

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 20, 2003 Session

CHEROKEE COUNTRY CLUB, INC. v. CITY OF KNOXVILLE, ET AL.

**Direct Appeal from the Circuit Court for Knox County
No. 1-136-02 Dale C. Workman, Judge**

FILED OCTOBER 15, 2003

No. E2002-01156-COA-R3-CV

This appeal arises from a dispute over the validity of a Knoxville City Ordinance. The lower court, finding the challenged ordinance invalid and void, issued a Peremptory Writ of Mandamus requiring the Chief Building Official to issue a demolition permit. Subsequently, the court entered an “Agreed Order Granting Temporary Stay,” whereby the plaintiff agreed not to demolish the structure pending a final resolution of the case. The parties raise multiple issues on appeal. For the following reasons, we reverse in part, vacate in part, and remand.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Reversed in Part, Vacated in Part
and Remanded**

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Michael S. Kelly, Law Director, Hillary B. Jones, Assistant City Attorney, for Appellant City of Knoxville

Charles Swanson, Jason H. Long, Knoxville, TN, for Appellants Members of City Council

Charles A. Wagner, III, W. Turner Boone, for Appellee

OPINION

Facts and Procedural History

In 1999, Cherokee Country Club (“Cherokee”) bought a parcel of real property located on Lyons View Pike in Knoxville, Tennessee. A house known as the J. Allen Smith House (“House”) is located on the property. Cherokee acquired the property with the purpose and intention of demolishing the house.

On January 17, 2002, the Mayor of Knoxville filed an Application for Historic Overlay Zoning and a Re-zoning Application that proposed to re-zone the property in question as an H-1 historic district. Thereafter, on February 20, 2002, Cherokee applied to the Building Official of the City of Knoxville for a demolition permit, but the request was denied. At the time Cherokee applied for the demolition permit, Cherokee was unaware of the pending re-zoning application. The denial of the permit was based on Knoxville City Ordinance No. 0-119-00, the challenged ordinance, which states:

No demolition permit shall be issued, for a period of 180 days, for any property under review and consideration for an H-1 overlay or NC-1 overlay designation after the application process has been initiated in accordance with the procedures set forth in Article IV, § 14 and § 22, respectively, of the Knoxville Zoning Code. The 180 day period can be extended by Knoxville City Council, as necessary.

This ordinance was passed on April 4, 2000, using emergency procedures and thus was not submitted to the Metropolitan Planning Commission (“MPC”), nor was notice of a hearing given.

On March 8, 2002, Cherokee filed a Verified Complaint for Declaratory Judgment and Writ of Mandamus, alleging that the City Building Official lacks the authority to deny a demolition permit where the structure is not currently in an H-1 district and that Ordinance No. 0-119-00 is invalid. Cherokee also asked that a Writ of Mandamus be issued requiring the city building official to issue a demolition permit. The City of Knoxville and the City Council¹ filed their sworn answer on April 4, 2002. Thereafter, Cherokee moved for judgment on the pleadings.

On April 12, 2002, the trial court granted Cherokee’s motion for judgment on the pleadings, finding that Ordinance No. 0-119-00 is invalid because it was not adopted in accordance with the mandatory notice and hearing requirements set forth in Tenn. Code Ann. §§ 13-7-201 to -211 (2003). In accordance with the April 12, 2002 order, the Circuit Court Clerk issued a Peremptory Writ of Mandamus on April 15, 2001 and the City Building Official issued the demolition permit on April 16, 2002. The parties entered into an Agreed Order Granting Temporary Stay on April 16, 2002, whereby Cherokee agreed not to demolish the House pending a final resolution of the case, and the City agreed that any vested rights under the permit would not be affected. The City then timely filed its notice of appeal from the decision of the trial court.

Issues

The City raises the following issues, as we perceive them, for our review:

- I. Whether the trial court erred in finding Ordinance No. 0-119-00 void for failure to satisfy the procedural requirements applicable to zoning ordinances;

¹ These two entities will hereinafter be referred to, collectively, as “The City.”

- II. Whether Cherokee failed to join necessary parties in its action for declaratory relief;
- III. Whether the trial court erred in granting Cherokee judgment on the pleadings;
- IV. Whether the trial court erred by issuing a writ of mandamus to the Chief Building Official commanding the issuance of a demolition permit to Cherokee.

Cherokee raises an additional issue for our consideration:

- V. Whether the trial court erred in declaring Ordinance No. 0-119-00 a valid emergency ordinance under the Knoxville City Charter.

Standard of Review

The standard of review in a case involving a grant of judgment on the pleadings is set forth in *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991):

In light of the fact that this case was dismissed on a motion for judgment on the pleadings pursuant to Rule 12.03 of the Tennessee Rules of Civil Procedure, we are bound to treat as false all allegations of the . . . moving party, which are denied, and as true all well-pleaded allegations contained in the pleadings of the . . . opponent of the motion. See *Trigg v. Middle Tenn. E.ec. Membership Corp.*, 533 S.W.2d 730, 732-33 (Tenn. App. 1975). In other words, on an appeal from an order allowing a judgment on the pleadings, as in this case, all well-pleaded facts and all reasonable inferences drawn therefrom must be accepted as true. *Trigg* at 733 (citing *Darwin v. Town of Cookeville*, 97 S.W.2d 838 (Tenn. 1936); *Rogers v. Rogers*, 53 Tenn. 489 (1871)). Conclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to the judgment. *Trigg* at 733.

Id. We review the present case with this standard in mind.

Law and Analysis

I. Procedural Requirements of Charter § 410

The first issue that we will address involves the lower court's finding that Ordinance No. 0-119-00 constitutes a valid emergency ordinance pursuant to the Knoxville City Charter. In its Findings of Fact and Conclusions of Law, the lower court specifically found that "Ordinance 0-119-00 states sufficient grounds to be adopted as an emergency ordinance pursuant to Section 410 of the

Charter of the City of Knoxville.” Section 410 of the Knoxville City Charter, in turn, states in relevant part:

The council may, by an affirmative vote of two-thirds of its membership, pass emergency measures to take effect at the time of passage. An emergency measure is an ordinance or resolution for the immediate preservation of the public peace, property, health or safety, or providing for the usual daily operation of a municipal department in which the emergency is set forth in the preamble thereto, and the declaration of emergency by the council in the ordinance shall be conclusive thereof.

The practical effect of Charter § 410 is to permit the expeditious passage and immediate effectiveness of an ordinance without the time-consuming procedural safeguards normally required by Charter § 409.² Cherokee, which raises this issue on appeal, contends that Ordinance 0-119-00 fails to meet the requirements of Charter § 410 because it does not properly declare an emergency. We disagree.

Charter § 410 permits the passage of an emergency ordinance for, among other things, the immediate preservation of public property. It further states that a declaration of emergency by the City Council shall be conclusive as to whether an emergency exists. Ordinance No. 0-119-00, on its face, satisfies the precepts of Charter § 410. This ordinance was passed to prevent anticipatory demolition of property being considered for historic overlay. The ordinance makes clear that the City of Knoxville faced a “substantial threat” of anticipatory demolition at the time the ordinance was passed.³ Anticipatory demolition occurs where a property owner demolishes a structure on his property before an historic overlay can be imposed upon the property to protect the historically significant structure. The very nature of anticipatory demolition presents an immediate threat to property of public significance, which is the type of concern contemplated by Charter § 410. Also, the title of Ordinance No. 0-119-00 describes it as “AN EMERGENCY ORDINANCE OF THE COUNCIL OF THE CITY OF KNOXVILLE.” This constitutes a declaration of emergency by the council that Charter § 410 deems conclusive on the matter. In sum, we agree with the trial court’s finding that Ordinance No. 0-119-00 satisfies the requirements set forth in Charter § 410. Accordingly, we affirm the ruling of the lower court on this issue. Note, however, that the ordinance’s status as a valid emergency measure only takes the ordinance out of the scope of Charter § 409’s procedural requirements. There still remains another procedural scheme that may apply, depending upon whether Ordinance No. 0-119-00 can be characterized as a zoning ordinance.

² Charter § 409 contains several procedural safeguards for the passage of normal ordinances. For example, each ordinance must be read at no less than two regular city council meetings at least two weeks apart, with the proposed ordinance to be filed in the city recorder’s office for public inspection during the interim. In addition, each ordinance normally takes effect seventeen days after passage, unless otherwise specified.

³ The preamble to Ordinance No. 0-119-00 states explicitly that “a substantial threat of anticipatory demolition of properties under consideration and review for H-1 and NC-1 overlay designation exists.”

II. Procedural Requirements for Zoning Ordinances

Local governments lack the inherent authority to control the use of land within their boundaries. *Family Golf of Nashville, Inc. v. Metro. Gov't of Nashville*, 964 S.W.2d 254, 257 (Tenn. Ct. App. 1997). Such power resides with the State, and must be delegated by the General Assembly to local governments. *Id.* Tennessee's Municipal Zoning Statute, codified at Tenn. Code Ann. §§ 13-7-201 to -211 (2003), acts as such an enabling mechanism. It empowers municipalities to regulate various aspects of land use⁴ through the enactment of zoning ordinances. Included in the Municipal Zoning Statute are certain procedural regulations that must be followed by a local legislative body when crafting a zoning ordinance or amendment thereof. Specifically, Tenn. Code Ann. § 13-7-202 (2003) requires that a zoning ordinance originate with the planning commission of a municipality before being passed by the municipality's chief legislative body. Tenn. Code Ann. § 13-7-203 (2003) then provides that a public hearing must be held, after fifteen days general notice, before the enactment of any zoning ordinance or amendment thereof. Finally, Tenn. Code Ann. § 13-7-204 (2003) states that no amendment to a zoning ordinance will be effective "unless it is first submitted to and approved by the planning commission or, if disapproved, receives the favorable vote of a majority of the entire membership of the chief legislative body." Any zoning ordinance or amendment thereof is void if it fails to meet these statutory criteria. *Hutcherson v. Crimer*, 11 S.W.3d 126, 134 (Tenn. Ct. App. 1999). Supplementing these statutory provisions, Appendix B Article VII § 6 of the Knoxville City Code provides various hearing and reporting requirements for proposed amendments to any zoning ordinance.

In light of these numerous procedural requirements, the key issue becomes the characterization of Ordinance No. 0-119-00. The City maintains that it is merely a building regulation, not subject to the rigors of zoning procedures. Cherokee responds that the ordinance is, instead, an exercise of the City's power to control land use by zoning. In its findings of fact and conclusions of law, the lower court agreed with Cherokee, finding that Ordinance No. 0-119-00 is properly characterized as a zoning ordinance.⁵ It further found that the ordinance did not comply with the requirements enumerated in the Municipal Zoning Statute or in Appendix B Article VII § 6 of the Knoxville City Code. As such, the lower court declared Ordinance No. 0-119-00 invalid and void. We disagree with the court's characterization of Ordinance No. 0-119-00.

⁴ Tenn. Code Ann. § 13-7-201 specifically empowers municipalities to regulate: the location, height, bulk, number of stories and size of buildings and other structures, the percentage of the lot which may be occupied, the sizes of yards, courts and other open spaces, the density of population, and the uses of buildings, structures and land for trade, industry, residence, recreation, public activities and other purposes.

⁵ The lower court found that If the authority to adopt Ordinance 0-119-00 is vested in the City Council of the City of Knoxville as a moratorium the cases are clear that: (1) such ordinances are an exercise of the police power as zoning not building codes; (2) the ordinance must be adopted under the applicable procedural authority for zoning.

As we begin our analysis, we bear in mind an axiom regarding judicial construction of ordinances. Courts should construe municipal ordinances in the same manner as statutes. *Tenn. Manufactured Hous. Ass'n v. Metro. Gov't of Nashville*, 798 S.W.2d 254, 260 (Tenn. 1990) (citing *Carroll Blake Constr. Co. v. Boyle*, 203 S.W. 945, 948 (Tenn. 1918)). Namely, if an ordinance can be construed in two ways, the court should adopt the construction that upholds the ordinance's validity. *Id.* at 260 (citing *Rawlins v. Braswell*, 231 S.W.2d 1021, 1023 (Tenn. 1950); *Hermitage Laundry Co. v. City of Nashville*, 209 S.W.2d 5, 6 (Tenn. 1948)). Thus, if the ordinance at issue may legitimately be characterized as either a zoning regulation or a building regulation, we are bound to uphold the ordinance's validity by construing it as a building regulation.

There are two grounds urged upon this Court for concluding that Ordinance No. 0-119-00 is a zoning ordinance, subject to the procedural safeguards detailed above. The first is somewhat circuitous, beginning as it does with the Historic Zoning Statute. The other ground is more direct, stemming from the very nature and function of the ordinance at issue. Neither ground, however, is ultimately persuasive.

A. The Historic Zoning Statute

Tennessee's Historic Zoning Statute, codified at Tenn. Code Ann. § 13-7-401 to -410 (2003), is an enabling statute that empowers municipalities to establish historic districts and regulate construction, renovation, and demolition therein. As part of this overall statutory scheme, Tenn. Code Ann. § 13-7-404 (2003) mandates that any historic zoning regulations must be adopted either as part of a new zoning ordinance or as an amendment to existing zoning ordinances. This means that, in order to pass historic zoning ordinances, the local legislature must proceed as it would in enacting or amending any other zoning regulation. This process necessarily implicates the procedural requirements of the Municipal Zoning Statute and the Knoxville City Charter.

Cherokee argues that Ordinance No. 0-119-00 falls within the ambit of the Historic Zoning Statute and that, consequently, the ordinance is also subject to the procedural authority for zoning regulations. It is not clear whether the lower court relied upon this reasoning in its findings. Regardless, we do not find the argument persuasive. The scope of the Historic Zoning Statute does not extend to Ordinance No. 0-119-00 and cannot, therefore, serve as a ground upon which to apply the procedural requirements of zoning regulations to the ordinance at issue.

Because the issue before us deals with the issuance of a demolition permit, our inquiry into the scope of the Historic Zoning Statute is necessarily limited to those provisions regarding the regulation of demolition. The crucial provision for this inquiry is Tenn. Code Ann. § 13-7-402, which, in relevant part, empowers the legislative body of a municipality to “regulate the construction, repair, alteration, rehabilitation, relocation, *and demolition* of any building or other structure which is located or is proposed to be located within the boundaries of any historic district or zone.” (emphasis added). The plain language of the provision suggests that the statute's authority extends only to demolition occurring within an already established historic district. Specifically, the provision deals with the regulation of demolition “of any building or other structure” that is “located

or proposed to be located” in an historic zone. The provision makes no mention of regulating demolition in an area yet to be named an historic district.⁶ As such, the scope of the Historic Zoning Statute only applies to municipal ordinances that regulate demolition in an existing historic district. Ordinance No. 0-119-00 regulates the issuance of demolition permits for property that is only under consideration for historic zoning. The Historic Zoning Statute, therefore, does not extend to Ordinance No. 0-119-00, nor can it provide a basis by which to apply general zoning procedures to the ordinance.

B. “Land Use” Regulation

Cherokee’s next argument for characterizing Ordinance No. 0-119-00 as a zoning ordinance, and subjecting it to the applicable procedural requirements, arises from the putative nature and function of the ordinance. Zoning laws regulate the use of land and buildings by depriving a property owner of a use of the property that would otherwise be lawful. *Wilson County Youth Emergency Shelter, Inc. v. Wilson County*, 13 S.W.3d 338 (Tenn. Ct. App. 1998). The lower court found that Ordinance No. 0-119-00 is a zoning regulation because the ordinance “at least indirectly controls the rights of a property owner to make what is otherwise a lawful use of their [sic] property.” We disagree with the lower court’s characterization of the ordinance.

Tennessee courts have not directly addressed this issue, but other jurisdictions have indicated that ordinances similar to the one at issue do not constitute zoning ordinances. Instead, the ordinances were characterized as building ordinances. For example, in *Bittinger v. Corporation of Bolivar*, 395 S.E.2d 554 (W.Va. 1990), the West Virginia Supreme Court of Appeals considered the nature of both building and zoning regulations. That case arose from the lower court’s denial of a writ of mandamus directing the issuance of building permits to the appellants. *Id.* at 555. The appellants were initially denied twenty building permits by the Bolivar Town Council due to a new ordinance that specified certain requirements that appellants were unable to meet. *Id.* Appellants then brought suit, alleging that the relevant ordinance was invalid because it was a zoning ordinance and was not enacted according to proper procedure for zoning ordinances. *Id.* at 556. On appeal, the court ruled that the ordinance was a building regulation. *Id.* In reaching its decision, the court provided the following analysis:

While perhaps confusing, both zoning regulations and planning or building regulations involve the use of a certain area of the community. The distinguishing factor between the two types of permits is that a building permit involves how that

⁶ The only possible source of confusion in the statute is the “proposed to be located” language. A reader could possibly mistake the phrase as meaning that the statute’s authority extends to demolition in proposed historic districts. A closer analysis, however, does not support this reading. The phrase “proposed to be located” modifies “building or structure,” rather than “district or zone.” This means that the building or structure is the entity yet to come into existence, rather than the district or zone. Accordingly, we read the provision to apply to non-existing buildings proposed to be built in extant historic districts, rather than to existing buildings under consideration for future historic zoning.

use is undertaken, while a zoning permit concerns whether a certain area may be used for a particular purpose.

Id. at 558. According to this reasoning, the critical difference between the two types of ordinances rests with the role of each in land use planning. Zoning ordinances govern *what* uses are acceptable, while building ordinances regulate *how* those uses may be effectuated. Other courts have relied upon similar logic in differentiating zoning regulations from building regulations. See *Fairfax MK, Inc. v. City of Clarkston*, 555 S.E.2d 722 (Ga. 2001); *Baltimore Heritage, Inc. v. Mayor and City Council of Baltimore*, 557 A.2d 256 (Md. 1989); *Heritage Hill Association, Inc. v. City of Grand Rapids*, 211 N.W.2d 77 (Ct. App. Mich. 1974). We believe this line of reasoning provides the most helpful analysis for this case.

Applying it to the present case, we find it apparent that Ordinance No. 0-119-00 is a building ordinance. While Cherokee's property is being considered for historic overlay, it still retains its R-1 single-family residential district status. According to that zoning classification, Cherokee can make six uses of its property: (1) detached single-family dwellings; (2) utility substations and transportation easements; (3) accessory uses; (4) accessory buildings and structures; (5) signs; and (6) agricultural crops. KNOXVILLE, TN., CODE APPENDIX B, ARTICLE IV, § 2 (2003). Ordinance 0-119-00 does not affect any of these permissible uses. Cherokee is free to engage in any of the six purposes for which the property is zoned, so long as it does not demolish the House in so doing. Ordinance No. 0-119-00, therefore, is not a zoning regulation. Instead, it is a building ordinance, which simply involves *how* the use of the property may or may not be undertaken.

We also note that our characterization of Ordinance No. 0-119-00 is further justified by our duty to adopt, if possible, a construction of the ordinance that upholds its validity. See *Tenn. Manufacture Hous. Ass'n v. Metro. Gov't of Nashville*, 798 S.W.2d 254, 260 (Tenn. 1990). As a building regulation, Ordinance No. 0-119-00 is not subject to the procedural requirements for passage of zoning regulations and can, therefore, be upheld as valid. Accordingly, we reverse the finding of the lower court and hold that Ordinance No. 0-119-00 is a valid and effective building regulation.

Our holding on the validity of Ordinance No. 0-119-00 is dispositive of the case, so it is not necessary to reach the merits of the remaining issues on appeal. The lower court erred in granting Cherokee's judgment on the pleadings as to the underlying claims for declaratory judgment and writ of mandamus. Accordingly, we reverse the lower court's holding as to the validity of Ordinance No. 0-119-00 and vacate the order for a Peremptory Writ of Mandamus.

Conclusion

For the foregoing reasons, we reverse the judgment of the lower court, vacate the order for a Peremptory Writ of Mandamus, and remand the case for proceedings consistent with this opinion. Costs on appeal taxed to Cherokee Country Club, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE