IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 7, 2009 Session

CAROL D. SHELTON ET AL. v. RUTHERFORD COUNTY, TENNESSEE

Appeal from the Chancery Court for Rutherford County
No. 08-0884 CV Robert E. Corlew, III, Chancellor

No. M2008-02596-COA-R3-CV - Filed October 23, 2009

The Rutherford County Board of Commissioners denied a rezoning application to allow the development of an amusement park. The property owners filed a petition for certiorari challenging the denial of the application and the validity of a section of the county zoning resolution pursuant to which the county commission required a two-thirds vote for passage of the application. The chancery court vacated the county commission's decision and remanded the matter for further consideration. We have determined that the provision of the county zoning resolution requiring a two-thirds vote is invalid and that the zoning application should be granted since it received a majority vote.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

C. Dewees Berry and Charles David Killion, Nashville, Tennessee, for the appellant Rutherford County, Tennessee.

M. Taylor Harris, Jr., Nashville, Tennessee, for the appellees, Carol D. Shelton; Ben A. Shelton, III; William Albert Shelton; Jennifer R. Shelton; Mimi P. Shelton; Ben A. Shelton, III, Steve Shelton, and William Albert Shelton as Co-Trustees of the Blackman Road Properties Charitable Remainder Trust; William Albert Shelton as custodian for William Albert Shelton, Jr. and as custodian for Thomas Reynolds Shelton; Ben A. Shelton, III as custodian for Paul Andrew Shelton, for Kayli Virginia Shelton and for Amy Elizabeth Shelton; Blackman Road Properties LLC; and Carol D. Shelton as Trustee of the Ben A. Shelton Revocable Trust.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs, to whom we will refer collectively as "the Sheltons," own property in Rutherford County, Tennessee. In February 2008, BPU Holding, LLC, a firm to which the Sheltons had granted options to purchase their properties, submitted to the Rutherford County Planning Commission a "rezoning application" concerning approximately 282 acres of land currently zoned residential (R-15) for the purpose of allowing the development of the land for a Bible-themed amusement park. The planning commission sent a letter to area residents informing them of the proposed zoning change and of three meetings at which BPU's application would be addressed: first by the Future Development Committee of the Rutherford County Regional Planning Commission, then by the Rutherford County Regional Planning Commission, and finally by the Rutherford County Board of Commissioners. The future development committee was evenly divided and forwarded the application to the planning commission without a recommendation. The planning commission recommended denial of the application by a vote of eight to seven. A notice of public hearing concerning the May 15, 2008 county commission meeting was published in the local paper on April 20, 2008.

Section 4.05 of the Rutherford County Zoning Resolution provides:

> The Board of Commissioners shall approve or reject a proposed amendment by a simple majority vote. However, if twenty (20%) percent of the property owners of record, that have a common boundary or are directly across a public road from the proposed reclassification, submit a duly signed and acknowledged petition in opposition to the proposed reclassification/conditional use no later than ten days after the final notice of the public hearing is published, then the Board of Commissioners must have a 2/3 majority vote to approve the proposed reclassification/conditional use.

On April 30, 2008, a local resident submitted to the planning department a number of notarized petitions protesting the rezoning application. The planning department, in consultation with the county attorney, began reviewing the petitions to determine their validity.[1]

At the county commission meeting on May 15, 2008, the commission took up the issue of conditional use permit No. 08-A011 for BPU Holdings, Inc. regarding the Sheltons' property. A public hearing was held and many citizens voiced their views on the proposed development. Based upon a determination that the 20% threshold of Section 4.05 had been met by the protest petitions,

[1] A substantial portion of the parties' arguments below and on appeal center around the process by which the county determined the validity of the petitions and the number required to constitute 20% of the "property owners of record" under Section 4.05. Because of our disposition of the case, we need not address these issues.

the commission required a two-thirds vote in order to approve the application.[2] A motion to approve the application failed by a vote of twelve in favor of the motion and nine opposed to the motion.

The Sheltons filed a petition for certiorari on June 25, 2008, seeking review of the county commission's denial of the zoning application. The complaint includes the allegation that Section 4.05 "improperly and illegally allows community opposition, in the form of petitions opposing the Application by twenty (20%) percent of owners of property adjoining the subject property, to require a two-thirds (2/3) vote for approval of the opposed application instead of the normal simple majority vote." The Sheltons asserted that the County's actions violated due process and equal protection as well as their civil rights pursuant to 42 U.S.C. § 1983. In their prayer for relief, the Sheltons included a request that "the use of § 4.05 of the Zoning Resolution be declared illegal and void." They also requested that the County be required to pay their attorney fees pursuant to 42 U.S.C. § 1988.

The trial court granted the writ of certiorari. The County filed a motion to set aside, alter, or amend the order granting a writ of certiorari and argued that a suit for declaratory judgment rather than a petition for certiorari was the appropriate mechanism for review of the county commission's actions. In an order entered in September 2008, the trial court declined to set aside its order granting the plaintiffs' petition for a writ of certiorari but stated that the court would consider extrinsic evidence (outside the record of the proceedings before the county commission) including witness testimony.[3]

The case was tried on October 1, 2008, and the court heard testimony from ten witnesses. After the trial and by agreement of the parties, the County submitted a post-trial brief and the Sheltons submitted a responsive brief. In their post-trial brief, the Sheltons included an argument that, under Tenn. Code Ann. § 5-5-109, "a County Commission may only use a simple majority vote of all members of the body for all decisions."

The trial court issued a 29-page memorandum opinion on October 20, 2008, in which it concluded that the county commission's decision must be vacated and the matter remanded to the county commission for further consideration. The court was "troubled by the fact that the members of the Commission have provided little insight into the reasons for their decision" not to approve the zoning application. Of even greater concern to the trial court was "the total absence of any basis within the record for the Commission's determination that a majority vote of the Commissioners was insufficient in order to pass the change." The court declined to reach the constitutional issues raised by the Sheltons but acknowledged a number of problems with Section 4.05. The trial court

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[2] The Sheltons assert that the county attorney, not the county commission, essentially made the decision that the 20% threshold had been met, thereby requiring a 2/3 supermajority vote. Because of our disposition of the case, we need not address this issue.

[3] Extrinsic evidence is generally permissible in declaratory judgment actions but not under a writ of certiorari, where review is generally limited to the administrative record. *MC Props., Inc. v. City of Chattanooga*, 994 S.W.2d 132, 134 (Tenn. Ct. App. 1999).

remanded the case to the county commission for further consideration in accordance with the concerns identified in its opinion. The court further ruled that an award of attorney fees to the Sheltons was appropriate pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988. In accordance with the memorandum opinion, the trial court entered a final order on October 24, 2008.

On appeal, the Sheltons and the County have raised a number of issues, including whether the action should properly be treated as an action for declaratory judgment or a petition for certiorari, whether Section 4.05 is unconstitutional or otherwise void, whether the county commission's decision was supported by a rational basis, and whether the trial court's award of attorney fees was improper. Because we have determined that Section 4.05 is not a valid provision, we need not address many of the issues raised by the parties.

ANALYSIS

I.

A county's power to enact zoning regulations is derived from the state. *Edwards v. Allen*, 216 S.W.3d 278, 284 (Tenn. 2007); *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 471 (Tenn. 2004). Local zoning ordinances must be "within the zoning authority granted by state statute." *Brunetti v. Bd. of Zoning Appeals*, No. 01A01-9803-CV-00120, 1999 WL 802725, at *5 (Tenn. Ct. App. Oct. 7, 1999). Moreover, as attempts to limit a property owner's use of land, in derogation of the common law, local zoning ordinances "are to be strictly construed in favor of the property owner." *Id.*

The statutes governing county zoning appear at Tenn. Code Ann. §§ 13-7-101 to 13-7-119. Tenn. Code Ann. § 13-7-105(a) provides that any amendment to any provision of a zoning ordinance must be enacted according to the following procedures:

> [A]ny such amendment shall not be made or become effective unless the same be first submitted for approval, disapproval or suggestions to the regional planning commission of the region in which the territory covered by the ordinance is located, and, if such regional planning commission disapproves within thirty (30) days after such submission, such amendment shall require the favorable vote of a *majority of the entire membership of the county legislative body.*

(emphasis added). Section 4.05 of the Rutherford County Zoning Resolution provides that, if 20% of the neighboring property owners submit petitions in opposition, the county commission "must have a 2/3 majority vote to approve the proposed reclassification/conditional use." This supermajority requirement is not consistent with the grant of authority included in the enabling statute, Tenn. Code Ann. § 13-7-105, which requires only a majority vote to enact a zoning amendment.

The County argues that the issue of whether Section 4.05 is consistent with applicable enabling statutes was not properly raised below and is therefore waived. We disagree. The Sheltons' petition for certiorari specifically challenged the legality of Section 4.05, and they briefed the issue of statutory authority in their post-trial brief.

In *Edwards v. Allen*, another Rutherford County case, the Supreme Court held that a zoning amendment was void *ab initio* due to the county commission's failure to return the proposed amendment to the regional planning commission after a substantial revision. *Edwards*, 216 S.W.3d at 293. The defendants in *Edwards* asserted that the resolution at issue was not a zoning amendment but a special exception or conditional use permit, not subject to the requirements of Tenn. Code Ann. § 13-7-105. *Id.* at 283. The Supreme Court adopted the following reasoning: "[W]here the particular restriction constitutes, or would constitute, a *substantial interference* with land use, the [governmental body] ordinarily must treat it as a zoning regulation and must follow statutory or character zoning procedures, even though other authority for the particular type of ordinance has been granted." *Id.* at 286 (quoting 1 Edward H. Ziegler, Jr. et al., RATHKOPF'S THE LAW OF ZONING & PLANNING § 1.02 (4th ed. 2003)). The court found that the request at issue "'substantially affects' the use of the land" and that, regardless of whether the property owners had meant to apply for a special exception or conditional use permit or to request a new zoning classification, the resolution would amend the county zoning map. *Id.* The court concluded that the requirements of Tenn. Code Ann. § 13-7-105 applied. *Id.*

In the present case, BPU's request to allow a 282-acre tract of property zoned for residential uses to be used for the development of an amusement park would substantially affect the use of the land. Moreover, even if Tenn. Code Ann. § 13-7-105 does not apply, the same result would be reached in this case under another statute, Tenn. Code Ann. § 5-5-109(a), a provision requiring a majority vote for all business before the county legislative body. Neither Rutherford County's grant of authority to enact zoning ordinances nor its general legislative authority allows it to impose a supermajority requirement with respect to zoning amendments. The General Assembly has expressly imposed a supermajority requirement in other contexts where it intended to do so. *See, e.g.,* Tenn. Code Ann. §§ 5-1-118(c)(1), 5-1-204(c)(2), 5-2-115(d)(2), 5-7-117(a), 5-8-102(c)(1), 13-7-102.

The County cites several treatises in support of its argument that supermajority protest provisions have generally been sustained as valid and constitutional. The cited statements in these treatises and the supporting cases concern the validity of state statutes imposing supermajority protest provisions. *See, e.g.,* Larry D. Scheafer, *Zoning: Validity and Construction of Provisions of Zoning Statute or Ordinance Regarding Protest by Neighboring Property Owners*, 7 A.L.R.4TH 732, § 2[a] (1981). Here, we are dealing with a county ordinance, not a state statute. Cases and treatises addressing the validity of local ordinances imposing supermajority requirements not authorized by state statute reach the same result we have reached in this case. *See, e.g., S. Nev. Homebuilders Ass'n v. Clark County*, 117 P.3d 171, 175 (Nev. 2005); *Mossburg v. Montgomery County*, 620 A.2d 886, 892-93 (Md. 1993); *Nardone v. Ryan*, 266 N.Y.S.2d 847, 850 (N.Y. App. Div. 1966); Scheafer, 7 A.L.R.4TH 732, § 3.

The County also cites the case of *Jagendorf v. City of Memphis* in support of provisions such as Section 4.05. *Jagendorf*, 520 S.W.2d 333 (Tenn. 1974). The *Jagendorf* case involved the application of a provision in the Memphis City Code requiring a four-fifths (4/5) vote of the city council to pass a zoning amendment if 20% of certain categories of nearby property owners filed written protests. *Id.* at 335. The plaintiffs in *Jagendorf* did not challenge the validity of the city code's protest provision. The court determined that an amendment passed without a four-fifths vote was invalid. *Id.* at 337. The *Jagendorf* decision does not discuss or address the validity of the city code provision at all, and we do not consider the case to conflict with our decision in the present case.

We conclude that Section 4.05 of the Rutherford County Zoning Resolution is not within the General Assembly's grant of authority to the County and is therefore ultra vires and void *ab initio*. BPU's zoning application received a majority vote of the county commission and should be declared to have passed.

II.

Because of our conclusion that Section 4.05 is invalid, we need not address most of the other issues raised, including the Sheltons' challenge to the constitutionality of Section 4.05 and the County's actions thereunder. There does remain, however, the issue of attorney fees.

There has been a dispute as to whether this action was properly brought as a common law writ of certiorari or a declaratory judgment. This distinction is relevant to the attorney fees issue only because the request for attorney fees is based solely on the § 1983 claim. It is well-settled that a party cannot join a common law writ of certiorari with a direct action for damages such as a claim under 42 U.S.C. § 1983. *See Goodwin v. Metro. Bd. of Health*, 656 S.W.2d 383, 386 (Tenn. Ct. App. 1983). There is also authority, however, that a § 1983 and § 1988 claim can be attached to a petition for judicial review for the purpose of seeking attorney fees in certain circumstances. *See Wimley v. Rudolph*, 931 S.W.2d 513, 517 (Tenn. 1996).

We need not resolve the appropriateness of attaching the attorney fees claims, however, because we find that the Sheltons were not entitled to attorney fees under 42 U.S.C. § 1988. The attorney fee provision in 42 U.S.C. § 1988 provides that a court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." We review a trial court's decision to grant or deny attorney fees pursuant to § 1988 under an abuse of discretion standard. *Sunburst Bank v. Patterson*, 971 S.W.2d 1, 7 (Tenn. Ct. App. 1997). There has been an abuse of discretion "when the trial court reaches a decision against logic that causes a harm to the complaining party or when the trial court applies an incorrect legal standard." *Riley v. Whybrew*, 185 S.W.3d 393, 399 (Tenn. Ct. App. 2005).

The trial court made the following statement concerning the Sheltons' constitutional claims: "While we have grave doubts as to whether the practical application of the provisions of Section 4.05 could survive scrutiny, we are not prepared to rule that the provision is unconstitutional on its face,

or that it is void *per se.*" The court concluded that the record did not show that the County properly implemented Section 4.05 and decided to give the county commission a chance to "develop a record which justifies the implementation of the provisions of that section should they so determine upon remand." Thus, the trial court neither accepted nor rejected the Sheltons' constitutional claims. On appeal, we have determined that Section 4.05 is not authorized by the enabling statutes, and therefore, we do not reach any constitutional questions.

We are aware of related litigation pending in federal district court involving the Sheltons, the County, and other parties. *Shelton v. Rutherford County*, *Tenn.*, No. 3:09-cv-0318, 3:09-cv-0413, 2009 WL 2929394 (M.D. Tenn. Sept. 8, 2009) (order and memorandum opinion denying in part and granting in part defendants' motions to dismiss). In these related cases, which include claims under § 1983, the federal district court interpreted the chancellor's opinion in the present case as an implicit determination that the County had violated the Sheltons' civil rights in its denial of the zoning application. *Id.* at *9. The court reasoned that, by finding error in the county commission's denial and then ruling that the Sheltons were entitled to attorney fees under § 1988, the chancery court "necessarily decided, as a matter of fact and law," that the county commission's actions violated the Sheltons' constitutional rights.[4] *Id.* We respectfully disagree with this interpretation of the chancellor's opinion. The chancellor expressly stated that he did not reach the constitutional issues raised by the Sheltons. Rather, he ruled that the County had failed to properly implement the supermajority procedure of Section 4.05 and had not given reasons for its denial of the zoning request.

On the record before this court, we are unable to conclude that there were any constitutional violations. We therefore find that the chancellor erred in awarding attorney fees in this case.[5]

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[4] The federal district court stated:

> This Court finds that, by ruling that the County Commission's denial of the Rezoning Application either was "not made upon any fairly debatable and rational basis" or was "illegal, arbitrary and capricious" and, based on that conclusion, that Plaintiffs were entitled to attorneys' fees under § 1988, the Chancery Court necessarily decided, as a matter of fact and law, that the actions of the Commission infringed upon some constitutionally protected property interest and thereby violated Plaintiff's substantive due process rights.

Shelton v. Rutherford County, 2009 WL 2929394, at *9.

[5] This court is aware of cases holding that § 1988 may allow attorney fee awards to plaintiffs who succeed on state law claims that are pendent to undecided substantial civil rights or constitutional claims arising out of a "common nucleus of operative facts." *Williams v. Thomas*, 692 F.2d 1032, 1036 (5th Cir. 1982); *see also Seals v. Quarterly County Court*, 562 F.2d 390, 393-94 (6th Cir. 1977); *Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n*, No. 81-3567, 1986 WL 733015, at *3 (M.D. Tenn. Apr. 8, 1986). In the present case, however, we are unwilling to speculate as to the substantiality of the Sheltons' constitutional claims or as to whether they would have prevailed on these claims.

CONCLUSION

Based on the reasoning above, we vacate the decision of the trial court and remand with instructions that the trial court direct the Rutherford County Board of Commissioners to declare the zoning application granted. Costs of the appeal are assessed against Rutherford County, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE