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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000159-MR and
NO. 2001-CA-000184

EMMA JEAN COCHRAN HAMILTON and
CITY OF LIBERTY BOARD OF ADJUSTMENT — APPELLANTS

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE WILLIAM M. HALL, SPECIAL JUDGE
CIVIL ACTION NO. 00-CI-00040

DONALD THOMAS and SUSAN L. THOMAS;
KEITH ATWOOD and SUSAN ATWOOD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, KNOPF and SCHRODER, Judges.

HUDDLESTON, Judge: Emma Jean Cochran Hamilton and the City of Liberty Board of Adjustment appeal from a Casey Circuit Court order granting summary judgment to Donald A. Thomas, Susan L. Thomas, Keith Atwood and Susan Atwood. The Court ordered the Board to revoke a building permit improperly issued to Hamilton and directed

Cochran to remove her mobile home[1] from its current location within a reasonable time.

On December 9, 1999, Jamie Wethington, in his capacity as the Zoning Enforcement Officer for the City of Liberty and pursuant to Hamilton's request, issued a building permit to Hamilton granting her permission to place a mobile home on her property located adjacent to Casey Estates Subdivision within the city limits of Liberty. Wethington issued the permit after conducting research and consulting with Malcolm Wolford, a former zoning officer for the city and current member of the planning commission.

Apparently, certain copies of the city zoning regulations contain handwritten modifications relating to the minimum square footage requirements for structures located in areas classified as R-1L, the designation for the area where Hamilton's mobile home is located. Based on his belief that the regulations had been officially amended to allow both mobile homes and structures with a minimum living area square footage of 864 feet to be located in areas zoned R-1L, Wolford advised Wethington that the proposed structure did not violate the applicable zoning regulations. In reliance on the accuracy of this information, Wethington issued the permit for a "new modular home" to Hamilton despite the fact that her home was 1120 square feet and the minimum square footage requirement for R-1L areas is 1300 feet. As a consequence, Hamilton placed a mobile home on the property in question and subsequently made certain improvements and

[1] The terms "mobile home" and "modular home" are used interchangeably in this opinion.

modifications to the home at least partially in reliance on the permit.

Challenging the issuance of the permit, the Thomases and the Atwoods filed a notice of appeal to the Board requesting that the permit be revoked and that Hamilton be given a reasonable time to remove the modular home which is presently located on her property.[2] Both the Thomases and the Atwoods reside in Casey Estates Subdivision. As a basis for their appeal, the couples asserted that the "modular home" is actually a "doublewide mobile home" or "manufactured housing" as defined by the zoning regulations enacted by the city and is therefore prohibited in any area zoned R-1L. In addition, the couples contended that the structure fails to meet the minimum living area square footage requirement applicable to R-1L districts as mandated by the regulations.

On February 10, 2000, the Board held a public hearing at which both sides were represented and public comment was received on the matter. After private deliberations, the Board issued an order containing detailed findings of fact and conclusions of law on March 2, 2000. Ultimately, the Board concluded that Wethington acted in a reasonable manner when he issued the permit based on the information known to him at the time, Hamilton reasonably relied on Wethington's assessment and would be forced to incur "substantial and undue hardship" if she

[2] The original appeal was filed by Donald A. Thomas on behalf of Donald A. and Susan L. Thomas (husband and wife), Keith and Susan Atwood (husband and wife) and Wendell and Nancy Bastin (husband and wife). The Bastins did not join in the appeal to the circuit court and are not parties to this appeal.

were ordered to remove the mobile home from her property and the record before the Board did not compel such an outcome.

The Board specifically found that locating a mobile home on the premises would not adversely affect the value of any property located within the boundaries of the city. In denying the request to revoke Hamilton's permit, the Board determined that the mobile home in question, if allowed to remain on the premises, would not "adversely affect the public health, safety, or welfare, would not alter the essential character of the general vicinity, would not cause a hazard or a nuisance to the public, and would not allow an unreasonable circumvention of the requirements of the Zoning Regulations of the City of Liberty." According to the Board, its rationale was justified in light of the non-conforming uses on neighboring property which have lawfully remained within the city limits. Hamilton's mobile home was allowed to remain on the property, subject to the condition that she make the modifications necessary in order for it to comply with the minimum square footage requirement for the area within one year following the exhaustion of any and all legal remedies available to the opposing parties.

Claiming that the Board's action in denying their appeal was erroneous, arbitrary and capricious and constituted an impermissible act of legislation which exceeded the Board's authority, the Thomases and the Atwoods appealed the unfavorable ruling to the circuit court requesting the identical relief they sought from the Board plus costs and a reasonable attorney's fee.

A special judge was assigned to preside over the matter. Following numerous motions and responses filed on behalf of the parties, the court granted summary judgment in favor of the Thomases and the Atwoods, and ordered Hamilton to remove the mobile home from her property. Subsequently, the court denied the motions to dismiss previously filed by the Board and Hamilton as well as the motions to alter, amend or vacate and for findings of fact[3] later filed by Hamilton. It is the order reversing the decision of the Board and granting summary judgment to the Thomases and the Atwoods which is the subject of the present appeal.

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[4] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[5] In deciding a motion for summary judgment, the circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." "The trial judge must

[3] No factual findings are required when the court grants a motion for summary judgment since such an order requires a determination that there is no material fact at issue. Ky. R. Civ. Proc. (CR) 56.03.

[4] CR 56.03; Steelvest, Inc. v. Scansteel Service Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital v. Rose, Ky., 683 S.W.2d 255 (1985).

[5] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

examine the evidence, not to decide any issue of fact, but to discover if a real issue exists."[6]

When reviewing the decision of an administrative agency, the trial court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."[7] However, pursuant to Kentucky Revised Statutes (KRS) 13B.150(2), the court may affirm or reverse the agency's final order, in whole or in part, and remand the case for further proceedings if it finds the final order to be "[i]n excess of the statutory authority of the agency" and/or "[a]rbitrary, capricious, or characterized by abuse of discretion."[8]

On appeal, we review the summary judgment to determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[9] Deference to the trial court is not required since no factual findings are at issue.

We begin our analysis by examining the relevant regulations and statutory authority. Article VIII, Section 8.1 of the zoning regulations at issue provides as follows:

> A fully qualified administrative official designated by the City Council shall administer and enforce this regulation, under the direction of the Planning

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[6] Steelvest, supra, n. 4, at 480.

[7] Ky. Rev. Stat. (KRS) 13B.150(2).

[8] KRS 13B.150(b)(d).

[9] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996) (citations omitted).

> Commission and Board of Adjustment, and may issue building permits and certificates of occupancy in accordance with the literal terms of this regulation. He may not, however, issue any such permits and certificates, or allow any construction or change of use which does not conform to the literal terms of this zoning regulation.[10]

Similarly, KRS 100.271, which delineates the powers held by an official charged with the administration of zoning regulations, mandates compliance with the literal language of the regulations. In pertinent part, it provides as follows:

> The administrative official may be designated to issue building permits or certificates of occupancy, or both, in accordance with the literal terms of the regulation, but may not have the power to permit any construction, or to permit any use or any change of use which does not conform to the literal terms of the zoning regulation.[11]

Here, Wethington was the qualified administrative official responsible for administering the zoning regulations. On the permit he issued to Hamilton, he characterized her residence as a "New Modular Home." It is undisputed that no such classification exists according to the definition section of the zoning regulations in question.

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[10] Emphasis supplied.

[11] Emphasis supplied.

Of the housing categories found in Article VIII, Section 8.2 of the regulations, the following are potentially applicable: Housing, Manufactured, Mobile Home and Mobile Home, Doublewide. In its findings of fact, the Board refers to Hamilton's residence as a "mobile home," reflecting its conclusion that the home should be so classified with the implications that that classification entails. The Board also made a factual determination that Hamilton's mobile home "has less than 1,300 square feet of living space." Both of these findings are uncontroverted. As such, the dispositive inquiry becomes whether a mobile home with the stated dimensions may be placed in an area zoned R1-L under the terms of the zoning regulations at issue. If not, Wethington was without authority to issue the permit and the Board acted in excess of its authority, rendering its decision improper.

Article VIII, Section II, subsection 2.51 of the regulations provides that mobile homes "shall be located only within approved mobile home parks, except in the case of a replacement for a dilapidated house as defined in Section 2.52." According to Section 2.51(A), mobile home parks "shall contain no lots smaller than five thousand (5,000) square feet, and shall be located only in an R-3 Residential District."[12] The site where Hamilton's residence is located does not qualify as a mobile home park as it is designated as an R1-L zone. The stated exception is equally inapplicable as explained below. This section offers no support for the Board's decision.

[12] Emphasis supplied.

The conditions under which doublewide mobile homes and manufactured housing are permitted to be used as replacements for dilapidated housing are set forth in Article VIII, Section II, subsection 2.52(B) which further weakens Hamilton's position and does nothing to validate the Board's decision. First of all, no argument is made that this provision was the basis for issuing the permit. Regardless, according to the approval procedures it contains: "Doublewide mobile homes and manufactured housing shall be located only in R-2 and R-3 districts on single lots outside of mobile home parks as conditional uses following approval of the conditional use permit by the Board of Adjustment . . . ."[13] While Hamilton's residence qualifies as a doublewide mobile home, her permit is still unsalvageable as it is not for a conditional use, nor could it be as the plain language of the governing provision restricts its application to districts zoned R-2 and R-3 and, as previously established, Hamilton's property is classified as R-1L.

As if the failure to comply with the above criteria were not sufficient reason to invalidate Hamilton's permit, further justification for doing so is found in Article IX, Section 9.32 of the regulations which governs the issuance of conditional use permits. It states in relevant part: [T]he Board of Adjustment shall authorize conditional use permits only with such safeguards as are appropriate under this Regulation and shall deny conditional use permits when not in harmony with the purpose and intent of this

[13] Emphasis supplied.

Regulation."[14] Conditional use permits "shall not be granted by the Board of Adjustment" unless and until certain conditions are met under Section 9.32, the first of which is that a written application be submitted. In the same vein, KRS 100.237 provides that "[t]he Board shall have the power to hear and decide applications for conditional use permits to allow the proper integration into the community of uses which are specifically named in the zoning regulation . . . ." Hamilton did not submit a written application for a conditional use of her property. That being the case, it stands to reason that she did not compile a list of uses which the regulations are designed to promote in support of it.

KRS 100.241 vests the Board with the power to hear and decide applications for variances. Likewise, Article IX, Section 9.33 of the pertinent regulations permits a variance from the terms of the ordinance to be granted, but only pursuant to a written application. Again, it is uncontested that no written application was submitted here which dispenses with the need for further consideration of this argument.

As noted by this Court in Davis v. Board of Comm'rs,[15] "Under KRS 100.203, cities and counties may enact zoning regulations. The majority of counties still do not have zoning regulations. However, if the community does adopt planning and zoning regulations, it shall follow Chapter 100 of the Kentucky Revised Statutes." Wethington clearly failed to comply with the

[14] Emphasis supplied.

[15] Ky. App., 995 S.W.2d 404, 406 (1999).

literal, mandatory language of the aforementioned regulations and corresponding statutes and admitted as much in his testimony before the Board. "If the requirement is placed in the ordinance, it must be followed."[16]

In the present case, the Board chose to ignore the requirements of the zoning regulations and the zoning officer's lack of adherence to them, opting instead to fashion what would be most accurately described as an equitable remedy. While we are not unsympathetic to Hamilton's position and do not question the good faith of those involved in these proceedings, the Board's resolution of the issue is simply not supported by statutory authority. Consequently, its actions were arbitrary and must be reversed. There can be no alternative interpretation of the governing authority here as the language used is mandatory and unequivocal. After viewing the evidence in a light most favorable to Hamilton, the circuit court correctly determined that there were no genuine issues as to any material fact and that Hamilton could not prevail under any circumstances. The Thomases and the Atwoods were entitled to summary judgment as a matter of law.

The judgment is affirmed.

ALL CONCUR.

[16] Id. at 407.

BRIEF FOR APPELLANT
CITY OF LIBERTY BOARD OF
ADJUSTMENT:

Brian Wright
City Attorney
Liberty, Kentucky

NO BRIEF FOR APPELLANT
EMMA JEAN COCHRAN HAMILTON

BRIEF FOR APPELLEES:

Donald A. Thomas
Liberty, Kentucky