

Athens City Planning Commission
Minutes of Regular Meeting
Thursday, June 7, 2018, 12:00 p.m.

The regular meeting of the Athens City Planning Commission was held in City Council Chambers, third floor, at City Hall on June 7, 2018.

Attendees: None

1. Call to Order

RJ Sumney called the regular meeting of the Planning Commission to order at 12:03 p.m. There was no one in the audience to administer the oath to. Quorum was established.

PLANNING COMMISSION MEMBERS:

RJ Sumney, Chair	Present
Christy Zempter	Absent
Nancy Bain, Vice Chair.....	Present
Steve Patterson, Mayor	Present
Andy Stone, Service-Safety Director.....	Present

STAFF:

Paul Logue, City Planner	Absent
Rick Sirois, Code Enforcement Director.....	Present

2. Disposition of Minutes

Steve Patterson moved to accept the May 17, 2018 minutes. RJ Sumney seconded. All present voted aye. Motion passed 4:0.

3. Cases

Case #18-01 Request for Site Plan Change
Title 41
175 Columbus Road
TAT Realty

Rick Sirois/Summary

This case was originally approved in January of 2018. They are requesting a change in the number of tenants; from 3 to 6. This is a simple change, they partitioned the design to add the 3 tenants.

Discussion

Andy Stone: The capacity fees for utilities will increase because of this change, based on facility use. EPW will re-calculate the fees and forward on to them in advance to them getting the water and sewer taps.

Rick Sirois: The permit will be issued after they pay the capacity fees.

Andy Stone moved to approve Case #18-01/Site Plan Change. RJ Sumney seconded. All present voted aye. Motion passed 4:0.

4. **Communications**

Herrold Avenue Lot Split/Law Director Decision

Rick Sirois/Summary

This was a communication at the last meeting. The Law Director was requested to provide an interpretation of whether the application should be for a minor or for a major sub-division. The Law Director provided her opinion (included here for reference) and concluded that this should be considered a major subdivision. This decision has been communicated to the applicant.

Discussion

Rick Sirois: The applicant has indicated that they will re-submit as a major sub-division, however, they have not replied to his inquiry to pull the minor sub-division application.

Andy Stone: This is a unique situation as it is an in-town lot. The city will have to give careful consideration about what requirements are to be levied if this proceeds.

RJ Sumney: Would the city be more likely to participate in some of the infrastructure requirements?

Andy Stone: He would think so, to protect the city's interest going forward so that the city is not left to solve the problem when ownership changes hands.

Nancy Bain: Puzzled by the potential use of those lots. The far end lot could possibly be residential; do we want to install a storm sewer to capture the items currently going into the pond? There are nice condos down the road and we can't control any future architecture, but we can control the pond.

Andy Stone: It was originally a railroad ditch that turned into a retention pond. The 2013 design eliminates the pond and installs the storm sewer, which would require participation of several owners in order to occur (at least four, including the Fairgrounds). The 2013 design includes several catch basins and storm water pollution prevention features. He will share the design with the Planning Commission when the time comes.

RJ Sumney: Who would communicate with the property owners from the city?

Rick Sirois: Code would communicate the information. Each owner would have to accept the easement.

5. **Report from City Planner and Director of Code Enforcement**

Paul Logue

RJ Sumney read Paul Logue's written report:

- Comprehensive Plan Neighborhood Planning Meetings: There are a series of June neighborhood planning meetings scheduled this summer to gather input on neighborhood issues:
 - 6/7 Far East Side at the Community Center, 11-1 Room B & 6-8 Room C

- 6/12 Near East Side at the Public Library, 11-1 & 5-7
- 6/14 North Side at the Highland Park Pavilion, 11-1 & 5-7
- 6/26 West Side at Arts West, 11-1 & 4:30-6:30
- 6/28 South Side at the OU Inn's West Wilson Room, 11-1 & 5-7

The current comprehensive plan was adopted in February of 2007. This update will establish a community vision, perform a community inventory, and identify goals and recommendations to address neighborhoods, corridors, and general community initiatives to enhance the city.

Rick Sirois

- Wanted to clarify the above communication and state that the Law Director's opinion is titled 18-01 and will be available as an attachment to the minutes.
- Reminder that the grass is growing rapidly and as residents mow, they should not blow grass into gutters.

6. Opportunity for Citizens to Speak

None

7. Announcements & Other Business

- The next meeting will be June 21, 2018.
- Andy Stone: Preliminary engineering on the Stimson Avenue Corridor project is underway. The design may include recommendations in zoning changes or zoning overlays. These would be processed via the Planning Commission and will come sometime in the late summer or fall.

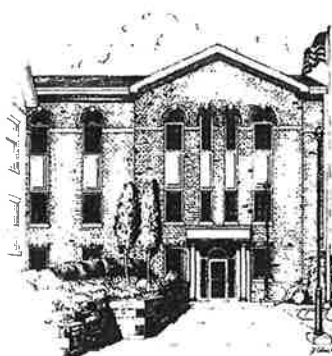
8. Adjournment

The meeting was adjourned at 12:18 p.m.

RJ Sumney, Planning Commission

Patricia Witmer, City of Athens

Office of the Law Director
and City Prosecutors
Law Administration Bldg.
8 E. Washington St., Suite 301
Athens, Ohio 45701 
Phone (740) 592-3332
Fax (740) 592-3350



City of Athens

LISA A. ELIASON
CITY LAW DIRECTOR

Tracy W. Meek, Chief City Prosecutor
Matthew M. Ward, City Prosecutor
Jessica L. Branner, City Prosecutor

OPINION 18-01

To: Athens City Planning Commission

From: Lisa A. Eliason, Athens City Law Director 

Date: May 31, 2018

Re: Minor Subdivision Application for 20 Herrold Avenue

Background

On May 17, 2018, the Athens City Planning Commission met to review the Application for Minor Subdivision (Lotsplit/Land Transfer), for 20 Herrold Avenue (the "Property"), owned by Hoon Inc., Parcel Number A028010002001. Exhibit A. The Chair of the Planning Commission informally requested review by the Athens City Law Department as to whether the lot split created a major or minor subdivision. The application requests that the parcel be divided into three tracts.

The 2015 deed to the Property, Book 505, Page 887, Athens County Official Records (OR), states:

"SUBJECT to a 30 foot ingress and egress Easement in perpetuity, running with the land over and across the above describe lands with the center of said Easement more fully described in Volume 291, Page 1179 and Volume 377, Page 512, Athens County Official Records.

ALSO SUBJECT to the right to drain storm water from a 2.7732 acre tract owned by Floyd Bolin V.F.W. Post No. 3477, onto and upon said premises as required

by the City of Athens Land Development Ordinance Building Permit previously issued to the Floyd Bolin V.F.W. Post No. 3477. APN: A02-801000020-01.”

The referenced Floyd Bolin V.F.W. Post No. 377 (VFW) 2.7732 acre tract is now owned by Sheltering Arms Hospital Foundation (OR 302, page 1654). The date of transfer was September 28, 2000.

The Property is bordered on the west by Jefferson Avenue and on the east by a tract of land owned by Larry Young (OR 377, Page 514) deeded to Young in 2004 from Athens Midtown Storage, LTD. There is a recorded “Shared Driveway Agreement,” recorded in OR 377, page 512, for the driveway that runs along the north side of the Property and leads back to the Larry Young and Get Group, LLC tracts. Sheltering Arms Hospital Foundation, to the north, is also referenced in the “Shared Driveway Agreement.” There is a 25 foot wide utility easement that runs along the back south side of the Property. There is a 30 foot easement for ingress and egress to the shared driveway.

Athens City Code

Athens City Code (ACC) Section 21.01.01, Purpose, Subdivision Regulations for the City of Athens, states:

“These regulations are adopted as minimum requirements for the regulations and control of land subdivision within the City of Athens and the three mile contiguous zone.

- (A) Establish standards for logical, sound and economical development.
- (B) To provide for adequate light, air and privacy, to secure safety from fire, flood, and other danger, to prevent population congestion and overcrowding of the land, to provide orderly expansion and extension of community services and facilities at minimum cost and maximum convenience.’

ACC Section 21.03.07, Outline of conditions for major subdivision, provides:

“A proposal involving any of the following shall be subject to major subdivision procedures:

- (A) More than five lots, any one of which is less than five acres including the original tract.
- (B) Creation, widening or extension of a street or access easement.
- (C) Division or allocation of land as a utility or drainage easement.”

Analysis

ACC 21.03.07(C), Utility or drainage easement.

ACC 21.01.01 states that the subdivision regulations are adopted as minimum requirements for the logical, sound and economical development of land and to secure safety from, among other things, flood.

At the May 17, 2018 City Planning Commission meeting, Code Director Rick Sirois explained that the drainage pond on the east end of the property must remain on the land. Service Safety Director (SSD) Andy Stone stated that the City of Athens purchased the materials for the storm sewer and Hoon installed the pipe for the 25 foot easement. SSD Stone does not believe the pipe is inside the 25 foot easement. There was concern expressed at the meeting that flooding would again occur, as it has in the past, if the area does not properly drain.

Code Director Sirois' concern is that the City has no written document to address what will happen once the properties are sold and the storm water pond is filled and who will have authority over the utility easement.

The Property deed does reference the right to drain water from the VFW (now Sheltering Arms) tract. However, the Property deed does not reference the right to drain water from the Larry Young tract or the University Commons (Student Real Estate, Inc.) tract.

The Eleventh District Court of Appeals found *In re State ex rel. Fabry* (Jan. 17, 1997), Portage County App. No. 95-P-0127, 1997 Ohio App. LEXIS 161, that the Ohio Revised Code allows a homeowner an abbreviated method of securing a subdivision when the proposed subdivision is small and uncomplicated. Exhibit B.

The subdivision of the Property, although small, is not uncomplicated. The Property deed fails to address the drainage rights of Larry Young and University Commons. The Property deed does not specifically reference the 25 foot wide utility easement that runs along the back south side of the property and the use of that easement. The further complication is that the pipe may not be inside the easement.

The complications of this subdivision include the drainage rights and the utility easement that are both critical to the issue of flooding. Flooding is a consideration found in the purpose of the ACC subdivision regulations. Therefore, ACC 21.03.07(C) is applicable. The Property is subject to the major subdivision regulations of the City of Athens.

ACC 21.03.07(B) Creation, widening or extension of a street or access easement.

At the May 17, 2018 City Planning Commission meeting, SSD Stone expressed concern that with the lot split, six tracts will use a shared driveway. The Property is zoned manufacturing. The only entrance to the shared driveway is through a 30 foot wide access easement across the Property. On page four (4) of 1964 OAG 1044, the Ohio Attorney General explained that "platting is not for the purpose of controlling the size of lots, but for the purpose of insuring that there is coordination between existing streets and roads and those to be created, and of providing for

orderly traffic and utility circulation.” Exhibit C. The City of Athens has an interest in providing for orderly traffic. The fact that six properties in a manufacturing zone will use a shared driveway, by which access is gained through a 30 foot wide right of ingress and egress over the Property, creates a situation that requires coordination for the orderly flow of traffic. The Property is subject to the major subdivision regulations of the City of Athens.

ACC 21.03.07(A), Number of Lots.

In 1964 OAG 1044, the Ohio Attorney General explained that further division of an original tract, which has previously been divided into five lots, requires replatting of the original tract. On page four (4) of the opinion, the Ohio Attorney General explained that “original tract refers to land originally owned by the proprietor or subdivider and not that owned when local subdivision regulations became effective.”

The Property is a residual parcel from the original 3.6121 acre tract deeded to Athens Midtown Storage in 1999 from the VFW. In 2005, Athens Midtown Storage deeded 0.3138 acres to Larry Young (OR 377, page 514) and in 2007 deeded 1.0219 acres to The GET Group, LLC (OR 413, page 2083) from the original 3.6121 tract. The Property contains 2.274 acres from the original 3.6121 acre tract.

From the original 3.6121 acre tract there have been two splits and with the three proposed additional splits, the total will be five. Therefore, ACC 21.03.07(A) is not applicable because the minor subdivision application does not propose the property be divided into more than five (5) lots.

Respectfully submitted,



Lisa A. Eliason, Athens City Law Director

Exhibit A

APPLICATION for MINOR SUBDIVISION



(Lotsplit/Land Transfer)
CITY OF ATHENS, OHIO
ATHENS CITY CODE TITLE 21

Applications must contain all of the following information.

An incomplete application will not be processed.

(For Office Use Only)

Permit # LS18-000012

Date Rec'd 5/4/2018

Applicant CASSANDRA A. BOWEN Phone # to call when processed 740 592 2687
Address 20 HERROLD AVE ATHENS OHIO 45701
Property Owner HDON, INC. Phone 740 592 2687
(if other than applicant) Address 20 HERROLD AVE ATHENS OHIO 45701
Surveyor Name and State Registration Number DANA A. EXLINE RS 7060

Address of Property: 20 HERROLD AVE PARCEL # A0280/0002001
Date property owner originally purchased the property: FEBRUARY 2, 2015 DEED # OR 505/886
Acreage of original purchase: 2.274 AC
Number and size of parcels subdivided since original purchase: 0 BY CURRENT OWNER

Acreage of proposed parcel(s) with new plat of survey attached: TRACT 1 - 1.005 AC TRACT 2 - 0.432 AC TRACT 3 - 0.839 AC
Public road frontage of proposed parcel(s) 0 residual TRACT 3 APPROX. 146.31 FT ON
(SEE EXISTING SHARED USE & MAINTENANCE AGREEMENT HERROLD AVE & JEFFERSON AVE.)
Date of survey of plat of proposed parcel(s): APRIL 23, 2018

Approval date of health authority of jurisdiction for sewage disposal: EXISTING UTILITY EASEMENT TO CITY SEWER
Approval date of County Engineer for mathematical accuracy of survey: RECORDED AS OR 377/514
APRIL 24 2018

Location:
Lot 64 Section 16 Town _____ Range _____ Township ATHENS

(For Office Use Only)

Do the proposed parcel(s) and residual satisfy minimum requirements for:

	Yes	No	N/A
Public Road Frontage	☐	☐	☐
Width to Depth Ratio	☐	☐	☐
Number of Splits Permitted as Minor Subdivision	☐	☐	☐
Engineer's Approval	☐	☐	☐
Health Department Approval	☐	☐	☐
Registered Surveyor	☐	☐	☐

Zoning Administrator recommendation:

Approval ☐ Refusal ☐

Richard P. Sirois Date:
Zoning Administrator

Approval ☐ Refusal ☐

Paula Horan-Moseley Date:
Service-Safety Director

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Document Research 1997 Ohio App. LEXIS 161 Actions

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A In re State ex rel. Fabry, 1997 Ohio App. LEXIS 161

Copy Citation

Court of Appeals of Ohio, Eleventh Appellate District, Portage County

January 17, 1997. Decided

CASE NO. 95-P-0127

Reporter

1997 Ohio App. LEXIS 161 * | 1997 WL 51433

IN THE MATTER OF: STATE ex rel. JOSEPH A. FABRY & DEBRA S. FABRY.

Prior History: [*1] CHARACTER OF PROCEEDINGS: Administrative Appeal from Common Pleas Court. Case No. 94 CV 0903.

Disposition: JUDGMENT: Affirmed.

Core Terms

plat, proposed subdivision, appellants', regulations, street, opening, exempt, parcel, requirements, public street, subdivisions, trial court, subdivided, set forth, widening, planning commission, proposed division, appellee's, zoning, days, summary judgment, private road, constructed, Regional, front

Case Summary

Procedural Posture

Appellant landowners challenged the judgment of the trial court (Ohio), which granted summary judgment in favor of appellee planning county commission with respect to the landowners' claims, a statutory appeal, a declaratory judgment action, and a petition for writ of mandamus, in which the landowners asserted that the commission improperly denied their request to subdivide their property.

Overview

The landowners had a parcel of land with a 60-foot wide right-of-way to provide access to the parcel from the street. The landowners made application for approval of a proposed subdivision of the lot into four parcels. The application was made as a minor subdivision, which did not require a plat pursuant to [Ohio Rev. Code Ann. 711.131](#). The comprehensive planner denied the application because it did not qualify as a minor subdivision. On review, the trial court agreed. The court affirmed the judgment and held that [§ 711.131](#) was restricted to proposed subdivisions where new roads, public or private, were not required. The landowners' application did not meet that requirement. The proposed subdivision's only access to the public road was through the right-of-way, which was nothing more than a dirt driveway. [Section 711.131](#) allowed a landowner an abbreviated method of securing a subdivision when the proposed subdivision was small and uncomplicated. The construction of any road, public or private, was a major undertaking, especially when private roads had to have been constructed or maintained to county road specifications and standards as was required in the county.

Outcome

The court affirmed the trial court's grant of summary judgment with respect to the landowner's appeal of the commission's denial of their proposed subdivision.

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HN1 Real Property Law, Zoning

There are two sections of the Ohio Revised Code that specifically govern the approval of subdivisions. [Ohio Rev. Code Ann. § 711.10](#) is

Document: In re State ex rel. Fabry, 1997 Ohio App. LEXIS 161 Actions
 concerned with larger or major subdivisions and it requires a plat to be filed with the regional planning commission for its approval. [Ohio Rev. Code Ann. § 711.131](#) governs minor subdivisions which may be approved without a plat. [More like this Headnote](#)

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HN2 Zoning, Ordinances

[Ohio Rev. Code Ann. § 711.131](#) provides, in its entirety: Notwithstanding the provisions of [Ohio Rev. Code Ann. §§ 711.001 - 711.13](#), inclusive, a proposed division of a parcel of land along an existing public street, not involving the opening, widening or extension of any street or road, and involving no more than five lots after the original tract has been completely subdivided, may be submitted to the authority having approving jurisdiction of plats under the provisions of [Ohio Rev. Code Ann. § 711.05](#), [711.09](#), or [711.10](#) for approval without plat. If such authority acting through a properly designated representative thereof is satisfied that such proposed division is not contrary to applicable platting, subdividing, or zoning regulations it shall within seven working days after submission approve such proposed division and, on presentation of a conveyance of said parcel, shall stamp the same "approved by planning authority; no plat required" and have it signed by its clerk, secretary, or other official as may be designated by it. Such planning authority may require the submission of a sketch and such other information as is pertinent to its determination hereunder. [More like this Headnote](#)

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HN3 Real Property Law, Zoning

There are three requirements that must be met for a subdivision to be approved without a plat: 1) it must be along an existing public street, 2) it must not involve the opening, widening or extension of any street or road, and 3) it must involve no more than five lots after the original tract has been completely subdivided. [More like this Headnote](#)

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 Transportation Law > [Bridges & Roads](#) > [Easements](#) >
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HN4 Real Property Law, Subdivisions

Portage County, Ohio, Subdivision Regulations, § 411 provides, in part: There shall be no private streets, lanes, or ways, nor any private easements used for the purpose of access to any subdivision including subdivisions exempt from platting under [Ohio Rev. Code Ann. § 711.131](#) and Portage County, Ohio, Subdivision Regulations, § 330, unless constructed and maintained to county road specifications and standards as set forth in these regulations. [More like this Headnote](#)

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 Transportation Law > [Bridges & Roads](#) > [Private Roads](#) >
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HN5 Public Improvements, Bridges & Roads

The construction of any road, public or private, is a major undertaking, especially when private roads have to be constructed or maintained to county road specifications and standards. [More like this Headnote](#)

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HN6 Zoning, Comprehensive Plans

Although they are sometimes used interchangeably the terms, "zoning" and "planning," are not synonymous. Zoning is concerned chiefly with the use and regulation of buildings and structures, whereas planning is of broader scope and significance and embraces the systematic and orderly development of a community with particular regard for streets, parks, industrial and commercial undertakings, civic beauty and other kindred matters properly included within the police power. [More like this Headnote](#)

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 Transportation Law > [Bridges & Roads](#) > [General Overview](#) >

HN7 Zoning, Comprehensive Plans

[Ohio Rev. Code Ann. § 711.131](#), which allows for subdivisions without plats, is restricted to proposed subdivisions where new roads, public or private, do not have to be constructed. [More like this Headnote](#)

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HN8 Zoning, Comprehensive Plans

[Ohio Rev. Code Ann. § 711.131](#) provides, in part: If such authority acting through a properly designated representative thereof is satisfied



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 that such proposed division is not contrary to applicable platting, subdividing, or zoning regulations it shall within seven working days after submission approve such proposed division. [More like this Headnote](#)

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Civil Procedure > Appeals > [Reviewability of Lower Court Decisions](#) > [Preservation for Review](#)

HN9 [Reviewability of Lower Court Decisions, Preservation for Review](#)

An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. [More like this Headnote](#)

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HN10 [Zoning, Comprehensive Plans](#)

[Ohio Rev. Code Ann. § 711.131](#) allows for approval by a single representative of the planning commission. Thus, by implication, denial of a proposed subdivision will also be made by the commission's representative. Submissions made pursuant to [§ 711.131](#) are done so without a plat. [More like this Headnote](#)

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Civil Procedure > ... > [Defenses, Demurrers & Objections](#) > [Affirmative Defenses](#) > [General Overview](#)

Governments > [Local Governments](#) > [Claims By & Against](#)

HN11 [Defenses, Demurrers & Objections, Affirmative Defenses](#)

In Ohio equitable estoppel does not apply against a state or its agencies in the exercise of a governmental function. [More like this Headnote](#)

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HN12 [Zoning, Comprehensive Plans](#)

The enforcement of platting and subdivision regulations is clearly a governmental function. [More like this Headnote](#)

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Counsel: ATTY. [L. JAMES MARTIN](#) ▼, Kent, OH, (For Appellants Joseph A. Fabry and Debra S. Fabry).

[VICTOR V. VIGLIUCCI](#) ▼, PORTAGE COUNTY PROSECUTOR, [PAUL A. RUSSELL](#) ▼, ASSISTANT COUNTY PROSECUTOR, Ravenna, OH, (For Appellee Portage County Regional Planning Commission).

Judges: HON. [DONALD R. FORD](#) ▼, P.J., HON. JUDITH A. CHRISTLEY, J., HON. [JOSEPH E. MAHONEY](#) ▼. FORD, P.J., concur, [CHRISTLEY](#) ▼, J., dissents with Dissenting Opinion.

Opinion by: [JOSEPH E. MAHONEY](#) ▼

Opinion

OPINION

[MAHONEY](#) ▼, J.

This appeal arises from an unsuccessful attempt by appellants, Joseph and Debra Fabry, to subdivide their property located in Shalersville Township, Portage County, Ohio. The property in question covers approximately thirteen acres and is located to the rear of the Ramsey Estate lots. At the time of the Ramsey Estates platting in 1979, a sixty foot wide right of way was reserved to provide access to the thirteen acre parcel from Streeter Road. Thus, appellants property is shaped like [*2] a rectangular sign on a post.

Appellant sought to subdivide the rectangular portion of the property into four triangular parcels of land, each less than four acres. Each parcel would have frontage on a cul de sac, and a private road would connect the cul de sac to the public road, Streeter Road, through the sixty foot wide post portion of the property.

On October 5, 1994, appellants made application for approval of the proposed subdivision to appellee, Portage County Regional Planning Commission. Specifically, appellants made application as a minor subdivision which does not require a plat pursuant to [R.C. 711.131](#). Appellants submitted a drawing of the proposed subdivision in addition to their application. On October 14, 1994, Jim Tresler, who is employed by appellee with the title "comprehensive planner," notified appellants by letter that their proposed lot split was denied. Appellants were informed that the subdivision was denied because it did not qualify as a minor subdivision.

In response, on December 8, 1994, appellants filed a document in the Portage County Common Pleas Court captioned as follows:

"STATUTORY APPEAL [SECTION 711.10 R.C.](#) DECLARATORY JUDGMENT ACTION PETITION [*3] FOR WRIT OF MANDAMUS"



Document: In re State ex rel. Fabry, 1997 Ohio App. LEXIS 161
 Subsequently, both appellants and appellee filed motions for summary judgment. On September 20, 1995, the trial court denied appellants' motion for summary judgment and granted appellee's motion for summary judgment. The trial court specifically granted summary judgment in favor of appellee as to all of appellants' claims; the statutory appeal, the declaratory judgment action and the petition for writ of mandamus.

Appellants timely filed a notice of appeal with the following assignments of error:

"1. The court erred in finding the proposal submitted by the Fabrys did not qualify for exemption from platting, as 1) the proposed subdivision did not involve the opening, widening, or extension of any road, and/or 2) the preexisting access reserved of record in the Ramsey Estates plat allowed the application to be exempt from platting.

"2. The court erred in determining the Fabry application was properly denied, as 1) the record contains no evidence of a proper designation of Mr. Tresler, 2) the regulations of the county require commission action, and 3) any denial of subdivision requiring plat approval must provide for a) the rejection to be set forth in [*4] the minutes of the commission and, b) rejection upon the face of the rejected plat with citations of any noncompliant matters."

In the first assignment of error, appellants contend that the trial court erred in finding that their subdivision proposal did not qualify for exemption from platting.

HN1 There are two sections of the Ohio Revised Code that specifically govern the approval of subdivisions. R.C. 711.10 is concerned with larger or major subdivisions and it requires a plat to be filed with the regional planning commission for its approval. R.C. 711.131 governs minor subdivisions which may be approved without a plat. **HN2** It provides, in its entirety:

"Notwithstanding the provisions of sections 711.001 to 711.13, inclusive, of the Revised Code, a proposed division of a parcel of land along an existing public street, not involving the opening, widening or extension of any street or road, and involving no more than five lots after the original tract has been completely subdivided, may be submitted to the authority having approving jurisdiction of plats under the provisions of section 711.05, 711.09 or 711.10 of the Revised Code for approval without plat. If such authority acting [*5] through a properly designated representative thereof is satisfied that such proposed division is not contrary to applicable platting, subdividing, or zoning regulations it shall within seven working days after submission approve such proposed division and, on presentation of a conveyance of said parcel, shall stamp the same 'approved by (planning authority); no plat required' and have it signed by its clerk, secretary, or other official as may be designated by it. Such planning authority may require the submission of a sketch and such other information as is pertinent to its determination hereunder."

Thus, **HN3** there are three requirements that must be met for a subdivision to be approved without a plat: 1) it must be along an existing public street, 2) it must not involve the opening, widening or extension of any street or road, and 3) it must involve no more than five lots after the original tract has been completely subdivided.

It is appellants' contention that their proposed subdivision satisfied the three requirements set forth in R.C. 711.131 and, therefore, was properly submitted without a plat. It is undisputed that appellants' proposed subdivision met the third requirement [*6] set forth in R.C. 711.131. In that there would be no more than five lots after the original tract was subdivided, There are legitimate concerns, however, whether or not the first two requirements were met.

The first requirement is that the proposed subdivision must be along an existing public street. In the case *sub judice*, the parcel of land, before division, had sixty feet of frontage on Streeter Road, a public street. Appellants assert, therefore, that the proposed subdivision was along an existing public street. They argue that it is the parcel of land sought to be subdivided that must have frontage on a public street rather than the individual lots following subdivision. Appellee takes the opposite viewpoint claiming that following subdivision, all of the lots must front on a public street.

We find appellants' argument more compelling. If appellee's interpretation of this requirement were correct, then there could never be a subdivision exempt from platting having interior lots fronting on a private street. Yet, **HN4** section 411 of the Portage County Subdivision Regulations provides, in relevant part:

"There shall be no private streets, lanes, or ways, nor any private easements [*7] used for the purpose of access to any subdivision including subdivisions exempt from platting under R.C. 711.131 and Section 330 of these regulations, unless constructed and maintained to County road specifications and standards as set forth in these regulations."

Thus, it is apparent that access to a subdivision, including a subdivision that is exempt from platting, may be through a private street or private easement as long as the street or easement is constructed and maintained to county road specifications and standards. Accordingly, appellants' interpretation of the first requirement is more consistent with the local regulations.

Additionally, the Sixth District Court of Appeals was recently confronted with this precise issue and reached the same conclusion. In Robison v. Fulton Cty. Regional Planning Comm. (June 30, 1995), 1995 Ohio App. LEXIS 2722, Fulton App. No. F-94-030, unreported, the court stated:

"We additionally note that the common pleas court interpreted the phrase 'a proposed division of a parcel of land along an existing public street' to require that each split off the original parcel be located along an existing public street. We conclude that this interpretation is in [*8] error. In our view, the phrase requires the original parcel which is the subject of the proposed subdivision to be located 'along an existing public street.' To interpret this language otherwise would effectively end any division of parcels which would meet the requirements of R.C. 711.131 by providing access to each division by a common drive. Such divisions may, in fact, meet approval by some planning commissions or zoning boards. See *Wise v. Satrom* (Oct. 11, 1977), Portage App.No. 722, unreported."

Based upon the foregoing analysis, appellants' proposed subdivision also met the first requirement of being submitted without a plat pursuant to R.C. 711.131.

The final requirement is that the proposed subdivision not involve the opening, widening or extension of any street or road. In the present case, it is clear that the proposed subdivision's only access to the public road was through the sixty foot wide "post" portion of the property which was nothing more than a dirt driveway at the time appellants submitted their application.

It is appellants' contention that their proposed subdivision did not involve the opening of a road because the construction of a private road does [*9] not result in the "opening" of a road. Instead, appellants argue that "opening" means open to the public that which was previously limited to private use.



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In the context of R.C. 711.131, we disagree with appellants' analysis. It is clear from the statutory scheme that R.C. 711.131 is a special provision that allows a landowner an abbreviated method of securing a subdivision when the proposed subdivision is small and uncomplicated. **HNS** The construction of any road, public or private, is a major undertaking, especially when private roads have to be constructed or maintained to county road specifications and standards as required in Portage County.

The Ohio Attorney General has pointed out that the purpose of platting under R.C. Chapter 711 is to provide for the coordination of new streets in a new subdivision with already existing streets. 1964 Ohio Atty.Gen.Ops. No. 1044; 1971 Ohio Atty.Gen.Ops. No. 71-083. In State ex rel. Kearns v. Ohio Power Co. (1955), 163 Ohio St. 451, 127 N.E.2d 394, the Supreme Court of Ohio addressed the difference between planning and zoning. The court stated:

HNS "Although they are sometimes used interchangeably the terms, 'zoning' and 'planning,' are not [*10] synonymous. Zoning is concerned chiefly with the use and regulation of buildings and structures, whereas planning is of broader scope and significance and embraces the systematic and orderly development of a community with particular regard for streets, parks, industrial and commercial undertakings, civic beauty and other kindred matters properly included within the police power." Id. at 460. (Citations omitted.)

Hence, it follows that **HNS** R.C. 711.131 which allows for subdivisions without plats, is restricted to proposed subdivisions where new roads, public or private, do not have to be constructed.

Accordingly, appellants' proposed subdivision failed to meet this last restriction because it would involve the opening of a road, i.e., the construction of a road where none exists whether it be public or private. Thus, the trial court did not err in finding that appellants' proposed subdivision did not qualify as a minor subdivision pursuant to R.C. 711.131.

Appellants also argue that the access road, if opened at all, was opened in 1979 when the Ramsey Estates subdivision was created, which was three years before the county's subdivision regulations took effect. This argument [*11] is not well taken, however, as there was no road on the "post" portion of the property so there obviously was no opening, widening or extension of a street at that time.

Appellants' first assignment of error is without merit.

In the second assignment of error, appellants assert that the trial court erred in determining that their application was properly denied. Specifically, appellants submit that the record contains no evidence of a proper designation for Jim Tresler, the person who informed them of appellee's denial of their application. Also, appellants claim that the county regulations require a denial to be made by the entire commission rather than by one person. Additionally, appellants maintain that any denial of a subdivision requiring plat approval must provide for the rejection to be included in the minutes of the commission, and that the rejection be noted on the face of the plat with citations for any and all noncompliant matters.

With regard to the proper designation of Jim Tresler, **HNS** R.C. 711.131 provides, in relevant part:

"If such authority acting through a properly designated representative thereof is satisfied that such proposed division is not contrary [*12] to applicable platting, subdividing, or zoning regulations it shall within seven working days after submission approve such proposed division ***." (Emphasis added.)

In the present case, appellants received a rejection letter signed by Jim Tresler who was identified as a "comprehensive planner" for appellee. Appellants argue that appellee failed to produce evidence in support of its motion for summary judgment that Jim Tresler was a "properly designated representative."

First, we believe that Mr. Tresler's title of comprehensive planner constituted sufficient notice to appellants of his status as the designated representative. Second, this is the first time appellants have raised this issue. The Supreme Court of Ohio has held:

HNS "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of State v. Glaros, 170 Ohio St. 471, 166 N.E.2d 379, approved and followed.)" State v. Williams (1977), 51 Ohio St. 2d 112, 364 N.E.2d 1364, paragraph one of the [*13] syllabus.

Thus, this argument is without merit.

Next, appellants assert that the denial of their proposed subdivision had to be made by the entire commission rather than a single representative of the commission. Appellants also allege that the rejection had to appear on the face of the plat and in the minutes of the commission's meeting. These arguments are not well taken.

It is apparent that appellants believe that once appellee determined that appellants' application needed to be submitted with a plat, appellee had to follow the plat review process set forth in R.C. 711.10. There is no authority to support this position. The procedures set forth in R.C. 711.10 apply to submission of proposed subdivisions with a plat. Minor subdivisions, i.e., those without a plat, are governed by R.C. 711.131 which begins, "notwithstanding the provisions of sections 711.001 to 711.13, inclusive, of the Revised Code ***."

In the case *sub judice*, appellants clearly submitted their proposed subdivision application, which they titled "minor subdivision," in accordance with R.C. 711.131. Once they did so, they were limited to the review process set forth in that section. **HNS** R.C. 711.131 allows [*14] for approval by a single representative of the commission. Thus, by implication, denial of a proposed subdivision will also be made by the commission's representative. Submissions made pursuant to R.C. 711.131 are done so without a plat. To argue that once a proposed subdivision was denied under R.C. 711.131, that it then had to be reviewed under R.C. 711.10, makes no sense since the latter section requires a plat to be submitted with the application. Thus, any application made pursuant to R.C. 711.131 would surely be denied if considered under the requirements of R.C. 711.10.

Similarly, appellants argue that in order for appellee to properly reject their proposed subdivision, appellee had to indicate directly on the plat that it was being rejected as well as the citation of or reference to the rule that was violated by the plat. This is a requirement of R.C. 711.10. Clearly, however, to require a planning commission to indicate directly on a plat the reason for rejecting the plat presupposes that a plat exists. The purpose of seeking approval of a subdivision under R.C. 711.131 is that a plat is not required. Hence, the legislature could not have intended the result suggested by [*15] appellants.

Also, appellants claim that the denial of their proposed subdivision was not timely made since it was not made within seven days of the filing of their application. Once again, however, this issue has been waived as appellants did not bring it to the attention of the trial court. Additionally,



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As response was timely given since R.C. 711.131 requires a planning commission to act within seven working days when reviewing a subdivision without a plat. Here, appellants made application on October 5, 1994 and were sent a decision letter on October 14, 1994. October 8 and October 9, 1994 were weekend days, and October 10, 1994 was a state holiday, Columbus Day. Thus, just seven working days elapsed before notice was sent to appellants. Accordingly, appellee's response was timely made.

Appellants also argue that they were misled by statements made by Jim Tresler and that they should prevail due to the doctrine of equitable estoppel. *HN11* In Ohio, however, equitable estoppel does not apply against a state or its agencies in the exercise of a governmental function. *Chevalier v. Brown* (1985), 17 Ohio St. 3d 51, 63, 477 N.E.2d 623. *HN12* The enforcement of platting and subdivision [*16] regulations is clearly a governmental function. Hence, this argument is not well taken.

Based upon the foregoing analysis, the trial court did not err in determining that appellants' application was properly denied.

Appellants' second assignment of error is without merit.

The judgment of the trial court is affirmed.

JUDGE JOSEPH E. MAHONEY ▼

FORD, P.J., concur,

CHRISTLEY ▼, J., dissents

with Dissenting Opinion.

Dissent by: CHRISTLEY ▼

Dissent

DISSENTING OPINION

CHRISTLEY ▼, J.

I respectfully dissent from the opinion and judgment in this matter. My specific concern references the majority's conclusion that appellants' proposed subdivision did not meet the second requirement set out under R.C. 711.131, to-wit: that a minor subdivision cannot involve the opening, widening or extension of any street or road. Appellee, in its brief, never directly addresses the argument raised by appellants that a direct conflict exists between the Portage County Regional Planning Commission's Regulation Section 330, and R.C. 711.131.

Specifically, appellants argued that the state law as set out in R.C. 711.131 contains no prohibition against private roads in subdivisions exempt from platting [*17] requirements, while the county regulation in Section 330 prohibits that which the state code has made permissible. Appellants also point out that the Portage County regulation is internally inconsistent as well, in that Section 411 makes an allowance for private roads in an exempted subdivision, if constructed to county standards, while Section 330 prohibits the exemption of lots which front along "private easements or streets, dedicated to the use of owners * * *."

Appellee's response to the above arguments was that because only one of the five lots of the proposed subdivision "fronted" on a public road, the parcel was not eligible anyway under R.C. 711.131. The majority opinion citing *Robinson* correctly disagreed with appellee's position on that specific point even though it went on to determine that the proposed subdivision would involve the opening, widening or extension of a street or road in derogation of R.C. 711.131.

However, once the majority reached the conclusion that, under R.C. 711.131, exempted lots could front on a private drive as well as a public road, then it also had to find that Section 330 of the county regulations, which specifically prohibited the exemption [*18] of such subdivisions from platting requirements, is in direct conflict with R.C. 711.131.

In other words, both the *Robinson* court and this court have determined that R.C. 711.131 allows private drive access to exempted subdivisions while Section 330 of the Portage County regulations specifically prohibits such access.

I believe appellants to be correct when they asserted in their appellate brief, that the "state platting statutes are matters of 'general law of state-wide concern.' In such a circumstance, the local prohibition must yield." In support of the foregoing argument, appellants relied on *Egbert v. Puleo* (1993), 67 Ohio St. 3d 78, 616 N.E.2d 195.

Although the instant matter deals with the powers of a county regional planning commission rather than a township or a municipality, I believe the principles set out in *Egbert*, *Wise*, and *Newbury Twp. Bd. of Trustees v. Lemak Petroleum (Ohio), Inc.* (1992), 62 Ohio St. 3d 387, 583 N.E.2d 302, are consistent with the rationale expressed above.

Thus, I would reverse and remand on that basis.

JUDGE JUDITH A. CHRISTLEY



Opin. 1044

ATTORNEY GENERAL

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an exempted village, as the case may be, has taken any official action on the petition, and this in turn depends upon the peculiar facts in each case. From a consideration of your letter of request, I perceive that you are concerned only with the question of withdrawal after a petition has been filed with the State Board of Education.

In specific answer to your questions, therefore, it is my opinion and you are advised that:

1. A petition for transfer under Section 3311.24, Revised Code, must contain the signatures of seventy-five per cent of the qualified electors residing in the territory proposed to be transferred who actually voted in the last general election.

2. The determination of the sufficiency of the signatures on a petition filed pursuant to Section 3311.24, Revised Code, is a matter for the city or exempted village board of education of the district in which the proposal originates, and it is not incumbent upon the State Board of Education to ascertain whether a petition filed with it is signed by the required number of qualified electors.

3. A person signing a petition under Section 3311.24, Revised Code, may not cause his name to be removed after the petition has been filed with the State Board of Education pursuant to this section.

OPINION NO. 1044

Syllabus:

1. An "original tract" within the meaning of Section 711.131, Revised Code, is a contiguous quantity of land held in common ownership which has not been platted by the existing owner or owners.

2. The term "completely subdivided" as used in Section 711.131, Revised Code, means a tract which is divided into as many lots as the subdivider intends for that tract.

3. Under Section 711.131, Revised Code, the further division of an original tract, which has been previously divided into five lots, requires the replatting of the original tract.

To: William H. Irwin, Belmont County Pros. Atty., St. Clairsville, Ohio
By: William B. Saxbe, Attorney General, May 14, 1964

I have before me your request for my opinion in which you ask the following:

"The Belmont County Engineer, R.J.B.,

has requested that I secure from you an opinion concerning your interpretation of the following questions relative to Section 711.131 of the Revised Code of Ohio:

"1. Is it proper to construe the words, 'original tract' as that which the subdivider actually owned when our Subdivision Regulations became effective, rather than what the subdivider originally owned?

"2. Mr. A. has twenty acres and sells Mr. B. five acres which is exempted in the definition of Subdivision (711.001,B). Mr. B. proposed to divide the five acres into five, one acre tracts under Section 711.131. Do you consider the original tract as the original twenty acres or is (sic) the five acres now owned by Mr. B. considered an original tract?

"3. Mr. X. has five acres and submits a sketch plat under Section 711.131 showing he proposed to subdivide the five acres into five various sized tracts, the largest of which is two and one-half acres. He conveys the two and one-half acres to Mrs. X. who then proposes to subdivide her two and one-half acre tracts into five, one half acre tracts under Section 711.131. In applying 711.131 to her two and one-half acre tracts, would not the original tract be considered to be the original five acre tracts?

"4. In regard to that portion which states, 'after the original tract has been completely subdivided', does it mean that for a tract to be completely subdivided, it would be subdivided into as many lots as feasibly proposed?

"5. For a tract to be completely subdivided, could it be further subdivided?

"6. In case of uncertainty on the part of the subdivider or if it is obvious to those administering the subdivision Regulations, that a tract would have more than five feasible building sites, may those administering the Subdivision Regulations, exercise their judgment as to whether there would be more than five lots after a tract has been completely subdivided?

"7. Some of the local bar association feel that Section 711.131 means that the first five lots may be sold without plat and the remaining lots by plat. Does not the phrase, 'and involving no more than five lots after the original tract has been completely subdivided', exclude the aforementioned contention."

Chapter 711, Revised Code, pertains to the platting of

land by the proprietor, within or adjacent to municipal corporations, or for the purpose of laying out a village, subdivision, or addition to a municipal corporation. Generally speaking the statutes require that a proprietor of lots or grounds in a municipal corporation or in unincorporated territory of the county which is subject to a plan by a county planning commission, who subdivides or lays them out for sale, make an accurate plat of such subdivision describing all streets, alleys, ways, commons or other public uses. Approval of such plats by a planning commission or legislative authority is required when the municipality or county has adopted a major plan for major streets or highways. The purpose of platting under this Chapter is to provide for the co-ordination of streets within a subdivision with existing streets and roads, for the proper amount of open spaces for traffic, circulation and utilities and for the avoidance of future congestion of population. While there is a relation between platting and zoning, the two are distinct and platting is not a substitute for zoning. It should be borne in mind at the outset that restrictions on the size of lots or related matters are properly within the scope of zoning ordinances and are not controlled directly by plats.

Section 711.131, Revised Code, contains an exception to the requirements that subdivisions of lots or land be platted, and provides as follows:

"Notwithstanding the provisions of sections 711.001 to 711.13, inclusive, of the Revised Code, a proposed division of a parcel of land along an existing public street, not involving the opening, widening or extension of any street or road, and involving no more than five lots after the original tract has been completely subdivided, may be submitted to the authority having approving jurisdiction of plats under the provisions of section 711.05, 711.09 or 711.10 of the Revised Code for approval without plat. If such authority acting through a properly designated representative thereof is satisfied that such proposed division is not contrary to applicable platting, subdividing, or zoning regulations it shall within seven working days after submission approve such proposed division and, on presentation of a conveyance of said parcel, shall stamp the same 'approved by (planning authority); no plat required' and have it signed by its clerk, secretary, or other official as may be designated by it. Such planning authority may require the submission of a sketch and such other information as is pertinent to its determination hereunder." (Emphasis added)

The answers to your first three questions depend upon the meaning to be given to the term "original tract" as used in this section.

Neither the word "original" or the word "tract" is defined in Chapter 711, Revised Code. I am of the opinion, however, that "tract" refers to a contiguous quantity of

land undivided by lot lines. I further am persuaded that the word "original" contemplates a tract which has not been divided under its present ownership. An "original tract" then, under Section 711.131, supra, is a contiguous quantity of land held by one person, or in common ownership, which has not been platted by the existing owner or owners. A tract may be an original tract as to one owner but not another. While I am aware that this definition may permit *de facto* subdividing through successive ownership, I cannot infer that original means the initial source of a tract or parcel--which is its literal meaning--or that the legislature intended that an original tract be defined by time rather than by its composition or formation. As noted heretofore, platting is not for the purpose of controlling the size of lots, but for the purpose of insuring that there is coordination between existing streets and roads and those to be created, and of providing for orderly traffic and utility circulation. The exception extended in Section 711.131, supra, is only to parcels along existing public streets and not involving the opening, widening or extension of any street or road.

In answer to your first question, therefore, it is my opinion that "original tract" refers to land originally owned by the proprietor or subdivider and not that owned when local subdivision regulations became effective. I am further of the opinion, however, that Section 711.131, Revised Code, is not to be given retroactive application.

In reply to query number two, it is my opinion that Mr. B's five acres constitute an "original tract."

In response to query number three, I believe that the two and one-half acres of Mrs. X would be an "original tract" if in fact this is the tract that she first purchased or received title to.

Your fourth, fifth and sixth questions involve an interpretation of "completely subdivided." There is again, no statutory definition. I am compelled to conclude in the absence of a specific legislative definition that the language "completely subdivided" means a tract that is divided into as many lots as the subdivider intends for the tract. A subdivider may of course subsequently decide to increase the number of lots in a subdivision but to do so--and assuming there will be more than five lots resulting--it will be necessary to replat the original tract.

In response to query number four, I do not believe that a tract to be "completely subdivided" must be divided into as many lots as feasibly proposed but all lands within the original tract must be included within one of the subdivided lots.

In reply to question number five, it is my opinion that a tract "completely subdivided" can be further subdivided by any party who purchases or obtains title to a lot or parcel in the subdivision large enough to divide without conflicting with local platting, subdivision or zoning regulations.

In reply to question number six, it must be noted that Section 711.131, Revised Code, provides that a proposed divi-

sion "may be submitted to the authority having jurisdiction." Section 711.01, Revised Code, provides that any person may lay out a subdivision by causing a territory to be surveyed and by having a plat made. Section 711.05, Revised Code, provides that "upon submission of a plat for approval" the County Commissioner shall then approve or refuse to approve said plat. It is my opinion that there is no authority in Chapter 711, Revised Code, for any governmental body to "anticipate" further divisions of an original tract of a property owner.

In response to your seventh question, the ownership of four lots from an original tract may be transferred without plat unless the proprietor expresses an intent to further divide the remaining lot. In the event the owner further divides the lot remaining after the transfer of the first four lots, he is required to plat the original tract including the first four lots. A conclusion which follows because the exception in Section 711.131, supra, extends only where there are no more than five lots after the original tract has been completely subdivided. Thus, all lots in the original tract must be platted and approved before lot number five (assuming a part of the original tract is retained) may be recorded.

Obviously four lots will have already been transferred and the transfer recorded, and the approval or the failure to approve the plat will have no effect on these lots. The owner of the original tract, however, will be in the same position he would have been in had he not transferred the first four lots. Conceivably this could present some practical problems to the owner-subdivider but none that I can foresee which will be insolvable or which could not be avoided by a realistic projection of intended land use.

In specific answer to your questions, therefore, it is my opinion and you are advised that:

1. An "original tract" within the meaning of Section 711.131, Revised Code, is a contiguous quantity of land held in common ownership which has not been platted by the existing owner or owners.
2. The term "completely subdivided" as used in Section 711.131, Revised Code, means a tract which is divided into as many lots as the subdivider intends for that tract.
3. Under Section 711.131, Revised Code, the further division of an original tract, which has been previously divided into five lots, requires the replatting of the original tract.