

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

October 22, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

CITY OF CHURCH HILL)
) HAWKINS COUNTY
Plaintiff - Appellant)
) 03A01-9603-CV-00098
)
v.)
) HON. WILLIAM L. JENKINS,
) JUDGE
)
DWIGHT S. TAYLOR¹)
)
Defendant - Appellee) AFFIRMED AND REMANDED

JOSEPH E. MAY OF CHURCH HILL FOR APPELLANT

WILLIAM E. PHILLIPS OF ROGERSVILLE FOR APPELLEE

O P I N I O N

Goddard, P. J.

This is a suit by the City of Church Hill, acting by and through the Church Hill Regional Planning Commission, seeking to enjoin Dwight S. Taylor from developing a mobile home park

¹ Thomas A. Peters, Trustee, is Grantee in a trust deed conveying the property to secure Howard Ed Lloyd, Sr., and wife, Peggy P. Lloyd, all of whom were made parties defendant in the original complaint, but are dismissed below and were not involved in this appeal.

outside the city limits of the City of Church Hill, but within an area controlled by the Planning Commission.

The Trial Judge dismissed the suit, finding that the statutory authority granted the Planning Commission only applied when property is sold and does not apply when sites are leased, as is the case in this instance.

The Planning Commission appeals, raising the following two issues:

1. A question of law which appears on the face of the pleadings and judgment of the Court - whether the Court erred when it found that subdivision regulations apply only to the development of property for which there is a contemplated "immediate or future" sale of that property, irrespective of whether the improvement of the property requires construction of multiple trailer sites; rights-of-way to and from those sites to access the public road; and, water, sanitation, electrical and other utilities for a mobile home park; and
2. A question of law which appears on the face of the pleadings and judgment of the Court - whether the Court erred when it declared that a planning commission may not properly deny approval of a Plan for Development of a Mobile Home Park for the sole reason that such approval would allow Appellee to establish a pre-existing use which he either knows or could have known was forbidden by the proposed Regional Zoning Ordinance being deliberated by the governing body of the City of Church Hill.

The facts, which are for the most part taken from the pleadings of the parties, are accurately stated by the Trial Judge in his final order:

{T}he Court finds, and the parties agree, that Plaintiff's governing body has appointed the Church Hill Regional Planning Commission to exercise the powers granted to it pursuant to *Tenn. Code Ann. §13-3-401 et seq.*; that the Church Hill Regional Planning Commission exercises jurisdiction pursuant to law over the Church Hill Planning Region, composed of the territory of the City of Church Hill, together with territory adjoining but outside of the City of Church Hill, no part of which is more than five (5) miles beyond the limits of the City of Church Hill; that Defendants have various interests in a certain 5.82 ± acre parcel of property located outside the boundaries of the City of Church Hill, but within the boundaries of the Church Hill Planning Region; that Plaintiff, by its Regional Planning Commission has established Subdivision Regulations pursuant to *Tenn. Code Ann. §13-3-401 et seq.*, governing the subdivision of property located within the Church Hill Planning Region; that these regulations include General Requirements and Minimum Standards of Design for Mobile Home Parks; that the definition of the term subdivision is found at *Tenn. Code Ann. §13-3-401 (4)(B)*; that Defendant, DWIGHT S. TAYLOR proposes to rent, but not sell, trailer spaces in his proposed mobile home park to be located on his property; that Plaintiff gave its statutory public notice of intent to adopt a Regional Zoning Ordinance pursuant to *Tenn. Code Ann. §13-7-303*; that the statutory six (6) month abeyance period has now expired; that the Church Hill Regional Planning Commission certified a Regional Zoning Ordinance to the Board of Mayor and Alderman of the City of Church Hill, which has not yet adopted it.

Resolution of the first issue turns upon a portion of T. C. A. Title 13, Chapter 3, Part 4, which creates Regional Planning Commissions, and specifically as to the issue raised in this appeal, T. C. A. 13-3-104(B):

(B) "Subdivision" means, in all counties except those in subdivision (4)(A), the division of a tract or parcel of land into two (2) or more lots, sites, or other divisions requiring new street or utility construction, or any division of less than five (5) acres for the purpose, whether immediate or future, of sale or building development, and includes resubdivision and, when appropriate to the context,

relates to the process of resubdividing or to the land or area subdivided.

The Planning Commission contends that the Chancellor's interpretation of the meaning of the words "the division of a tract or parcel of land into two (2) or more lots, sites, or other divisions requiring new street or utility construction," was too restrictive a construction, and that a more appropriate one would be to include lots rented, as well as those sold.

On the other hand, Mr. Taylor, quoting from a dictionary definition, makes the following argument in his brief:

The word "divide" is defined as "To separate; to break apart;. Webster's Illustrated Dictionary, Publishers Company, Inc. 1962. The word "separate" is defined as "To become detached from the whole; to draw apart; to go different ways; to divide; to break away from the whole; to keep apart..." *Webster's*, supra.

Real property in the State of Tennessee may only be divided or separated by an instrument of conveyance in writing. *Title 66, Chapter 5, Tennessee Code Annotated*; Hampton's lessee v. McGinnis, 1 Tenn. 286 (1808).

Zoning laws generally, of which the Code Section in question is akin, are in derogation of an owner's rights in property and are to be strictly construed. State v. City of Nashville, 207 Tenn. 672, 343 S.W2d 847 (1961); State v. City of Oak Hill, 204 Tenn. 353, 321 S.W2d 557 (1959); Boles v. City of Chattanooga, 892 S.W2d 416 (Tenn. App. 1994); Anderson County v. Remote Landfill Services, 833 S.W2d 903 (Tenn. App. 1991). We

believe the Trial Judge was correct in employing such a construction. In so finding, we recognize that the problems sought to be alleviated would result as much from leasing trailer sites as from selling them. We conclude, however, that the Planning Commission's remedy lies with the Legislature, and not with the courts.

The following allegations from the complaint are the predicate for the second issue the Planning Commission raises:

Pursuant to *Tenn. Code Ann §29-14-101 et seq.*, the Tennessee Declaratory Judgment Act, Plaintiff seeks a declaration of the rights, status and other legal relations between the parties relating to the application of the Regional Zoning Ordinance promulgated by Plaintiff to the improvements being made to the property of Defendants.

12. A copy of Resolution No. 223, adopted by the Board of Mayor and Alderman of the City of Church Hill, was delivered to the Hawkins County Executive, whereby Plaintiff gave its statutory public notice of intent to adopt a Regional Zoning Ordinance pursuant to *Tenn. Code Ann. §13-7-303*.
13. The statutory six (6) month abeyance period has now expired; and, the Church Hill Regional Planning Commission certified a Regional Zoning Ordinance to the Board of Mayor and Alderman of the City of Church Hill, who will soon consider the adoption of said ordinance on the first of two required readings.
14. Said Regional Zoning Ordinance, if ordained as recommended, would place the property within a Zoning District which would prohibit use of Defendants' property for a Mobile Home Park.
15. Plaintiff may properly deny approval of a Plan for Development of a Mobile Home Park, if Defendant DWIGHT S. TAYLOR were to submit one while the Regional Zoning Ordinance is under consideration, where such approval would allow him to establish a use which he either knows or could have known was

forbidden by the proposed ordinance; if it were otherwise, such would nullify the entire work of the municipality in endeavoring to carry out the purpose for which the zoning law was enacted.

In support of the second issue, the Planning Commission argues that the City of Church Hill is poised to adopt a regional zoning ordinance, which would unquestionably prevent Mr. Taylor from proceeding as he proposes.

The Planning Commission insists that it is appropriate that Mr. Taylor be enjoined from proceeding in light of the imminent adoption of a regional zoning ordinance by the City of Church Hill. In support of this proposition, the Planning Commission cites State ex rel. SCA Chem., etc. v. Konigsberg. The facts in that case are succinctly and accurately set out in an unreported opinion by Judge Lee Russell, Special Judge, sitting for this Court in State ex rel. v. City of Franklin Municipal Planning Commission, filed in Nashville on March 21, 1996, as follows:

The general rule is well established and is agreed by all parties here to be that there is no "vested right" to continuity of zoning or in the issuance of a building permit or approval of a site plan based on prior zoning unless actual construction has commenced. *State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*, 636 S.W2d 430 (Tenn.1982); *Schmieder v. Lazarov*, 390 S.W2d 197 (Tenn.1965); *Howe Realty Co. v. City of Nashville*, 141 S.W2d 904 (Tenn.1940).

The *SCA Chemical* case is instructive. In that case, a chemical company applied for a clean air permit from the Shelby County Health Department on September 4, 1990, as part of the process of building a waste disposal facility in Memphis. Over a month later, on

October 6, 1980, the governing bodies of Memphis and Shelby County jointly passed a comprehensive new zoning scheme which, among other things, added restrictions to waste processing. The new zoning had an effective date of January 1, 1981. On October 9, 1980, SCA Chemical applied for a grading permit to begin the process of constructing its new facility. The Chief Building Officer of Shelby County did not act on the application. On October 22, 1980, the Board of Shelby County passed a resolution which directed all county agencies not to issue permits to SCA Chemical until January 15, 1981, and then to require SCA Chemical to meet all standards in effect on January 15, 1981. The resolution was directed at SCA Chemical by name and applied to no other entity.

On October 27, 1980, SCA Chemical went into court seeking a mandamus to force the Shelby County Health Department to issue the clean air permit. On November 3, 1980, Shelby County amended its resolution of October 22, 1980, to make it apply to any proposed plant for hazardous waste treatment. The trial court ruled that the County Board of Commissioners had not acted arbitrarily, capriciously, illegally, unlawfully, or beyond its jurisdiction in adopting the resolutions of October 22, 1980, and November 3, 1980, and that therefore the Health Department was under no obligations to issue the permit. After the trial but not until January 15, 1981, over four months following the initial application, the clean air permit was issued.

Our Supreme Court observed that ordinances of the type passed by Memphis and Shelby County are called "stopgap" or "interim" ordinances and that their "function and purpose is to preserve temporarily the status quo of the municipality or section thereof to which they apply until a pending permanent zoning regulation [can] be finally adopted." *Id.* At 434. The Supreme Court goes on to explain that "because it takes much time to work out the details of a comprehensive zoning plan and it would be destructive of the plan if, during the period of its incubation and consideration, persons seeking to evade its operation should be permitted to enter upon a course of construction that would progress so far as to defeat, in whole or in part, the ultimate execution of the plan." *Id.* At 435 *citing with approval Miller v. Board of Public Works*, 195 Cal.777, 234 P.381 (1925).

It would seem that SCA Chemical is inapposite. We say this because the record shows that the first order, styled "Final Order" was entered on October 26, 1995. Thereafter, a motion to alter or amend the judgment was filed. It pointed out that "the previous judgment does not address any issue relating to the bond for restraining order," and asked that the judgment be amended to show that it was entered pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, which converts an otherwise interlocutory order into a final one. The motion was granted by an entry of a second final order on January 10, 1996, which is identical to the first, with the exception of the following paragraph:

4. That pursuant to Tenn. R. Civ. Pro. 54.02 the Court directs the entry of a final judgment upon its express determination that there is no just reason for delay and upon its express direction for the entry of judgment.

Thus, it appears the matter has been before the City Council of the City of Church Hill since before the filing of the complaint on September 12, 1995, until the date of the second final order, and presumably has not been acted upon at the time of oral argument in July 1996, nor as of the date of entry of this opinion. Otherwise, we are satisfied that counsel for the Planning Commission would have called this fact to our attention under the provisions of Rule 14 of the Tennessee Rules of Appellate Procedure relating to post-judgment facts.

We accordingly conclude that an injunction would be inappropriate under the facts of this case "to preserve temporarily the status quo of the municipality or section thereof to which they apply until a pending permanent zoning regulation can be finally adopted." To put it another way, we do not believe Mr. Taylor should be precluded indefinitely from developing the property, awaiting action of the City of Church Hill, which may never come.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the City of Church Hill and its surety.

Houston M Goddard, P. J.

CONCUR:

Don T. Mc Murray, J.

Charles D. Susano, Jr., J.