IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 13, 2007 Session

METROPOLITAN GOVERNMENT OF DAVIDSON COUNTY v. DYKE TATUM

Appeal from the Circuit Court for Davidson County
No. 06C2779 Walter C. Kurtz, Judge

No. M2007-00279-COA-R3-CV - Filed November 7, 2008

A Nashville homeowner filed a petition in Circuit Court to intervene in a proceeding brought by the Metropolitan Government of Nashville and Davidson County to enjoin further construction on an uncompleted duplex located on property adjoining the homeowner's residence. The homeowner had previously challenged the developer's building permit in the Board of Zoning Appeals and obtained a ruling that the permit was invalid. The Circuit Court denied the motion to intervene and ultimately ruled that the developer could not be enjoined from completing the duplex because he had performed substantial work on it in good faith reliance on his building permit. The only issue on appeal is whether the trial court abused its discretion in denying the homeowner's petition to intervene. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

James G. Martin, III, Alexandra T. MacKay, Nashville, Tennessee, for the appellant, Gregory Smith.

J. Brooks Fox, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville.

Thomas V. White, John P. Williams, Nashville, Tennessee, for the appellee, Dyke Tatum.

OPINION

I. PROCEEDINGS BEFORE THE BOARD OF ZONING APPEALS

This appeal arose out of dispute between Nashville homeowner Gregory Smith and developer Burton-Tatum Enterprises, LLC. Since Dyke Tatum, a principal in the development firm, is the named defendant in this case and the lower court tried the case without distinguishing between the

firm and Mr. Tatum, any references we make to Mr. Tatum in this opinion should be understood as referring to the firm as well.

Gregory Smith lives at 1620 South Observatory Drive in the Green Hills area of Nashville, a street of mainly single-family homes. Mr. Tatum purchased the adjoining lot at 1622 South Observatory Drive. The developer obtained a building permit from the Codes Administrator of the Metropolitan Government of Nashville and Davidson County for a two-story duplex which was to be set back forty feet from the street. Such a setback would have placed the facade of the front unit of the duplex directly in line with the facade of Mr. Smith's house. Mr. Smith and his neighbors were not happy that the large duplex was planned for their street and they had several discussions with the developers and their agents prior to the commencement of work on the site.

Mr. Tatum obtained a new building permit on March 3, 2006, which provided for a reduction in the front setback to thirty feet, placing it closer to the street and in line with the edge of a concrete slab at the front of Mr. Smith's house. Testimony by Mr. Smith and photographs in the record show that there are two french doors on the front of Mr. Smith's house. Access to those doors is by way of the unroofed concrete slab, which is about twenty-four feet wide and extends about ten feet from the front facade of the house. Three steps leading up to the slab extend across its entire width.

After the amended permit was issued, the developer immediately began construction. He poured the foundation, which Metro inspected and approved on March 9, 2006. Although Mr. Smith knew that Mr. Tatum had obtained a permit for the duplex, he was unaware that there was a new permit which provided for a thirty foot setback. As the framing began to rise, the emerging structure obstructed Mr. Smith's line of vision to the right of his front door. He complained to the Metro Codes Department that the setback had been wrongly determined.

Under the Metro Zoning Ordinance, "[i]n residential areas with an established development pattern, the minimum required street setbacks .. shall be the average of the street setback of the lots immediately adjacent on either side of the lot[.]" M.C.L. § 17.12.030. Metro Codes officials usually measure the setback from the front facade of the house, but if a covered front porch is attached to the facade, the setback is measured from the leading edge of the porch. A set of steps or an uncovered stoop at the front door, which in usually no more than four foot by four foot in size, is considered a "permitted obstruction" into a setback and plays no part in the setback measurement.

The Codes Department responded to Mr. Smith's complaint on April 14, 2006 by performing a site inspection, which included setback measurements on the adjacent lots on both sides of the developer's property. After discussion of the matter among four Codes officials, which included consideration of whether the slab in front of Mr. Smith's house should be considered a stoop or an uncovered porch, Metropolitan Zoning Administrator Lon "Sonny" West informed Mr. Smith that the Codes Department had concluded that the thirty foot minimum setback had been correctly determined. As Mr. West's later testimony indicated, its decision was consistent with the Department's prior interpretations of the Code. Mr. West also informed Mr. Smith that he had the right to appeal the decision to Metro's Board of Zoning Appeals ("BZA").

Four days later, Mr. Smith appealed to the BZA. His appeal was heard on June 15, 2006. Mr. West appeared at the hearing to support the validity of the permit in dispute. Mr. Tatum's attorney and an architect retained by him were also present, and both made statements to the Board. Mr. Smith presented his objections and used photographic slides to illustrate the appearance of the front of his house and the effect of the duplex on the view from his front door. His position was supported by a Metro Councilman and by several neighbors.

After deliberation, the Board of Zoning Appeals unanimously voted to overturn the decision of the Codes Administrator. The BZA held that the slab in front of Mr. Smith's house should be considered a terrace, that a terrace was a permitted obstruction, and that the proper measurement for purposes of calculating the average street setback should therefore be from the street to the front facade of Mr. Smith's house, resulting in a required street setback of thirty-five feet for Mr. Tatum's property.[1] However, the Board did not address any questions involving enforcement, nor did it consider whether the developer had acquired any rights as a result of work it had done in reliance on its permit.

II. COURT PROCEEDINGS

Neither Metro nor Mr. Tatum appealed the ruling of the Board of Zoning Appeals through a petition for writ of certiorari, as they were entitled to do under Tenn. Code Ann. § 27-9-102. Two days after the BZA issued its order, Metro notified Mr. Tatum that he would have to modify his final site plan in order to bring the setback into compliance. The developer then stopped work on the front of the duplex. After the BZA's order became final, Mr. Tatum's attorney advised him that in his opinion he could resume work on the front unit of the duplex. In a letter to the zoning administrator, dated August 21, 2006, the attorney explained in detail why he believed the BZA's ruling only applied prospectively and that his client could not be compelled to demolish the work he had already completed in order to increase the front setback to thirty-five feet.

Mr. Tatum resumed construction, and the Codes Department responded by posting a stop work order on the site. Metro then issued a civil warrant seeking to enjoin Mr. Tatum from further construction. The warrant was heard by a general sessions court referee, who ruled on September 28, 2006, that the citation should be dismissed and the stop work order should be lifted because Mr. Tatum had acted in good faith and in reasonable reliance on assurances by representatives of Metro Government that the duplex was in compliance with the applicable zoning ordinance. That order was appealed by Metro to the General Sessions Court itself. The court agreed with the referee and entered an order dismissing the citation.

Metro then appealed to the Davidson County Circuit Court, seeking a mandatory injunction to compel the developer to bring his property into compliance with the setback requirements. Metro also moved the court for an expedited hearing and for a stay of the order of the General Sessions

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[1]The home of Mr. Smith's neighbor on the other side of Mr. Tatum's property was set back thirty feet from the street. Thus, thirty-five feet was the average setback of the two properties adjoining the developer's property.

court, so that the stop work order could remain in effect. The Circuit Court granted the motion, and work on the front portion of the duplex was stayed pending the result of the hearing.

Mr. Smith filed a motion to intervene in the circuit court proceeding under Tenn. R. Civ. P. 24. The circuit court heard the motion to intervene on November 3, 2006. Mr. Smith argued that as an adjoining landowner, he has an interest in the property at issue and that he did not believe Metro could adequately represent his interests since it had taken a position adverse to him at the Board of Zoning Appeals hearing. Metro announced that it had no objection to Mr. Smith's motion. Nonetheless, the Circuit Court overruled the motion, stating that "Metropolitan Government is well able to handle this enforcement proceeding if it goes forward."

The dispositive hearing on the enforcement proceeding was conducted on November 20, 2006. Mr. Smith testified in support of the proposed injunction, as did Mr. West and Chief Metro Zoning Examiner Rick Shepherd. Mr. Tatum and his partner Daniel Burton both testified for the defense. Mr. Smith testified as to his interactions with the developer and the circumstances which led him to challenge his building permit. The developer presented an argument which did not rely on the validity of the permit. He testified instead that he had expended a considerable amount of money on construction in good faith reliance on the permit and on repeated assurances from Codes Officials as to the correctness of the setback it established. He accordingly argued that he had detrimentally relied on the permit he had received and that he had thereby obtained a vested interest in being able to complete the project as planned.

He also testified that if he were forced to demolish and reconstruct the front of the duplex to bring it into compliance with the decision of the Board of Zoning Appeals, the cost would be enormous, and the resulting changes in the floor plan of the unit would make it very difficult to market. He testified that on April 14, 2006, when Codes officials performed the site inspections that first alerted him to Smith's objections about the setback, he had already expended $180,000 on the duplex in good faith reliance on the building permit. By June 15, 2006, the date of the hearing before the Board of Zoning Appeals, he had expended $282,000. At the conclusion of testimony and of argument, the trial court took the matter under advisement.

The trial court announced its decision in a well-reasoned Memorandum and Final Order filed January 8, 2007. The court first discussed the genesis of the case in detail, then noted that the developer was not challenging the correctness of the BZA's setback determination, but rather whether it could be enforced under the circumstances. The court performed a careful analysis of Tennessee cases and of cases from other jurisdictions involving reliance on defective or rescinded permits and found that the developer met the requirements to be allowed to continue construction, whether considered under a theory of vested rights or of estoppel.

The court found that the developer had acted in good faith in reliance on the advice and approval of government employees and that the employees had themselves acted in good faith and made decisions that were consistent with their prior interpretations of the setoff ordinance. The court further found that the developer had engaged in substantial construction and had expended

substantial funds before he learned of a challenge to the setback. Accordingly, the court declined to issue an injunction against the developer, and it dismissed Metro's Complaint. Metro Government did not appeal the trial court's decision, but Gregory Smith filed a notice of appeal to contest the court's denial of his motion to intervene.

III. INTERVENTION

The issues before this court are rather narrow in scope. As an adjoining landowner, Mr. Smith claimed a legal interest in the subject matter underlying the proceeding below. However, he was not a party to the Circuit Court proceeding, which was brought by Metro Government as an enforcement action against the developer. Mr. Smith asked to be allowed to intervene in the case, but his motion to intervene was denied. He argues on appeal that the trial court's dismissal of his motion to intervene was error, because he had a right to intervene, or in the alternative that it was an abuse of the trial court's discretion to deny his motion.

An examination of the arguments in this appeal must be based on the type of action herein. This was brought as an enforcement action. Metro's amended complaint stated that the suit was being brought "to enforce the Defendant's compliance with the Metropolitan Zoning Code as well as the Defendant's final site plan as modified by the Board of Zoning Appeals." As the trial court set out:

> This case is before the Court as an appeal from Division IV of the General Sessions Court of Nashville-Davidson County. The parties' dispute is over the enforcement of a zoning ordinance "setback" (*i.e.*, essentially here the required distance from a structure to the street). The Metropolitan Government is seeking an injunction to enforce a setback requirement against the defendant, Mr. Dyke Tatum.

A. INTERVENTION OF RIGHT

Rule 24 of the Rules of Civil Procedure, governs intervention in civil proceedings. Rule 24.01 deals with intervention as of right. It reads as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties; or (3) by stipulation of all the parties.

Mr. Smith first argues that he was entitled to intervene as of right under Tenn. R. Civ. P. 24.01(1). He cites Tenn. Code Ann. § 13-7-208(a)(2) of the zoning statutes as giving him that right. That statute grants a private right of action to landowners whose property adjoins property upon

which the erection or alteration of a building or structure in violation of the zoning ordinances is proposed. If such a landowner feels he would be especially damaged by such violation, he may "in addition to other remedies, institute injunction, mandamus or other appropriate action or proceeding to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance or use, or to correct or abate such violation, or to prevent the occupancy of the building, structure or land."[2]

Mr. Tatum does not dispute that Mr. Smith had the right to challenge the construction of the duplex by filing an independent action through Tenn. Code Ann. § 13-7-208(a)(2). He argues, however, that the right to file an independent action cannot be equated with an unconditional right to intervene in an enforcement action brought by a governmental body. He notes that statutes elsewhere in the Tennessee Code provide an unconditional right to intervene in other situations. For example, Tenn. Code Ann. § 31-6-111 specifically states that any person who claims an interest in any property which is the subject of an escheat proceeding may intervene by filing a petition in the proceeding setting forth the basis of his claim. Other statutes permit intervention "upon leave given." *See* Tenn. Code Ann. § 27-9-110 (allows intervention by parties affected by the decision of a board or commission).[3] In contrast, Tenn. Code Ann. § 13-7-208(a)(2) does not even mention intervention, and thus it cannot be said to confer upon Mr. Smith "an unconditional right to intervene."

Mr. Smith also contends that he has the right to intervene under 24.01(2) Tenn. R. Civ. P. because as an adjoining landowner he has an interest in the property at issue, and that as a practical matter the disposition of the case may impair that interest. While that may be true, it raises the question of whether his interest "is adequately protected by existing parties," which in this case means by Metro Government. Mr. Smith argues that Metro Government could not adequately protect his interest because it took a position adverse to him in the Board of Zoning Appeals. In his brief, Mr. Smith states that "[i]t cannot be the law in Tennessee that a city which has fought a citizen tooth and nail should automatically be trusted to protect that citizen's interest once the citizen has prevailed in his or her claim against the city." However, while the record shows that Metro defended its employees' interpretation of the zoning ordinance in the Board of Zoning Appeals, there is nothing to support Mr. Smith's implication that Metro was inordinately aggressive in doing so, or

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[2]Tenn. Code Ann. § 13-7-208(a)(2) reads in its entirety:

> In case any building or structure is or is proposed to be erected, constructed, reconstructed, altered, converted or maintained, or any building, structure or land is or is proposed to be used in violation of any ordinance enacted under this part and part 3 of this chapter, the building commissioner, municipal counsel or other appropriate authority of the municipality, or any adjacent or neighboring property owner who would be specially damaged by such violation, may, in addition to other remedies, institute injunction, mandamus or other appropriate action or proceeding to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance or use, or to correct or abate such violation, or to prevent the occupancy of the building, structure or land.

[3]The appeal before us is from a circuit court decision in an enforcement proceeding, not an action to review the BZA's decision. Consequently, this statute does not apply herein.

that it was somehow biased against him or his interests.

Further, after the BZA ruled, its interpretation became that of the Metropolitan Government, pursuant to the authority given by law to that Board. The record shows that after the Board overturned the decision of the Codes Administrator, Metro filed and prosecuted enforcement actions against the developer, first before the General Sessions Court referee, then in the General Sessions Court itself, then in the Circuit Court. In all those proceedings, Metro advocated for the outcome that Mr. Smith desired while advocating Metro's position. During the hearing in Circuit Court on Mr. Smith's motion to intervene, the judge asked him if there was any argument he intended to make which Metro had not already presented. His only response was that the citation in the case was issued against Dyke Tatum, whereas the true party in interest was Burton-Tatum Enterprises, Inc. He did not explain why this anomaly might make a difference in the outcome, at least insofar as it might affect his own interest. The judge said that he found that Mr. Smith had presented an interesting issue, but "I don't see how it affects what I do."

The courts must always presume that governmental officials and agencies discharge their duties in good faith, and in the manner prescribed by law. *Wood v. Metropolitan Nashville & Davidson County Government*, 196 S.W.3d 152, 159 (Tenn. Ct. App. 2005); *Tennessee Department of Transportation v. Medicine Bird*, 63 S.W.3d 734, 775 (Tenn. Ct. App. 2001) (citing *Mitchell v. Garrett,* 510 S.W.2d 894, 898 (Tenn. 1974); 421 Corp. v. Metropolitan Government, 36 S.W.3d 469, 480 (Tenn. Ct. App. 2000). Of course, that presumption can be overcome if there is clear evidence to the contrary. *Mitchell v. Garrett,* 510 S.W.2d at 898.

Mr. Smith did not suggest that Metro's attorneys did not act in good faith in the earlier court proceedings or that they were not acting in good faith in the current proceeding. In fact, when the trial judge stated at the motion hearing that Metro's attorney "seems plenty adamant to me about enforcing this stop work order," Mr. Smith concurred, stating that, "Mr. Fox [the Metro attorney] is doing an admirable job. I appreciate the effort that Metro is doing. Metro has an interest in enforcing its codes generally and applying its codes generally across the board and I think that Mr. Fox has stepped up to the plate, and Metro is doing an excellent job."

But Mr. Smith went on to insist that as an adjoining property holder, he had a particularized interest in preventing the developer from going ahead with the duplex, which differed from Metro's generalized interest in seeing that its codes be enforced. Regardless of their separate motivations, the interests of Mr. Smith and the interests of Metro converged once the Board of Zoning Appeals ruled that the setback had been improperly determined. That interest was to enforce the setback as interpreted by the BZA. Mr. Smith has conceded that Metro was vigorous in pursuing the result that he desired. He also testified extensively at trial and, therefore, cannot complain that his concerns were not heard. We accordingly agree with the trial court that Mr. Smith was not entitled to intervene as of right under 24.01(1).

B. PERMISSIVE INTERVENTION

The trial court may grant a party permission to intervene in a proceeding under Tenn. R. Civ. P. 24.02, which reads as follows:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising discretion the court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Metro and Mr. Smith had an common interest in obtaining from the trial court an order compelling the developer to bring his property into compliance. The questions of law and of fact necessary to achieve such a result were therefore common to both parties. Thus, the trial court could have chosen to grant Mr. Smith's motion to intervene. However, the standard of review for permissive intervention is abuse of discretion. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 191 (Tenn. 2000); *Ballard v. Hertzke*, 924 S.W.2d 652, 661 (Tenn. 1996).

An abuse of discretion exists when the decision of the lower court has no basis in law or in fact and is therefore arbitrary, illogical, or unconscionable. *State v. Brown & Williamson Tobacco Corp.,* 18 S.W.3d at 191; *Boyd v. Prime Focus, Inc.*, 83 S.W.3d 761, 765 (Tenn. Ct. App. 2001). The standard of review for discretionary decisions accords a great deal of deference to the trial court. *Ali v. Fisher,* 145 S.W.3d 557, 564 (Tenn. 2004). "The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). Thus, "[a]ppellate courts should permit a discretionary decision to stand if reasonable minds can differ concerning its soundness." *Buckner v. Hassell*, 44 S.W.3d 78, 83 (Tenn. Ct. App. 2000) (*citing White v. Vanderbilt University,* 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999)).

Applying that standard to the present case, the record shows that Metro had vigorously pursued the desired remedy through two prior court proceedings. Its complaint in Circuit Court set out essentially the same facts that Mr. Smith recited in his motion to intervene. The court asked Mr. Smith if he had any arguments or issues to add which Metro had not already presented. Mr. Smith's sole response involved a matter which could not have affected the outcome in any substantial way. Thus, even though the trial court had the discretion to grant Mr. Smith's motion to intervene in Metro's enforcement action against Mr. Tatum, we cannot conclude that the court abused that discretion by declining to grant Mr. Smith's motion.

IV. THE NON-PARTY'S VESTED RIGHTS ARGUMENT

In his appellate brief, Mr. Smith argues that the trial court erred in allowing the developer to raise the defense of vested rights in the circuit court proceeding. The developer responds that Mr. Smith does not have the right to raise that argument on appeal. He reasons that if we affirm the trial

court's denial of Mr. Smith's motion to intervene, which we have, he cannot be considered a party to this case. *See City of Chattanooga v. Swift*, 442 S.W.2d 257, 258 (Tenn. 1969) (holding that "would-be intervenors" are not parties and do not have the right to discretionary appeals). He also contends that since Rule 13 Tenn. R. App. P., which sets out the scope of review on appeal states that ". . . any question of law may be brought up for review and relief by any party," it also implies that non-parties are not entitled to bring up questions of law on appeal.

Mr. Smith had the right to appeal the trial court's denial of his motion to intervene. Because we have affirmed the trial court as to that denial, Mr. Smith lacks status as a party and cannot raise any issue regarding the merits of the trial court's decision in this enforcement action. The Metropolitan Government did not appeal the trial court's decision to dismiss Metro's enforcement action and deny the enforcement remedies it sought.

Because the only issue properly before this court in this appeal is the question of the trial court's denial of Mr. Smith's motion to intervene, we decline to consider or discuss Mr. Smith's arguments regarding the developer's right to raise the issue of vested rights.

IV.

The judgment of the trial court is affirmed. Remand this case to the Circuit Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellant, Gregory Smith.

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PATRICIA J. COTTRELL, JUDGE