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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000834-MR

BRIGHTON PROPERTIES, INC. APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE DANIEL J. ZALLA, JUDGE
ACTION NO. 17-CI-00992

DONNIE GLENN; CAMPBELL
COUNTY & MUNICIPAL BOARD OF
ADJUSTMENT; DIOCESE OF COVINGTON;
AND KYLE T. WAYMEYER APPELLEES

AND

NO. 2018-CA-000854-MR

CAMPBELL COUNTY & MUNICIPAL
BOARD OF ADJUSTMENT APPELLANT

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OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Brighton Properties, Inc., brings Appeal No. 2018-CA-000834-MR from a March 15, 2018, Opinion and Order and a May 15, 2018, Opinion and Order reversing a decision of the Campbell County & Municipal Board of Adjustment concluding that it lacked jurisdiction to consider Donnie Glenn's appeal. The Campbell County & Municipal Board of Adjustment brings Appeal No. 2018-CA-000854-MR from the same Opinion and Orders. We affirm Appeal No. 2018-CA-000834-MR and Appeal No. 2018-CA-000854-MR.

Brighton Properties, Inc. (Brighton) sought to purchase real property located at 5161 Skyline Drive in Campbell County, Kentucky, owned by the Diocese of Covington (Diocese). On August 21, 2017, the Diocese and Brighton filed a Request for Zoning Verification concerning said real property. The Diocese and Brighton specifically sought "verification that Brighton Properties' proposed use of the property is a continuation of an existing, approved conditional use

and/or continuation of a legal nonconforming use." Request for Zoning Verification at 1.

In a decision dated September 1, 2017, Cynthia Minter, director of Campbell County & Municipal Planning & Zoning Commission (Commission), opined that Brighton's proposed use of the property would constitute a combination of a "continuation of its previously determined existing use which pre-date zoning (deemed legal non-conforming use) and permitted conditional uses."

Subsequently, on September 27, 2017, in conformance with Campbell County Zoning Ordinance 18.2, Donnie Glenn filed a Zoning Review, Modification, or Appeal Application (Appeal Application) with the Campbell County & Municipal Board of Adjustment (Board).[1] Therein, Glenn sought to appeal the decision of Minter that Brighton's proposed use of the property was proper.

At a special called meeting of the Board, it concluded that the Board lacked jurisdiction to consider Glenn's appeal. The Board determined that Kentucky Revised Statutes (KRS) 100.261 required Glenn to state that he was injuriously affected or aggrieved in his appeal application. As Glenn failed to do so, the Board believed it was without jurisdiction per KRS 100.261 to consider the

[1] It appears that the real property in dispute is located in Donnie Glenn's neighborhood.

appeal. Glenn then sought judicial review by filing a complaint in the Campbell Circuit Court.

By Opinion and Orders entered March 15, 2018, and May 15, 2018, the circuit court reversed the Board's decision and determined that the Board possessed jurisdiction to consider Glenn's appeal. In particular, the circuit court concluded:

> [T]he salient parts of KRS 100.261 require any person claiming to be "injuriously affected or aggrieved by official action" from a zoning administrator's decision to appeal such "action of the official by filing with said officer and with the board a notice of appeal specifying the grounds thereof . . ." The statute continues and states that "At the public hearing on appeal held by the board, any interested person may appear and enter his appearance, and shall be given an opportunity to be heard."
>
> The Court finds that the appeal requirements of KRS 100.261 and KRS 100.347 are not the same. While KRS 100.347 has been interpreted by Spencer [*Cty. Pres., Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327 (Ky. App. 2007)] to require a plaintiff to explicitly claim in an appeal to the Circuit Court that he has been "injured or aggrieved" by final action of the BOA [Campbell County & Municipal Board of Adjustment], there is no Kentucky case that this Court is aware that required [Glenn] in this case to specifically plead that he was "injuriously affected or aggrieved" in order to gain the right to perfect his appeal to the BOA under KRS 100.261.
>
> In addition, KRS 100.261 has distinct features which separates it from KRS [100.347]. Namely, the person appealing must set forth "grounds" for the appeal to the BOA, and the BOA must then conduct a hearing

> where any "interested person may appear" and be given an "opportunity to be heard." None of these requirements and rights are set forth in KRS [100.347]. Consequently, the Court finds that to require a plaintiff to specifically plead that he has been "injuriously affected or aggrieved" to gain BOA appeal jurisdiction under KRS 100.261 would be inconsistent with permitting "any interested person," not just a person claiming to be injuriously affected or aggrieved, to appear and be heard at the hearing before the BOA.
>
> The Court also finds it significant that KRS 100.367 deals with the appeals to Circuit Court, not to appeals to the BOA. While the BOA is correct that an appeal of an administrative decision is not a constitutional guarantee, meaning that a party must strictly comply with the statute granting the right of appeal, that the law concerns appeals to the circuit court, not to appeals to the administrative agency itself. *Spencer [Cty. Pres., Inc.]*, 214 S.W.3d at 329-30; *Ky. Unemployment Ins. Comm'n v. Providian Agency Group, Inc.*, 981 S.W.2d 138 (Ky. App. 1998). As reasoned above, administrative agencies such as the BOA are required to conduct a hearing, take and weigh evidence and the [sic] enter of findings of fact in order to fulfill procedural due process requirements. The Court finds that the appeal application of Glenn not only provides all the information requested in the application, but also meets the statutory requirements of an appeal to the BOA under KRS 100.261.

March 15, 2018, opinion and order at 4-5.

Brighton filed a notice of appeal (Appeal No. 2018-CA-000834-MR) and the Board filed a notice of appeal (Appeal No. 2018-CA-000854-MR) in the Court of Appeals from the March 15, 2018, and May 15, 2018, Opinion and

Orders. As Brighton and the Board have raised similar arguments in these appeals, we shall concomitantly address the merits of their arguments.

As an appellate court, our role is to review the administrative agency's decision for arbitrariness. *Martin Cty. Home Health Care v. Cabinet for Health and Family Servs.*, 214 S.W.3d 324, 326 (Ky. App. 2007). Relevant to this appeal, we must determine whether the Board properly interpreted KRS 100.261. The construction and interpretation of a statute presents an issue of law for the court. *Bd. of Educ. v. Hurley-Richards*, 396 S.W.3d 879, 882 (Ky. 2013). When interpreting a statute, our paramount concern is "to ascertain and give effect to the intent of the general assembly." *Spencer County Preservatopm, Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, 329 (Ky. App. 2007).

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.

For purposes of these appeals, the pivotal language of KRS 100.261 is found at the beginning of the statute and reads that a person "claiming to be injuriously affected or aggrieved" may appeal to the Board. Brighton and the Board contend that it was incumbent upon Glenn to allege that he was injuriously affected or aggrieved in his appeal application to invoke the jurisdiction of the Board per KRS 100.261. In support thereof, Brighton and the Board rely upon *Spencer County Preservation, Inc.*, 214 S.W.3d 327. We do not interpret KRS 100.261 as requiring same.

In *Spencer County Preservation, Inc.*, 214 S.W.3d 327, the Court of Appeals was called upon to interpret KRS 100.347(3), which contained similar language to KRS 100.261. The Court pointed out that KRS 100.347(3) authorized "any person . . . claiming to be injured or aggrieved" from a final action of a legislative body to "appeal" to the circuit court. *Id.* at 328 (quoting KRS 100.347(3)). In considering the language of KRS 100.347(3), the Court of Appeals recognized that "[w]here an appeal is filed in circuit court [from an administrative decision] by grant of a statute, . . . the parties must strictly comply with the dictates of that statute." *Id.* at 329. In light thereof, the Court interpreted KRS 100.347(3) as mandating that "a person . . . must claim in its complaint on appeal to be injured or aggrieved by a final action of a legislative body to pursue an appeal to the circuit court." *Id.* If a party failed to allege to be injured or aggrieved, the Court held that "a statutory mandate for the exercise of judicial power by the circuit court

was not met, and the circuit court was required to dismiss the appeal for want of jurisdiction." *Id.* at 330.

We view *Spencer County Preservation, Inc.*, 214 S.W.3d 327 as distinguishable from the issue in this case. Unlike *Spencer County Preservation, Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, this case involves an appeal from an administrative decision-maker (director of planning and zoning) to another administrative decision-maker (Board) under KRS 100.261. Whereas in *Spencer County Preservation, Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, the appeal was from an administrative decision-maker (fiscal court) to the circuit court under KRS 100.347(3). When seeking judicial review from an administrative agency's decision by grant of statutory authority, the Court in *Spencer County Preservation, Inc.*, 214 S.W.3d 327, recognized well-established precedent that the mandates of such statute must be strictly complied with by any party. *See Board of Adjustments v. Field*, 581 S.W.2d 1, 2 (Ky. 1978); *Louisville Gas & Electric Co. v. Hardin & Meade County Property Owners*, 319 S.W.3d 397, 400 (Ky. 2010).

However, we find no authority in Kentucky that internal administrative agency reviews are subject to such strict compliance review. Given that the agency regulates its own internal review, we do not believe strict compliance is required under KRS 100.261 mandating that a party must claim to

be injuriously affected or aggrieved in an appeal application with the Board.[2] As pointed out by the circuit court, KRS 100.261 and KRS 100.347 are not identical and their respective differences in terminology must be given effect:

> KRS 100.261 has distinct features which separates it from KRS [100.347]. Namely, the person appealing must set forth "grounds" for the appeal to the BOA, and the BOA must then conduct a hearing where any "interested person may appear" and be given an "opportunity to be heard." None of these requirements and rights are set forth in KRS [100.347]. Consequently, the Court finds that to require a plaintiff to specifically plead that he has been "injuriously affected or aggrieved" to gain BOA appeal jurisdiction under KRS 100.261 would be inconsistent with permitting "any interested person," not just a person claiming to be injuriously affected or aggrieved, to appear and be heard at the hearing before the BOA.

March 15, 2018, opinion and order at 4-5.

Accordingly, we agree with the circuit court's interpretation of KRS 100.261 and do not interpret it as mandating that a party must allege to be injuriously affected or aggrieved in order to invoke the jurisdiction of the Board in an internal agency appeal. Hence, we conclude that the Board was not deprived of jurisdiction because Glenn failed to state he was injuriously affected or aggrieved in his appeal application. The Board committed an error of law by concluding otherwise.

[2] Interestingly, the Campbell County & Municipal Board of Adjustment (Board) prepares its own appeal application form for appeals to the Board, which makes no reference to an applicant alleging to be injured or aggrieved by an action of the agency.

For the foregoing reasons, the Opinion and Orders of the Campbell Circuit Court in Appeal Nos. 2018-CA-000834-MR and 2018-CA-000854-MR are affirmed.

ALL CONCUR.

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