RENDERED: DECEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000212-MR

BLUE GRASS TRUST FOR HISTORIC PRESERVATION APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 18-CI-03781

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT PLANNING COMMISSION; WILLIAM WILSON; AND THE RESIDENCES AT SOUTH HILL, LLC APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MAZE AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Blue Grass Trust for Historic Preservation ("Appellant") appeals from an Opinion and Order of the Fayette Circuit Court dismissing an appeal from a decision of the Lexington-Fayette Urban County Government Planning Commission ("the Commission"). Appellant argues that the

circuit court erred in finding that Appellant's failure to name the Historic South Hill Neighborhood Association ("the Association") was fatal to the appeal. We conclude that because the Association is not an owner or applicant as contemplated by Kentucky Revised Statute (KRS) 100.347(4), it was not an indispensable party to the appeal. Accordingly, we REVERSE the opinion and order, and REMAND the matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

On August 22, 2018, the Lexington-Fayette County Board of Architectural Review ("BOAR") conducted a public hearing to consider the application of the Residences at South Hill, LLC ("the Residences") for two Certificates of Appropriateness ("COAs") allowing for the demolition of a historic building at the corner of High Street and South Upper Street in Lexington, Kentucky.[1] The Residences sought the demolition for the purpose of constructing a new residential building. Appellant, the Association, and several other individuals and organizations argued against the approval. BOAR approved the application.

[1] The application was made pursuant to Lexington-Fayette Urban County Government Zoning Ordinance Sections 13-7(c)(1)(b) and (c), which allows for the demolition of a building "which does not contribute to the character of, and will not adversely affect the character of the property in a zone protected by an H-1 [historic] overlay."

Thereafter, Appellant, the Residences, and the Association filed separate appeals before the Commission. Upon review, the Commission sustained the issuance of the COAs. On October 30, 2018, Appellant filed a Notice of Appeal in Fayette Circuit Court appealing the Commission's decision to grant the demolition COA.

The matter proceeded in Fayette Circuit Court, whereupon the Commission and the Residences ("Appellees") moved to dismiss the appeal. In support of the motion, Appellees argued that 1) Appellant did not comply with the requirements of KRS 100.347 by failing to name the individual members of the Commission as Appellees, and 2) Appellant failed to comply with subsection (4) of the statute by neglecting to name the Association as a party to the appeal. Upon considering the motion, the circuit court concluded that Appellant properly named the Commission as an appellee and was not required to name individual Commission members. As to the second argument, however, the court determined that the Association was a required party to the appeal and the failure to name it as a party was "a fatal defect to the proceedings." The court acknowledged that while the Association was not an applicant which initiated the proceeding, it was an "applicant" as contemplated by KRS 100.347(4) for purposes of appeal. The court cited by example *Harrison v. Park Hills Bd. of Adjustment*, 330 S.W.3d 89 (Ky. App. 2011), in which a panel of this Court characterized the city of Park Hills as an

applicant because, though it had not (according to the Fayette Circuit Court) initiated the proceeding, it contested the planning commission's decision to the Board of Adjustment. Just as Park Hills was found to be an "applicant" for purposes of KRS 100.347(4), the Fayette Circuit Court determined in the instant proceeding that the Association was an "applicant" because it appealed BOAR's decision to the Commission. It determined that strict compliance with KRS 100.347(4) was required and denied a motion for reconsideration. This appeal followed.

ARGUMENT AND ANALYSIS

Appellant now argues that the Fayette Circuit Court committed reversible error in sustaining Appellees' motions to dismiss. It argues that the Association was not a necessary party to the appeal before the circuit court; that KRS 100.347(4) and zoning ordinances demonstrate that the Residences was the only "applicant" for purposes of those provisions; that the Association effectively abandoned its appeal to the Commission and therefore cannot rightly be characterized as an applicant; and that the instant facts are distinguishable from *Harrison, supra*. Appellant directs our attention to the plain language of KRS 100.347(4), which it contends requires only the owner of the subject property and the applicants who initiated the proceeding to be parties to the appeal. The focus of its argument is that the proceeding from which the appeal to the circuit court

arose was initiated at the BOAR level as an application seeking COAs. It asserts that because the proceeding did not originate at the Commission, the Planning Commission proceeding should not be the proceeding examined to determine the "applicants" responsible for initiating the proceeding. Appellant contends that there is only one application, *i.e.*, the application filed by the Residences seeking COAs. As such, it argues that the Association is not an "applicant" for purposes of KRS 100.347(4), and that the Fayette Circuit Court erred in so ruling.

KRS 100.347(4) states that, "[t]he owner of the subject property and applicants who initiated the proceeding shall be made parties to the appeal. Other persons speaking at the public hearing are not required to be made parties to such appeal." The sole question for our consideration is whether the Fayette Circuit Court properly determined that the Association is an "applicant" as contemplated by KRS 100.347(4) for purposes of the appeal before the circuit court.

In *Harrison, supra*, upon which the Fayette Circuit Court relied in finding that the Association was an indispensable party to the appeal, residents Richard and Pamela Spoor sent a letter to Park Hills Zoning Administrator Dennis R. Uchtman complaining that the Den Lou Motel was operating in violation of applicable zoning provisions. Margaret Harrison and her husband Kenneth Wolfe owned the subject parcel. Harrison also owned WMLH, Inc., which operated Den

Lou Motel. Mr. Uchtman investigated the Spoors' complaint and found no zoning violation.

The Spoors then filed an application with the Board of Adjustment seeking a ruling on the matter. The City of Park Hills filed an identical application, and the applications were heard and considered as one because they sought the same relief, *i.e.*, a finding of a zoning violation. Harrison, Wolfe, and WMLH, Inc. were parties to the proceeding. A hearing on the applications was conducted, resulting in the Board of Adjustment finding that Den Lou Motel was operating in violation of the application zoning regulations.

Harrison, Wolfe, and WMLH, Inc. appealed to the Kenton Circuit Court. The court dismissed the appeal upon finding that the appellants had improperly failed to name the Spoors as parties to the appeal. In support of the dismissal, the court determined that KRS 100.347(1) and (4) required the Spoors, as the original applicants before the Board, to be named as indispensable parties to the appeal. A panel of the Court of Appeals affirmed the dismissal.

In the matter before us, the Fayette Circuit Court concluded that like the City of Park Hills in *Harrison*, the Association herein must be characterized as an applicant for purposes of KRS 100.347(4) and is therefore an indispensable party. We find this conclusion to be in error. In *Harrison*, it is uncontroverted that the City of Park Hills was in every sense a true "applicant," as it applied to the

Board of Adjustment for consideration of its complaint. As noted by the panel of this Court, "[t]he City of Park Hills, through its mayor, filed an identical *application*[.]" *Harrison*, 330 S.W.3d at 91 (emphasis added). In contrast, the Association herein is not an applicant. The Residences, not the Association, is both the landowner and the applicant for the COAs. And just as Harrison, Wolfe, and WMLH, Inc. appealed to the Kenton Circuit Court in *Harrison* as interested parties, so too did the Association herein appeal from BOAR's ruling to the Commission.[2] Simply put, whereas the City of Park Hills was an applicant in *Harrison*, the Association is not an applicant in the matter *sub judice*.

CONCLUSION

KRS 100.347(4) requires that the owner of the subject property and applicants who initiated the proceeding shall be made parties to the appeal. Persons merely speaking at the public hearing are not required to be made parties to such appeal. *Id*. The Association does not own the subject parcel and is not an applicant who initiated the proceeding. As such, it is not an indispensable party to

[2] We note that the administrative schemes differed in the two proceedings. In the matter before us, the application was made to BOAR, with the adverse decision being appealed to the Commission and subsequently to the Fayette Circuit Court. In contrast, the *Harrison* application was made to the Board of Adjustment, with its decision being appealed directly to the Kenton Circuit Court. Complicating matters, the City of Park Hills' action before the Board of Adjustment was characterized as both an application for purposes of KRS 100.347(4) and an appeal from the zoning administrator's ruling.

the appeal. Accordingly, we REVERSE the opinion and order on appeal, and REMAND the matter to the Fayette Circuit Court for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jessica K. Winters
Lexington, Kentucky

BRIEF FOR APPELLEE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT PLANNING COMMISSION:

Tracy W. Jones
Lexington, Kentucky

BRIEF FOR APPELLEE THE RESIDENCES AT SOUTH HILL, LLC:

William M. Lear, Jr.
Nick Nicholson
Lexington, Kentucky