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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001336-MR

DOUG ARNOLD; WAYNE LYSTER; and MARGARET LYSTER — APPELLANTS

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 04-CI-00282

WOODFORD COUNTY BOARD OF ADJUSTMENT MEMBERS; SAM DOZIER, BILL GOODAN, DAVID PREWITT, FRANK STARK, TIM TURNEY; and VERSAILLES UNITED METHODIST CHURCH, INC. — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** ** ** ** **

BEFORE: TAYLOR, JUDGE; ROSENBLUM,[1] SENIOR JUDGE, MILLER,[2] SPECIAL JUDGE.

ROSENBLUM, SENIOR JUDGE: Doug Arnold, Wayne Lyster, and Margaret Lyster ("Arnold and Lyster") appeal from an order of the Woodford Circuit Court, entered June

[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

6, 2005, affirming a decision of the Woodford County Board of Adjustment ("Board") granting a conditional land use permit to the Versailles United Methodist Church ("Church"). Finding error, we affirm in part and reverse in part and remand.

BACKGROUND

The Church applied to the Board for a conditional use permit to construct a church and associated buildings on the northeast corner of Paynes Mill Road and Lexington Road in Woodford County, Kentucky. On September 7, 2004, the Board held a public hearing on the matter. The Board received testimony both for and against the Church's application. Arnold and Lyster opposed the permit and offered testimony against granting it. On October 4, 2004, the Board approved by unanimous vote the request for the conditional use permit. Specifically, the Board's factual findings were:

> . . . . [t]hat the Religious Land Use and Institutionalized Persons Act of 2000 applies to the action that this Board is to take, that action being an individualized assessment of this proposal for a religious institution, and
>
> . . . . the regulation of churches in the Woodford County Zoning Ordinance substantially burdens a religious exercise, in particular that the Versailles United Methodist Church which by all accounts and testimony needs to expand, and
>
> . . . . the concerns raised by opponents to this request although legitimate and serious concerns do not rise to the level of being compelling public interests as required by the law, and
>
> . . . . there are no steps presented either in evidence or in the application that if taken by the Board are acceptable as being the least restrictive means of achieving a compelling interest, subject to the conditions contained in this motion . . . .

The Board approved the Church's application for the conditional use permit subject to the following conditions:

1. The use of the property is limited to those listed on the "conditional use permit site plan" as reviewed at the public hearing for this application;
2. Access to the subject property is limited to Paynes Mill Road;
3. The number and location of proposed buildings are limited to that shown on the "conditional use site plan";
4. Existing buffering along Paynes Mill Road is to remain;
5. Non-Ministry commercial uses such as restaurants, book stores and consumer services as not requested and not being religious in nature are prohibited;
6. The Planning Commission must per the applicable regulation approve the site development plan for the site;
7. All lighting on the site shall be full cut-off lighting with the point source of light not visible from adjacent properties; and
8. The sign for the use will not [have] moving parts or electronic changing messages of any kind.

Arnold and Lyster appealed the Board's decision to the Woodford Circuit Court. On June 6, 2005, the court entered an order affirming the decision of the Board. This appeal followed.

STANDARD OF REVIEW

It is well-established that a court's review of the action of an administrative agency is limited to "review, not reinterpretation." *Jones v. Cabinet for Human Resources, Division for Licensure & Regulations,* 710 S.W.2d 862, 866 (Ky.App. 1986)(citation omitted). A reviewing court (either appellate or circuit) may not substitute its judgment for that of an administrative agency even though it might have reached a different result. *Kentucky State Racing Commission v. Fuller,* 481 S.W.2d, 298, 308-309

(Ky. 1972). The Supreme Court of Kentucky articulated this standard of review as follows:

> [T]he scope of judicial review of zoning action taken by public bodies, both administrative and legislative, is limited to determining whether the action was arbitrary, which ordinarily involves these considerations: (1) whether the action under attack was in excess of the powers granted to the public bodies [;] (2) whether the parties were deprived of procedural due process by the public bodies[;][and] (3) whether there is a lack of evidentiary support in the findings of the public bodies[.]

Fallon v. Baker, 455 S.W.2d 572, 574 (Ky. 1970)(citing *American Beauty Homes Corp. v. Louisville & Jefferson Co. Planning & Zoning Commission*, 379 S.W.2d 450 (Ky. 1964)). A board's factual findings are not deemed to be arbitrary if they are supported by substantial evidence, which is defined as "'evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men.'" *Fuller*, 481 S.W.2d at 308 (citation omitted).

DISCUSSION

Arnold and Lyster argue that the court erred when it found that the Board made findings of fact in compliance with KRS[3] 100.111(7). We agree.

Chapter 100 of the Kentucky Revised Statutes sets forth the legislative authorization and general scheme for local planning and zoning. A "conditional use" is statutorily defined in the chapter as:

> [a] use which is essential to or would promote the public health, safety, or welfare in one or more zones, but which would impair the integrity and character of the zone in which

[3] Kentucky Revised Statutes.

> it is located, or in adjoining zones, unless restrictions on location, size, extent, and character of performance are imposed in addition to those imposed in the zoning regulation . . . .

KRS 100.111(5). Additionally, KRS 100.111(7) defines a conditional use permit as:

> legal authorization to undertake a conditional use, issued by the administrative official pursuant to authorization by the board of adjustment, consisting of two (2) parts:
> (a) A statement of the factual determination by the board of adjustment which justifies the issuance of the permit; and
> (b) A statement of the specific conditions which must be met in order for the use to be permitted[.]

Thus, both statutory parts (i.e., facts and conditions) are required of a valid conditional use permit. Accordingly, there must be a statement of the factual determination made by the Board of Adjustment which justifies the issuance of the permit. Here, the Woodford Circuit Court affirmed the Board's decision to issue the conditional use permit and stated:

> The state's highest court in Davis v. Richardson, 507 S.W.2d 446 (Ky. 1974) held that "the factual determinations made by the [B]oard should demonstrate that it had considered the effect of the proposed land use on the public health, safety and welfare in the zone affected, in adjoining zones and on the overall zoning scheme." Id. at 449. The Court also stated, "[A] specific conclusionary statement that the conditional use would promote the public health, safety or welfare was a *sine qua non* to the grant of a permit . . . ." In this case if the Board had to make this type of conclusionary statement, the granting of the permit would have to be overturned because there is none here in this case. It would be advisable to do so in the future.

The court recognized that *Davis* required the Board to make factual determinations within the scope of KRS 100.111. Nevertheless, the court erred because it concluded that the Board did not have to make specific findings as to the effect of this particular land use on

the "public health, safety or welfare" in that particular location. *See Davis, supra*. *See also* KRS 100.111(5).

Here, the Board made no findings of the type described by the *Davis* court and KRS Chapter 100. The Board made only four findings and all were related to the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Significantly, the Board failed to make any findings relating to the effect that the Church's proposed use would have on the public health, safety or welfare in that location. Thus, we determine that the Board's action in granting the permit was arbitrary because it lacked substantial evidentiary support. *See Fallon* and *American Beauty, supra*. Accordingly, we must reverse and remand for additional findings to be made by the Board in accordance with the above.

Similarly, the Board's findings also fail to show a substantial burden to the Church's right to religious exercise under RLUIPA. The Board used conclusory language in its four findings without adequate reference to any of the evidence before it. The Board found that the "regulation of churches in the Woodford County Zoning Ordinance substantially burdens a religious exercise, in particular that the Versailles United Methodist Church which by all accounts and testimony needs to expand . . . ."

RLUIPA specifically prohibits any government agency from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious institution, unless the government demonstrates that imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling

governmental interest. 42 U.S.C. § 2000cc (a)(1); *see also Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1220 (C.D. Cal. 2002).

We agree with the Church that the Board should consider the provisions of RLUIPA when making its determination of whether to issue a conditional use permit. However, a religious entity is not free to use RLUIPA as a shield from all other applicable hurdles to obtain a use permit. We note that Senators Hatch and Kennedy, sponsors of RLUIPA, stated:

> This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations . . . .

146 *Cong. Rec. S.* 7774, 7776 (July 27, 2000). Thus, not only must the Board still make its factual findings in compliance with KRS 100.111 and *Davis*, but it should also consider whether the Church would be substantially burdened in a religious exercise because of the land use regulation.

The Supreme Court has articulated the substantial burden test differently over the years. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In *Lyng*, the Supreme Court stated that for a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs. 485 U.S. at 450-51, 108 S.Ct. 1319; *see also Thomas*, 450 U.S. at

717-18, 101 S.Ct. 1425 (holding that a substantial burden exists where the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs ····"). Conversely, a government regulation does not substantially burden religious activity when it only has an incidental effect that makes it more difficult to practice the religion. *Id.*; *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient. *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

Here, by the Board's logic, a religious entity could obtain a conditional use permit and build anywhere it wanted without regard to KRS 100.111 and *Davis*, merely because it wants to expand to larger facilities. The factual findings of the Board were conclusory statements without substantial supporting evidence sufficient to "induce conviction in the minds of reasonable men." Consequently, again, we reverse and remand for additional findings.

Arnold and Lyster also contend that the circuit court erred by entering extensive "Findings of Fact" because it amounted to a *de novo* review of an administrative agency's decision. We agree.

In its June 6, 2005, Order affirming the Board's decision, the Woodford Circuit Court stated it "has reviewed that record and makes **its** findings as to the relevant facts as follows . . . ." (emphasis ours). Thereafter, the court enumerated some forty "Findings of Fact" of its own, gleaned from the testimony at the Board's hearing on the matter. Additionally, one of the court's findings was that the Church was "precluded

from expanding on its current location because it is landlocked." The Board did not make such a finding. As noted above, the Board made only four conclusory findings related to RLUIPA. Such a finding by the court amounts to a *de novo* review, in violation of *American Beauty, supra*. Moreover, the court's order concludes that substantial evidence supported the Board's action by referencing the court's own findings of fact, also in violation of *American Beauty, supra*. The court was to have determined whether the Board's four factual findings were supported by substantial evidence, not create new evidence. Accordingly, upon remand, the Board, not the court, is to determine the findings of fact consistent with the above.

Finally, Arnold and Lyster argue that the circuit court erred in finding that they waived their right to pursue a declaratory judgment action. We disagree.

The court entered an Agreed Order allowing Arnold and Lyster forty-five (45) days to file a brief in support of their complaint and appeal, which included a request for declaratory relief. However, when they filed the brief, they failed to address the claim for declaratory relief. All parties to this action signed the Agreed Order of the court without objection and were aware of their responsibilities. Because Arnold and Lyster's brief did not include support for the request for declaratory relief, the court properly dismissed that action as waived. More importantly, where an exclusive statutory remedy such as KRS 100.347[4] has been provided, an action for declaratory judgment is improper. A comparison of the prayer for relief set forth in the appeal and the declaratory judgment

[4] Includes an appeal from an action of the Board of Adjustment.

action reveals that the claims and relief sought in each are identical. Accordingly, the court properly dismissed the declaratory judgment action.

Finally, we note that Arnold and Lyster have withdrawn an argument on appeal that RLUIPA is unconstitutional and thus that issue is moot.

CONCLUSION

For the foregoing reasons, we affirm that portion of the judgment of the Woodford Circuit Court dismissing the declaratory judgment action. We otherwise reverse the judgment of the Woodford Circuit Court and remand this cause for additional proceedings consistent with this opinion.

ALL CONCUR.

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