

RENDERED: DECEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000846-MR

MARLENE WHITE AND RIKKI JAMALIA

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 07-CI-00985

LEXINGTON-FAYETTE URBAN
COUNTY PLANNING COMMISSION
MEMBERS, DALLAM HARPER,
LINDA GODFREY, JOAN WHITMAN,
NEILL DAY, LYLE ATEN, K. MICHAEL CRAVENS,
JIM MAHAN, LYNN ROCHE-PHILLIPS
and ANN ROSS

LEXINGTON-FAYETTE URBAN GOVERNMENT
CITY COUNCIL MEMBERS, JIM NEWBERRY, MAYOR;
JIM GRAY, VICE MAYOR; RANDAL VAUGHN,
CHUCK ELLINGER, LINDA GORTON,
ANDREA JAMES, TOM BLUES, JULIAN BEARD,
DAVID STEVENS, KEVIN STINNETT, K.C. CROSBIE,
GEORGE MYERS, JAY MCCHORD, DON BLEVINS,
RICHARD MOLONEY and ED LANE

APPELLEES

OPINION
DISMISSING AND REMANDING

** ** *

BEFORE: COMBS, J. LAMBERT AND VANMETER, JUDGES.

COMBS, JUDGE: This is a zoning case in which Marlene White and Rikki Jamalia appeal the judgment of the Fayette Circuit Court that affirmed a decision of the Lexington-Fayette Urban County Government. At issue was a zone change affecting the Ashland Park neighborhood in Lexington. We have thoroughly reviewed the parties' arguments on appeal, the record, and the applicable law. Because of the procedural posture of the case, we are compelled to dismiss the appeal as having been taken from an interlocutory order rather than a final judgment.

A summary of the procedural history of the case is essential. On December 16, 1995, Marlene White filed an application for a conditional use permit with the local Planning Commission's Board of Adjustments (BOA). She intended to convert a duplex at 119 and 121 South Ashland Avenue in Lexington to a commercial enterprise -- a bed and breakfast with four guestrooms. The duplex is located in an R-3 zone, which allows for a conditional use permit to operate a multiple-guest-room bed and breakfast under certain circumstances if sanctioned by the BOA. A hearing before the BOA was scheduled for January 27, 2006.

In the meantime, White secured what was commonly referred to (before the subprime mortgage crisis of 2008) as a “NINA” (no income, no asset) loan¹ to acquire the property. On January 16, 2006, **before** the hearing was scheduled to occur, White purchased the duplex.

At the January 27, 2006, hearing before the Board of Adjustments, neighbors appeared and expressed their opposition to the operation of a bed and breakfast in the neighborhood. They requested that the hearing be postponed for thirty days, and the BOA granted the request. During this interval, the neighbors contacted Urban County Council member Bill Farmer and voiced their opposition to the new enterprise. At the Council meeting conducted on February 9, 2006, Councilmember Farmer proposed a moratorium that would prevent the BOA from taking action on any application for conditional use permits for R-3 zoned properties located in a specific area, which included 119 and 121 South Ashland Avenue. The purpose of the moratorium was “to give the Planning Commission and the Urban County Government time to consider downzoning these properties to a single-family residential zone. . . .” After hearing both sides, the council granted a moratorium for a period of six months. It was later extended to September 15, 2006.

At its meeting on August 17, 2006, the Council resolved to initiate a zone change review of the area surrounding and including 119 and 121 South

¹ This questionable lending practice is often viewed as a significant factor in the collapse of the subprime lending industry that preceded the severe economic downturn that began in 2008.

Ashland Avenue. The Planning Commission conducted a hearing on the matter and sent its recommendations to the Urban County Council.

On January 25, 2007, the Council held a zone change hearing. Following the hearing, the Council voted to rezone the area to R-2. With White's application for a conditional use permit still pending, the Council announced that she could proceed as if her property were still governed by the R-3 zone provisions.

On February 23, 2007, White and her daughter, Jamalia, appeared before the BOA on their hearing for a permit to run a four-guest-room bed and breakfast under the R-3 designation. Members of the Ashland Park Neighborhood Association again appeared at the hearing and again opposed her proposed use of the property. Following the hearing, the BOA voted to deny White's application for a conditional use permit.

On February 26, 2007, White and Jamalia filed an appeal to the Fayette Circuit Court. They contended that the decision of the Urban County Council to rezone the disputed property was arbitrary and capricious and contrary to the governing comprehensive plan. They sought to have the R-3 designation restored to the neighborhood. They also alleged that the Council's February 2006 decision to impose a six-month moratorium on conditional use permits in the neighborhood denied them due process and equal protection of the law. Finally, they alleged that the property had been taken from them without just

compensation. The Urban County Council and Board of Adjustments answered and denied the allegations.

One year later, White and Jamalia filed a motion to consolidate this action with a separate appeal that had been filed following the decision of the Board of Adjustments not to issue a conditional use permit for the proposed four-guest-room bed and breakfast. In that earlier appeal, White and Jamalia contended that the Board of Adjustments had erred by failing to grant the conditional use permit. While no written order appears of record, the motion was granted and the two cases were consolidated.

On October 10, 2011, White and Jamalia filed a motion for partial summary judgment. They argued that they were entitled to judgment as a matter of law with respect to the decision of the Urban County Council to rezone the disputed property. By order entered September 20, 2012, the motion was denied.

On January 16, 2015, the Urban County Council filed a motion for summary judgment. Its motion was granted on March 2, 2015.

In conducting its review, the Fayette Circuit Court rejected the contention that the Urban County Council's decisions to impose a brief moratorium and then to enact a zone change were arbitrary or unreasonable. The circuit court also rejected the contention that the council's decision deprived White and Jamalia of due process, violated their rights to equal protection, or constituted an unlawful "taking" of their property. The circuit court did not determine or

announce that there was “no just reason to delay” entry of a final judgment, nor did it indicate in any manner that its decision was to be regarded as final.

On May 6, 2015, the Fayette Circuit Court denied the motion of White and Jamalia to alter, amend, or vacate the summary judgment that had been entered with respect to the actions of the Urban County Council.² In a separate order, the circuit court set a briefing schedule for the issues related to the decision of the Board of Adjustments. On May 11, 2015, the court entered an order concerning pending discovery matters -- including the request for permission to conduct video depositions. On June 4, 2015, White and Jamalia filed a notice of appeal with respect to the circuit court’s decision entered on March 2, 2015; *i.e.*, the order granting summary judgment to the Urban County Council.

On appeal to this Court, White and Jamalia argue that the circuit court erred by upholding the decisions of the Council to impose a moratorium on the Board of Adjustment’s consideration of conditional use permit applications and to rezone an area that included the disputed property. They believe that the court erred in failing to conclude that those decisions were unreasonable and arbitrary. White and Jamalia reiterate here that they were deprived of both a state and a federal constitutional right to just compensation for the “taking” of their property and that the court erred in failing to so conclude.

We conclude that the summary judgment which is now before us on appeal is an interlocutory decision. Where an underlying order lacks finality, this Court is

² Recourse to our Rule of Civil Procedure (CR) 59.05 (motion to alter or amend or vacate a judgment) is only available with respect to a final judgment.

required to raise the jurisdictional issue *sua sponte*. *Tax Ease Lien Investments I, LLC v. Brown*, 340 S.W.3d 99 (Ky.App. 2011).

White and Jamalia filed two actions in circuit court concerning the use of the disputed property. First, they filed an action against the Urban County Council. This action relates to the decision to re-zone the Ashland Park neighborhood. Next, they filed an action against the Board of Adjustments concerning its decision to deny a conditional use permit under the zoning requirements as they existed at the time White purchased the duplex. Pursuant to the request of White and Jamalia, these actions were consolidated into a single action by the court several years ago.

The summary judgment motion filed by the Urban County Council did not seek to resolve the claims related to the decision of the Board of Adjustments to deny the application for a conditional use permit. And the circuit court clearly did not grant relief pertaining to those claims. In fact, the circuit court continued to entertain motions with respect to the issues related to the decision of the Board of Adjustments that were still pending.

While our rules of procedure recognize finality of a judgment upon one or more but less than all of the parties' claims, they do so only where the court makes a specific determination that there is no just reason to delay final judgment. CR 54.02 provides that the judgment **must** recite that determination and **must** expressly indicate that the judgment is final. In this case, the circuit court's decision did not adjudicate all the claims or the rights and liabilities of all of the

parties, nor did it include the necessary recitals. Therefore, its order did not terminate the action as to any of the claims or parties. Consequently, the decision remains interlocutory and subject to revision at any time before the entry of final judgment. CR 54.02; *see Bank of Danville v. Farmers Nat'l.*, 602 S.W.2d 160, 164 (Ky.1980) (“Order was interlocutory and subject to change by the trial court at any time prior to the final adjudication.”).

This Court does not have jurisdiction to review the decision of the circuit court entered on March 2, 2015, because it remains interlocutory and subject to further revision by the circuit court. Accordingly, we are compelled to dismiss the appeal and to remand this matter back to the Fayette Circuit Court for its additional consideration.

ALL CONCUR.

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