RENDERED: NOVEMBER 4, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001360-MR

MARY IVES AND
IVES VETERINARY CLINIC, INC. APPELLANTS

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 14-CI-01217

CITY-COUNTY BOARD OF ADJUSTMENTS
BOWLING GREEN, WARREN COUNTY, KENTUCKY;
KEVIN SHEMWELL, LISA SHEMWELL, LARRY EMBRY,
JUDY EMBRY, DON SPEARS, JUDY SPEARS, CECILE GOFF,
KATHY GOFF, DOUGLAS ROWANS, PATRICIA ROWANS,
BOBBY HUGHES, TERESA HUGHES, ROBERT A. FULLER,
JEFF BROWN, KATHY BROWN, DAVID WOODALL,
RANDAL GIBSON, PATRICIA GIBSON, DONALD SMITH,
SARA SMITH, STEVE WELLS, STEWART ENNIS, SUSAN ENNIS,
JACK MOORE, ELA MOORE, CHARLES CUNNINGHAM, LAURA
CUNNINGHAM, SARA PITTMAN, SAMUEL MATT BRUNT,
STEPHEN BROOKS, AND AMANDA BROOKS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Mary Ives and Ives Veterinary Clinic, Inc., appeal from an order of the Warren Circuit Court affirming the decision of the City-County Board of Adjustments Bowling Green, Warren County, denying Ives's application for a Conditional Use Permit and zoning variance.[1] We affirm.

The Warren Circuit Court succinctly set forth the following underlying facts in its final judgment:

> Mary Ives owns two tracts of adjoining property bordering Rigelwood Lane in Bowling Green, Kentucky. These tracts are 5.236 acres and 8.34 acres, respectfully, and are zoned 'agricultural.' On December 12, 2012, Ives was granted a Conditional Use Permit to construct a veterinary clinic on her 5.236 acre lot. The evidence offered during that hearing consisted of testimony from Ives and one neighbor opposing the permit. The status of that permit is also under appeal in a separate action, Warren Circuit Court, Division 2, Civil Action No. 13-CI-00054. After she was granted the permit she began inspecting the tract and discovered the topography would not permit construction of the veterinary clinic as designed. Ives then obtained a building permit to construct the clinic on her adjoining 8.34 acre tract but she had not received a Conditional Use Permit for that tract. Moreover, a zoning ordinance requires veterinary clinics to be constructed more than 500 feet from a residential zone. The clinic as designed would have been constructed 477 feet from the neighboring residential zone. Ives's neighbors, intervening Appellees herein, discovered her constructing the clinic and a Stop Work Order was issued. Ives ceased construction upon receiving the order. On September 11, 2014, the Board of Adjustments called a hearing to determine whether a Conditional Use Permit would be granted on Ives's 8.34 acre lot and, if granted, whether to issue a variance for

[1] The individual Appellees named in this appeal are neighboring property owners who opposed Ives's request for a Conditional Use Permit.

> the building's encroachment into the 500 foot buffer zone. During this hearing the Board of Adjustments received evidence from Ives and four citizens in opposition to the permit and variance.
>
> Reasons given for opposition included concerns of increased traffic, noise from barking dogs, and parking overflow onto the road. Ives provided the only testimony in favor of issuing the permit and variance. When asked why she began construction on her 8.34 acre lot Ives testified that she believed the original Conditional Use Permit covered both tracts of land. However, she admitted on cross-examination that she signed the original Conditional Use Permit which stated construction was limited to the 5.236 acre lot. Ives was also aware that the original Conditional Use Permit was under appeal, but began construction on her adjoining lot because she was concerned the [appellate] process would take too long. (See TR 1:04:22 and 1:05:50). At the close of evidence the Board of Adjustments voted against issuing the permit and variance 4-1. The Board stated fears that Ives's use of the property would not fit with the existing use of adjacent property and fear of increased traffic congestion and noise as reasons for denying Ives relief. Specifically, Chairman Davenport believed the new site of the building was incompatible with the neighborhood and Ives's intentional construction on an unauthorized lot constituted a willful violation of the zoning ordinance.

Ives appealed the Board's decision to the Warren Circuit Court, arguing the decision was arbitrary and contending she had not committed a willful violation of the zoning ordinance. The circuit court concluded the record did not compel a decision in Ives's favor and affirmed the denial of the Conditional Use Permit and variance. This appeal followed.

Pursuant to KRS 100.237, the board of adjustment has "the power to hear and decide applications for conditional use permits to allow the proper integration

into the community of uses which are specifically named in the zoning regulations which may be suitable only in specific locations in the zone only if certain conditions are met[.]" "The board may approve, modify, or deny any application for a conditional use permit." KRS 100.237(1). "[S]ince zoning determinations are purely the responsibility and function of the legislative branch of government, such determinations are not subject to review by the judiciary except for the limited purpose of considering whether such determinations are arbitrary." *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005).

Article 3, Section 3.8.4 of the Warren County Zoning Ordinance provides, in relevant part:

> The Board of Adjustments shall approve an application for a conditional use permit if, and only if, the applicant has demonstrated that the proposed use and any associated development:
>
> C. Will be compatible with existing uses adjacent to and near the property;
>
> D. Will not be hazardous, detrimental or disturbing to present surrounding land uses due to noise, glare, smoke, dust, odor, fumes or other general nuisance;
>
> E. Will not otherwise adversely affect the development of the general neighborhood or of the district in which the use is proposed;
>
> F. Will be consistent with existing and planned pedestrian and vehicular circulation adjacent to and near the property[.]

In the case at bar, the Board denied the conditional use permit because it found the proposed clinic would not be compatible with the surrounding residential

neighborhood, the clinic would increase traffic congestion, and it would create a nuisance for neighboring landowners.

Ives, who bore the burden of proof before the Board, was denied relief at the administrative level. On appeal, she asserts the Board's decision to deny her application was arbitrary because it was not supported by substantial evidence. In *Bourbon County Bd. of Adjustment v. Currans*, 873 S.W.2d 836 (Ky. App. 1994), this Court explained:

> [T]he failure to grant administrative relief to one carrying the burden is arbitrary if the record compels a contrary decision in light of substantial evidence therein. Not infrequently, contestants appear at the judicial level arguing that the administrative decision is not supported by substantial evidence when the board has offered no relief in the first instance. In other words, the board has ruled that the one having the burden of proof—usually the applicant—has failed. In such cases, attention should be directed to the administrative record in search of compelling evidence demonstrating that the denial of the relief sought was arbitrary. The argument should be that the record compels relief. The argument that there is no substantial evidence to support nonrelief is an anomaly.

Id. at 838 (internal citation omitted).

Relying on her own testimony, Ives contends she presented substantial evidence to support granting the permit. Ives points out she agreed to certain restrictions in her application to minimize any traffic congestion and noise from barking dogs that might result from the construction of her clinic. Ives further opines the Board had previously approved her application with the same

restrictions when it granted the permit for the clinic to be built on the adjacent 5.236 acre tract in 2012.

For evidence to compel a different result, the proof in Ives's favor must be so overwhelming that no reasonable person could reach the same decision as the Board. *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985), *overruled on other grounds*, *Haddock v. Hopkinsville Coating Corp.*, 62 S.W.3d 387 (Ky. 2001). Although Ives testified in favor of granting the permit, the Board also heard ample evidence regarding the concerns of the residents who opposed the clinic because it would not be compatible with the surrounding residential neighborhood, it would increase traffic congestion, and it would create a nuisance for neighboring landowners. The Board, as fact-finder, had the sole authority to assess the weight and credibility of the evidence before it. *Ball v. Oldham County Planning and Zoning Com'n*, 375 S.W.3d 79, 86 (Ky. App. 2012). After reviewing Ives's contentions and the evidence presented, we conclude the record does not compel a decision in Ives's favor.

Finally, as to her request for a zoning variance, Ives contends the Board erred by finding her actions constituted a willful violation of the zoning ordinance.

The circuit court addressed this issue in its final judgment, stating, in relevant part:

> 'The board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant

> subsequent to the adoption of the zoning regulation from which relief is sought.' KRS § 100.243(2). Ives denies her actions were a 'willful violation' because she asserts it was an honest mistake and that she is not a lawyer. However, the standard is not 'a knowing violation.' Ives intended to construct a veterinarian clinic at the location in question, and therefore her actions were willful. In Ball v. Oldham County Planning and Zoning Commission, 375 S.W.3d 79, 85 (Ky. App. 2012), the Court of Appeals provided an example of a potential 'willful violation.' Although dicta, the Ball court stated a landowner who purposefully broke up his tract of land into plots smaller than permissible under the applicable zoning ordinance, and selling those plots prior to seeking a variance, would provide a reasonable basis for arguing the landowner committed a willful violation. Thus, a variance seeker who decides to build first and ask questions later can reasonably be accused of committing a willful violation. Ives essentially admitted engaging in this behavior when she stated she could not wait for the [appellate] process to conclude. Therefore, because Ives failed to meet her burden in proving the record compelled a finding in her favor, and because she willfully violated the 500 foot buffer zoning ordinance, the Board's decision to deny her a variance is affirmed.

After careful review, we agree with the circuit court's well-reasoned analysis of this issue and conclude the Board properly denied Ives's request for a variance.

For the reasons stated herein, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR

BRIEFS FOR APPELLANTS:

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