[Cite as *Shaheen v. Cuyahoga Falls City Council*, 2010-Ohio-640.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

THOMAS SHAHEEN, et al. Appellants v. CUYAHOGA FALLS CITY COUNCIL, et al. Appellees	C. A. No. 24472 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2006 11 7126

DECISION AND JOURNAL ENTRY

Dated: February 24, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} The Cuyahoga Falls City Council approved a "Regulating/Final Development Special Overlay Plan" for a residential development in the Northampton area of the City. The approved plan, among other things, applied a "Conservation Residential Overlay" to the property on which the development is to be located, changing the zoning from "R-1, Large-Lot Residential," and "R-2, Low-Density Residential," to "R-1-C, Conservation Residential Overlay," and "R-2-C, Conservation Residential Overlay." It also authorized 38 residential lots on the property. Five neighboring landowners filed a notice of appeal to the Summit County Common Pleas Court under Section 2506.01 of the Ohio Revised Code, arguing that the proponents of the development had failed to demonstrate that they were entitled to have a Conservation Overlay applied to the property or to develop that many lots on it. The Common Pleas Court affirmed, and the neighboring property owners have appealed to this Court. The

City Council, the Planning Commission, the owners of the property on which the development is to be located, and the proposed developer (collectively "the City") have cross appealed.

{¶2} The City has argued that the Common Pleas Court lacked jurisdiction under Section 2506.01 to review City Council's approval of the Regulating/Final Development Special Overlay Plan because, according to it, in providing that approval, Council took legislative action and legislative actions are not reviewable under Section 2506.01. This Court vacates the Common Pleas Court's judgment because, under existing Ohio Supreme Court precedent, inasmuch as the City Council changed the zoning of the property, it took legislative action and the Common Pleas Court lacked jurisdiction to review that action under Section 2506.01.

BACKGROUND

{¶3} In 2005, Cuyahoga Falls adopted new comprehensive zoning regulations that it codified as Part 11 of its Code of Ordinances. Among other things, Part 11 divided the City into four "Planning Areas," one of which was designated the "Northampton Planning Area." Cuyahoga Falls, OH, Codified Ordinances § 1131.01 (2005). It also divided the City into various "Zoning Districts," including "R-1, Large-Lot Residential," and "R-2, Low-Density Residential." Cuyahoga Falls, OH, Codified Ordinances § 1131.02. This appeal involves a 54.41 acre parcel in the Northampton Planning Area, most of which was classified R-1 on the Zoning Map included in Appendix B to Part 11 at the time Part 11 was adopted and the remainder of which was classified R-2 on that same map.

{¶4} Part 11 includes a number of "Special or Overlay Districts," including "R-C, Conservation Residential Overlay." Cuyahoga Falls, OH, Codified Ordinances § 1131.02(C). The City did not classify any property as within the Special or Overlay Districts at the time it adopted Part 11. Rather, the Special or Overlay Districts are "floating zones" that "hover" over

the city until later action "confines" them to particular areas. See 3 Patricia E. Salkin, Am. L. Zoning § 24:11 (5th ed. 2009); *Kure v. City of North Royalton*, 34 Ohio App. 3d 227, 231 (1986) (citing 2 Anderson, Am. L. Zoning § 11.06 (3d ed. 1986)).

{¶5} To have a particular area "rezoned" from the otherwise applicable zoning district, which is referred to in Part 11 as the "base zoning district," to a Special or Overlay District, an owner or owner's agent must submit a proposed "Regulating Plan" to the City Planning Commission for review. Cuyahoga Falls, OH, Codified Ordinances § 1113.12. Once the Planning Commission has completed its review, the proposed Regulating Plan goes to City Council for final approval. *Id*. A proposed Regulating Plan must, among other things, be accompanied by a "development site map, and codes and development guidelines to be applied throughout the development plan." Cuyahoga Falls, OH, Codified Ordinances § 1113.12(D). Once City Council approves a proposed Regulating Plan, thereby rezoning the area, the owner or agent must submit a "Final Development Plan" for Planning Commission review. Cuyahoga Falls, OH, Codified Ordinances § 1113.12(E). As with proposed Regulating Plans, final approval of proposed Final Development Plans lies with City Council. *Id.* A Final Development Plan must comply with the approved Regulating Plan. *Id*. Alternatively, the owner or agent may submit proposed Regulating and Final Development Plans simultaneously. Cuyahoga Falls, OH, Codified Ordinances § 1113.12(A). In this case, the developer submitted a combined Regulating/Final Development Special Overlay Plan.

{¶6} Section 1131.02(C)(2) explains that a Conservation Overlay District is intended to preserve rural landscapes better than large-lot or low-density residential development. It allows a developer to place homes on smaller lots than would otherwise be allowed in the base zoning district in return for preserving "contiguous amounts of natural open space." *Id.* An R-C

Overlay "may be applied to" a number of the residential districts established by Part 11, including R-1 and R-2 districts. Cuyahoga Falls, OH, Codified Ordinances § 1132.20(A)(1). Part 11 specifically provides that "[a]n R-C Overlay is appropriate anywhere in the [Northampton] Planning Area." Cuyahoga Falls, OH, Codified Ordinances § 1132.20(A)(2).

{¶7} According to Part 11, in order to qualify for a rezoning to an R-C Overlay District, a proposed development in an R-1 or R-2 district must cover at least 10 acres and at least 20%, but not more than 75%, of the total area of the development must be preserved as natural open space. Cuyahoga Falls, OH, Codified Ordinances § 1132.20(B)(1), (2). Smaller lots are possible in an R-C Overlay District than those required by the base zoning as a result of two things. First, a developer can "cluster" the same number of lots on the part of the rezoned area that is not preserved as natural open space as the base zoning "would have . . . allowed" on the entire area before the rezoning: "Residential districts applying a cluster overlay shall be allowed to vary the lot sizes on the developed parcel in order to fit the maximum number of units on the developed parcel as would have been allowed on the original parcel under the base residential zoning, considering application of all other development regulations." Cuyahoga Falls, OH, Codified Ordinances § 1132.20(B)(3). Second, the developer is provided a "density bonus" beyond the number of lots that would have been allowed under the base zoning. The larger the proportion of the preserved area to the total rezoned area, the more bonus lots awarded. Cuyahoga Falls, OH, Codified Ordinances § 1132.20(C).

{¶8} Part 11 specifically provides that not more than 40% of the area preserved to meet the requirements for a Conservation Overlay "shall be land that is undevelopable due to natural features or other physical impracticalities, such as water bodies, steep grades, or wetlands." Cuyahoga Falls, OH, Codified Ordinances § 1132.20(D)(2). It further provides that "[n]o land

that is undevelopable due to other laws or ordinances is eligible for inclusion in the preserved area calculations." Cuyahoga Falls, OH, Codified Ordinances § 1132.20(D)(3).

{¶9} Shortly after the City Council adopted Part 11, a developer, Mission Falls LLC, presented a proposed Regulating/Final Development Special Overlay Plan to the Cuyahoga Falls Planning Commission for a Conservation Residential Overlay on 60 acres it wished to develop in the Northampton Planning Area, including the 54.41 acres at issue in this appeal. The base zoning district for most of the 60 acres was R-1, which requires lots that are at least one and one-half acres, while the base zoning for the remainder was R-2, which requires lots that are at least one-half acre. Mission's original plan called for setting aside approximately 30 acres as preserved area and placing 55 residential lots on the remaining property. The average proposed lot size was one-quarter acre. The Planning Commission tabled the proposed plan.

{¶10} Before the Planning Commission again took up Mission's proposed plan, Mission revised it. The revised plan still covered 60 acres, but called for only 48 lots rather than the originally proposed 55. All of the lots under the revised plan were at least one-half acre, and the proposed preserved area consisted of 26 acres of "common preserved area" and 5 acres of "private preserved area." The Commission initially again tabled the proposed plan, but eventually rejected it.

{¶11} Mission again revised its proposal and filed a new Regulating/Final Development Special Overlay Plan. This revision reduced the proposal to the 54.41 acres at issue in this appeal. As with the previous proposals, the base zoning district for most of the area for which a zoning change was sought was R-1 and the remainder was R-2. It called for setting aside 35.02 acres as preserved area and placing 38 residential lots on the remaining property. All of the proposed lots were at least one-half acre, most just slightly more than that.

{¶12} In Its combined Regulating/Final Development Special Overlay Plan, Mission did not clearly delineate between the "Regulating" part of the Plan and the "Final Development" part of the Plan. Inasmuch as Regulating Plans must include, among other things, a developmental site map, the change from R-1 and R-2 to R-1-C and R-2-C and the designation of 38 lots would have been in the Regulating part rather than the Final Development part.

{¶13} An attorney representing the neighbors appeared before the Planning Commission and spoke against the proposed plan. He asserted that his clients would be economically harmed if the property were developed as proposed and said that, if the City approved the plan, they would appeal. He also presented the testimony of an engineer who had reviewed the proposed plan. The engineer testified, among other things, that approximately 60% of the proposed preserved area rather than the maximum permissible 40% is land that cannot be developed because of its natural features. He further testified that 26.51 acres of the proposed preserved area is land that cannot be developed because of other laws. According to him, if the proposed preserved area is properly calculated, it contains only 8.51 acres, or 15.6% of the total 54.41 acres, rather than the minimally required 20%. Accordingly, he concluded that the proposed development did not qualify under Part 11 for rezoning to a Conservation Overlay. He further testified that, even if the proposed development qualified for rezoning, proper application of Part 11 would not allow the 38 lots sought by the developer.

{¶14} The Planning Commission recommended that City Council approve the 38-residential-lot Regulating/Final Development Special Overlay Plan. City Council adopted an ordinance accepting the Planning Commission's "Approval, Recommendation, Findings and Conditions for the Mission Falls Regulatory/Final Development Special Overlay Plan and Declaring an Emergency," and the neighbors appealed to the Summit County Common Pleas

Court. That court affirmed City Council's action, and the neighbors have appealed to this Court. The City has cross appealed. Because the City's argument is that the trial court lacked jurisdiction to review City Council's approval of the Regulating/Final Development Special Overlay Plan under Section 2506.01, we must consider its cross appeal before we consider the neighbors' appeal.

LEGISLATIVE, ADMINISTRATIVE, QUASI-JUDICIAL

{¶15} As mentioned above, the neighbors appealed to the Summit County Common Pleas Court under Section 2506.01 of the Ohio Revised Code. That section provides that, with certain exceptions not here relevant, "every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located . . . ." Despite the broad language of Section 2506.01, the Ohio Supreme Court, in *Berg v. City of Struthers*, 176 Ohio St. 146, 146-47 (1964), held that the jurisdiction granted by that section does not include jurisdiction to review actions of legislative bodies: "The Administrative Appeals Act (Chapter 2506, Revised Code), providing for appeals from actions of administrative officers, tribunals and commissions, does not permit appeals from acts of legislative bodies." *Id*.

{¶16} Local governments, however, are not required to and do not strictly separate executive, legislative, and judicial functions. Much of what local "legislative" bodies do is, in reality, something other than "legislative." Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 260 (Apr. 2000); Todd W. Prall, Comment, *Dysfunctional Distinctions in Land Use: The Failure of Legislative/Adjudicative Distinctions in Utah and the Case for a Uniform Standard of Review*,

2004 B.Y.U. L. Rev. 1049, 1051 (2004). In *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1 (1968), the Supreme Court clarified that it is not the identity of the decision maker that determines whether a decision is appealable under Section 2506.01, but the capacity in which the decision maker is acting when it makes the decision: "A public body essentially legislative in character may act in an administrative capacity." *Id.*, paragraph one of the syllabus. According to the Supreme Court in *Donnelly*, the question of whether an action by a legislative body is appealable under Section 2506.01 depends on whether the legislative body has acted legislatively or administratively and "[t]he test for determining whether the action of a legislative body is legislative or administrative is whether the action is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence." *Id.*, paragraph two of the syllabus.

{¶17} But even the holding in *Donnelly* is too broad because there is more than one type of administrative action. See Christopher B. McNeil, *Government Agencies and Administrative Law*, Ohio Admin. L. Handbook and Agency Directory § 1:21 (Howard N. Fenton & Christopher B. McNeill eds., Ohio State Bar Association, 2009). Rule making is a type of administrative action that is "quasi-legislative." *Id.* Adjudication, on the other hand, is a type of administrative action that is "quasi-judicial." *Id.* In *M. J. Kelley Co. v. City of Cleveland*, 32 Ohio St. 2d 150 (1972), the Supreme Court refined its holding in *Donnelly* by holding that only "quasi-judicial" administrative actions are appealable under Section 2506.01: "The review of proceedings of administrative officers and agencies, authorized by Section 4(B), Article IV of the Ohio Constitution, contemplates quasi-judicial proceedings only, and administrative actions of administrative officers and agencies not resulting from quasi-judicial proceedings are not appealable to the Court of Common Pleas under the provisions of R.C. 2506.01." *Id.*, at

paragraph one of the syllabus; *State ex rel. City of Lorain v. Stewart*, 119 Ohio St. 3d 222, 2008-Ohio-4062, ¶55.

{¶18} The questions presented by the City's cross appeal, therefore, are whether the City Council acted in a legislative or administrative capacity in approving the developer's proposed Regulating/Final Development Special Overlay Plan and, if it acted in an administrative capacity, did it reach its decision as the result of a quasi-judicial proceeding. We will consider these questions in reverse order.

QUASI-JUDICIAL

{¶19} A quasi-judicial proceeding is one "in which notice, a hearing, and the opportunity for the introduction of evidence have been given." *State ex rel. City of Lorain v. Stewart*, 119 Ohio St. 3d 222, 2008-Ohio-4062, ¶55. Although it is not clear from the record whether the neighbors were mailed notice of the meeting before the City Planning Commission that led to its recommendation that City Council approve the 38-residential-lot Regulating/Final Development Special Overlay Plan, such notice appears to have been required by Part 11. Approval of the Regulating part of the Regulating/Final Development Special Overlay Plan rezoned the property from the base zoning districts to the Special or Overlay Districts. Part 11 specifically provides that, when a property owner applies for a Zoning Map Amendment for ten or fewer parcels of land, owners of land within 200 feet in any direction of the land proposed to be rezoned must be mailed notice of the public hearing on the proposed amendment. Cuyahoga Falls, OH, Codified Ordinances § 1113.07(E)(2)(a). There is also a requirement that notice of the hearing be posted on the land to be rezoned. Cuyahoga Falls, OH, Codified Ordinances § 1113.07(E)(2)(b). Although it is not clear from the record that the neighbors' properties were

within 200 feet of the proposed development, there is no doubt that they were represented at the hearing, and presumably that was a result of their having received the required notice.

{¶20} Further, the Planning Commission held an evidentiary hearing on the developer's proposed Regulating/Final Development Special Overlay Plan. At the outset of that hearing, people who intended to present testimony were sworn. At the hearing, the commission received evidence tending to prove or disprove that the proposed development satisfied the criteria listed in Part 11 for approval of a rezoning to an R-C Conservation Overlay with 38 residential lots. The hearing before the Planning Commission in this case was very similar to that held before the Tallmadge City Council in *Gross Builders v. City of Tallmadge*, 9th Dist. No. 22484, 2005-Ohio-4268. This Court concluded that the hearing in *Gross* was a quasi-judicial proceeding. *Id*. at ¶34.

{¶21} Because the City provided notice, a hearing, and an opportunity for introduction of evidence before approving the Regulating/Final Development Special Overlay Plan, if that approval was administrative action, it was quasi-judicial administrative action and appealable under Section 2506.01. Just because the City provided notice, a hearing, and an opportunity to submit evidence, however, does not make the approval of the Regulating/Final Development Special Overlay Plan administrative. Although due process does not require notice, a hearing, and an opportunity to submit evidence before a legislative body adopts legislation, there is nothing that prohibits a legislative body from providing notice, a hearing, and an opportunity to submit evidence before adopting legislation. See Michael S. Holman, Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 Ohio St. L.J. 130, 134-35 (1972); Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 217-18 (1956).

LEGISLATIVE V. ADMINISTRATIVE

{¶22} There is much about the City's approval of the developer's proposed Regulating/Final Development Special Overlay Plan that looks like administrative quasi-judicial action rather than legislative action. The hearing on the Regulating/Final Development Special Overlay Plan was "narrow in scope, focusing on . . . [a] specific situation[]," rather than "open-ended, affecting a broad class of . . . situations." Michael S. Holman, Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 Ohio St. L.J. 130, 134-35 (1972). Such a narrow focus is usually a sign of quasi-judicial administrative action rather than legislative action. *Id.* The type of facts properly considered at a quasi-judicial hearing relate "to individuals or particular situations. They are 'roughly the kind of facts that go to a jury in a jury case.'" *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1502, 1511 (1978) (quoting Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 199 (1956)). The "facts" that were before the Planning Commission were just that kind of "facts." They related to the 54.41 acres at issue: whether, in view of the topography of those acres and other laws allegedly applicable to them, the proposed development satisfied the requirements of Part 11 for rezoning to a Conservation Overlay with 38 lots.

{¶23} "[L]egislative action results in the *formulation* of a general rule or policy, while [quasi-judicial] action results in the *application* of a general rule or policy." Michael S. Holman, Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 Ohio St. L.J. 130, 135 (1972). "Legislative facts are normally generalizations concerning a policy or state of affairs: they 'do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion.'" *Developments in the Law—Zoning*, 91

Harv. L. Rev. 1502, 1510-11 (1978) (quoting Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 199 (1956)).

{¶24} At the time the City Council adopted Part 11, it made a lot of policy decisions, presumably based on "general facts" about the use of Conservation Overlays as a part of zoning ordinances. It decided that Conservation Overlays would "preserve rural landscapes better than [was occurring] through large-lot or low-density residential developments." Cuyahoga Falls, OH, Codified Ordinances § 1131.02(C)(2). It decided that Conservation Overlays are "appropriate anywhere in the [Northampton] Planning Area." Cuyahoga Falls, OH, Codified Ordinances § 1132.20(A)(2). It decided that Conservation Overlays in areas with R-1 or R-2 base zoning must cover at least ten acres. Cuyahoga Falls, OH, Codified Ordinances § 1132.20(B)(1). It decided that Conservation Overlays in areas with R-1 or R-2 base zoning must preserve between 20% and 75% of the rezoned area from development in perpetuity. Cuyahoga Falls, OH, Codified Ordinances § 1132.20(B)2). It decided that, within a Conservation Overlay, a developer can vary the lot size "in order to fit the maximum number of units on the developed parcel as would have been allowed on the original parcel under the base residential zoning, considering application of all other development regulations." Cuyahoga Falls, OH, Codified Ordinances § 1132.20(B)(3). It decided that, within a Conservation Overlay, a developer is entitled to a specific "density bonus" based on the ratio of the preserved area to the overall size of the development. Cuyahoga Falls, OH, Codified Ordinances § 1132.20(C). It decided that not more than 40% of the preserved area in a Conservation Overlay "shall be land that is undevelopable due to natural features . . . ." Cuyahoga Falls, OH, Codified Ordinances § 1132.20(D)(2). And it decided that "[n]o land that is undevelopable due to other laws or

ordinances is eligible for inclusion in the preserved area calculation" for a Conservation Overlay. Cuyahoga Falls, OH, Codified Ordinances § 1132.20(D)(3).

{¶25} By contrast, at the time the City Council approved the developer's Regulating/Final Development Special Overlay Plan, it purported to simply apply the existing law to the proposed development. It appeared as though all the policy decisions had already been made, and the Planning Commission's and City Council's tasks were simply to decide whether this particular proposed development fell within the existing law. Rather than determining "[w]hat the law shall be in future cases," as is done by legislative decisions, the Planning Commission and City Council appeared to determine "[t]he rights and duties of parties under existing law and with relation to existing facts," as is done by quasi-judicial administrative decisions. Michael S. Holman, Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 Ohio St. L.J. 130, 135 (1972) (quoting *Gulnac v. Board of Chosen Freeholders of the County of Bergen*, 74 N.J.L. 543, 546 (1906) (concurring opinion) and *Newell v. Franklin*, 30 R.I. 258, 263 (1910)) (brackets added by Holman).

{¶26} As mentioned previously, the hearing in this case was very similar to that held before the Tallmadge City Counsel in *Gross Builders v. City of Tallmadge*, 9th Dist. No. 22484, 2005-Ohio-4268, a case in which this Court determined that the Tallmadge City Council had made a quasi-judicial administrative decision that a proposed project satisfied the requirements of Tallmadge's Codified Ordinances for a planned-unit development and that, therefore, that decision was appealable to the Summit County Common Pleas Court under Section 2506.01. A Conservation-Overlay development under Part 11 is a type of planned-unit development. See *State ex rel. Zonders v. Delaware County Board of Elections*, 69 Ohio St. 3d 5, 7-10 (1994); *Gray v. Trustees, Monclova Twp.*, 38 Ohio St. 2d 310, 311 (1974). There is, however, a

significant difference between a planned-unit development under Tallmadge's Codified Ordinances and a Conservation Overlay under Part 11. Under Tallmadge's ordinances, a planned-unit development is a conditional use, permitted in residential districts without a zoning change. While Conservation Overlays are "appropriate" in the Northampton Planning Area under Part 11, the approval process requires a zoning change. The Ohio Supreme Court has consistently followed a formalistic approach, classifying all zoning changes as legislative and, therefore, not appealable under Section 2506.01.

ZONING CHANGES

{¶27} In *Berg v. City of Struthers*, 176 Ohio St. 146 (1964), the plaintiffs had sought a zoning change for certain property, and, when the city council refused to grant it, they attempted to appeal under Section 2506.01 of the Ohio Revised Code. The Court held that Section 2506.01 "does not permit appeals from acts of legislative bodies." *Id.* at 147. Two years later, in *Tuber v. Perkins*, 6 Ohio St. 2d 155 (1966), the Court considered whether a zoning change by a board of township trustees was appealable under Section 2506.01. It concluded that it was not: "This section, relates to appeals from administrative orders of such bodies; it does not provide for appeals from legislative bodies or from resolutions of administrative bodies promulgated in a delegated legislative capacity. . . . The enactment and amendment of zoning regulations constitute legislative action." *Id.*, at 156-157.

{¶28} In *Gray v. Trustees, Monclova Township*, 38 Ohio St. 2d 310 (1974), the Court considered whether, when township trustees approved a proposed change to an earlier adopted planned-unit-development plat, they were acting legislatively or administratively. The Court concluded that, because the change was "equivalent" to a rezoning, the trustees acted

legislatively: "Under Monclova's zoning laws, the location of buildings and yard requirements must appear on a [planned-unit development] plat submitted to the board of trustees for approval. Once approved by the board and filed with the county recorder, the specific development plans disclosed on the plat become part of the township's zoning regulations; that is, the developer must, unless an amendment is granted, comply with these plans. . . . Hence, the action of the board in approving such a plat is the functional equivalent of traditional legislative zoning, even though the entire [planned-unit development] area is covered by the same 'nominal' zoning classification both before and after approval of the plat. Similarly, the approval by the township trustees of an application to amend a previously approved [planned-unit development] plat is equivalent to legislative rezoning, even though there is no change in the nominal zoning." *Id*. at 314.

{¶29} In *Peachtree Development Co. v. Paul*, 67 Ohio St. 2d 345 (1981), the Court considered whether the Hamilton County Commissioners' approval of a "Community Unit Plan," a form of planned-unit development similar to the Conservation Overlay in this case, was legislative or administrative action. Under the Hamilton County Zoning Resolution, if a proposed Community Unit Plan complied with a number of requirements, "zoning certificates [could] be issued even though the use of land, the location of the buildings to be erected in the area, and the yards and open spaces contemplated by the plan [did] not conform in all respects to the District Regulations of the District in which it [was] located." *Id*. at 346 n.3 (quoting Hamilton County, OH, Zoning Code, Art. XVI, § 163). The actual zoning classification of the land remained the same after approval of the Plan as it had been before that approval. In reliance on its earlier decision in *Gray*, the Court held that the Commissioners' approval of the Plan was the "functional equivalent of traditional legislative zoning," and, therefore, legislative action:

"By that legislative act the board created a new zoning classification known as a Community Unit Plan, different from the other districts, more flexible but subject to the limitations and proceedings set forth in Article XVI." *Id*. at 351 (quoting *Peachtree Dev. Co. v. Paul*, 1st Dist. Nos. C-790820, C-790886, 1980 WL 353155 at *5 (Nov. 19, 1980)).

{¶30} In *State ex rel. Zonders v. Delaware County Board of Elections*, 69 Ohio St. 3d 5 (1994), the Court reaffirmed its earlier holdings in *Gray* and *Peachtree*. The issue in *Zonders* was whether a township's rezoning of land from a rural-residential district to a planned-residential district was legislative action subject to referendum. The Court concluded that it was: "[T]he enactment of a new [planned-unit development] classification that is not tied to any specific piece of property is a legislative act subject to referendum. However, where specific property is already zoned as a [planned-unit development] area, approval of subsequent development as being in compliance with the existing [planned-unit development] standards is an administrative act which is not subject to referendum. Finally, the application of preexisting [planned-unit development] regulations to a specific piece of property which is zoned under a non-[planned-unit development] classification (the situation here) effects a rezoning of the property and is thus a legislative act subject to referendum." *Id*. at 319 (citations omitted).

{¶31} In *State ex rel. Committee for the Referendum of Ordinance No. 3844-02 v. Norris*, 99 Ohio St. 3d 336, 2003-Ohio-3887, the Court again considered the three-step process it had described in *Zonders*. The North Ridgeville City Council took the first step of the three-step process in 1999 when it established a new zoning classification known as a Planned Community Development District. It took the second step in 2000, when it approved a preliminary development plan for a 640-acre Planned Community Development and changed its zoning map to classify the property on which the development was to be located as a Planned Community

Development District. It took the final step in 2002, when it adopted two ordinances approving final development plans and final plat plans for two parts of the proposed development. While the issue before the Court in *Zonders* had been whether the second step, the rezoning, was administrative or legislative, the issue in *Committee for the Referendum of Ordinance No. 3844-02* was whether the third step, approval of the proposed development as being in compliance with the planned-unit development standards, was administrative or legislative. The Court concluded, consistent with what it had written in *Zonders*, that that third step was administrative. In doing so, it emphasized that "the zoning change to the property here was made in 2000 when the [planned-unit development] classification was applied to the . . . property." *Id.* at ¶35.

{¶32} In *State ex rel. Marsalek v. Council of the City of South Euclid*, 111 Ohio St. 3d 163, 2006-Ohio-4973, the Court considered whether the South Euclid City Council's adoption of a resolution allowing a planned-unit development as a conditional use was a legislative act subject to referendum. The Court concluded that it was not. In reaching that conclusion, the Court again emphasized that the resolution at issue did not rezone the property: "Resolution 12-06 merely executes and administers the preexisting provisions of Section 722.06 of the South Euclid Codified Ordinances, which permits planned-unit residential developments as a conditional use in residential districts, but endeavors 'to maintain the predominately residential character of the City.' Section 722.06 specifies criteria for this conditional use, including the permissible dwelling types, minimum project area, maximum density, minimum setbacks, and minimum distance between buildings. Resolution 12-06, which approves a conditional-use permit in accordance with Section 722.06, does not change the zoning of the property." *Id*. at ¶14-15.

{¶33} City Council's approval of the Regulating part of the developer's Regulating/Final Development Special Overlay Plan in this case changed the zoning classifications of the 54.41 acres at issue from R-1 and R-2 to R-1-C and R-2-C and adopted the specific regulations with which the developer will have to comply in completing the development. In doing so, Council took the second step of the three-step process the Supreme Court described in *Zonders*, a legislative action. It is inconsequential that, as a result of the developer having submitted a combined Regulating/Final Development Special Overlay Plan, Council, at that same time, also took the third step, an administrative action. The actions that the neighbors have complained about are the approval of R-C Conservation Residential Overlay and the approval of the 38 lots, both of which were part of the rezoning. They have not complained about Council's decision that the Final Development part of the plan complies with the Regulating part of the plan. If, as the neighbors have contended, Mission failed to demonstrate that it was entitled, under Part 11, to a Conservation Overlay on the 54.41 acres at issue or to develop 38 lots on that property, City Council, in effect, amended Part 11 to allow the Conservation Overlay and the 38 lots without satisfaction of the previously adopted requirements. Accordingly, the neighbors attempted to appeal from a legislative action, and the Summit County Common Pleas Court did not have jurisdiction under Section 2506.01 of the Ohio Revised Code.

{¶34} The type of formal approach to the distinction between legislative and administrative action followed by the Ohio Supreme Court has been much criticized. As one commentator has noted, "[t]he formal approach allows local governments to choose the standard by which a local government's land use decisions will be reviewed based on how local ordinances 'label' the decisions. This can give too much deference to adjudicative decisions and

too little to certain legislative decisions. . . . [Planned-unit development] plans can be approved through either a floating zone method or special use permit method, but both methods essentially accomplish the same end result through differing labels. However, when applying the formal approach to these procedures, one is legislative, while the other is adjudicative. Both methods require those interested in developing a [planned-unit development] to petition the planning commission and fulfill certain requirements, including submitting plans that address a number of different factors. Both methods also require that the area previously be zoned for [planned-unit developments] either by creating a floating zone or by allowing a permitted exception. The only difference between the two methods is that under the floating zone method, the legislative body must amend the zoning map, while a board of adjustments simply grants special use permits as an exception to the zoning map." Todd W. Prall, Comment, *Dysfunctional Distinctions in Land Use: The Failure of Legislative/Adjudicative Distinctions in Utah and the Case for a Uniform Standard of Review*, 2004 B.Y.U. L. Rev. 1049, 1084-85 (2004). Any change in the formal approach followed by the Ohio Supreme Court, however, will have to come from that court.

CONCLUSION

{¶35} The Common Pleas Court did not have jurisdiction over this matter under Section 2506.01 of the Ohio Revised Code. Accordingly, its judgment is vacated, and this matter is remanded with instructions that the attempted appeal be dismissed. The neighbors' assignment of error is moot and is overruled on that basis.

Judgment vacated,
and cause remanded.

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 appellees.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

BLAKE R. GERNEY, and CARA L. GALEANO-LEGARRI, attorneys at law, for appellants.

VIRGIL ARRINGTON, JR., director of law, for appellee.

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