

RENDERED: JULY 25, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001566-MR

AND

NO. 2001-CA-001654-MR

DANNY McKINNEY;
NANCY McKINNEY;
PATRICK HALLORAN; AND
PHYLLIS HALLORAN

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM JESSAMINE CIRCUIT COURT
V. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 97-CI-00631

JESSAMINE COUNTY;
JESSAMINE COUNTY-CITY
OF WILMORE JOINT PLANNING
COMMISSION;
PETER BEATY, MEMBER OF
JOINT PLANNING COMMISSION;
KEN HOUP, MEMBER OF
JOINT PLANNING COMMISSION;
CHARLES V. KESTEL, JR.,
MEMBER OF JOINT PLANNING
COMMISSION;
JOHN BLACKFORD, MEMBER OF
JOINT PLANNING COMMISSION;
WAYNE McCRAY, MEMBER OF
JOINT PLANNING COMMISSION;
C. V. ELLIOTT, MEMBER OF
JOINT PLANNING COMMISSION;
JOSEPH L. POAGE, MEMBER OF
JOINT PLANNING COMMISSION;
ED McKINLEY, MEMBER OF
JOINT PLANNING COMMISSION;

JOHN FITCH, JR., MEMBER OF
JOINT PLANNING COMMISSION; AND
RICHARD HARDEN, MEMBER OF
JOINT PLANNING COMMISSION

APPELLEES/CROSS-APPELLANTS

OPINION

AFFIRMING IN PART - REVERSING IN PART AND REMANDING

** **

BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Danny McKinney and Nancy McKinney ("the McKinneys") appeal from a decision of the Jessamine Circuit Court affirming a decision of the Jessamine County-City of Wilmore Joint Planning Commission's ("the Commission") denial of the McKinneys' application for a subdivision regulation variance. For the reasons set forth below, we affirm in part, reverse in part, and remand.

On December 27, 1996, the McKinneys purchased a parcel of real property situated adjacent to U.S. 27 in Jessamine County, Kentucky from Charles Moore ("Moore"). In March, 1997, they applied to the Commission for a building permit in order to build a commercial structure on the parcel. After some negotiation with the administrative officer, language was added to the application stating that there would be no direct access from the parcel to U.S. 27. Rather, access would come via a

connecting road called Groggins Ferry Road or from "Sleepy Head House".¹

The McKinneys' business, American Backyard Buildings, was completed and began operation in 1997. When the McKinneys were unable to get permission to use the Sleepy Head House entrance to U.S. 27, they began accessing U.S. 27 directly in violation of the terms of the building permit. On August 14, 1997, they were served with a cease and desist order based on the violation of the Commission's subdivision regulations.

The McKinneys did not appeal the cease and desist order to the Board of Adjustment as provided by statute. Rather, on September 29, 1997, they filed with the Commission an application for a variance from the regulation. On November 11, 1997, the Commission denied the application.

Thereafter, the McKinneys filed an appeal of the Commission's decision to the Jessamine Circuit Court. The Commission counterclaimed, seeking an injunction enforcing the cease and desist order. Upon taking proof, the circuit court rendered a decision on June 21, 2001, affirming the Commission's denial of the McKinneys' application for a variance and denying the Commission's counterclaim seeking an injunction. As a basis for the decision, it opined that the McKinneys failed to meet their burden of proving that the Commission's decision was

¹ The parties do not reference what Sleepy Head House is, though we may assume that it is an adjoining business.

arbitrary and that the Commission erred as a matter of law. On the Commission's counterclaim, the court concluded that the McKinnys did not fail to exhaust their administrative remedies because they applied for a variance. This appeal followed.²

The McKinnys now argue that the circuit court erred in affirming the Commission's decision denying their application for a variance. They maintain that the circuit court improperly concluded that an encroachment permit issued by the Commonwealth did not avail them of access to U.S. 27; that it incorrectly concluded that the Commission did not waive its right to enforce its subdivision regulations; that it erroneously approved the Commission's decision not to permit the McKinnys' use of the access; that the court should have applied the "honest error" doctrine to resolve the dispute; and, that KRS Chapter 100 does not authorize the Commission to regulate the McKinnys' access to U.S. 27. They seek an order vacating the decision of the Jessamine Circuit Court.

We have closely studied the record, the law, and the written arguments, and find no basis for tampering with the circuit court's decision as it relates to the McKinnys' arguments. While the McKinnys make several claims of error, the corpus of their argument is that the trial court erred in

² During the pendency of this appeal, the McKinnys sold the parcel to Patrick and Phyllis Halloran. Pursuant to an order of this Court, the Hallorans joined the appeal as appellants/cross-appellees.

affirming the Commission's decision not to grant the McKinneys' request for a variance. As the Commission and the circuit court have properly noted, the standard of review is not whether any substantial evidence exists to support the Commission's decision. Bourbon County Board of Adjustment v. Currans, Ky. App., 873 S.W.2d 836 (1994). Rather, since the McKinneys did not receive the relief sought before the Commission, the question is whether substantial evidence exists in the record to compel a decision that the McKinneys were entitled to the relief sought. Id.

In support of their argument on this issue, the McKinneys characterize the question as whether the Commission properly exercised its police power in a fair and reasonable manner for promotion of the common good. Pursuant to Currans, though, the burden rests with them to point to any substantial evidence in the record which compels a conclusion that the variance was necessary. They have failed to meet this burden. While they offer arguments as to why the Commission might have ruled in their favor, they have offered little as to why that result was compelled. "The argument should be that the record compels relief." Currans, 873 S.W.2d at 838. As there is little evidence to support the conclusion that the Commission was compelled to create the variance sought by the McKinneys,

the circuit court did not err in affirming the Commission on this issue.

The McKinneys also argue that KRS 177.020 vests control of U.S. 27 solely with the Commonwealth. As such, they maintain that the encroachment permit issued by the Commonwealth to the prior landowner, Charles Moore, supercedes or otherwise supplants that Commission's exercise of jurisdiction over the matter. The circuit court adopted the Commission's argument on this issue, to wit, that the clear and unambiguous terms of the permit provided 1) that the permit was personal to Moore and "shall not inure to his successors and assigns", and 2) that the "permit does not alleviate any requirements of any other government agency." The terms and conditions of the permit refute the McKinneys' argument on this issue, and the circuit court properly so found.

The McKinneys' next argument is that the circuit court should have concluded that the Commission waived its right to enforce its subdivision regulations when it approved Moore's plat and later issued a building permit to the McKinneys. They maintain that by issuing the building permit in the absence of essential infrastructure (i.e., Moore Drive), and by tacitly acquiescing to the subject lot being accessed by means of the encroachment permit for approximately three years, the

Commission waived its right to enforce the subdivision regulations it now seeks to enforce.

The circuit court concluded that nothing done by the Commission or its administrative officer can be construed as a waiver of the subdivision regulations. We find no basis for tampering with this conclusion. The building permit, which Mr. McKinney signed and accepted, states that the McKinneys shall not access U.S. 27 directly. While this provision was not enforced until Moore Road was made accessible some three years later, we cannot construe this as a waiver of the right to enforce the building permit. The McKinneys accepted the restriction before building commenced, and were well aware at that time that Moore Drive was not yet accessible. The restriction to U.S. 27 access was enforced only to the extent so stated on the face of the building permit, and we find no error on this issue.

The McKinneys' fourth argument is that the court should have applied the doctrine of "honest error" to the resolution of this case. Citing, City of Berea v. Wren, Ky. App., 818 S.W.2d 274 (1991), they contend that when an administrative official errs in good faith and a property owner relies on such action, the governmental entity is estopped from enforcing its regulations to the detriment of the property owner.

As we have not concluded that the Commission or an administrative official erred in the matter at bar, Wren and the doctrine of honest error are not applicable herein.

Lastly, the McKinneys claim that KRS Chapter 100 does not authorize the Commission to regulate their access to U.S. 27. The circuit court did not address this issue, leaving us with nothing to review. See generally, Payne v. Hall, Ky., 423 S.W.2d 530 (1968), holding that a matter not ruled on by the trial judge must be presented by a motion for a new trial before there can be appellate review of the matter. Nevertheless, we will note that the case relied upon by the McKinneys, Rieke v. City of Louisville, Ky. App., 827 S.W.2d 694 (1991), supports the Commission's position that direct access to U.S. 27 may be denied. In addressing public thoroughfares, it states that "an abutting owner cannot complain so long as he has reasonable access to the street system." Rieke, 827 S.W.2d at 697. The McKinneys, and their successors in interest, have reasonable access to the street system via Moore Drive, and accordingly we find no basis for tampering with the decision on appeal on this issue.

On the Commission's counterclaim, its sole claim of error is that it is entitled to a permanent injunction prohibiting the McKinneys and their successors from directly accessing U.S. 27. As a basis for its argument, the Commission

maintains that the McKinnes have failed to exhaust their administrative remedies thus entitling the Commission to a permanent injunction on the matter. The circuit court opined that the McKinnes did not fail to exhaust said remedies because they "continued their efforts before the administrative body, i.e., the Board of Adjustment by applying for a variance following the decision of the administrative officer."

We must conclude that the circuit court erred on this issue. With respect to the administrative remedies available to the McKinnes after the issuance of the cease and desist order, KRS 100.261 states that, "[s]uch an appeal shall be taken within thirty (30) days . . . by filing with the board a notice of appeal" (Emphasis added). It is uncontroverted that the McKinnes did not appeal to the board within 30 days from the issuance of the cease and desist order. In fact, they never appealed to the board.

The circuit court opined that the McKinnes' application to the Commission for a variance is the functional equivalent of an appeal to the board. Even if this were true, the application for the variance was not made within 30 days from the issuance of the cease and desist order. More important, the application for a variance simply is not an appeal to the board as required by KRS 100.261. Any landowner or affected person may seek from the Commission a variance

without first being subject to a cease and desist order. The administrative appeals process, however, is wholly different and is governed by statute.

KRS 100.337 provides that the "[c]ommission shall have a cause of action for all appropriate relief including injunctions against any . . . aggrieved person who violates . . . regulations adopted hereunder." Since the circuit court's basis for denying the injunction was its conclusion that the McKinneys availed themselves of the administrative process, and as we find that conclusion to be erroneous, we reverse the circuit court's decision on this issue and remand the matter for a determination of whether the Commission is entitled to an injunction pursuant to KRS 100.337. While an injunction may be redundant in light of the fact that the issue of access to U.S. 27 has been ruled upon by the trial court and now the appellate court, the Commission should be availed of its right to seek an injunction pursuant to KRS 100.337 should it so desire.

For the foregoing reasons, we reverse the Jessamine Circuit Court's decision as to its conclusion that the McKinneys exhausted their administrative remedies, and remand the matter for consideration of the Commission's claim that it is entitled to an injunction. The decision is in all other respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-
APPELLEES:

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BRIEF FOR APPELLEES/CROSS-
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