

RENDERED: SEPTEMBER 5, 2003; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000772-MR

KITTY GRADDY TONKIN

APPELLANT

APPEAL FROM WOODFORD CIRCUIT COURT  
v. HONORABLE ROBERT B. OVERSTREET, JUDGE  
ACTION NO. 00-CI-00151

WOODFORD COUNTY PLANNING AND ZONING  
COMMISSION, RAYMOND STAN KRAMER, CHAIRMAN;  
SHIRLEY BICKFORD, ROBERT BLANKENSHIP,  
GEORGE HOWARD, ROBERT JACKSON, BUDDY JOHNSON,  
MARY ANN SQUIRES, J.D. WOLF, HERMAN  
PLAYFORTH; THE ESTATE OF HERBERT GILKISON;  
PATRICK GILKISON, EXECUTOR, PATRICK G.  
GILKISON, PAMELA A. JONES, CARLIE C. GILKISON,  
JENNIFER L. DOYLE, KATHERINE B. SARGENT,  
SARAH S. GILKISON, MARGARET K. BARNETT,  
AND HERBERT A. GILKISON

APPELLEES

OPINION

AFFIRMING

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BEFORE: COMBS AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

McANULTY, JUDGE. Appellant Kitty Graddy Tonkin appeals the order of the Woodford Circuit Court which dismissed her appeal and her petition for declaratory judgment against appellees Woodford County Planning and Zoning Commission and the estate and heirs of Herbert Gilkison. On appeal, Tonkin argues that the trial court erred in dismissing her appeal for failure to state a claim; because, in doing so, it decided the case on the merits and considered evidence outside of the record; and erroneously found that it did not have subject matter jurisdiction over appellant's declaratory judgment action. We affirm the dismissal of the appeal and the declaratory judgment.

On April 13, 2000, the Woodford County Planning and Zoning Commission approved an In-Family Conveyance by the Herbert Gilkison estate. The minutes reflect that Mr. Gilkison had a 20 acre farm which he left to his six children, three of whom bought out the other three children and wished to subdivide it to dwell on. The motion to approve the In-Family Conveyance was carried by a unanimous vote of the eight Commission members. Appellant was not present at the Commission meeting at which the conveyance was approved.

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580

In the Woodford Circuit Court, appellant filed an appeal, pursuant to Kentucky Revised Statutes (KRS) 100.347(2),<sup>2</sup> of the Planning and Zoning Commission action in which she alleged that it violated various zoning ordinances and that she was not afforded written notice of intent to act. In addition, she filed a declaratory judgment complaint, arguing that the Commission wrongfully approved three new entrances onto Clifton Road and three new septic systems creating an unreasonable risk of groundwater contamination to her well. Appellees filed motions to dismiss the appeal and declaratory judgment actions pursuant to CR 12.02, contending that appellant's complaint failed to state a claim upon which relief could be granted. They argued that appellant raised new issues which should have been raised before the Commission.

On February 18, 2002, the trial court entered an Order of Dismissal. In its Order, the trial court assessed whether the Commission's action was arbitrary pursuant to the grounds for judicial review of zoning cases established in American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n, Ky., 379 S.W.2d 450 (1964). The court concluded that the Commission acted within its authority, it afforded appellant procedural due process, and there was

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<sup>2</sup> KRS 100.347(2) states: "Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall appeal from the final action to the Circuit Court of the county in which the property, which is the subject of the commission's action, lies."

evidentiary support for the commission's action. Therefore, the trial court found that the action taken by the Commission was not arbitrary within the American Beauty Homes scheme.

Next, the trial court examined appellant's petition for declaratory judgment. The court concluded that the encroachment permits for the driveway entrances to Clifton Road were determined by the state Department of Highways, which had exclusive authority over the issue, and so the court had no authority to act. In addition, the trial court found that local ordinances required the County Health Officer to approve construction projects, which was done in this case. The court concluded that it lacked "authority to intervene by questioning the valid and unchallenged authority of the Woodford Health Department or its agent with regard to approval of proposed sewage disposal and concomitant issuance of approval." As a result, the trial court found that it had no authority to grant appellant any relief by declaratory judgment. Appellant appeals the Order of Dismissal.

First, appellant argues that under the Civil Rules the trial court could not have properly dismissed this action. She alleges that the trial court must have dismissed the claim pursuant to CR 12.02 for failure to state a claim, or as a summary judgment pursuant to CR 56, but that those rules do not substitute for a party's fair and reasonable opportunity to

present a case. Second, appellant argues that it was clear error for the trial court to consider the merits of the case in its order dismissing, and to consider facts outside the record. We will consider these arguments together.

We believe the trial court proceeded properly with its dismissal. Because the court considered matters outside the pleadings by consulting the record below and appellees' attachments to the motion to dismiss, according to CR 12.02 the disposition was converted to that of a CR 56 motion for summary judgment. Appellant argues that she was entitled to develop her evidence before the court ruled on the motion to dismiss. We do not agree that the court was compelled to examine the new evidence appellant wished to adduce in this appeal.

Under the standard in American Beauty Homes, an appeal of a zoning case is not a trial de novo. "No new or additional evidence would be admissible on appeal except to determine what state of facts the Commission acted on, or possibly to establish the violation of some legal right with respect to a matter not in issue in proceedings before the Commission." American Beauty Homes, 379 S.W.2d at 457-58. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. Ira A. Watson Dep't Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000). Judicial review of such an administrative

decision confines the issues "to questions of law which are encompassed in the question: 'Was the administrative decision arbitrary?'" American Beauty Homes, 379 S.W.2d at 457; Danville-Boyle County Planning & Zoning Comm'n v. Prall, Ky., 840 S.W.2d 205, 208 (1992).

The trial court proceeded correctly with the motion to dismiss by reviewing the Commission's action to determine whether it was arbitrary under American Beauty Homes. The trial court properly decided the case on the record before the Commission. Moreover, we do not agree with appellant that the court consulted evidence which was not properly before the court. We observe only that the trial court was applying the law to the facts available in the record.

Next, we turn to appellant's arguments concerning the declaratory judgment action. Appellant argues that it was error for the trial court to find that it lacked subject matter jurisdiction to consider the issues raised in her declaratory judgment action. The trial court did not cite authority for its conclusion that it did not have subject matter jurisdiction over the decisions of the Department of Highways and the Woodford County Health Department. We review the trial court action for a determination of whether summary dismissal of the declaratory judgment was correct for any reason.

The foremost question for the court's consideration of whether to dismiss the declaratory judgment action is whether appellant alleged a justiciable controversy. In order to bring an action for a declaratory judgment, a person must show that there is a justiciable controversy between the parties, from the standpoint of one party asserting a right against another party or claiming the existence of a duty owed to him by another party. Ex parte Weyler, Ky., 252 S.W.2d 884, 885 (1952); KRS 418.040. Questions already adjudicated by a court having jurisdiction of the subject matter and the parties, cannot thereafter be the subject between such parties and their privies of "an actual controversy" within the meaning of those terms in the Declaratory Judgment Act. Shearer v. Backer, 207 Ky. 455, 269 S.W. 543 (1925).

We conclude that the issues appellant raises are issues which were adjudicated in the action before the Planning and Zoning Commission. Appellant had notice of the action before the Commission which approved the issues regarding the permits which she now challenges by declaratory judgment. Appellant could have participated in the adjudication of these matters before the Commission. She availed herself of a right of appeal from that action. We conclude that these are matters previously adjudicated between these parties and not properly the subject of a declaratory judgment. "The purpose of the

Declaratory Judgment Act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated had been properly adjudicated." Back's Guardian v. Bardo, 234 Ky. 211, 27 S.W.2d 960, 963 (1930).

Appellant has not alleged a justiciable controversy, and the trial court's dismissal was proper.

For the foregoing reasons, we affirm the order of the Woodford Circuit Court which dismissed appellant's appeal of the action before the Woodford County Planning and Zoning Commission, and the declaratory judgment action.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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