IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
SEPTEMBER 18, 2001 Session

IRENE NEIGHBORHOOD ASSOCIATION, A Tennessee Not for Profit Corporation, DR. BURGIN E. CLAIBORNE, LAVERENE RUSSELL, AND HARRY STEWART

v.

QUALITY LIFE, LLC, d/b/a QUALITY LIFE COMMUNITIES, CITY OF MEMPHIS, MEMPHIS CITY COUNCIL, COUNTY OF SHELBY, AND SHELBY COUNTY BOARD OF COMMISSIONERS

An Appeal from the Chancery Court for Shelby County
No. CH-00-1635-3 D.J. Alissandratos, Chancellor

No. W2001-00474-COA-R3-CV - Filed May 24, 2002

This is a challenge by a neighborhood association to the municipal approval of a proposed development. Both the county commission and the city council approved the challenged development. The neighborhood association filed a petition for a writ of certiorari and for injunctive relief against the county commission, arguing that the reconsideration of its original rejection of the development was invalid, and against the city council, arguing that the association did not receive proper notice of the council's vote on the development. The trial court granted summary judgment in favor of the defendants. We affirm, finding that the county commission could, within reasonable time limits, reconsider its original vote, and that the city council substantially complied with the applicable notice requirements.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

HOLLY K. LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

David Wade and Elizabeth J. Landrigan, Martin, Tate, Morrow & Marston, P.C., of Memphis, Tennessee, for the appellants, Irene Neighborhood Association, Inc., a Tennessee Not for Profit Corporation, Dr. Burgin E. Claiborne, Laverene Russell, and Harry Stewart.

Nathan A. Bicks, Burch, Porter & Johnson, PLLC, of Memphis, Tennessee, for the appellee, Quality of Life LLC d/b/a/ Quality Life Communities.

Allan J. Wade and Lori Hackleman Patterson, Baker, Donelson, Bearman & Caldwell of Memphis, Tennessee, for the appellees, City of Memphis and Memphis City Council.

Fred E. Jones, Jr., and Kelly Rayne Brayton of Memphis, Tennessee, for the appellees, County of Shelby and Shelby Board of County Commissioners.

OPINION

This is a challenge by a neighborhood association to the municipal approval of a proposed development. On January 26, 2000, Defendant/Appellee Quality Life, LLC, d/b/a Quality Life Communities ("Quality Life"), filed an application with the Memphis and Shelby County Office of Planning and Development ("OPD") for approval of a planned senior living facility known as Haynes Pecan Grove. Haynes Pecan Grove was to be located in the residential area served by Plaintiff/Appellant Irene Neighborhood Association, Inc. ("Irene Association"). For the development to proceed, approval from both Shelby County and the City of Memphis was required. The OPD recommended rejection of the application for approval of the development because the OPD believed that it would lead to increased density and increased commercial development in an otherwise residential area. However, the Memphis and Shelby County Land Use Control Board recommended approval of the project with certain conditions.

On May 8, 2000, the Shelby County Commission ("the County Commission" or "the Commission") held a public meeting at which Quality Life's application was to be considered. Written notice of that hearing was published in *The Daily News*, a local newspaper of general circulation, and notices were mailed to owners of property within 1,500 feet of the site of the proposed development. Representatives of the Irene Association attended the meeting. At the May 8 meeting, the Commission voted against the development.

The Memphis City Council ("the City Council" or "the Council") was scheduled to vote on Quality Life's application at its May 16, 2000, meeting. As with the May 8 County Commission meeting, written notice of the City Council meeting was published in *The Daily News*, and notices were mailed to surrounding landowners. However, because approval from both the County Commission and the City Council was needed for the development to proceed, and the County Commission had rejected the application at its May 8 meeting, members of the Irene Association did not attend the City Council meeting. At the May 16 City Council meeting, the Council voted to hold over discussion of the Haynes Pecan Grove matter until its meeting on June 20, 2000. No further notice was given to the Irene Association members that the matter would be addressed by the City Council at the later time.

Meanwhile, the next meeting of the County Commission was held on June 5, 2000. Members of the Irene Association attended that meeting. At the June 5 County Commission meeting, the minutes of the previous meeting, at which Quality Life's application was rejected, were approved. Because it appeared that the Commission's rejection of the development had been finalized, the attending members of the Irene Association left the meeting. Just after the departure

of the Irene Association representatives, a member of the Commission made a motion to reconsider the Haynes Pecan Grove matter. The members of the Commission then voted to reconsider the matter at their next meeting, scheduled for June 19, 2000. The County Commission gave the Irene Association notice that Quality Life's application was to be reconsidered on that date.

Members of the Irene Association attended the County Commission's June 19 meeting. At the June 19 meeting, the County Commission reversed its original decision on Quality Life's application and approved the project.

The next day, June 20, 2000, was the City Council meeting to which consideration of Quality Life's application had been postponed. Members of the Irene Association, apparently unaware of the City Council's postponement of Quality Life's application at the earlier May 16 meeting, did not attend the City Council's June 20 meeting. At the meeting, the City Council approved the project by a unanimous vote, noting that there were no objectors in the audience. Thus, upon the approval of both the County Commission and the City Council, Quality Life was authorized to proceed with developing Haynes Pecan Grove.

On August 18, 2000, the Irene Association filed a petition for a writ of certiorari and for injunctive relief against both the County Commission and the City Council. Also named as defendants were Quality Life, LLC, d/b/a Quality Life Communities, the City of Memphis, and the County of Shelby. The petition asserted that the County Commission's June 19, 2000 vote to approve the Haynes Pecan Grove project was invalid because, in voting to reconsider its initial vote almost a month after they voted to reject the project, the Commission violated its own internal rules of procedure. The petition further asserted that the City Council's June 20, 2000 approval of Quality Life's application was invalid, because the City Council failed to give adequate notice to the Irene Association of its intent to table its May discussion of the project until the June 20, 2000 meeting. Because the material facts were not disputed, the Irene Association filed a motion for summary judgment. The defendants filed a cross-motion for summary judgment, arguing that their actions were consistent with the municipal regulations then in effect and were not arbitrary or capricious.

On February 2, 2001, the trial court heard the parties' motions for summary judgment. The trial court determined that both the County Commission and the City Council acted in a manner that was consistent with the applicable rules then in effect, and that their actions were not arbitrary, capricious, or illegal. Consequently, the trial court granted summary judgment in favor of the defendants. From this order, the Irene Association now appeals.

On appeal, the Irene Association maintains that the decisions of both the County Commission and the City Council were invalid, asserting that the County Commission violated its internal rules in reconsidering Quality Life's application, and the City Council failed to give the neighborhood association notice that it had delayed its consideration of Quality Life's application. We review the decision of a legislative body to determine whether its actions were arbitrary, capricious, fraudulent, or illegal. ***See McCallen v. City of Memphis***, 786 S.W.2d 633, 640-42 (Tenn. 1990); ***Hoover, Inc. v. Metro Bd. of Zoning Appeals***, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996). "An illegal, arbitrary,

or fraudulent action could be any number of things. Examples include . . . the failure to follow minimum standards of due process . . . [and/or] the misrepresentation or misapplication of a legal standard." ***Hoover***, 924 S.W.2d at 905 (citation omitted). The legislative acts of a local government must be given their due deference. ***McCallen***, 786 S.W.2d at 641. This "court's primary resolve is to refrain from substituting its judgment for that of the local governmental body. . . . Both legislative and administrative decisions are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action." ***Id.***

We first address the Irene Association's argument regarding the actions of the County Commission. The Irene Association argues that the County Commission's decision to reverse itself and approve the Haynes Pecan Grove development one month after it initially rejected the development constituted a violation of the Commission's own regulations and, therefore, must be overturned as arbitrary, capricious, or illegal. The Irene Association notes that the County Commission is governed by the Permanent Rules of Order of the Board of County Commissioners ("Permanent Rules") together with Robert's Rules of Order Newly Revised ("Robert's Rules"). The Permanent Rules in effect at the relevant time provided in pertinent part:

> MOTION TO RECONSIDER
>
> When a question has been made and carried either affirmatively or negativetly [sic], any member voting with the prevailing side may move for its reconsideration *at any time*. It shall require the votes of a majority of the membership of the Board to reconsider a question. A member who is absent or votes pass will not be entitled to make a motion to reconsider.

(Emphasis added). Thus, the rule provides that a motion for reconsideration may be made "at any time," with no explicit limitation on the time frame for such reconsideration.

Robert's Rules, however, provide that a motion for reconsideration must be made during the meeting at which the vote to be reconsidered was originally taken, or the next day after that vote. Robert's Rules explain that a motion to reconsider allows a majority of a group, "within a limited time and without notice, to bring back for further consideration a motion which has already been voted on." The Rules further state:

> To provide both usefulness and protection against abuse, the motion to Reconsider has the following unique characteristics: The making of this motion is subject to time limits, as follows: . . . In a session of one day . . . the motion to Reconsider can be made *only on the same day the vote to be reconsidered was taken.*

(Emphasis added).

Reading Robert's Rules together with the Permanent Rules, the Irene Association argues that the "at any time" language in the Permanent Rules means that any member voting with the

prevailing side on an issue may move for reconsideration at any time *during that meeting*. The Association contends that allowing the "at any time" language to be interpreted literally to mean any time in the future is nonsensical and would be a denial of due process to constituents. In support, the Irene Association cites ***Ceresa v. City of Peru***, 273 N.E.2d 407 (Ill. App. Ct. 1971), and ***Kitty v. City of Springfield***, 178 N.E.2d 580 (Mass. 1961). In both of those cases, the courts relied on the applicable parliamentary rules in holding that a motion to reconsider decisions on rezoning matters by a municipal legislative body must be made at the same session in which the initial vote was taken, and that any decision not followed by a timely motion for reconsideration is final and binding on the legislative body. ***Ceresa***, 273 N.E.2d at 410-11; ***Kitty***, 178 N.E.2d at 582-83.

The County Commission argues that the provision of Robert's Rules cited by the Irene Association conflicts with the internal rules of the Shelby County Board of Commissioners. It notes that Rule 28 of the Permanent Rules specifically provides that "[i]f there be any conflict between the [Permanent Rules] and Robert's [Rules], these rules [the Permanent Rules] shall prevail." The Permanent Rules provide that a motion to reconsider can be made "at any time," and the applicable Robert's Rule apparently conflicts in that it requires that such a motion be made at any time *during the meeting* of the vote to be reconsidered. In this situation, the Commission argues, the applicable Robert's Rule must be disregarded.

In support of its position, the Commission cites this Court's decision in ***Ferguson v. The Metropolitan Employee Benefit Board***, 1985 Tenn. App. LEXIS 3067 (Tenn. Ct. App. Aug. 1, 1985). In ***Ferguson***, the Metropolitan Employee Benefit Board made a decision at a regular meeting held on May 9, 1982, to approve the petitioner's claim for disability benefits. Over the next few days, the Board sent notice of its decision to the petitioner and also sent him a check for $14,824.56 for partial benefits accrued from the date of his termination. On May 18, 1982, however, one of the board members called a special meeting to offer a motion to rescind approval of the petitioner's claim. On June 13, 1983, the Board voted to reverse its original decision and rescind its approval of the claim. ***Ferguson***, 1985 Tenn. App. LEXIS 3067, at *2-*3. The petitioner sought a writ of certiorari for review of the Board's action, arguing, among other things, that Robert's Rules require that reconsideration of a vote take place only on the day of the original vote.

This Court rejected the petitioner's argument, finding that the Board had the power to reconsider its own decisions despite the restriction in Robert's Rules. The ***Ferguson*** court recognized that, "[i]n the absence of some legislative restriction, administrative agencies have the inherent power to reopen or to modify and to rehear orders that have been entered. Of course, the power must be exercised reasonably and application seeking its exercise must be made with reasonable diligence." ***Id.*** at *4-*5 (quoting ***Ruvoldt v. Nolan***, 305 A.2d 434, 440-41 (N.J. 1973) (quoting ***Burlington County Evergreen Park Mental Hosp. v. Cooper***, 267 A.2d 533, 545 (N.J. 1970)). After a review of the law in other states, the ***Ferguson*** court held that an administrative agency's power to reconsider its own decisions exists during the sixty-day period in which review may be sought by writ of certiorari. ***Id.*** at *8. It concluded that "[t]he provisions of Robert's Rules do not displace that power [to reconsider its actions] . . . . Robert's Rules governing the mechanics of conducting business in a deliberative body should not displace the quasi-judicial power to

reconsider unless the statutes creating the board compel that conclusion." ***Id.*** at *9. Thus, despite the language in Robert's Rules, this Court held that a deliberative body, such as the employee benefit board, retains the power to reconsider its decisions during the time in which a petition for writ of certiorari may be filed.

In accordance with ***Ferguson***, we find that the County Commission in this case retained the quasi-judicial power to seek reconsideration of its May 8 decision at the meeting held on June 5, 2000. ***See*** Tenn. Code Ann. § 27-9-102 (2000). After the Commission voted to reconsider the Haynes Pecan Grove matter, members of the Irene Association were notified of the Commission's action and were given an opportunity to present their arguments to the Commission before the second vote at the June 19, 2000 meeting.[1]

With respect to the actions of the City Council, the Irene Association argues that the Council failed to give it the required notice of the Council's June 20, 2000 vote on the Haynes Pecan Grove development. There is no dispute that, other than the oral announcement at the first Council meeting, the Council gave no notice to surrounding landowners that the Council would vote on the development at the June 20, 2000 meeting. The Irene Association argues that the Council was required to give due notice of that vote pursuant to Memphis and Shelby County Zoning Ordinance § 14(I)(5), which provides in pertinent part:

> The legislative body shall hold a public hearing on the application for the planned development . . . . Written notice of such hearing shall be published in some newspaper of general circulation stating the date, time, and place of the hearing, and shall be mailed to owners of property within five hundred (500) feet in the city and fifteen hundred (1500) feet in the county of the property which is the site of the proposed planned development.

Thus, the ordinance requires that, when the City Council holds a public hearing on an application for a planned development, it should give notice to the nearby landowners of the hearing.

The Council gave the Irene Association notice that it would be voting on the Haynes Pecan Grove development at its May 16, 2000 meeting, which the Irene Association chose not to attend. The Council gave only oral notice of its intent to postpone the vote until the June 20, 2000 meeting. Had it been given written notice, the Irene Association argues, its members would have appeared at the June 20 meeting to voice strong opposition to approval of the development, and the Council would not have "merely rubber stamped an approval without any input from the citizens who were the most concerned about the issue." The Irene Association asserts that the Council failed to comply

[1]The Irene Association notes that the Commission's new Permanent Rules include a provision stating that "[a] motion to reconsider a question carried in the negative must be made before the approval of the minutes for the session in which the resolution or ordinance was voted upon." The Association asserts that "[h]ad the amended procedural rule been applied to the Haynes Pecan Grove matter, this lawsuit would not have been filed." Of course, the new rule is not applicable to the instant case.

with its own internal notice provisions, and that it therefore acted arbitrarily and capriciously, and its decision to approve the project should be reversed by this Court.

The City Council notes that it gave proper notice of the May 16 meeting through individual mailing and publication in *The Daily News*, and that at the May 16 meeting it openly announced the postponement of the vote. Thus, the City Council argues, it satisfied the notice requirements in the ordinance. The Council asserts that, had the Irene Association attended the May 16 meeting, made the appropriate inquiries, or reviewed the Council's agenda for the June 20 meeting published in *The Daily News* on June 19, 2000, it would have known that the vote on the Haynes Pecan Grove project was postponed until the later meeting.[2] In support, the Council cites ***Bennett v. City Council of Las Cruces***, 973 P.2d 871 (N.M. Ct. App. 1998).

In ***Bennett***, the city council for the city of Las Cruces, New Mexico, had scheduled a hearing on a proposed zoning change for September 19, 1994. It was announced at that meeting that the council would table its vote until the October 3, 1994 meeting. Though one of the interested nearby property owners attended the September 19 meeting, he arrived too late to hear the announcement about the postponement of the vote and made no inquiry about it. At the October 3 meeting, the council approved the proposed zoning change. ***Bennett***, 973 P.2d at 873. The interested property owner and others jointly applied for a writ of certiorari to the district court contending, among other things, that the notice of the second city council meeting was insufficient. The district court held that the council failed to give proper notice of the second meeting in accordance with statutory requirements similar to the notice provision at issue in the instant case. ***Id.*** The appellate court reversed, finding that the council's actions had constituted "substantial compliance" with the notice requirements, because any absent party interested in the outcome could have found out about the postponement of the vote through reasonable inquiry. The appellate court concluded that, under the circumstances, the council had provided actual notice of the postponement through its open announcement, and that "it was incumbent upon [the absent property owner] to inquire of the City as to the status of the proposed ordinance." ***Id.*** at 874.

The Irene Association argues that ***Bennett*** is distinguishable both on its facts and on the applicable law. It is important, the Association argues, that the property owner in ***Bennett*** had actual notice that the matter had not been addressed at the originally scheduled meeting, and it was unreasonable for him to leave the meeting without inquiring about when the matter would be heard. The Association asserts that, in contrast, its members acted reasonably in not attending the initial City Council meeting in light of the County Commission's rejection of the development, and that it was reasonable "to assume that the Haynes Pecan Grove development would simply be dropped from the City Council's agenda."

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[2] It is unclear from the record whether the June 19, 2000 notice of the June 20, 2000 meeting in *The Daily News* included a specific reference to the Haynes Pecan Grove development.

The Association also asserts that the standard for "substantial compliance" with the notice provision is more strict in Tennessee than in New Mexico, and that under these circumstances Tennessee jurisprudence indicates an unwillingness to find "substantial compliance" with the notice requirements. The Irene Association cites Tennessee's definition of "substantial compliance":

> Tennessee courts have consistently held that statutory provisions setting forth the procedure for issuing notice require substantial compliance. . . . "Substantial compliance" has been defined as *actual* compliance in respect to the substance essential to every reasonable objective of the statute. There has been substantial compliance . . . when there has been a partial compliance and when it is reasonable to conclude that the objective sought by the [statute] has been as fully attained thereby, as a practical matter, as though there had been a full and literal compliance. Thus, when there is such actual compliance as to all matters of substance then mere technical imperfections of form or variations in mode of expression . . . or such minima as obvious typographical errors, should not be given the stature of non-compliance.

Morrow v. Bobbitt, 943 S.W.2d 384, 389 (Tenn. Ct. App. 1996) (citations and quotation marks omitted). Thus, under ***Morrow***, "substantial compliance" is achieved by partial compliance "when it is reasonable to conclude that the objective sought by the statute has been fully attained." ***Id.*** The objective of the notice provision in the ordinance at issue here is to ensure that interested parties have notice of the hearing "so that they may attend and state their views on [a] proposed zoning amendment, pro or con." ***See Hawthorne v. City of Santa Fe***, 537 P.2d 1385, 1386 (N.M. 1975), ***quoted in Bennett***, 973 P.2d at 874.

In this case, it is undisputed that the notice of the first meeting complied with the notice provision of the ordinance, and it is also undisputed that the members of the Irene Association did not attend the May 16 City Council meeting and did not inquire about the results of that meeting; they simply assumed, erroneously, that the Haynes Pecan Grove item would be dropped from the Council's agenda. The reasonableness of the Association's decision not to attend the first Council meeting and not to inquire later about that meeting is largely irrelevant, because it did not stem from the Council's failure to give adequate notice of the first meeting or the Council's failure to respond appropriately to the Association's inquiry. There is no evidence of such a failure by the City Council. Here, as in ***Bennett***, the members of the Irene Association could have found out about the postponement of the vote through reasonable diligence. "[W]here circumstances are such that a reasonably prudent person should make inquiries, that person is charged with knowledge of the facts reasonable inquiry would have revealed." ***Bennett***, 973 P.2d at 874 (quoting ***Bogan v. Sandoval County Planning & Zoning Comm'n***, 890 P.2d 395, 402 (N.M. Ct. App. 1994)). It is an ordinary practice of a legislative body such as the City Council to postpone voting on particular items. The Council need not give written notice of each postponement, so long as notice of the original hearing was sufficient, and the Council makes the postponement public so that interested property owners, through reasonable diligence, would be able to determine the status of the matter in which they are interested. Thus, we find that the City Council substantially complied with the notice requirement

in the ordinance, and affirm the trial court's conclusion that the City Council's decision was not arbitrary, capricious, or illegal.

The decision of the trial court is affirmed. Costs are assessed to the appellants, The Irene Neighborhood Association, Dr. Burgin E. Claiborne, Laverene Russell, and Harry Stewart, and their sureties, for which execution may issue if necessary.

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HOLLY K. LILLARD, JUDGE