RENDERED: MARCH 19, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002048-MR

LAWRENCE R. RIDDLE; RUTH S. SAMS; ROBERT F. MCGONNELL; ALBERT R. HAEBERLIN; GENEVA J. HAEBERLIN; MARGARET G. LANIER; JERALD J. GOB; GEORGE WILLIAM MCBRIDE; GEORGE E. FISCHER; AND NORVIN F. GREEN — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 08-CI-006956

LOUISVILLE/JEFFERSON COUNTY METRO PLANNING COMMISSION; FINCASTLE GROUP, LLC; AND EUGENIA F. FALLS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, STUMBO AND WINE, JUDGES.

ACREE, JUDGE: After the Louisville/Jefferson County Metro Planning Commission granted an application to subdivide property owned by Appellees Fincastle Group, LLC and Eugenia F. Falls, the Appellants filed an appeal pursuant

to Kentucky Revised Statutes (KRS) 100.347(1) to challenge the subdivision. The Jefferson Circuit Court dismissed the appeal for failure to name all "applicants" as required by KRS 100.347(4). We affirm.

R. Stephen Canfield as president and on behalf of Canfield Development, Inc. filed an application with the planning commission to subdivide certain real property owned by Fincastle and Falls. The planning commission held a hearing on May 29, 2008, and approved Canfield's subdivision plan application.

Appellants own separate individual parcels of real property adjacent to or nearby the subject real estate. They filed their appeal of the final subdivision approval in Jefferson Circuit Court, naming the planning commission, Fincastle and Falls as appellees, but failing to name Canfield in any capacity.

Fincastle and Falls filed a motion to dismiss the appeal arguing the statutory scheme for appeals from planning commission decisions requires the naming of the subdivision applicant as a party. Specifically, Fincastle and Falls asserted that Appellants did not name Canfield as required by KRS 100.347(4). That subsection states: "The owner of the subject property *and applicants who initiated the proceeding* shall be made parties to the appeal." (KRS 100.347(4)(emphasis supplied). On September 30, 2008, the circuit court entered an opinion and order granting the motion to dismiss.

This case turns on the sole question whether failing to name Canfield as a party in the circuit court action is fatal to the appeal. We conclude it is.

The Kentucky Supreme Court noted,

> [t]here is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, a strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy.

Bd. of Adjustments of Richmond v. Flood, 581 S.W.2d 1, 2 (Ky. 1979). The jurisdictional issue in this case involves a question of law; therefore, we review it *de novo*. *See Appalachian Reg'l Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 53-54 (Ky. 2007).

In *Flood*, the Kentucky Supreme Court determined that failure to join the board of adjustment, as required by KRS 100.347(1), was fatal to the appeal; naming the parties identified in the statute was a prerequisite to the invocation of the circuit court's appellate jurisdiction. *Flood*, 581 S.W.2d at 2; KRS 100.347(1) ("The board of adjustment shall be a party in any . . . appeal filed in the Circuit Court"). The Court determined that because the parties failed to make the board of adjustment a party, "one of the conditions precedent to the exercise of judicial power by the circuit court was not met and it was required to dismiss the appeal for want of jurisdiction." *Flood*, 581 S.W.2d at 2.

Similar to subsection (1), subsection (4) of KRS 100.347 requires "[t]he owner of the subject property *and applicants who initiated the proceeding* shall be made parties to the appeal." KRS 347.100(4)(emphasis supplied).

Appellants first argue that the meaning of "applicants" in the context of KRS 100.347 is ambiguous. We believe no ambiguity exists. The meaning of "applicant" is quite clear – it is the party filing the application. In this case, the applicant was the party pursuing a major subdivision of Fincastle's and Falls' real property – that party was Canfield Development, Inc.

The application and the planning committee staff report, as well as the docket of the development review committee of the Louisville Metro Planning Commission, all reflect that Canfield Development, Inc. was the applicant. Nevertheless, Appellants urge us to conclude that the term "applicant" might mean many things, for example: developer, owner, or subdivider. True, coincidence might result in the "applicant" also being the owner, developer, or subdivider, in which case such a party would not need to be named twice in the appeal. However, when the "owner of the subject property and applicants who initiated the proceeding," KRS 347.100(4), are *not* one and the same, failing to name each one separately will be fatal to the appeal.

Appellants also argue they substantially complied with the statute by including Fincastle as a party to the appeal since R. Stephen Canfield is the contact person both for Fincastle and for Canfield Development. However, the doctrine of substantial compliance is not an appropriate means of remedying a jurisdictional defect. *See City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). This is particularly so when the appeal is from the final decision of an administrative agency and the right to appeal is a matter of legislative prerogative. *Flood*, 581

S.W.2d at 2. Strict compliance with the enabling statute is required. *Id.* When the statute mandating the requirements for an appeal is not strictly followed, the circuit court does not have jurisdiction. *Id.*

Finally we reject a slightly different version of the preceding argument that the purpose of the statute is to assure all parties have actual knowledge or notice of the action initiated in the circuit court. If that were so, the statute would build unnecessary redundancy into all appeals under KRS 100.347 since notice of the action is the function of Kentucky Rule of Civil Procedure (CR) 4.02. CR 4.02; Kurt A. Philips, et al., Kentucky Practice Series, *6 Ky. Prac. R. Civ. Proc. Ann*. Rule 4.02, Comment 3 (6th ed. 2009)(purpose of CR 4.02 is that it "notifies each defendant that a legal action has been filed against him or her").

In *Flood*, the Supreme Court pointed out this Court's mistake, which we will not repeat here, of "myopically view[ing] the issue" as one controlled by a civil rule. We were told in *Flood*, "The civil rules do not apply in this type of litigation until after the appeal has been perfected." *Flood* at 2, *citing* CR 1 and KRS 100.347(2). With that, the Supreme Court rejected Flood's argument that the statute's purpose was the same as CR 19.01 – to assure indispensible parties were named in the appeal. When Flood argued that the real purpose of the statute was to duplicate a function of the civil rules, he placed the cart before the horse. Appellants in the case before us, with this argument, have done the same thing.

The appeal to the Jefferson Circuit Court was never perfected because the failure to strictly comply with the statute left that court without jurisdiction.

Canfield was not named a party as required by KRS 100.347, the circuit court never acquired jurisdiction to proceed, and the notice function of CR 4.02 never came into play. The circuit court, lacking jurisdiction, had no choice but to dismiss the appeal.

For the foregoing reasons, the September 30, 2008, Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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