

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003133-MR

WILLIAM GARFIELD HOWARD and MRS. WILLIAM
GARFIELD HOWARD (AKA TAMMY HOWARD)

APPELLANTS

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, SPECIAL JUDGE
ACTION NO. 94-CI-000104

HARTFORD/BEAVER DAM PLANNING
AND ZONING COMMISSION

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: GUDGEL, CHIEF JUDGE, KNOX, AND MCANULTY, JUDGES.

KNOX, JUDGE: Appellants, William and Tammy Howard, appeal from a summary judgment entered by the Ohio Circuit Court in favor of appellee, Hartford/Beaver Dam Planning and Zoning Commission (the Planning Commission), finding the Howards' operation of a mobile home park located on their property to be in violation of local zoning laws, and ordering them to remove all mobile homes from their property and to cease all operation of their mobile home park thereon.

On January 31, 1994, William Howard purchased an existing mobile home park in downtown Hartford, Kentucky, consisting of approximately 1.75 acres and containing a total of eight (8) mobile home spaces. Apparently, the property had been operating as a mobile home park since the 1950s. According to Howard, there were two (2) mobile homes on the property at the time he purchased it. Shortly after Howard's purchase of the property, the local zoning administrator, Irvin White, visited Howard and, according to White, "told Howard what he needed to do" to bring the mobile home park into compliance with local zoning law.

Four (4) months later, in May 1994, Howard had not yet made any improvements to his property, although he had purchased and placed two (2) or three (3) additional mobile homes in the park. As such, the Planning Commission sued Howard, alleging numerous violations of local zoning law and requesting issuance of a restraining order and, ultimately, an injunction ordering Howard to remove the mobile homes from the area and cease all operation of the property as a mobile home park. The complaint further alleged that Howard had failed to obtain a state permit to operate his mobile home park, as required by KRS 219.330¹ and,

¹KRS 219.330. Permit for operation of park - Application.

No person shall operate a park without having first obtained a permit as provided for in KRS 219.310 to 219.410. An application for a permit to operate a park shall be made to the cabinet upon forms provided by it and shall contain such information as the cabinet reasonably requires, which may include affirmative evidence of ability to comply

(continued...)

additionally, he had neither applied for, nor obtained, permits required under local zoning law, e.g. operational, building, and occupancy permits.

The circuit court issued a restraining order, ex parte, on May 12, 1994, the date the Planning Commission filed its complaint. The court enjoined Howard from: (1) placing additional mobile homes on the property; (2) connecting the existing mobile homes to utilities; and, (3) renting the mobile homes to tenants. Howard was served with the order two (2) weeks later. The following month, in June 1994, Howard moved the court to dissolve the restraining order and allow him to continue to operate and collect rent, pending resolution of the litigation. In response, the Planning Commission moved the court to hold Howard in contempt of the restraining order, alleging that after issuance of the order and in spite of the terms therein, Howard had placed yet another mobile home on the property and had connected the existing homes to utilities.

The circuit court denied Howard's motion to continue operation of his mobile home park and, further, found Howard to be in contempt of the restraining order. However, the court stayed the jail term and fines it imposed, on the condition that Howard begin the process of obtaining the requisite permits to operate his mobile home park.

On July 15, 1994, Howard submitted an application for an operational permit, which was later rejected by the Planning

¹(...continued)
with such reasonable standards and
regulations as may be prescribed.

Commission, apparently on the basis the application was deficient on its face. By letter dated September 16, 1994, counsel for the Planning Commission advised counsel for Howard that due to Howard's impatience in the matter with zoning personnel, Howard was not to communicate further with the zoning administrator. Rather, counsel advised, once a proper application was submitted by Howard, he would personally review it and make recommendations to the Planning Commission.

It is unclear from the record what events transpired over the next eight (8) months. However, by May 1995, the Planning Commission had placed the matter of Howard's mobile home park on its agenda. The minutes from the Commission's meeting on May 16, 1995, addressing the issue, reflect that the Commission accepted Howard's plat, which depicted eight (8) mobile home spaces as well as the following improvements: placement of a chain-link fence along one side of the property and construction of a paved main entrance into the park. The Commission voted to approve the plat on the condition that Howard obtain a state permit before placing additional homes on the property:

William Garfield Howard presented a subdivision developmental plat of a proposed mobile home park to be located in Hartford, on a tract of land located between Locust and Clay Street. The plat showed the allowable eight Mobile Home spaces plus a chain link fence between the Park and Locust Street. A motion was made by William Tichenor to accept the plat on the condition that Howard will get a Kentucky permit before placing any more Homes on the lot or begin operations. The motion was seconded by Lynn Likins. Motion carried without dissent.

By way of a follow-up memorandum dated May 18, 1995, the chairman of the Planning Commission advised Howard, "[T]he Commission voted to permit you to develop the above Park while you wait for a State permit to operate." The memo further advised: "It is important that you do not add trailers or families to the Park until you have provided this agency with a copy of your State permit. Such improvements include the necessary fencing, sewage disposal, water pipes, necessary electrical work, and roadways within the Park."²

Shortly thereafter, the parties executed an agreed order dissolving the restraining order which had been in effect for the past year. The agreed order stated in part, "there has been an interim settlement in this matter" The specific terms of the settlement, however, were not set forth in the order.

Two (2) months after entry of the agreed order, on July 14, 1995, the Planning Commission moved the court to reinstate the restraining order, alleging that Howard had placed three (3) additional mobile homes on his property, in violation of the terms of conditional approval, and had not yet made any of the agreed-upon improvements.

The court heard the motion on July 24, 1995, at which hearing the chairman of the Planning Commission, Keith Dale, testified that the Commission had, in fact, approved Howard's mobile home park because "it just wanted to do whatever it took

²This memorandum appears to enumerate conditions of approval additional to those imposed during the Commission's meeting two (2) days earlier.

to put an end to the problem." Mr. Dale noted that the Commission accepted Howard's development plat even though it was deficient under the local zoning ordinance. When asked whether Howard had been provided a time frame within which to make the required improvements, Mr. Dale testified there was "no real timetable" for them. He further testified that Howard agreed to erect a chain-link fence along the perimeter of the property as well as construct one main entrance into the park, and that in return, the Planning Commission agreed to grant him an operational permit, which Howard would need when he applied for the state permit.

We had some requirements that we felt were necessary for the safety and good of the community, and we asked that he put a chain-link fence down the edge of Locust Street to prevent children and people from running out in the road. And also that he move his driveway to where it would come in off of Clay Street, which is an adjoining street, and that would prevent each mobile home having a drive where cars would constantly be backing in and out onto the side street there.

We told him that if he would agree to do this, then we would grant him a permit which he could then use to apply to the state for a state mobile home permit which he would need before he placed anymore mobile homes on the park.

Mr. Dale concluded that all Howard had to do was "put up a chain-link fence and move a driveway," and "he would've been alright."

Toward the close of the hearing, counsel for the Planning Commission advised the court he believed Howard should be allowed to continue his efforts to improve his property, pursuant to the terms of the Commission's conditional approval:

Court: Should I restrain him from putting up the fence or making one driveway? You want these done anyway, right?

Counsel: I would welcome the court's opportunity to let Howard take remedial actions, but I can't speak for the Commission. My personal opinion is, let him try to take remedial action. Just tell him he can't re-rent; can't move in more people or homes.

On August 1, 1995, the circuit court reinstated the restraining order of May 12, 1994, enjoining Howard from placing additional mobile homes on his property and from re-renting vacant mobile homes. Thereafter, several delays occurred. Howard's attorney withdrew from the matter, and a second special judge was assigned to the case.³ Finally, a trial in the matter was scheduled for March 1997. Meanwhile, on December 20, 1996, Howard obtained a state permit to operate his mobile home park, issued by the Cabinet for Human Resources.⁴

It is not clear from the record whether the Planning Commission was aware that Howard had finally obtained the required state permit. In any event, in January 1997, the Planning Commission moved the court for summary judgment, alleging the same violations as had been alleged in its original complaint, including Howard's failure to secure a state permit. The Commission further alleged, among other things, that Howard's

³The Ohio Circuit judge recused himself from the matter, and the first special judge assigned to the case was subsequently appointed a federal district judge.

⁴The Cabinet for Health Services is now responsible for issuing operational permits.

development plat was deficient, as was his application for a local operational permit, and his acreage was inadequate under the zoning ordinance (which required a 2-acre minimum). The Commission made no mention of its conditional approval of Howard's mobile home park or the terms thereof.

The motion for summary judgment was heard on February 13, 1997, at which hearing Howard was not present. The court granted the Commission's motion for summary judgment, finding that Howard had failed to secure the proper operational permits and that his mobile home park otherwise violated local zoning law.

Howard, proceeding pro se when the Planning Commission's motion for summary judgment was filed, later testified he had not known about either the motion or the hearing. It was later discovered that the Commission's motion had, in fact, been forwarded to Howard at an incorrect address. As such, the court set aside its summary judgment and allowed Howard to respond to the Commission's motion.

In his response, Howard argued his property was "grandfathered in" as a mobile home park when the local zoning ordinance was adopted in 1991 and, as such, constituted a nonconforming use which was not subject to local zoning laws in the first place. Nonetheless, he noted in his affidavit, he was asked to make the following improvements, all of which, he alleged, he has made: (1) move the individual driveways; (2) erect a fence along Locust Street; (3) place a gate in the fence, to be used as a fire exit; (4) build porches for every home; (5)

submit blueprints showing the location of every home; (6) install new electrical connections and poles for each home; (7) bring the sewage disposal system into compliance with local health department regulations; (8) install new water pipes; and, (9) construct sidewalks from the road to each of the homes.⁵

In addition to his own affidavit, Howard submitted the affidavit of William Tichenor, a former member of the Planning Commission who was present at the Commission's meeting of May 16, 1995, and made the motion to approve Howard's mobile home park pending issuance of a state operational permit. Mr. Tichenor testified, in part:

I served on the Commission from October 12, 1994, until December 14, 1995. During the time I was a member of the Commission, it had a lawsuit pending against Mr. and Mrs. William Garfield Howard. The purpose of this suit was to stop Mr. Howard from operating a mobile home park located at the corner of Clay and Locust Streets in Hartford, Kentucky. I was not in favor of proceeding with the suit and do not believe the Commission was treating Mr. Howard fairly.

At the time the Commission voted to allow Mr. Howard to operate his mobile home park, I was familiar with the rules, regulations, and ordinances governing the Hartford/Beaver Dam Planning and Zoning Commission. Based on my knowledge of the proceedings of the Commission dealing with William Garfield Howard, I can state that William Garfield Howard was in compliance with the rules, regulations, and ordinances governing the Hartford/Beaver Dam Planning and Zoning Commission, except that he did not have a license or permit from the state health

⁵Later, in a hearing addressing Howard's motion for relief pending appeal in this matter, Howard testified that among his expenses incurred in improving the property, he spent \$5,000.00 erecting the fence, \$6,500.00 constructing the new driveway, and \$8,000.00 in electrical repairs.

department. If Mr. Howard has since then obtained a permit from the state health department, then he would have come into compliance with all such rules, regulations, and ordinances.⁶

On October 8, 1997, the court re-heard the Planning Commission's motion for summary judgment, this time with counsel for Howard present. Counsel for the Commission claimed that although the parties entered into an agreed order dissolving the original restraining order, as a result of the Commission's conditional approval of Howard's mobile home park, they thereafter disagreed concerning the specific terms of conditional approval and, as such, never reduced those terms to writing. Thus, counsel argued, there was "no actual agreement ever put in place." Counsel for Howard countered that Howard had, in fact, made all the improvements he had been asked to make. Even had there been no agreement between the parties, he argued, Howard nonetheless now has a state permit, which he could not have obtained absent compliance with local zoning laws.

On November 10, 1997, the circuit court entered summary judgment in favor of the Planning Commission. The court found no merit in Howard's nonconforming use argument, holding that Howard's failure to obtain a state operational permit in a timely manner interrupted the use of the property and destroyed its nonconforming character. The court further found, among other things, that Howard failed to file a proper application for a local operational permit as well as a sufficient development

⁶The state health department permit is one in the same as the state operational permit referenced several times in this opinion.

plat, concluding that Howard's mobile home park violates both KRS Chapter 219 ("Mobile and Recreational Vehicle Park") and local zoning law, and ordered Howard to remove the eight (8) mobile homes currently on the property and cease operation of the property as a mobile home park.

On appeal, Howard argues the Planning Commission did not establish it would be impossible for him to prevail in this matter, given the affidavits in the record, and considering that he has, in fact, obtained a state permit to operate his mobile home park. Further, Howard argues, there is a question of fact concerning whether he has fulfilled the terms of the Planning Commission's conditional approval of his park.

We should note here that we do not believe there is a question of nonconforming use in this case. Howard's agreement to bring his property into compliance with certain of the local ordinance's mobile home park regulations, we believe, nullifies any argument he may have had that his property is not at all subject to local zoning law. Indeed, both he and the Planning Commission approached this case, from its inception, as an expansion, more or less, of Howard's small mobile home lot, containing only two (2) homes at the time he purchased it, in which case such an expansion would nonetheless have been subject to current zoning law even if the property had constituted a valid nonconforming use. See KRS 100.253.

The Commission maintains that, contrary to the representations made in the parties' agreed order, it never really reached an "agreement" with Howard and implies, we

believe, that it never really approved the park, with or without conditions. However, the minutes of the Commission meeting on May 16, 1995, the follow-up letter from the chairman to Howard on May 18, 1995, and the testimony of the chairman on July 24, 1995, all indicate there was, in fact, conditional approval of Howard's mobile home park as well as an agreement reached concerning the conditions imposed.

Both the record of the minutes and the testimony of Keith Dale, the chairman of the Planning Commission, reflect that Howard was obligated only to erect a chain-link fence and construct one main entrance into the park. Mr. Dale's memo to Howard, however, dated two (2) days after the Commission approved Howard's plat, seems to impose additional conditions upon Howard. Howard himself, through his affidavit, alleges numerous improvements he was asked to make to the mobile home park, all of which, he maintains, he has made. We believe there is a genuine issue of fact concerning the terms of the agreement reached, i.e. the conditions imposed by the Planning Commission, and, further, whether Howard has met those conditions.

"[A]s in all summary judgment cases, we must consider two questions: 1) Are there any genuine issues as to material facts, and 2) is there entitlement to judgment as a matter of law? All considerations are loaded in favor of the non-movant." Palmer v. Bank of Louisville & Trust Co., Ky. App., 682 S.W.2d 789, 791 (1985) (citations omitted). As stated above, we believe there are questions of material fact remaining in this case.

For the foregoing reasons, we reverse the judgment of the Ohio Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kent Overstreet
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Michael McKown
Hartford, Kentucky