[Cite as *Parker v. Swancreek Twp. Bd. of Zoning Appeals*, 2005-Ohio-538.]

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

Nancy A. Parker, et al.	Court of Appeals No. F-04-035 F-04-036
Appellees	F-04-038
v.	Trial Court No. 03-CV-000247
Swancreek Township Board of Zoning Appeals, et al.	**DECISION AND JUDGMENT ENTRY**
Appellants	Decided: February 4, 2005

* * * * *

Brian P. Barger and Patricia J. Keeberger, for appellees.

Kevin A. Heban and Gerald E. Galernik, for appellants Swan Creek Township Board of Zoning Appeals, Swan Creek Township, Swan Creek Township Trustees, Walter Hallett, III, Swan Creek Township Zoning Inspector.

Jeffrey M. Stopar and Kimberly S. Baker, for appellants Gary M. and Sherrie M. Harden.

* * * * *

PER CURIAM

{¶ 1} Appellees, Nancy C. Parker, et al., ("the Parkers") have filed a motion to dismiss this appeal. The appellants, the Swancreek Board of Zoning Appeals ("BZA"); Swancreek Township ("township"); Walter Hallett, III, Swancreek Township Zoning Inspector ("zoning inspector"); Swancreek Township Trustees ("trustees"); and Sherrie and Gary Harden ("the Hardens") filed memoranda in opposition to the motion to

dismiss. For the reasons that follow, the court grants the motion to dismiss as to the Swancreek Board of Zoning Appeals and denies it as to the remaining appellants.

PROCEDURAL HISTORY

{¶ 2} The Parkers submitted a zoning permit application to the Swancreek Township Zoning Inspector to build a 16.9 acre pond on the property in question. The zoning inspector denied the permit. The Parkers then applied to the BZA for a conditional use permit. The BZA denied the permit and the Parkers appealed to the Fulton County Court of Common Pleas pursuant to R.C. Chapter 2506. The Parkers' notice of appeal to the common pleas court is captioned as follows:

> Nancy A. Parker
> Robert H. Parker, Jr. c/o Sandman Trucking Inc.
> and
> Shaun M. Parker c/o Sandman Trucking Inc.
>
> vs.
>
> The Swan Creek [sic] Township Board of Zoning Appeals

{¶ 3} The Parkers filed an appellate brief and the BZA responded as appellee. No other parties participated in the proceedings at the common pleas court level. The court of common pleas reversed the decision of the BZA and ordered that a conditional use permit be issued to the Parkers. The BZA, the township, the zoning inspector, the trustees, and the Hardens, who live across the street from the property in question, filed notices of appeal to this court from the common pleas court judgment. The Parkers responded to the appeals with the present motion to dismiss, alleging that none of the

appellants has standing to appeal. The appellants have all filed memoranda in opposition to the motion to dismiss.

STANDING OF THE BOARD OF ZONING APPEALS

{¶ 4} "Neither a township board of zoning appeals nor any of its members as such have a right to appeal from the judgment of a court, rendered on appeal from a decision of such board and reversing and vacating that decision." *A. Di Cillo & Sons, Inc. v. Chester Zoning Bd. of Appeals* (1952), 158 Ohio St. 302, syllabus. A board of zoning appeals is not a party to the zoning dispute, but a body to determine whether a permit will be issued. "[T]he board [of zoning appeals] should be as disinterested in deciding matters brought before it as a court should be." Id. at 305. Just as a common pleas court is not a party in a case it decides and may not appeal from a decision of a court of appeals that reverses the common pleas' decision, the board of zoning appeals is not a party to this appeal and has no standing to appeal. Accordingly, the court grants the Parkers' motion to dismiss the BZA's appeal.

STANDING OF SWANCREEK TOWNSHIP, SWANCREEK TOWNSHIP ZONING INSPECTOR AND SWANCREEK TOWNSHIP TRUSTEES

{¶ 5} The Parkers also allege that the township, the zoning inspector, and the trustees do not have standing to appeal the common pleas court order because they did not intervene as parties in the administrative appeal to the common pleas court and because they did not openly oppose the conditional use permit in the proceedings before the BZA . We disagree.

{¶ 6} In *Gold Coast Realty, Inc. v. Bd. of Zoning Appeals* (1971), 26 Ohio St.2d 37, Gold Coast's application to the BZA for a variance was denied. Gold Coast appealed the BZA's decision to the common pleas court and captioned its appeal as "Gold Coast Realty Inc., appellant, v. Board of Zoning Appeals of the city of Cleveland, appellee." Neither the city of Cleveland nor the building commissioner participated as appellees in the appeal to the common pleas court. The common pleas court reversed the BZA's decision.

{¶ 7} The BZA, the building commissioner and the city of Cleveland appealed to the court of appeals. Gold Coast filed a motion to dismiss the appeal because neither the building commissioner nor the city of Cleveland was a party to the appeal in the common pleas court, and pursuant to *DiCillo*, supra, the BZA is not a party to the case. The court of appeals granted the motion and dismissed the appeal. BZA, the building commissioner and the city of Cleveland appealed the dismissal to the Supreme Court of Ohio where the court held that Gold Coast Realty incorrectly named the board of zoning appeals as the opposing party in its appeal to the common pleas court and failed to name any of the correct opposing parties. The court held that the city of Cleveland and its building commissioner could properly appeal the decision of the common pleas court to the court of appeals even though they did not intervene in Gold Coast's appeal to the court of common pleas. The court further held that it was Gold Coast's notice of appeal that was defective by not naming either the city or the building commissioner in the appeal to the common pleas court. "[T]he defect relied upon by the appellee [Gold

Coast] is one which *it* injected into the proceedings." Id. at 39. *Gold Coast*[1] states at paragraphs one and two of the syllabus:

{¶ 8} "Where an appeal is filed from a decision of a municipal commissioner of building to the municipality's board of zoning appeals, either the municipality or its commissioner of building is a party adverse to the appellant and necessary to the appeal.

{¶ 9} "Where an adverse and necessary party appears and participates in an appeal from a decision by a municipal commissioner of building to the municipal board of zoning appeals, such party remains adverse and necessary in a further appeal to the Court of Common Pleas under R. C. Chapter 2506, even though not named as such in the appellant's notice of appeal filed therein."

{¶ 10} In the instant case, the situation is very similar. The zoning inspector refused to issue a permit to the Parkers to build a 16.9 acre pond. The Parkers appealed to the BZA for a variance in order to build their pond. The BZA denied the variance. The Parkers appealed to the common pleas court naming only the BZA as an appellee. They now allege that *no one* can appeal to this court from the common pleas court decision. As stated by the township in its memorandum in opposition to the motion to dismiss, granting the Parkers' motion would allow the Parkers "to insulate

[1]The Parkers allege that *Gold Coast* does not apply to this case because that case "involves a municipality and not a township, and the law clearly provides a municipality with greater authority than a township." We fail to see why, even if true, this is pertinent.

any decision of a trial court by simple [sic] not naming the proper parties in the lower court. That is simply not a proper application of the law." We agree.

{¶ 11} In *Sich v. Bd. of Zoning Appeals for the City of Middletown* (July 16, 1984), 12th Dist. No. CA83-08-093, the BZA denied Sich's request for a variance. Sich appealed to the Butler County Court of Common Pleas naming the BZA as the only appellee. The court of common pleas reversed the BZA's decision and the BZA filed a timely appeal from that judgment. The appellate court held that even though a correct party, namely "the city, the city official responsible for enforcing the zoning regulations, or other persons aggrieved by the court's decision" did not appeal from the common pleas court's decision, "[g]iven the city of Middletown's continuing interest in enforcing its zoning regulations and since this court has subject-matter jurisdiction over the review of administrative actions by a common pleas court, we will address the merits of appellant's assignment of error." The *Sich* court, citing *Gold Coast*, states:

{¶ 12} "The Ohio Supreme Court has, however, recognized the principle that, although adverse parties have not been named in the notices of appeal to common pleas courts, those parties remain adverse and may appeal to a higher court. *Gold Coast Realty*, supra at paragraph two of the syllabus. See also, *Thomas v. Webber* (1968), 15 Ohio St. 2d 177."

{¶ 13} Finally, the Parkers argue that, even if *Gold Coast* applies to this case, since the trustees, the township, and the zoning inspector did not appear and participate as adverse parties in the proceedings before the BZA as required by *Gold*

Coast paragraph two of the syllabus and *Kline v. Bd. Of Twp. Trustees* (1968), 13 Ohio St.2d 5, they cannot now appeal to this court.

{¶ 14} In the instant case, we find that the zoning inspector did actively and adversely participate in the proceedings before the BZA. The zoning inspector testified as to why he denied the Parkers' application for a zoning permit to build a 16.9 acre pond. The denial of that permit establishes the active and adverse position of the zoning inspector. Further, we agree with the *Sich* court that the township's continuing interest in enforcing its zoning regulations gives it standing to appeal to this court.

{¶ 15} We find that the zoning inspector, the township, and the trustees are proper parties to this appeal and the motion to dismiss the appeal as to them is denied.

STANDING OF THE HARDENS

{¶ 16} The Parkers contend that Gary and Sherrie Harden, owners of the property across the street from the property in question, do not have standing to appeal the common pleas court's decision since they did not intervene and participate in the appeal proceedings in the common pleas court and they did not personally attend the hearing before the Swancreek Township Board of Zoning Appeals. The record shows that the Hardens own property located across the street from the Parkers' property and that they voiced their opposition to the conditional use permit through a letter to the BZA. The transcript of the BZA hearing contains testimony of an adjacent landowner who requested and was granted permission (over objection of the Parkers' attorney) to read the letter written by the Hardens in opposition to the conditional use permit because the Hardens were unable to personally attend the hearing. In the Hardens'

letter, they voice their concern that issuing the permit to the Parkers will have an adverse effect on their only water supply, will devalue their residence, will increase traffic and damage the road in front of their house, and will pose safety concerns for their children.

{¶ 17} The Parkers state that while the Hardens may have an interest in how the land directly across the street from them is used, since they did not appear and participate in the BZA hearing it is now too late for them to enter the fray. In *Roper v. Bd. Of Zoning Appeals* (1962), 173 Ohio St. 168, syllabus, the court states:

{¶ 18} "A resident, elector and property owner of a township, who appears before a township Board of Zoning Appeals, is represented by an attorney, opposes and protests the changing of a zoned area from residential to commercial, and advises the board, on the record, that if the decision of the board is adverse to him he intends to appeal from the decision to a court, has a right of appeal to the Common Pleas Court if the appeal is properly and timely made * * *."

{¶ 19} More recently, the Supreme Court of Ohio held in *Schomaeker v. First Nat'l Bank of Ottawa* (1981), 66 Ohio St.2d 304, paragraph two of the syllabus:

{¶ 20} "The order of a village planning commission granting a use variance is appealable pursuant to R.C. Chapter 2506. A person owning property contiguous to the proposed use who has previously indicated an interest in the matter by a prior court action challenging the use, and who attends a hearing on the variance together with counsel, is within that class of persons directly affected by the administrative decision and is entitled to appeal under R.C. Chapter 2506."

{¶ 21} The Parkers contend that while the Hardens own property across the street from the affected property, they did not indicate an interest in the matter by attending the BZA hearing and, therefore, cannot now participate.

{¶ 22} The Hardens acknowledge the "appear and participate" requirement but state that they were not given adequate notice of the BZA hearing. In *Alihassan v. Alliance Bd. Of Zoning Appeals* (Dec. 18, 2000), 5th Dist. No. 1999CA00402, the court addresses the issue of adequate notice as a precondition to attendance at the hearing. The court states:

{¶ 23} "There is an exception to the general rule set forth by the Ohio Supreme Court in *Roper*[*v. Bd. Of Zoning Appeals*] that for one to have standing to appeal from the decision of a commission, such as the one in the case sub judice, one must have participated in the proceedings before the commission. Adequate notice is a requisite to participation. Certainly if one received no notice of a hearing, participation would not be expected. Or, certainly if the notice given was inadequate pursuant to the procedure set forth by the political subdivision, then participation would not be expected. * * * In other words, requiring participation to preserve the right to appeal presupposes sufficient notice to the participant. Therefore, in order to have standing to bring an administrative appeal under R.C. Chapter 2506, the adjacent or contiguous property owner must be directly affected by the decision of the administrative entity. In addition, he or she must have actively participated in the administrative proceedings unless he or she did not receive sufficient notice * * *."

{¶ 24} See, also, *Capital L. Corp. v. City of Cleveland Bd. Of Zoning Appeals* (Apr. 27, 2000), 8th Dist. No. 76795, discretionary appeal not allowed, (2000), 90 Ohio St. 3d 1413, where the issue of notice of the administrative hearing was considered. "[A] party might be 'directly affected' by the administrative ruling yet cannot be heard to complain about that administrative ruling if it did not take part in any of the proceedings in a way that could have affected the outcome of those proceedings.

{¶ 25} "* * *

{¶ 26} "The city maintains the standing requirement is absolute - that failure to engage in the administrative process will always deprive a party of standing to bring an appeal from that administrative process. We think this goes too far. * * * . If we accepted the city's position, we would permit the city to violate the terms of its own notice requirements and effectively deprive interested parties of the right to be present at proceedings before the board of zoning appeals. * * * Consequently, we find the issue of notice can be considered by the court when determining a party's standing to appeal from a decision of the board of zoning appeals."

{¶ 27} The Zoning Resolution for Swancreek Township, eighth revision, 2003, Article 100-5.7(2)(b), Conditional Use Permits, states:

{¶ 28} "b. Public Hearing

{¶ 29} "Upon receipt of the conditional use application, the Board of Zoning Appeals should set a date for a public hearing thereon, which date shall not be less than twenty (20) or more than forty (40) days from the date of the filing of such

application. Notice of such hearing shall be given by the Board of Zoning Appeals by one (1) publication in one (1) or more newspapers of general circulation in each township affected by such proposed conditional use application at least fifteen (15) days before the date of such hearing.

{¶ 30} "Written notice of the hearing shall be mailed by the Board of Zoning Appeals by first class mail at least ten (10) days before the date of the public hearing to all owners of property within and contiguous to and directly across the street from such area proposed for a conditional use application to the addresses of such owners appearing on the County Auditor's current tax list or the Treasurer's mailing list and to such other list or lists that may be specified by the Board of County Commissioners. The published and mailed notices shall set forth the time and place of the public hearing and the nature of the proposed conditional use application. Upon the appointed date the Board of Zoning Appeals shall then hold a public hearing prior to any determination of the conditional use application."

{¶ 31} The public hearing on the Parkers' conditional use permit application was on August 14, 2003, and continued on September 11, 2003. Notice of the hearing by publication in a newspaper of general circulation was on August 5, 2003. Written notice to owners of property in the area of the Parkers' property was dated August 4, 2003, but there is no indication in the record of the date it was mailed. The list of property owners who received a mailed written notice does not include the Hardens. The Hardens contend that they did not receive written notice, but found out about the hearing from their neighbor.

{¶ 32} The Parkers argue that the lack of adequate notice to the Hardens "did not result in fatal error to them," because the notice they eventually received "was adequate enough for them to submit a one and one-half, single-spaced, typewritten letter to the Swan Creek [sic] Township Board of Zoning Appeals strongly opposing Appellees' request for a conditional use permit." The issue is not whether they ever found out about the hearing, it is whether the notice followed the Zoning Resolution Requirement. Clearly, it did not.

{¶ 33} Finally, the Parkers state that since the Hardens are attempting to appeal to the court of appeals from a decision of the trial court in which they were not parties, the lack of notice of the BZA hearing is irrelevant. We disagree. In *Gold Coast Realty*, the court held that parties who did not participate in an appeal to the common pleas court, but who did participate in the hearing before the BZA and voice their opposition to the issuance of the permit, have standing to participate in the proceedings at the court of appeals. As stated above, if the Hardens did not get proper notice of the hearing, they cannot be faulted for not attending the hearing in person. They did the next best thing and made their opposition known through a "one and one-half, single-spaced, typewritten letter to the Swan Creek [sic] Township Board of Zoning Appeals strongly opposing Appellees' request for a conditional use permit." The Parkers cannot rely on the existence of this letter as evidence that the Hardens should have attended the hearing in person and at the same time ignore the letter as evidence of the Hardens' opposition to the permit.

{¶ 34} Based on all of the above, we find that the Hardens have standing to appeal to this court from the decision of the common pleas court. The Parkers' motion to dismiss the Hardens' appeal is denied.

{¶ 35} The court orders the appeal of Swancreek Board of Zoning Appeals dismissed. The remaining appellants shall file their assignments of error and briefs within 20 days of the date of this decision and judgment entry.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE