[Cite as *Robin's Trace Homeowners' Assn. v. City of Green Planning & Zoning Comm.*, 2010-Ohio-1168.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
ROBIN'S TRACE HOMEOWNERS' ASSOCIATION Appellant v. CITY OF GREEN PLANNING AND ZONING COMMISSION, et al. Appellees	C.A. No. 24872 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008-09-6533

DECISION AND JOURNAL ENTRY

Dated: March 24, 2010

Per Curiam

{¶1} Appellant, Robin's Trace Homeowners' Association, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On July 7, 2008, the developers of property on Moore Road in the City of Green, Ohio, submitted a preliminary and final site plan review application to the City of Green. As submitted, the 15.7 acre property, in an area already zoned as a multi-family district, would contain a 132 unit apartment complex. The property abutted the residential neighborhood of Robin's Trace.

{¶3} After updated and revised plans were submitted, at a public meeting held on August 20, 2008, the City of Green's Planning and Zoning Commission ("the Commission") reviewed the application. At the meeting, several Robin's Trace homeowners expressed their

concerns and asked questions of the developer and the Commission. The Commission unanimously approved the project, subject to conditions. On August 22, 2008, the City of Green Planning Department sent the developer and architect written notice of the Commission's conditional approval.

{¶4} On September 15, 2008, residents of Robin's Trace sent the City of Green Planning Department a "Residents [sic] Request for Reconsideration" of the approval of the Moore Road development. The request was signed by approximately 150 neighboring residents. On September 18, 2008, the Robin's Trace Homeowners' Association ("Homeowners' Association") filed its administrative appeal, pursuant to Ohio Revised Code Chapter 2506. After the administrative record was filed, the trial court allowed the Homeowners' Association to supplement the record only with regard to the arguments made in the residents' request for reconsideration. The parties submitted briefs, and on June 29, 2009, the trial court upheld the decision of the Commission. The Homeowners' Association timely appealed this decision, and has raised three assignments of error for our review. The Commission, as the appellee, asserted an assignment of error in its response to the Homeowners' Association's brief, urging this Court to conclude that the Homeowners' Association lacked standing to file its administrative appeal in the trial court. When the trial court affirmed the Commission's decision on the merits, it left the administrative decision in tact. On appeal, the Commission seeks, albeit on different grounds, to affirm the trial court's judgment leaving the administrative decision in tact. As the Commission does not seek to change the judgment of the trial court, we conclude that this cross-assignment of error is properly before us. See App.R. 3(C)(2). We have combined the Homeowners' Association's assignments of error for ease of review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS DETERMINATION THAT THE PLANNING AND ZONING COMMISSION APPROPRIATELY CALCULATED SETBACKS."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN AFFIRMING THE PLANNING AND ZONING COMMISSION'S APPROVAL OF THE PROJECT IN REGARD TO OPEN SPACE REQUIREMENTS AND DENSITY REQUIREMENTS."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN AFFIRMING THE PLANNING AND ZONING COMMISSION'S APPROVAL OF THE PROJECT AS THAT APPROVAL WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE."

APPELLEE'S ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN DETERMINING THAT THE PLAINTIFF HAD STANDING TO PURSUE THE ADMINISTRATIVE APPEAL."

{¶5} In its sole assignment of error, the Commission contends that the trial court erred when it determined that the Homeowners' Association had standing to sue. We agree.

{¶6} The question of standing involves whether the party who brought the claim "has alleged such a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (Quotations and citations omitted.) *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469.

{¶7} In concluding that the Homeowners' Association had standing to bring the appeal, the trial court determined, without authority, that "Robin's Trace owns property next to and contiguous to the proposed development. As a potential neighbor directly next to the proposed development, Appellant is without question directly affected by said development." With regard

to an administrative appeal brought by a contiguous land owner, the Ohio Supreme Court has held that 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." *Schomaeker v. First Natl. Bank of Ottawa* (1981), 66 Ohio St.2d 304, at paragraph two of the syllabus.

The Court based its reasoning on its previous decision in *Roper v. Bd. of Zoning Appeals*, in which it held that:

> "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 pursuant to Sections 519.15 and 2506.01 to 2506.04, inclusive, and Chapter 2505, Revised Code." *Roper v. Bd. of Zoning Appeals* (1962), 173 Ohio St. 168, 168-69.

{¶8} Thus, the *Schomaeker* Court concluded that "[i]n order to bring an R.C. Chapter 2506 direct appeal of an administrative order, plaintiff must be a person directly affected by the decision of the planning commission" and must have previously indicated its interest. *Schomaeker*, 66 Ohio St.2d at 311-312; see, also, *Sheward*, 86 Ohio St.3d at 469 (holding that a person must allege a personal stake in the outcome of the controversy.)

{¶9} The record before this Court reveals that the Homeowners' Association is a contiguous land owner. The August 20, 2008, Commission meeting minutes reveal, however, that no representative on behalf of the Homeowners' Association was in attendance or voiced any concerns about the proposed site plan. Instead, several individual residents raised concerns and asked questions regarding the plan. Further, the September 15, 2008 "Residents' Request for Consideration" was signed and sent to the City of Green Planning Department by individual

residents of neighboring properties. There is no indication that this request was signed by anyone on behalf of the Homeowners' Association as a contiguous landowner. There is no indication in the record that the Homeowners' Association ever asserted its right as a contiguous landowner, either at the hearing or otherwise. Accordingly, we conclude that the Homeowners' Association has failed to previously indicate its interest as a contiguous landowner at the administrative level. Therefore, the trial court erred when it concluded that because the Homeowners' Association was a contiguous landowner, it had standing to bring the administrative appeal.

{¶10} The Homeowners' Association states that, in the alternative, it had standing in a representative capacity on behalf of its members. The record before this Court does not support this contention. In its brief before the trial court, the Homeowners' Association asserted in a footnote that "Robins' Trace also represents its members who have standing." To support its argument it cited to the Ohio Supreme Court, which stated:

> "The United States Supreme Court has held that an association has standing on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' However, to have standing, the association must establish that its members have suffered actual injury." *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 319, quoting *Hunt v. Washington State Apple Advertising Comm.* (1977), 432 U.S. 333, 343.

{¶11} Although there is evidence that the contiguous property owners would have standing to sue, there is no evidence that these property owners are members of the Homeowners' Association, no evidence of the Homeowners' Association's purpose, or evidence that its members have suffered actual injury. Again, we note that the parties below briefed the issue of standing and the trial court decided the issue. In the absence of evidence regarding

representative standing, we conclude that the Homeowners' Association is without standing on behalf of its members to bring this appeal and that the trial court erred in determining the merits of the case. Accordingly, this Court is without authority to determine the merits of the Homeowners' Association's assigned errors. *Sheward*, 86 Ohio St.3d at 469. As we conclude that the Homeowners' Association was without standing to bring the administrative appeal, we affirm the decision of the trial court, which left the administrative decision in tact, albeit on different grounds. Accordingly, the Commission's assigned error is sustained, and the judgment of the trial court is affirmed.

III.

{¶12} The Commission's assignment of error is sustained. The Homeowners' Association's assigned errors are moot. The judgment of the Summit County Court of Common pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CLAIR E. DICKINSON
FOR THE COURT

DICKINSON, P. J.
CARR, J.
CONCUR

MOORE, J.
DISSENTS, SAYING:

{¶13} I respectfully dissent from the majority's conclusion that the Commission's cross assignment of error was properly before us. The trial court determined, after briefing and argument by the parties, that the Homeowners' Association had standing to bring the instant administrative appeal. The trial court then went on to determine the merits of the case. Because the Commission assigned error to the trial court's decision regarding standing, specifically asking this Court to reverse that determination, I would conclude that the Commission's purported assignment of error sought to change the judgment of the trial court and therefore, the assigned error was not properly before us. App.R. 3(C). Therefore, I would not consider the Commission's assigned error.

{¶14} Although I would conclude that the Commission's assigned error was not properly before us, "[i]t is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469, citing *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320. Accordingly, I would raise the issue of standing sua sponte. See *Buckeye Foods v. Cuyahoga Cty. Bd. of Revision* (1997), 78 Ohio St.3d 459, 460; *Warren Cty. Park Dist. v. Warren Cty. Budget Comm.* (1988), 37 Ohio St.3d 68. I agree with the majority's decision that the Homeowners' Association did not have standing on

behalf of its members to bring the instant appeal. However, I would conclude that because the trial court erred in determining that the Homeowners' Association had standing to prosecute the case, the trial court should have dismissed the case rather than determine the merits. Accordingly, I would dismiss the present appeal for lack of standing and vacate the decision of the Summit County Court of Common Pleas. Therefore, I respectfully dissent from the majority's decision.

APPEARANCES:

COLIN G. SKINNER, Attorney at Law, for Appellant.

STEPHEN J. PRUNESKI, Attorney at Law, for Appellee.