

IN THE CHANCERY COURT FOR  
ROBERTSON COUNTY, TENNESSEE

CUSTOM LAND DEVELOPMENT, INC ,            )  
  )  
  )                    Petitioner                    )  
  )  
vs    )                    NO 17206  
  )  
TOWN OF COOPERTOWN, and                    )  
COOPERTOWN BOARD OF ZONING             )  
APPEALS,                                        )  
  )  
  )                    Respondents                    )

MEMORANDUM OPINION

This case arises from the continuing efforts of the petitioner, Custom Land Development, Inc , (hereinafter "Custom"), to develop a sanitary landfill in Robertson County, Tennessee, on property located on Highway 49, approximately two and a half miles north of the intersection of I-24 and Highway 49. The respondent, Town of Coopertown (hereinafter "Coopertown" or "Town"), is a duly created municipal corporation pursuant to T C A. §6-1-101 et seq. The Coopertown Board of Zoning Appeals is authorized by the Zoning Ordinance of the Town of Coopertown to hear and decide appeals pertaining to the enforcement of the provisions of the Coopertown Zoning Ordinance. For purposes of this opinion, the Coopertown Board of Zoning Appeals and the Town of Coopertown will be considered as one entity as the decisions made by the Board of Zoning Appeals which are at issue in this case were made on behalf of and in conformity with the Zoning Ordinance of the Town of Coopertown.

A brief history of the litigation is in order. Custom acquired the property in

question in October of 1995. At that time, the property was subject to the zoning regulations of Robertson County, Tennessee, since Coopertown had not yet incorporated. Under Robertson County's zoning regulations, the property was located in an agricultural district. Custom thereafter agreed to lease the property to Browning-Ferris Industries, Inc. ("BFI"). BFI intended to utilize the property for a sanitary landfill. In August of 1988, the Tennessee Department of Health and Environment issued a permit authorizing BFI to construct and operate a sanitary landfill on the property, consisting of approximately 243 acres. BFI opened a sanitary landfill on the property and received solid waste at the site on September 6, 1988. On that same day, Robertson County obtained an injunction in the Robertson County Circuit Court prohibiting the use of the property as a sanitary landfill on the grounds that a sanitary landfill was not a permitted use in an agricultural district pursuant to Robertson County's zoning regulations. After a trial, the Robertson County Circuit Court permanently enjoined BFI from using the property as a sanitary landfill without zoning approval from Robertson County. That decision was appealed to the Court of Appeals of Tennessee. On March 11, 1990, the Court of Appeals ruled that Robertson County's zoning regulations were invalid to the extent that they totally excluded sanitary landfills from locating anywhere in the county. The case was remanded to the Robertson County Circuit Court to allow Robertson County to amend its zoning regulations to allow for sanitary landfills. The injunction was allowed to remain in place pending the amendment of Robertson County's zoning regulations.

On March 20, 1989, the Robertson County Commission had adopted an amendment to Robertson County's zoning regulations creating the special impact

industrial district. A sanitary landfill was a permitted use in the special impact industrial district. However, BFI notified Custom that it was terminating the lease of the property by letter dated April 21, 1993. In July of 1994, the Tennessee Department of Environment and Conservation approved the transfer of the state permit authorizing construction and operation of a sanitary landfill on the property from BFI to Custom. Since that time, Custom has taken all steps necessary to keep the state permit as an active landfill permit.

In May of 1996, Custom filed a petition with the Robertson County Circuit Court seeking to dissolve the injunction prohibiting use of the property as a landfill. Custom asserted that the sanitary landfill on the property was a legally permitted nonconforming use under Robertson County zoning regulations. Custom also contended that the March, 1989 amendment to Robertson County zoning regulations was unconstitutional and illegal, because the regulations were unduly restrictive and exclusionary and designed to prevent Custom from developing a sanitary landfill on the property. In July of 1996, the Robertson County Commission approved a settlement of the litigation with Custom. All of Custom's existing claims against Robertson County were dismissed in exchange for the County's agreement that the sanitary landfill on the property qualified as a "non-conforming use" under Robertson County's zoning regulations.

On August 22, 1996, the Robertson County Circuit Court entered an Order approving the settlement. The order provided that the property, consisting of 406 acres, "qualifies as a non-conforming use pursuant to Section 7.020 of the Robertson County Zoning Ordinance" and further "that the non-conforming use status of such property shall not be altered or restricted by any amendment or subsequent change of the Robertson County Zoning Ordinance." The parties agree that the non-conforming use has not been

discontinued through the date of the entry of this order, Custom Land having been under prior injunction of this court ” The order went on to provide that the claims of Custom Land with regard to the constitutionality or invalidity of the provisions of the Robertson County Zoning Ordinance were dismissed with prejudice, “Provided, however, to the extent the status of the property as a non-conforming use is terminated, disallowed or materially altered, other than as a result of the subsequent action or omission by Custom Land or its successors and assigns, then the provisions of this order will be null and void” (emphasis supplied) <sup>1</sup> The order of the court also dissolved the injunction prohibiting the use of the property as a sanitary landfill.

On July 26, 1996, several individual Robertson County citizens, most, if not all of whom lived in the Coopertown area, filed a Motion to Intervene in the litigation between Robertson County and Custom The intervenors sought to challenge the settlement which had been approved by the Robertson County Commission The Robertson County Circuit Court denied the Motion to Intervene on September 26, 1996, finding that the Robertson County Commission had the power both to settle the litigation and to decide that the landfill was a valid non-conforming use The Circuit Court found that the Robertson County Commission was adequately representing all the citizens of Robertson County when it made its decision on these issues

During the time the injunction against Custom, which prohibited the use of the site as a landfill, had been in effect, more stringent environmental regulations pertaining to

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<sup>1</sup>Thus, the Order of Settlement, approved by Custom, addresses circumstances under which the non-conforming use status could be “terminated, disallowed or materially altered” as a result of Custom’s own “act[s] or omission[s] ”

landfills took effect in 1995. On December 1, 1996, the Town of Coopertown was incorporated. Custom modified its design of the landfill to meet the new environmental regulations and on April 14, 1997, the Tennessee Department of Environment and Conservation approved a modification to the design. Custom then submitted a site plan based upon the modified design of the sanitary landfill to the Robertson County Planning Commission on August 26, 1997. Section 7.030(d) of Coopertown's Zoning Ordinance provided that the site plan review would be performed by the County Planning Commission on behalf of the Town. On September 4, 1997, the Robertson County Planning Commission, acting on behalf of the Town, approved the site plan submitted by Custom. On August 21, 1997, Custom obtained a business license to operate the landfill on the property in accordance with applicable law and has maintained a business license for the landfill on the property since that date.

The Robertson County Building Commissioner, acting on behalf of the Town, advised Custom that a building permit would be needed only for the construction of the office building at the landfill, but not for excavation or other site preparation activities. In early 1998, Custom entered into a tentative agreement with Republic Industries, Inc., a waste collection company for construction and operation of a sanitary landfill on the property. In April of 1998, the Robertson County Commission approved the host agreement between Robertson County, Republic and Custom. From late March, 1998, to mid-May, 1998, construction activities were conducted to prepare the property for use as a sanitary landfill in compliance with the site plan approved by the Robertson County Planning Commission. Other than the receipt of waste on the site on September 8, 1988, the on-site construction activities during the March-May period of 1998, are the only

activities which have occurred on site from 1988-2002. Over \$400,000 was expended to construct the access road, siltation pond and first waste cell for the sanitary landfill on the property. In June of 1998, Republic terminated its involvement in the development of the landfill. Custom then renewed its efforts to find a waste collection company that controlled sufficient waste to provide the revenue necessary to pay the costs of constructing and operating a landfill and ultimately obtained an option to purchase from Waste Industries on August 31, 2001. New minor modifications to the state permit were sought by Waste Industries and approved by the Tennessee Department of Environment and Conservation.

In May of 2002, the Town of Coopertown created the Coopertown Municipal Planning Commission. Custom submitted its revised site plan and request for a building permit for the trailer office and waste scales to the Coopertown Municipal Planning Commission on July 23, 2002. In its submittal, Custom asserted that the sanitary landfill on the property was a legally permitted non-conforming use protected by T.C.A. §13-7-208, which in pertinent part provides:

(b) In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, 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 and be permitted, provided, that no change in the use of the land if undertaken by such industry or business

(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, provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners. 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, provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

At its meeting on September 17, 2002, the Coopertown Planning Commission determined that the site plan would not be reviewed by the MPC until a final zoning determination had been obtained by Custom on whether the landfill was a legally permitted non-conforming use. Custom then requested that the Building Commission make a zoning determination that the sanitary landfill was a legally permitted non-conforming use of the property and issue the building permit for the trailer office and the weight scales. On September 20, 2002, the Building Commissioner determined that the sanitary landfill was not a legally permitted non-conforming use of the property and refused to issue the building permit on the grounds that Custom had discontinued its non-conforming use of the property as a landfill. This ruling was confirmed by letter from the Building Commissioner dated September 23, 2002, citing Section 6 021(I) of the Coopertown Zoning Ordinance which provides

I, Discontinuance

When a nonconforming use of land or the active operation of substantially all the nonconforming uses in any building or other structure or tract of land is discontinued for a period of one (1) year then the land or building or other structure shall thereafter be used only for conforming use. Intent to resume active operations shall not affect the foregoing provision.

On September 20, 2002, Custom appealed the decision of the Building Commissioner to the Board of Zoning Appeals pursuant to Section 7.050(B) of the Zoning Ordinance. On October 8, 2002, the Board of Zoning Appeals met and conducted a public hearing on Custom's appeal. At the conclusion of the public hearing, the appeal was denied. An order evidencing denial of Custom's appeal was entered on November 12, 2002. In the final order, the Board of Zoning Appeals found that: (i) when the Zoning Ordinance was adopted on January 30, 1997, the Property was zoned agricultural and a landfill was not permitted as either a permitted or conditional use; (ii) although a court order entered on August 22, 1996 provided that the landfill had been deemed legally non-conforming under Robertson County's zoning regulations and that the use had not been discontinued because of the injunction issued in the case, the court did not rule that the use was in operation at the time of the order or at the time of the issuance of the injunction, (iii) although the owners have submitted permit applications and received site plan approval, the landfill has never been operational since the adoption of the Zoning Ordinance, (iv) even though some construction activities were conducted either before April of 1998, or at the latest, through the end of June 1998, the landfill was never in operation despite those activities; (v) those construction activities were not substantial and thus insufficient to vest a right to continue the use of the Property as a landfill, (vi) those construction activities ended in April, 1998, or at the latest in June of 1998, and thus any use established as the result of those activities has been discontinued for over



one year, (vii) the construction activities were not completed and the landfill never opened, (viii) no evidence was presented that waste materials have ever been deposited at the site, (ix) no evidence was presented that any landfill activities as opposed to construction activities were conducted on the Property; (x) no evidence was presented that any landfill activities were conducted on the Property since the adoption of the Zoning Ordinance, (xi) no evidence was presented of any meaningful activities conducted on the Property since June of 1998; (xii) while the owner has maintained the necessary permits, any landfill use has been discontinued for well over one year, and (xiii) since the landfill use has been discontinued for well over one year, Section 6 02(I) of the Zoning Ordinance prohibits the re-establishment of the landfill use on the Property

In its Petition for Certiorari, Custom contends (i) the sanitary landfill on the Property was a nonconforming use protected by Tenn Code Ann § 13-7-208 and the Town was not authorized to limit the protection afforded by Tenn Code Ann § 13-7-208 by adopting an ordinance that provided for the termination of nonconforming uses merely as the result of nonuse, (ii) Custom never voluntarily discontinued its landfill business operations, (iii) Custom had been actively engaged in the landfill business since the injunction was lifted in 1996, (iv) Custom obtained a property right in the use of the Property as a landfill as the result of the settlement of the litigation with Robertson County, and that property right could only be abandoned upon a showing of an intent to abandon and an overt act that evidenced that intent, (v) the town's conduct in permitting its agent to approve the site plan for the sanitary landfill on September 4, 1997, and the expenditure of over \$400,000 00 for construction activities in reliance of that approval, precluded the Town from now contending that the nonconforming use of the Property as

a sanitary landfill had been abandoned, (vi) as the result of the settlement of the earlier litigation with Robertson County, Custom obtained a contract right to develop the Property as a landfill that cannot be taken by the Town without just compensation, (vii) since the Robertson County Circuit Court found that Robertson County represented all the citizens of Robertson County when it settled the earlier litigation with BFI and Custom by agreeing that the sanitary landfill on the Property was a legally permitted nonconforming use, the Town was barred by the doctrine of res judicata from contending that the sanitary landfill on the Property was not a legally permitted nonconforming use. Therefore, BZA exceeded its jurisdiction, or acted capriciously, arbitrarily or illegally in finding that the Property was not a legally permitted nonconforming use and could not be utilized as a sanitary landfill. In addition, there was no substantial or material evidence upon which the BZA based its decision that the Property was not a legally permitted nonconforming use and could not be utilized as a sanitary landfill, and therefore that decision was arbitrary and illegal.

#### SCOPE OF REVIEW

The scope of review of a decision of a municipal zoning board pursuant to the common-law writ of certiorari is extremely narrow. In McCallen v. City of Memphis, 786 SW2d 633 (Tenn. 1990), the Supreme Court set out the standard of review in a case such as the one at bar:

Review under the common law writ [of certiorari] is limited to whether "the inferior board or tribunal (1) has exceeded its jurisdiction, or (2) has acted illegally, arbitrarily, or fraudulently."

The courts must determine whether the action of the [local administrative body] in the exercise of its administrative, judicial or quasi-judicial function was

illegal or in excess of jurisdiction

The “fairly debatable, rational basis,” as applied to legislative acts, and the “illegal, arbitrary and capricious” standard relative to administrative acts are essentially the same. In either instance, the court’s primary resolve is to refrain from substituting its judgment for that of the local governmental body. An action will be invalidated only if it constitutes an abuse of discretion. If “any possible reason” exists justifying the action, it will be upheld (emphasis supplied)

Id. At 638, 640, 641. Under this standard, the reviewing court may not weigh the evidence, or scrutinize the intrinsic correctness of the decision. Lafferty v. City of Winchester, 46 S.W.3d 752, 759 (Tenn. Ct. App. 2000). “A decision by a local zoning board will be considered arbitrary only where there is no evidence in the record to support it.” Id.

The Court of Appeals for the Middle Section of Tennessee further discussed the standard for determining whether the decision is arbitrary and capricious. In Jackson Mobilphone Co. v. Tennessee Public Service Commission, 876 S.W.2d 106 (Tenn. App. 1993), the Court stated

A court should not apply Tenn. Code Ann. §4-5-322(h)(4)’s “arbitrary and capricious” standard of review mechanically. In its broadest sense, the standard requires the court to determine whether the administrative agency has made a clear error in judgment. An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.

## ISSUES AND FINDINGS

The central issue in this case is the determination of whether or not the Coopertown Board of Zoning Appeals, acting on behalf of the City of Coopertown, exceeded its jurisdiction or has acted illegally, arbitrarily or fraudulently. The parties in

this case, through their excellent attorneys, have briefed the case extensively and presented oral argument to the court, all of which I have found helpful. As I did at the conclusion of oral argument, I want to again thank counsel for both parties for their excellent work in this case. To reach its determination in this matter, the court must consider three questions:

1. What was the effect of the August 22, 1996, Robertson County Circuit Court Order of Compromise and Settlement?

2. Is the provision of Coopertown's Zoning Ordinance providing for loss of a nonconforming use if that use is discontinued for a period of one year valid? and

3. Assuming validity of the ordinance, is Customs' period of non-use involuntarily so as to estop enforcement of the ordinance against it?

Coopertown contends that there was never any nonconforming use on this property and refuses to concede that the court's order of August 22, 1996, is binding on it. The court vehemently disagrees. The order clearly states that the use or non-use (whatever it may have been at that time) of the property as a sanitary landfill by Custom Land or its successors or assigns, qualifies as a non-conforming use. The order of the court clearly conferred "non-conforming use status" for the property.

Coopertown argues that the landfill was not "in operation" as required by T C A §13-7-208 when the settlement was reached and the order entered. This court finds that the effect of the settlement order was to determine that the landfill was a non-conforming use for all purposes under the statute and that Coopertown cannot now collaterally challenge that determination. The residents of Coopertown objected to that settlement at the time and attempted to intervene and their Petition to Intervene was denied. To the extent that the Coopertown Board of Zoning Appeals' order denying Customs' application

for determination of non-conforming use status is based on its view that the 1996 court order did not bind Coopertown and did not confer non-conforming use legal status upon the landfill, this court finds that such rationale would be arbitrary and capricious and “clear error” as discussed in the Jackson Mobilphone case. However, a review of the order entered by the Coopertown Board of Zoning Appeals on November 12, 2002, which is the subject of this action, reveals that only a part of the board’s rationale for denying the application of Custom is based upon its interpretation of the effect of the 1996 order (See specifically paragraph 3(b))

Custom contends that Coopertown lacked the power to enact Section 6.021(l) of its zoning ordinance (the “discontinuance provision”). Custom contends that Coopertown lacks such authority since it is an attempt to limit the protections afforded non-conforming uses by T.C.A. §13-7-208. Custom also contends that even to the extent Coopertown possesses the power to limit the protections afforded by the statute, the zoning ordinance does nothing more than create a presumption of abandonment that Custom overcame by proving that non-use of the landfill site was involuntary and that Custom did not intend to abandon the landfill. Coopertown asserts that while it may not enact provisions in its zoning regulations which directly conflict with state law, the placing of an objective time limit on non-conforming uses which are not operational is imminently reasonable and does not conflict with the state statutory scheme.

There is nothing in the Tennessee statute which specifically authorizes a discontinuation provision. However, there is nothing in the statute which would specifically preclude a municipality from adopting such a provision. Nor is there any Tennessee case which directly deals with the validity of a discontinuation provision such

as Coopertown has enforced in this case. The statute also contains no specific language with reference to amortization, however, there is Tennessee case law which suggests that amortization provisions are valid. (Amortization of a non-conforming use is a zoning technique whereby a legally non-conforming property is required to cease operation within some reasonable time and thereafter, only conforming uses are permitted on the property). In the case of Rives v. City of Clarksville, 618 S.W.2d 502, the Court of Appeals for the Middle Section remanded the case to the trial court for determination as to whether an amortization period was reasonable. In that case, the court also stated at page 510 of its opinion:

It should also be remembered that retrospective zoning is only one of several possible methods of attempting to eliminate non-conforming uses. There are other methods which include condemnation through the power of eminent domain invoking the law of nuisance, forbidding a resumption of use after a specified period of non-use, and prohibiting or limiting extensions or repairs to property (emphasis supplied).

This dicta in Rives suggests that a discontinuation clause would be an appropriate method of controlling non-conforming use. While the enforcement of discontinuation provisions in zoning ordinances generally may be fairly debatable, the Coopertown Board of Zoning Appeals thus had a rational basis for its determination upon which to base enforcement of its zoning ordinance, including the discontinuation provision.

Custom also contends that Coopertown cannot enforce the discontinuation provision because Custom's non-use of the site was involuntary. Custom cites a litany of problems which it confronted in developing the landfill site. First, there are a limited number of companies which control adequate waste volume to ensure the economic viability of a landfill. The issuance of the injunction in 1988 obviously prevented

development of the property as a landfill. Also problematic were various changes in environmental regulations which occurred both during the time the injunction was in place and after it had been dissolved. And, of course, after identifying companies with sufficient waste volume to operate the landfill, contracts for preparation and operation of the landfill between Custom and both BFI and Republic were terminated by the latter companies. All the actions or activities undertaken by Custom with regard to development of the site were carefully chronicled in the Petition for Writ of Certiorari and have been previously noted in this opinion. Despite this, the landfill has never actually been operational since the time of the adoption of the Coopertown Zoning Ordinance. While some construction activities were undertaken, at the latest in June of 1998, the landfill has never been in operation despite those activities. There is no evidence of any activity whatsoever on the site, through regulatory agencies, or otherwise from June of 1998 through August 31, 2001, when an option to purchase the property was entered into with Waste Industries, Inc. Even so, it was not until July 23, 2002, that a building permit was applied for.

It is this significant period of inactivity upon which the Coopertown Board of Zoning Appeals relies in making its determination that the non-conforming use of the property has been discontinued (assuming that it ever did operate before the adoption of the zoning ordinance) for well over (1) year. The case of Toles v. City of Dyersburg, 39 S.W.3d 138 (Tenn. Ct. App. 2000) is very similar factually. There the landowner had trouble finding a new lessee, just as Custom had trouble finding an operator. The landowner argued that its intent to continue operation entitled it to protection under T.C.A. §13-7-208. Despite its intentions, the Court of Appeals held that the use of a tavern

which had been in actual operation for almost 40 yaers in an appropriately zoned district was not legally non-conforming as the result of a zone change, because there was no actual business use of the premises at the time the zoning change took effect. Intent to resume operations was not enough and the owner's difficulties in finding a lessee was "not the concern of [the city]." Toles, at 141. The court finds that Coopertown's interpretation of the discontinuance provision of its zoning ordinances is therefore rationally supportable.

In this case the court cannot substitute its judgment for that of the Coopertown Board of Zoning Appeals. Coopertown's action should be invalidated only if it constitutes an abuse of discretion. Custom has failed to bear its burden of proof that Coopertown exceeded its jurisdiction or acted illegally, arbitrarily or fraudulently. There is substantial and material evidence in the record to support Coopertown's course of reasoning and exercise of judgment. There clearly is a basis for the decision, i.e. reasonable minds could reach the same conclusion. The decision of the Board of Zoning Appeals is accordingly affirmed. This case is dismissed at the cost of the petitioner, Custom Land Development, Inc.

Mr. Dean should prepare an appropriate order.

THIS the 7<sup>th</sup> day of July, 2003

  
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ROSS H HICKS  
Circuit Judge

cc: Mr. James L. Murphy III  
Mr. George A. Dean