

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-002483-MR

GEORGE ARLINGHAUS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE STEVEN R. JAEGER, JUDGE  
ACTION NOS. 95-CI-01969 & 99-CI-00558

COVINGTON URBAN DESIGN & REVIEW  
BOARD; CITY OF COVINGTON; AND  
COVINGTON BOARD OF ADJUSTMENTS

APPELLEES

### OPINION

### AFFIRMING

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BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

DYCHE, JUDGE. This matter involves a zoning dispute.

Appellant, George Arlinghaus, owns property which is located at 416 Emma Street in Covington, Kentucky. Appellee Urban Design and Review Board (UDRB) is a public board created through the City of Covington's Zoning Ordinance (ZO) 158.215, et seq. Appellee Board of Adjustment (BOA) is also a public board created by Zoning Ordinance 158.229(B), et seq., through

authority of KRS 100.217, et seq., to hear appeals of planning and zoning matters.

On April 11, 1989, the City of Covington created an Historic Preservation Overlay Zone via ZO O-22-89. This zone includes architecture dating back to the mid-1800's. Arlinghaus's property is within this area. Before renovations or certain alterations can be made to any property in an historic area, a property owner must obtain a Certificate of Appropriateness. ZO 158.223.

Authority for the City's action generates from KRS 100.201 which allows a city to enact permanent land-use regulations that would "facilitate orderly and harmonious development and the visual or historic character of the unit . . . ." Likewise, KRS 100.203 allows a city to enact zoning regulations regarding districts of special interests, such as historic districts.

Sometime in 1994, Arlinghaus replaced thirty-five (35) single-pane windows in his building due to rotting and leaking with vinyl clad double-pane insulated windows. These windows were smaller in size than the previous windows, and siding was used in the window openings to cover plywood left by the smaller windows. Arlinghaus did not apply for a Certificate of Appropriateness prior to making these alterations.

On April 15, 1995, Arlinghaus was criminally cited for failure to obtain the proper permit. His case was held in abeyance to allow him to apply to the UDRB for a Certificate of Appropriateness. After reviewing Arlinghaus's application, the UDRB denied it. Arlinghaus followed the proper channels for review of this decision, but at each level the UDRB's decision was upheld.

Having exhausted his administrative remedies, Arlinghaus appealed to the Kenton Circuit Court. The circuit court remanded the matter to the UDRB for a determination of the historic significance of Arlinghaus's property and for a stated reason for disapproving his application.

On November 3, 1997, the UDRB reviewed Arlinghaus's application a second time. The UDRB found that the property was historically significant,<sup>1</sup> that the alterations to the windows were inconsistent with the Design Guidelines as they relate to modifications of window openings, and that they also were inconsistent with other properties in the historic area. The

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<sup>1</sup> The UDRB found that the property was significant for the following reasons:

- 1) For its identification with a person or persons who significantly contributed to the development of the city, state, or nation;
- 2) For its value as a building that is recognized for the quality of its architecture;
- 3) Because it is characteristic of an architectural style or period; and
- 4) For its character as a contributing element in the Main Strasse Historic District.

The UDRB also found that the structure on the property was built between 1845 and 1851 by Onerias Powell, a prominent Covington resident who served as a city and county official.

UDRB also concluded that the installation of the windows would diminish the architectural character of the building.

Arlinghaus once again followed the proper procedures for appealing this decision, but the decision was upheld at each level. He again took his case to the Kenton Circuit Court which also upheld the decision of the UDRB. Arlinghaus now appeals from that order.

In zoning cases the standard of judicial review is set forth in American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). Basically, the judicial review of an administrative decision provides that those issues are confined to questions of law which are encompassed in the question: "Was the administrative decision arbitrary?" By arbitrary we mean clearly erroneous and by clearly erroneous we mean unsupported by substantial evidence. By unreasonable it is meant that under the evidence or as the record is presented that there is no room for difference of opinion among reasonable minds. Crouch v. Police Merit Board, Ky., 773 S.W.2d 461 (1989).

Martin\_Marietta Materials, Inc. v. Boone County Fiscal Court, Ky. App., 89 S.W.3d 428, 430 (2002) (quoting Danville-Boyle Planning and Zoning Com'n v. Prall, Ky., 840 S.W.2d 205, 208 (1992)).

Arlinghaus makes a varied attack on the zoning scheme of the City of Covington and the denial of his application. First, he argues that the appellees lacked jurisdiction over his

property because the UDRB failed to survey and evaluate his specific property for its historic or architectural merit prior to his repairs.

Arlinghaus, however, misreads the zoning ordinances at issue. Pursuant to ZO 158.216, an "Historic Area" "[s]hall mean an Historic Preservation Overlay Zone . . . or an individual structure or site. . . ." The City's zoning ordinances encompass entire neighborhoods or areas as well as individual structures or sites located outside the boundaries of historic neighborhoods or areas. The ordinance creating the historic area did not require that individual properties or structures within a designated historic area be individually declared as historically significant. Instead, the purpose of creating an historic area in a neighborhood was to preserve the character of an entire area, where such was appropriate. See ZO 158.215(A).

The UDRB was, however, required to make a finding of the significance of Arlinghaus's property once he applied for the Certificate of Appropriateness. ZO 158.223. The UDRB complied with this requirement as ordered by the Kenton Circuit Court on Arlinghaus's second application. See note 1.

Next, Arlinghaus alleges that the City failed to comply with ZO 158.222(E), which requires the UDRB to "review" the survey or study of the areas or sites designated as historic every five years. He argues that failure to do so strips the

appellees of jurisdiction over his property. Arlinghaus is wrong on this argument as well.

The record includes the unrebutted affidavit of Leah Konicki, the Preservation Specialist for the Economic Development Department of Covington. She states that the survey by the UDRB is reviewed on a continuing basis and that this process results in periodic reviews occurring more often than every five years.

Alternatively, even if this method does not meet the requirements of the ordinance, failure to timely update the survey does not make the UDRB's decision arbitrary. See Fritz v. Lexington-Fayette Urban County Gov't, Ky. App., 986 S.W.2d 456, 460 (1998) ("[E]ven if the comprehensive plan has not been timely updated, that does not make the refusal to rezone arbitrary."). This is especially relevant in the case at hand wherein the five-year period may not even have passed at the time of the repairs. The ordinance at issue was adopted on April 11, 1989, and the alterations were done some time in 1994.

Arlinghaus next argues that even if the UDRB has jurisdiction over his property, this jurisdiction is limited to those portions of his building which are visible from the street. Zoning Ordinance 158.224(E) states that "[i]n reviewing

an application for a Certificate of Appropriateness, the Board shall not consider . . . features not subject to any public view . . . ."

It is nonsensical to say that the public view is only that exposed to the street. Pictures of the building in the record show that windows other than those located at the front of the building are clearly in the public view. See, e.g., TR 164. Also, Arlinghaus has failed to show how any of the property is hidden from the public's eye. Therefore, this argument fails.

Arlinghaus also contends that window repair is an ordinary repair exempt under both state law and the City's zoning ordinances. He is incorrect on this argument as well.

Initially, Arlinghaus relies on KRS 198B.010(21) arguing that replacement of windows is an ordinary repair and that this statute preempts the field. He maintains that ordinary repairs must comply only with the State Building Code in KRS Chapter 100. According to Arlinghaus's argument, the City's zoning ordinances are therefore in conflict with the statute and enactment of the ordinances was unconstitutional.

First, Arlinghaus's reliance on the State Building Code at KRS 198B.191(21) for a definition of "ordinary repair" is erroneous in this situation. The Building Code establishes standards for "*construction* of all buildings." KRS 198.050

(emphasis added). Pursuant to KRS 198.010(10) "construction" is defined as "the erection, fabrication, reconstruction of a building, or the installation of equipment therein, but shall not include the ordinary repair of a building." Thus, this statutory provision is irrelevant to the case at hand.

Further, KRS 100.201 gives local legislative bodies the authority to enact land-use regulations and specifically includes historic zones as a permitted use. Arlinghaus's reading of KRS 198B.010(21) would render KRS 100.201 and KRS 100.203 meaningless because, without controls on proposed alterations made in an historic zone, there would be no police power to preserve the character of the area. "[S]tatutes should be construed in such a way that they do not become meaningless or ineffectual." Commonwealth v. Phon, Ky., 17 S.W.3d 106, 108 (2000). Accordingly, KRS 198B.010 does not preempt the field as Arlinghaus argues, and Covington's zoning scheme does not conflict with the State Building Code.

Alternatively, Arlinghaus contends that a Certificate of Appropriateness is not necessary for ordinary repairs under ZO 158.223. The zoning code definitively states that, while replacement of the glass in windows is an ordinary repair, altering the style or type of windows is not an ordinary repair. ZO 158.223(A)(2). Consequently, the UDRB's finding that the alterations were not ordinary repairs is not arbitrary.

Arlinghaus also contends that developed lands and preexisting uses are "grandfathered in" and not subject to the zoning ordinances at issue. This is an illogical argument. Obviously, only older buildings have historic significance. If they are grandfathered in, there would be no need for the legislature to pass laws allowing for historic districts.

Finally, Arlinghaus contends that he did not receive proper notice for the public hearing to designate the area as historic. However, the record contains the uncontradicted affidavit of Ralph Hopper, the Zoning Administrator for the City. TR 285. In his affidavit, he states that Arlinghaus, along with every other property owner in the area, was notified by first class mail at least fifteen days prior to the public hearing. Also, notice was posted at the public library. Consequently, Arlinghaus's argument regarding inadequate notice is without any merit.

We decline to review the remaining arguments made by Arlinghaus because they were not raised below at any level. "It is well settled that failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review . . . ." Urella v. Kentucky Board of Medical Licensure, Ky., 939 S.W.2d 869, 873 (1997) (citing Jackson v. State Automobile Mutual Insurance Company, Ky., 837

S.W.2d 496, 498 (1992); Personnel Board v. Heck, Ky., 725 S.W.2d 13, 17 (1987)).

In summary, upon a complete review of the record, we find that the UDRB's denial of Arlinghaus's application was not arbitrary. The order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Fortner  
Covington, Kentucky

BRIEF FOR APPELLEES CITY OF  
COVINGTON; THE COVINGTON URBAN  
DESIGN REVIEW BOARD, AND THE  
COVINGTON BOARD OF ADJUSTMENT:

John Jay Fossett  
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