IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 13, 2004 Session

CITY OF CHATTANOOGA v. MARK T. ROBARDS

Appeal from the Criminal Court for Hamilton County
Nos. 4022, 4023 Stephen M. Bevil, Judge

No. E2003-01340-COA-R3-CV - FILED OCTOBER 28, 2004

Mark T. Robards, owner of Robards Express, a trucking company, seeks reversal of the trial court's judgment finding that he violated the zoning ordinance of the City of Chattanooga by operating a trucking company on his property. The trial court determined that Robards' business is a manufacturing business, a non-conforming use in a commercial zone. Robards proffers that his non-conforming use was grandfathered in by virtue of the fact that the two previous users of the property used it for similar purposes. We affirm the judgment of the trial court.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and H. DAVID CATE, SP.J., joined.

Howard Barnwell, Chattanooga, Tennessee, for the appellant, Mark T. Robards.

Kenneth O. Fritz, Chattanooga, Tennessee, for the appellee, City of Chattanooga.

OPINION

I.

This case involves two adjacent parcels of property – one located at 2201 Hamill Road ("Tract One"), and the second located on Crescent Drive ("Tract Two").[1] In 1972, a chili manufacturing company, which was a wholesale distributor for Krystal Restaurants, purchased Tract One for the purpose of constructing a manufacturing facility. When the facility was built, Tract One and the abutting Tract Two were located in Hamilton County, but outside the city limits of Chattanooga. In 1974, the City annexed both tracts. It placed Tract One in a "convenience

[1] This tract is not municipally numbered.

commercial zone"[2] ("C-2"); Tract Two was zoned for two different types of businesses – one portion of the tract was zoned as a C-2 zone, and the other portion was zoned as an "office zone" ("O-1"). Under the Chattanooga zoning ordinance, a chili manufacturing facility could only be operated in a "manufacturing zone"[3] ("M-1"). However, since the chili manufacturing facility was in operation prior to the City's annexation, it could continue to operate as such as a non-conforming grandfathered M-1 use in a C-2 zone.

Tract One was continuously used for manufacturing until it was purchased by J. B. Stiles in December, 1989. Stiles purchased both parcels of property (collectively "the Property"), but he limited his use of Tract Two to that of ingress and egress to the Property. Stiles owned a sheet metal manufacturing company called Commercial Service Company, Inc. ("CSC"). When he purchased the Property, he moved his manufacturing operation to Tract One. At the time CSC was founded, it employed fewer than five employees. However, by 1975, the company had expanded and, depending upon the quantum of its business at any given time, employed between 12 to 30 people.[4]

Stiles obtained a business license sometime prior to 1983.[5] However, the City Treasurer's office, which keeps track of business licenses, sent CSC a delinquency notice in 1999 for failure to renew its license. At that point in time, CSC informed the Treasurer's office that it had closed its business in June, 1997. Stiles testified that in 1998, he was "phasing out" his operations such that only former employees were operating out of the shop; during this period, fewer than five employees were actually working for CSC. By 1999, CSC had discontinued all operations. At some point in

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[2]Chattanooga City Ordinance 603(11) provides, in relevant part, that the following "principal uses and structures may be permitted in any C-2 Convenience Commercial Zone":

> *Provided that not more than five (5) persons are employed therein*, the following uses may be permitted:
> -Plumbing shops
> -Electrical shops
> -Radio and TVshops
> -Appliance repair shops
> -Small print shops
> -Photocopying services
> -Similar workshop type uses

(Emphasis added).

[3]Chattanooga City Ordinance 1000 provides the requirements regarding a manufacturing zone.

[4]Although Stiles testified that his business expanded so as to require more employees, it is unclear, based on the record before us, how much of this expanded workforce actually worked at the Property. It was not until a couple of years prior to closing his business that Stiles moved all of his operation to Tract One.

[5]The business license inspector from the Treasurer's office testified that the office did not have records of licenses obtained prior to 1983; consequently, the precise date on which CSC obtained its business license is unclear. This fact is not material to our decision.

time, Stiles leased a portion of Tract One to Robards. However, during this lease period, Robards did not have any large trucks on the Property similar to those that the City alleges are illegally on the Property today. After leasing the property for a period of time, Robards purchased the Property from Stiles in July, 2002.

Following Robards' purchase of the Property, the City zoning department received a complaint that work was being conducted on the Property without a permit. Ron Esdaile, a City zoning inspector, visited the Property, issued a stop-work notice, and advised Robards that he was not permitted to operate a trucking company, an M-1 type business, on Tract One, which was zoned for C-2 use. At that time, Esdaile noticed that trucks and trailers were parked on both the O-1 and C-2 portions of Tract Two, and that the building out of which Robards operated was situated on Tract One.

As a result of Esdaile's observations, the City issued two citations charging Robards with violating the City's zoning ordinance. One citation was for violating the C-2 zone on Tract One by operating a trucking company, a non-conforming use on a C-2 zone; the second citation was for parking trailers on Tract Two, contrary to the provisions of the C-2 and O-1 zoning regulations. The City Municipal Court found that Robards violated the ordinances and assessed a fine of fifty dollars plus costs on each citation. Robards appealed to the trial court. Following a *de novo* hearing, the trial court found that Robards violated the City's zoning ordinance. It also imposed a fine of fifty dollars plus court costs for each citation. Robards appeals.[6]

II.

In a non-jury case, our review is *de novo* upon the record before us, accompanied by a presumption of correctness, unless the evidence preponderates against the trial court's findings of fact. Tenn. R. App. P. 13(d). However, we accord no such deference to the trial court's conclusions of law. ***Genzevoort v. Russell***, 949 S.W.2d 293, 296 (Tenn. 1997).

III.

Robards contends on appeal that the trial court erred in finding him guilty of the zoning violations and that his convictions should be reversed. Robards' argument turns on the applicability of the "grandfather" provision, codified at Tenn. Code Ann. § 13-7-208 (1999). He contends that the statute permits him to continue his non-conforming use. The grandfather statute provides, in relevant part, as follows:

> 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

[6]This appeal was originally filed in the Court of Criminal Appeals. However, upon motion by the City, the Court of Criminal Appeals ordered that the matter be transferred to this court pursuant to Tenn. R. App. P. 17.

> 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 land is undertaken by such industry or business.

Tenn. Code Ann. § 13-7-208(b). In seeking to invoke the protection of this statute, Robards proffers (1) that since CSC had over five employees, it operated as an M-1 entity rather than a C-2 entity such that CSC's non-conforming use was grandfathered in as an M-1 entity, and (2) since CSC operated as an M-1 entity, and there was no lapse in time between the termination of CSC's operations and the commencement of Robards' operations, it was proper for Robards to operate his trucking company on the Property as a grandfathered non-conforming use.[7] As a consequence, he argues that he is "permitted to operate under zoning regulations . . . prior to the zoning change." ***Id.***

The City responds by arguing that the extent to which CSC's use of the Property was non-conforming is irrelevant in light of the fact that more than 100 days elapsed between the time CSC used the Property and the time Robards commenced using it in the operation of his trucking business, thereby terminating the grandfather exemption, even assuming CSC used the Property for an M-1 use. With respect to Tract Two, the City proffers that Robards used Tract Two in commercial ways not previously employed by previous owners. The City argues that a zoning ordinance may prevent a landowner from expanding his non-conforming use to new land. We must therefore determine (1) if CSC operated as an M-1 or C-2 entity, and (2) whether 100 days or more elapsed between the time when CSC ceased operations and the point in time when Robards commenced his M-1 use on the Property.

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[7] In further support of his argument, Robards proffers that the primary issue is whether the change from CSC to a trucking operation terminates his right to a non-conforming use of the Property. Robards contends this question is answered by a provision of the City zoning code, which provides that

> [a] non-conforming use may be changed to a use of the same classification according to the provisions of this Ordinance. When a zone shall hereafter be changed, any then existing non-conforming use in such changed zone may be continued or changed to a use of a similar classification; provided all other regulations governing the new use are complied with.

Chattanooga Zoning Ordinance, Art. VII, § 102. However, the same provision goes on to provide that

> [w]henever a non-conforming use of a building has been discontinued or changed to a conforming use, such use shall not hereafter be changed to a non-conforming use.

IV.

A grandfather clause has been 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." ***Outdoor West of Tennessee, Inc. v. City of Johnson City***, 39 S.W.3d 131, 135 (Tenn. Ct. App. 2000) (quoting ***Black's Law Dictionary*** 629 (5th ed. 1979)). Therefore, Tenn. Code Ann. § 13-7-208 was created to alleviate confusion that would inevitably arise as local governments, in their attempts to promulgate and institute a zoning scheme, would try to force private property owners to cease operations that were previously legal but that would not conform to the new zoning scheme. ***See Lafferty v. City of Winchester***, 46 S.W.3d 752, 758 (Tenn. Ct. App. 2000).

In the instant case, it is undisputed that the grandfather statute permitted the chili manufacturer to continue to operate as an M-1 zone entity despite the fact Tract One was zoned as a C-2 zone after annexation. However, Robards seeks to extend the benefit of the grandfather statute so that he, too, may operate as if Tract One was situated in an M-1 zone. The party seeking to invoke this exception bears the burden of proving that its use of the property is a "pre-existing non-conforming use which qualifies for protection," ***Outdoor W.***, 39 S.W.3d at 135 (citing ***Lamar Adver. of Tenn., Inc. v. City of Knoxville***, 905 S.W.2d 175, 176 (Tenn. Ct. App. 1995)), and the grandfather 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).

To make a threshold showing under Tenn. Code Ann. § 13-7-208(b), Robards must demonstrate (1) that a change in zoning has occurred either by virtue of a city's adoption of zoning where none existed previously, as in the instant case, or by an alteration in existing restrictions, and (2) that the use to which he used the Property was permitted prior to the zoning change. ***See Outdoor West***, 39 S.W.3d at 135 (citing ***Rives v. City of Clarksville***, 618 S.W.2d 502, 505 (Tenn. Ct. App. 1981)). It is clear that a change in zoning occurred in 1974 when the City annexed the Property. It is also apparent that the manner in which Robards used the Property, as an M-1 entity, was acceptable prior to the implementation of the City's zoning ordinance in 1974 when the City annexed the Property. However, the issue remains of whether CSC continued to use the Property as an M-1 entity and, if so, whether there was any lapse between CSC's and Robards' non-conforming use of the land that would render the grandfather statute inapplicable.

With respect to whether CSC was operating as a C-2 or an M-1 entity, the trial court determined that since CSC's operations constituted a "similar workshop type" as contemplated by the City zoning ordinance defining the C-2 zone, the use of the Property during the tenure of CSC fell within the ambit of a C-2 entity, which constituted a *conforming* use of the Property so long as no more than five employees were working at CSC. Since the court found that when Stiles purchased the Property and commenced operations, he had less than five employees, Stiles' use of Tract One fell under the C-2 zone classification. The trial court's judgment was predicated primarily on its finding that the only entity to be grandfathered in as a manufacturing entity was the chili manufacturer; once CSC commenced operations, it was in compliance with the C-2 zoning and, consequently, the grandfathering protection ceased to apply. We find that the evidence proffered at

the hearing does not preponderate against the trial court's findings. Robards raises the issue that the trial court misinterpreted Stiles' testimony because although CSC, at its inception, may have had only a few employees, by the time it moved to the Property, the company had expanded so its workforce exceeded five employees, thereby bringing it within the ambit of an M-1 zone. It is possible that more than five employees were working at the Tract One facility during the time in which CSC was operating. However, there was at least one point in the relevant time frame when CSC had fewer than five employees – when it was "phasing out" operations. We agree with the trial court's observation that a trucking company and a sheet metal manufacturing facility, which predominantly provides products for heating and air conditioning purposes, are drastically different entities, the latter being of the type contemplated by the C-2 zoning provision.

Assuming *arguendo* that CSC's use of the property brought it within the ambit of an M-1 entity, this does not help Robards. This is because at least 100 days lapsed between the termination of CSC's non-conforming use and Robards' non-conforming use. The City's zoning ordinance provides, in relevant part, as follows:

> The lawful use of a building existing at the time of the passage of the Chattanooga Zoning Ordinance or any amendment thereto…shall not be affected by the Ordinance, although such use does not conform to the provisions of the Ordinance and such use may be extended throughout any such building, provided that no structural alterations, except those required by law or other City ordinance, or ordered by an authorized officer to secure the safety of the building, are made therein, but no such use shall be extended to occupy any land outside such buildings.
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> If such non-conforming building is removed *or the non-conforming use of such building is discontinued for 100 consecutive days* regardless of the intent of the owner or occupant of such building to continue or discontinue such use, *every future use of such premises shall be in conformity with the provisions of the Ordinance*.

Chattanooga Zoning Ordinance, Article VII, § 100 (emphasis added).

In the case at bar, testimony reflected that CSC commenced its operation as soon as the chili manufacturing company ceased to operate on the Property. If this is, in fact, true and if CSC was operating as an M-1 entity, the Property would still be grandfathered into the current zoning scheme as an M-1 entity. However, testimony relative to CSC's discontinuance of its business activity on the Property revealed the following: that CSC reported to the City's treasurer office that it closed in 1997; that CSC's business license expired in September, 1998; that in 1998, Stiles was "phasing out" operations on the Property such that CSC was no longer operating but that some of his former employees were operating out of the shop; that by 1999, CSC had shut down all operations; and that

when Robards approached Stiles about purchasing the Property in 2001, CSC no longer conducted any business on the Property, as Stiles had leased all of Tract One to Robards by this time.

Robards suggests that there was an overlap in the time that Robards was leasing the Property and when Stiles was phasing out operations at CSC. However, we do not find that the evidence preponderates against the trial court's findings on this point. At the time that CSC was "phasing out" its operations, Stiles leased *office* space to Robards. Yet, even during the leasing period, it does not appear from the record before us that Robards was using the leased space in the manner in which he is presently employing the Property. Stiles testified that Robards leased office space from him to manage his trucking company; during that time frame, Robards did not bring large trucks onto the Property of the type that were present when Esdaile visited the site. Consequently, even if there was an overlap in the CSC's and Robards' operations, it does not appear that Robards' operations on the Property at that time were, in fact, of an M-1 nature.

Robards proffers that "[a]n existing non-conforming use is a vested property right that a zoning ordinance may not abrogate except under limited circumstances." In support of this contention, he cites a number of cases from other jurisdictions to stand for the proposition that merely changing legal ownership or the name of the operation is not such a circumstance, ***see Budget Inn of Daphne, Inc. v. City of Daphne***, 789 So.2d 154, 160 (Ala. 2000), or that selling the land does not terminate the non-conforming use where the use "runs with the land," ***see Town of Lyons v. Bashor***, 867 P.2d 159, 160 (Colo. App. 1993). However, these cases cited are inapposite to the matter before us. The trial court's judgment that Robards violated the City's zoning ordinance did not hinge on the change in ownership or the selling of the land. In fact, it seems to us that if CSC had, in fact, operated as an M-1 zone entity, and there had been no lapse in time between CSC's cessation of operations and Robards commencing his trucking operation, Robards may have continued the non-conforming use of the Property. It is true that in interpreting a zoning ordinance, a court must strictly construe the relevant ordinance in favor of the property owner. ***Boles v. City of Chattanooga***, 892 S.W.2d 416, 420 (Tenn. Ct. App. 1994) (citing ***State v. City of Oak Hill***, 321 S.W.2d 557, 559 (Tenn. 1959)). However, it is also true that the grandfather provision codified in Tenn. Code Ann. § 13-7-208(b) must be construed strictly against the party seeking to invoke it. *See* ***Teague***, 920 S.W.2d at 221.

V.

We also find that the evidence does not preponderate against the trial court's judgment that parking trailers on Tract Two violated the City zoning ordinance. The grandfather statute is inapplicable to Tract Two because it was not being used by the chili manufacturing company when Tract One was annexed. The record below evidences that up until the time that both tracts were purchased by Robards, Tract Two was not even used for commercial purposes. We find that Robards' present use of Tract Two is in violation of the City's zoning ordinance, as that tract is classified as both a C-2 and O-1 zone. The trucks and trailers parked on Tract Two are ancillary to the trucking operation, an M-1 entity, which is an illegal non-conforming use under the City's zoning ordinance.

VI.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Mark T. Robards.

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CHARLES D. SUSANO, JR., JUDGE