

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

Velocity Development, LLC, et al.

Case No. WD-11-037

Appellees

Trial Court No. 2010CV0997

v.

Perrysburg Township Board of Trustees

Appellee

DECISION AND JUDGMENT

[Lynn Hunter, Pamela Neil,
and Kimberly Schwartz-Appellants]

Decided: December 2, 2011

* * * * *

Jerome R. Parker and George J. Conklin, for appellees.

Charles E. Bloom, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellants, Perrysburg Township residents and property owners, Lynn Hunter, Pamela Neil, and Kimberly Schwartz, have commenced this appeal of the Wood County Court of Common Pleas' December 15, 2010 judgment denying their motion to

intervene in a declaratory judgment action. Because we find that the motion failed to satisfy the requirements of Civ.R. 24, we affirm.

{¶ 2} The relevant facts of this case are as follows. In December 2007, the Perrysburg Township Trustees voted unanimously to pass three resolutions to rezone three parcels of property (the Neiderhouse, Wolf and DeChristopher parcels) for residential development. Appellants, opposed to the development, circulated three referendum petitions seeking to place the rezoning issue before the electorate of Perrysburg Township. Ultimately, appellants were successful at placing two of the resolutions on the November 2009 ballot (the Wolf parcel was excluded due to an inaccuracy in the referendum petition.) See *Hunter v. Britten*, 6th Dist. No. WD-08-019, 2009-Ohio-663; *State ex rel. Miller Diversified Holdings, L.L.C. v. Wood Cty. Bd. of Elections*, 123 Ohio St.3d 260, 2009-Ohio-4980. The voters of Perrysburg Township voted against the rezoning resolutions.

{¶ 3} On October 15, 2010, plaintiffs-appellees, Velocity Development, LLC, Roland and Sandra Neiderhouse, and Jeffrey DeChristopher, filed a complaint in the Wood County Court of Common Pleas for declaratory judgment against defendant-appellee, Perrysburg Township Board of Trustees. The complaint requested that the court declare unconstitutional either the results of the November 3, 2009 referendum election, which invalidated the December 2007 resolutions rezoning the Neiderhouse property from A-1 to A-1 and R-3, and the DeChristopher parcel from A-1 to R-4A, or

the existing zoning classifications. The parties requested that the court require the trustees to reapprove the rezoning request.

{¶ 4} On October 21, 2010, the trustees filed their answer and raised a counterclaim relating to the rezoning amendment as to the Wolf Parcel which contained certain conditions that the trustees wished to enforce.

{¶ 5} On November 29, 2010, appellants filed a motion to intervene in the action. In support, appellants noted that the November 3, 2009 election was the result of the efforts of appellants, nearby property owners, who opposed the rezoning and development of the parcels. Appellants were also relators in a mandamus action before this court which resulted in the court's order that the trustees certify the petitions to the board of elections. See *Hunter v. Britten*, supra. Appellants acknowledged that they do not have a legal interest in the property; such interest is generally required to intervene in a zoning action. However, appellants argued that because the trustees openly opposed the repeal of the referendum, they would not adequately represent their interests in the declaratory judgment action.

{¶ 6} In opposition to appellants' motion, appellees asserted that Ohio law does not support intervention because appellants do not have a legal interest in the property. Appellees further argued that the motion and answer were facially defective as they failed to assert a legal interest in the property. On December 15, 2010, the motion was summarily denied.

{¶ 7} The parties ultimately entered into a consent decree following publication and an opportunity for public comment. The Neiderhouse and DeChristopher parcels were reclassified subject to certain restrictions regarding future annexation. This appeal followed.

{¶ 8} Appellants now raise the following assignment of error:

{¶ 9} "The trial court abused its discretion by denying appellants' motion to intervene."

{¶ 10} In their sole assignment of error appellants contest the trial court's refusal to allow them to intervene in the declaratory judgment action. Specifically, appellants assert they had a right to participate in the action where their rights to initiate a referendum to consider site-specific zoning legislation would be adversely affected. Appellants further contend that they have a right to intervene in the action where the defendants/trustees will likely enter into a consent entry which will result in the reclassification of the zoning of the land.

{¶ 11} A ruling on a motion to intervene under Civ.R. 24(A) is reviewed under an abuse of discretion standard. *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, Slip Opinion No. 2009-1806, 2011-Ohio-4612, ¶ 41. An abuse of discretion is found only when it is determined that a trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 12} Appellants sought leave to intervene as a matter of right under Civ.R.

24(A). The section provides:

{¶ 13} "(A) Intervention of right

{¶ 14} "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

{¶ 15} In order to intervene under Civ.R. 24(A)(2), the motion must be timely and the following factors must be shown: (1) the intervenor must claim an interest relating to the property or transaction that is the subject of the action, (2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect his or her interest, and (3) the intervenor must demonstrate that his or her interest is not adequately represented by the existing parties. *Fairview Gen. Hosp. v. Fletcher* (1990), 69 Ohio App.3d 827, 830-831. Failure of the party seeking to intervene to satisfy each of the requirements will result in a denial of the motion. *Id.* at 831. However, the right to intervene under Civ.R. 24 is to be construed liberally to permit intervention. *Merrill*, *supra*, at ¶ 41.

{¶ 16} The parties chiefly dispute whether appellants have an "interest" in the action. Under Civ.R. 24(A)(2), the applicant's interest must be legally protectable and

must not be adequately protected by the existing parties. *Merrill* at ¶ 42. (Citations omitted.) Appellees urge the court to apply the construction of the "legal interest" requirement as set forth in *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St.2d 263, where the court held that "[t]he surrounding property owners are not necessary parties to a declaratory judgment action challenging the constitutionality of a township zoning ordinance as it applies to a specific parcel of property." *Id.* at paragraph three of the syllabus. The court concluded that although the "surrounding property owners may have a practical interest in the outcome of a declaratory judgment action attacking the constitutionality of zoning as it applies to a specific parcel of property, * * * they have no legal interest in the outcome." *Id.* at 273.

{¶ 17} In *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, the Supreme Court of Ohio reiterated that in a declaratory judgment action, a party has an unconditional right to intervene under Civ.R. 24(A)(2) only where the applicant has a "legal interest" in the action. *Id.* at ¶ 22. The court noted that a "legal interest" is defined as "[a]n interest recognized by law" or an interest that is "legally protectable." *Id.* at ¶ 14, quoting *Black's Law Dictionary* (9 Ed.2009) 886 and *In re Schmidt* (1986), 25 Ohio St.3d 331, 336.

{¶ 18} Conversely, appellants rely on *Peterman v. Pataskala* (1997), 122 Ohio App.3d 758. In *Peterman*, the appellee commenced a declaratory judgment action seeking the court to rezone her tract of land from agricultural to residential. *Id.* at 759. Appellants were neighboring property owners who had been using their property in

conformance with the existing zoning classification. The matter was settled between appellee and the village just prior to appellants' motion to intervene and the motion was denied. On review, the court found that appellants demonstrated a right to intervene under Civ.R. 24(A) because they were adjacent or nearby property owners and they raised "legitimate concerns that may affect the use of their property if forty-nine homes are constructed on the Peterman's property." *Id.* at 761. Such concerns included, *inter alia*, low soil permeability and the lack of a central sewer system. *Id.*

{¶ 19} In the present case, we cannot find that the trial court abused its discretion when it denied appellants' motion to intervene. Despite their vocal opposition to the zoning reclassification, in their motion appellants failed, unlike the *Peterman* property owners, to demonstrate a legally protected interest in the subject of the declaratory judgment action. Accordingly, we find appellants' sole assignment of error not well-taken.

{¶ 20} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.