RENDERED: FEBRUARY 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001850-MR

DOUG ARNOLD; WAYNE LYSTER;
AND MARGARET LYSTER — APPELLANTS

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 07-CI-00153

VERSAILLES-MIDWAY-WOODFORD
COUNTY BOARD OF ADJUSTMENT;
BOARD OF ADJUSTMENT MEMBERS
SAM DOZIER, JENNIFER STEEN,
DAVID PREWITT, FRANK STARK,
AND TIM TURNEY; AND VERSAILLES
UNITED METHODIST CHURCH, INC. — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert 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.

LAMBERT, SENIOR JUDGE: Doug Arnold, Wayne Lyster and Margaret Lyster (collectively Lyster) bring this appeal from the Woodford Circuit Court opinion and order affirming the determination of the Versailles-Midway-Woodford County Board of Adjustment granting a conditional land use permit to the Versailles United Methodist Church for the construction of a church building, a school building, a gymnasium, and parking areas. A previous determination of the Board was affirmed by the Woodford Circuit Court in 2005 but this court reversed and remanded the matter with instructions. Arnold and Lyster now argue that those instructions were not followed and again seek appellate review. Upon examination of the Board's response to our remand, we agree and reverse the new determination in part and again remand with instructions.

Originally, the Board of Zoning Adjustment held a public hearing on the permit application with testimony both for and against the Church application. The Board issued findings and by a unanimous vote, granted a conditional land use permit allowing construction of the church and associated buildings on the corner of Paynes Mill Road and Lexington Road in Woodford County. Arnold and Lyster appealed from that determination to the Woodford Circuit Court which affirmed the decision of the Board. Arnold and Lyster then appealed to the Kentucky Court of Appeals. In an opinion not to be published, we affirmed in part, reversed in part and remanded to the Board with instructions. *Lyster v. Woodford County Bd. of Adjustment Members,* 2007 WL 542719 (Ky. App. 2007) (2005-CA-001336-MR).

Our prior opinion instructed the Board to make additional findings in accord with KRS 100.111 as construed in *Davis v. Richardson,* 507 S.W.2d 446 (Ky. 1974), requiring that "the factual determinations made by the board should demonstrate that it had considered the effect of the proposed land use on the public health, safety and welfare in the zone affected, in adjoining zones and on the overall zoning scheme." *Id.* at 449. We additionally required the Board to make findings based on sufficient evidence rather than merely conclusory statements regarding the Church and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). *See* 42 U.S.C. § 2000cc(a)(1). Finally, we held that the Board and not the Woodford Circuit Court was responsible for making those findings.

Following remand, on May 5, 2008, the Board met and made its new decision. It first determined by a unanimous vote not to hear any additional comments from any interested parties regarding the proposed conditional use. The Board then unanimously determined that it did not want to change its decision and allowed the proposed conditional use to stand approved. Next, the Board voted unanimously not to make any substantive changes in its previously approved findings.

Thereafter, Arnold and Lyster filed a petition for declaration of rights along with an appeal from the Board's determination in the Woodford Circuit Court. That court dismissed the petition for declaration of rights and affirmed the determination of the Board. Arnold and Lyster then filed this appeal wherein they have raised five issues for our consideration. They first argue that the Board failed

to heed the Woodford County zoning ordinance by defining "church" to include schools and gymnasia. They next argue the Circuit Court erred when it affirmed procedures created by counsel for the Board where those procedures usurped the fact-finding and decision-making duties of the Board and denied Arnold and Lyster their procedural due process rights. The third claim is that the Board lacked substantial evidence to reach a conclusion granting the Church's conditional use request. Fourth, they argue that the record does not support the finding of the circuit court that the Board deleted its findings relative to RLUIPA, and finally that it was error to dismiss the petition for declaratory judgment.

The Board of Zoning Adjustment is an administrative agency and courts are not at liberty to substitute their judgment even though they might have reached a different result. *Kentucky State Racing Comm'n v. Fuller,* 481 S.W.2d 298, 308 (Ky. 1972).

> [T]he scope of judicial review of zoning action taken by public bodies, both administrative and legislative, is limited to determining whether the action was arbitrary, which ordinarily involves these considerations: (1) whether the action under attack was in excess of the powers granted to the public bodies? (2) whether the parties were deprived of procedural due process by the public bodies? [and] (3) whether there is a lack of evidentiary support in the findings of the public bodies?

Fallon v. Baker, 455 S.W.2d 572, 574 (Ky. 1970). An administrative board's factual findings are not to be deemed arbitrary if they are supported by substantial evidence defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Fuller,* 481 S.W.2d

at 308 (quoting *O'Nan v. Ecklar Moore Express, Inc.*, 339 S.W.2d 466, 468 (Ky. 1960)). It is not our role to dictate the manner in which an administrative agency functions.

Arnold and Lyster first argue that the Board failed to heed the Woodford County zoning ordinance by defining "church" to include a school and a gymnasium. The Circuit Court determined that the zoning ordinance allows "churches and related facilities." The Church's application proposed a sanctuary, family life center, educational building and a recreation center or gymnasium. A "church" is defined by the zoning ordinance as "[a] facility used primarily for religious worship services of an assembly nature that may secondarily provide social or community services such as counseling, child care, senior services, and educational programs." Zoning Ordinance Article II, §218A.

Arnold and Lyster would have us adopt an unduly narrow reading of the zoning ordinance allowing but a single building for religious worship and some secondary uses for social or community services. The ordinance, however, authorizes a "facility." Were the ordinance intended to limit development to but a single building, it would have surely used more precise and limited language. Furthermore, a facility for religious worship of an assembly nature presupposes that significant numbers will congregate. Necessarily incident to such human congregation are associated services that may include food preparation and service, offices for employees, parking, and the provision of other direct needs. Moreover, religious education and recreational activities have been a traditional hallmark of

the service and proselytizing mission of religious organizations. Based on the broad language of the ordinance and the general understanding of the mission of religious organizations, we have no doubt in concluding that not just a single building was contemplated by the Board in its ordinance.

Arnold and Lyster next argue that the circuit court erred when it affirmed the use of procedures created by the Board's counsel which, they contend, effectively usurped the fact finding and decision making duties of the Board and, thus, denied them their procedural due process rights. Our prior opinion reversed in part and remanded the matter for additional proceedings. *See Lyster v. Woodford County Bd. of Adjustment Members,* 2007 WL 542719 (Ky. App. 2007) (2005-CA-001336-MR). The "decision tree" or memoranda prepared by counsel did not include any findings or recommendations but was merely a guideline for the Board to follow as to procedures available to it when reaching a decision.

"In every case involving the judicial review of the proceedings before a zoning commission the presumption is that the action of the commission was reasonable and was carried out according to law." *Hatch v. Fiscal Court of Fayette County,* 242 S.W.2d 1018, 1021 (Ky. 1951). Arnold and Lyster have not provided any evidence that the Board's reliance on counsel's recommended manner of proceeding was unreasonable or not according to law. There is nothing in the proposed recommended procedures that deprived the Board of its fact finding or decision making role. There was no error as it relates to this argument.

Arnold and Lyster's third issue is that the Board lacked substantial evidence to reach the conclusion that the Church's conditional use request should be approved. This is essentially the same argument as presented in the prior appeal where we held that the Board failed to make appropriate findings as required by KRS 100.111(7). On remand, we required the Board make factual determinations within the scope of KRS 100.111. "[T]he factual determinations made by the board should demonstrate that it had considered the effect of the proposed land use on the public health, safety and welfare in the zone affected, in adjoining zones and on the overall zoning scheme." *Davis v. Richardson,* 507 S.W.2d at 449.

The Church responds that the Board adopted supplemental findings on April 2, 2007, but acknowledges that those findings do not directly address the requirement of findings that the Church's use is essential or would promote public health, safety or welfare. Our prior opinion very precisely held:

> Here, the Board made no findings of the type described by the *Davis* court and KRS Chapter 100. The Board made only four findings and all were related to the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Significantly, the Board failed to make any findings relating to the effect that the Church's proposed use would have on the public health, safety or welfare in that location. Thus, we determine that the Board's action in granting the permit was arbitrary because it lacked substantial evidentiary support.

Lyster, 2007 WL 542719 at *3. As before, we must again reverse and remand for additional findings by the Board in accordance with the *Davis* decision and KRS Chapter 100.

For their fourth argument, Arnold and Lyster state that the record does not support the conclusion that the Board's findings relative to RLUIPA were deleted. Upon review, we discover that the minutes of the Board's May 5, 2008, meeting reveal that the Board's counsel recommended that the Board delete "the prior findings that referred to RLUPA [sic]" yet no motion regarding this issue was ever made or voted upon by the Board. In our prior opinion we noted: "We agree with the Church that the Board should consider the provisions of RLUIPA when making its determination of whether to issue a conditional use permit." *Id*.

With respect to the RLUIPA, prior findings of the Board presently remain intact as originally adopted. We held "[t]he factual findings of the Board were conclusory statements without substantial supporting evidence sufficient to 'induce conviction in the minds of reasonable men.'" *Id*. at *4. Here, it is not the lack of substantial supporting evidence that has been brought before us, but rather the Circuit Court's error in determining that those findings had been deleted. The Board's minutes are clear that it never took such action and the Circuit Court's determination was in error. On remand, the Board shall make appropriate findings under RLUIPA.

Finally, Arnold and Lyster argue that it was error to dismiss their petition for declaratory judgment. We disagree. KRS 100.347 provides an exclusive statutory remedy for an appeal from the actions of the Board. *See Black v. Utter*, 303 Ky. 803, 190 S.W.2d 541, 542 (1945). A request for a declaratory judgment cannot substitute for an action that is "particularly provided for, to be

brought in a particular way." *Sullenger v. Sullenger's Adm'x*, 287 Ky. 232, 152 S.W.2d 571, 574 (1941).

The judgment of the Woodford Circuit Court is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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