IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

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No. 21667

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MARION V. MCFILLAN, JR.,
Plaintiff Below, Appellant

v.

BERKELEY COUNTY PLANNING COMMISSION,
Defendant Below, Appellee

Appeal from the Circuit Court of Berkeley County
Honorable Patrick G. Henry, III, Judge
Civil Action No. 92-P-26

AFFIRMED

Submitted: September 21, 1993
Filed: December 13, 1993

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JUSTICE MILLER delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. Under W. Va. Code, 8-24-1, et seq., the governing body of a municipality or the county commission may create a planning commission to develop a comprehensive plan for zoning, building restrictions, and subdivision regulations. Thereafter, the governing body or the county commission may adopt all or part of such a comprehensive plan.

2. The broad scope of land-use regulations authorized in W. Va. Code, 8-24-1, et seq., allows a nonconforming use exemption enacted thereunder to apply to any regulation that restricts the use of land.

3. A non-conforming use is a use which, although it does not conform with existing zoning regulations, existed lawfully prior to the enactment of the zoning regulations. These uses are permitted to continue, although technically in violation of the current zoning regulations, until they are abandoned. An exception of this kind is commonly referred to as a 'grandfather' exception.

4. A nonconforming use allows the owner of property to avoid conforming to a land-use regulation that effects his property. However, the nonconforming use is limited to the use existing at the time the regulation was adopted and it ordinarily may not be expanded into other areas of the property where the nonconforming use did not previously exist.

5. "The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine of estoppel against the state."

Syllabus Point 7, Samsell v. State Line Development Co., 154 W. Va. 48, 174 S.E.2d 318 (1970).

6. Land-use regulations will not constitute an impermissible taking of property under the Fifth Amendment to the United States Constitution and Section 9 of Article III of the West Virginia Constitution if such regulations can be reasonably found to promote the health, safety, morals, or general welfare of the public and the regulations do not destroy all economic uses of the property.

Miller, Justice:

Marion V. McFillan, Jr., the appellant and plaintiff below, appeals a final order of the Circuit Court of Berkeley County, dated December 3, 1992, denying his request for an exemption from complying with the Berkeley County Subdivision Regulations (Regulations). On appeal, the plaintiff argues, under several legal theories, that he should be allowed to expand his mobile home park notwithstanding the Regulations. We have reviewed the record and find the plaintiff's arguments to be without merit; accordingly, we affirm the trial court's final order.

I.

On January 21, 1975, the Berkeley County Court adopted the Regulations which relate to unincorporated land in Berkeley County. The Regulations were part of a comprehensive plan the Berkeley County Planning Commission (Commission) passed pursuant to W. Va. Code, 8-24-16 (1969). Article IX of the Regulations prescribes a wide variety of minimum standards for mobile home parks and developments. For example, the Regulations require all mobile home parks to be at least five acres and each individual mobile home lot to contain at least 5000 square feet.

On August 14, 1980, the plaintiff purchased from Howard T. and Mary Margaret Stolipher a mobile home park that had been in existence when the Regulations were passed. After purchasing the property, the plaintiff asked the Planning Director of the Commission, Christine L. DeCamp, whether this mobile home park was required to comply with the provisions of the Regulations.

In correspondence dated December 12, 1980, Ms. DeCamp informed the plaintiff that the Stolipher mobile home park was exempt from the Regulations. However, Ms. DeCamp explained that this decision applied only to the Stolipher mobile home park and that the Commission's staff would determine on a case-by-case basis whether such an exemption would be granted to other preexisting mobile home parks.

Approximately one year later, the plaintiff purchased the Rocky Glen Mobile Home Community (Rocky Glen), also located in Berkeley County. Instead of requesting an opinion from the Commission on whether this mobile home park was subject to the provisions of the Regulations, the plaintiff simply assumed that the property was exempt and proceeded to expand the park without attempting to meet the standards outlined in Article IX of the

Regulations. From 1981 to May of 1992, the plaintiff increased the number of mobile home lots in Rocky Glen from 25 to 245. None of the new lots conformed with the Regulations.

On October 29, 1991, William Teach, an interim director for the Commission, wrote the plaintiff and explained that any further expansion of Rocky Glen would require the Commission's review and approval. After not hearing from the plaintiff for over a year, Mr. Teach sent him a follow-up letter once again reminding him that he would have to obtain the Commission's approval before expanding the number of mobile home lots at Rocky Glen. Finally, on April 13, 1992, Mr. McFillan wrote back to the director stating that he had been led to believe that any mobile home park that was in existence at the time the Regulations were passed was not subject to their provisions. In a letter dated April 27, 1992, Mr. Teach informed Mr. McFillan that he must secure the Commission's approval before proceeding any further on his plan to expand Rocky Glen.

On further inquiry, the plaintiff received from the Commission a copy of a document entitled "DIRECTIVE TO ENFORCEMENT OFFICER AND LEGAL COUNSEL," which was dated September 11, 1989. This directive informed the necessary personnel that any future expansion of a mobile home park, regardless of whether the business existed before the Regulations were passed, was subject to the Regulations and would, therefore, have to conform with all their provisions.

On May 18, 1992, the plaintiff appeared before the Commission. At that meeting, the plaintiff informed those attending that there were 245 mobile home lots at Rocky Glen, 230 of which were already occupied. Mr. McFillan also stated that he had preliminary plans to expand the trailer park by an additional 63 units. When the Commission asked the plaintiff to provide it with these plans, he advised that he was not looking for their approval. Thereafter, the Commission voted to require the plaintiff to comply with the Regulations for any future expansion.

Subsequently, the plaintiff filed a petition for certiorari in the Circuit Court of Berkeley County requesting a review of the Commission's decision. In an order dated December 3, 1992, the circuit court upheld the Commission's decision.

II.

The Regulations at issue in this case are subdivision

regulations enacted pursuant to W. Va. Code, 8-24-28 through -35.

Among these statutory provisions is the following requirement contained in W. Va. Code, 8-24-33 (1969):

> "After a comprehensive plan and an ordinance containing provisions for subdivision control and the approval of plats and replats have been adopted and a certified copy of the ordinance has been filed with the clerk of the county court [county commission] as aforesaid, the filing and recording of a plat involving the subdivision of lands covered by such comprehensive plan and ordinance shall be without legal effect unless approved by the commission[.]" (Emphasis added).

The subdivision control provisions are part of a larger statutory scheme dealing with planning, zoning, and development of a comprehensive plan. See W. Va. Code, 8-24-1, et seq. Initially, under W. Va. Code, 8-24-1 (1969), the "governing body of every municipality and the county court [county commission] of every county may by ordinance create a planning commission[.]" The creation and composition of municipal and county planning commissions are outlined in W. Va. Code, 8-24-5 (1986), and W. Va. Code, 8-24-6 (1986). Under W. Va. Code, 8-24-16 (1969), a planning commission "shall make and recommend for adoption to the governing body . . . a comprehensive plan for the physical development of the territory within its jurisdiction."

It is clear from the comprehensive nature of the provisions in W. Va. Code, 8-24-1, et seq., that the historic distinction we have made between zoning and planning has been largely obliterated because both concepts are now incorporated into a comprehensive plan. W. Va. Code, 8-24-39 (1988), gives broad zoning authority power over a variety of different subjects. Moreover, a comprehensive subdivision plan under W. Va. Code, 8-24-28, may contain both zoning and building restrictions through its use of the term "comprehensive plan."

Thus, we believe that under W. Va. Code, 8-24-1, et seq., the governing body of a municipality or the county commission may create a planning commission to develop a comprehensive plan for zoning, building restrictions, and

subdivision regulations. Thereafter, the governing body or the county commission may adopt all or parts of such a comprehensive plan.

III.

In this case, the plaintiff does not argue that the Regulations violated any provisions of W. Va. Code, 8-24-1, et seq. Rather, his principal argument is that because Rocky Glen existed as a mobile home park prior to the adoption of the Regulations, a valid nonconforming use existed.

We have recognized the concept of a nonconforming use, which occurs when land is lawfully used prior to the adoption of an ordinance that restricts its use. Such a nonconforming use generally may be continued until it is abandoned, as we stated in note 1 of Longwell v. Hodge, 171 W. Va. 45, 47, 297 S.E.2d 820, 822 (1982):

> "A non-conforming use is a use which, although it does not conform with existing zoning regulations, existed lawfully prior to the enactment of the zoning regulations. These uses are permitted to continue, although technically in violation of the current zoning regulations, until they are abandoned. An exception of this kind is commonly referred to as a 'grandfather' exception."

See also H.R.D.E., Inc. v. Zoning Officer of the City of Romney, 189 W. Va. 283, 430 S.E.2d 341 (1993). See generally 83 Am. Jur. 2d Zoning & Planning § 624 at 520 (1992).

The Regulations in question do not contain specific language exempting a nonconforming use. However, we recognized in H.R.D.E., Inc. v. Zoning Officer of the City of Romney, 189 W. Va. at ___, 430 S.E.2d at 344, that "[i]n West Virginia we have statutorily recognized a nonconforming use, and we have mandated that a nonconforming use cannot be prohibited if the purpose of the use remains the same after the ordinance is enacted. W. Va. Code, 8-24-50 [1984]." (Footnote omitted).

Both Longwell and W. Va. Code, 8-24-50, speak of a nonconforming use in terms of a zoning ordinance. However, we believe the broad scope of land-use regulations authorized in

W. Va. Code, 8-24-1, et seq., allows a nonconforming use exemption enacted thereunder to apply to any regulation that restricts the use of land. In the present case, we deal with subdivision regulations enacted under W. Va. Code, 8-24-28, et seq.

In this case, the controversy is not over the mobile home lots that existed in 1975, when the Regulations were adopted. Likewise, the Commission has not sought to enforce the Regulations against the mobile homes placed on the property before it warned the plaintiff in October of 1991 that any additional mobile homes must comply with the Regulations. The issue, therefore, focuses on the extent to which a landowner may expand a nonconforming use.

The general rule with regard to extending a nonconforming use to additional property is reiterated in 83 Am. Jur. 2d Zoning & Planning § 670 at 572 (1992):

> "A nonconforming use is generally restricted to the area that was nonconforming at the time the restrictive ordinance was enacted. Where the use of property involves a physical extension of a nonconforming use to a part of the land not used for the prohibited purpose prior to the enactment of the restrictive ordinance, the extension is frequently deemed to violate an ordinance which in general language prohibits the extension of nonconforming uses." (Footnotes omitted).

See also Patchak v. Lansing Township, 361 Mich. 489, 105 N.W.2d 406 (1960); State ex rel. Howard v. Village of Roseville, 244 Minn. 343, 70 N.W.2d 404 (1955); Lower Mount Bethel Township v. Stables Dev. Co., 97 Pa. Commw. 195, 509 A.2d 1332 (1986), appeal denied, 516 Pa. 620, 531 A.2d 1121 (1987). We recognized much this same principle in Longwell v. Hodge, 171 W. Va. at 48, 297 S.E.2d at 823:

> "A 'grandfather' exception alleviates the initial hardship to the owner of non-conforming property of immediate compliance with a new ordinance. A 'grandfather' clause, however, is not designed to create a continuing, protected, non-conforming use within the zoned area, running with the land

> and inuring indefinitely to the benefit of the owner."

In Stop & Shop v. Board of Zoning Appeals, 184 W. Va. 168, 399 S.E.2d 879 (1990), after quoting the foregoing language from Longwell, we held that the Stop & Shop Market could not, under the theory of a nonconforming use, expand its parking onto an adjacent residential lot which it owned.

Accordingly, we conclude that a nonconforming use allows the owner of property to avoid conforming to a land-use regulation that affects his property. However, the nonconforming use is limited to the use existing at the time the regulation was adopted and it ordinarily may not be expanded into other areas of the property where the nonconforming use did not previously exist.

This same general principle has been applied to the proposed expansion of a nonconforming mobile home park. Other courts have repeatedly held that an owner's right to a nonconforming use extends only to those mobile home lots in existence or under construction at the time the land use regulation was implemented and does not include sites that are merely planned. Blundell v. City of West Helena, 258 Ark. 123, 522 S.W.2d. 661 (1975); Langford v. Calcasieu Parish Police Jury, 396 So. 2d 956 (La. App. 1981); Patchak v. Township of Lansing, supra; Town of Amherst v. Cadorette, 113 N.H. 13, 300 A.2d 327 (1973); In Re Tadlock's Appeal, 261 N.C. 120, 134 S.E.2d 177 (1964); Overstreet v. Zoning Hearing Bd., 49 Pa. Commw. 397, 412 A.2d 169 (1980). See generally 2 R. Anderson, American Law of Zoning § 14.14 (3d ed. 1986 & Supp. 1992).

Although the plaintiff recognizes that the majority of jurisdictions do not favor the enlargement of a nonconforming use, he urges us to adopt the "natural expansion doctrine," which permits the nonconforming user to increase its volume of business. See, e.g., Rotter v. Coconino Cty., 169 Ariz. 269, 818 P.2d 704 (1991) ; Gilbertie v. Zoning Bd. of Appeals, 23 Conn. App. 444, 581 A.2d 746 (1990); Chartiers v. William H. Martin, Inc., 518 Pa. 181, 542 A.2d 985 (1988). As explained in 83 Am. Jur. 2d Zoning & Planning § 661 at 562-63, the "natural expansion
doctrine" recognizes the property owner's right

> "to expand a nonconforming business use to meet the demands of normal growth. . . .

> However, it has been held to be subject to limitation where (1) the expansion is inconsistent with the public interest, (2) the proposed expansion is in actuality not an expansion of the old use but the addition of a new use, or (3) the imposition of limitations is necessary to prevent excessive expansion." (Footnotes omitted).

We have reviewed the cases cited by the plaintiff and the vast majority of them discuss the natural expansion doctrine in terms of accommodating an expansion of a building or existing parking area because of an increase in the volume of business conducted on the same parcel of land. The majority of these cases do not address situations where the landowner desires to expand his business onto property where the business did not previously exist.

IV.

The plaintiff further argues that the Commission should be estopped from enforcing the Regulations against him because he relied on the representations of Ms. DeCamp that all preexisting mobile home parks would not be subject to their provisions. The plaintiff refers to Ms. DeCamp's letter of December 12, 1980, but, as we pointed out in the factual recitations, this letter discussed only the Stolipher Mobile Home Park and not Rocky Glen.

Moreover, his reliance on Ms. DeCamp's memorandum cannot be construed to authorize an indefinite expansion of an original nonconforming use.

Even if it could be so construed, the Commission, as a governmental entity, is subject to the doctrine of estoppel only when equity clearly requires that it be done. We explained this principle in Syllabus Point 7 of Samsell v. State Line Development Co., 154 W. Va. 48, 174 S.E.2d 318 (1970):

> "The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine of estoppel against the state."

Moreover, "a municipality acting in a governmental, rather than a

proprietary, capacity is not subject to the law of equitable estoppel and . . . therefore, estoppel cannot be based on unauthorized acts of municipal authorities acting in a governmental capacity." Martin v. Pugh, 175 W. Va. 495, 503, 334 S.E.2d 633, 641 (1985). In Shaffer v. Monongalia General Hospital, 135 W. Va. 163, 169-70, 62 S.E.2d 795, 798 (1950), we stated:

> "The basic test in determining whether a public corporation, in its operations, is engaged in a discharge of a governmental function or is acting in a proprietary capacity is whether the act performed is for the common benefit of the public or is for the special benefit or profit of the corporation." (Citation omitted).

The enforcement of the Regulations by the Commission and its agents is for the common benefit of the public generally and not for the private gain of the governmental entity. Thus, when Ms. DeCamp determined whether the plaintiff's mobile home park was exempt from the Regulations, she was performing a governmental function.

The reason estoppel is not invoked when a municipality is acting in a governmental capacity was explained in Cawley v. Board of Trustees, 138 W. Va. 571, 584, 76 S.E.2d 683, 690 (1953): "To permit such estoppel on the basis of mistake or ill advised action would hinder and hamper governmental functions; and may be contrary to the public interest in many cases." Thus, even if we thought that Ms. DeCamp had misinformed the plaintiff in her December 12, 1980, correspondence, we would not apply the doctrine of estoppel and find the planned expansion exempt from the Regulations. Therefore, we hold that the Commission is not estopped from enforcing the Regulations against all proposed growth in mobile home parks that preexisted the enactment of the Regulations.

V.

Finally, the plaintiff argues that if he is forbidden to expand Rocky Glen, the Commission, in effect, is taking his property without just compensation in violation of the Fifth Amendment to the United States Constitution and Section 9 of Article III of the West Virginia Constitution. The United States Supreme Court in Lucas v. South Carolina Coastal Council,

___ U.S. ___, ___, 112 S. Ct. 2886, 2894, 120 L. Ed. 2d 798, 813 (1992), reiterated what the Court had previously said on numerous occasions: "[T]he Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land." Quoting Agins v. Tiburn, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 112 (1980). (Citations omitted; emphasis in Lucas). In other words, "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." ___ U.S. at ___, 112 S. Ct. at 2895, 120 L. Ed. 2d at ___. (Footnote omitted; emphasis in original). In Penn Central Transportation Co. v. New York City, 438 U.S. 104, 125, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631, 649 (1978), the Court gave this summary of a regulation that does not offend the Fifth Amendment's prohibition against the taking of property:

> "More importantly for the present case, in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." (Citations omitted).

In G-M Realty, Inc. v. City of Wheeling, 146 W. Va. 360, 120 S.E.2d 249 (1961), we addressed a constitutional attack on an ordinance that prohibited the operation of a gasoline service station in a Commercial A zone, but allowed them in a Commercial B zone. We stated in Syllabus Point 1:

> "A zoning ordinance of a municipality prohibiting a gasoline service station within a definite zone or area of a municipality, though other types of businesses are permitted therein, is not invalid as constituting an unwarranted classification, or as violating constitutional provisions relating to due process, since the nature of the operation of such a station inherently involves potential dangers to the health, safety, morals and general welfare of the people."

See also Par Mar v. City of Parkersburg, 183 W. Va. 706, 398 S.E.2d 532 (1990); DeCoals, Inc. v. Board of Zoning Appeals, 168 W. Va. 339, 284 S.E.2d 856 (1981).

Thus, land-use regulations will not constitute an impermissible taking of property under the Fifth Amendment to the United States Constitution and Section 9 of Article III of the West Virginia Constitution if such regulations can be reasonably found to promote the health, safety, morals, or general welfare of the public and the regulations do not destroy all economic use of the property. Under the foregoing law, we find that the Regulations herein are a reasonable exercise of police power and conclude they do not violate the Fifth Amendment to the United States Constitution or Section 9 of Article III of the West Virginia Constitution. In this case, the Regulations do not deny the plaintiff all economic use of his land. Indeed, the plaintiff may expand the mobile home park on his property so long as he complies with the Regulations.

VI.

Accordingly, in light of the foregoing, we affirm the final order of the Circuit Court of Berkeley County.

Affirmed.

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