RENDERED: FEBRUARY 7, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001021-MR

DAVID WATKINS APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, SPECIAL JUDGE
ACTION NOS. 11-CI-00358 & 12-CI-00018

WALTER MULLINS; SALLY MULLINS;
CITY OF MIDDLESBOROUGH, KENTUCKY;
MIDDLESBOROUGH BOARD OF ADJUSTMENT,
A/K/A VARIANCE BOARD; DON WILFORD,
IN HIS CAPACITY AS A MEMBER OF
THE MIDDLESBOROUGH BOARD OF ADJUSTMENT;
SALLY SMITH, IN HER CAPACITY AS A MEMBER OF THE
MIDDLESBOROUGH BOARD OF ADJUSTMENT;
RONNIE REECE, IN HIS CAPACITY AS A MEMBER OF THE
MIDDLESBOROUGH BOARD OF ADJUSTMENT;
SCOTT BRANSCOME, IN HIS CAPACITY AS A
MEMBER OF THE MIDDLESBOROUGH BOARD
OF ADJUSTMENT; ADAM BOWLING, IN HIS
CAPACITY AS A MEMBER OF THE MIDDLESBOROUGH
BOARD OF ADJUSTMENT; MICKEY HATMAKER,
CITY OF MIDDLESBOROUGH PLANNING COMMISSION
MEMBER; RANDALL WRIGHT, CITY OF
MIDDLESBOROUGH PLANNING COMMISSION MEMBER;
RONNIE REECE, CITY OF MIDDLESBOROUGH
PLANNING COMMISSION MEMBER; D. ALEX COOK,
CITY OF MIDDLESBOROUGH PLANNING

COMMISSION MEMBER; HAROLD (DOC) MASSENGILL,
CITY OF MIDDLESBOROUGH PLANNING
COMMISSION MEMBER; AND J.C. MEREDITH,
CODE ENFORCEMENT OFFICER FOR THE
CITY OF MIDDLESBOROUGH, KENTUCKY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, TAYLOR AND THOMPSON, JUDGES.

STUMBO, JUDGE: David Watkins appeals from an Order of the Bell Circuit Court affirming a decision of the Middlesborough Board of Adjustment. The Board determined that Walter and Sally Mullins used a parcel of real property as a residential, single family dwelling before industrial zoning codes were adopted, thus making the property exempt from the industrial zoning. Watkins, who owns an adjoining industrial parcel, contends that the Board improperly failed to conclude that the Mullinses' construction of a new or rebuilt home on the parcel did not run afoul of the zoning scheme. We find no error, and affirm the Order on appeal.

In 1991 and 1992, the city of Middlesborough adopted zoning codes which established a light industrial zone within the city limits. At the time of the adoption, Walter and Sally Mullins owned two parcels of adjoining residential property situated within the new industrial zone. Situated on the parcels was a

concrete block house which was used as a residence, along with a mobile home and a trailer.[1] Mr. Mullins resided on the parcel since 1968.

On January 26, 2006, the concrete block structure burned down. The Mullinses were residing in the structure at the time of the fire. The Mullinses temporarily relocated to another residence for about six months while making repairs to the mobile home. After the repairs to the mobile home were completed, the record indicates that the Mullinses re-established residency on the parcel.

In July 25, 2006, the Mullinses applied for a permit to remodel the old house and a mobile home, to restore water and electricity and to reside on the parcel. The Mullinses were allowed to reside in one of the mobiles homes, but could not rebuild the concrete block house at its previous location due to front and side set-back restrictions. The Mullinses then resided in the mobile home for five years. In 2011, they rebuilt the house in conformity with the set-back restrictions, and began residing in the house.

David Watkins owns a parcel of commercial property adjacent to the Mullinses parcels. On May 20, 2011, he filed a Complaint with the City alleging various violations of the zoning code, including that the Mullinses had abandoned the residential usage of the house and had therefore lost the grandfathered nonconforming status. About three days later, the city attorney stated his determination that the residence was not in violation of the code.

[1] The record also characterizes the mobile home and trailer as "two mobile homes".

On May 13, 2011, Watkins appealed to the Board of Adjustment. After the Board allegedly failed to provide a due process hearing, he filed a Petition for Writ of Mandamus in Bell Circuit Court seeking an Order compelling the Board to hear the appeal. On September 21, 2011, the Board conducted a hearing which Watkins maintained failed to examine the facts of the case and which summarily affirmed the City's action.

Watkins renewed or re-noticed his Petition for a Writ of Mandamus in Bell Circuit Court, which rendered an Order on October 19, 2011, directing the Board to conduct a full evidentiary hearing on Watkins' Complaint. The Board then conducted the second hearing on November 10, 2011, and determined that the Mullinses did not abandon their residency of the parcel for more than one year, and therefore had not lost their nonconforming residential usage status. Watkins appealed to the Bell Circuit Court, which rendered a Judgment on May 9, 2013. The court found that the Board acted within the scope of its statutory powers, that the affected parties received procedural due process, and that the decision was supported by substantial evidence. Watkins' Motions for CR 52.02 and CR 59.05 relief were overruled, and this appeal followed.[2]

Watkins now argues that the Bell Circuit Court erred in sustaining the decision of the Board of Adjustment. In support of this contention, he offers a litany of alleged errors centering on the Board's alleged improper failure to conclude that the Mullinses lost or otherwise abandoned their nonconforming

[2] Watkins prosecuted two actions in Bell Circuit Court styled 11-CI-00358 and 12-CI-00018. These actions were consolidated for purposes of appeal.

residential status. Watkins contends that the new construction of the 1,216 square foot home violated the enlargement, expansion or extension provisions of the city code, that a pre-existing, nonconforming residential use does not allow for new or additional construction, and that the zoning restrictions do not remain residential for purposes of future construction. Watkins also argues that the square footage from the old storage trailer, refurbished mobile home and unused, burnt-out residence cannot be added together to construct a new 1,216 square foot home, that the code's repair and maintenance provisions do not allow for new construction, and that the Board failed to properly exercise its statutory powers. In sum, Watkins contends that the circuit court erred in sustaining the Board's decision, and he seeks an Order vacating the December 11, 2011 Decision of the Board of Adjustment and the two subsequent Orders of the Bell Circuit Court as arbitrary, capricious, unlawful and unsupported by substantial evidence.

Middlesborough Zoning Code 150.38(A) addresses pre-existing, nonconforming land usages which are allowed to continue within the zoning districts. It states that,

> Within the districts established by this chapter (and subsequent amendment) there exists lots, structures, and uses of land and structures which were lawful before this chapter was passed or amended, but which would be prohibited, regulated, or restricted under the forms of this chapter or future amendments. It is the intent of this chapter to permit these nonconformities to continue but not to allow their enlargement, expansion, or extension.

Code 150.38(B) addresses lapses in the nonconforming usage. It states that,

> The lawful use of a lot or structure, existing at the time of adoption of any zoning regulations affecting it may be continued, although such use does not conform to the provisions of such regulations, except as otherwise provided herein. A nonconforming use may lapse for a period of one (1) year, without being considered abandoned. The property owner may appeal to the board of adjustment for an additional year prior to the end of the first year. Any lapse of a nonconforming use for a period of more than two (2) years will result in the property being required to conform to existing zoning requirements regarding appropriate uses. The board of adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted. Nor shall the board permit a change from one nonconforming use to another unless the new nonconforming use is in the same or a more restrictive classification.

And finally, Code 150.38(C) states that,

> Should any nonconforming structure or nonconforming portion of a structure be damaged, destroyed, or demolished by any means, it may be reconstructed or repaired but not to exceed the number of cubic feet existing in it, and not to extend or enlarge the scope and area of its operation prior to its damage, destruction, or demolition.

In concluding that the new structure on the Mullinses' parcel was a nonconforming single family dwelling in an industrial zone, the Board first applied Code 150.38(A). It determined that the Mullinses' parcel was "used as a residential, single family dwelling since well before the applicable zoning codes were adopted by the city, making the Mullins property use nonconforming with an Industrial Zone." The record supports this conclusion, and Watkins acknowledges the Mullinses pre-existing, nonconforming usage.

The Board next examined whether the Mullinses abandoned the nonconforming usage for more than one year, thus waiving the nonconforming usage. In answering this question in the negative, the Board applied Code 150.38(B) to conclude that they abandoned their residential usage for just under six months after the concrete block structure burned down. It found that the fire burned the house on January 26, 2006, and that their permit to restore water and power to the trailer and to remodel the original house was filed on July 25, 2006. This conclusion is also supported by the record.

Finally, the Board examined whether the Mullinses' construction of the new structure ran afoul of Code 150.38(C). In concluding that it did not, the Board found that the new house did not "extend or enlarge the scope and area of its operation" in violation of this Code provision. The Board also sought to determine whether the cubic footage of the new structure exceeded that of the prior structures. It found that the height of the new structure was not presented to the Board, thus preventing the Board from concluding that the cubic footage of the new structure ran afoul of Code 150.38(C).

The standard of review in administrative appeals is well-settled in the Commonwealth. "In its role as the finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." *McManus v. Kentucky Retirement Systems,* 124 S.W.3d 454, 458 (Ky. App. 2003) (internal quotation marks and citation omitted). Thus, "[a] reviewing court is not free to substitute its

judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious." *Id.*

> In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

Commonwealth of Kentucky Transportation Cabinet v. Cornell, 796 S.W.2d 591, 594 (Ky. App. 1990) (citations omitted). " 'Substantial evidence' means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Kentucky Retirement Systems v. Bowens,* 281 S.W.3d 776, 780 (Ky. 2009) (citation omitted). "We review an agency's conclusions of law *de novo.*" *Id.* And finally, a "court's function in administrative matters is one of review, not reinterpretation." *Thompson v. Kentucky Unemployment Ins. Comm'n,* 85 S.W.3d 621, 624 (Ky. App. 2002).

In applying the foregoing principles, we find no basis for concluding that the Bell Circuit Court erred in affirming the Board's decision. The record supports the Board's conclusion that the Mullinses used the parcel as a single family dwelling prior to the establishment of the industrial zone; that such usage was not abandoned for more than one year; and, that there was insufficient

evidence to conclude that the cubic footage of the new structure exceeded that of the old structures. Code 158.38(A) expressly establishes as controlling whether there existed "lots, structures, uses of land and structures which were lawful before this chapter was passed", and the record support's the Board's conclusion that the parcel was and continues to be used as a single family residential dwelling. Additionally, the record supports the Board's finding that Watkins did not demonstrate that the cubic footage of the residence increased as a result of the construction. The question for our consideration is not whether the Board could have reached a different result, but whether the conclusion reached conforms to *Cornell*, *supra.* We conclude that the Bell Circuit Court properly determined that the Board acted within its statutory authority, that due process was provided to all affected parties, and that the decision is supported by substantial evidence. Accordingly, we affirm the Order of the Bell Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jeffery W. Helton
Pineville, Kentucky

BRIEF FOR APPELLEE MIDDLESBOROUGH BOARD OF ADJUSTMENT:

J.P. Cline III
Middlesboro, Kentucky