IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

HUGHIE RAGAN,	)	
	)	
Plaintiff/Appellant,	)	**Madison Chancery No. 48296**
	)	
VS.	)	**Appeal No. 02A01-9501-CH-00007**
	)	
JACK HALL and MADISON COUNTY BOARD OF ZONING APPEALS,	)	
	)	
Defendants/Appellees.	)	

APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY
AT JACKSON, TENNESSEE
THE HONORABLE JOE C. MORRIS, CHANCELLOR

FILED

December 29, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

HUGHIE RAGAN
Jackson, Tennessee
Attorney for Plaintiff/Appellant

HUGH HARVEY, JR.
Jackson, Tennessee
Attorney for Defendants/Appellees

AFFIRMED

ALAN E. HIGHERS, JUDGE

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

PAUL G. SUMMERS, SP. J.

This appeal arises from the Madison County Building Commissioner Jack Hall's

(hereinafter "Commissioner") denial of a building permit to the Appellant, Hughie Ragan. Mr. Ragan appealed the Commissioner's decision to the Board of Adjustments and Zoning Appeals (hereinafter "Board") and the Madison County Chancery Court, both of which affirmed the Commissioner's decision. Appellant filed a timely notice of appeal with this Court.

The facts of this case are as follows. A fire occurred at Appellant's property located at 733 Boone Lane, Madison County, Tennessee. On June 23, 1993, the Commissioner issued an order to prevent any repair work from being done on said property because no building permit had been issued. Building permits are required whenever the Commissioner finds that more than $100 in repairs are needed. The Appellant thereafter requested a building permit and it was denied. The Commissioner denied Appellant's request based upon the following:

> 1) The structure, as determined by the Building Commissioner, was destroyed by fire beyond the 75% threshold allowed for nonconforming structures. Once this threshold is reached, the structure can not be rebuilt or repaired.
>
> 2) The structure has not received proper approval from the Health Department regarding the septic system. No permit can be issued for a structure which has not been given septic system approval by the Health Department. The Health Department has stated that no approval will be given for this structure since it is located in a flood hazard area.

On appeal to the Board, the Appellant argued that the house was not 75% damaged and therefore should retain its status as a nonconforming structure; that the house had a proper septic tank; and that the property qualified as a business establishment subject to a statutory exemption from zoning regulations. The Board affirmed the Commissioner's denial of Appellant's request for a building permit. On appeal to this Court, Appellant makes the additional arguments that (1) the Board's decision was improper because none of the witnesses before the Board testified under oath and (2) if the Board's decision was correct, Appellant is entitled to compensation because the Commissioner's denial of a building permit to Appellant constitutes a compensable taking.

This case comes before us by a common law writ of certiorari. T.C.A. § 27-9-101

(1980). Thus, the scope of this Court's review is limited to determining whether the Board "exceeded its jurisdiction or acted fraudulently, illegally, or arbitrarily" in denying Appellant a building permit. See Hedgepath v. Norton, 839 S.W.2d 416, 421 (Tenn. App. 1992) (citing Hoover Motor Express Co. v. R.R. & Public Utilities Comm'n, 195 Tenn. 593, 599-600, 261 S.W.2d 233, 236 (1953)). Actions of an administrative agency which are not supported by material evidence in the record are deemed arbitrary and void. Watts v. Civil Serv. Bd., 606 S.W.2d 274, 276-77 (Tenn. 1980), *cert. denied*, 450 U.S. 983, 101 S. Ct. 1519, 67 L. Ed.2d 818 (1981). In order for this Court to uphold the Board's decision, the administrative record must contain "such relevant evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." Hedgepath, 839 S.W.2d at 421(citing Pace v. Garbage Disposal Dist., 54 Tenn. App. 263, 267, 390 S.W.2d 461, 463 (1965)).

We first address Appellant's contention that 733 Boone Lane is a non-conforming business establishment which is exempt from changes in or, as in the present case, the adoption of, zoning regulations. T.C.A. § 13-7-208 provides in pertinent part:

> (2)(b) In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restriction of any governmental agency of this state or its political subdivisions . . . then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation . . . .
>
> (c) Industrial, commercial or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto in effect immediately preceding a change in zoning shall be allowed to expand operations and construct additional facilities which involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning . . . . No building permit or like permission for construction or landscaping shall be denied to an industry or business seeking to expand and continue activities conducted by that industry or business which were permitted prior to the change in zoning . . . .
>
> (d) Industrial, commercial or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto immediately preceding a change in zoning shall be allowed to destroy present facilities and reconstruct new facilities necessary to the conduct of such industry or business subsequent to the zoning change . . . . No building permit or like permission for demolition, construction or

> landscaping shall be denied to an industry or business seeking to destroy and reconstruct facilities necessary to the continued conduct of the activities of that industry or business, where such conduct was permitted prior to a change in zoning . . . .

Id. (1992 & Supp. 1994).

Appellant built the house at 733 Boone Lane in 1958. Madison County had not adopted zoning regulations at that time. Despite the fact that the property is rented solely as a residence, Appellant contends that the property is zoned business since he is in the *business* of renting property. Relying on the provisions set forth in T.C.A. § 13-7-208, Appellant argues that his *business* property is exempt from zoning regulations adopted after the structure was built. For that reason, Appellant concludes that he should be permitted to repair said property.

Neither the pertinent provisions of the Tennessee Code Annotated nor the Zoning Resolution of Jackson, Tennessee Planning Region (hereinafter "Zoning Resolution") specifically define "residential use" or "business use." Testimony of both Jev Vaughan, Chairman of the Board of Zoning Appeals and Stan Pilant, Senior Planner for the Jackson Planning Commission, indicates that property is zoned according to the particular parcel's use. Additionally, our review of both the residential use and business use classifications set forth in the Zoning Resolution indicates that residential dwellings are prohibited in all property zoned "business." Based upon the foregoing, as well as Appellant's testimony that the property is used solely as a residential rental unit, we find that it is not an exempt business establishment as contemplated by T.C.A. § 13-7-208.

Appellant next contends that the house at 733 Boone Lane was not 75% destroyed by fire. Because Appellant built the house at 733 Boone Lane before Madison County adopted the Zoning Resolution, the property enjoyed the status of a nonconforming structure, exempt from Zoning Resolution requirements. However, once a nonconforming structure is damaged more than 75% percent, it loses its nonconforming status and must comply with the Zoning Resolution. At his hearing before the Board, Appellant's only proof that the house was not 75% destroyed was his own statement to that effect. After

reviewing photographs of the damaged property and considering the Jackson Municipal Regional Planning Commission's recommendation, which supported the Commissioner's denial of a building permit to Appellant, the Board concluded that the property was 75% damaged. Significantly, the Board requested that Appellant produce an appraisal of the property's value and an estimate of the damages to the house. Appellant failed to produce either of the requested documents. Based upon the foregoing, we conclude that material evidence in the record supports the Board's decision .

Appellant's third contention is that, if the 733 Boone Lane is subject to the Zoning Resolution, the property had an approved septic tank system at the time of the fire. However, Appellant presented no evidence that the Madison County Health Department (hereinafter "Health Department") ever issued a permit allowing a septic tank to be installed on the property. Moreover, Appellant testified that he had a concrete block septic tank system. Concrete block septic tank systems are not and have never been approved by the Health Department. We conclude that material evidence in the record supports the Board's finding that Appellant did not have a Health Department sanctioned septic tank system.

In his appeal before this Court, Appellant argues that the decision of the Board is invalid because testimony in the Board hearing was not given under oath. Appellant cites various provisions of the Uniform Administrative Procedures Act (hereinafter "Act"), T.C.A. § 4-5-101 et. seq. (1991), as authority for his proposition. However, Appellant fails to cite this Court to T.C.A. § 4-5-106, which provides:

> Application -- (a) The provisions of this chapter shall not apply to the military, the governor, the general assembly, the state building commission or the courts, nor shall they apply to county and municipal boards, commissions, committees, departments or officers. (Emphasis added)

Id. (1991).

Accordingly, the Act does not apply to the hearing at issue because such hearing was held before a muncipal board. In addition, we find no authority outside the Act that

would require the Board to put witnesses under oath at its hearings. Moreover, this Court is not impressed with Appellant's argument that he was prejudiced by the Board's failure to put witnesses, including Appellant himself, under oath, where Appellant did not earnestly object to the Board's procedure at the time of the hearing.

Appellant makes the alternative argument that, if the Board's decision was proper, he is entitled to compensation because the requirements of the Zoning Resolution constitute a taking of property without just compensation, in violation of U.S. Const. amend. 5; Tenn. Const. art. 1, § 8. Appellant claims that 733 Boone Lane's only viable use is as residential rental property. Thus, Appellant claims that he is entitled to compensation for the value of the property if he is not permitted to rebuild the house.

We conclude that Appellant's assertion that the Zoning Resolution has deprived Appellant of all reasonable use of his property is without merit. As pointed out by counsel for the Appellee during oral argument, Appellant's land is zoned, and may be used, for agricultural and forestry purposes. In Draper v. Haynes, 567 S.W.2d 462, 465 (Tenn. 1978), the court stated:

> Zoning and land-use ordinances . . . represent an exercise of the police power of a municipal government.
>
> Ordinances regulating the use and development of property are generally held to lie within the police power of municipal corporations, and their adoption, while frequently affecting property values and restricting use of property, has generally not been considered to amount to a taking under the power of eminent domain or to constitute retrospective legislation within the meaning of the state constitution (citations omitted).

Both the Health Department and the Zoning Resolution regulations are valid exercises of Madison County and Jackson's police powers. Accordingly, we hold that those regulations, which mandated the Commissioner's denial of Appellant's request for a building permit, do not constitute a compensable taking of Appellant's property.

Based upon the foregoing, we affirm the decision of the chancellor. Costs on

appeal are taxed to the Appellant.

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_____HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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SUMMERS, SP. J.