RENDERED: JULY 26, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000872-MR

GLEN HILL — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JUDGE
ACTION NO. 00-CI-00658

BARREN RIVER HEALTH DEPARTMENT;
CABINET FOR HEALTH SERVICES — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; McANULTY, AND MILLER, JUDGES.

McANULTY, JUDGE: Glen Hill appeals a judgment of the Warren Circuit Court affirming the final Order of the Secretary of the Cabinet for Health Services, which approved a permit for an on-site sewage system located on property adjacent to the appellant's residence. We affirm.

Glen Hill owns a residence located on Lot 59 in Pleasant Place Subdivision in Bowling Green, Kentucky. William Fishback, a home builder, is the owner of an adjacent lot, Lot 58, and undertook to construct a home on the lot. On January 7, 1997, Fishback filed an On-site Sewage Disposal System

Construction Application and Permit with the Barren River District Health Department (Health Department). Fishback subsequently filed for and received five variances relating to repair area and setback distance requirements. The granting of the variances resulted in the approval to install a septic system on Lot 58. On October 15, 1998, pursuant to KRS 211.260, Hill filed an appeal with the Secretary of the Cabinet for Health Services (Cabinet Secretary) objecting to the granting of the variances and approval of the septic system for Lot 58.

On March 5, 1999, a public hearing on the appeal was held before Administrative Law Judge (ALJ) Elizabeth A. Johnson. On May 12, 1999, the ALJ entered a recommended order. The order recommended remanding the matter to the Health Department for a reconsideration of its decision to grant a permit and variances for the septic system on Lot 58. Specifically, the order recommended that the case be remanded for the Health Department (1) to determine the number of bedrooms in the Lot 58 residence, and (2) to determine whether a system should be approved for a lot with a zero percent repair area when the only alternative if the system fails is a holding tank. The order also directed the Health Department not to approve a septic system that was not of the proper size and not in compliance with the applicable regulations. The recommended order notified the parties that each had fifteen days from the date of the recommended order to file exceptions to the recommendations. The Health Department filed exceptions to the recommended order; Hill, however, did not

file any exceptions. The order was subsequently adopted by the Cabinet Secretary as his own.

On July 21, 1999, the Health Department issued a reconsideration determination. The Health Department determined that the Lot 58 house had two bedrooms; that the onsite sewage disposal system was properly sized; and that the variances granted were in compliance with the Kentucky Onsite Sewage Disposal System Regulations. Hill again appealed to the Cabinet Secretary, and a hearing was conducted on December 8, 1999, before a successor ALJ, Lori Payne Eisele. On March 29, 2000, the successor ALJ filed a recommended order holding (1) that the evidence supported Fishback's contention that the residence had two bedrooms and, as such, the 1,200 square foot septic system was properly sized; (2) that the evidence supported approval of a variance for a zero repair area, even though the only alternative if the system fails is a holding tank; (3) that none of the variances granted was for a prohibited purpose; (4) that Hill failed to prove by a preponderance of evidence that the July 21, 1999, reconsideration determination was incorrect; and (5) that if Hill had additional concerns with the system beyond those addressed in the reconsideration determination "he should address those in an appropriate forum." On April 19, 2000, the Cabinet Secretary entered an order adopting the recommended order as his own.

Hill then appealed the Cabinet Secretary's decision to the Warren Circuit Court. On March 6, 2001, the circuit court entered an order upholding the Cabinet Secretary's decision on

the basis that it was supported by substantial evidence. This appeal followed.

First, there is a dispute concerning the scope of our review in this appeal. Hill advocates a broad-based review under which essentially all of the issues raised in the course of the administrative proceedings may be addressed in this appeal. The Health Department, on the other hand, maintains that Hill's failure to file exceptions to the initial May 12, 1999, recommended order resulted in the narrowing of the issues in the case to those issues specifically identified for further reconsideration on remand and a waiver of all other issues. The relevant paragraphs in the May 12, 1999, recommended order are as follows:

CONCLUSIONS OF LAW

> 5. The undersigned concludes that the Health Department made its decision to grant the variances based on the evidence presented by William Fishback and evidence presented by the inspectors. However, the information provided to the Health Department was inaccurate as to the number of bedrooms in the house. Therefore, the approved septic system is not adequate for the size of the home.
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> 6. Secondly, the lot does not have a sufficient repair area. A repair area is defined as "an area, either in its natural state or which is capable of being modified, consistent with this regulation, which is reserved for the installation of an additional lateral field(s) and is not covered with permanent structures or impervious materials." 902 KAR 10:085, Section 2(25). A 100% repair area is required for sites classified as provisionally suitable. 902 KAR 10:085, Section 4. Lot 58 has been deemed provisionally suitable but has a 0% repair area.

> 7. After reviewing the evidence in this matter, the undersigned concludes that the septic system installed on lot 58 is likely to fail and cause damage to Mr. Hill's property, Lot 59. Because of the 0% repair area, the only alternative once the system fails is a holding tank, which is an expensive option. Based on the new information provided at the hearing, the undersigned orders the Health Department to reconsider its decision to grant a permit and variances for a septic system on Lot 58. On reconsideration, the Health Department shall determine the number of bedrooms in the house so that a determination can be made as to the proper size of the septic system needed. Additionally, the Health Department must determine whether a system should be approved for a lot with a 0% repair area when the only alternative if the system fails is a holding tank. The Health Department shall not approve a septic system that is not of proper size and not in compliance with the applicable regulations.

Based upon the foregoing, on remand, the Health Department limited the scope of its reconsideration to the issues of (1) the number of bedrooms in the Lot 58 residence, and (2) the repair area issue. In the subsequent appeal to the Cabinet Secretary, the ALJ likewise declined to consider any matters beyond the bedroom and repair area issues. The circuit court similarly limited the scope of its review to these two issues. As a result, a review of matters by the successor ALJ, the Cabinet Secretary, and the circuit court beyond these two issues is not included in the appellate record.

KRS 13B.110 establishes the administrative procedure to be followed by agencies when an ALJ is used to conduct a hearing and propose recommendations. 13B.110(4) provides that each party must be given fifteen days from the date the recommended order is mailed within which to file exceptions. We construe the May 12,

1999, recommended order as providing for no more than a remand for the Health Department to consider the two issues of (1) number of bedrooms, and (2) repair area. We disagree with Hill's contention that the inclusion of the language "[t]he Health Department shall not approve a septic system that is not of proper size and not in compliance with the applicable regulations" as indicating that the ALJ intended a broad-based remand for complete reevaluation of all issues. The ALJ's explicit identification of two specific issues for reconsideration on remand belies Hill's interpretation. We construe the cited language as applicable to the two issues specifically identified for reconsideration on remand.

Hence, to preserve issues beyond the two identified by the ALJ, Hill was required to file exceptions pursuant to KRS 13B.110(4). See Swatzell v. Commonwealth, Ky., 962 S.W.2d 866 (1998). In summary, we are persuaded that by not filing exceptions to the initial recommended ALJ order, Hill failed to preserve any issues not designated to be considered by the Health Department on remand. The only issues specified in the order to be considered concerned the number of bedrooms in the residence and the repair area issue. We will accordingly limit our review to these two issues.

We now address the two issues which are preserved, beginning with the issue concerning the number of bedrooms in the Lot 58 residence.

Initially, Fishback represented to the Warren County Building Inspector that the Lot 58 residence would be a three-

bedroom home. However, when he applied for approval of the septic system, Fishback represented to the Health Department that the home would be a two-bedroom home. Size and capacity requirements for a septic system is determined by the number of bedrooms in the residence. If the residence is, in fact, a three-bedroom home, it appears uncontested that the septic system would not meet Health Department size and capacity standards. On the other hand, if the residence is a two-bedroom home, the septic system would be of adequate size.

On remand, the Health Department determined that the residence is, in fact, a two-bedroom home. Health Department Director of Environmental Health Services Barry Turner stated that he arrived at this conclusion based upon three factors. First, he and Health Department worker David Burton personally viewed the site and reconciled the house with the floor plans which had been provided by Fishback indicating the house to be a two-bedroom house with an office. Second, though two previous building permit applications reflected that the home was a three-bedroom home, the amended application indicated that the home was a two-bedroom home. Third, Fishback filed an affidavit swearing that the house was a two-bedroom house. In addition, Fishback testified that he represents to potential buyers of the property that the residence is a two-bedroom residence. Based upon this evidence, the Cabinet Secretary accepted the Health Department's conclusion that the Lot 58 home had two bedrooms, not three.

In reviewing a decision by an administrative agency, the reviewing court is "bound by the administrative decision if

it is supported by substantial evidence." Commonwealth Transportation Cabinet v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990). Substantial evidence is defined as evidence which, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Bowling v. Natural Resources, Ky. App., 891 S.W.2d 406, 409 (1994). In weighing the substantiality of the evidence supporting an agency's decision, a reviewing court must hold fast to the guiding principle that the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972). An agency's decision may be supported by substantial evidence even though a reviewing court may have arrived at a different conclusion. Id. Furthermore, if an agency's findings are supported by substantial evidence, "the findings will be upheld, even though there may be conflicting evidence in the record." Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 856 (1981). Simply put, "the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes." Commonwealth Transportation Cabinet v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990).

Hill contends that the Cabinet Secretary's conclusion that the house was a two-bedroom house was erroneous because the house was converted from three bedrooms to two bedrooms merely by converting one of the bedrooms to an office, and there is nothing to prevent the office from being converted back to a bedroom.

While Hill's argument is credible, nevertheless, based upon the evidence of record, so is the Cabinet Secretary's conclusion that the residence is a two-bedroom structure. The finding of the Cabinet Secretary that the house is a two-bedroom residence is supported by substantial evidence, and we are constrained to accept the finding.

Next, 902 KAR 10:085, Section 4 (8)(c) requires that sites classified as provisionally suitable, such as Lot 58, "shall have a minimum repair area equal to 100 percent of the area occupied by the lateral field set aside in addition to [other] space required. . . ." It is uncontested that there is no repair area, i.e., zero percent repair area, on Lot 58, but that a variance to the requirement was granted, subject to the installation of a holding tank with an alarm system. In its Final Determination letter following remand, the Health Department stated as follows:

> A variance was issued relative to the lack of adequate repair on this lot. The issuance of variances where there is less than one hundred (100 %) percent repair area is a common practice and is consistent with this health department's past practice and that of other health departments in the state of Kentucky. In consideration of this variance and the variances issued by the health department relative to setback distances, the onsite sewage system installed on Lot #58 is in compliance with the Kentucky Onsite Sewage Disposal Systems Regulations (902 KAR and 902 KAR 10:081).
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> None of the variances that were issued will make this system any more likely to fail; however, in the unlikely event of a system malfunction, a holding tank with an alarm could be installed and the holding tank pumped as necessary by a licensed septic tank cleaner. If done properly, this is an

> acceptable practice and would result in no public health nuisance or groundwater contamination. This could prove to be costly, but the costs should not be a deciding factor for the health department or a concern of Mr. Hill.

902 KAR 10:081, Section 14, permits a variance to be issued for minimum repair area requirements. The Health Department's final determination reflects that it is not uncommon for a variance to be granted for inadequate repair area. Further, the determination indicates that none of the variances granted will make the system any more likely to fail. There was hearing testimony presented by Barry Turner, Director of Environmental Health Services for the Health Department, consistent with the conclusions stated in the determination. Mr. Turner also testified that he did not "have any reason to believe that the granting of this variance will cause a public health nuisance." On the whole, we are persuaded that there is substantial evidence in the record to support the Cabinet Secretary's decision to uphold the variance for inadequate repair area.

Finally, Hill requests that he be awarded attorney fees as a penalty against the appellees pursuant to KRS 13B.110(1). However, as Hill has failed to prevail in this matter, he is not entitled to an award of attorney fees.

For the foregoing reasons the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James R. Laramore
Bowling Green, Kentucky

BRIEF FOR APPELLEE BARREN RIVER DISTRICT HEALTH DEPARTMENT:

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