RENDERED: JUNE 26, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000987-MR

BOBBY D. CRICK, AND HIS
WIFE, SANDRA K. CRICK — APPELLANTS

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, CHIEF JUDGE
ACTION NO. 17-CI-00181

CITY OF MORTONS GAP,
KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, TAYLOR, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Bobby D. Crick and Sandra K. Crick (the Cricks) appeal from the Hopkins Circuit Court's order granting the City of Mortons Gap, Kentucky, summary judgment and dismissing their case which collaterally challenged an adverse zoning decision as untimely filed.

In 1998, Spencer Witt and Ethel Witt (the Witts) purchased property in Mortons Gap, Kentucky, and began living there in a 1998 model year single-wide manufactured home. In 2006, the Official Zoning Ordinance of the City of Mortons Gap (Zoning Ordinance) was adopted. The Zoning Ordinance rezoned the Witts' property to Single Family Residential I.

As set out in Article VIII, Section 8.0, in a table entitled Zone District and Conditional Use (ZDCU), the Single Family Residential I classification allows detached single-family dwellings which are defined as having, among other characteristics, a minimum width of eighteen feet and a permanent foundation.[1] By having a width requirement of eighteen feet, single wide manufactured homes are effectively excluded because even with special permitting the maximum width of an object that can be hauled on Kentucky highways is sixteen feet.[2] However,

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[1] A detached single-family dwelling was defined as:

> A dwelling standing by itself and containing only one (1) dwelling unit, separate from other dwellings by open space, but shall not include mobile homes. The lowest minimum length and width dimension being greater than 18 feet and a minimum living space square footage excluding porches and garage shall be 600 sf and is affixed to a solid foundation of permanent material built between the ground and first floor of the dwelling.

Zoning Ordinance, Art. VII § 7.0.

[2] Manufactured homes are built off-site and must be transported to the property where they will be occupied. As specified in Kentucky Revised Statutes (KRS) 189.221(1) and KRS 189.222(9)(a), the standard acceptable widths of manufactured homes to be transported on Kentucky highways is eight feet on some highways and eight and one-half feet on others. While KRS 189.270(3) permits a width of up to sixteen feet to be transported on a highway with a

the ZDCU also specifically prohibits the use of single-wide manufactured homes on the property.

A manufactured home[3] can be attached to a permanent foundation and converted to real estate pursuant to KRS 186A.297, and thereby qualify as a detached single-family dwelling under the Zoning Ordinance if it meets the other criteria for that definition.[4] While the manufactured home at issue was apparently converted to real estate, it did not meet the width requirement, which would require at least a double-wide manufactured home.

The Single Family Residential II classification allows both detached single-family dwellings and single-wide manufactured homes. Mobile homes,[5] which could never become detached single-family dwellings, are excluded from both Single Family Residential I and II.

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special permit, there are no exceptions for transporting anything wider. Therefore, a single-wide manufactured home cannot be wider than sixteen feet while a double-wide manufactured home can be twice as wide because the halves are connected on-site.

[3] A manufactured home was defined as follows: "A single-family residential dwelling constructed after June 15, 1976, in accordance with the federal act, transportable in one or more sections, which is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities." Zoning Ordinance, Art. VII § 7.0. *See* KRS 186.650(3) and KRS 219.320(3).

[4] However, conversion to real estate is not necessarily permanent; a manufactured home can later be severed from real estate pursuant to KRS 186A.298. As part of that process, pursuant to KRS 186A.298(1)(f)1, a new certificate of title is required under KRS 186A.070(1).

[5] The definition of a mobile home included a provision that "the removal of wheels and/or the permanent or semi-permanent attachment of a foundation to said mobile structure shall not change its classification." Zoning Ordinance, Art. VII § 7.0.

Because the Witts' manufactured home was on the property prior to the zoning change, pursuant to Zoning Ordinance, Article IX section 9.5, the Witts were entitled to continue in their nonconforming use. However, the Zoning Ordinance provides that this right could be lost "[w]hen a nonconforming use is abandoned or non-use is continued for a period of ninety (90) consecutive days, or if non-use is continued through a lack of diligence as to amount to an abandonment[.]" Zoning Ordinance, Art. IX § 9.5(D). Abandonment is defined as:

> The relinquishment of property, or a cessation of the use of the property by the disconnection of water, sewer, or electric for a period greater than ninety (90) days, by the owner with the intention neither of transferring rights to the property to another owner nor of resuming the use of the property.

Zoning Ordinance, Art. VII § 7.0.

The Witts vacated the property sometime in April or May 2012. Water service was turned off on May 1, 2012, and power service was disconnected on May 7, 2012. The Witts filed for Chapter 7 bankruptcy and were granted a discharge on June 5, 2012.

On August 10, 2012, Zoning Administrator Gary Johnson wrote to the Witts and informed them that he had determined the property was vacated for the past ninety days and they had thirty days to bring the property into compliance

with the zoning ordinance. The Witts took no further action regarding the property.

Later in 2012, the Witts' mortgage company initiated a foreclosure action against them and, in 2013, the mortgage company was granted a default judgment. On April 22, 2013, a commissioner sale was conducted by Master Commissioner Rush Hunt and the Cricks brought the property for $14,201, with the deed entered on May 9, 2013. It is disputed whether the Cricks were provided notice that the manufactured home on the property was a nonconforming use.[6]

While the Cricks were able to get electric service restored to the property, the City refused to reconnect water service. On July 23, 2013, Johnson wrote to Bobby Crick stating his determination that the nonconforming use of the property was no longer allowed as the home was in non-use for more than ninety days and stated he had thirty days to appeal this determination.

Bobby Crick appealed this decision to the Mortons Gap Board of Adjustments (the Board) and it was heard on August 29, 2013. On September 9, 2013, Chairwoman Julie Boling sent the Cricks a letter stating that following the hearing, the Board determined the nonconforming use was abandoned and

[6] The City and the circuit court recounted that Hunt provided the city with a letter that he announced during the auction that the manufactured home was a nonconforming use and the City would not provide it with utilities; the Cricks argued they were never told that they could not use the manufactured home as a residence.

provided the Board votes. She explained that the manufactured home[7] remained vacant for approximately one year starting on or about May 7, 2012. The Cricks did not appeal.[8]

In 2014, the City of Mortons Gap filed a civil action against the Cricks to enforce the zoning decision and make them remove the manufactured home from the property. The Cricks attempted to use this action to challenge the Board's decision. On December 30, 2014, Bobby Crick filed an affidavit of conversion indicating the manufactured home was permanently affixed to the real estate and surrendered the certificate of title.[9]

The circuit court granted the City's motion for summary judgment on the basis that it lost jurisdiction over the underlying dispute as more than thirty days had elapsed since the Board's decision. The Cricks did not appeal from this decision.

On March 22, 2017, the Cricks filed a collateral action against the City seeking declaratory and injunctive relief. They argued the Board could not lawfully issue a ruling as board members failed to properly attend or document

[7] The letter erroneously referred to the manufactured home as a mobile home.

[8] The letter did not inform the Cricks of their right to appeal and the Cricks alleged in affidavits that they did not know they had this right.

[9] It is unclear when the manufactured home was attached to the property through a permanent foundation.

their attendance at statutorily mandated continuing education classes as mandated by KRS 147A.027, removal of the manufactured home would cause irreparable damage to it, and because it was converted to real estate the order of removal was moot.

The Cricks and the City filed an agreed order to enter exhibits and filed competing motions for summary judgment.[10] On June 1, 2018, the circuit court granted the City summary judgment. The circuit court explained that it did not have jurisdiction to hear this collateral attack pursuant to KRS 100.347 as interpreted in *Triad Development/Alta Glyne, Inc. v. Gellhaus*, 150 S.W.3d 43, 47 (Ky. 2004), because it was not filed within thirty days of the Board's action taken in 2013.

The circuit court additionally ruled that the justification for the collateral attack failed on the merits because there was no statutory right for citizens to appeal the makeup or validity of the Board and there was no automatic removal process. Therefore, failure to comply with KRS 147A.027 did not invalidate the Board's action because failing to complete continuing education

[10] The City's motion for summary judgment does not appear in the record. Although the parties filed a joint motion to supplement the record, this was only for inclusion of a copy of the Zoning Ordinance and not for the missing motion and its potential reply. At the February 19, 2018 hearing during which a schedule was set for filing the City's motion and reply, the judge mentioned that the parties needed to make sure that these motions came up to his office. Perhaps in their zealousness to see that this was done, separate copies for both the bench and the record were not submitted.

classes only allowed the Mayor of Mortons Gap to remove Board members from their posts pursuant to KRS 100.217. The Cricks appealed from the dismissal of their collateral action.

The Cricks argue: (1) the Board's determination that their nonconforming use of the property was abandoned was void and subject to collateral attack; (2) the Zoning Ordinance is unconstitutional to the extent that it deprived them of substantive procedural due process and constituted a taking of property without compensation for its presumptions regarding abandonment of a nonconforming use; and (3) the conversion of the manufactured home to real estate brought the property into compliance with the Zoning Ordinance.

We agree with the circuit court that the Cricks' action must be dismissed because it was untimely filed. As provided in KRS 100.347:

> (1) Any person or entity claiming to be injured or aggrieved by any final action of the board of adjustment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the action of the board of adjustment, lies. Such appeal shall be taken within thirty (30) days after the final action of the board. *All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review.* The board of adjustment shall be a party in any such appeal filed in the Circuit Court.
> . . .
>
> (5) For purposes of this chapter, final action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body.

(Emphasis added.)

"Kentucky does not recognize a constitutional appeal from an administrative action in addition to a statutory appeal." *Moore v. Corbin Board of Adjustment*, 544 S.W.3d 666, 669 (Ky.App. 2018). Therefore, "[w]hen grace to appeal is granted by statute, a strict compliance with its terms is required." *Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978).

Accordingly, in interpreting the effect of KRS 100.347, in *Triad Development*, 150 S.W.3d at 47-48, the Kentucky Supreme Court held that because an appeal from an administrative decision is a matter of legislation and not a right, a failure to strictly follow the established procedure and appeal within thirty days would necessitate dismissal.

It is undisputed that the Cricks failed to timely appeal from the Board of Adjustment's decision. Therefore, once that time expired, they could no longer obtain judicial review of its ruling in any form. It was too late to challenge the Board's decision when the City filed an injunction action against the Cricks to enforce the Board's decision. *See Daugherty v. Jessamine County-City of Wilmore Joint Planning Com'n*, No. 2005-CA-002160-MR, 2007 WL 121920, *3 (Ky.App. Jan. 19, 2007) (unpublished) (holding the failure to appeal from an adverse action of the board, required that the circuit court grant summary judgment to the planning commission in its injunction action to enforce the board's action; the

appellant was procedurally barred from raising any constitutional claims challenging the underlying adverse action once the time for filing an appeal of the board's action expired). It is also too late for the Cricks to pursue a collateral action. Accordingly, the circuit court properly granted summary judgment to the City.

We also agree with the circuit court that the Board's action was not rendered void by Board members either failing to complete continuing education requirements or to properly report the completion of this continuing education. KRS 147A.027(7) requires Board members to complete and report continuing education hours: "[if] a . . . board of adjustment member fails to . . . [do so] . . . the board of adjustment member shall be subject to removal according to the provisions of KRS 100.217." However, as the circuit court correctly noted, pursuant to KRS 100.217(8) "[a]ny member of a board of adjustment may be removed by the appropriate appointing authority [here the mayor] for inefficiency, neglect of duty, malfeasance, or conflict of interest." Lack of training is a ground for optional removal and does not void the action such Board member takes.

We do not reach the merits of the Cricks' collateral attack because judicial review of the Board's action is no longer available.

Accordingly, we affirm the Hopkins Circuit Court's order granting the City summary judgment and dismissing the case against it.

LAMBERT, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
Thomas E. Springer, III Madisonville, Kentucky	William M. Cox, Jr. Madisonville, Kentucky