

NATURE OF PENDING ACTIONS

This matter comes before the Court on three separate Petitions for Judicial Review filed on September 8, 2008, which have been consolidated into Case No. 08-C-1308. Each of the judicial review actions involve issues that are substantially similar. Thus, because the issues have been fully briefed and no request for oral argument has been made, these judicial review actions are deemed to be submitted for decision.

FACTUAL FINDINGS

1. Plaintiffs Charles and Rachel Hockenbarger (“the Hockenbargers”) own real property located at 3434 S.W. Westover Rd., Topeka, Shawnee County, Kansas.
2. Plaintiff Rebekah Phelps-Davis (“Phelps-Davis”) owns real property located at 1216 S.W. Cambridge Ave., Topeka, Shawnee County, Kansas.
3. Plaintiffs Brent Roper and Shirley Phelps-Roper (“the Ropers”) own real property located at 3640 S.W. Churchill Rd., Topeka, Shawnee County, Kansas.
4. All of the Plaintiffs in this matter are members of the same family and are members of the same church.
5. On or about May 16, 2008, a City of Topeka Zoning Inspector issued Violation Notice No. 2008004 to the Hockenbargers, Violation Notice No. 200805 to the Ropers, and Violation Notice No. 2008006 to Phelps-Davis.
6. With the exception of the property descriptions and the identity of the owners, the three (3) notices were substantially identical and alleged violations of Topeka City

Ordinance §48-1.09(a)(1) and §48-29.02(a)(2).

7. Specifically, the “Nature of Violation” listed in each of the Violation Notices stated:
“Construction of a storage shed within the required front yard setback. . . .”
8. Moreover, the “Corrective Action Required” listed in each of the Violation Notices stated: “Remove shed from the required 30' required [sic] front yard setback no later than June 16, 2008.”
9. The Violation Notices further stated: “FAILURE TO COMPLY WILL RESULT IN REFERRAL TO THE CITY ATTORNEY’S OFFICE FOR PROSECUTION AS A CRIMINAL OFFENSE WITH A POTENTIAL FINE OF \$499 FOR EACH DAY THE VIOLATION EXISTS AND POSSIBLE JAIL TIME.”
10. On June 9, 2008, the Plaintiffs timely filed appeals with the City of Topeka Board of Zoning Appeals (“the Board of Zoning Appeals”).
11. On August 11, 2008, the Board of Zoning Appeals held a hearing. At the hearing, all of the Plaintiffs asserted that the sheds were not located in violation of the zoning ordinances. In addition, Phelps-Davis asserted that her shed was a non-conforming use that pre-existed the adoption of the zoning ordinances in question.
12. The Board of Zoning Appeals denied each of the appeals and affirmed the decision of the City Zoning Inspector in all three (3) cases.

STANDARD OF REVIEW

The scope of judicial review in zoning matters is strictly limited to determining the lawfulness of the action taken and the reasonableness of such action. *Combined Inv. Co. v. Bd. of Butler Co. Commrs.*, 227 Kan. 17, 28, 605 P.2d 533 (1980) (citing *Golden v. City of Overland Park*, 224 Kan. 591, 595-96, 584 P.2d 130 (1978)). There is a presumption that a zoning authority acted reasonably, and a landowner has the burden of proving unreasonableness by a preponderance of the evidence. 227 Kan. at 28.

“[An] action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate.”

227 Kan. at 28. Furthermore, a court has no authority to substitute its judgment for that of a zoning authority. 227 Kan. at 28.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

A. The Topeka City Zoning Regulations.

As indicated above, the Zoning Inspector cited the Plaintiffs for violations of two (2) Topeka City Zoning Ordinances. The first, Topeka City Ordinance § 48-1.09(a)(1), states that “[n]o person shall use any premises for a use other than those permitted in the district in which such premises are located.” The second, Topeka City Ordinance, § 48-29.02(a)(2) states, in part, as follows:

“Except as otherwise provided, an accessory building shall be separated from lot lines in compliance with the following

requirements: a. Accessory structures shall not be located within a required front yard as established by the comprehensive zoning regulations for interior and corner lot street frontages; and further, . . . accessory structures shall observe interior and corner lot street frontage front yard setbacks as established by the principal structure. . . . If, in the judgment of the planning director, construction of an accessory building is compatible with the neighborhood, in respect to availability of public sidewalks, right-of-way needs, other nonconforming structures within the block and the location of principal structures within the block, then such construction may occur without regard to the setback.”

Although not identified in the Violation Notices, the City also relies upon several other ordinances as support of its position in this judicial review action. Topeka City Ordinance § 48-4.03(b)(1) states that the minimum front yard setback requirement is thirty (30) feet. Moreover, Topeka City Ordinance § 48-4.03(b)(5), states that the “side yard of a corner lot . . . shall conform to the minimum front yard requirements. . . .” Likewise, Topeka City Ordinance § 48-27.02(e) provides: “Front yard requirements . . . shall apply to both frontages” on corner lots. In addition, Topeka City Ordinance § 48-27.03(a) states: “Accessory buildings may be located in any yard except the front yard.”

B. Setback Requirements on Corner Lots.

In the opinion of the Court, the plain and unambiguous language of the Comprehensive Zoning Regulations of the City of Topeka do not support the position that a corner lot has two (2) front yards. Neither the common meaning of the words used nor the definitions set forth in the Comprehensive Zoning Regulations such an interpretation. Although it is clear that no accessory buildings may be located in a front yard, the

Comprehensive Zoning Regulations permit the construction of accessory buildings in side or rear yards so long as they meet the appropriate standards. However, this does not end the court's analysis.

A "corner lot" is defined in the Comprehensive Zoning Regulations as "[a] lot abutting upon two or more streets at their intersection." City of Topeka Municipal Code, Appendix C, Article XXXV. As indicated above, the City has cited the Plaintiffs for alleged violations of Topeka City Ordinance § 48-29.02(a)(2)(a). This ordinance not only provides that accessory structures, such as sheds, "shall not be located within a required front yard," but goes on to state that "accessory structures shall observe . . .corner lot street frontage front yard setbacks. . . ." Thus, the Court finds that accessory buildings in yards that abut a street must comply with the thirty (30) feet setback requirement applicable to front yards.

The use of the word "further" in Topeka City Ordinance § 48-29.02(a)(2) makes it clear that this section of the Comprehensive Zoning Regulations is applicable to more than one situation. The Court notes that the common definition of the word "further" is "in addition, additionally; moreover (esp. used in introducing a fresh consideration in an argument)." Oxford English Dictionary, Oxford University Press (1996). In other words, §48-29.02(a)(2) prohibits the construction of accessory buildings in front yards and, **additionally** requires that any accessory buildings constructed in a yard that abuts a street must be in compliance with the thirty (30) foot setback applicable to front yards.

From a review of the record, it does not appear that the Plaintiffs challenge the fact that their sheds are located closer than thirty (30) feet to the City's right-of-way. As such,

the Court concludes that it was reasonable for the Board of Zoning Appeals to find that the sheds were in violation of Topeka City Ordinance § 48-29.02(a)(2), as alleged in the Violation Notices dated May 16, 2008. Although none of the real property involved in this case had two (2) front yards, the side yards of corner lots still must comply with the front yard setback requirements.

C. Non-Conforming Use.

_____ In addition to the arguments presented by the other Plaintiffs, Phelps-Davis asserts that the decision of the Board of Appeals should be reversed because the shed located on her property has been in the same location since the early 1960s. Specifically, she contends that “it is unreasonable for [the City] to allow a shed to be placed in the same location on a piece of property for at least 45 years, and then demand that it be moved upon threat of criminal prosecution.” She continues: “It is particularly unreasonable in that [the City’s] employees have been at [her] property for two (2) major remodeling projects (in 1995 and 2006) doing inspections for building permits, and never said a word about the shed violating the Code.” In addition, Phelps-Davis contends that the shed should have been “grandfathered” in since it pre-existed the adoption of the current Comprehensive Zoning Regulations by the City of Topeka.

In Kansas, a “non-conforming use” is defined as a “use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.” *Goodwin v. City of Kansas City*, 244 Kan. 28, 32, 766 P.2d

177 (1988). Although it is unclear when the shed was first constructed upon the property currently owned by Phelps-Davis, it is undisputed that it was prior to the enactment of the zoning ordinances at issue in this action. However, the City asserts that the shed was never legally located upon the property and, as such, “it could not be ‘grandfathered in’ and legal now.” Furthermore, the Defendant contends that the setbacks applicable in this action “have been part of the City code since before 1948.”

The Court has reviewed the 1975 Code of the City of Topeka, which includes many of the zoning provisions adopted by the Defendant in 1947. It appears from a review of the 1975 Code that the former § 30-402b(8) addressed the issue of setbacks for accessory buildings. Specifically, it provided that “[a]ny accessory building that is not a part of the main structure shall be located not less than sixty (60) feet from the front lot line.” Interestingly, although § 30-405(b) of the 1975 Code contained a provision that stated “where lots have a double frontage, the required front yard [setback of thirty (30) feet] shall be provided on both streets,” the Court finds no similar provision for corner lots. A “Double Frontage” lot was defined in § 30-302(28) to mean “[a] lot having a frontage on two (2) non-intersecting streets, as distinguished from a corner lot.”

Unfortunately, based on the limited factual information contained in the record, the Court cannot determine whether the shed located on the Phelps-Davis property constitutes a pre-existing non-conforming use. As such, the Court must remand the Phelps-Davis action to the City of Topeka Board of Zoning Appeals for further consideration. If Phelps-Davis can establish that the shed located on her property complied with the zoning ordinances of

the City prior to the adoption of the Comprehensive Zoning Regulations in 1982, and that there has been no structural alteration, enlargement or addition to the shed since that time, the decision of the Zoning Inspector should be set aside. However, if Phelps-Davis is unable to meet her burden of proof, the decision of the Zoning Inspector should be allowed to stand.

D. Selective Enforcement.

All of the Plaintiffs assert that the City has acted unreasonably in this matter because it has selectively enforced the Comprehensive Zoning Regulations against them based on improper motives. As indicated above, each of the Plaintiffs is a member of the same family and a member of the same church. Moreover, the Violation Notices received by the Plaintiffs were nearly identical, were issued on the same date and were consecutively numbered. The Plaintiffs assert that the Violation Notices “were not the result of a concern the defendant received about their sheds, but were a result of [the Zoning Inspector] inspecting [their] properties after she received a complaint about the shed built on [the Hockenbarger’s] property about a half mile away.”

Certainly, the Court agrees that it would be inappropriate for a governmental entity “to target individuals because of their religious practices.” However, the Plaintiffs have failed to come forward with sufficient evidence that the Zoning Inspector who issued the Violation Notices on May 16, 2008, did so because of their religious beliefs. Rather, it appears from a review of the record that the Zoning Inspector received a complaint regarding at least one of the sheds and went to investigate. Although it is certainly possible that a private complainant or a governmental employee might have improper motives in reporting

an alleged zoning violation, the Court must rely upon the evidence rather than speculation.

In the current action, there is not sufficient evidence in the record of impropriety on behalf of the Zoning Inspector. Although it is unusual that properties owned by three (3) members of the same family and church that are located in different neighborhoods would have been cited for the same alleged zoning violations on the same day, the record reflects that the Zoning Inspector found objective evidence of the violations in question when she inspected the properties. Based on the record provided, it would be impossible for this Court to determine the subjective motives of the Zoning Inspector in issuing the Violation Notices in question. Thus, the Court finds that the Plaintiffs have failed to meet their burden of proof on the issue of selective enforcement.

E. Application of Equitable Estoppel

_____As indicated above, it is undisputed that the shed located on the property now owned by Phelps-Davis has been there for at least 28 years. During that period of time, it appears that the City of Topeka did nothing to enforce the alleged violations of the Comprehensive Zoning Regulations. In addition, the Hockenbargers and Ropers contend that they received permission from representatives to construct the sheds located on their respective property. Thus, the Plaintiffs contend that the City should be estopped from enforcing the zoning ordinances in question.

It has been held that “there can never be estoppel against a city when it acts beyond its authority. A city is without authority to nullify its ordinances without following prescribed procedures dictated by due process.” *Goodwin*, 244 Kan. at 34. Moreover, “[a] landowner is charged with knowledge of the zoning ordinances.” 244 Kan. at 33. “Approval

by city officials of a use which is prohibited by the ordinances, without the issuance of a special permit, is without effect.” 244 Kan. at 34. Therefore, the Court concludes that the doctrine of equitable estoppel is not applicable against the City of Topeka in this case.

F. Exercise of Discretion by Planning Director.

The Plaintiffs also assert that the City Planning Director should have exercised his discretion pursuant to Topeka City Ordinance § 48-29.02(a)(2) to allow the sheds to remain in place. As indicated above, the parties agree that the shed on the Phelps-Davis property has been in the same location since at least 1980, and perhaps for a much longer period of time. Likewise, the Hockenbargers and Ropers contend that they received permission to construct the sheds on their respective properties from representatives of the City of Topeka.

Certainly, the Planning Director had (and continues to have) the discretion to allow any or all of the sheds in question to remain in place if he determines that they are “compatible” with their respective neighborhoods. Moreover, under the circumstances presented, the Court would encourage the Planning Director to work with the Plaintiffs, especially Phelps-Davis, to resolve these disputes without the need for further litigation. However, the Court has no authority to substitute its own judgment for that of the Planning Director. Thus, the Court finds that the Plaintiffs did not meet their burden of proof on this issue.

CONCLUSION

For the reasons set forth above, the Court hereby affirms the decision of the City of Topeka Board of Zoning Appeals entered on or about August 12, 2008, relating to the sheds

located on the Hockenbarger and Roper properties. As such, the Hockenbarger and Roper sheds cannot be located within thirty (30) feet of the City's right-of-way and must be moved or removed. However, the Court finds that the issue of whether the shed located on the Phelps-Davis property constitutes a pre-existing non-conforming use must be remanded to the City of Topeka Board of Zoning Appeals for a determination of whether the shed lawfully existed prior to the enactment of the current Topeka City Zoning Ordinances.

This Memorandum Decision and Order shall constitute the final judgment of the Court. No further journal entry is required.

IT IS SO ORDERED.

Dated this ___ day of September, 2009.

David E. Bruns
District Court Judge

CERTIFICATE OF MAILING

_____I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in pick-up bin this ____ day of September, **2009**, to the following:

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