IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 10, 2005 Session

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY v. HUTTON BUCHANAN

Appeal from the Circuit Court for Davidson County
No. 03C-3245 Hamilton V. Gayden, Jr., Judge

No. M2004-01716-COA-R3-CV - February 1, 2006

Hutton Buchanan ("Defendant") was served with a civil warrant alleging that he was in violation of the Metropolitan Government of Nashville and Davidson County Code ("Metro Code") for "utilizing the premises located at 8331 + [8337] McCrory Ln. [("the Property")] for the open storage of abandoned, unlicensed and inoperable vehicles, scrap metal, building rubbish, trailers and other scraped materials and debris." The case was tried without a jury and afterward, the Trial Court entered an Order, *inter alia*, finding that Defendant is required to comply with Metro Code § 16.24.330(B), ordering Defendant "to remove abandoned unlicensed and inoperable vehicles and unusable scrap materials" from the Property, and ordering Defendant to enclose the Property. Defendant appeals to this Court. We reverse.

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

George A. Dean, Nashville, Tennessee for the Appellant, Hutton Buchanan.

John P. Long, Jr., Margaret M. Holleman, and John L. Kennedy, Nashville, Tennessee for the Appellee, the Metropolitan Government of Nashville and Davidson County.

OPINION

Background

The relevant facts of this case are not in dispute. In January of 2003, Defendant was served with a civil warrant alleging that he was in violation of Metro Code § 16.24.330(B) for "utilizing [the Property] for the open storage of abandoned, unlicensed and inoperable vehicles, scrap metal, building rubbish, trailers and other scraped materials and debris." A hearing was held before a referee and an order entered on July 30, 2003, holding, *inter alia*, that Defendant was in violation of Metro Code § 16.24.330(B) and was not entitled to the protection of Tenn. Code Ann. §13-7-208. Defendant appealed to the General Sessions Court, which confirmed the referee's order. Defendant then appealed to the Circuit Court ("Trial Court") and the case was tried without a jury in April of 2004.

Defendant testified that he resides on the Property and also sells scrap materials from the Property in addition to running a quarry business located down the street from the Property. Defendant testified that he has owned the Property for "[a]bout 50-something years now." Defendant testified that he has lived on the property since 1957 and that he started to accumulate scrap metal on the Property in the 1950's. At trial, Defendant produced income tax returns going back to 1999, showing that he had reported income from the sale of scrap metal located on the Property in each of these years. These tax returns show that Defendant claimed a loss of $7,540 for the sale of scrap iron for the year 2002, and income ranging from $6,803 to $31,125 for the sale of scrap iron in the other years. In addition, Defendant testified that he had sold such materials from the Property prior to 1999. Defendant testified that he pays both residential and commercial taxes on the Property.

Ron Mitchell, the property standards field supervisor for the Metropolitan Government Codes Department, testified that he is "responsible for making sure that properties in Metro Nashville Davidson County comply with the Metro Code of Law relative to the zoning laws, building codes, zoning, property standards code." Mr. Mitchell testified that he first inspected the Property "a couple of years ago, a year and a half ago" because issues had been raised about the Property being an eyesore. Mr. Mitchell testified that several inspectors have talked to Defendant and "let him know that there were several items on the property that probably qualified to be debris, junk, trash, as defined in the property standards code."

Photographs of the Property taken by Mr. Mitchell were introduced at trial. Mr. Mitchell described the items pictured in the photographs as:

> What looks to be, like, farm-type equipment, equipment used to move things around. You got a lot of stone, rock; again, general debris. Many items we just don't know the name of like a lot of steel or metal that's out there; a lot of items that, again, have been subjected to weather and they have, you know, rusted.

Mr. Mitchell also testified that there are some underground and above-ground storage tanks, some vehicles, and some other things that he would categorize as "junk and debris" on the Property. When asked what kind of hazards to the public that the storage tanks pose, Mr. Mitchell stated: "I'm not an expert, but I would imagine that the health and the morals and safety of the community are at risk here. Someone - - I guess maybe a small kid could maybe get in one of them and get hurt."

Mr. Mitchell testified that the Property is in serious violation of the property standards code. He stated:

> The property standards code would require that most of what's there be removed or enclosed. The Code says that it cannot be openly stored, and if it's going to be there, be in an enclosed space. That would bring it into compliance. The other thing would simply be to remove the items from the property.

Mr. Mitchell agreed that in his opinion, the Property constitutes a threat to public health and safety.

Mr. Mitchell testified that the property standards code, which contains the Metro Code section at issue, was passed in 2000 or 2001. Mr. Mitchell admitted that the Property has been used in the same manner as it is currently being used since before the adoption of the property standards code. Mr. Mitchell further admitted that prior to the adoption of the first zoning ordinance in the 1970's, there was no zoning regulation that would preclude the use of the Property as a scrap operation. Mr. Mitchell further testified that he is unaware of any period of time during which Defendant discontinued the use of the Property as a scrap operation.

The record contains an "Order of Dismissal" entered on April 20, 2004, dismissing the case and stating that "[t]he Metropolitan Government may bring a common law action for nuisance or attractive nuisance, however." The Trial Court then entered a second "Order of Dismissal" on April 22, 2004, finding and holding, *inter alia*:

> that Defendant Hutton Buchanan is required to comply with Metropolitan Code § 16.24.330(B) and is hereby **Ordered** to remove abandoned unlicensed and inoperable vehicles and un-usable scrap materials from property located at 8331 and 8337 McCrory Lane, Nashville, Tennessee. Furthermore, Defendant is ordered to enclose the property.…Once having complied with this Order, Hutton Buchanan shall continue to maintain said property in a manner consistent with this Order.
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> It is further **Ordered** that this case be DISMISSED, …

In its appellate brief, the Metropolitan Government of Nashville and Davidson County ("Metro Gov") explains that the order signed on April 20, was submitted to the Trial Court for signature by Defendant and that the April 22 order was submitted to the Trial Court by Metro Gov. Metro Gov asserts that the April 22 order supersedes the April 20 order.

The confusion resulting from these two orders was eliminated after Defendant filed a Motion to Alter or Amend which the Trial Court resolved by order entered June 10, 2004. This order of the Trial Court, which is the actual "final" order, basically provided for the same disposition of the case as the April 22, 2004 order without including the language that the "case be DISMISSED. . . ." Defendant appeals the Trial Court's final order to this Court.

Discussion

Defendant raises one issue on appeal: whether his use of his property is protected as a previous non-conforming use by virtue of Tenn. Code Ann. § 13-7-208. Metro Gov phrases the issue differently asking whether it has the authority to regulate the condition of Defendant's property through Metro Code § 16.24.330(B) for purposes of public health and safety even if Defendant is entitled to the protection of Tenn. Code Ann. § 13-7-208.

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).

The civil warrant served upon Defendant that began this action states, in pertinent part:

> Summon Hutton R. Buchanan … to answer in a civil action brought by the Plaintiff(s) for
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> On January 10th 2003 in violation of Metro Code Section 16.24.330B by utilizing the premises located at 8331 + 8377[1] McCrory Ln. for the open storage of abandoned, unlicensed and inoperable vehicles, scrap metal, building rubbish, trailers and other scraped materials and debris

In pertinent part, Metro Code § 16.24.330(B) provides:

> B. Open Storage. Except as otherwise provided for in the zoning code, it is unlawful for the owner, occupant, or person or entity in control of a building, structure or premises to utilize the premises of such property for the open storage of any: inoperable, unlicensed, or unregistered motor vehicle; appliance; building material, including glass, brick, stone, block, wood, metal; rubbish; tires; automotive parts; or debris, including but not limited to weeds, dead trees, trash, rubbish, garbage, etc.,

[1]The civil warrant states that the property in question is located at 8331 and 8377 McCrory Lane, however, the evidence shows that the correct address for the Property is 8331 and 8337 McCrory Lane. There is no dispute as to which property is actually being cited for an alleged violation of Metro Code.

> or similar items. It shall be the duty and responsibility of every such owner or occupant to keep the premises in a safe, clean, and sanitary condition and to remove from the premises all such stored items upon notice from the director.

Metropolitan Government of Nashville and Davidson County, Tennessee, Code § 16.24.330(B).

Metro Gov argues that § 16.24.330(B) concerns public health and safety, which Metro Gov has the authority to regulate through the adoption of property standards. The Metro Code section at issue, § 16.24.330(B), falls under the heading of 'Property Standards,' which falls under the heading 'Buildings and Construction' in the Metro Code. Defendant, however, argues that Metro Code § 16.24.330(B) is merely a zoning regulation and, therefore, he is entitled to the protections of Tenn. Code Ann. § 13-7-208.

In a matter of first impression, our Supreme Court recently discussed an issue regarding whether a metropolitan ordinance was a zoning ordinance or one concerned instead with public health, safety, and welfare, stating:

> Notwithstanding the mandatory provisions on zoning, a municipality has the authority to enact regulations concerning the health, safety, and welfare of the community pursuant to its police powers without providing notice or hearings. *See* 1 Edward H. Ziegler, Jr., et. al., Rathkopf's The Law of Zoning & Planning § 1.02 (4th ed. 2003) ("Ziegler"). A municipality may not, however, "evade the protections thrown about the citizen's use of his property by the legislative limitations imposed on the zoning power by the device of labeling a zoning act a mere exercise of police power." *Ellison v. Fort Lauderdale*, 183 So. 2d 193, 195 (Fla. 1966).

Cherokee Country Club, Inc. v. City of Knoxville, 152 S.W.3d 466, 471-72 (Tenn. 2004). The *Cherokee Country Club, Inc.* Court held:

> In resolving this issue of first impression, we believe that the determination of whether a regulation or an ordinance "substantially affects" the property owners' use of land is a well-reasoned and persuasive approach. This analysis avoids the difficulty of definitions found in some decisions by focusing on both the terms and the effect of an ordinance, as well as its "relation to the general plan of zoning." McQuillin § 25.53. The analysis is also more comprehensive and more precise than simply attempting to distinguish whether the terms of an ordinance regulate the use of land or how the land is used. Finally, the analysis eliminates the risk that a municipality may avoid statutory zoning requirements by attempting to label what is in reality a zoning ordinance as a building regulation.

Id. at 473 (footnote omitted).

Applying the 'substantially affects' test, we find and hold that Metro Code § 16.24.330(B), as applied to Defendant, substantially affects Defendant's use of the Property as a scrap operation and, therefore, is a zoning regulation. We reach this conclusion for several reasons. First, Defendant's ability to continue to sell scrap metal from the Property would be substantially impaired if he were required to remove the scrap metal from the Property. This conclusion cannot be seriously contested given the proof before us.

In addition, the civil warrant served upon Defendant states that Defendant is in "violation of Metro Code Section 16.24.330B *by utilizing* [the Property] for the open storage of abandoned, unlicensed and inoperable vehicles, scrap metal, building rubbish, trailers and other scraped materials and debris." (emphasis added). The very warrant itself states that it is Defendant's use of the Property that is in violation of Metro Code § 16.24.330(B), not the condition of the Property. In addition, in its brief on appeal, Metro Gov states: "On January 10, 2003, Hutton Buchanan was served with Civil Warrant #03GC1604, for violation of Metropolitan Code of Laws ("M.C.L.") § 16.24.330(B), *for using* property located at 8331 and 8337 McCrory Lane for open storage of abandoned, unlicensed and inoperative vehicles, scrap metal, building rubbish and other scrap materials and debris." (emphasis added).

Metro Gov argues, in part, that its "Property Standards Code does not regulate the **use** of property; rather it regulates the **condition** of the property such that the property must be maintained in a 'safe, clean and sanitary **condition** ….'" (emphasis in original). Metro Gov asserts that even "nonconforming uses are subject to reasonable regulation under the police power to protect the public health, safety, welfare or morals …." However, Metro Gov did not cite Defendant for the condition of the Property. Rather, it cited Defendant for "utilizing [the Property] for the open storage of abandoned, unlicensed and inoperable vehicles, scrap metal, building rubbish, trailers and other scraped materials and debris." Additionally, Metro Gov did not produce evidence showing that the Property posed a risk to public health, safety, or welfare. Mr. Mitchell did testify that it was his opinion that the Property constitutes a threat to public health and safety. However, Mr. Mitchell further stated that he was not an expert, but he "*would imagine* that the health and the morals and safety of the community are at risk here." (emphasis added). This statement of personal opinion regarding what Mr. Mitchell imagines or what "maybe ... maybe," standing alone, is insufficient, especially in light of the other facts in the case, to prove a risk to public health, safety, or welfare.

Metro Gov also argues that "the Tennessee Supreme Court has also recognized that a public official may sue to abate a common law nuisance, which may exist wholly independent of any state statute." However, Metro Gov did not bring an action against Defendant for nuisance. Metro Gov brought an action against Defendant based solely upon Metro Code § 16.24.330(B), for "utilizing [the Property] for the open storage of abandoned, unlicensed and inoperable vehicles, scrap metal, building rubbish, trailers and other scraped materials and debris." Metro Gov may not deny Defendant the protections applicable to his use of his property as provided by the legislative limitations imposed on Metro Gov's zoning power simply by labeling its attempt to restrict the Defendant's use of his property as an exercise of its police power.

This weakness in Metro Gov's position is clearly evident from a review of the Trial Court's statements contained in the transcript of court proceedings on April 6, 2004. In this transcript, which is attached to the Trial Court's Order of April 22, 2004, the Trial Court stated:

> The judgment of the Court is that, in fact, the property standards code can and does regulate the use of a nonconforming permissible use, which is this. So it boils down to what is scrap operations under the property standards code. And as you actually mentioned and what the Court is thinking about is common law nuisance or attractive nuisance.
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> So what the Court is going to do, the Court is going to dismiss the case, but with a caveat that such things as abandoned motor vehicles that have locked doors -- doors that lock, for example, or anything that could cause an attractive nuisance has to be removed. And that's up to you. You know, you could get sued next week because some kid came and got in a truck and locked themself in and couldn't get out and died from starvation. So it's really a matter of what is attractive nuisance, although that's not before me because that's not what was brought. But the Court holds that the City can bring a common law or attractive nuisance action.
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> As far as property standards act, scrap is permissible. Rock from the quarry is permissible. The propane tank and trailer are permissible. But some of the pictures also show what looks like abandoned vehicles that have no market value. So whatever is usable in the scrap business is okay. What isn't needs to be removed, and then on top of that, you need to make sure it's enclosed. There's kind of a rickety fence, but that's not for me to decide.
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> So I will dismiss the case with that caveat.

Clearly, the Trial Court believed the Code section at issue here could be used to "regulate the use of a nonconforming permissible use . . . ." The Trial Court focused on Defendant's use of the Property rather than the Property's condition despite what Metro Gov argues. Equally telling is the fact the Trial Court acknowledged that attractive nuisance and health and safety issues were "not before me because that's not what was brought."

A fair reading of the civil warrant that started this process and the Trial Court's statements attached to its April 22 Order and referenced in its June 10 Order lead to the conclusion that what Metro Gov attempted to do here by applying the code section at issue was to regulate Defendant's use of his property. The issues raised by the civil warrant, and the proof actually presented to the Trial Court pertain to Defendant's use of the Property rather than to the condition of the Property as that condition impacts any public health or safety issues.

Defendant concedes in his appellate brief that if the Property constitutes a health hazard, and Metro Gov is able to prove this, he would be subject to an enforcement action relative

to the health issues. However, Defendant was not charged with any public safety or health related violation.

We hold that Metro Code § 16.24.330(B), as here applied to Defendant, constitutes a zoning regulation. As such, we must address the issue of whether Defendant's use of the Property constitutes a previous non-conforming use protected under Tenn. Code Ann. § 13-7-208. In pertinent part, Tenn. Code Ann. § 13-7-208 provides:

> (b)(1) 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 (Supp. 2005).

This Court discussed Tenn. Code Ann. § 13-7-208 in *Outdoor W. of Tenn., Inc. v. City of Johnson City*, stating:

> A grandfather clause [such as is provided in 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).…[T]he party seeking the protection of the statute has the burden of proving that its [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). In *Rives v. City of Clarksville*, 618 S.W.2d 502 (Tenn. Ct. App. 1981), this Court found that a plaintiff must make two threshold showings before invoking the protection of T.C.A. § 13-7-208: (1) that there has been a change in zoning (either adoption of zoning where none existed previously, or an alteration in zoning restrictions), and (2) that the use to which they put their land was permitted prior to the zoning change.

Outdoor W. of Tenn., Inc. v. City of Johnson City, 39 S.W.3d 131, 135 (Tenn. Ct. App. 2000).

The evidence shows that the first applicable zoning ordinances were adopted in the 1970's. Mr. Mitchell admitted that prior to the adoption of the first zoning ordinance in the 1970's, there was no zoning regulation in existence that would preclude the use of the Property as a scrap operation. Thus, Defendant has shown there was an adoption of zoning where none had existed previously. The evidence also shows that Defendant has owned the Property for approximately 50 years and has been accumulating scrap metal on the Property since the 1950's. The evidence shows that Defendant sells scrap metal off of the Property and has done so for many years. Mr. Mitchell testified that he is unaware of any period of time during which Defendant discontinued the use of the Property for a scrap operation.

Metro Gov argues, in part, that the Property admittedly is Defendant's residence and, therefore, Tenn. Code Ann. § 13-7-208 is inapplicable as this statute only applies to an industrial, commercial, or business establishment already in operation. However, the evidence shows that Defendant both resides on the Property and sells scrap metal from the Property. Defendant produced income tax returns dating back several years that clearly show claimed income and claimed losses from the sale of scrap iron from the Property, and Defendant testified that he has sold scrap metal from the Property for many years. Without question, the property use objected to by Metro Gov relates to Defendant's commercial and business use of the property. There is no requirement under Tenn. Code Ann. § 13-7-208 that a property be used solely as an industrial, commercial, or business establishment.

There is no real dispute that Defendant is using the Property in the same manner today as he did prior to the adoption of the first zoning ordinance. Thus, Defendant has proven that his use of the Property is a previous non-conforming use that is entitled to the protection of Tenn. Code Ann. § 13-7-208.

We hold that Metro Code § 16.24.330(B) as applied to Defendant constitutes a zoning regulation and that Defendant's use of the Property is a previous non-conforming use entitled to the protection of Tenn. Code Ann. § 13-7-208. We reverse the decision of the Trial Court and dismiss this case.

Conclusion

The judgment of the Trial Court is reversed and this case is dismissed. This cause is remanded to the Trial Court solely for collection of the costs below. The costs on appeal are assessed against the Appellee, the Metropolitan Government of Nashville and Davidson County.

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D. MICHAEL SWINEY, JUDGE