RENDERED: OCTOBER 17, 2003; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001927-MR

ELM STREET/MCCRACKEN PIKE
PRESERVATION ALLIANCE, INC. APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
CIVIL ACTION NO. 01-CI-00238

JOSEPHINE BARROWS; BLUEGRASS
TRADITION, LLC; CITY OF VERSAILLES APPELLEES

OPINION

VACATING AND REMANDING

** ** ** ** **

BEFORE: EMBERTON, Chief Judge; McANULTY, Judge; HUDDLESTON, Senior Judge.[1]

HUDDLESTON, Senior Judge: The Elm Street/McCracken Pike Preservation Alliance[2] appeals from a summary judgment in favor

---

[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 Ky. Rev. Stat. (KRS) 21.580.

of Josephine Barrows and Bluegrass Tradition.[3] The Developers appealed to Woodford Circuit Court from the denial of their application for a zoning change involving approximately 47 acres owned by Barrows.[4] Because the findings of the Versailles-Midway-Woodford County Planning and Zoning Commission were supported by substantial evidence, the circuit court ordered the "Versailles City Council to adopt the proposal of the [planning commission] amending the zoning map to show that the [Barrows property] shall be zoned R-1B/PUD with a planned unit development overlay."

Since 1977, the Barrows property has been designated for future residential land use in the comprehensive plan, and that designation remained intact as of the most recent plan update in 1997. In 1999, the City of Versailles annexed the property into the city limits with the consent of Barrows based on its finding that the property was "suitable for residential subdivision or urban purposes without unreasonable delay." Currently, 41.197 acres of the Barrows property are being

---

[2] The Alliance was the intervening defendant below.

[3] Barrows and Bluegrass Tradition will be referred to collectively as the Developers throughout this opinion.

[4] The subject property is located on the south side of Elm Street/McCracken Pike (Ky. Hwy. 1659) adjacent to and west of Elm Street Heights, within the city limits of Versailles, in Woodford County, Kentucky. Currently, 1.651 acres are zoned R-1A, 4.961 acres are zoned R-1B and 40.585 acres are zoned A-1.

utilized for agricultural purposes although there is one single family residence on the portion of the farm currently zoned R1-A.

On May 8, 2000, the Developers filed an application for a zoning map amendment requesting that the zoning classification of the subject property be changed to R-4. The Developers subsequently decided to reconfigure their development plan in order to incorporate principles of new urbanism as defined by a task force appointed to study future development in Woodford County, and they amended their application to request that the property be classified as R-1C with a Planned Unit Development (PUD) overlay. After conducting a public hearing on both the zoning map amendment and conceptual development plan/preliminary plat, but prior to any motion, the chairman of the planning commission clarified that only the issues of the amendment and the PUD would be considered. No vote was taken on the preliminary plat.

On March 8, 2001, the planning commission held a public hearing on the zone change application at which the staff presented its report and introduced numerous exhibits. The Developers and the Alliance offered documentary and testimonial evidence in support of their respective positions. At a meeting held on May 10, 2001, the planning commission voted six to three in favor of recommending that the zoning classification of the

Barrows property be changed to R-1B/PUD "based upon the Summary of Evidence and Findings and Conclusions presented on behalf of [the Developers], and the minutes of the public hearing held on March 8, 2001 . . . ." In so doing, the planning commission concluded that the zone map amendment, and the evidence offered in support thereof, "fits precisely within the land use and development standards of the 1997 Comprehensive Plan and further is in conformity with the princip[le]s of the Master Plan as recently approved" by the planning commission.

On July 17, 2001, the Versailles City Council convened to consider the recommendation of the planning commission. By a unanimous vote, the city council declined to conduct a public hearing or hear presentations from the parties. "After reviewing the entire record of the Planning Commission and listening to the summary statements from opposing counsel," the city attorney submitted a motion to disapprove the requested zoning change and "findings of fact" in support thereof on behalf of a council member which the city council unanimously approved.

On the same day, the Developers filed a complaint against the City of Versailles alleging that the city had acted arbitrarily and in excess of its authority in denying the recommendation of the planning commission thereby denying them due process of law. On August 24, 2001, before the Alliance had

filed a responsive pleading, the Developers filed an amended complaint, again naming the City of Versailles as the defendant. The City of Versailles filed its answer on August 30, 2001 and, one week later, the Alliance filed a motion to intervene. Although the Alliance argued its motion on September 12, 2001, the circuit court did not grant the motion until November 13, 2001. While the motion was pending, Barrows deposed the members of the city council and those depositions were of record below.

The Developers then filed a motion for summary judgment to which both the City of Versailles and the Alliance responded. On April 26, 2002, the court held oral arguments on the matter. Because all parties agreed that there were no factual issues to be resolved, the sole issue as framed by the court was "whether the record supports the decision of the city council."

Drawing a parallel with Bryan v. Salmon Corp.,[5] the circuit court determined that the decision of the city council was arbitrary "since there was not significant evidence to support any of its findings, some of its findings were beyond its authority, and some were irrelevant." Having read the depositions of the council members, the court concluded that the city council had improperly relied upon extraneous evidence not

[5] Ky. App., 554 S.W.2d 912 (1977).

considered by the planning commission in reaching its decision. As the action taken by the planning commission was "supported by the record," the court concluded that it "had no choice but to order the City of Versailles to amend its zoning map to reflect the decision of the [planning commission] in this case."

Relevant for present purposes, the court resolved the threshold issue of whether the proper parties had been named as follows:

> The first issue which must be resolved is [the Alliance's] argument that the complaint must be dismissed because it has named the improper party by naming the City of Versailles instead of the Versailles City Council. As grounds for that, [the Alliance] submits a charter of a municipal improvements corporation granted on December 8, 1965, and claims that that municipal improvements corporation is the party actually sued and not the Versailles City Council. As [the Developers] very correctly point out, the charter cited by [the Alliance] is for a municipal improvement corporation and is not the City of Versailles. [the Alliance's] argument is absurd. One need not look any further than the caption of one of the most significant planning and zoning cases in Kentucky, City of

Louisville v. McDonald,[6] to see that the proper way to institute this action was to name the City of Versailles. It is this Court's decision that the City of Versailles is the proper party and the complaint will not be dismissed for that reason.

In denying the Alliance's subsequent motion to alter, amend or vacate the summary judgment, the court engaged in the following analysis of this issue:

> Obviously, that argument was absurd and the Court pointed out that the City of Versailles was not a corporation, but a municipality and a local unit of government pursuant to Section 156 of the Constitution of Kentucky and KRS Chapter 81, et seq. However, [the Alliance] is quite correct that . . . City of Louisville v. McDonald, [] is not controlling on this issue since that case was decided prior to the amendment of KRS 100.347, which specifically requires that "[t]he legislative body shall be a party in any such appeal filed in the Circuit Court."
>
> [The Alliance] now states that the case should be dismissed since: the Versailles City Council has never been named in this case; and more

[6] Ky., 470 S.W.2d 173 (1971).

than 30 days have elapsed since the final decision in this matter. It is interesting to the Court that the City of Versailles and the members of the Versailles City Council which have participated in this litigation and are represented by the City Attorney have never raised this objection and, in fact, in their answer admitted that they were before the Court as the legislative body through the naming of the City of Versailles,[]. Although it is not dispositive of the issue in this case, the Court does question the ability of [the Alliance], who did not file to intervene until after the answer of the City of Versailles was filed and the 30 days had run, to raise an issue concerning jurisdiction over the original Defendant.

However, there is another reason this matter should not be dismissed. * * * All parties in their memorandums discussed items produced during the discovery which indicate that this was more than an appeal of an administrative body. [In] Greater Cincinnati Marine Service, Inc. v. City of Ludlow,[7] the [C]ourt held: "It is clear that the complaint,

[7] Ky., 602 S.W.2d 427, 429 (1980).

> judged by its content, is far more than an appeal under the aegis of KRS 100.347(2) [which requires any person or entity claiming to be injured or aggrieved by a final action of the planning commission to name the planning commission as a party on appeal to the circuit court].” Since this matter is clearly more than just an appeal, the requirements under Board of Adjustments v. City of Richmond v. Flood[8] of KRS 100.347(2) are not dispositive of this matter. Therefore, the complaint should not be dismissed.

On appeal, the Alliance argues that the failure to name the legislative body, i.e., the Versailles City Council, “is a clear jurisdictional defect and requires dismissal as a matter of law.” In its view, City of Louisville v. McDonald “had nothing to do with any issue relative to filing a zone change appeal against a statutorily mandated party” and is not dispositive. Further, “the 1986 General Assembly, in amending KRS 100.347, made it unequivocally clear that the legislative body had to be named as a party.” We agree.

According to the Alliance, the city attorney filed an answer on behalf of the City of Versailles rather than the city council and, contrary to the court’s opinion, the city attorney

[8] Ky., 581 S.W.2d 1 (1978).

"could not answer on behalf of a party which was never sued" nor does the court cite any authority for its holding to that effect. Acknowledging that the city attorney did not raise an objection regarding the failure of Barrows to name the city council as a party, the Alliance also observes that it did object on that basis.

Citing Evangelical Lutheran Good Samaritan Society v. Albert Oil Co., Inc.[9] and Nicholasville Road Neighborhood Consortium, Inc. v. Lexington-Fayette Urban County Government,[10] the Alliance emphasizes that strict compliance with a planning and zoning statute is required. In response to the court's assertion that its motion to intervene was not timely, the Alliance explains that it "filed its Motion to Intervene on September 7, 2001, only fourteen days after [the Developers] filed their amended complaint[] and only eight days after the City of Versailles tendered its answer[]," although the court did not grant its motion until November 13, 2002. Lastly, the Alliance disputes the court's characterization of the complaint, distinguishing Greater Cincinnati Marine Service which involved a complaint consisting of nine substantive counts in addition to the appeal itself, from the "single count complaint which, by

---

9 Ky., 969 S.W.2d 691 (1998).

10 Ky. App., 994 S.W.2d 521 (1999).

its own terms, was an 'appeal' of the rezoning decision" at issue here. In relevant part, the Kentucky Supreme Court held in that case that the "requirement that the planning commission be joined as a party is applicable only to the part of the complaint which sought review of the decision of the board of adjustment,"[11] a holding which, according to the Alliance, supports its position.

In response, the Developers argue that "the only means of invoking jurisdiction over the City Council is to name the City of Versailles as the real party in interest" as "the Council is not a corporate entity, and the Council itself lacks the power to sue and be sued." The Developers further contend that the City of Versailles, "including its Council members were not only on notice of the appeal, but appeared in the action below and attempted to defend its arbitrary acts."[12] In their view, the Alliance is estopped from arguing that the City of

---

[11] Greater Cincinnati Marine Service, supra, n. 7, at 428.

[12] In City of Louisville v. McDonald, relied upon by the circuit court, Kentucky's highest court reaffirmed its prior holding that the circuit court "was not at liberty to consider additional exhibits and evidence in the absence of a claim of fraud or misconduct on the part of the fiscal court or its individual members." Supra, n. 6, at 228. Although our resolution of the statutory question renders further discussion of this issue unnecessary, the circuit court should not have considered the depositions of council members in the instant case.

Versailles is not the proper party given its "failure to raise any objection to the alleged misnomer" below.

According to the Developers, the cases relied upon by the Alliance, Evangelical Lutheran and Nicholasville Road, "can be readily distinguished" because in those cases the Kentucky Supreme Court and this Court, respectively, were "specifically addressing the 90 day deadline for action on a commission's recommendation under KRS 100.211(1)." Further, Kentucky Rules of Civil Procedure (CR) 9.01 and 12.02, as well as Kentucky case law, "establish that the defense of a misnomer is waived if not plead [sic]," and the City of Versailles "also admitted that the jurisdiction of the circuit court" was invoked under KRS 100.347.

Pursuant to KRS 100.347(3):

> Any 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. Such appeal shall be taken within thirty (30) days after the final action of the legislative body. All final actions which have not been appealed within thirty (30) days shall not be

subject to judicial review. The legislative body shall be a party in any such appeal filed in the Circuit Court.[13]

Our duty is to construe statutes so as to ascertain and give effect to the intent of the General Assembly. In determining legislative intent, courts must refer to the language of the statute and are not at liberty to add or subtract from the legislative enactment or interpret it at variance from the language used.[14] "Statutes should be construed in such a way that they do not become meaningless or ineffectual," and courts have a duty to harmonize the law and give effect to multiple statutes on the same subject.[15] All statutes should be interpreted to give meaning to each provision in accord with the statute as a whole.[16] Courts have a duty to accord the words of a statute their literal meaning unless to do

---

[13] Emphasis supplied.

[14] Hale, id., at 151(citations omitted); Stogner v. Commonwealth, Ky. App., 35 S.W.3d 831, 834 (2000).

[15] Commonwealth v. Phon, Ky., 17 S.W.3d 106, 108 (2000)(citation omitted). See also Manies v. Croan, Ky. App., 977 S.W.2d 22, 23 (1998).

[16] DeStock No. 14, Inc. v. Logsdon, Ky., 993 S.W.2d 952, 957 (1999); Aubrey v. Office of Attorney General, Ky. App., 994 S.W.2d 516, 520 (1998).

so would lead to an absurd or wholly unreasonable conclusion.[17] "Where the words of a statute 'are clear and unambiguous and express legislative intent, there is no room for construction or interpretation and the statute must be given effect as written.'"[18] Statutory interpretation is purely a question of law subject to de novo review.[19]

Both the circuit court and the Developers have misconstrued governing precedent as to the dispositive issue of whether the Developers were required to name the city council as a party on appeal to the circuit court from its decision. In Nicholasville Road, decided well after the 1986 amendments to KRS 100.347, this Court reiterated that "'strict compliance with the statute on planning and zoning is required.'"[20] Contrary to the Developers' implicit assertion, noticeably absent from this explicit directive is any language limiting its application to specific provisions. Although we have not been cited to nor has

---

[17] McElroy v. Taylor, Ky., 977 S.W.2d 929, 931 (1998); Bailey v. Reeves, Ky., 662 S.W.2d 832, 834 (1984); Worldwide Equipment, Inc. v. Mullins, Ky. App., 11 S.W.3d 50, 59 (1999).

[18] White v. Check Holders, Inc., Ky., 996 S.W.2d 496, 497 (1999)(citation omitted). See also Commonwealth v. W.E.B., Ky., 985 S.W.2d 344, 345 (1998); Ware v. Commonwealth, Ky. App., 34 S.W.3d 383, 386 (2000).

[19] Revenue Cabinet v. Hubbard, Ky., 37 S.W.3d 717, 719 (2000); Bob Hook Chevrolet-Isuzu v. Commonwealth, Transp. Cab., Ky., 983 S.W.2d 488, 490 (1999); Marks v. Bean, Ky. App., 57 S.W.3d 303, 306 (2001).

[20] Supra, n. 10, at 523 (citation omitted).

our research revealed any Kentucky case directly addressing the precise issue presented here, Rosary Catholic Parish of Paducah v. Whitfield,[21] involving the application of KRS 100.347(1), provides guidance. In significant part, the language of that provision parallels KRS 100.347(3), with the primary distinction being that the entity referenced is the "board of adjustment" rather than "the legislative body."[22]

Whitfield sought to enjoin the operation of a community residential correctional center in his neighborhood because it violated a municipal zoning ordinance.[23] In concluding that the circuit court did not have jurisdiction to entertain the action, we observed that Whitfield had not raised issues sufficient to allow him to bypass the administrative review process.[24] Citing KRS 100.347(1), we reminded him "and others contemplating appeal to circuit court, that the Board of Adjustment must be made a party to any appeal taken" consistent

---

[21] Ky. App., 729 S.W.2d 27 (1987).

[22] Noteworthy is the fact that subsections (1), (2) and (3) of KRS 100.347 all contain mandatory language requiring that the person or entity claiming to be injured or aggrieved name the entity whose decision is being appealed as a party on appeal to the circuit court, i.e., the board of adjustment, planning commission and legislative body, respectively, thereby removing any doubt as to the intent of the General Assembly in this regard.

[23] Rosary Catholic Parish, supra, n. 22, at 27.

[24] Id. at 29.

with the guiding principle that "[s]tatutory procedures must be strictly complied with in respect to administrative appeals."[25] As this reasoning is equally applicable here, the same outcome necessarily follows.

> The right of appeal in administrative as well as other proceedings does not exist as a matter of right. When the right is conferred by statute, a strict compliance with its terms is required. It is the general rule that where the conditions for the exercise of the power of a court are wanting the judicial power is not, in fact, lawfully invoked.[26]

It is beyond dispute that the city council is the "legislative body" in this instance. In unambiguous and mandatory[27] terms, KRS 100.347(3) requires any person or entity [the Developers] claiming to be injured or aggrieved by any final action of the legislative body [the city council] to name the legislative body as a party in an appeal to the circuit court from its decision. Contrary to the Developers' assertion, "a party [the City of Versailles] and particularly a nonparty

---

[25] Id. (citation omitted).

[26] Roberts v. Watts, Ky., 258 S.W.2d 513 (1953). Although this case was decided prior to the enactment of the 1986 amendments to KRS 100.347, the quoted language is consistent with the more recent authority previously cited.

[27] According to KRS 446.010(29) "'Shall' is mandatory[.]"

[the city council], could not waive the statutory conditions which limited [the Developers'] right of appeal," especially after the time had passed within which they could have complied.[28] Accordingly, the Developers' failure to name the Versailles City Council as the defendant in their appeal was a fatal omission and the jurisdiction of the circuit court was not "lawfully invoked." In light of this conclusion, we do not reach the merits of the remaining arguments raised by the Alliance.

Consistent with the foregoing authority, the judgment is vacated and this case is remanded to Woodford Circuit Court which is instructed to dismiss the Developers' appeal.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

T. Bruce Simpson, Jr.
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEES:

Robert L. Roark
WALTHER, ROARK, GAY & TODD, PLC
Lexington, Kentucky

[28] George v. Kentucky Alcoholic Beverage Control Board, Ky., 403 S.W.2d 24, 25 (1966).