RENDERED: JULY 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2003-CA-001324-MR

LUKE PIKE AND PRISCILLA PIKE — APPELLANTS

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 02-CI-00080

MEADE COUNTY FISCAL COURT AND
COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Luke and Priscilla Pike have appealed from the findings of fact, conclusion of law, and judgment entered by the Meade Circuit Court on June 3, 2003, which, inter alia, permanently enjoined them from operating any automobile, vehicle, or machinery recycling establishment or place of business on their property until they secure the proper permits.

Having concluded that the trial court erred in its determination that the Kentucky Department of Highways was legally precluded from granting the Pike's application for a recycler's permit, we reverse and remand.

On March 13, 1976, Luke purchased a lot in the Wild Wood Park subdivision, which is located in Meade County. On February 12, 1977, Luke purchased an adjoining lot in the same subdivision.[1] When Luke purchased the lots, the plat for the subdivision contained a restrictive covenant prohibiting any junk from accumulating on the lots located within the subdivision. The plat of the subdivision was recorded in the Meade County Clerk's Office on October 1, 1975.

In the early 1980's Luke began collecting older model cars and storing them on his property. In 1998 the Meade County Fiscal Court enacted the Meade County Zoning Ordinance. In addition to designating the Pikes' property as "R-1 Residential," the zoning code restricted the use of junkyards to industrial zones. Pursuant to Section 1.8(43) of the zoning code, a junkyard is defined as:

> Any area, lot, land or parcel where junk is kept outside as defined herein, or waste discarded or salvaged materials are bought, sold, exchanged, stored, baled, cleaned, packed, disassembled, handled, including auto wrecking yards, used lumber yards and places or yards for use of

[1] Both lots abut a county road.

> salvaged house wrecking structural steel materials and equipment.[2]

In December 1999 the Pikes were cited for storing junk on their property in violation of the zoning code. In March 2000 the fiscal court filed a complaint against the Pikes in the Meade District Court seeking to enforce the provisions of the zoning code. The action was subsequently dismissed at the fiscal court's request. In December 2000 the fiscal court filed another complaint against the Pikes seeking to enforce the provisions of the zoning code. This action was also dismissed at the fiscal court's request.

On March 4, 2002, Luke filed an application for a recycling permit with the Department of Highways.[3] In his application, Luke indicated that "ten (10) or more junked, wrecked or nonoperative automobiles, vehicles or machines" were

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[2] Junk is defined in Section 1.8(42) of the zoning code as:

> Any scrap, waste, reclaimable material, or debris, whether or not stored, for sale or in the process of being dismantled, destroyed, processed, salvaged, stored, baled, disposed, or other use or disposition. Examples of which include tires, vehicle parts, equipment, paper, rags, metal, glass, building materials, household appliances, machinery, brush, wood and lumber.

[3] Kentucky Revised Statutes (KRS) 177.910 requires an operator of an automobile, vehicle, machinery or material recycling establishment which is located closer than 1,000 feet from the right-of-way of any road to obtain a permit from the Department of Highways. Pursuant to KRS 177.905(2), an automobile, vehicle or machinery recycling establishment is defined as "any place where five (5) or more junked, wrecked or nonoperative automobiles, vehicles, machines and other similar scrap or salvage materials . . . are deposited, parked, placed or otherwise located[.]"

stored on his property.[4] On March 5, 2002, the fiscal court filed a complaint against the Pikes in the Meade Circuit Court, in which it alleged that the Pikes were operating a junkyard in violation of the zoning code. The fiscal court sought an injunction against the Pikes prohibiting them from using their property "in a manner that does not conform to the Meade County Zoning Ordinance[.]"[5] On March 14, 2000, Luke received a letter from the Department of Highways notifying him that his application for a recycling permit had been denied on the basis that he had failed to obtain "local approval."

On April 1, 2002, the Pikes filed a response and counterclaim, in which they averred, inter alia, that they were exempt from complying with the zoning code because their use of the property qualified as a nonconforming use pursuant to KRS

[4] Specifically, the application contained the following questions:

> 4. If automobile, vehicle or machinery recycling establishment, does it contain a combined total of five (5) or more junked, wrecked, or nonoperative automobiles, vehicles or machines? YES__ NO__
>
> 5. If automotive dealer, body shop operator, wrecker service operator or service station operator, does it contain ten (10) or more junked, wrecked or nonoperative automobiles, vehicles or machines? YES__ NO__

Luke checked the box marked "YES" in response to both questions.

[5] The fiscal court also sought a declaration that the Pikes' property constituted a public nuisance pursuant to KRS Chapter 177.910, which is incorporated in the zoning code.

100.253(3).[6] The Pikes also alleged that the fiscal court's action was barred by the doctrine of laches and that the zoning code was unconstitutional on its face and as applied to their case.[7]

On November 22, 2002, the Department of Highways filed a motion to intervene as a third-party plaintiff pursuant to CR[8] 24.01(b), which was granted. On December 6, 2002, the Department filed a third-party complaint, in which it alleged that the Pikes were operating an automobile, vehicle, or machinery recycling center without a permit in violation of KRS 177.910. The Department sought an injunction against the Pikes prohibiting them from operating any automobile, vehicle, or machinery recycling business on their property without a permit. On December 10, 2002, the Pikes filed a response and

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[6] KRS 100.253(3) provides, in relevant part, that except in counties containing a city of the first or second class, a consolidated local government or urban county government:

> Any use which has existed illegally and does not conform to the provisions of the zoning regulations, and has been in continuous existence for a period of ten (10) years, and which has not been the subject of any adverse order or other adverse action by the administrative official during said period, shall be deemed a nonconforming use.

[7] In a subsequent pleading, the Pikes alleged that their use of the property qualified as a lawful existing, nonconforming use pursuant to KRS 100.253(1), which provides, in relevant part, as follows:

> The lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it, may be continued, although such use does not conform to the provisions of such regulations[.]

[8] Kentucky Rules of Civil Procedure.

counterclaim, in which they alleged that the Department's cause of action was barred by the doctrine of laches and that its actions were arbitrary and capricious under the United States and Kentucky Constitutions.

A bench trial was held on May 29, 2003. The trial court heard testimony from Luke concerning the status of the vehicles stored on his property. Specifically, Luke went through a list of all the vehicles stored on his property and he identified each vehicle that was not capable of being driven in its present condition. Luke conceded that he had more than ten vehicles stored on his property that were not capable of being driven in their present condition. Luke further testified that the statements contained in his application for a recycling permit were truthful. The trial court also heard testimony from the Department of Highways. In sum, the Department argued that it was precluded from granting the Pikes a recycler's permit based on the restrictive covenant contained in the plat for the Wild Wood Park subdivision.[9] The Pikes responded that the Department did not have standing to raise the restrictive covenant.[10]

[9] As previously discussed, the subdivision plat, which was recorded in the Meade County Clerk's Office on October 1, 1975, contained a restriction prohibiting the accumulation of junk on the lots located within the subdivision.

[10] The Pikes contended that the restrictive covenant could only be enforced by the other property owners in the subdivision.

On June 3, 2003, the trial court entered its findings of fact, conclusion of law and judgment. The trial court first found that the Pikes were required to obtain a recycler's permit due to the number of inoperable vehicles located on their property. The trial court defined operable as "'capable of being used or operated'" and reasoned that "[i]f additional repairs are needed to get a vehicle's engine ready to operate, beyond charging the battery, then the vehicle is not 'capable of being operated.'" The trial court went on to conclude that the Department was "legally precluded from granting [Luke's] [a]pplication for [a] Recycler's Permit even if it found all other conditions for approval were met" [footnote omitted]. The trial court reasoned that the restrictive covenant contained in the subdivision plat precluded the Department from issuing the Pikes a recycler's permit.[11] The trial court specifically declined to address the remaining issues surrounding the zoning ordinance on the ground that they were moot in light of its resolution of the "Recycler Permit issue."[12] The trial court permanently enjoined the Pikes from operating any automobile,

[11] In support of its ruling, the trial court cited Ashland-Boyd County City-County Health Dept. v. Riggs, Ky., 252 S.W.2d 922 (1952), for the proposition that a governmental body, such as the Department of Highways, is barred from issuing a permit in violation of a restrictive covenant imposed upon a subdivision by the developers or property owners.

[12] As previously discussed, the Pikes raised several issues concerning the validity of the zoning ordinance in their responsive pleadings. In addition, the Pikes alleged that the Department acted arbitrarily when it denied Luke's application for a recycler's permit.

vehicle, or machinery recycling establishment or place of business on their property until they secure the proper permits and it ordered the Pikes to remove all but four of the nonoperable vehicles stored on their property within 30 days.[13] This appeal followed.

The Pikes contend that the trial court erred in its determination that the Kentucky Department of Highways was legally precluded from granting their application for a recycler's permit. Further, the Pikes claim that the trial court used an improper definition of "nonoperative" as it appears in KRS 177.905(2).[14]

We first address the Pikes' argument that the trial court erred in its determination that the Kentucky Department of Highways was legally precluded from granting them a recycler's permit. As previously discussed, the trial court concluded that pursuant to Ashland-Boyd, supra, a governmental body, such as the Department of Highways, is barred from issuing a permit in violation of a restrictive covenant imposed upon a subdivision

[13] The trial court also declared the Pikes' use of their property to be a public nuisance.

[14] In addition, the Pikes claim they "have a protected constitutional right to continue to use their property as they have for over twenty (20) years" and that "Meade County had no legitimate basis under the allegations contained in its initial complaint for an injunction against [them]." However, these issues were not addressed by the trial court and we decline to address them for the first time on appeal, especially since the trial court will have an opportunity to do so on remand. See, e.g., Light v. City of Louisville, Ky.App., 93 S.W.3d 696, 699 (2002).

by the developers or property owners. We disagree with the trial court's interpretation of Ashland-Boyd.

In Ashland-Boyd, a city-county health department acquired a parcel of land located in a Boyd County subdivision and proposed to erect a health center on the property.[15] The subdivision consisted of several lots, each of which was subject to a restrictive covenant prohibiting the erection of a "business house of any kind" on the property. Several property owners in the subdivision sought an injunction prohibiting the health department from violating the covenant. The former Court of Appeals concluded that the health department was bound by the restrictive covenant.[16] The Court stated:

> [W]e are among the jurisdictions which adhere to the concept that such restrictions constitute mutual, reciprocal, equitable easements of the nature of servitudes in favor of owners of other lots of a plot of which all were once a part; that they constitute property rights which run with the land so as to entitle beneficiaries or the owners to enforce the restrictions, and if it be inequitable to have injunctive relief, to recover damages.[17]

The Court went on to hold that "the state and its subdivisions of government are bound by restrictions of this charter the same

[15] Ashland-Boyd, 252 S.W.2d at 923.

[16] Id. at 925.

[17] Id. at 924-25.

as a private person, subject, however, to the exercise of power of eminent domain."[18]

We are unpersuaded that Ashland-Boyd stands for the proposition that a governmental body, such as the Department of Highways, is barred from issuing a permit in violation of a restrictive covenant imposed upon a subdivision by the developers or property owners. First and foremost, the procurement of a permit to operate an automobile vehicle or machinery recycling establishment does not relieve the permit holder from complying with any restrictive covenants prohibiting such use on the property in question. Simply put, "[p]ermits as to [the] use of property [issued] by [governmental] authorities do not abrogate or destroy the rights of persons acquired under covenants as to restrictive use of property, where such restrictions do not violate public law or public policy."[19] Moreover, KRS 177.935 vests the discretion to grant or to deny a recycler's permit with the Department of Highways. To allow private covenantors to divest the Department of such discretion by way of a restrictive covenant would, in our opinion, constitute an impermissible usurpation of the authority granted

[18] Id. at 925. The Court further concluded, however, that the city-county health department's proposed use of the property did not constitute a "business house" within the meaning of the restrictive covenant. Id. at 926.

[19] Arlington Cemetery Corp. v. Hoffman, 119 S.E.2d 696, 700 (Ga. 1961). See also 8 McQuillin, The Law of Municipal Corporations, § 25.09 (3d ed. 2000 & Supp. 2004).

to the Department by the Legislature. If the other property owners in the Wild Wood Park subdivision are aggrieved by the Pikes' use of their property they may seek to enforce the restrictive covenant by way of a declaratory judgment action or injunctive relief. In sum, we are of the opinion that the trial court erred in its determination that the Kentucky Department of Highways was legally precluded from granting the Pikes a recycler's permit. Consequently, we must remand the matter for further proceedings.

In the interest of judicial economy, we will address the Pikes' argument that the trial court's definition of "nonoperative" was erroneous as this issue is likely to arise again on remand. The Pikes take issue with the trial court's conclusion that any vehicle that needed additional repairs to render its engine ready to operate is "not capable of being operated." As previously discussed, KRS 177.905(2) defines an automobile, vehicle or machinery recycling establishment as "any place where (5) or more junked, wrecked or nonoperative automobiles, vehicles, machines and other similar scrap or salvage materials . . . are deposited, parked, placed or otherwise located" [emphasis added]. The statute, however, does not define "nonoperative." Consequently, the trial court defined operable as "capable of being used or operated" and reasoned that "[i]f additional repairs are needed to get a

vehicle's engine ready to operate, beyond charging the battery, then the vehicle is not capable of being operated." The Pikes contend that the term "operable" should be defined so as to include vehicles that are "stored without a battery[.]" We cannot agree.

The construction and application of statutes is a matter of law subject to de novo review.[20] When interpreting a statute, we must "ascertain and give effect to the intent of the General Assembly."[21] "A fundamental rule of statutory construction is to determine the intent of the legislature, considering the evil the law was intended to remedy."[22] In addition, it is well-established that the words used in a statute are to be given their plain and ordinary meaning.[23] A court may refer to a dictionary to ascertain the plain and ordinary meaning which the Legislature intended to ascribe to the term.[24]

Operative is defined by Webster's Dictionary as "[f]unctioning effectively[.]"[25] We are of the opinion that this

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[20] Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet, Ky., 983 S.W.2d 488, 490 (1998).

[21] Commonwealth v. Harrelson, Ky., 14 S.W.3d 541, 546 (2000)

[22] Beach v. Commonwealth, Ky., 927 S.W.2d 826, 828 (1996).

[23] Harrelson, supra at 547.

[24] See Young v. Commonwealth, Ky., 968 S.W.2d 670, 672 (1998).

[25] Webster's II New College Dictionary 767 (2d ed. 1995).

definition is consistent with the principle objective of KRS 177.905, et seq., which is to control the unsightliness of junk along our highway system in Kentucky.[26] Furthermore, we are persuaded that an automobile without a battery is not capable of functioning effectively. Consequently, we find no error on the part of the trial court in this respect.

Based on the foregoing reasons, the judgment of the Meade Circuit Court is reversed and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

George R. Carter
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BRIEF AND ORAL ARGUMENT FOR APPELLEE, TRANSPORTATION CABINET:

Darren A. Sipes
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[26] See Jasper v. Commonwealth, Ky., 375 S.W.2d 709, 711 (1964).