RENDERED: JANUARY 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000603-MR

ROBERT HAMLIN and
MARY HAMLIN APPELLANTS

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 06-CI-00526

DANVILLE-BOYLE COUNTY
BOARD OF ADJUSTMENT;
DANVILLE-BOYLE COUNTY
PLANNING AND ZONING
COMMISSION;
MARION "PETE" COYLE;
PAULA BARY;
VIRGIE JOHNSON; VICKEY GOODE;
JERRY ROGERS;
SHIRLEY ROGERS;
WOODY LEAVELL;
WINCE ROGERS; OPAL ROGERS;
DONALD GRUBBS;
JIMMY CLOYD; LINDA CLOYD;
MIKE COCANOUGHER;
STEPHANIE COCANOUGHER;
and LONNIE BARNETT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXION AND MOORE, JUDGES; KNOPF, SENIOR JUDGE.[1]

MOORE, JUDGE: This case involves two separate orders and a convoluted procedural history, but in essence involves the resolution of only one question: are the appellants, Robert and Mary Hamlin, precluded from litigating the issue of whether they have a right to maintain a junkyard on their property?[2] The Boyle Circuit Court held that they are so precluded and that an injunction forcing them to remove over fifty vehicles from their property was proper. We affirm its decision.

The procedural history of this case and the Hamlins' method of litigating it[3] are more confusing than the issue actually involved; as mentioned

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

[2] The Hamlins' prehearing statement before this Court provides that the issue presented on appeal is "whether the appellants are precluded from litigating their status as a non-conforming user under the applicable statues [sic]," and that this appeal will turn on interpretation or application of "KRS 100 et seq."

[3] In their brief before this Court, the Hamlins also offer the argument that their junkyard actually does qualify as a nonconforming use, pursuant to KRS 100.253(3), and contend that the circuit court erred in failing to recognize this. Further, they allege that the circuit court could not have reviewed the administrative record because the plastic wrapping covering the record appears to remain intact.

We do not review either of these arguments because the Hamlins failed to include them in their prehearing statement. *See* Kentucky Rules of Civil Procedure (CR) 76.03(8). Even if we were to ignore CR 76.03(8) regarding this latter argument, however, it remains meritless. The record was never sealed in such a manner so as to make it evident that it was never reviewed. Rather, the plastic wrapping can be removed and replaced (as this Court accomplished) without disturbing the condition of the plastic material. The plastic material, once replaced around the record, easily clings to it. But, more importantly is the fact that the circuit court included in its opinion references to the evidence contained in that record to support the Board's decision. In short, there is no reason whatsoever to impugn the integrity of the circuit court on this issue.

above, it involves an appeal of two orders: one rendered December 17, 2004, and another rendered October 19, 2006. To avoid confusion, we separately analyze these orders; the facts of this case will be developed within the contexts of these separate analyses.

I. THE DECEMBER 17, 2004 CEASE AND DESIST ORDER

A. Relevant facts leading up to the order

Robert and Mary Hamlin own two adjoining tracts of farmland on Stewart's Lane in Boyle County, Kentucky, zoned as agricultural/residential. Robert stores inoperable vehicles, junk equipment, building materials and other items on these tracts; he claims he began this practice on one tract as early as 1987 and on the other sometime after 1995. The zoning ordinance of Boyle County defines Robert's use of his property as a "junkyard." Consequently, this is not in conformity with an agricultural/residential use.

On July 9, 2004, the Compliance Administrator for the Planning and Zoning Commissioner sent a letter to Robert, stating

> [a] recent site visit to your property has revealed well over 50 vehicles, of varying types and uses located throughout the property. The Zoning Ordinance allows for up to three (3) inoperable and/or unlicensed vehicles per location. More than three (3) inoperable and/or unlicensed vehicles would constitute a junkyard by definition within the Zoning Ordinance.

The letter further advised Robert that if he wished to continue using his property in that manner, he would need to apply for a conditional use permit. Robert Hamlin received this letter but ignored it. When the Compliance Administrator followed

up his letter with a personal visit on July 16, 2004, Robert claims he told him that he thought that his use of his property, as a junkyard, had been "grandfathered in."

In a December 17, 2004 letter addressed only to Robert, the Compliance Administrator stated in relevant part:

> Consider this letter a Cease & Desist Order for the removal of the 50+ vehicles from your property located on Stewarts Lane. Five months has [sic] passed since our initial meeting regarding the complaint on file in our office regarding this issue. No action of any kind has been taken on your part to resolve this Ordinance violation as of this date.
>
> You are hereby ordered to effect removal of the vehicles no later than Jan 16, 2005. Failure to adhere to this order may result in further action by the Danville-Boyle County Planning Commission in the filing of a criminal complaint in Boyle District Court. Violations of the provisions of the ordinance or failure to comply with any of its requirements shall constitute a misdemeanor as per Section 3.7 of the Zoning Ordinance and shall upon conviction thereof be fined not less than $100 but no more than $500 for each conviction. Each day of the violation shall constitute a separate offense.

B. Relevant facts subsequent to the order

Robert claims he never received the December 17, 2004 cease and desist order. However, on June 25, 2005, Robert was personally served with a criminal summons from the Boyle District Court. The summons alleged that Robert had violated the Boyle County zoning ordinance by maintaining a junkyard on his property without either obtaining a conditional use permit or registering his junkyard with the planning and zoning commission as a nonconforming use. The

summons cited the December 17, 2004 cease and desist order and its January 16, 2005 deadline.

Additionally, on September 21, 2006, in a hearing before the Danville-Boyle County Board of Adjustment on the unrelated subject of Robert and Mary Hamlin's application for a conditional use permit, a copy of the December 17, 2004 cease and desist order was entered into evidence as an exhibit. The Hamlins and their attorney were also informed at that hearing that the December 17, 2004 cease and desist order had never been administratively appealed. To date, Robert and Mary have never administratively appealed this order.

On November 17, 2006, the Hamlins petitioned the Boyle Circuit Court for a declaration of rights regarding the December 17, 2004 cease and desist order. They asked the circuit court to hold, as a matter of law, that their appellate rights relating to that order never ripened because the notice they received did not comport with the minimum requirements of due process as stated in *Godman v. City of Fort Wright*, 234 S.W.3d 362 (Ky. App. 2007). The circuit court dismissed the Hamlins' petition, holding that their window for an administrative appeal of the December 17, 2004 order had expired and that it was final as a consequence.

C. Analysis: Whether the Hamlins have a right to appeal the December 17, 2004 order

Regarding the statutory time period for an administrative appeal in this context, KRS 100.261 provides that, upon receipt of actual notice, "any

person, or entity[,] claiming to be injuriously affected or aggrieved by an official action, order, requirement, interpretation, grant, refusal, or decision of any zoning enforcement officer" shall take an appeal to the Board within thirty days thereafter. In *Taylor v. Duke*, 896 S.W.2d 618 (Ky. App. 1995), we interpreted this statute to mean that where a party had not received written notice of an adverse decision or the opportunity to participate in a hearing, it had thirty days after it received actual notice of the Board's action to appeal the decision, irrespective of the date the order was actually entered.

Here, the latest the Hamlins could have become apprised of this order was September 21, 2006, when it was introduced as an exhibit at the hearing regarding the Hamlins' application for a conditional use permit. As stated above, the Hamlins have, to date, taken no such appeal. Nonetheless, the Hamlins contend that this thirty-day appellate period does not apply to them even if they did have actual notice of the Compliance Administrator's action prior to the expiration of any thirty-day period. In support, they cite to *Godman, supra*, and its holding that appellate rights relating to this kind of action do not ripen unless the notice of that action comports with the minimum requirements of due process. We disagree with their interpretation of *Godman*.

Godman states that minimum due process requires that the notice an appellant must receive of an administrative agency's action must 1) set out the reasons for the action; and 2) advise of the obligation to appeal to the administrative agency. *Id.* at 369. Here, the Hamlins had actual notice of the

reasons for the Compliance Administrator's action. The July 9, 2004 letter advised that over 50 vehicles were on the Hamlins' property and, in the absence of a conditional use permit, the law allowed only for three at most. Additionally, the December 17, 2004 cease and desist order specified that the presence of the "50+ vehicles" violated the county zoning ordinance and ordered their removal.

Moreover, the Hamlins had actual notice of their obligation to administratively appeal the Compliance Administrator's action when the Hamlins and their counsel were advised during the September 21, 2006 conditional use permit hearing before the Board of Adjustments that the December 17, 2004 cease and desist order had never been appealed. Following receipt of this information the Hamlins not only failed to appeal the cease and desist order within thirty days, they instead waited almost sixty days, and even then addressed it before the circuit court, rather than the administrative agency.

In short, the period of time in which to appeal the Compliance Officer's December 17, 2004 cease and desist order has expired. Accordingly, the issue of whether the Hamlins have any right to maintain a junkyard on their property is settled, so long as the order is not void. The resolution of this issue depends upon our analysis of the October 19, 2006 order.

II. THE OCTOBER 19, 2006 ORDER DENYING THE HAMLINS' REQUEST FOR A CONDITIONAL USE PERMIT

A. Relevant facts leading up to the order

Unlike the previous order, the history of the October 19, 2006 order is far more complicated. And, it is made more complicated by the fact that the Hamlins' appeal of the October 19, 2006 order does not actually represent an appeal of that order at all. Rather, the Hamlins' ostensible appeal of that order is, at its heart, a collateral attack upon the validity of the December 17, 2004 cease and desist order.

As stated above, Robert Hamlin was personally served with a criminal summons from the Boyle District Court on June 25, 2005. The summons alleged that Robert had violated the Boyle County zoning ordinance by maintaining a junkyard on his property without either obtaining a conditional use permit or registering his junkyard as a nonconforming use, and it referenced as its basis the December 17, 2004 cease and desist order.

On March 31, 2006, as a condition of holding the criminal proceedings in abeyance, Robert and Mary applied to the Danville-Boyle County Board of Adjustment for a conditional use permit to allow for a junkyard on their property. A number of adjoining property owners, who stated that they would be seriously injured if such a permit were granted, intervened and opposed the Hamlins' application. The sole issue before the Board was whether to grant or deny the Hamlins' application for a conditional use permit.

The confusion surrounding the October 19, 2006 order resolving the matter of their application began at a September 21, 2006 hearing before the Board. In their brief, the Hamlins state that the question of whether they had any

preexisting right to maintain a junkyard on their property constituted no part of the proceedings before the Board of Adjustments relating to their application for a conditional use permit.[4] The record of those proceedings, however, contradicts this statement. There, the Hamlins' counsel asked the Board if it would allow the Hamlins to register their junkyard as a nonconforming use (*i.e.*, recognize that they had a preexisting right to operate a junkyard) as an alternative to issuing them a conditional use permit:

> Counsel: Robert believes that this property was, quote, grandfathered into the zoning ordinance. Your zoning ordinance has a requirement in it that if it's there at the adoption of the ordinance, you have sixty days to register it with the commission. Robert indicates to me he was not aware of that requirement and did not register it. I believe had he registered it, we would not even be here today.
>
> . . . .
>
> Robert was cited under a criminal statute in district court. We raised the issue of the preexisting condition or the grandfather clause. In pretrial talks with Mr. Campbell and a representative of your commission, at their request we agreed to ask for a conditional use permit to sort of satisfy hopefully and cooperate with the commission and everyone, as to both the existence and location of this material.
>
> . . . .
>
> So what we're really asking, depending on how your attorney advises you, is either to waive the 60-day requirement, let use register, because that's all that

[4] The Hamlins clarify that any discussion of whether they had a right to maintain a junkyard on their property would have been "illogical since a request for a conditional use permit involves the assumption that one has no legal right to a specific use[,]" and that "a claim of right . . . would not necessitate a conditional use."

> technically is keeping us from operating legally under your ordinance, and give us a conditional use permit with reasonable and appropriate restrictions.

The Hamlins concluded their argument before the Board without offering any evidence demonstrating that their junkyard was essential to or promoted the public health, safety, and welfare in the area where it is located. Nor, for that matter, did the Hamlins offer any evidence demonstrating how or why their junkyard qualified as a nonconforming use that could be registered.

The intervening landowners then presented their case before the Board. They urged the Board not to waive the Hamlins' failure to register their junkyard as a nonconforming use. They argued that, to be a nonconforming use, the use in question had to have been legal prior to the adoption of any zoning ordinance making it nonconforming.[5] To demonstrate that the junkyard could not have been a preexisting legal use, they introduced the Compliance Administrator's December 17, 2004 cease and desist order as an exhibit, as well as copies of the zoning ordinance as it appeared at all times relevant to the Hamlins' operation of their junkyard, which demonstrated that the Hamlins' use of their property as a junkyard had never been legal at any time. They also argued that because the Hamlins had never appealed the December 17, 2004 order's essential

[5] This theory tracks the language of KRS 100.253(1), which provides that "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." However, it ignores the alternate rule for determining nonconforming uses, which is specified in KRS 100.235(3). That rule specifies that "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."

determination that the Hamlins had no right to use their property as a junkyard, the issue could not be raised.

On October 19, 2006, the Board of Adjustment voted to deny the Hamlins' application for a conditional use permit. In its written opinion, the Board concluded that the Hamlins produced no evidence demonstrating that their proposed conditional use (*i.e.*, junkyard) was essential to, or promoted, the public health, safety, and welfare in the area where it is located. Further, the Board held that there were no conditions that the Board could impose which would effectively prevent the aesthetic, environmental, and economic damage which the conditional use would cause.

Finally, the Board's opinion also stated that its denial meant that the junkyard was not protected as a preexisting and nonconforming, or "grandfathered," use "because there has not been a conditional use permit granted for this property and the Zoning Ordinance in effect when the junkyard was created required a conditional use permit for junkyards[.]"

B. Relevant facts subsequent to the order

As stated above, on November 17, 2006, the Hamlins petitioned the Boyle Circuit Court for a declaration of rights. As it relates to this October 19, 2006 order, the Hamlins included with that petition an appeal, pursuant to KRS 100.347. There, the Hamlins did not contest the Board's denial of their request for a conditional use permit or whether its denial was supported by substantial evidence of record. Instead, the Hamlins took umbrage with that portion of the

Board's order stating that its denial of the conditional use permit meant that their junkyard was not protected as a preexisting and nonconforming use. They contended only that the use of their property was *exempt* from any regulation (*i.e.*, that it qualified as a preexisting nonconforming use per KRS 100.253(3)) because they had illegally maintained a junkyard on their property and had received no adverse order regarding that junkyard for a period exceeding ten years.

On this basis, the Hamlins asked the circuit court for the following relief: (1) an order overturning the October 19, 2006 order of the Board and allowing the Hamlins to continue operating the junkyard on their property as a nonconforming use; (2) a declaration, pursuant to KRS 418.040, that the Hamlins' junkyard qualified under KRS 100.253(3) as a valid nonconforming use; and (3) an injunction to prevent enforcement of any order prohibiting the Hamlins from maintaining a junkyard on their property. In sum, the Hamlins *asked the circuit court to declare that they had a right to maintain a junkyard on their property*. As such, the Hamlins' appeal of the October 19, 2006 order necessarily attacked the validity of the Compliance Administrator's December 17, 2004 cease and desist order.

Two groups opposed the Hamlins in this action: (1) the governmental appellees, which consisted of the Danville-Boyle County Board of Adjustment, the Danville-Boyle County Planning and Zoning Commission, and their respective members in their official capacities; and (2) the same group of adjoining landowners who had intervened before the Board of Adjustment. Both groups

asked the circuit court for an injunction, based upon the December 17, 2004 cease and desist order, to force the Hamlins to remove the vehicles from their property. And, as stated above, both groups argued that this order was enforceable because the Hamlins did not administratively appeal it within thirty days of its issuance and could not contest its merits before the circuit court.

The circuit court granted summary judgment in favor of the governmental appellees and intervening landowners, holding that the Hamlins could not litigate the issue of nonconforming use because they had failed to exhaust their administrative remedies by timely appealing the December 17, 2004 cease and desist order. The circuit court also held that because the Hamlins could not appeal the December 17, 2004 order and because substantial evidence supported the denial of the conditional use permit, they likewise could not contest the issuance of an injunction to enforce it. The Hamlins appealed.

C. Analysis: Whether the Hamlins may collaterally attack the validity of the December 17, 2004 order

As a preliminary matter, we agree with the Hamlins that the October 19, 2006 opinion and order of the Board, from which this appeal ostensibly arises, could not have disposed of whether the Hamlins had any kind of right to maintain a junkyard on their property. It appears that the Hamlins put the subject of their right to maintain a junkyard on their property at issue in those proceedings and the October 19, 2006 order purports to have decided that issue. However, the question of the Hamlins' right to maintain a junkyard on their property had already been

answered in the negative and disposed of, prior to October 19, 2006, in the Compliance Administrator's December 17, 2004 cease and desist order. As a consequence, that part of the Board's opinion addressing this matter was purely advisory and could not somehow revitalize the period of time for appealing the December 17, 2004 cease and desist order if that time had expired.

In most cases, this result would mandate dismissing the remainder of this appeal. However, if the December 17, 2004 cease and desist order was void for want of jurisdiction either of the person or subject matter, then it is subject to collateral attack. *Grooms v. Grooms*, 225 Ky. 228, 7 S.W.2d 863, 866 (1928). A collateral attack of a judgment differs from a direct attack of a judgment; where a direct attack calls a judgment into question in a proceeding for a new trial, through an appeal, or through an action to vacate, modify, or set it aside for fraud, a collateral attack is an attack made on a judgment in any other way.[6] *Id.* This rule

[6] We treat the Hamlins' ostensible appeal of the October 19, 2006 order as a collateral attack upon the validity of the December 17, 2004 cease and desist order, as it does not constitute a direct attack upon the December 17, 2004 cease and desist order and could succeed only if the underlying action of the enforcement officer was void for want of jurisdiction. This strategy was originally recognized in *Goodwin v. City of Louisville*, 309 Ky. 11, 215 S.W.2d 557, 559 (1942):

> [T]he right to an injunction or declaratory judgment in circumvention of a hearing and determination by similar administrative agencies has been denied because of the adequacy of the legal remedies through use of the statutory administrative processes, which are regarded as exclusive when the case is within their purview. But direct judicial relief is held available without exhaustion of administrative remedies where the statute is charged to be void on its face, or where the complaint raises an issue of jurisdiction as a mere legal question, not dependent upon disputed facts, so that an administrative denial of the relief sought would be clearly arbitrary. The concept of the term jurisdiction embraces action, or contemplated action, by the body without power and in the given case, it is necessary for the judiciary to restrain the agency in order to prevent irreparable injury.

applies with equal force to administrative decisions made by an agency acting in a judicial or quasi-judicial capacity. *Department of Conservation v. Sowders*, 244 S.W.2d 464, 467 (Ky. 1951). *See also Kentucky Bd. of Hairdressers and Cosmetologists,* 393 S.W.2d at 888 ("judicial relief [as distinguished from administrative appeal process] is always available to directly attack a void administrative order.") The rule, then, is that if a judgment is collaterally attacked, the court will merely determine whether the court or agency wherein it was rendered had jurisdiction of the parties and of the subject matter of the action. *Rollins v. Board of Drainage Com'rs. of McCracken County for Mayfield Drainage Dist. No. 1*, 281 Ky. 771, 136 S.W.2d 1094, 1097 (1939). It is well understood, however, that "judgment may not be so impeached for mere errors or irregularities committed in the course of the proceeding by the court in the exercise of its jurisdiction." *City of Hickman v. First Nat. Bank in City & State of N.Y.*, 307 Ky. 702, 211 S.W.2d 801, 802 (1948).

The Hamlins argue that the Compliance Administrator did not have jurisdiction to render its order and that its order was consequently void because (1) Mary Hamlin was an indispensible party and the order does not name her; and (2)

(Internal citations omitted.) This tactic has also been utilized and discussed in other cases, including *Kentucky Board of Hairdressers and Cosmetologists v. Stevens,* 393 S.W.2d 866 (Ky. 1965); *Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, 602 S.W.2d 427 (Ky. 1980); *Alcorp, Inc. v. Barton*, Not Reported in S.W.3d, 2003 WL 22064248 (Ky. App.); and *Thomas v. Cynthiana-Harrison County-Berry Joint Planning Com'n*, Not Reported in S.W.3d, 2008 WL 4601243 (Ky. App.).

the Hamlins did not receive the December 17, 2004 cease and desist order in the mail. In sum, they contend that personal jurisdiction was lacking. We disagree.

The rules regarding the necessity of joining "indispensable parties" to litigation are defined by the requirements of CR 19.01. However, the Civil Rules, and particularly CR 19.01, do not apply in this type of proceeding until after the appeal has been perfected to the circuit court. *Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978). *See also* CR 1. Accordingly, CR 19.01 cannot supply a basis to void this order.[7] Moreover, regardless of any joinder issues, the injunction against Robert applies to Mary with equal force because Mary received actual notice of the injunction as a result of the circuit court's order and has been a co-owner of the property with Robert at all relevant times. *See* CR 65.02(2) ("Every restraining order or injunction shall be binding upon the parties to the action, their officers, agents, and attorneys; and upon other persons in active concert or participation with them who receive actual notice of the restraining order or injunction by personal service or otherwise.") As such, we cannot find that the order is void on this basis.

Also, while the Hamlins argue they did not receive a copy of the cease and desist order in the mail, the order is not void as a result. In *Godman, supra,* a landowner similarly did not receive notice of an adverse action taken by an enforcement officer via certified mail. However, we emphasized that the

[7] Although tangential to this issue, the Supreme Court of Kentucky has also held that a nonparty cannot collaterally attack a judgment on the ground that CR 19.01 had not been complied with. *Murphy v. Lexington-Fayette County Airport Bd.*, 472 S.W.2d 688, 690 (Ky. 1971).

determination was not void for lack of notice because the landowner had actual notice of the enforcement officer's determination (*i.e.*, he acknowledged receipt of the letter). *Id.* at 369. In the case at bar, the Hamlins likewise had actual notice of the enforcement officer's determination; even assuming that Robert Hamlin never received it in the mail, he certainly was made aware of it as a result of the June 27, 2005 criminal summons, and it was introduced as an exhibit at the September 21, 2006 conditional use permit hearing. Robert Hamlin and his attorney (who represented both Robert and Mary) attended that hearing. As such, Robert and Mary Hamlin had actual notice of this order and its contents, at the latest, on September 21, 2006. In light of the above, we cannot consider this order void or subject to collateral attack.

CONCLUSION

Considering these facts, as well as the total circumstances of this case, we agree with the circuit court and find that the Hamlins' appellate rights have expired. And when the Hamlins failed to avail themselves of an appeal within thirty days, as mandated by KRS 100.261, the cease and desist order became final and not subject to appellate review. As such, the injunction must stand, and we affirm the decision of the Boyle Circuit Court.

ALL CONCUR.

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