

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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001256-MR

OWENSBORO METROPOLITAN BOARD
OF ADJUSTMENT AND ITS MEMBERS
IN THEIR OFFICIAL CAPACITY;
OWENSBORO METROPOLITAN
PLANNING COMMISSION AND ITS
MEMBERS IN THEIR OFFICIAL CAPACITY;
CITY UTILITY COMMISSION OF THE CITY
OF OWENSBORO, KENTUCKY, D/B/A
OWENSBORO MUNICIPAL UTILITIES

APPELLANTS

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 12-CI-00927

BETTY BOWLES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal from a judgment entered by the Daviess
Circuit Court vacating the decision of the Owensboro Metropolitan Board of

Adjustment (“OMBA”) affirming the Notice of Violation of the Owensboro Metropolitan Zoning Ordinance by the Appellee, Betty Bowles, by holding that the zoning ordinance at issue was an unconstitutional delegation of authority to utilities to waive or limit the ordinance’s prohibition of structures in a public utility easement and declining to give effect to the severability provision contained in the zoning ordinance. Based upon the following, we affirm the decision of the trial court.

BACKGROUND SUMMARY

Bowles is the owner of property located at 407 Stableford Circle, Owensboro, Kentucky. Title to the property set forth a dedicated ten-foot-wide public utility easement located along the western edge of the property. Prior to Bowles’s purchase of the property, City Utility Commission of the City of Owensboro, Kentucky, d/b/a Owensboro Municipal Utilities (“OMU”), had installed an underground electrical line which runs along the easement. Bowles began the construction of a wall on her property and, in August of 2011, OMU became aware of the construction of the wall. On August 5, 2011, OMU inspected the structure. It determined that the wall was being constructed over and through a significant portion of the easement on the western edge of the property.

OMU notified Bowles and her contractor that the construction of the wall was in violation of the easement and, while she halted construction for a short period of time, the wall was completed. OMU then requested Bowles remove the structure, which she refused to do. OMU then sought its removal through a circuit

court action against Bowles on December 7, 2011. Bowles answered the complaint by setting forth that OMU had not exhausted its administrative remedies. OMU then filed a complaint with the Owensboro Metropolitan Planning Commission (“OMPC”). The Zoning Administrator of OMPC determined that the structure was in violation of Section 3-6(e) of the Ordinance and issued a Notice of Violation to Bowles requiring that she remove the structure from the easement.

Bowles then appealed this decision to the OMBA which voted to uphold the Notice of Violation. Bowles next appealed the decision to the Daviess Circuit Court. Upon the filing of cross-motions for summary judgment, the trial court held in favor of Bowles, holding that Section 3-7(g)(6) of the Ordinance constituted an unlawful delegation of authority to the utilities that use public utility easements:

[A] reading of the entire Article 3 leads to the conclusion that neither a complete prohibition nor a complete authorization of walls and fences in PUEs was intended. To allow walls and fences in PUEs at a landowner’s discretion would be an absurd result contrary to the intent of the legislative body. Likewise, a complete prohibition of all buildings and signs would be contrary to the intent of the legislative body. (Citation omitted.) A different reading must be found to reflect the intent of the City Commission in enacting the Ordinance. *Woods v. Commonwealth*, 142 S.W. 3d 34, 40 (Ky. 2004).

‘The intent of the lawmakers is the soul of the statute and the search for this intent we have held to be the guiding star of the court. It must prevail over the literal sense and the precise letter of the language of the statute.’ So it has always been a recognized poser of the courts in the construction of a statute to delete or interpolate words to prevent an absurd consequence or to resolve an ambiguity in order to carry into effect the spirit, purpose

and intent of the law-makers. *Fidelity & Columbia Trust Co. v. Meek*, 294 Ky. 122, 171 S.W.2d 41, 48 (1943). However the ability of courts to cure legislation may only be limited to correcting mere imperfections in the language of an Ordinance, not to rewrite an Ordinance. There is only so much leeway. *E.g., Western Kentucky Coal Co. v. Nall & Bailey*, 228 Ky. 76, 14 S.W.2d 400, 401-02 (1929).

Unfortunately, the delegation of authority to OMU (and other utilities) is unconstitutional. Now, one of two approaches must be taken. The first is severance, that is, either (a) sever the offending language in ORD. § 3-7(g)(6) (i.e., strike the language “subject to the discretion and limitations of the agencies that maintain facilities in such easements”) or (b), sever Ord. §3-7(g)(6) in its entirety. The second approach is to revert to the common law, that is, treat Ord. §3-6(e) and Ord. §3-7(g)(6) *solely as they relate to walls and fences as nullities*.

Trial Court Opinion at pp. 10-11.

The trial court determined that the correct approach was to return to the common law and found that, thereunder, the parties should return to the original action filed in Daviess Circuit Court filed by OMU and determine whether Bowles’s use of the easement was reasonable, which is a question of fact. The trial court also set forth that the Ordinance would require amendment to make it constitutional. The OMU then brought this appeal.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine whether the trial court correctly found “that there were no genuine issues as to any material fact and that the moving party was

entitled to judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03.

“[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden shifts to the party opposing summary judgment to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Community Trust Bancorp v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court’s decision and must review the issue *de novo*. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the granting of summary judgment by the trial court.

DISCUSSION

The Appellants first argue that Section 3-7(g)(6) of the Zoning Ordinance is not an unconstitutional delegation of authority. The Ordinance prohibits the erection of structures in a public utilities easement. It provides as follows:

Public Utility easements. Walls and fences may be erected within public utility easements subject to the discretion and limitations of the agencies that maintain

facilities in such easements. Walls and fences shall not preclude the natural flow of surface storm water through yards, even if no formal easements exist for storm water runoff.

Additionally, Section 3-6(e) of the Ordinance provides:

Encroachments. Accessory buildings, structures and features shall not encroach upon or be located within public rights-of-way, public utility easements, or adjoining lots, unless specifically permitted elsewhere in this article.

The trial court held that “[t]he grant to utilities to approve or disapprove encroachments under the authority of Ord. §3-7(g)(6) violates Section 2 of the Kentucky Constitution.” As authority for its holding, the trial court cited *Bd. of Trustees of Town of Bloomfield v. Bayne*, 206 Ky. 68, 266 S.W. 885, 886-7 (Ky. App. 1924), *Louisville and Jefferson County Planning Commission v. Schmidt*, 83 S.W.3d 449, 445 (Ky. 2002), and *Snyder v. Owensboro*, 528 S.W.2d 663,664 (Ky. 1975). The Appellants contend that these cases dealt with the delegation of the decision to grant or deny an application, plat, or plan, where no standards had been established as a part of the delegation. They argue that the sections of the Ordinance at issue here involve a legislative prohibition with a provision for a waiver or modification of the prohibition by the utilities whose interest the prohibition is designed to protect. Appellants assert that the discretion given to the utilities to waive this prohibition is not the exercise of legislative authority, but rather a part of the legislative scheme.

Section 2 of the Kentucky Constitution provides that “[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” In *Colyer v. City of Somerset*, 306 Ky. 797, 208 S.W.2d 976 (Ky. 1948), the court held that “. . . an ordinance which lays down no requirements to be followed and no general and uniform rule is invalid because it leaves the granting of such a thing as a building permit to the sometimes arbitrary discretion of municipal authorities.” The ordinance at issue in *Colyer* required a property owner to obtain a building permit from the city before building within the city limits. The city had the right to determine the distance of the construction from the sidewalk. The highest court in Kentucky held that an ordinance such as this “would empower city officials, merely by the imposition of their own singular conditions to grant building permits to those who voted them into office or to deny the same to those who attempted to do the contrary.” *Id.* at 977. Appellees argue that such a delegation of arbitrary power violates Section 2 of the Kentucky Constitution. We agree.

The OMBA’s authority is limited to the interpretation of the ordinance and does not have the authority to require utilities to allow the encroachment. OMBA does not have authority to determine if the ordinance is valid. In allowing OMU to determine on its own whether or not a violation of the easement occurred, the ordinance gives OMU arbitrary power. No guidelines are set forth, and those who build structures on the easement have no guidance. OMU’s power under the ordinance is unconstitutional.

The Appellants next argue that, if Section 3-7(g)(6) is unconstitutional, it should be severed and the rest of the Zoning Ordinance should remain in effect. They contend that, even if the ordinance is unconstitutional, the Owensboro legislative body included a severability provision which allows for the invalidation of any provision determined to be contrary to law. Specifically, it provides that:

1.6 SEPARABILITY. If any clause, sentence, subdivision, paragraph, section or part of this Zoning Ordinance be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence subdivision, paragraph, section or part thereof directly involved in the controversy in which said judgment shall have been rendered.

In *Myers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 819 (Ky. 1992), the Kentucky Supreme Court held that “where there is both a specific statute and a general statute seemingly applicable to the same subject . . . the specific statute controls.” In this case, it is Section 3-7(g)(6) which is the more specific statute. This statute controls whether the fence or wall at issue can be constructed upon the easement. Kentucky Revised Statutes (KRS) 446.090 provides that “essentially and inseparably connected [statutes and ordinances] with and dependent upon [an] unconstitutional part that it is apparent” that it would not have been enacted without the part, cannot stand on its own. Thus, it would not be possible to sever the section and maintain the constitutionality of the remaining ordinance. Therefore, we affirm the trial court’s decision on this issue as well.

THOMPSON, JUDGE, CONCURS.

BRIEF FOR APPELLANTS:

Patrick D. Pace
Stephen C. Pace
Terra Ward Knight
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Warren J. Hoffmann
Keith Moorman
Lexington, Kentucky

R. Michael Sullivan
Owensboro, Kentucky