

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 8, 2003 Session

**JAMES W. HUNTER, ET AL. v. METROPOLITAN BOARD OF ZONING
APPEALS, ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 00-328-II Carol McCoy, Chancellor**

No. M2002-00752-COA-R3-CV - Filed February 17, 2004

This appeal involves a Nashville landowner's efforts to avoid constructing a landscape buffer on his industrial property. The landowner submitted plans to construct a new building that included a buffer but then did not construct the buffer. After the landowner failed to obtain a use and occupancy permit, he sought a variance from the landscape buffer requirement. The Board of Zoning Appeals denied the requested variance, and the landowner filed a petition for common-law writ of certiorari in the Chancery Court for Davidson County asserting that the Board erred by declining to grant the variance. We have determined that the Board did not act arbitrarily, capriciously, or illegally and, therefore, affirm the trial court.

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

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

C. LeAnn Smith, Nashville, Tennessee, for the appellants, James W. Hunter and James R. Hunter.

Karl Dean, J. Brooks Fox, and John L. Kennedy, Nashville, Tennessee, for the appellees, Metropolitan Board of Zoning Appeals and Metropolitan Government of Nashville and Davidson County.

OPINION

I.

James W. Hunter and his family ("Hunters") have owned a tract of property and a building on Georgia Avenue in Nashville since the late 1950s. They have leased the property over the years to various tenants, all of whom have used it for industrial purposes. In early 1999, the Hunters' lessee, Mobile Storage Group, Inc., requested improvements to the building. However, the Department of Codes Administration of the Metropolitan Government of Nashville and Davidson County declined to issue a building permit because of the discovery of a railroad easement under the proposed new building.

The Hunters decided to demolish the existing building and to construct a new one that would not interfere with the easement. Because the project included the construction of a new building, Metropolitan Government of Nashville & Davidson County, Tennessee Code § 17.24.240 (2002) (“Metro Code”) required the creation of a 20-foot “B Landscape Buffer” because the property was adjacent to residentially zoned property.¹ The Hunters included a landscape buffer in the plans submitted to obtain a building permit, and the Department of Codes Administration issued a building permit based on these plans.

The Hunters proceeded to demolish the old building and to construct the new building but did not construct the landscape buffer. The Department of Codes Administration declined to issue a use and occupancy permit because of this omission. Rather than constructing the landscape buffer, the Hunters applied to the Metropolitan Board of Zoning Appeals for a variance from the landscape buffer requirement. Following a public hearing on December 2, 1999, the Board issued an order on December 7, 1999 declining to grant the variance because the construction plans had included a landscape buffer and because the Hunters had failed to demonstrate that the requirement of a landscape buffer imposed a hardship on them.

On February 1, 2000, the Hunters filed a petition for common-law writ of certiorari in the Chancery Court for Davidson County asserting that the Board had acted arbitrarily and capriciously by denying their request for a variance.² Following a hearing regarding the Hunters’ amended petition, the trial court filed a memorandum and order on February 27, 2002, denying the petition for writ of common-law certiorari. The Hunters have appealed.

II. THE STANDARD OF REVIEW

The proper vehicle for seeking judicial review of a decision by a local board of zoning appeals is a petition for common-law writ of certiorari. *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990); *Hoover, Inc. v. Metropolitan Bd. of Zoning App.*, 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997). Accordingly, despite the trial court’s decision to review the Board’s decision using Tenn. Code Ann. § 4-5-322 (1998),³ we will review the Board’s decision using the standards more commonly applicable to reviewing decisions either to grant or deny petitions for common-law writs of certiorari.

A common-law writ of certiorari provides quite limited judicial review. *Willis v. Tennessee Dep’t of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003); *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994). The scope of this review goes no further than determining

¹Originally, both the Hunters and the local building officials believed that the project required a 30-foot buffer. At the December 2, 1999 hearing, the Board’s staff reported that only a 20-foot buffer would be required.

²The Hunters’ original petition also includes claims under 42 U.S.C.A. § 1983 (West 2003); however, these claims were removed from their amended petition.

³This statute defines the standard of review applicable to contested cases arising under the Uniform Administrative Procedures Act.

whether the administrative body exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983); *Hutcherson v. Lauderdale County Bd. of Zoning App.*, 121 S.W.3d 372, 375 (Tenn. Ct. App. 2002); *421 Corp. v. Metropolitan Gov't*, 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000).

Judicial review under a common-law writ of certiorari is limited to the record made before the board or agency, unless the court has permitted the introduction of additional evidence on the issue of whether the board or agency exceeded its jurisdiction, or acted illegally, capriciously, or arbitrarily. *Cooper v. Williamson County Bd. of Educ.*, 746 S.W.2d 176, 179 (Tenn. 1987); *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983). The reviewing courts will not reweigh the evidence,⁴ examine the intrinsic correctness of the decision being reviewed,⁵ or substitute their judgment for that of the local officials.⁶

A common-law writ of certiorari likewise provides limited options for dealing with errors discovered in the proceedings being reviewed. Because courts should avoid dictating specific decisions to local zoning boards except in the most extraordinary circumstances, the most common judicial remedy in zoning cases is to remand the case to the zoning agency with instructions appropriate to the circumstances of the case. Rather than shouldering the local agency's responsibilities, the courts should insist that the agency carry out its task in an appropriate manner. The goal of a remand should be to place the parties and the agency in the position they would have been in had the agency not acted improperly. *Hoover, Inc. v. Metropolitan Bd. of Zoning App.*, 955 S.W.2d at 55.

Because a common-law writ of certiorari is an extraordinary judicial remedy, *Robinson v. Traugher*, 13 S.W.3d 361, 364 (Tenn. Ct. App. 1999), it is not available as a matter of right. *Boyce v. Williams*, 215 Tenn. 704, 713-14, 389 S.W.2d 272, 277 (1965); *Yokley v. State*, 632 S.W.2d 123, 127 (Tenn. Ct. App. 1981). Decisions either to grant or to deny the writ are addressed to the trial court's discretion. *Blackmon v. Tennessee Bd. of Paroles*, 29 S.W.3d 875, 878 (Tenn. Ct. App. 2000). Accordingly, the courts review these decisions using the familiar "abuse of discretion" standard. Under this standard, a reviewing court should not reverse a trial court's discretionary decision unless it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003); *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

⁴*Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 277 (Tenn. 1980); *Case v. Shelby County Civil Serv. Merit Bd.*, 98 S.W.3d 167, 172 (Tenn. Ct. App. 2002); *Hoover, Inc. v. Metropolitan Bd. of Zoning App.*, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996).

⁵*McCord v. Nashville, C. & St. L. Ry.*, 187 Tenn. 277, 294, 213 S.W.2d 196, 204 (1948); *Littles v. Campbell*, 97 S.W.3d 568, 571 (Tenn. Ct. App. 2002); *Hall v. McLesky*, 83 S.W.3d 752, 757 (Tenn. Ct. App. 2001).

⁶*421 Corp. v. Metropolitan Gov't*, 36 S.W.3d at 474; *Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 15 (Tenn. Ct. App. 1992).

III.
THE PRESENTATION AND CONSIDERATION OF THE HUNTERS' EVIDENCE

The Hunters first assert that the Board did not give them a fair hearing because it arbitrarily refused to allow Wilburn Honeycutt, their engineer, to testify about his conversation with “a member of the Zoning Committee” regarding the need for a landscape buffer and the effect of the railroad right-of-way on the construction of their new building. They also insist that the Board prevented Mr. Honeycutt from presenting correspondence from their tenant’s architect regarding the intended use of the newly constructed building.

We have reviewed the transcript of the Board’s December 2, 1999 hearing and can find no support for this assertion. The Board permitted both James R. Hunter, Mr. Hunter’s son, and Mr. Honeycutt to participate fully in the hearing. There is no indication that the Board did anything to deprive the Hunters of a fair opportunity to present their case. The Board did not interrupt either Mr. Hunter or Mr. Honeycutt, and neither of them protested that they needed more time. Accordingly, the record does not support the Hunters’ assertion that the Board acted arbitrarily by refusing to permit them to present their case.

Changing their focus slightly, the Hunters also assert that the Board acted arbitrarily, capriciously, and illegally because it “refused to consider” the evidence they presented. This argument, like their previous one, is not supported by the transcript of the hearing. While the Board was clearly unpersuaded by the Hunters’ presentation, the record provides no basis for concluding that the Board did not at least consider the evidence and arguments the Hunters presented.⁷

IV.
THE BOARD’S DENIAL OF THE HUNTERS’ REQUEST FOR A CONTINUANCE

The Hunters also argue that the Board acted arbitrarily by declining to permit them to withdraw their application. The trial court concluded that the Hunters elected to proceed with the hearing rather than wait another six months to file another application for a variance. While the record on this point is somewhat unclear, it does not appear that the Board acted arbitrarily by adhering to its rule regarding the effect of withdrawing an application after the public hearing has started.

The Board consists of seven members. Not only do four members constitute a quorum to transact business, but the affirmative vote of at least four members is required for the Board to act. Thus, persons seeking a variance from the Board must obtain four affirmative votes to be successful, no matter how many members of the Board are present at a particular hearing. Understanding these procedural rules illuminates the parties’ actions during the December 2, 1999 hearing.

⁷The Hunters would fare no better had they argued that the Board failed to give proper weight to the evidence they presented. Courts may not reweigh the evidence in common-law certiorari proceedings. *421 Corp. v. Metropolitan Gov’t*, 36 S.W.3d at 474; *Hoover, Inc. v. Metropolitan Bd. of Zoning App.*, 924 S.W.2d at 904.

Only four members of the Board were present for the December 2, 1999 hearing. That meant that the Hunters could not obtain their variance unless all four board members present at the meeting voted in their favor.⁸ The Hunters initially requested that the hearing be continued for two weeks, but the Board declined after neighboring landowners objected. Later, after the hearing started, the Hunters asked to withdraw the application. When the Board and its staff informed the Hunters that persons who withdrew their applications after a public hearing started could not file another application for six months, the Hunters decided to proceed because they realized that they were facing immediate enforcement of the landscape buffer requirement if the Board did not grant them a variance.

This record provides no basis for concluding that the Board's procedural rules are inherently arbitrary or that the Board enforced its rules arbitrarily with regard to its consideration of the Hunters' application for a variance. The Hunters elected to proceed with the hearing rather than being required to wait six months to file another application. In light of this tactical decision, the Hunters are in no position to complain that the Board abused its discretion by following its own procedural rules.

V.
THE HUNTERS' CLAIM THAT THEY ARE EXEMPT FROM THE
LANDSCAPE BUFFER REQUIREMENT

The Hunters renew their argument that they should be exempt from the landscape buffer requirement because their use of the property commenced before landscape buffers were required and has continued without change ever since. The trial court declined to consider the merits of this claim on procedural grounds. We have determined that the Board did not act arbitrarily, capriciously, or illegally by basing its denial of the requested variance on its belief that the landscape buffer ordinance applied to the Hunters' property once they decided to construct a new building.

The Hunters did not argue in their original or amended petition for common-law writ of certiorari that their property was exempt from the landscape buffer requirement by virtue of Tenn. Code Ann. § 13-7-208 (1999) and Metro Code §§ 17.04.020(D) (1999), 17.24.030(A) (2002). They made this argument for the first time when they filed their trial brief requesting a declaratory judgment that the enforcement of the landscape buffer requirement would violate these provisions. The trial court determined that the Hunters could not seek a declaratory judgment because they could not use their trial brief to amend their petitions and because combining original and appellate causes of action in the same case is improper.

The Hunters' request for a declaratory judgment was inartful, and the trial court correctly determined that appellate causes of action, like a petition for common-law writ of certiorari, may not be combined with original causes of action, like petitions for declaratory judgment. However, the trial court could have addressed whether the Board acted arbitrarily, capriciously, or illegally

⁸A majority vote (3 to 1) would not have sufficed because the Board cannot act without four votes. The Board's staff explained when the hearing commenced that "[f]ailure to receive four (4) concurring votes in thirty (30) days of the public hearing then the application shall again be advertised and set for public hearing at the next regular meeting."

by basing its decision to deny the requested variance on its understanding that the landscape buffer ordinance applied to the Hunters' project. Accordingly, we will address the substance of the Hunters' claim.

As we understand their argument, the Hunters assert that they should not be required to construct a landscape buffer on their property because they began using the property long before the enactment of the ordinances requiring the construction of these buffers. They argue that they should be allowed to continue to use their property as they always have and that requiring them to construct a landscape buffer is inconsistent with their prior use of their property. The Hunters' argument is not supported by established land use jurisprudence. It overlooks the marked difference between the legal principles regarding a landowner's use of property and the legal principles governing a landowner's obligation to see to it that the structures on its property meet all applicable building, safety, and zoning requirements.

The statutes and ordinances governing nonconforming uses have no application to this case.⁹ Neither the Board, nor the codes administrators, nor the Hunters' neighbors asserted that their past or planned use of the property was somehow inconsistent with the uses permitted by the property's zoning classification. Everyone agrees that the property may continue to be used for the same purposes it has always been used for. The only issue is whether the Hunters' new building meets the applicable building requirements.

The Hunters insist that the landscape buffer ordinance itself exempts them from its requirements. To support their claim, they cite Metro Code § 17.24.030(A) which exempts "improvements or repairs to the interior or exterior features of existing structures which do not result in expansion, changes in land use, or the removal or destruction of trees." This exemption, by its own terms, does not apply to the Hunters. They have neither improved nor repaired the interior or exterior of an existing structure. They have instead demolished an existing structure and constructed an entirely new one. Because the construction of new buildings is not explicitly excluded from the application of the landscape buffer requirements, the Hunters' new building was required to comply with these requirements in order to obtain a use and occupancy permit.

As a general matter, all newly constructed or significantly renovated buildings and structures must comply with the applicable building, health and safety requirements no matter whether their use is conforming or nonconforming. *Bastian v. City of Twin Falls*, 658 P.2d 978, 980-81 (Idaho Ct. App. 1983) (landowner erecting a building is not insulated from compliance with the landscaping and off-street parking requirements generally applicable to the construction of new buildings or the expansion of old ones); *Brown v. City of Cleveland*, 420 N.E.2d 103, 105-06 (Ohio 1981) (landowner building a new structure must comply with accessory off-street parking requirements); *Taft v. Zoning Bd. of Review*, 64 A.2d 200, 203 (R.I. 1949) (structural alterations of a building require the landowner to comply with pertinent building ordinances); 1 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 6.78, at 723-24 (4th ed. 1996) ("ANDERSON'S AMERICAN LAW OF ZONING").

⁹Tenn. Code Ann. § 13-7-208 and Metro. Code § 17.040.020(D).

Based on this record, the Hunters have failed to present any persuasive argument that the landscape buffer requirement did not apply to their project once they decided to construct a new building on their property. A local government may decline to issue of a certificate of occupancy when the landowner has failed to comply with applicable local zoning requirements or building codes. *Celani v. Marconi*, 682 N.Y.S.2d 754, 756 (App. Div. 1998). Therefore, we find no basis for concluding that Metro acted arbitrarily, capriciously, or illegally by declining to issue the Hunters a certificate of occupancy until they constructed the required landscape buffer.

VI. THE HUNTERS' REQUEST FOR A VARIANCE

As a final matter, the Hunters assert that they presented sufficient evidence to support their application for a variance and that the Board acted arbitrarily, capriciously, or illegally by declining to grant them relief from the landscape buffer requirement. The Board asserts that the Hunters failed to demonstrate that they met all the requirements for a variance. We concur with the Board.

A variance is an authorization to construct or maintain a building or structure or to establish or maintain a use of land that is otherwise prohibited by the zoning ordinance. ANDERSON'S AMERICAN LAW OF ZONING § 20.02, at 410. It is not granted as a matter of right, *DiGiovanni v. Board of Appeals*, 474 N.E.2d 198, 204 (Mass. Ct. App. 1985); 3 E.C. YOKLEY, ZONING LAW & PRACTICE § 20-1 (4th ed., rev. vol. 2002) ("ZONING LAW & PRACTICE"), but rather it is a form of administrative relief from the literal import and strict application of the zoning regulations.

Granting or denying a variance is a discretionary decision. *Glankler v. City of Memphis*, 481 S.W.2d 376, 378 (Tenn. 1972); *Reddoch v. Smith*, 214 Tenn. 213, 223, 379 S.W.2d 641, 645 (1964). The decision depends on analyzing the particular facts of each case, ZONING LAW & PRACTICE § 20-2, in light of the standards supplied in the applicable statutes and zoning ordinance. Tenn. Code Ann. § 13-7-207(3) permits local boards of zoning appeals to grant variances

[w]here, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the enactment of the zoning regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this part or part 3 of this chapter would result in peculiar and exceptional practical difficulties to or exception or undue hardship upon the owner of such property.

In addition, Tenn. Code Ann. § 13-7-207(3) provides that a variance should not be granted if it will cause "substantial detriment to the public good" or "[substantial impairment to] the intent and purpose of the zone plan and zoning ordinance."

In a complementary provision, Metro Code § 17.40.370 states that the Board may grant a variance only if it makes affirmative findings of fact with regard to each of the following standards:

A. Physical Characteristics of the Property. The exceptional narrowness, shallowness or shape of a specific piece of property, exceptional topographic condition, or other extraordinary and exceptional condition of such property would result in peculiar and exceptional practical difficulties to, or exceptional or undue hardship upon the owner of such property upon the strict application of any regulation enacted by the ordinance codified in this title.

B. Unique Characteristics. The specific conditions cited are unique to the subject property and generally not prevalent to other properties in the general area.

C. Hardship Not Self-Imposed. The alleged difficulty or hardship has not been created by the previous actions of any person having an interest in the property after the effective date of the ordinance codified in this title.

D. Financial Gain Not Only Basis. Financial gain is not the sole basis for granting the variance.¹⁰

E. No Injury to Neighboring Property. The granting of the variance will not be injurious to other property or improvements in the area, impair an adequate supply of light and air to adjacent property, or substantially diminish or impair property values within the area.

F. No Harm to Public Welfare. The granting of the variance will not be detrimental to the public welfare and will not substantially impair the intent and purpose of this zoning code.

G. Integrity of Master Development Plan. The granting of the variance will not compromise the design integrity or functional operation of activities or facilities within an approved planned unit development.

The Hunters decided to demolish their existing building and to construct a new one to satisfy the demands of their lessee. After they tore down the existing building, they learned that they could not construct the new building in the same location because of a previously unknown railroad easement. Thus, they were required to re-site the new building. Moving the location of the new building on the property, placed parking, storage, and operating space at a premium, and accordingly, the Hunters decided not to construct the required landscape buffer in order to satisfy their lessee's demand for more operating space.

¹⁰Pecuniary loss, by itself, does not provide grounds for granting a variance. *Reddoch v. Smith*, 214 Tenn. at 224, 379 S.W.2d at 646; *McClurkan v. Board of Zoning App.*, 565 S.W.2d 495, 497 (Tenn. Ct. App. 1977); *Houston v. Memphis & Shelby County Bd. of Adjustment*, 488 S.W.2d 387, 389 (Tenn. Ct. App. 1972).

Like the Board, we find that the Hunters failed to demonstrate how the physical characteristics of their property significantly interfered with their beneficial use or that their current predicament was not caused by their voluntary decision to demolish their existing building and construct a new one. It appears that the Hunters' principal reason for seeking the variance was their concern that their tenant would either move or demand a reduction in the rent. Pecuniary loss and self-imposed hardship do not provide adequate grounds for granting a variance. Accordingly, we fail to find that the Board acted arbitrarily, capriciously, or illegally when it declined to grant the Hunters relief from the landscape buffer requirements.

VII.

We affirm the judgment and remand the case to the trial court for whatever further proceedings may be required. We tax the costs of this appeal jointly and severally to James W. Hunter and James R. Hunter and their surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., J.