

RENDERED: AUGUST 22, 2008; 10:00 A.M.  
 NOT TO BE PUBLISHED

Commonwealth of Kentucky  
Court of Appeals

NO. 2007-CA-00232-MR

CHEROKEE PARK NEIGHBORHOOD  
 ASSOCIATION, INC.

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT  
 v. HONORABLE GARY D. PAYNE, JUDGE  
 ACTION NO. 04-CI-02133

1713 NICHOLASVILLE ROAD, LLC;  
 DR. JOHN W. GILBERT; LEXINGTON-  
 FAYETTE URBAN COUNTY GOVERNMENT  
 BOARD OF ADJUSTMENT; MEMBERS OF  
 THE LEXINGTON-FAYETTE URBAN  
 COUNTY GOVERNMENT BOARD  
 OF ADJUSTMENT IN THEIR OFFICIAL  
 CAPACITIES: JOANNE BELL,  
 PETER E. BROWN, PAULA DEBOOR,  
 SARAH GREGG, JAMES GRIGGS, HERBERT  
 A. MILLER, AND DAVID P. WINTERS;  
 LEXINGTON-FAYETTE URBAN COUNTY  
 GOVERNMENT, DIVISION OF BUILDING  
 INSPECTION; AND CURT FARLEY, DIRECTOR  
 OF THE LEXINGTON-FAYETTE URBAN  
 COUNTY GOVERNMENT, DIVISION OF  
 BUILDING INSPECTION IN HIS OFFICIAL  
 CAPACITY

APPELLEES

OPINION AND ORDER  
AFFIRMING

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BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Cherokee Park Neighborhood Association, Inc.

appeals from an order of the Fayette Circuit Court which found that the board of adjustment acted outside its jurisdiction in denying the use of an access point to commercial property. We affirm.

Since 1965, various businesses occupied commercial property located at the northwest corner of Nicholasville Road and Cherokee Park Road in Lexington, Kentucky. After purchasing the property, appellee, Dr. John W. Gilbert, razed the existing building in order to construct a new medical facility. The property contained two circular driveways that provided vehicular access points on both Nicholasville Road and Cherokee Park Road. The Cherokee Park Road access point is at issue in this case. There was varying evidence regarding the historical use of the Cherokee Park access. However, there was no evidence in the record of any legal action that had been taken to eliminate the access point.

Dr. Gilbert was granted a building permit in September 2003. In October 2003, the Neighborhood Association filed an appeal to the board of adjustment arguing that retention of the existing Cherokee Park access was hazardous. The board of adjustment overturned the issuance of the building permit

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<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

because it found that the Cherokee access was adjacent to a public park and that there was an inadequate study of the traffic impact upon the public park. Dr. Gilbert then applied for another building permit. The division of traffic engineering conducted an analysis of the traffic impact in the area that concluded that the access did not create a hazard. The division of building inspection issued another permit. The Neighborhood Association filed another appeal to the board of adjustment which reversed the portion of the building permit regarding the Cherokee Park access. Dr. Gilbert then filed a complaint in the Fayette Circuit Court. The trial court found that the board of adjustment acted outside of its jurisdiction and ordered the reinstatement of the building permit in full force and effect. This appeal followed.

KRS 100.261 provides:

Appeals to the board may be taken by any person, or entity claiming to be injuriously affected or aggrieved by an official action, order, requirement, interpretation, grant, refusal, or decision of any zoning enforcement officer. Such appeal shall be taken within thirty (30) days after the appellant or his agent receives notice of the action of the official by filing with said officer and with the board a notice of appeal specifying the grounds thereof, and giving notice of such appeal to any and all parties of record. Said officer shall forthwith transmit to the board all papers constituting the record upon which the action appealed from was taken and shall be treated as and be the respondent in such further proceedings. At the public hearing on the appeal held by the board, any interested person may appear and enter his appearance, and all shall be given an opportunity to be heard.

Persons aggrieved by determinations of the board in turn may take appeals to the circuit court pursuant to KRS 100.347. Administrative decisions granting relief to the party bearing the burden of proof must be supported by substantial evidence.

*Bourbon County Bd. of Adjustment v. Currans*, 873 S.W.2d 836, 838 (Ky.App. 1994). Otherwise, the decision is arbitrary and cannot withstand judicial review.

*Id.*

In the present case, the Neighborhood Association bore the burden of proof before the board of adjustment and was granted relief. We find that the board of adjustment acted arbitrarily in denying the portion of the building permit relating to the Cherokee Park access. The property in question was zoned commercial in 1965. The Cherokee Park access has existed continuously since that time. It is undisputed in the record that no legal action was ever taken to eliminate this access. Also, Dr. Gilbert applied for a building permit rather than a conditional use permit or a variance. There was no essential change in character. The division of traffic engineering conducted a study which found that the access did not create a hazardous condition. The division of building inspection complied with the ordinances and, therefore, issued the permit. This was all that was necessary to ensure the permit's validity. Retention of a preexisting access point is simply not an enforcement of the zoning regulations. Rather, the Neighborhood Association's attack on the building permit was an attempt to relitigate the original zoning classification of the property without evidence of a variance or non-conforming use.

Accordingly, the order of the Fayette Circuit Court is affirmed. This Court ORDERS that the appellees' motion to dismiss the appeal be, and it is hereby, DENIED.

ALL CONCUR.

ENTERED: August 22, 2008

/s/ John W. Graves

SENIOR JUDGE, COURT OF  
APPEALS

BRIEFS FOR APPELLANT:

Robin Cornette  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Anne A. Chesnut  
Michael L. Ades  
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