Cite as 2013 Ark. App. 336

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-12-110

LOCA LUNA, LLC, and WILKES-ABERNATHY, LLC APPELLANTS V. BOARD OF ADJUSTMENT, CITY OF LITTLE ROCK ET AL. APPELLEES	**Opinion Delivered** May 22, 2013 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION [NO. CV-2010-7196] HONORABLE WENDELL GRIFFEN, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from a circuit court order affirming the City of Little Rock Board of Adjustment's decision to grant a zoning variance to Greens Investments, LLC, to operate a restaurant despite having inadequate parking facilities on its property. Appellants argue that the circuit court erred in finding undue hardship sufficient to support the grant of a variance and that the circuit court employed an improper standard in reviewing the Board's decision. We find no prejudicial error, and we affirm.

The Little Rock City Code requires restaurants to have one parking space for every 100 square feet of gross floor area. Little Rock City Code–Rev. 1988 (Ark.) § 36-502(b)(3)(c) (current through Dec. 2012). The proposed restaurant requires twenty-two parking spaces, but the property has room for only twelve on-site parking spaces. Little Rock City Code section 36-507(a) provides that not more than twenty-five percent of the total number of required parking spaces may be located off-site. Although the proposed restaurant

would be entitled to locate five parking spaces off-site pursuant to section 36-507(a), this would only yield a total of seventeen parking spaces—leaving the restaurant five parking spaces short. Greens Investments, LLC, therefore sought a variance to allow it to locate an additional five parking spaces off-site. The variance was granted by the Board, and appellants appealed that decision to circuit court, seeking summary judgment on undisputed facts. The circuit court found that, under the stipulated facts, a hardship unique to the individual property existed and that the grant of a variance was in keeping with the spirit and intent of the provisions of the ordinance. This appeal followed.

Appellants argue that the circuit court wrongly interpreted Ark. Code Ann. § 14-56-416 (Repl. 1998), which permits variances in cases of undue hardship resulting from circumstances unique to the property when doing so is in keeping with the spirit and intent of the provisions of the zoning ordinance. Appellants cite numerous authorities from foreign jurisdictions for the proposition that a variance will not be granted to relieve a landowner from the effects of a "self-inflicted hardship." These authorities, however, have never been adopted as Arkansas law. The Arkansas authority that is closest to the circumstances presented here is *City of Little Rock v. Kaufman*, 249 Ark. 530, 460 S.W.2d 88 (1970), where our supreme court held:

> [T]here is substantial evidence to sustain the trial court's finding that strict enforcement of the zoning ordinance would cause undue hardship due to circumstances unique to the individual property under consideration. This is especially so since such variance would not adversely affect other property in the immediate area.

Id. at 532–33, 460 S.W.2d at 89–90. In so doing, the supreme court upheld a finding of

undue hardship in the absence of any evidence of "natural hardship barriers" peculiar to the property, even though the landowner wanted to construct a parking lot for his office building in an impermissible location. Furthermore, the supreme court in *Kaufman* engaged in no discussion of whether the landowner's hardship regarding parking was "self-inflicted," *e.g.*, by rental of office space to a business that required an inordinate amount of parking space. Under this precedent, we think the Board and the circuit court could properly find that the intended use of the property for a restaurant (for which the property was zoned) and the concomitant need for an additional five off-site parking spaces was an undue hardship that would have negligible adverse impact on other property, and that granting a variance to accommodate the use was thus in keeping with the spirit and intent of the provisions of the ordinance.

Appellants also argue that the circuit court erred in its recitation of the standard of review. Appellants are correct. In the course of its opinion, the trial court erroneously cited a "substantial evidence" standard of review that would be appropriate under the Administrative Procedure Act. However, as appellant correctly notes, the applicable standard in appeals from zoning decisions of the Board of Adjustment to the circuit court is *de novo* review pursuant to Ark. Code Ann. § 14-56-425.

Nevertheless, the Arkansas Supreme Court has long held that error is not presumed to be prejudicial and that the appellate court will not reverse for error unless prejudice is demonstrated. *See, e.g.*, *Jim Halsey Co. v. Bonar*, 284 Ark. 461, 688 S.W.2d 275 (1985) (citing *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984)). Here, although the circuit court did

err in its statement of the standard of review applicable to factual findings of the Board, no prejudice could possibly have resulted from this error because there was no dispute regarding the relevant facts: the case was submitted on cross-motions for summary judgment and decided on undisputed facts. The question presented both to the circuit court and in the present appeal involves the application and interpretation of the Arkansas Supreme Court's holding in *City of Little Rock v. Kaufman*, *supra*. This is a question of law to be decided by the court de novo, *Lux Tan, Inc. v. JK Products & Services, Inc.*, 2013 Ark. App. 275, and it is clear from the record that this was the standard employed by the circuit court in applying *Kaufman*, *supra*. Because appellant suffered no prejudice from the errors and surplusage regarding the standard of review in the circuit court's opinion, there was no reversible error.

Affirmed.

WALMSLEY and WOOD, JJ., agree.

Gil Elrod Ragon Owen & Sherman, P.A., by: *Drake Mann*, for appellant.

D. Clifford Ward, Office of the City Attorney, for appellee City of Little Rock, Board of Adjustment.