[Cite as *Santus v. Twp. of Swanton*, 2004-Ohio-5669.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

John C. Santus, Trustee, et al.

Appellants

v.

The Township of Swanton, Lucas County, Ohio, et al.

Appellees

Court of Appeals No. L-04-1136

Trial Court No. CI-2002-3311

DECISION AND JUDGMENT ENTRY

Decided: October 22, 2004

* * * * *

Jerome R. Parker, for appellants.

Julia R. Bates, Prosecuting Attorney, John A. Borell, Assistant Prosecuting Attorney, for appellee.

* * * * *

HANDWORK, P.J.

{¶ 1} This accelerated appeal is from the April 15, 2004 judgment of the Lucas County Court of Common Pleas, which granted summary judgment in favor of appellees, Swanton Township Board of Trustees, and upheld that Board's denial of a rezoning request. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant, Audry A. Santus, acting as a trustee and in her individual capacity as owner of the property at issue, asserts the following assignments of error on appeal:

{¶ 2} "I. The trial court erred in summarily denying appellant's motion for summary judgment and in granting appellees' motion for summary judgment finding that appellant had not established beyond fair debate that the imposition by appellees of agricultural zoning on appellant's property under the subject facts was arbitrary, capricious, and unreasonable; bore no relationship to the public health, safety and general welfare of the community; deprived appellants of property rights without due process; and was unconstitutional. [sic]

{¶ 3} "2. The trial court's decision summarily granting appellees' cross-motion for summary judgment was contrary to the applicable established principles of law governing review of township zoning decisions. [sic]

{¶ 4} "3. The trial court erred in not finding that Swanton Board of Trustees' denial of appellant's zoning request exceeded the Board of Trustees' authority as delegated and provided for under Swanton Township's own Zoning Resolution." [sic]

{¶ 5} Appellant filed a complaint for declaratory judgment along with John C. Santus, Trustee, who is now deceased, against appellees, Swanton Township and the Swanton Township Board of Trustees. Appellant asserted that the resolution of the Swanton Township Trustees denying the recommendations of the Swanton Township Zoning Commission and her application to rezone her property was unconstitutional and constituted a taking without due process or just compensation. Appellant sought an order directing the trustees to rezone the property as commercial. Appellant also sought an award of damages as just compensation for the loss of the use and/or diminution in the value of the property.

{¶ 6} The parties stipulated to the following facts. Appellant requested a zoning change to change her approximately 2-acre parcel in Swanton Township from the existing "A" classification (agricultural) to a "C-2" classification (general commercial). The Lucas County Ohio Professional Planning Commission recommended approval of the request to the Lucas County Plan Commission because the change appeared to be compatible with the parcel's location, consistent with the land use plan, and should not have a detrimental impact on adjacent properties. After a public hearing, the Lucas County Plan Commission unanimously recommended approval of the request to the Swanton Township Zoning Commission. That board, after a public hearing, unanimously recommended approval of the request to the Swanton Township Trustees. The Swanton Township Trustees, however, denied the recommendation of the Swanton Township Zoning Commission even though they had, on several prior occasions, approved similar rezoning requests. One of the prior approvals related to property directly across the highway. In that case, the board did not require a site plan and it did not make any subsequent use or development of such properties subject to submission of and approval of a site plan.

{¶ 7} Also before the lower court was the transcript of the public hearing before the Swanton Township Trustees. Neither appellant nor John Santus, attended the hearing. The trustees expressed disappointment that they were unable to discuss the issues with the applicant. The trustees were especially concerned about rezoning this property, which is located at the corner of Airport Highway and Wilkens Road, with the longer frontage being located on Wilkens Road. One of the trustees knew that there was

a curb on the Airport Highway side; but no one knew whether the cut was large enough for commercial use. The trustees discussed that they had been considering putting in a provision that redeveloped land on Airport Highway must have a parallel access road at the back of the property to prevent numerous curb cuts along Airport Highway. Since this property was located at the corner, the trustees wanted to make sure that the rule applied to it so that all of the adjacent parcels along Airport Highway would have the access to Wilkens Road. Their ultimate goal was to prevent confusion, congestion, and accidents in the area. They determined that the best solution might be to eliminate the current access on the Airport Highway frontage and form the beginning of an access road off Wilkens Road. However, they recognized that there were problems with this solution because not all of the neighboring properties were of the same depth and they did not know how the applicants intended to use the corner property. The trustees also recognized that there might be a need for further changes as the entire area developed. The trustees unanimously decided to deny the application until the applicants came forward with a plan explaining what they intended to do with this property.

{¶ 8} After her application was denied, appellant filed this declaratory judgment action. Both sides sought summary judgment. The court denied appellant's motion for summary judgment and granted summary judgment to the trustees. The court identified the primary issue before the court as being whether the denial of the rezoning application was "unconstitutional, unreasonable, capricious, or arbitrary." Because only six out of the fifty neighboring properties were zoned commercial, the court found that the agricultural classification was consistent with surrounding properties and was not reverse

spot zoning. Furthermore, the court held that one who purchases property could not then claim that the government's refusal to rezone the property was unconstitutional. Finally, the court found that the trustees acted reasonably by refusing to rezone the property when appellant had failed to provide the trustees with sufficient information to ensure that the rezoning of this property would not lead to traffic congestion in the area.

{¶ 9} On appeal from that decision, appellant argues in her first assignment of error that the trial court erred in denying her motion for summary judgment and in granting the motion for summary judgment filed by appellees and in finding that she had not met her burden of proof to establish that the zoning regulation is unconstitutional. In her second assignment of error, appellant argues that the trial court erred in granting summary judgment to the trustees because its decision was contrary to the principles of law governing township zoning decisions. In her third assignment of error, appellant argues that the trial court erred when it failed to find that the trustees' denial of her application exceeded its authority under Swanton Township Zoning Resolution. We have consolidated all three assignments of error for purposes of this appeal.

{¶ 10} On appeal, we review the ruling on a motion for summary judgment under a de novo standard. *Advanced Analytics Lab., Inc. v. Kegler, Brown, Hill & Ritter*, 148 Ohio App.3d 440, 2002-Ohio-3328, at ¶33. Therefore, we must determine if the requirements of Civ.R. 56(C) have been met. That rule provides that summary judgment is appropriate if:

{¶ 11} "* * * there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be

rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. * * *"

{¶ 12} Appellant first argues that the trial court erred as a matter of law in stating her burden of proof in this case. We agree. Both parties recognize that the burden of proof in a declaratory judgment action which challenges the constitutionality of a zoning regulation is set forth in *Goldberg Companies, Inc. v. Council of the City of Richmond Heights* (1998), 81 Ohio St.3d 207, 214. However, they disagree on the elements to be proven in this case.

{¶ 13} In *Goldberg*, supra, the Ohio Supreme Court held that if a party challenges the constitutionality of a zoning regulation as applied to their property, the zoning regulation is presumed to be constitutional unless the party proves "beyond fair debate" that the regulation is "* * * clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." Id. The beyond fair debate standard is the equivalent of the criminal standard of beyond a reasonable doubt. *Central Motors Corp.*, supra; *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 22 at fn. 7; and *Heritage Dev. Co., LLC v. City of Willoughby Hills*, 11th Dist. App. No. 2001-L-221, 2002-Ohio-7269, at ¶17. This standard reflects an attitude of judicial restraint in areas that involve legislative decision making. *Willott v. Village of Beachwood,* (1964), 175 Ohio St. 557, 560.

{¶ 14} Furthermore, if a party also challenges that the zoning regulation constitutes a taking of the property, and the regulation is found constitutional, that party must also prove that he was deprived of all economically viable uses of the land. *Goldberg,* supra.

{¶ 15} The *Goldberg* test was a reinstatement of the disjunctive test developed in *Euclid v. Amber Realty Co.* (1926), 272 U.S. 365, and followed by *Leslie v. City of Toledo* (1981), 66 Ohio St.2d 488, 491, and *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560. The trial court, citing to these earlier cases, held that the test was whether the regulation was "unconstitutional, unreasonable, capricious, or arbitrary." The court also held that it could "* * * substitute its judgment for that of the local governing body only when a local government exercises its zoning authority in an arbitrary, capricious, unreasonable, and confiscatory manner, which violates constitutional guarantees of due process principles." We agree with appellant that the trial court misquoted the test and failed to cite to the most recent Ohio Supreme Court authority on the issue, which clarifies the test. However, in our de novo review, we will consider the issues with the correct burden of proof in mind.

{¶ 16} In the case before us, appellant set forth, first, a claim that the trustees' resolution was unconstitutional as applied to her property and, second, a claim that the resolution constituted a taking of her property. However, appellant's arguments focused only on the first claim. Since appellant argues that she was not required to prove that the zoning classification deprived her of all economically viable uses of her property, we find that she has abandoned the second claim. Therefore, the trustees' arguments relating to

the taking of appellant's property are irrelevant. We will focus on only the issue of whether this zoning regulation is constitutional as applied to her property under the *Goldberg* test.

{¶ 17} Appellant argues that it is clear in this case that the trustees acted in an arbitrary and discriminatory manner. Her conclusion is based on the following facts: two other similarly-situated properties located at the corner of Wilkins Road and Airport Highway are already zoned C-2; the area is designated to be a commercial area in the land use plan; three statutorily-created bodies specifically designed to make land use decisions recommended granting the application; and the trustees did not given strong deference to the zoning commission recommendation.

{¶ 18} The trustees argue that the denial of the application was reasonable and constitutional. They also argue that their concern about the impact of further commercial development in the area is a legitimate basis for denying the application and, whether supported by the evidence or not, is related to the public health, safety, morals, or general welfare of the township. Their conclusions are based on the following facts: the overriding goal of the township trustees, as was stated in the land use plan, is to protect farm land; the trustees considered the zoning classifications of the immediately adjacent properties, as well as the general zoning in the area; appellant did not attend the hearing nor provide a site plan which would have assisted the trustees in determining whether the intended use of the property would be appropriate; and that while there is a process for recommendations to be made, the trustees are not bound to accept those recommendations.

{¶ 19} One of the justifications the trial court gave for denying declaratory judgment relief was that that appellant could not claim that the zoning regulation is unconstitutional because she purchased the property with the A classification. The cases cited by the trustees and the court relate to situations where there was a close proximity between the time the property was purchased and the declaratory judgment action was filed. *Mintz v. Village of Pepper Pike* (1978), 57 Ohio App.2d 185 and *Maurer v. Plain Twp*. (Oct. 23, 1998), 6th Dist. App. No. WD-97-119. That is not the situation in this case. The property at issue in this case was purchased in 1961, and appellant only recently sought to rezone the property. Therefore, we find these cases distinguishable on their facts.

{¶ 20} The trial court also found that there was a proper reason for denying the recommendation of the zoning commission. We agree. While the land use plan for the township sets forth a goal of preserving large tracts of farmland, it also set forth a plan of controlled commercial development along Airport Highway. Furthermore, the plan indicates that highway access management is one of the issues the township needs to address. The property at issue falls within the area indicated on the land use plan as expected future commercial development. In fact, other property in the immediate vicinity is already zoned for commercial use. However, the property at issue is distinct because it is located at the northwest corner of Airport Highway and Wilkens Road, with the longer frontage on Wilkens Road. Since all development is currently to the east of this property, the future development of the area further west begins at Wilkins Road. Furthermore, the property to the west includes several narrow, long lots. The trustees

were concerned that each of these lots might be commercially developed and need access to Airport Highway. Because the trustees did not know what appellant intended to do with the property, they did not know whether an access road could be provided at the back of the property at issue. Beginning a secondary access road to all of the properties along this section of Airport Highway could eliminate potential traffic congestion. Because appellant was unavailable to discuss the concerns, the only reasonable option the trustees had was to deny the application.

{¶ 21} While the trustees must consider the recommendation of the Swanton Township Zoning Commission, they are not required to adopt the recommendation. However, if they decide to deny the recommendation, their vote must be unanimous. Swanton Township Zoning Resolution 14.2.9. We agree with appellant that this requirement implies that the recommendation carries significant weight and that the trustees should give deference to the zoning commission's recommendation. See, also, R.C. 519.05.

{¶ 22} In this case, however, the trustees noted that the zoning commission approved the change in zoning solely because the property fronts a major roadway. It did not appear that the commission considered the issue of the access to this property and neighboring properties along Airport Highway. Because the trustees unanimously believed that the zoning commission did not consider the issue of traffic access to the entire area, the trustees had the power to deny the recommendation.

{¶ 23} We disagree with appellant that the access issue was not an appropriate reason for denying the rezoning. She asserts that this issue will be resolved by the

Swanton Township Zoning Commission, who approves the site plan under Section 9.18 of the Swanton Township Zoning Resolution, and the Ohio Department of Transportation. We find, however, that even though there may be other safeguards to ensure that there are limited curb cuts along this section of Airport Highway, there is nothing which prevents the trustees from also taking steps to ensure that there is appropriate traffic access to the area while the area is in the process of being developed. Considerations of traffic congestion alone may not be enough to justify a zoning decision even though regulation of traffic falls under the government's police power. *Columbia Oldsmobile, Inc. v. Montgomery* (1990), 56 Ohio St.3d 60, 66. However, traffic considerations that are part of a comprehensive zoning scheme will justify a zoning decision. Id.

{¶ 24} We also find no merit to appellant's argument that the trustees' decision was based on conjecture because they did not have actual data to support their assumptions regarding the traffic. In this case, we find that the trustees did not need specific traffic data to make a reasonable decision that numerous curb cuts within a short distance of a commercially developed area could lead to traffic problems. The trustees were also well aware of the traffic issues that exist in other communities along this highway. It is the responsibility of trustees to anticipate similar problems in their community and protect against them.

{¶ 25} We conclude, as a matter of law, that appellant failed to meet her burden of proving beyond fair debate that the denial of the application for a zoning change was arbitrary and unreasonable and without substantial relation to the public health, safety,

morals, or general welfare of the community. Controlling the development of an entire area of township land to avoid the traffic congestion problems experienced in other communities is a reasonable, public safety justification for denying the Swanton Township Zoning Commission's recommendation. We find that the trial court property granted summary judgment to appellees and denied summary judgment to appellant.

{¶ 26} Therefore, we find all of appellant's assignments of error not well taken. Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is hereby ordered to pay the court costs incurred on appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE