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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000484-MR

LOUISVILLE METRO BOARD OF
ZONING ADJUSTMENT; AND LOUISVILLE
METRO GOVERNMENT — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CI-010107

A-1 SANITATION; BRENT HALL
AND KIM HALL, CO-EXECUTORS OF
THE ESTATE OF IRA LEROY HALL — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: This matter concerns a zoning violation notice served on appellees for operating an industrial business in a residential zone. We agree with appellants Louisville Metro Board of Zoning Adjustment (BOZA) and Louisville Metro

[1] Senior Judge William L. Knopf sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Government that BOZA did not err by refusing to dismiss the violation notice. Hence, we reverse and remand the summary judgment which the Jefferson Circuit Court entered in favor of appellees.

The property in question is located at 8012 National Turnpike in Jefferson County. In 1953, the property was rezoned from the classification of E-3, Heavy Industrial, to the classification of A, Single Family. Neither that nor the current zoning classification of R-4, Single Family Residential, permitted industrial uses of any kind.

Although the record contains no specific information regarding the ownership or use of the property prior to 1962, after that date a pipe and construction company was operated on the site for at least several years. In 1973, the property was purchased by an industrial sanitation business owned by Ira Hall and a partner, based on their belief that the property was zoned for industrial use. Over time the property came to be owned by Ira Hall and his wife, Ernestine Hall,[2] and at some point the business became known as A-1 Sanitation.

In 2004, the Halls were advised that their industrial use of the property violated the Louisville/Jefferson County Land Development Code. The Halls appealed the matter to BOZA, asserting that the property was zoned for industrial use or, alternatively, that the property was

> entitled to non-conforming status since there has been continuous use of the property for industrial purposes since 1943. Except for one addition to the building, the same building, containing an office, garage, and apartment have been on the property within the memory of the current owners.

[2] After the deaths of Ernestine and Ira Hall during the pendency of this action, the action was revived by Ira Hall's co-executors, appellees Brent Hall and Kim Hall.

Both Ira Hall and Ernestine Hall filed affidavits stating that their 1973 purchase of the property was "from the widow of a Mr. Lewis, who had used the real estate for industrial purposes for a number of years, conducting Lewis Pipe and Construction Company on the property." Further, the affiants asserted their familiarity with the property

> since the mid-1940's when he [she] moved to that part of Jefferson County. Of his [her] own knowledge, that real estate has been used continuously for industrial purposes as long as he [she] can remember, certainly at least from the mid-1940's. The basic buildings currently on the property, which are used in the business of A-1 Sanitation, were on the property when Valley Sanitation, Inc. originally purchased it in 1973, and had been there for several years before that purchase.

BOZA conducted a public hearing on the matter in November 2004. Appellees presented evidence to show the ongoing industrial use of the property since 1962. However, they presented no evidence beyond their affidavits to identify any specific and continuous industrial use of the property prior to 1962. A BOZA staff report included a historical review of local zoning laws and directories to show that in 1953 the property was rezoned from heavy industrial to residential. The report indicated that no information was found regarding the property's use prior to 1962, that Lewis Pipeline Contractors operated a business on the property from 1962 to 1965, that the property was vacant from 1966 to 1975, and that the sanitation business was operated on the property from 1975 to the present. BOZA denied appellees' appeal of the zoning violation notice.

Appellees then appealed to the Jefferson Circuit Court, which found that BOZA had acted arbitrarily as the evidence before it

> was clear; two affidavits from [appellees] stated that the property had been used for industrial purposes since the 1940s. BOZA's own Staff Report could not refute this evidence; it confirmed that the property had been used for

> industry for at least three years in the 1960s. BOZA's argument that the old telephone directories make no mention of the property is a "nothing proves something" contention. The Court finds this argument misguided. This was an unusual case, in that the parties were faced with determining the uses of a property from many, many years ago. The evidence presented on such uses would naturally be scarce, there being far less emphasis on record keeping and retention from the 1950s as opposed to these modern days. What evidence did exist was presented to BOZA, and the Court is convinced it was substantial enough to support the requested acknowledgement.

The court entered summary judgment for appellees, and this appeal followed.

As stated by this court in *Warren County Citizens for Managed Growth, Inc. v. Board of Comm'rs of City of Bowling Green*, 207 S.W.3d 7, 16 (Ky.App. 2006),

> judicial review of a zoning action is confined to a determination of whether the action taken was arbitrary, and neither the trial court nor this Court is authorized to conduct a *de novo* review of the decision. [*City of Louisville v. McDonald,* 470 S.W.2d 173, 178 (Ky. 1971).] A decision that is not supported by substantial evidence is clearly erroneous and therefore arbitrary. [*Danville-Boyle County Planning and Zoning Commission v. Prall,* 840 S.W.2d 205, 208 (Ky. 1992).] Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. [*Smyzer v. B.F. Goodrich Chemical Co.,* 474 S.W.2d 367, 369 (Ky. 1971).] In its role as a finder of fact, the Planning Commission is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. [*Kentucky State Racing Commission v. Fuller,* 481 S.W.2d 298, 309 (Ky. 1972).]

See also Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n, 379 S.W.2d 450, 456 (Ky. 1964).

Kentucky courts have consistently held that an applicant before an administrative agency bears the burden of proof and must provide sufficient evidence to

establish a prima facie case for the relief sought. *See, e.g., City of Louisville, Div. of Fire v. Fire Services Managers Ass'n*, 212 S.W.3d 89, 94 (Ky. 2006); *Danville-Boyle County Planning and Zoning Comm'n v. Prall,* 840 S.W.2d 205, 208 (Ky. 1992); *Energy Regulatory Comm'n v. Kentucky Power Co.,* 605 S.W.2d 46, 50 (Ky.App. 1980). If that burden is not met, the agency need not show the negative of the issue in controversy. *City of Louisville*, 212 S.W.3d at 94; *Mollette v. Kentucky Personnel Bd.,* 997 S.W.2d 492, 497 (Ky.App. 1999); *Personnel Board v. Heck*, 725 S.W.2d 13, 17 (Ky.App. 1986).

The zoning issue before us is governed by KRS 100.253(1), which generally permits the continuance of a lawful nonconforming use of property which exists "at the time of the adoption of any zoning regulations affecting it . . . except as otherwise provided herein." Immediately following that provision is KRS 100.253(2), which reflects an intent to gradually eliminate any nonconforming uses of property by providing that a board of adjustment shall neither

> allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted, nor . . . permit a change from one (1) nonconforming use to another unless the new nonconforming use is in the same or a more restrictive classification[.]

See, e.g., Smith v. Howard, 407 S.W.2d 139 (Ky. 1966) (continued nonconforming use was permitted where property was used by tractor repair and reconstruction business, by plumbing supply business, and then by screw company); *City of Bowling Green v. Eiller,* 335 S.W.2d 893 (Ky. 1960) (established use claim was rejected where building's nonconforming use switched from the passive display and storage of furnaces and parts, to the manufacturing operation of a sheet metal business); *Feldman v. Hesch,* 254 S.W.2d 914 (Ky. 1953) (nonconforming use was impermissibly enlarged when property's use

changed from repairing, washing and painting milk trucks incidental to a dairy business, to operating an automobile repair and reconditioning business).

Here, no dispute exists on appeal that the zoning classification was changed from industrial to residential in 1953, and that the property has been used for industrial purposes since 1962. Instead, the parties' arguments pertain to whether substantial evidence was produced to show that the property was used in a nonconforming manner between 1953 and 1962, thereby providing a basis for the continued nonconforming use of the property from 1962 to the present time.

The use of the property between 1953 and 1962 was addressed only by the Halls' affidavit statements that they knew the property had been "used continuously for industrial purposes as long as [they could] remember, certainly at least from the mid-1940's[,]" and by the BOZA staff report which stated that no information was found to show how the property was used before 1962. Even if the Halls' statements could be found to indicate that, from the mid-1940's forward, they were specifically aware of the alleged industrial use of the particular tract of property which they later purchased, rather than simply aware of the general use of property in that vicinity, no substantial evidence was adduced to show and compare the nature of the alleged industrial uses of the property before and after the 1953 rezoning. Thus, there was no showing that any nonconforming use of the property after 1953 was not an enlargement of the property's prior use. KRS 100.253. Further, even if there was a permissible nonconforming use of the property between 1953 and 1962, no substantial evidence was adduced to show that the property's nonconforming use after 1962 was not an enlargement or extension of any prior permissible nonconforming use. KRS 100.253(2). Hence, appellees failed to meet

their burden of providing substantial evidence to show that there was a continuous nonconforming use of the property after 1953, and that they were entitled to continue such nonconforming use in accordance with the limitations of KRS 100.253. *See, e.g., City of Louisville,* 212 S.W.3d at 94; *Prall,* 840 S.W.2d at 208; *Energy Regulatory Comm'n,* 605 S.W.2d at 50. Given the absence of such a prima facie showing, BOZA was not obligated to prove that any nonconforming use of the property was improper. *See, e.g., City of Louisville*, 212 S.W.3d at 94; *Mollette,* 997 S.W.2d at 497; *Heck*, 725 S.W.2d at 17. It follows, therefore, that the circuit court erred by finding that BOZA's dismissal of the appeal was arbitrary, and by entering a summary judgment in favor of appellees.

The Jefferson Circuit Court's summary judgment is reversed, and this case is remanded for further proceedings.

KNOPF, SENIOR JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, JUDGE, DISSENTING: Respectfully, I dissent, and would affirm the holding of the Jefferson Circuit Court in all respects.

BRIEF FOR APPELLANTS:

Theresa Z. Senninger
Jonathan L. Baker
Louisville, Kentucky

BRIEF FOR APPELLEES:

Bill V. Seiller
Louisville, Kentucky