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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-000402-MR

WILLIAM FELTY AND
LINDA FELTY — APPELLANTS

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 07-CI-00696

FRED PETTY AND ROSE
ANN PETTY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellants, William and Linda Felty, appeal the July 27, 2009, summary judgment order of the Greenup Circuit Court, requiring the

[1] Senior Judge Joseph E. Lambert, sitting as Special Judge by the assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

removal of their carport, finding that it violated the five-foot setback ordinance of the City of Flatwoods. On appeal, the Feltys argue that KRS 100.253 should operate to preclude summary judgment, as this case was filed twelve years after their carport was constructed. The Appellees, Fred and Rose Ann Petty, assert that the summary judgment order entered by the court below was proper and should be affirmed. Having reviewed the record, the arguments of the parties, and the applicable law, we reverse.

The Feltys and the Pettys live next door to one another, and are residents of the City of Flatwoods in Greenup County, a city of the third class. In 2007, the Pettys sued the Feltys concerning the alleged encroachment of the Feltys' carport onto the Pettys' adjoining lot. In so doing, the Pettys asserted that the Feltys had erected and were maintaining a carport on their property which extended onto the Pettys' property for several feet. On November 15, 2007, the Feltys filed an answer denying that their carport encroached on the Pettys' property. Thereafter, surveys and discovery were conducted, and the Pettys moved for summary judgment, alleging that the carport had been unlawfully constructed by the Feltys, who did not first obtain a building permit from the City of Flatwoods.[2]

[2] Having reviewed the record, we are unable to determine whether the ordinance which the Pettys allege was violated by the Feltys contains a provision authorizing a private right of action for citizens to seek enforcement of the ordinance. While state statutes or local ordinances will often expressly confer standing on certain private parties to enforce zoning restrictions, it has also been held that the mere fact that statutes or ordinances are silent as to the existence of a private cause of action does not by its silence preclude such an action. A private right of action may be recognized judicially or implied from the purposes for which zoning laws are enacted. *See, e.g.*, *Crump v Perryman*, 193 S.W.2d 233 (Tex. Civ. App 1946) (*see also Graves v. Johnson*, 75 SD 261, 63 N.W.2d 341 (1954), holding that a landowner threatened with

In response, the Feltys argued that no action had previously been filed by any party to remove the carport, despite the fact that it had been constructed approximately twelve years ago, and that according to KRS 100.253, no action could now be brought to have the carport removed based on the doctrines of laches and estoppel.

As noted, the trial court granted summary judgment in favor of the Pettys on July 27, 2009. In so doing, it held that the carport was unlawfully constructed, that the Feltys reliance upon KRS 100.253 was misplaced, and that the carport had to be removed within forty-five days from the date of entry of the order. The Feltys filed a motion to alter, amend, or vacate. On September 1, 2009, the trial court denied that order, but nevertheless agreed to amend the prior order to reflect that it was interlocutory in nature and not yet final and appealable. It then encouraged the parties to try and resolve their remaining issues by agreement (or to take these issues to trial), such that a final judgment and order could be issued. Subsequently, on February 4, 2010, the court entered another order making its previous entry of summary judgment final and appealable. The Feltys then requested that the court make additional findings concerning the carport itself. Accordingly, the trial court entered an order dated February 26, 2010, in which it

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irreparable injury may therefore have a right to take legal action to remedy the injury even in absence of an express or implied grant of authority under the zoning laws).

In the instant appeal, the parties did not argue issues of standing to enforce the zoning ordinance to this Court. Accordingly, our opinion is based squarely on the applicability of KRS 100.253(3) to the facts of the matter *sub judice,* as discussed herein, *infra*, and not intended as a commentary on whether or not the Pettys had standing to bring an action to enforce the ordinance itself.

acknowledged that no action had been filed by any party to remove the carport prior to the instant action, despite the fact that the carport had been in existence for more than ten years.

On appeal, the Feltys argue that this order, coupled with the previous order of summary judgment dated July 27, 2009, violates KRS 100.253. The Pettys disagree, arguing that the doctrines of laches and estoppel do not apply to prevent the enforcement of a city ordinance, and that the Feltys were clearly in violation of applicable city ordinances when they constructed the carport in question.

At the outset, we note that the standard of review applicable to an appeal of a summary judgment is well-established. An appellate court must decide whether the trial court correctly ruled that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Barnett v. Hospital of Louisa, Inc.,* 64 S.W.3d 828, 829 (Ky.App. 2002). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56.03.

Summary judgment should only be granted when it appears that it would be impossible for the non-moving party to produce sufficient evidence to succeed at trial. *Paintsville Hosp. Co. v. Rose,* 683 S.W.2d 255, 256 (Ky. 1985). Because there are no disputed facts involved with summary judgments, we review

the decision of the trial court without deference. *Kreate v. Disabled American Veterans,* 33 S.W.3d 176, 178 (Ky.App. 2000).

In reviewing the arguments of the parties, we note that KRS 100.253 provides as follows:

> (1) 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, except as otherwise provided herein.
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> (2) The board of adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted, nor shall the board permit a change from one (1) nonconforming use to another unless the new nonconforming use is in the same or a more restrictive classification, provided, however, the board of adjustment may grant approval, effective to maintain nonconforming-use status, for enlargements or extensions, made or to be made, of the facilities of a nonconforming use, where the use consists of the presenting of a major public attraction or attractions, such as a sports event or events, which has been presented at the same site over such period of years and has such attributes and public acceptance as to have attained international prestige and to have achieved the status of a public tradition, contributing substantially to the economy of the community and state, of which prestige and status the site is an essential element, and where the enlargement or extension was or is designed to maintain the prestige and status by meeting the increasing demands of participants and patrons.
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> (3) 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. Thereafter, such use shall be governed by the provisions of subsection (2) of this section.
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> (4) The provisions of subsection (3) of this section shall not apply to counties containing a city of the first class, a city of the second class, a consolidated local government, or an urban-county government.

On appeal, the Feltys argue that the court's finding that the structure violated the five-foot setback line applicable in the City of Flatwoods necessarily implies a finding that the violation began twelve years ago when the structure was built. The Feltys assert that this finding, coupled with the court's finding that no person or entity had brought an action to remove the structure for more than ten years after it was built, renders the summary judgment a nullity. Thus, the Feltys argue that the doctrine of laches should prevent the Pettys from bringing this action as the carport is a non-conforming use pursuant to KRS 100.253(3) and that, accordingly, any action to remove the structure for violation of a regulation must have been brought within the ten-year period set forth in the statute.

In response, the Pettys note that the Feltys did not respond below to the request for an admission that the Feltys did not apply for a construction permit to construct the carport. Thus, the Pettys argue that pursuant to CR 37 the fact is deemed admitted. Likewise, the Pettys note that the Feltys did not obtain a variance allowing the carport to be constructed within the five-foot setback rule required by the city ordinance of Flatwoods. Accordingly, the Pettys assert that the Feltys did not exhaust their administrative remedies, and did not attack the validity

of the ordinance in the trial court. The Pettys therefore argue, in reliance upon *Goodwin v. City of Louisville,* 215 S.W.2d 557 (1948), and *Perkins v. Joint City County Planning Commission*, 480 S.W.2d 166 (Ky. 1972), that as they did not exhaust administrative remedies and attack the ordinance itself, but merely sought to have the use of their property declared a valid nonconforming use, they are not permitted to seek judicial relief. Further, the Pettys argue in reliance upon *Deerfield Company v. Stanley*, 441 S.W.2d 119, 121 (Ky. 1969), that a non-conforming use may not be continued merely because the enforcing officials have failed to take action to prevent it for a long time. Likewise, they argue that the doctrine of estoppel does not apply to a city, and accordingly, should not apply in this case. *See Attorney General v. Johnson*, 355 S.W.2d 305 (Ky. 1962).[3]

In reviewing the arguments made by the parties, we note that the argument made concerning the exhaustion of administrative remedies was not presented to the court below. Accordingly, we do not believe it is appropriately before this Court for review and we decline to address it further herein. *See Perkins v. Joint City County Planning Commission*, 480 S.W.2d 166 (Ky. 1972).[4] Further, we are not persuaded by the Pettys reliance upon *Deerfield,* as that matter concerned non-conforming use statute KRS 100.068, which has since been

[3] Citing 101 C.J.S. Zoning, Section 390, p. 1235, for the proposition that a municipality cannot be estopped from enforcing a zoning regulation against a violator by the conduct of its officials in permitting such violations to occur in the past, as in the enforcement of a zoning ordinance, bylaw, regulation, or restriction, a municipality or other governmental subdivision acts in its governmental capacity, as distinguished from its proprietary capacity.

[4] Holding that, "[W]hen the point was not raised at the trial level and was developed only in the briefs, it is not properly before us for review."

repealed. Moreover, what the Pettys assert is the "holding" of *Deerfield*, namely that a non-conforming use may not be continued simply because officials have failed to enforce it for a long time, is actually the *Deerfield* Court's interpretation of the holding in *Attorney General v. Johnson, supra.*

A review of *Attorney General v. Johnson*, however, reveals that it is a case primarily centered upon whether a non-conforming use had been abandoned for a period of almost five years. In addressing this issue, the *Johnson* court did cite to 101 C.J.S. Zoning, Section 390, p. 1235, which addresses the conduct of city officials in encouraging or permitting violations. In the matter *sub judice*, however, there is no evidence that any permit for the carport was sought or granted, erroneously or otherwise. Indeed, there is no evidence that city officials were even aware of the carport at issue or that any city official had ever been contacted regarding same. Accordingly, we do not believe *Johnson, Deerfield*, or the doctrine of estoppel to be applicable to the matter *sub judice.*[5]

Having reviewed the arguments of the parties, this Court believes the issues to turn on the application of KRS 100.253(3) to the facts of the matter *sub judice*. Having reviewed that statute, we believe that the carport at issue clearly falls under the parameters of KRS 100.253(3). Certainly, there is no dispute that the carport was constructed more than ten years ago. Likewise, there is no dispute that it has existed illegally, namely without permit, that is in violation of the five-

[5] Likewise, we do not believe the applicability of the doctrine of laches to be an inquiry necessary to the determination of the matter *sub judice*. As discussed herein, *infra*, this Court believes the issues raised by the parties may be determined solely on the basis of interpretation of the governing statute at issue.

foot setback ordinance, and that it has not been the subject of an adverse action until the filing of the Pettys' complaint herein. Accordingly, this Court believes that the carport is clearly a "non-conforming use" as that term is defined by the statute, and that the Feltys are entitled to the continuance of its use in the manner which they have been using it from the time of its original construction.

Certainly, our courts have clearly held that nonconforming use constitutes a legitimate, vested property right and enjoys broad constitutional protection. *Dempsey v. Newport Bd. of Adjustments*, 941 S.W.2d 483 (Ky.App. 1997). Based upon the undisputed facts in the matter *sub judice*, the Feltys' carport clearly falls under the parameters of KRS 100.253, and as the court below conceded no action prior to the instant matter had been brought to contest that use. Accordingly, we believe the order of summary judgment against the Feltys to have been in error, and we reverse.

Wherefore, for the foregoing reasons, we hereby reverse the July 27, 2009, order of summary judgment entered by the Greenup Circuit Court, and remand this matter for additional proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Greenup, Kentucky

BRIEF FOR APPELLEE:

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