

RENDERED: September 19, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-001926-MR

DONALD MOORE; SANDRA S.
MOORE; BARBARA DELVIN;
TOM MEIHAUS; ALLESON MEIHAUS;
KEVIN TALBERT; VIRGINIA MOLIQUE;
AND ANTHONY J. DEYE APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 00-CI-02301

B&Z DEVELOPMENT, INC.;
CITY OF FORT WRIGHT; AND
FORT WRIGHT CITY COUNCIL APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; McANULTY, JUDGE; AND HUDDLESTON,
SENIOR JUDGE.¹

McANULTY, JUDGE: This is an appeal from an order of the Kenton
Circuit Court denying the appellants' motion to intervene in the
proceedings below, and from an order adopting a settlement

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

agreement entered into among the appellees and dismissing B&Z Development, Inc.'s zoning appeal and petition for declaratory judgment. The appellants contend that their motion to intervene should have been granted and that, for various reasons, the circuit court erred in adopting the settlement agreement and dismissing B&Z's zoning appeal and petition for declaratory judgment. Because the circuit court properly denied B&Z's motion to intervene, and because the remaining issues are not properly before us, we affirm.

B&Z Development, Inc. (B&Z) is the owner of an approximately 60-acre tract located in the City of Fort Wright. On August 13, 1998, B&Z submitted an application to the Kenton County Municipal Planning and Zoning Commission (Planning and Zoning Commission) to rezone the tract to a zoning classification which would accommodate uses such as department stores, grocery stores, and small retail establishments.

On September 3, 1998, the Planning and Zoning Commission held a public hearing on B&Z's application. Following the hearing the Planning and Zoning Commission recommended approval of the zone change. On September 15, 1998, the Fort Wright City Council (City Council) voted to adopt the Commission's recommendation for the zone change subject to eleven conditions, including that a Stage I Development Plan be submitted to the Planning and Zoning Commission for review,

recommendation, and approval, and that the Plan be adopted by the City Council. The City Council's vote was adopted as Ordinance 576-98.

In October 2000, B&Z completed its proposed Stage I Development Plan. Under the plan, a Wal-Mart supercenter would function as the anchor retail establishment of the development. The Planning and Zoning Commission voted 14 to 1 to approve the Plan. Upon learning that Wal-Mart was to be the anchor establishment, various members of the community, including the appellants, commenced a public campaign to challenge the development.

On October 11, 2000, the City Council conducted a public hearing to review B&Z's Stage I Development Plan. At the hearing the City Council heard evidence concerning the traffic impact of the proposed development. Based upon the traffic impact evidence, the City Council denied B&Z's proposed Stage I Development Plan.

On November 8, 2000, B&Z filed an "Appeal and Complaint for Declaratory Judgment" in Kenton Circuit Court contesting the City Council's denial of its Stage I Development Plan. The appeal was brought pursuant to KRS² 100.347(3), and the petition for declaratory judgment was brought pursuant to KRS 418.040. Named as Defendants/Appellees in the circuit court

² Kentucky Revised Statutes.

case were the City of Fort Wright and the Fort Wright City Council.

During the pendency of the circuit court case, B&Z developed a revised Stage I Development Plan. It appears that the revised Stage I Plan was prepared in consultation with the City of Fort Wright and the City Council. Eventually, the City of Fort Wright, the City Council, and B&Z entered into a settlement agreement under which B&Z's revised plan would be adopted by the City Council and the circuit court case would be terminated as moot. The settlement agreement was advertised as an agenda item and presented to the City Council in a public hearing held on May 22, 2002, following which the City Council voted to accept the agreement.

As a result of the turn of events, on June 5, 2000, the appellants filed a motion to intervene in the circuit court proceeding. In their motion to intervene the appellants sought to challenge both the settlement agreement and the merits of the revised Stage I Development Plan. B&Z and Fort Wright objected to the intervention on the basis that the pending proceeding had become a moot controversy with the approval of the revised Stage I Plan.

On June 26, 2002, the first reading was held on Ordinance No. 9-02, an ordinance adopting and approving B&Z's revised Stage I Development Plan. On July 10, 2002, the

settlement agreement was executed by the parties to the circuit court case, and, also, the second reading of Ordinance 9-02 was held. At that time the ordinance approving the revised Stage I Development plan was enacted.

On August 14, 2002, the circuit court entered an order denying the appellants' motion to intervene. The circuit court stated that to permit the appellants to intervene would "create a confusion of issues." Also on August 14, the circuit court entered an "Agreed Order and Judgment" "adopt[ing] as its judgment" the July 10, 2002, settlement agreement³ and dismissing the case with prejudice.

³ The settlement agreement stated, in relevant part, as follows:

WHEREAS, a revised development plan for the site has been negotiated among the parties so that a Stage One Development Plan for the site acceptable to all parties can be adopted making the questions pending in the lawsuit moot.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties agree to settle the present action under the following terms and conditions.

1. The City will enact an Ordinance substantially in the form of Exhibit "A" attached hereto. [The ordinance, among other things, provided for the settlement of the circuit court case and the approval of the revised Stage I Plan.]

2. That when effective that Ordinance will render all of the matters in controversy in this lawsuit moot.

3. That upon enactment of the Ordinance the parties hereto will jointly apply to the Kenton Circuit Court for entry of a judgment approving the Ordinance and dismissing this lawsuit with prejudice.

First, we address the appellants' contention that the circuit court erred by denying their motion to intervene in the circuit court proceeding.

B&Z's "Appeal and Complaint for Declaratory Judgment" reflects that its exclusive purpose was to challenge the City Council's denial of its initial Stage I Development Plan. During the pendency of the circuit court proceedings, however, B&Z developed a revised Stage I Plan which superceded the initial Plan. After developing the revised Stage I Development Plan, B&Z no longer sought to defend the original Stage I Plan, but rather sought to implement the revised Plan. On June 5, 2002, when the appellants filed their motion to intervene, the subject matter of the circuit court proceeding, B&Z's challenge to the City Council's rejection of the initial Stage I Plan, was moot.

In their June 5, 2002, motion to intervene, in support of their motion, the appellants identified three legal issues. First, the appellants alleged, in effect, that the adoption of the revised Stage I Development Plan by settlement agreement did not comply with rezoning procedures; second, the appellants alleged that the adoption of the revised Stage I Development Plan by settlement was improper because there was no public hearing regarding the revised Plan; and third, the appellants alleged that the revised Plan was improper because it violated

the zoning ordinance requirements for a neighborhood shopping center.

In its order denying the appellants' motion to intervene, the circuit court stated as follows:

the court concludes, based upon review of the entire record in this case, that the motion to intervene should be denied. If movants have a cause of action, it is from any subsequent decision and action of the defendant City, and not the City's action appealed herein. To permit intervention would, in this court's view, create a confusion of the issues.

CR⁴ 24.01, which addresses intervention as a matter of right, provides, in relevant part, as follows:

(1) Upon timely application anyone shall be permitted to intervene in an action . . .

(b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

As a practical matter, the "disposition of the action" in this case amounted to a dismissal of B&Z's appeal and petition for declaratory judgment as moot. While in the meantime the parties did enter into a settlement agreement and the circuit court "adopt[ed] as its Judgment the Settlement

⁴ Kentucky Rules of Civil Procedure.

Agreement"; nevertheless, the circuit court's "adoption of the settlement agreement" was not res judicata as to the appellants, see Napier v. Jones By and Through Reynolds, Ky. App., 925 S.W.2d 193, 195 (1996), and the appellants had the remedy of appealing the City Council's approval of the revised Stage I Development Plan under KRS 100.347(3),⁵ much as B&Z appealed the City Council's denial of the initial Plan under the same statute. As denial of their intervention did not impair the appellant's ability to protect their interests, they were not entitled to intervene as a matter of right under CR 24.01.

Similarly, CR 24.02, which addresses permissive intervention, provides, in relevant part, as follows:

Upon timely application anyone may be permitted to intervene in an action: . . .

(b) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The appellants' "claims" and/or "defenses" raised in their motion to intervene concerned issues related to the City Council's adoption of the revised Stage I Plan. Again, the

⁵ KRS 100.347(3) provides, in part, that "[a]ny person or entity claiming to be injured or aggrieved by any final action of the legislative body of any city, county, consolidated local government, or urban-county government, relating to a map amendment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the map amendment, lies.

subject matter of B&Z's appeal and petition for declaratory judgment was the City Council's denial of the initial Stage I Plan. The appellant's remedy to the City Council's approval of the revised plan was an appeal under KRS 100.347(3). As such, the circuit court did not abuse its discretion by denying the appellants' motion to intervene under CR 24.02.

In summary, we agree with the circuit court that the issues the appellants sought to litigate in the pending circuit court proceeding would "create a confusion of the issues." As reflected in their motion to intervene, the appellants sought to challenge the procedures surrounding the adoption of the revised Stage I Development Plan, the merits of the revised Plan, and whether the revised Plan could be adopted by settlement agreement. However, these issues, all of which concerned the revised plan, were outside the scope of B&Z's appeal and petition for declaratory judgment. The circuit court proceeding litigating B&Z's appeal and petition for declaratory judgment was not the proper forum to consider the issues raised by the appellants in their motion to intervene, as that proceeding was concerned with the City Council's denial of B&Z's initial Stage I Development Plan. See Summe & Ratermann Company v. City of Covington, Ky., 314 S.W.2d 568 (1958).

The appellants also seek to appeal the circuit court's August 14, 2002, order adopting the settlement agreement and

dismissing the case with prejudice. CR 73.02(2) authorizes "a party to file a timely notice of appeal . . ." (Emphasis added.) "The term 'party' as used in CR 73.02(2) clearly means a party to the proceeding." City of Louisville v. Christian Business Women's Club, Inc., Ky., 306 S.W.2d 274, 276 (1957); Bartholomew v. Paniello, Ky., 287 S.W.2d 616 (1956). The term "party" as used in CR 73.02 means a party of record, and one who is not a party may not appeal even though he files a notice of appeal. White v. England, Ky., 348 S.W.2d 936, 937 (1961). As the appellants' motion to intervene was denied, they were not parties to the circuit court case, and, as such, they do not have standing to appeal the order adopting the settlement agreement and dismissing the case.

For the foregoing reasons the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard G. Meyer
Mark D. Guilfoyle
Covington, Kentucky

BRIEF FOR APPELLEE B&Z
DEVELOPMENT:

Gerald F. Dusing
Mary Ann Stewart
Covington, Kentucky

BRIEF FOR APPELLEE CITY OF
FORT WRIGHT:

Peter J. Summe
Fort Wright, Kentucky