IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 10, 2004 Session

MICHAEL P. RUTHERFORD, IN HIS OFFICIAL CAPACITY AS WASHINGTON COUNTY ZONING ADMINISTRATOR v. ROBERT LEWIS MURRAY, JR.

Appeal from the Chancery Court for Washington County
No. 7618 G. Richard Johnson, Chancellor

No. E2003-01333-COA-R3-CV - FILED AUGUST 20, 2004

Michael P. Rutherford, in his official capacity as Washington County Zoning Administrator, ("Plaintiff") sued Robert Lewis Murray, Jr. ("Defendant") claiming Defendant was operating an automobile repair business and a junkyard in violation of Washington County zoning regulations. Defendant claimed the use of his property was a nonconforming use allowed prior to a change in the zoning regulations, and, therefore, was entitled to protection under Tenn. Code Ann. § 13-7-208, the grandfather statute. After a bench trial, the Trial Court found and held that Defendant's business was grandfathered in as a prior nonconforming use because Defendant was working substantially on the construction of his business garage prior to the change in zoning. Plaintiff appeals. We affirm, but remand for further proceedings on the issue of whether Defendant is operating a junkyard in addition to his automobile repair business.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and CHARLES D. SUSANO, JR., J., joined.

John Rambo, Jonesborough, Tennessee, for the Appellant, Michael P. Rutherford, in his official capacity as Washington County Zoning Administrator.

John S. Taylor, Johnson City, Tennessee, for the Appellee, Robert Lewis Murray, Jr.

OPINION

Background

In August of 2001, Plaintiff sued Defendant seeking, among other things, a permanent injunction prohibiting Defendant from using his property located on Douglas Chapel Road in Washing County ("the Property") as an automobile wrecking yard, an automobile repair shop, or for storing inoperative motor vehicles and junk in violation of Washington County Zoning Regulations ("the Zoning Regulations"). The case was tried in March of 2003.

As in most alleged zoning violation cases, the facts are of particular importance. Therefore, the evidence as reflected in the record before us will be discussed in detail.

Defendant testified that in August of 1988, he, his mother, and his grandmother, purchased the Property, which at that time was zoned A-1 Agricultural. The property still is zoned A-1 Agricultural. Defendant, who builds race cars or hot rods, planned to build a garage on the Property to house his business, Big Toy Fabrication. When Defendant purchased the Property, the Zoning Regulations allowed for automobile repair shops within an A-1 Agricultural zone. Junkyards, however, are not and never have been allowed in an A-1 Agricultural zone under the Zoning Regulations.

Marion Light, a member of the Washington County Planning Commission ("the Planning Commission") from 1986 to 1995, testified that the Planning Commission received complaints regarding Defendant's use of the Property as early as January of 1989. At its January 9, 1989, meeting, the Planning Commission discussed a complaint from the acting Building Commissioner that Defendant was operating an illegal junkyard on the Property. Mr. Light visited the Property to investigate and saw seven junk cars, but no building on the Property. The Planning Commission referred the matter to the Review Committee, a subcommittee of the Planning Commission.

On January 16, 1989, the Review Committee met to discuss the problem of junk cars on the Property. The Review Committee recommended Defendant be given thirty days to correct the violation before the matter was referred to the County Attorney. At its February 6, 1989, meeting, the Planning Commission voted and gave Defendant thirty days to correct the problem. Mr. Light testified that at the Review Committee's February 10, 1989, meeting, someone realized Defendant had not been allowed a hearing and recommended that Defendant be given a hearing at the next Planning Commission meeting.

Defendant was given a hearing at the March 6, 1989, Planning Commission meeting. Defendant appeared and told the Planning Commission he had lost his lease on a garage in Elizabethton where he rebuilt vehicles; that he owned the six vehicles on the Property but did not keep up their registration; that he planned to build a garage which would look like a barn in which

to rebuild vehicles; and that he planned to build his house on the Property. Defendant was given thirty days to remove the six vehicles from the Property.

On April 17, 1989, Defendant applied for and was granted a building permit to build a garage on the Property. Defendant testified that when he applied for the permit, he stated that he was building a garage in which to build race cars and hot rods. Within two or three days of obtaining the permit, Defendant called a friend who came and dug and poured footers for the garage. Defendant testified the footers were poured the same evening they were dug or the next day. Defendant previously had purchased cinder block for the construction and at that time, Defendant called the seller and had the block delivered. Another of Defendant's friends then laid the block for the garage. Defendant testified he started having the block stacked within three days of receiving the building permit. On April 11, 1989, Defendant purchased welding supplies so he could weld the metal parts for the garage including the steel door frames. Mr. Light testified he drove by the Property in late April of 1989, and did not see a structure but still did see the junk vehicles.

At its March 10, 1989, meeting, the Review Committee recommended to the Planning Commission that the category of automobile repair shops be removed from the A-1 Agricultural District. On May 22, 1989, approximately five weeks after Defendant obtained his building permit, the Planning Commission voted to delete automobile repair shops from the A-1 Agricultural District effective immediately.

At trial, Defendant estimated it took a year and a half to build his garage. He stated he started doing business at the Property at the end of 1989, or the beginning of 1990, although the building was not complete until the middle of 1990. Defendant stated that construction proceeded continuously until the building was finished. Defendant testified he used a large generator to supply power to his business for approximately one year before he had electric service turned on. At trial, Defendant produced some phone bills and supply bills for items used in his business in 1990.

Plaintiff, who is, among other things, the Washington County Zoning Administrator and has been since March 1989, testified that he himself issued the building permit to Defendant. Plaintiff testified he "issued a permit for a storage garage, not a business." If Defendant had applied for a permit to build a commercial garage, Plaintiff stated he would have checked the box on the form marked commercial. The box marked commercial was not checked on Defendant's permit.

Eddie Harin, the Assistant Zoning Administrator testified that it's not unusual for someone to build a personal garage to store things prior to building a house. Mr. Harin explained that in an A-1 Agricultural zone, the setbacks for a residential garage would be twelve feet on the sides and thirty feet front and back. For a commercial building, the setbacks would be fifty feet. The permit Defendant obtained calls for setbacks of fifty feet. Defendant testified that when he applied for the building permit, he told Plaintiff he was going to build his garage twenty feet from the property line and was told he had to go back fifty feet. Defendant went back fifty-two feet when he built his garage.

Regarding the setbacks, Plaintiff testified:

> The reason his setbacks were fifty feet around . . . is because what Mr. Harin quoted to you were for single family detached structures. This parcel lacking a single family residence simply makes it a garage or a storage facility on that property. In order to gain the reduced setback of twelve feet, that garage would have to be located behind the rear setback line of the house. And since there's no house the setbacks increase for the security of the adjoining pieces of property.

Both Plaintiff and Mr. Harin testified that one of the requirements for a commercial building is to pave the parking lot. Mr. Harin stated the County required paved parking for commercial buildings in 1989, when Defendant obtained his building permit. Plaintiff testified that if the application had been for a commercial building permit, he would have noted the off-street paved parking lot requirements on the permit and the permit would have had an addendum attached showing the section of the Zoning Regulations that required the paved parking. The permit Defendant obtained has no note regarding paved parking and no addendum.

Plaintiff testified there were different fees charged for residential building permits and commercial building permits when Defendant obtained his permit. The fee for a residential or non-commercial permit was $16.00 and the fee for a commercial permit was $26.00. The permit Defendant obtained does not state what Defendant was charged but Plaintiff stated, some fourteen years later, "my recollection was $16.00."

Edith Ellis, the Supervisor of Application Services for the Johnson City Power Board, testified Defendant applied for power on June 3, 1992, for a garage on the Property for commercial use. An electric meter was set on June 5, 1992. Johnson City Power Board records reflect that this was a new service.

Wayne Cox, a Deputy Assessor for Washington County, testified the tax book for 1992, shows no improvements on the Property and an appraised value of the land of $18,600. The tax book for 1993, shows improvements on the Property consisting of a building valued at $16,400, with an appraised value of the property of $24,700. Mr. Cox testified that this new building was discovered either after September 1992, or sometime before September of 1993. He explained that half a dozen deputies split the county up and check every parcel, every year by riding the roads looking for new construction. If they see a new structure that has been completed, they appraise it at that time. That information is used in determining the tax base. However, Mr. Cox also testified it is possible that new construction may not be picked up until a later date and occasionally a new building is missed.

Gale Dye, who works for the County Clerk's Office in Washington County issuing business licenses, testified Defendant applied for a business license in June of 1993. Mr. Dye further testified Defendant's business license was not renewed annually as it should have been. However, in April of 2001, the license was renewed for the years 1994, through 2001. Mr. Dye testified that

it is common for people to be delinquent in renewing their license but "[n]ot that many years." He also testified that sometimes people begin running a business before obtaining a business license. Defendant testified he thought he had obtained a business license before 1993, but he could not find one in his records.

In November of 2000, Defendant received a letter from Plaintiff stating, among other things, that Plaintiff had conducted a site inspection of the Property and had concluded:

> The County Zoning Administrator has classified your business as an automobile repair shop. The county Zoning Atlas indicates that your parcel is classified as A-1 General Agriculture. The A-1 zoning classification does not permit this type of use. At one time in the late eighties and early nineties automobile repair businesses such as yours were permitted in the A-1 General Agriculture District. A Zoning Resolution amendment discontinued this type of use. Because your business was established before that time and verified by the Planning Director, Mr. P.C. Snapp you were permitted to continue. . . .

The letter also stated that inoperative motor vehicles and junk were found on the Property in violation of the zoning regulations and requested that Defendant contact Plaintiff to discuss correcting the problems.

David Sean Henley, who lives next to the Property and has since 2000, testified he has seen "quite a bit of cars and cinder blocks and . . . a dump truck and there's some tires and, … some metal and stuff . . ." on the Property. Mr. Henley testified he has seen "quite a bit of people there . . . " and has seen Defendant there sometimes during the day and a lot at night. Mr. Henley stated "[Defendant] comes over there late in the evening and - - and sometimes is there till pretty early in the morning." Mr. Henley complained to Plaintiff that he was having problems selling his house due to the cars and things on the Property.

Bobby France, who works for the Washington County Zoning Office investigating zoning violations, testified that in March of 2003, he found thirty-five vehicles either without tags or with expired tags on the Property. Mr. France testified that a lot of these vehicles "had parts taken off of them . . . [were] inoperable because they didn't have a motor or transmission in them, frames been cut, ..." He also testified there were probably a couple hundred cinder blocks stacked up and stated he saw a "lot of debris . . . [n]umerous tires and old frames and stuff like that, body parts."

Defendant testified that what looks like a bunch of metal on the Property is more than that to him and to his customers. He testified he is a metal fabricator and that he builds the base of the car and then the car goes back to the owner to have the engine and transmission installed and to be painted.

Plaintiff testified that the correct zoning for Defendant's business, would "have to be something that allows outside storage of metals . . . ", not the A-1 Agricultural zone. Plaintiff

testified that the only classification in the mid to late eighties for a business that customized automobiles would have been an auto repair shop, but that the auto repair shop category limited the number of vehicles stored outside. Plaintiff stated "you could have several, but they had to belong to somebody and they had to be licensed and tagged."

Regarding the general state of the Property, Plaintiff stated:

> We're talking about an eye sore, a blight that depreciates the property of Washington County. Junk cars. Frames that sit and rust. Cars that trees grow up through. That's what we're talking about. . . . We're talking about junk, inoperative cars that don't belong to individuals, they belong to him, excess stuff, wrecked fenders, that's what we're talking about.

After a bench trial, the Trial Court entered its order on April 24, 2003, finding and holding, *inter alia*, that when Defendant purchased the Property, obtained his building permit, and began to construct his garage, automobile repair garages were allowed within the A-1 Agricultural zone; that at the time Defendant began his automobile customizing business, Washington County did not have a category for such a business so the authorities placed Defendant's business into the automobile repair category; that on May 22, 1989, after Defendant began construction of his garage, the Planning Commission changed the Zoning Regulations to forbid automobile repair businesses in the A-1 Agricultural zone; and, that in November of 2000, Defendant received a letter from Plaintiff telling Defendant that because his use of the Property was a prior nonconforming use, he could continue using the Property as an automobile repair shop. The April 24, 2003, order dismissed Plaintiff's case. The Trial Court also stated in its April 24, 2003 Order that "[t]he Court further finds that the Plaintiff has not proven their theories by a preponderance of the evidence." Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises four issues on appeal: 1) whether the Trial Court erred by placing upon Plaintiff the burden of proving that Defendant's use of the Property is not a protected prior nonconforming use; 2) whether the evidence preponderates against the Trial Court's finding that Defendant's use of the Property constitutes a prior nonconforming use and is entitled to the protection of Tenn. Code Ann. §13-7-208(b); 3) whether the Trial Court erred by finding that Plaintiff is equitably estopped from enforcing the Washington County Zoning Regulation; and, 4) whether the Trial Court erred by finding that Defendant is operating an automobile customizing and fabricating business rather than a junkyard.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Defendant claims the protection of Tenn. Code Ann. § 13-7-208, which provides, in pertinent part:

> (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 is undertaken by such industry or business.

Tenn. Code Ann. § 13-7-208(b) (1999).

A grandfather clause, such as Tenn. Code Ann. § 13-7-208,

> is defined as "an exception to a restriction that allows all those already doing something to continue doing it, even if they would be stopped by the new restriction." Black's Law Dictionary 629 (5th ed. 1979). A grandfather clause exception in a statute must be construed strictly against the party who seeks to come within the exception. *Teague v. Campbell County*, 920 S.W.2d 219, 221 (Tenn. Ct. App. 1995), *perm. app. denied*, (Tenn. 1996). . . . [T]he party seeking the protection of the statute has the burden of proving that [their use] is a pre-existing non-conforming use which qualifies for protection. *Lamar Advertising of Tennessee, Inc. v. City of Knoxville*, 905 S.W.2d 175, 176 (Tenn. Ct. App. 1995), *perm. app. denied*, (Tenn. 1995).

Coe v. City of Sevierville, 21 S.W.3d 237, 243 (Tenn. Ct. App. 2000) (quoting Black's Law Dictionary 629 (5th ed. 1979).

In order to qualify for protection under Tenn. Code Ann. § 13-7-208, a party must make two threshold showings: "(1) There has been a change in zoning (either adoption of zoning where none existed previously, or an alteration in zoning restrictions), and (2) the use to which they put their land was permitted prior to the zoning change." *Lamar Adver. of Tennessee, Inc. v. City of Knoxville*, 905 S.W.2d 175, 176 (Tenn. Ct. App. 1995).

We begin by addressing whether the Trial Court erred by placing upon Plaintiff the burden of proving that Defendant's use of the Property is not entitled to be considered a protected prior nonconforming use. Plaintiff is correct that Defendant has the burden of proving his use of the Property is a pre-existing nonconforming use which qualifies for protection under the grandfather statute. *Lamar Adver. of Tennessee, Inc.*, 905 S.W.2d at 176. Plaintiff's appellate brief argues "the ruling of the trial court shows that it did not impose the burden of proof upon the Defendant to prove that he was entitled to the protections of a nonconforming use when the trial court did state 'that the

Plaintiffs have not proven their theories by a preponderance of the evidence.'" (emphasis in original). We disagree. A thorough review of the record shows the Trial Court properly placed the burden upon Defendant to prove a prior nonconforming use. We believe that a fair review of the Trial Court's Order and supporting Opinion in their entirety shows that the quoted statement as made by the Trial Court was in reference to other theories and issues upon which Plaintiff did have the burden of proof. Therefore, we find this issue to be without merit.

We next consider whether the evidence preponderates against the Trial Court's findings and ultimate conclusion that Defendant's use of the Property constitutes a prior nonconforming use and is entitled to the protection of Tenn. Code Ann. § 13-7-208(b), the grandfather statute. Defendant had to make two threshold showings: "(1) There has been a change in zoning (either adoption of zoning where none existed previously, or an alteration in zoning restrictions), and (2) the use to which they put their land was permitted prior to the zoning change." *Lamar Adver. of Tennessee, Inc.*, 905 S.W.2d at 176. The Trial Court found and the evidence shows there was a change in the Zoning Regulations on May 22, 1989, that removed the category of automobile repair shops from the A-1 Agricultural zone. The evidence further shows that prior to this zoning change, automobile repair shops were allowed within an A-1 Agricultural zone and that the Property lies within an A-1 Agricultural zone.

As shown in the record, the Trial Court found that Defendant purchased the Property and obtained a building permit to build his garage prior to the change in the Zoning Regulations. Defendant testified he had the footers for his garage dug and poured and began stacking the block for the garage within days of receiving his permit and several weeks prior to the change in the Zoning Regulations. Defendant further testified he worked on the garage continuously until it was completed, and that he began operating his business on the Property even before the garage was completed. In addition, the evidence shows that in November of 2000, Defendant received a letter from Plaintiff telling Defendant that his use of the property for an automobile repair shop was a prior nonconforming use and that Defendant could continue with this particular use. The Trial Court found that Defendant "started his business and was substantially working on his building before the change in zoning." The evidence does not preponderate against these findings by the Trial Court.

Plaintiff cites to *Dickson County, Tennessee v. Jennette*, in which this Court stated: "courts uniformly agree that 'mere preparation for use of property before adoption of a zoning ordinance is not enough to show a devotion of the property to that use' in order to show a pre-existing nonconforming use." *Dickson County, Tennessee v. Jennette*, No. M1999-00054-COA-R3-CV, 2000 Tenn. App. LEXIS 518, at *19 (Tenn. Ct. App. Aug. 9, 2000), *no appl. perm. appeal filed*, (quoting *City of Pharr v. Pena*, 853 S.W.2d 56, 64 (Tex. App. 1993)). In *Jennette,* the trial court held the defendants had failed to prove their use of the property as a quarry was a use in existence at the time the zoning ordinance was enacted. *Id*. at *14-15. The evidence in *Jennette* showed that defendants admitted they did not have the equipment for a full-scale quarry; that they had done little more than have the property surveyed, discuss business plans, and begin blasting and clearing to construct a road; and that defendants admitted that there was no quarry, only a proposed quarry. *Id*. at *9-10. The *Jennette* Court applied a test articulated as: "an existing use should mean the

utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose." *Id*. at *21-22 (quoting *City of Pharr v. Pena*, 853 S.W.2d at 64). The evidence in *Jennette* showed that not even the defendants considered the quarry to be in operation prior to the adoption of the zoning regulation. *Id*.

Jennette differs from the instant case in that Defendant showed, as found by the Trial Court, that he had taken substantial steps in the construction of his commercial garage prior to the change in the Zoning Regulations. "It is well settled that rights under an existing ordinance do not vest until substantial construction or substantial liabilities are incurred relating directly to construction." *State, ex rel. SCA Chem. Waste Servs., Inc. v. Konigsberg*, 636 S.W.2d 430, 437 (Tenn. 1982). Defendant showed a devotion of the Property to use as an automobile repair shop prior to the change in the Zoning Regulations. In addition, the November 2000, letter from Plaintiff to Defendant shows that others, including Plaintiff, recognized Defendant was operating an automobile repair shop on his property prior to the change in the Zoning Regulations.

Although the individuals who testified on Plaintiff's behalf gave testimony contrary to Defendant's testimony, the Trial Court was entitled to make a determination regarding which testimony he found most credible. "When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings." *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999) (quoting *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn.1998)). Clearly, the Trial Court found the evidence presented by Defendant to be more convincing than the evidence presented by Plaintiff. The evidence does not preponderate against the Trial Court's findings and resulting conclusion that Defendant's use of the Property as an automobile repair shop constitutes a prior nonconforming use and is entitled to the protection of the grandfather statute.

Our resolution of the previous issue pretermits the necessity of considering whether the Trial Court erred by finding that Plaintiff is equitably estopped from enforcing the Washington County Zoning Regulation.

We next consider whether the Trial Court erred by finding that Defendant is operating an automobile customizing and fabricating business, which was classified under the automobile repair shop category, rather than a junkyard. As discussed above, the evidence does not preponderate against the Trial Court's finding that Defendant is operating an automobile customizing and fabricating business. However, the Trial Court made no determination about whether Defendant is operating a junkyard in addition to his automobile customizing business. The fact that Defendant is operating his automobile customizing business on the Property does not mean necessarily that all material and items stored on the Property are necessary to the operation of that prior nonconforming use. Likewise, the fact that he is operating his automobile customizing business does not mean that he is not operating a junkyard in addition to his automobile customizing business. There is evidence in the record that shows Defendant may be operating a junkyard in addition to his automobile customizing business. If Defendant is operating a junkyard and storing materials and items on his

property beyond what is necessary for use in his automobile customizing business and what is allowed under the automobile repair shop category, the junkyard would be in violation of the Zoning Regulations. Therefore, we remand this case to the Trial Court for further proceedings as the Trial Court determines are necessary to resolve the issue of whether Defendant is operating a junkyard in violation of the Zoning Regulations, in addition to operating his automobile customizing business under the automobile repair shop category.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for further proceedings as the Trial Court determines are necessary to resolve the issue of whether Defendant is operating a junkyard in violation of the Zoning Regulations, in addition to operating his automobile customizing business under the automobile repair shop category, and for collection of the costs below. The costs on appeal are assessed one-half against the Appellant, Michael P. Rutherford, in his official capacity as Washington County Zoning Administrator, and his surety, and one-half to the Appellee, Robert Lewis Murray, Jr.

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D. MICHAEL SWINEY, JUDGE