RENDERED: July 7, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000881-MR

DONALD AND THERESA McCOY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CI-006857

LOUISVILLE METRO BOARD OF ZONING
AND ADJUSTMENT — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE[1] AND JOHNSON, JUDGES.

COMBS, CHIEF JUDGE: Donald and Teresa McCoy have appealed from an Opinion and Order of the Jefferson Circuit Court entered on April 11, 2005, which granted summary judgment to the Louisville Metro Board of Zoning Adjustment (the Zoning Board or the Board). After our review, we conclude that the court erred in summarily affirming the action of the Zoning Board. Therefore, we reverse.

[1] Judge R. W. Dyche concurred in this opinion prior to his retirement effective June 17, 2006.

The McCoys own property at the southeast corner of Orbit Court and Agena Drive in Louisville, Jefferson County, Kentucky. They wanted to build a six-foot privacy fence around the property for privacy and for security around their swimming pool. Because the Land Development Code (the Code) of the Zoning Board prohibits a fence more than four feet high, the McCoys filed an application on May 24, 2004, for two variances from the requirements of the Code: one variance for the portion of the fence in the front yard on Agena Drive and one for the portion of the fence on the side yard on Orbit Court.

In accordance with the bylaws of the Zoning Board, a staff report was prepared based upon an on-site inspection of the property, information provided by the McCoys, and staff research and findings. The staff report recommended approval of the variances. On July 15, 2004, a letter was sent to the Zoning Board from Debi Cecil, Code Enforcement Coordinator, reporting that some of the McCoys' neighbors had complained about the construction of the fence. The letter stated as follows:

> Our office responded to a request . . . to inspect property known as 3500 Orbit Court for zoning and property maintenance issues.
>
> . . . .
>
> Upon inspection of the site [the inspector] noticed that fence posts were being erected in excess of the maximum height in the

> required front and side yards. Also noticed that this is a corner lot which prohibits building in the side yard. Inspector sent a courtesy letter to property notifying of the restriction on the proposed fence.
>
> Inspector also cited for property owner creating a public nuisance (violation of the Property Maintenance Code). The property owner is placing 4″ x 4″ posts across the sidewalk and drainage easement. This is obstructing the pedestrian traffic and creating a drainage obstruction. It must be removed. The property owner was also cited for parking in the required front yard and not on a hard durable surface on July 15, 2004. The vehicle is parked in a manner to obstruct walkers and children from crossing the property owners' yard. Thus it forces children into the street to walk around the property in question.
>
> Reinspection compliance is scheduled for July 20, [2004]. As of July 15, 2004, the property owner has made no attempt to remove obstructions from the sidewalk and drainage easement.

On July 19, 2004, the Zoning Board held a public hearing on the McCoys' request for variances. The McCoys testified that they needed a higher fence to insure their privacy and to prevent debris from a neighbor's tree from falling into their swimming pool. Three of their neighbors appeared and voiced their opposition to the proposed variances. One neighbor stated that the variances were not needed and expressed his belief that the extended fence would block his view of the road, be an eyesore, box-in his house, and create a dark corner. A second neighbor testified that the enhanced

fence could be a security problem and that it would obstruct her view out the front side of her house. The third neighbor complained that the taller fence would be an eyesore and a safety concern since it would be built too close to the existing sidewalk on Agena Drive. The McCoys were permitted to rebut this testimony. They re-stated their desire and need for additional security.

Two Board members expressed their concern that a higher fence might cause sightline problems for adjacent neighbors when they left their driveways. Another member was skeptical as to how a higher fence would help keep children and debris out of the pool. A third member stated that he saw no problems with the proposed variances. Following the testimony and presentation of evidence, three members voted in favor of granting the variances, and two abstained from voting. The formal Board approval of the variances reported as follows:

> WHEREAS, the Board finds, from the file of this case, the staff report, and the evidence and testimony submitted at the public hearing that the proposed fence will exceed the maximum height in the required yards; and
>
> WHEREAS, the Board finds the size and shape of the lot are special circumstances which does [sic] not generally apply to land in the general vicinity or in the same zone; and
>
> WHEREAS, the Board finds the chief result of a denial of these variances would be that

> the applicants would not be able to build the proposed wooden privacy fence as planned; and
>
> WHEREAS, the Board finds that the applicants are not responsible for the size and shape of the lot or the location of the neighbor's tree; such special circumstances are not the result of actions of the applicants taken subsequent to the adoption of the zoning regulation from which relief is sought; and
>
> WHEREAS, the Board finds the site is slightly irregular in shape; **that there appear to be similar fences throughout the neighborhood**; that the fences will be at least 19 feet from the existing pavement; that the additional privacy and security will be provided with the higher fence; that this **does not appear to create any type of sight distance concerns**; therefore, the granting of these variances will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations;
>
> NOW, THEREFORE, BE IT RESOLVED, that the variances are hereby APPROVED. (Resolution of July 19, 2004) (Emphasis added.)

One week later, on July 26, 2004, the McCoys received notice from the Zoning Board that it planned to reconsider its decision granting the variances at a hearing to be held on August 2, 2004; it also announced that no additional evidence or testimony would be permitted. Following a motion by one of the Board members at the second meeting, four members voted to

reconsider and to deny the request for variances. The voting breakdown was as follows: two members of the Board changed their previous votes from granting now to denying the variances; the two members who had abstained previously now voted to deny the variances. A fifth member did not see a problem with the variances and affirmed his original vote to grant the variances as well as to deny the motion for reconsideration. In their complaint and appeal to the circuit court, the McCoys argued that something "irregular occurred outside the public meeting" between July 14, 2004, and July 26, 2004, "that was not a part of the public record."

The Zoning Board made the following findings:

> WHEREAS, the Board finds that a 6-foot tall wood fence would have a negative visual impact; and
>
> WHEREAS, the Board finds that the wood fence, if allowed to be erected, will cause an adverse impact on the character of the general vicinity, will create a nuisance to the adjoining property owners in that **it is a visual obtrusion and not in keeping with the character of the neighborhood**, and further, the variance would allow an unreasonable circumvention of the requirements of the zoning regulations because the applicant has not demonstrated that a 6-foot tall fence is needed on the property; and
>
> WHEREAS, **the Board determined that it erred in approving a variance** to allow the fence to exceed four feet in height on July 19, 2004;

> NOW, THEREFORE, BE IT RESOLVED, that the **Board does hereby DENY** the proposed fence to exceed the maximum height in the required yards. (Emphases added.)

In summary, the findings at the August 2, 2004, hearing amounted to a complete about-face from the findings contained in the resolution passed at the hearing of July 19.

Pursuant to KRS[2] 100.347(1), the McCoys filed a complaint and appeal on August 13, 2004, in the Jefferson Circuit Court, claiming that the Zoning Board violated the provisions of KRS Chapter 100 in reconsidering its approval of the variances. KRS 100.347(1) provides as follows:

> Any person or entity claiming to be injured or aggrieved by any final action of the [Zoning Board] shall appeal from the action to the [c]ircuit [c]ourt of the county in which the property, which is the subject of the action of the [Zoning Board], lies. Such appeal shall be taken within thirty (30) days after the final action of the [Zoning Board]. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. The [Zoning Board] shall be a party in any such appeal filed in the [c]ircuit [c]ourt.

The McCoys argued that the Board's denial of the applications for the two variances was arbitrary and capricious and that it violated constitutional due process.

The Board claimed that it based its decision on substantial evidence in the answer that it filed on September 1,

[2] Kentucky Revised Statutes.

2004. On September 23, 2004, the Zoning Board filed a memorandum and motion for protective order asking the circuit court to prevent the McCoys from taking the depositions of all the Zoning Board members and of one of its staff members. The McCoys responded on September 27, 2004, filing a memorandum and motion opposing the issuance of a protective order. They stated that the depositions were necessary:

> to determine what went on outside of the public hearing and record to bring about the July 26 notice and the change of votes and findings when the record contains no additional testimony after the first hearing and resolution.

On October 28, 2004, the circuit court granted the Board's motion and quashed the McCoys' notice for depositions. (The circuit court's order states that the hearing on the motion was videotaped; however, the McCoys did not designate that portion of the record for our review.)

On December 9, 2004, the McCoys filed a motion for summary judgment with an accompanying memorandum of law. The Board filed its own motion for summary judgment and an accompanying memorandum of law on January 21, 2005. Both parties filed replies to the motions for summary judgment of their respective adversaries. In an Opinion and Order entered on April 11, 2005, the circuit court granted the Board's motion

and denied the McCoys' motion, noting its "extreme displeasure" in so doing. This appeal followed.

The summary judgment was based on the court's review of the action of an administrative agency, which is limited to "review, not reinterpretation." Jones v. Cabinet for Human Resources, Division for Licensure & Regulations, 710 S.W.2d 862, 866 (Ky.App. 1986). [citation omitted]. A reviewing court (either appellate or circuit) may not substitute its judgment for that of an administrative agency -- even though it might have reached a different result. Kentucky State Racing Commission v. Fuller, 481 S.W.2d, 298, 308-309 (Ky. 1972). The Supreme Court of Kentucky articulated this standard of review as follows:

> [T]he scope of judicial review of zoning action taken by public bodies, both administrative and legislative, is limited to determining whether the action was arbitrary, which ordinarily involves these considerations: (1) whether the action under attack was in excess of the powers granted to the public bodies[;] (2) whether the parties were deprived of procedural due process by the public bodies[;] [and] (3) whether there is a lack of evidentiary support in the findings of the public bodies[.]

Fallon v. Baker, 455 S.W.2d 572, 574 (citing American Beauty Homes Corp. v. Louisville & Jefferson Co. Planning & Zoning Commission, 379 S.W.2d 450 (Ky. 1964).) A board's factual findings are not deemed to be arbitrary if they are supported by

substantial evidence, which is defined as "'evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men.'" [citation omitted.] Fuller, 481 S.W.2d at 308.

In their appeal, the McCoys first argue that the Board's policy allowing for the reconsideration of the granting of variances exceeds the statutory powers granted to it under KRS Chapter 100. KRS 100.243 sets out the findings the Zoning Board must make before it grants a variance and provides, in relevant part, as follows:

> (1) Before any variance is granted, the board must find that the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the board shall consider whether:
>
> (a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;
>
> (b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and
>
> (c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

They argue that KRS Chapter 100 does not provide a mechanism (such as adopting a bylaw) to enable the Board to reconsider one of its final decisions. In response, the Board argues that the granting or denial of variances is one of its basic functions and that it is not bound by staff reports prepared before a hearing takes place.

KRS 100.221(3) requires the Zoning Board to "adopt bylaws for the transaction of business . . . ." The Board accordingly adopted the following bylaws containing a procedure for reconsideration:

> 9.01 No appeal, application, or other matter acted upon by the Board may be reconsidered, except:
>
> 9.01.01 Upon motion by a member of the Board who voted with the majority.
>
> 9.01.02 Said motion must be seconded by any member of the Board either for reconsideration, or rehearing.
>
> 9.01.03 Such motions for reconsideration shall be made[, and reconsideration shall occur,][3] within thirty (30) days of the Board's original vote.

In analyzing whether the Board exceeded its authority in establishing these bylaws, we must first determine whether KRS 100.221(3) provides "general standards" or "the statute in

[3] The Zoning Board notes in its brief that Section 9.01.03 was amended to add the language "and reconsideration shall occur." Although this wording is included in the court's order, the copies of the bylaws in the record before this Court do not include this language.

itself prescribes the exact procedure[.]" Union Light, Heat & Power Co. v. Public Service Commission, 271 S.W.2d 361, 365 (Ky. 1954). If the statute provides general standards, the Zoning Board "may implement the statute by filling in the necessary details"; but if it is specific, "the administrative agency may not add to or subtract from such a provision." Id.

The McCoys argue that KRS 100.221(3) does not leave latitude for such a reconsideration of the Board's final decision regarding variances because it affects the specifically detailed appellate procedure of KRS 100.347. They contend that KRS 100.347(1) requires that an appeal of a Zoning Board's decision on a variance be taken within the same thirty days as the bylaws grant for reconsideration.

In its order, the circuit court carefully addressed this argument and reasoned as follows:

> An appellant shall have [30] days from the date of the approval or disapproval of a matter pending before [the Zoning Board]; if [the Zoning Board] should notify an appellant it intends to reconsider and makes a last minute finding not to reconsider, that appellant does not, as the McCoys contend, have mere hours to appeal the decision. **As the [c]ourt sees it, the appellant would have [30] days from the time the reconsideration was decided one way or another.** Further, should an appellant be aggrieved with a decision and decide to appeal it, and by some strange chance [the Zoning Board] moved to reconsider the decision after an appeal had been made, the **simple solution would be to hold the appeal**

> **in abeyance until the reconsideration decision had been made**. This is common sense and in keeping with the tenet that appellants are to exhaust all administrative remedies before seeking judicial relief. (Emphases added.)

The court correctly held that a zoning bylaw or regulation permitting reconsideration of Board action is not prohibited by KRS Chapter 100. While KRS 100.221(3) does not expressly state that the Zoning Board may enact bylaws allowing it to reconsider certain matters, we conclude that the power to enact bylaws "for the transaction of business" is sufficiently broad to empower the Zoning Board to adopt a policy for reconsideration of its decisions. We find no error on this issue.

The McCoys next argue that the Zoning Board deprived them of due process when it refused to allow additional evidence or testimony at the reconsideration hearing on August 2, 2004, resulting in a decision that was not supported by substantial evidence. The McCoys cite Morris, supra, which sets forth the required procedural process for matters before a zoning board as follows:

> We have held that procedural due process by an administrative body includes: ". . . a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved,

> a judicial review of the administrative action. . . ."

Morris, 437 S.W.2d at 755. (citations omitted.)

The McCoys argue that since a reconsideration was granted, the Board was required to receive additional evidence. At the time of the original hearing and the initial discussion, the record did contain testimony concerning the potential problems and the objections involving the fence. Thus, evidence existed that would have supported a different ruling at the first meeting as the Zoning Board has discretion to choose which testimony to believe in case of conflicting or contradictory evidence. Fuller, 481 S.W.2d at 307.

As an appellate court, we may not substitute our judgment for that of an administrative agency where substantial evidence exists to support its official action. In this case, however, there is no clue as to **what judgment** was exercised by the Board since there is neither explanation nor evidence -- much less any of a substantial nature -- upon which it based its sudden and dramatic change of decision. Within the period of one week (July 19 - July 26, 2004), the Board decided to reconsider its action; and then at its August 2, 2004, hearing, it did a complete about-face with no additional evidence having been taken and absolutely no reasoning explaining its reversal of its original decision to grant the variances.

In the space of two weeks, the recitations of the Board flip-flopped from describing the fences as follows:

> ... that there appear to be similar fences throughout the neighborhood ... that this does not appear to create any type of sight distance concerns ....
>
> NOW, THEREFORE, BE IT RESOLVED, that the variances are hereby HEREBY APPROVED. July 19, 2004

Note the contrast:

> ... the wood fence ... will create a nuisance to the adjoining property owners in that it is a visual obtrusion and not in keeping with the character of the neighborhood ....
>
> NOW, THEREFORE, BE IT RESOLVED, that the Board does hereby DENY the proposed fence .... August 2, 2004

While we do not agree that the Board lacked statutory authority to reconsider a matter before it, we are compelled to concur with appellants that due process was seriously impaired -- if not denied -- when the Board radically changed its decision while barring presentation of any additional evidence. Absent some newly discovered evidence or at the very least some reasoning as to the Board's wholly different treatment of the evidence already before it, there is no rational explanation for the total reversal of its decision. Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970), expresses the rudimentary principle that

evidentiary support must be present as a prerequisite for meaningful due process.

The disturbing issue in this case is the unanswered question, "Why?" Why did the dramatic reversal occur? The appellants were deprived of an opportunity to depose Board members, further exacerbating their obvious frustration and confusion as to why a governmental body exercised its powers as it did. The appellants imply that improprieties may have occurred in the week that intervened between July 19 and the July 26 announcement of the decision to reconsider. We need not speculate nor point an accusatory finger as to allegedly unsavory motives by the Board. It is quite sufficient to base this reversal on the troubling departure from due process rendering this zoning action both arbitrary and capricious under the most classic definitions of those terms.

Consequently, we reverse the opinion and order of the Jefferson Circuit Court.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the Majority's opinion to the extent that it has affirmed the Zoning Board's authority to enact bylaws to govern reconsideration of its decisions. However, as to the

Majority's decision that the McCoys were denied due process of law when the Zoning Board overturned its decision to grant the McCoys's request for certain variances, without taking additional proof, I must respectfully dissent.

The Majority has cited Fallon for the proposition that without new evidence or some compelling reason as to the Zoning Board's complete change of position based on the evidence already before it, there is no rational explanation for the total reversal of the Zoning Board's decision. I disagree.

The Court in Fallon stated:

> [T]he scope of judicial review of zoning action taken by public bodies, both administrative and legislative, is limited to determining whether the action was arbitrary, which ordinarily involves these consideration: (1) whether the action under attack was in excess of the powers granted to the public bodies[;] (2) whether the parties were deprived of procedural due process by the public bodies[; and] (3) whether there is a lack of evidentiary support for the findings of the public bodies[.][4]

The Majority's reversal seems to turn on the following summation:

> While we do not agree that the Board lacked statutory authority to reconsider a matter before it, we are compelled to concur with appellants that due process was seriously impaired – if not denied – when the Board radically changed its decision while barring presentation of any additional

[4] Fallon, 455 S.W.2d at 574.

> evidence. Absent some newly discovered evidence or at the very least some reasoning as to the Board's wholly different treatment of the evidence already before it, there is no rational explanation for the total reversal of its decision. Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970), expresses the rudimentary principle that evidentiary support must be present as a prerequisite for meaningful due process.

I reject the Majority's reasoning because the record in this case contains substantial evidence to support either an affirmative decision to grant the variances or a decision to deny the variances. There is no reason the record would need to be supplemented in this case for the Zoning Board to have rendered a different opinion. I agree with the Zoning Board that neither KRS 200.121, nor its own bylaws, which the Majority has held are appropriate, require any additional testimony or evidence be taken if a matter before it is reconsidered. I fail to see how this case is any different from many where there is substantial evidence which would support one position and contrary evidence which will support the other position. The Zoning Board has the discretion to choose which testimony, if conflicting, to believe.[5] In such an instance, the only way a denial of due process would occur would be if there was proof of some impropriety in the alternate decision. While the Majority takes issue with the fact that the circuit court refused to

[5] Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 309 (Ky. 1972).

allow the McCoys to depose the Zoning Board members to determine an explanation for why it reversed its decision, and while I would agree that the circuit court may have erred in this instance, this issue was not argued on appeal and, therefore, was not properly preserved for our review. Thus, this issue should not have any impact in a decision as to whether the McCoys were denied due process of law, and I would affirm.

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