

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

Alexis Entertainment, LLC

Court of Appeals No. L-13-1028

Appellant

Trial Court No. CI0201205719

v.

City of Toledo, et al.

DECISION AND JUDGMENT

Appellee

Decided: September 13, 2013

* * * * *

Bradley R. Waugh, for appellant.

Adam W. Loukx, Director of Law, and John T. Madigan,
Senior Attorney, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Alexis Entertainment, LLC, appeals from the February 6, 2013 judgment of the Lucas County Court of Common Pleas dismissing the administrative appeal of appellant from the decision of the Toledo Board of Zoning Appeals. Because we find the trial court properly dismissed the appeal, we affirm.

{¶ 2} Thomas Lemon, Director of the Toledo-Lucas County Plan Commission granted a building permit to Nick Hasan to remodel a unit of a shopping center at 5801 Telegraph Road, Toledo, Ohio. Hasan intended to operate a sexually-oriented business in that unit. From 1997 until 2011, another company had operated a sexually-oriented business in another unit of the shopping center until it was destroyed by fire. Appellant has also been operating a sexually-oriented business since 1997 approximately one mile from the shopping center property at issue.

{¶ 3} After the enactment of a comprehensive zoning code in 2004, the sexually-oriented establishments which were already operating became legal non-conforming uses. Appellant appealed the decision of the director to the Toledo Board of Zoning Appeals asserting that Hasan's proposed sexually-oriented business establishment should not have been deemed a prior non-conforming use under Toledo Municipal Code 1114.0201. The Toledo Board of Zoning Appeals determined that appellant had standing to file the appeal but affirmed the decision of the director.

{¶ 4} Appellant filed a timely notice of appeal from that decision to the Lucas County Court of Common Pleas. The trial court dismissed the appeal on the ground that appellant lacked standing to appeal the decision of the board.

{¶ 5} On appeal to this court, appellant asserts the following single assignment of error:

THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO,
ERRED AS A MATTER OF LAW IN DETERMINING THAT

APPELLANT, ALEXIS ENTERTAINMENT, LLC, HAD NO
STANDING TO APPEAL THE ADMINISTRATIVE DECISION OF THE
CITY OF TOLEDO, BOARD OF ZONING APPEALS.

{¶ 6} Appellant argues first that the issue of its standing was already raised by the city of Toledo at the board hearing. Because the board concluded that appellant had standing, appellant argues the trial court cannot reach a different conclusion. We disagree. The issue of standing raised by appellee relates to appellant’s standing to seek an appeal to the court of common pleas, not appellant’s standing to appeal the decision of the director to the board.

{¶ 7} Normally, “standing” is “the capacity of a party to bring an action, not the subject matter jurisdiction of the court.” *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 701 N.E.2d 1002 (1998). However, standing is a jurisdictional issue in administrative appeals where the “parties must meet strict standing requirements in order to satisfy the threshold requirement for the administrative tribunal to obtain jurisdiction.” *Id.* at fn. 4. *Accord Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177, 743 N.E.2d 894 (2001) (the right to appeal an administrative decision must be conferred by statute). Furthermore, standing is a question of law. *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 20. Therefore, the appellate court reviews the issue under a de novo standard of review. *Id.*

{¶ 8} Second, appellant argues that it has standing because it sought the appeal to the board and was not just an interested party. Third, appellant argues it was a party

“directly affected” by the decision and satisfies the standing requirements. These two issues will be addressed simultaneously.

{¶ 9} The party seeking to appeal has the burden of establishing its standing from the record. *Kraus v. Put-In-Bay Twp. Bd. of Zoning & Appeals*, 6th Dist. Ottawa No. OT-04-011, 2004-Ohio-4678, ¶ 12.

{¶ 10} While R.C. Chapter 2506 provides generally for judicial review of administrative rulings by political subdivisions, it does not define who has standing to bring such appeals. Prior to the enactment of R.C. 2506 in 1957, an appeal from the zoning board could be made to the county court of common pleas pursuant to R.C. 519.15¹ if the person seeking an appeal was “adversely affected” and the decision was unreasonable or unlawful. *Roper v. Bd. of Zoning Appeals*, 173 Ohio St. 168, 171-172, 180 N.E.2d 591 (1962). Although the General Assembly eliminated the “adversely affected” language in R.C. 519.15, the *Roper* court reasoned that it was a fundamental principal of common law that parties adversely affected by a judgment which resolves litigation may seek an appeal. Furthermore, the *Roper* court found it was clear from the language of R.C. 2506.01(A) (“every final order * * * of any * * * division of any political subdivision of the state may be reviewed by the court of common pleas * * *”) the General Assembly intended to continue the right of appellate review of every final decision of the board. *Id.* at 173. Since *Roper* was adversely affected by the decision, he

¹ R.C. 519.15 still provides that “any person aggrieved or by any officer of the township affected by any decision of the administrative officer” may take an appeal to the board of zoning appeals.

fell within the unspecified class of person who could appeal under R.C. Chapter 2506. *Id.* at 174. *Accord Willoughby Hills v. C. C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26-27, 591 N.E.2d 1203 (1992) (the determination of whether a private landowner has standing to appeal the decision of the zoning board depends upon whether the private landowner was directly affected by the decision of the board). *Compare Board of Trustees v. Petitioners for Incorporation of the Village of Holiday City*, 70 Ohio St.3d 365, 371, 639 N.E.2d 42 (1994) (“the party appealing must have a ‘present’ and ‘substantial’ interest in the subject matter of the litigation and must be ‘aggrieved or prejudiced’ by the decision”).

{¶ 11} A person has been directly affected by a decision of the board and asserted those rights if he: (1) was a resident, elector, and property owner of the township whose legal rights and privileges were uniquely affected by the decision of the board, (2) appeared before a township board to protest the board’s action, and (3) stated his intention on the record to appeal the board’s decision to the common pleas court. *Schomaeker v. First Natl. Bank of Ottawa*, 66 Ohio St. 2d 304, 312, 421 N.E.2d 530 (1981); *Willoughby* at 27; and *Roper* at 173-174.

{¶ 12} The trial court reasoned that appellant was not directly affected by the board’s decision because it only asserted the potential loss of profit as a basis for challenging the board’s decision. We agree. Competition and a loss of profit share are business interests, not legal rights and privileges affected by the board’s decision, and therefore do not provide a basis for standing to appeal an administrative decision.

Westgate Shopping Village v. Toledo, 93 Ohio App.3d 507, 514, 639 N.E.2d 126 (6th Dist.1994). *Accord Aarti Hospitality, LLC v. City of Grove City, Ohio*, 486 F.Supp.2d 696, 702 (S.D. Ohio 2007).

{¶ 13} On appeal, appellant also asserts standing on the basis that it filed an appeal opposing the decision of the director. Filing an appeal establishes only the fact that appellant attempted to assert its rights. Appellant must also identify some legal right or privilege that was affected by the board's decision to have standing to seek an appeal from the decision and appellant did not do so in this case. Therefore, we find appellant's sole assignment of error not well-taken.

{¶ 14} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

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.

Alexis Entertainment, LLC
v. Toledo
C.A. No. L-13-1028

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

James D. Jensen, 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>.