RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000223-MR

JERRY NEWBERRY APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
V. HONORABLE WILLIAM J. WEHR, JUDGE
CIVIL ACTION NO. 02-CI-00478

CITY OF NEWPORT, KENTUCKY;
THOMAS L. GUIDUGLI; BETH FENNELL;
KEN RECHTIN; JERRY PELUSO;
JAN KNEPSHIELD; NEWPORT HISTORIC
PRESERVATION COMMISSION;
KEN CLIFT; PAUL BLASSING;
NICK MILLER; AND BOB YODER APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

MINTON, JUDGE: When Jerry Newberry's application to raze a building in the East Row Historic Preservation District (ERHPD)

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

was denied, he sued the City of Newport and the Newport Historic Preservation Commission (NHPC), along with City and NHPC officials in their individual capacities (City). Discovery proceeded and each side filed summary judgment motions. After several months, Newberry filed a second application to demolish the same building. The second application was approved. The City then moved to dismiss the lawsuit, asserting that approval of the second application mooted the issues raised in the lawsuit. The circuit court agreed and granted summary judgment for the City. Newberry appealed. We affirm.

NEWPORT'S ERHPD

In 1987, the City passed an ordinance creating the NHPC.[2] The ordinance, which was enacted under KRS[3] 82.206, authorized the City to designate and regulate "landmarks, landmark sites and historic districts," and to provide for "penalties for the violation thereof." Three years later, the City passed a second ordinance establishing the boundaries of the ERHPD.[4] And, in 1999, the City enacted a final ordinance adopting the revised "historic district design review guidelines" for regulation of the ERHPD.[5]

[2] City of Newport, Ordinance No. 0-87-61.

[3] Kentucky Revised Statutes.

[4] City of Newport, Ordinance No. 0-90-23.

[5] City of Newport, Ordinance No. 0-99-10.

Included in the 1999 ordinance is a section highlighting the requirements for demolition within the ERHPD. The ordinance reads:

> Demolition of buildings within the East Row Historic District must be approved by the Historic Preservation Commission except in cases where there is a threat to the public safety. The purpose of historic zoning is to protect historic properties and the demolition of a building which contributes historically or architecturally to the character of the district is inappropriate and shall be avoided. Demolition shall only occur where it has been demonstrated that public safety is threatened; if economic hardship has been determined and the demolition is approved by the Historic Preservation Committee; or for building or additions which are of a later time period, have lost their original architectural integrity, or do not contribute to the neighborhood's streetscape as determined by the Historic Preservation Committee.

A property owner within the ERHPD wanting to demolish a building must file a Certificate of Appropriateness (COA) application with the NHPC. The NHPC will consider the merits of the request, then vote to either approve or deny the application. If a COA application is denied, the ordinance provides for an appeal to the Newport Board of Commissioners (NBOC) under Newport Code 12,7-7.

NEWBERRY'S CONFLICT WITH ERHPD

Newberry owns several houses in the ERHPD; two of the houses are located at 206 and 216 Park Avenue. After the City enacted an ordinance eliminating on-street parking along Park Avenue, Newberry filed a COA to demolish the building located at 206 Park Avenue. He was concerned that the elimination of on-street parking would discourage renters for his property at 216 Park Avenue. So he wanted to raze 206 Park Avenue and pave the lot for parking. According to Newberry, 206 Park Avenue was in "such disrepair, it would be cost prohibitive to repair it." Newberry estimated that repairing 206 Park Avenue would cost him over $80,000.

NHPC received the COA application on October 9, 2001. And it held its hearing on Newberry's demolition application on October 24, 2001. Newberry explained to the committee that the reason for his application was the elimination of on-street parking on Park Avenue. Newberry stated:

> Without the parking on Park Ave., the building at 216 Park——the four family, no one is going to rent there. Even with the parking across the street——they put in parking for 8 or 10 cars across the street. The people who live in my building would have to walk 2 blocks to get to——they would have to walk down a block, cross the street at the crosswalk and back up to get to the building. And people who rent just aren't gonna do that. And this building is occupied——it's gonna take 8 cars, possibly

8 cars, and if we still have this building . . . .

After a brief discussion, committee member Paul Blasing warned that it would be "improper" for the NHPC to approve an application for demolition based on a lack of parking. Blasing noted that the committee was bound by the criteria cited in ordinance number 0-99-10. Because 206 Park Street was a "contributing structure" and was not in irreparable condition, he concluded that demolition would be inappropriate. The rest of the committee agreed with Blasing and denied the application.

Following the appeals process cited in ordinance number 0-99-10, Newberry appealed to the NBOC. The hearing took place on January 7, 2002. Newberry reiterated his request to demolish the building at 206 Park Avenue to provide parking spaces for the residents of 216 Park Avenue. Newberry also stated that demolition was necessary because "renovations to the building would be too costly," and "he would not see any return on his investment."

The NBOC gave thoughtful consideration to Newberry's request; members voiced concerns about both the lack of parking in the ERHPD and the potential demolition of a historically significant building. But after Emily Butler, a Historic Preservation Officer in attendance at the NBOC meeting, noted

that the building Newberry wished to demolish “was constructed in the 1890’s, has Italian features and fits into the streetscape with the smaller buildings,” the NBOC members voted unanimously to deny Newberry’s application.

After the NBOC denied his application, Newberry filed a complaint with the Campbell Circuit Court. He alleged that the City “acted arbitrarily and capriciously in that they failed to make any factual determinations or legal conclusions and they failed to comply with the procedural and substantive provisions of Ordinance 10-87-61 . . . .” He also argued that the City restricted his use of his property in violation of Sections 1 and 2 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution; deprived him “of all economically viable use” of his property, resulting in an unconstitutional “taking”; and subjected him “to the deprivation of rights, privileges and immunities secured by federal law, within the meaning of 42 U.S.C. 1983.”

Following a brief period of discovery, both parties filed motions for summary judgment; and, almost a year after his initial complaint was filed, Newberry filed an amended complaint. The amended complaint added that ordinances 0-87-61, 0-90-23, and 0-99-10 were “facially void *ab initio*, in that they are in violation of federal and state statutes, and the due process, equal protection and just compensation provisions of

the federal and state constitutions . . . ." The amended complaint also alleged that application of the ordinances to Newberry was "contrary to law and void"; that application of the ordinances had resulted in a "regulatory taking" of 106 Park Avenue in violation of Section 13 of the Kentucky Constitution and the Fifth and Fourteenth Amendments of the United States Constitution; and that pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988, the City was liable to Newberry "for his loss and damage . . . plus his costs and reasonable attorney fees . . . ."

On May 6, 2003, the circuit court held a status conference at which alternative resolutions were discussed. The court ordered the case to be held in abeyance pending the outcome of Newberry's renewed application for demolition.

Three months later, Newberry filed a status report stating that his application for demolition had been approved by the NHPC. Shortly after that the City filed a motion to dismiss. The motion stated that because Newberry's application for demolition had been approved by the NHPC, the underlying controversy was moot. The court agreed with the City; and on December 31, 2003, the case was dismissed. The court observed:

> First, Plaintiff does not have a temporary taking claim under a Fifth Amendment analysis. Second, Plaintiff's standing argument that he owns other property in the East River Historic District is not enough

> for standing upon him to litigate a non-justiciable matter. Kentucky courts have held that mere citizenship and/or residency in a particular city will not in and of itself form sufficient basis to assert standing to challenge a city ordinance; rather there must be a showing of present and substantial interest, as opposed to a mere expectancy. Finally, Plaintiff is not a "prevailing party" under 42 [U.S.C. §] 1988 and, therefore, is not entitled to an award of attorney's fee. There was no relief on the merits of Plaintiff's claim that "materially altered the relationship of the parties".[sic] (citations omitted).

This appeal follows.

Newberry makes six main arguments: first, there exists a justiciable cause requiring further adjudication by the court; second, he has standing; third, the ordinances are facially invalid; fourth, the ordinances are invalid as applied to him; fifth, he was subjected to a "regulatory taking;" and sixth, he is owed costs and attorney's fees under 42 U.S.C.[6] § 1988. On all points, we disagree.

<u>"FACIAL" OR "AS APPLIED" INVALIDITY OF THE ORDINANCES</u>

Newberry makes two arguments regarding the invalidity of the ordinances: first, the ordinances are "facially" invalid because they fail to "conform to the requirements of either statutes or constitutions; and, second, the ordinances are invalid "as applied" to him. Newberry specifically argues that

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[6] United States Code.

the ordinances violate the requirements of KRS[7] Chapter 100 and that application of the ordinances resulted in denial of his due process rights.

Because the circuit court found that Newberry did not have standing to pursue this claim, it did not make a specific ruling on the validity of the ordinances. We believe this decision was proper.

Article III of the United States Constitution limits courts to adjudication of "actual, ongoing cases or controversies."[8] Even if a court has subject matter jurisdiction over a case, "there remains a question of whether a particular cause is justiciable."[9] The purpose behind requiring a litigant to present an actual case or controversy is that our courts are "not authorized to give advisory opinions on hypothetical factual situations."[10]

"Justiciability has both constitutional and prudential dimensions, and encompasses a number of doctrines under which courts will decline to hear and decide a cause. Though justiciability has no precise definition or scope, doctrines of

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[7] Kentucky Revised Statutes.

[8] Lewis v. Continental Bank Corporation, 494 U.S. 472, 477, 110 S.Ct. 1249, 1253, 108 L.Ed.2d 400 (1990); *see also*, Associated Industries of Kentucky v. Commonwealth, 912 S.W.2d 947, 950-951 (Ky. 1995).

[9] Fisher v. United States, 364 F.3d 1372, 1381 (C.A.Fed. 2004).

[10] Combs v. Matthews, 364 S.W.2d 647, 649 (Ky. 1963).

standing, mootness, ripeness, and political question are within its ambit."[11] Among the doctrines encompassed by justiciability, the United States Supreme Court has held that "standing . . . is perhaps the most important."[12] In Allen v. Wright, the Court stated that "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[13] The doctrine of standing "has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[14]

In granting the City's motion to dismiss, the circuit court dismissed Newberry's argument that he had standing based on his ownership of other property in the ERHPD. Citing City of Ashland v. Ashland FOP No. 3, Inc.,[15] the circuit court held that Newberry's "mere citizenship and/or residency in a particular city will not in and of itself form sufficient basis to assert standing to challenge a city ordinance; rather there must be a

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[11] Fisher, *supra*.

[12] 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

[13] *Id.*

[14] *Id.*

[15] 888 S.W.2d 667 (Ky. 1994).

showing of present and substantial interest, as opposed to a mere expectancy."

We agree with the court's reasoning. Newberry's argument that he has standing to challenge the "facial" and, "as applied," validity of the ordinances because he owns property in the ERHPD is without merit. Newberry has neither asserted nor proved that he is currently suffering a "personal injury" traceable to the alleged invalidity of the ordinances. Even if the ordinances violate KRS Chapter 100 or contravene Newberry's due process rights, there is not a current case or controversy through which Newberry can challenge their validity. The mere fact that Newberry may suffer an injury in the future related to the ordinances is insufficient to sustain a present cause of action. Therefore, we believe the circuit court properly held that Newberry did not have standing to challenge the validity of the ordinances. Moreover, because Newberry does not have standing, no case or controversy exists; so there is no justiciable cause worthy of further adjudication by the court.

REGULATORY TAKING

Next, Newberry argues that the City subjected his property to a regulatory taking. Frankly, we are puzzled by Newberry's argument; but for purposes of thoroughly analyzing this claim, we will nonetheless discuss his assertion. Because

of our confusion, however, we believe Newberry's claim is best articulated in his own words:

> The material facts that are not in dispute in this controversy establish at least a jury issue in regard to both a substantial advancement of a legitimate public interest by the denial of the demolition of the dilapidated building proposed by Newberry and the deprivation of all economically viable use of his property by that denial. In this controversy, the governmental interest is the preservation of the characteristics of the East Row Historic District described in the East Row Historic Guidelines adopted by Ordinance 0-99-10. Nothing in the record on appeal precludes Newberry from convincing a jury that the dilapidated building that he proposed for demolition has none of the characteristics described in the Guidelines for preservation, that the Newport defendants have permitted the demolition of other buildings in the East Row Historic District with more of those characteristics and that the denial of the demolition of Newberry's dilapidated building doesn't substantially advance a legitimate public interest.

The "Takings Clause" is found in the Fifth Amendment of the United States Constitution and is applied to the states through the Fourteenth Amendment. The clause reads: "[N]or shall private property be taken for public use, without just compensation."[16] The United States Supreme Court has held that "one of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens

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[16] US Const., Amend V.

which, in all fairness and justice, should be borne by the public as a whole.'"[17]

In Penn Central Transportation Company v. City of New York,[18] the Supreme Court faced a situation similar to the one apparently contemplated by Newberry's argument. The question presented to the Court was "whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks . . . without affecting a 'taking' requiring the payment of 'just compensation."[19] The Court held that a city could designate specific areas as "historic" without implicating the Fifth Amendment, specifically stating:

> [I]n instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.
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> Zoning laws generally do not affect existing uses of real property, but "taking"

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[17] Dolan v. City of Tigard, 512 U.S. 374, 383, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994), *quoting* Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

[18] 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[19] *Id.* at 107.

> challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm.
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> . . . .
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> Apart from our own disagreement with appellants' characterization of the effect of the New York City law, the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore believed was available for development is quite simply untenable.[20]

We do not believe that Newberry's argument is sufficient to sustain a "takings" argument. He has neither asserted nor proved that his property was physically taken from him by the City; likewise, he fails to establish how the denial of his COA application resulted in a regulatory taking. There is no evidence that Newberry's property rights or economic viability were affected by the initial denial of his application.

Moreover, based on the Supreme Court's decision in Penn Central, it is clear that the City's decision to designate the ERHPD as a historic area was valid; therefore, we do not believe the NHPD and NBOC's initial decision to deny Newberry's COA application could possibly be viewed as a governmental

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[20] *Id.* at 125-131 (citations omitted).

taking, regulatory or otherwise. So we agree with the circuit court's decision that Newberry "does not have a temporary taking claim under a Fifth Amendment analysis."

COSTS AND ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988

Finally, although not explicitly discussed in his brief, we note that Newberry argued before the circuit court that his claims amounted to a "civil rights" action under 42 U.S.C. § 1983; and because he was the "prevailing party," Newberry asserted that he was owed costs and attorney's fees pursuant to 42 U.S.C. § 1988. The court dismissed this argument based on the fact that Newberry was not a "prevailing party."

The federal civil rights statute, 42 U.S.C. § 1983, creates a private action for the deprivation of rights. The statute reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1988 states that in any action brought under 42 U.S.C. § 1983, "the court, in its discretion, may allow the

prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ."

First, we note that Newberry fails to explain how his civil rights were violated. There is no allegation of discrimination; moreover, there is no proof that the City deprived Newberry of his present "rights, privileges, or immunities."

Second, even if this claim did fall under 42 U.S.C. § 1983, we do not understand how Newberry is the "prevailing party" to whom attorney's fees are owed. To be a prevailing party, one party must, assumedly, "win." Because there was never a full adjudication before the court, it is difficult to assess one party as the clear victor over the other. Even though Newberry's COA application was eventually approved, we do not believe he "prevailed" for purposes of 42 U.S.C. § 1988. Therefore, we agree with the circuit court's decision.

CONCLUSION

For these reasons, the order of the Campbell Circuit Court granting the City's motion to dismiss is affirmed.

ALL CONCUR.

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