15. (Doc. #18, Jan. 8, 2013 Planning Board minutes at 8-9). Brane told the Planning Board, "Really you folks have it within your power to approve this." (Doc. #14 at 75). Shortly thereafter, the Planning Board *did* approve Vectren's application. (Doc. #18, Jan. 8, 2013 Planning Board minutes at 9).

{¶ 11} The matter later was forwarded to the City Council, apparently out of an abundance of caution, due to "uncertainty as to the original establishment and operation approval" and "the uncertainty of the extent of the potential impact on surrounding districts and uses and the potential contentiousness of the proposed project[.]" (Doc. #18 at Jan. 17, 2013 memorandum from Keith Brane to City Manager Debora McDonnell and Community Development Director Chris Wimsatt at 6). In subsequent proceedings before the City Council, Vectren still took the position that its application was "correctly characterized as a minor modification to an existing development plan." (Doc. #18, Feb. 12, 2013 memo from Vectren President Colleen Ryan to the Fairborn City Council at

7). Vectren maintained before the City Council that “[a]s a minor modification, the Planning Board held the sole decision-making authority on this plan modification pursuant to Section 1145.15, assuming it determined the changes to be ‘consistent with the purpose and general character’ [of] the approved development plan.” (*Id.*).

{¶ 12} Although the City Council subsequently approved Vectren’s application, its approval was unnecessary. As we will explain in our analysis of the Trebein appellants’ third argument below, Vectren’s proposed change in use from a private to a public natural-gas fueling facility qualified as a minor modification. Under Fairborn Codified Ordinance 1145.15, the Planning Board, alone, had authority to approve, and did approve, Vectren’s application for a minor modification. The fact that the City Council unnecessarily also approved the application did not transform Vectren’s proposed change from a minor modification to a major one. The major-versus-minor nature of a proposed modification turns on the substance of the request, not the number of levels of review a municipality decides to apply. In other words, a proposed modification either qualifies as a minor modification under the applicable ordinances or it does not, regardless of how the parties treat it.

{¶ 13} In a third and final argument under their first assignment of error, the Trebein appellants insist that Vectren’s change in use from a private to a public natural-gas fueling facility does not qualify as a minor modification because (1) the new facility will be located closer to Trebein Road and will be more obtrusive and (2) a public facility is inconsistent with the purpose and general character of the existing, approved development plan.

{¶ 14} In its decision, the trial court found that the evidence supported the City’s

approval of Vectren's application under the "minor modification" standards of Fairborn Codified Ordinance 1145.15, which provides that "substantive changes may be authorized by the Planning Board if it deems the changes are consistent with the purpose and general character o[f] the approved development plan." We see no error in the trial court's determination.

{¶ 15} As set forth above, the subject property is in a PD-2 planned commercial development district, and in 1990 the City passed Resolution No. 92-90, which approved DP&L's final development plan for a service center and office building on the property. The purpose of a PD-2 district is "to promote harmoniously designed groupings of structures upon well-landscaped sites which are compatible with surrounding land uses, achieve a high degree of pedestrian-vehicular separation and control the number of street access points and other undesirable features of uncontrolled strip commercial development." Fairborn Codified Ordinance 1147.01.

{¶ 16} Under the City's ordinances, "automotive service stations" are permitted in PD-2 districts (because they are allowed in B-3 highway service districts) provided they are compatible with all existing surrounding uses and zoning districts. Fairborn Codified Ordinance 1147.02(b). In its decision, the trial court concluded that Vectren's natural-gas fueling station qualifies as an "automotive service station" and that it meets the compatibility requirements. In reaching this conclusion, the trial court reasoned:

The term "automotive" generally refers to a self-propelled machine, in other words, a vehicle propelled by its own power. Construing the zoning ordinances in favor of the property owner, Vectren, and strictly against Fairborn, the Court finds that "automotive service stations," a permitted use

in a B-3 Highway service district, can fairly be construed to include fueling service stations serving a wide variety of self-propelled vehicles, such as the CNG fueling station. The record includes an express finding by the Planning Board that it had determined that Vectren's request appeared to "be consistent and compatible with all existing and surrounding land uses and zoning districts and will leave the spirit and intent of the original planned unit development approval intact." Accordingly, the Court finds that the City met the requirements of Sec. 1147.02(B) in approving the CNG fueling station as a use at the Vectren property, and finds that the approval was lawful and in accordance with its ordinances.

(Doc. #63 at 13).

We agree with the trial court that Vectren's natural-gas fueling station is permitted in the PD-2 district it occupies. We also agree with the trial court's additional finding that Vectren's proposed change in use from a private to a public natural-gas fueling station qualifies as a minor modification under Fairborn Codified Ordinance 1145.15 because it is consistent with the purpose and general character of the existing development plan. On this issue, Vectren President Colleen Ryan persuasively argued to the City Council as follows:

* * * The proposed CNG fueling station merely alters the existing use from private access service center for Vectren's own fleet to add public access to the CNG. * * * There is in existence an approved development plan adopted by the City pursuant to which the Vectren service center and its associated uses are permitted uses. The changes proposed to the

existing land use contemplate the relocation of the CNG fueling equipment and related improvements to facilitate safe public access and a very modest increase in traffic volumes entering and exiting the site. CNG refueling has operated on the site in compliance with the appropriate regulatory permits and within the uses permitted by the development plan. It is difficult to argue that the proposed use of the site is incompatible with surrounding locations, with its single dispenser and modest discreet location to the rear of Vectren's service center and its location adjacent to a Speedway gas station. Moreover, warehousing and distribution facilities directly across the street, and shopping and retail centers to the west all are uses that generate and indeed encourage vehicle traffic and take advantage of the highway access to I-675, a common attribute of highway business districts. The comprehensive plan that designated the area as part of the VPA 50 clearly contemplated this PD-2 development directly adjacent to the residential district to the north and addressed compatibility concerns within the PD-2 zoning and development plan approval by establishing set-backs, landscape and other screening requirements. The proposed CNG fueling station cannot be distinguished from the Speedway station or other uses within the PD-2 development plan in the characteristics relevant to the zoning question before Council, i.e. the compatibility of the use to the surrounding uses.

(Doc. #18, Feb. 12, 2013 memo from Vectren President Colleen Ryan to the Fairborn City Council at 7).

{¶ 17} We see no reason why the City would have to disagree with the foregoing assessment of Vectren's proposed use. The record reflects that Vectren's property is adjacent to a public Speedway gas station and is near a public Grismer tire center. Commercial warehouse and distribution facilities are across the street with shopping and retail centers to the west. Although estimates varied somewhat regarding increased traffic due to Vectren's conversion from a private to a public natural-gas fueling station, the record establishes that any increase will be relatively small. The proposed facility will involve a single, unmanned pump accessible with a credit card. By one estimate, its pumping capacity will be 760 gallons per day, which is enough to fill 15 trash trucks or approximately 10 semi-trucks. (Doc. #18, January 22, 2013 City Council meeting minutes at 23). Another estimate stated that the proposed public natural-gas facility might service 20 vehicles per day. (*Id.* at Feb. 13, 2013 memo from City Engineer James E. Sawyer to City Manager Deborah McDonnell at 2). Vectren President Colleen Ryan estimated that the public facility was likely to be used by six vehicles per day. (Doc. #18, Feb. 12, 2013 memo from Vectren President Colleen Ryan to the Fairborn City Council at 5). Ryan also stated that "Vectren's business plan is not to develop or operate retail fueling stations for CNG, but rather is focused on facilitating the creation of a market of CNG users to whom Vectren ultimately will supply natural gas." (*Id.* at 1). Finally, in relation to Vectren's proposed change in use of its natural-gas facility, both the Planning Board and the City Council thoroughly considered and addressed issues ranging from set-backs, buffering, screening, landscaping, grading, lighting, and signage. We are unpersuaded that Vectren's proposed expanded use of its natural-gas facility is inconsistent with the

approved development plan or existing zoning regulations with regard to any of these issues. For the foregoing reasons, we agree with the trial court that Vectren's change in use from a private to a public natural-gas fueling facility qualifies as a minor modification. The first assignment of error is overruled.

{¶ 18} In their second assignment of error, the Trebein appellants contend the trial court erred in finding that Fairborn Codified Ordinances 1145.03, 1145.08, and 1145.13 did not apply to the review and approval of Vectren's application. The crux of this argument is that Vectren's application was filed and processed as a "major modification" under Fairborn Codified Ordinance 1145.15, not a minor one. Based on that premise, the Trebein appellants insist that mandatory processes and procedures found in Fairborn Codified Ordinances 1145.08 and 1145.13 applied and required findings to be made regarding "general criteria" for approval set forth in Fairborn Codified Ordinance 1145.03. (Appellants' brief at 21). The Trebein appellants argue that the Planning Board failed to consider the general criteria or to submit findings regarding those criteria to the City Council.

{¶ 19} The flaw in the Trebein appellants' argument is that Vectren's application involved a request for a minor modification, not a major one. The processes and procedures described in the ordinances referenced in the Trebein appellants' second assignment of error do not apply to minor modifications. Accordingly, the second assignment of error is overruled.

{¶ 20} The judgment of the Greene County Common Pleas Court is affirmed.

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DONOVAN, J., and WELBAUM, J., concur.

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(sitting for Judge Michael A. Buckwalter)