

IN THE COURT OF APPEALS OF OHIO
TWELFTH APPELLATE DISTRICT
BUTLER COUNTY

SUSAN K. GROVE, et al., :
 :
Plaintiff-Appellants, : CASE NO. CA2010-04-076
 :
- vs - : OPINION
 : 1/10/2011
 :
OXFORD CITY COUNCIL, :
 :
Defendant-Appellee. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-05-2089

Michele Gressel, 1248 Nilles Road, Suite #7, Fairfield, Ohio 45014, for Plaintiff-Appellants,
Susan K. Grove and Jack F. Grove

Altick & Corwin Co., LPA, Stephen M. McHugh and Robert F. Jacques, 1700 One Dayton
Centre, 1 South Main Street, Dayton, Ohio 45402, for Defendant-Appellee, Oxford City
Council

.....

BROGAN, J.

{¶1} Plaintiffs-appellants, Susan and Jack Grove, appeal the trial court's dismissal of their administrative appeal from plaintiff-appellee, Oxford City Council's, decision granting preliminary approval for a housing subdivision and a planned unit development (PUD) to be constructed on land adjacent to their property.

{¶2} In their sole assignment of error, the Groves contend the trial court erred in dismissing their appeal without first "determining and considering" the entire administrative

record. Although the Groves raise four issues under their assignment of error, we will address the fourth issue first because it is dispositive. Under the fourth issue, the Groves assert that the Oxford City Council's enactment of two ordinances granting preliminary approval for the housing subdivision and PUD was "final" action that supported an administrative appeal under R.C. 2506.01.¹

{¶3} In dismissing the Groves' appeal, the trial court concluded that the Oxford City Council's preliminary approval of the proposed subdivision and PUD was not a final order, adjudication, or decision that could be challenged via an administrative appeal under R.C. 2506.01. In support, the trial court relied on *State ex rel. Harpley Builders, Inc. v. Akron* (1992), 62 Ohio St.3d 533. In that case, the Akron City Planning Commission preliminarily approved an eight-unit housing subdivision subject to certain conditions being fulfilled. *Id.* at 534. The Planning Commission later rescinded its preliminary approval on the basis that the proposed subdivision did not satisfy five subdivision regulations. *Id.* The developer, Harpley Builders, responded by filing an administrative appeal under R.C. Chapter 2506. A referee concluded that the Planning Commission could not rescind its preliminary approval and, in fact, was required to grant final approval once the conditions attached to the preliminary approval were satisfied. *Id.* at 534-535. The referee found that those conditions had been satisfied and recommended remanding to the Planning Commission for a decision on final approval. *Id.* at 535. The trial court agreed, and the court of appeals affirmed with one immaterial modification. *Id.*

{¶4} On further review, the Ohio Supreme Court first concluded that the Planning

1. R.C. 2506.01(A) provides that "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[.]" A ruling is a "final order, adjudication, or decision" within the meaning of R.C. 2506.01(A) if it is "an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided[.]" R.C. 2506.01(C).

Commission did have authority to rescind its preliminary approval. *Id.* at 535-537. In a unanimous ruling, the court reasoned that "a preliminary approval is just that, preliminary. It connotes initial, not final, approval, after which the parties can hammer out all of the relevant details for final action." *Id.* at 537. The *Harpley* court further determined that the Planning Commission's grant of preliminary approval was not a final, appealable order. It reasoned: "Preliminary approval is but one step in the approval process. Once preliminary approval is granted, the developer must fulfill the Planning Commission's conditions, and then submit a final plat for approval. * * * These further steps are persuasive evidence that the decision to grant preliminary approval is not final. Preliminary approval of a real estate project does not determine the final rights and duties of the developer until further action is taken. Therefore, the grant of preliminary approval is not a final appealable order under R.C. 2506.01." *Id.*

{¶15} In our view *Harpley* is controlling, and the trial court properly relied on it to dismiss the Groves' appeal under R.C. 2506.01. The record reflects that the two ordinances at issue granted preliminary approval for a subdivision and a PUD next to the Groves' property. With regard to subdivisions, the Oxford Code provides:

{¶16} "No person being the owner, agent or person having control of any land within the City shall subdivide such land in lots unless by a plat, in accordance with the regulations contained herein. *A preliminary plan shall first be submitted to the Planning Commission for the recommendation and Council for approval or disapproval. If Council approves the preliminary plan, the subdivider may proceed with the preparation of the final plat. The final plat shall also be submitted to the Planning Commission and after review and recommendation; it shall then be submitted to Council for final action.* If either a preliminary plan or final plat is disapproved by the Planning Commission, it may be approved by Council. No plat shall be recorded and no lots shall be sold from such plat unless and until approved as herein provided." Oxford Planning and Zoning Code §1101.03(a) (emphasis added).

{¶7} With regard to PUDs, the Oxford Code provides:

{¶8} "A preliminary plan shall be approved prior to approval of a final plan, although the processes can be concurrent for small, single phase developments. Both preliminary and final plan approval require a Planning Commission recommendation and Council approval.

{¶9} " * * *

{¶10} "The general decision standards for approval of a preliminary and final planned development are substantially similar. *The final plan requires greater detail and is subject to additional decision standards.*" Oxford Planning and Zoning Code §1145.06 (emphasis added).

{¶11} The foregoing provisions make clear that the Oxford City Council's grant of preliminary approval for a subdivision or PUD is "just that, preliminary." *Harpley*, supra, at 537. "It connotes initial, not final, approval[.]" *Id.* As the Oxford City Council points out, the pertinent Oxford Code provisions reveal that obtaining final approval requires the submission of additional information for both subdivisions and PUDs. Oxford Planning and Zoning Code §1101.04(a) and (b); §1145.05(b). The Oxford City Council also correctly notes that no construction can occur, and no permits can be issued, until final approval is obtained. Oxford Planning and Zoning Code §1101.06; §1145.08(b)(1) and (2). Counsel for the Groves conceded this point during oral argument before the trial court. (Doc. #8, oral argument transcript at 24.)

{¶12} In light of the foregoing facts, we agree with the trial court that *Harpley* precludes the Groves from appealing the Oxford City Council's grant of preliminary approval for the proposed subdivision and PUD. Although the Groves cite two cases in which an appeal from a preliminary decision was permitted, we find both cases to be distinguishable. In *Quinn v. Toledo* (Feb. 21, 1986), Lucas App. No. L-85-136, a developer took an R.C.

Chapter 2506 appeal from the Toledo City Planning Commission's *denial* of approval for a preliminary plat. Nothing in the opinion indicates that the developer had any remedy available other than an administrative appeal. Therefore, it appears that the denial of approval in *Quinn* was final action. Likewise, the second case, *Emerald Lakes, Inc. v. South Russell Planning Comm.* (1991), 74 Ohio App.3d 74, involved the *denial* of a developer's application for approval of a preliminary plat. Once again, nothing in that opinion indicates that the developer had any recourse other than an administrative appeal. Cf. *Court Street Dev. v. Stow City Council* (1998), 129 Ohio App.3d 359, 361 (finding that a developer could not appeal the denial of "pre-preliminary approval" under R.C. Chapter 2506 when, after the denial, the developer proceeded to obtain partial approval of a preliminary plan). The present case is distinguishable from the cases cited by the Groves because the Oxford City Council's preliminary approval of a proposed subdivision and PUD plainly was not final action.

{¶13} The Groves nevertheless insist that the Oxford City Council's preliminary approval determined the "duties, privileges, benefits, and legal relationships" in this case. In particular, they assert that the two ordinances at issue approved a street matrix and decided street configuration, size, and layout. They further assert that the ordinances authorize "plan submission for final approval of the layout, which includes lot creation, infrastructure, and the particulars for platting the final subdivision." The Groves also contend the ordinances determine how their property will be impacted. Finally, they assert, in both their initial brief and their reply, that the preliminary approval ignores the developer's noncompliance with certain existing requirements and regulations as well as potential drainage problems.

{¶14} In response to the Groves' concerns, we note again that the Oxford City Council's approval was preliminary. It did not fix any duties, privileges, benefits or establish any legal relationships with finality. As set forth above, additional plans must be submitted

and additional consideration must be given to the project before the developer can do anything. This means the Groves will have another opportunity to air their concerns and point out any problems, irregularities, or illegalities regarding the development project. Consequently, the trial court correctly found no final action and dismissed the Groves' appeal pursuant to *Harpley*, supra.

{¶15} Finally, with regard to the Groves' assertion that an administrative appeal must be decided on a complete record, which they allege did not exist here, we note that the trial court did not hear and decide the merits of the appeal. Instead, it dismissed the appeal for lack of final action by the Oxford City Council. We agree with the Oxford City Council's argument that the trial court was not required to hear or consider any additional evidence to decide whether jurisdiction existed under R.C. Chapter 2506. Regardless of whether the administrative record was complete, the trial court had ample information before it to make a threshold determination that, under *Harpley*, the Oxford City Council's grant of preliminary approval did not authorize an appeal under R.C. 2506.01. The Groves have not identified any missing evidence that would, or even might, alter our resolution of that issue. Nothing other than additional action by the Oxford City Council can transform its *preliminary* approval into *final* approval, which the parties agree is necessary before anything can be done. Accordingly, we overrule the Groves' assignment of error and affirm the judgment of the Butler County Common Pleas Court.

.....

DONOVAN, J., and FAIN, J., concur.

(Donovan, J., Brogan, J., and Fain, J., of the Second District Court of Appeals, sitting by assignment of the Chief Justice of Ohio, pursuant to Section 5(A)(3), Article IV, of the Ohio Constitution.)