IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT KNOXVILLE

FRANK O'LEARY AND WIFE, JOANN O'LEARY, AND LARRY JAMES BROCK, SR., AND WIFE, HAZEL CHADWICK BROCK,	)	
Plaintiffs/Appellants,	)	**Hamilton Chancery No. 74428**
VS.	)	**Appeal No. 03A01-9507-CH-00235**
LEONARD E. HALL AND WIFE, ANN C. HALL, AND JAMES CLEMONS AND WIFE, RUTH CLEMONS,	)	
Defendants/Appellees.	)	

FILED

February 27, 1996

Cecil Crowson, Jr.

Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF HAMILTON COUNTY
AT CHATTANOOGA, TENNESSEE
THE HONORABLE R. VANN OWENS, CHANCELLOR

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AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

Plaintiffs-Appellants, Frank and Joanne O'Leary and Larry J. and Hazel C. Brock,[1] filed suit requesting an injunction to prohibit the Defendants-Appellees, Leonard and Ann Hall and James and Ruth Clemons,[2] from subdividing the Halls' lot, which lies between the O'Learys' and the Brocks' land. The lower court denied Appellants' request for an injunction.

The property that is the subject of the present suit was originally a single, 17.75 acre tract. When Lecta O'Leary, the original owner, died intestate, the tract passed to her heirs as follows: 4 acres to Ruth Brock, known as Tract 1; 8.75 acres to Louis O'Leary, known as Tract 2; and 5 acres to Frank O'Leary, known as Tract 3. When the property was originally subdivided, the deeds provided for a 30 foot easement along the southern property line of Tracts 1 and 2. The purpose of the easement was to provide Tracts 2 and 3 with access to the nearest public road, Anderson Pike. Sometime after the division on the original 17.75 acre tract, Ruth Brock deeded her land, Tract 1, to her son, Larry Brock, Appellant herein. Louis O'Leary sold his land, Tract 2, to Leonard and Ann Hall, Appellees herein.

After the Halls purchased Tract 2, they sought permission from the Chattanooga-Hamilton County Planning Commission ("Planning Commission") to further subdivide their land. The Halls wanted to sell .36 acre and the existing house on Tract 2 to Ann Hall's parents, James and Ruth Clemons. The Halls planned to build a home for themselves on another part of the lot.

Pursuant to § 303.1 of the Chattanooga-Hamilton County Regional Subdivision Regulations ("Subdivision Regulations"), a minimum lot size of 20 acres is required on private roads. Additionally, § 303.1.1 of the Subdivision Regulations requires that private access easements be at least 15 feet wide for each lot served. If the Halls divided their

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[1]This suit was originally filed by Appellants Frank and Joann O'Leary, owners of Tract 3. A second suit was filed by Larry and Hazel Brock, owners of Tract 1, the servient estate. The suits were consolidated for trial.

[2]After the Halls purchased the middle lot, they sold .36 acre to James and Ruth Clemons.

property, they would create a third lot using the existing 30 foot wide easement; Subdivision Regulations require a minimum easement width of 45 feet. Because of these regulations, the Halls needed a variance in order to subdivide.

Requests for variances are initially investigated by the Planning Commission staff. In a letter dated December 6, 1993, the Planning Commission staff recommended that the Planning Commission deny the Halls' request for a variance. The staff's reasons for denying the variance were that "[a]pproval of this variance would allow division of property that would not otherwise be allowed by State Law." The staff also stated that approving a variance would set a precedent for anyone wishing to develop land on private roads in Hamilton County.

The Planning Commission unanimously adopted the staff recommendation that the variance be denied in its December 13, 1993 meeting. The meeting minutes reflect the Planning Commission's opinion that the Halls could come before the Planning Commission at a later date should they be unable to access their property other than by using the O'Learys' easement.

On January 10, 1994, the Planning Commission held its next monthly meeting. Once again, the Halls sought a variance and the staff recommended that their request be denied. However, the Planning Commission approved the variance. Appellants argue that the Halls were granted a variance only after Ms. Killebrew, a Planning Commission member and the Halls' real estate agent, advocated on behalf of the Halls. Appellants contend that Ms. Killebrew had a personal and pecuniary conflict of interest and should not have participated in the vote. The Planning Commission minutes do not indicate that Ms. Killebrew spoke at the meeting, although it is clear that she seconded a motion, made by another member of the Planning Commission, to grant the Halls' variance.

Appellants first and second issues on appeal are as follows:

1. Whether the trial court erred in refusing to consider if the

> decision by the Hamilton County Planning Commission to grant the Defendants' subdivision variance was tainted by the improper influence and advocacy of a commission member who had a substantial conflict of interest.
>
> 2. Whether Planning Commission member Lois Killebrew, who zealously advocated for approval of the Defendant's variance, should have been disqualified from any participation in the hearing because she was also Defendants' real estate listing agent and thereby engaged in a conflict of interest which prejudiced the rights of the Plaintiffs.

We agree with Appellees that Appellants' first and second issues are not properly before this Court.

Where review of a decision rendered by a board or commission is not specifically provided for, judicial review is available pursuant to T.C.A. § 27-9-101 et seq. (Michie 1980) See also Wheeler v. City of Memphis, 685 S.W.2d 4, 6 (Tenn. Ct. App. 1984). That statute requires that the aggrieved party file a petition for certiorari either in circuit or chancery court within sixty (60) days of the order or decision becoming final. In Wheeler, this Court stated that a party's failure to file a petition for certiorari within the specified time period makes the decision of the board or commission final. See also Fairhaven Corp. v. Tennessee Health Facilities Comm'n, 566 S.W.2d 885, 886 (Tenn. Ct. App. 1979) (Drowota, J.).

Appellants argue that the purpose of both their Complaint for Injunction and Amended Complaint for Injunction was to appeal the Planning Commission's decision. Appellants state that the fact that a party may mistakenly entitle an action does not preclude a court from proceeding with the action as if it were correctly titled. Fallin v. Knox County Bd. of Comm'rs, 656 S.W.2d 338 (Tenn. 1983). In Fallin, the court stated that an action for declaratory judgment may be employed, rather than a petition for certiorari, in an action to invalidate zoning legislation. Id. at 342. However, even if Appellants had filed an action for declaratory judgment, which they did not, Appellants' error was not only their failure properly to entitle the Complaint. T.C.A. § 27-9-102 (Michie 1980) requires the petitioner to state the basis for relief in the complaint. Appellants' Amended Complaint states that the Planning Commission granted the Halls' request for a variance. The

Amended Complaint does not allege any impropriety with regard to the actions of the Planning Commission or Lois Killebrew. Significantly, T.C.A. § 27-9-104 (Michie 1980) also provides that the petition "shall name as defendants the particular board or commission and such other parties of record, if such, as were involved in the hearing before the board or commission." Appellants failed to name the Planning Commission, or Ms. Killebrew, as parties to the present suit.

We fail to see how Appellants can challenge the actions of the Planning Commission where no representative of the Planning Commission was present at trial. During closing arguments, the judge prohibited counsel for the Appellants from challenging the Planning Commission's actions in granting the Halls' request for a variance, stating "I just don't think that in a separate proceeding that you should be allowed to contaminate the action of the Planning Commission. It could have been appealed and should have been appealed if, in fact someone is acting in a conflict of interest." We agree.

It is well settled that matters not properly before the trial court cannot be raised for the first time on appeal. Foley v. Dayton Bank & Trust, 696 S.W.2d 356, 359 (Tenn. Ct. App. 1985); T.C.A. § 16-4-108 (1994). In bringing the present action, Appellants failed to comply with the provisions of T.C.A. § 27-9-101 et seq. Thus, the trial court did not have jurisdiction to review the Planning Commission's actions. This Court cannot consider the Planning Commissions' actions for the first time at the appellate level. Accordingly, we hold that Appellants first and second issues are not properly before this Court.

Appellants' third issue on appeal is as follows:

> Whether adding another home in the area, with the corresponding increase in traffic frequency and cost for maintenance upon the easement, constitutes a "material increase upon the burden" on the easement as granted in the original deeds subdividing the O'Leary homestead property.

The lower court found that there would not be a material increase in the burden on the easement due to the creation of a second lot on Tract 2, the Halls' property.

This case was tried by the court sitting without a jury; thus, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the lower court's findings, we must affirm, absent error of law. T.R.A.P. 13(d).

The law of easements is well established. In Adams v. Winnett, 156 S.W.2d 353, 357 (Tenn. Ct. App. 1941), this Court stated

> an easement for the benefit of a particular piece of land cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached. In other words, an easement appurtenant to a dominant tenement can be used only for the purposes of that tenement; it is not a personal right and cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate. The purpose of this rule is to prevent an increase of the burden upon the servient estate, and it applies whether the easement is created by grant, reservation, prescription or implication.
>
> A principle which underlies the use of all easements is that the owner thereof cannot materially increase the burden of it upon the servient estate, nor impose a new and additional burden thereon.

Although an owner may not impose new or additional burdens on an easement, it is established that "where the additional burden is relatively trifling, the user will not be enjoined . . . [from using the easement]." Ogle v. Trotter, 495 S.W.2d 558, 566 (Tenn. Ct. App. 1972).

Appellants cite Adams as authority for their proposition that the Appellees' use of the easement will materially increase the burden on Appellants' estate. We find Adams distinguishable. In that case the complainant, Adams, filed suit to enjoin Winnett from interfering with Adams' right of way over Winnett's property. Winnett had previously sold Cummings and Melton a tract of land which adjoined Winnett's property. Winnett granted Cummings and Melton a right of ingress and egress over his property. Adams owned a lot in the same block, the rear of which abutted the side of the Cummings and Melton property. Adams proposed to erect a building on his lot to serve as a United States Post Office. Because the post office contract required access from the rear of the building, Adams purchased a strip of land from Cummings and Melton. That deed included the

same right of ingress and egress over Winnett's land that the grantors had enjoyed. When Winnett threatened to construct a fence to prevent Adams' tenants from using the parcel for ingress and egress, Adams filed suit. The Adams court held that permitting the postal trucks to use the easement would materially increase the burden on the servient estate, far exceeding the use of the easement contemplated in the original grant from Winnett to Adams' grantors, Cummings and Melton.

Whether a change in the use of an easement constitutes a material increase in the burden on the servient estate is a question of fact. Unlike the Adams case, the present suit does not involve a major change in the intended use of the easement. The Halls do not propose a commercial use of the existing easement, as in Adams. Subdivision of the Halls' lot will merely result in one additional family using the right of way. The evidence at trial revealed that this easement has, in the past, been used by more people than are currently using it. There is nothing to prevent additional use of the easement in the future by the Halls, the Clemons, the O'Learys, or the Brocks, even if the land is not further subdivided.

The actual deed creating the easement is not a part of this Court's record. However, the trial court's Memorandum Opinion and Order states the following:

> It is difficult for this Court to find that the parties originally intended to prohibit each other from subdividing the property into reasonable size lots. The holding sought by the Plaintiffs herein would bar any of the owners from dividing their property so as to provide a lot for their children. The Court does not find such an intention in the deed executed on December 24, 1966.

The lower court found that the original deed does not reflect an intention to prevent the parties from subdividing. In the absence of language in the original deed specifically prohibiting subdivision, this Court will not find a restriction by implication. See Turnley v. Garfinkel, 362 S.W.2d 921, 923 (Tenn. 1962).

We hold that the evidence does not preponderate against the trial court's finding that the burden on the servient estate will not be materially increased due to a fourth

family's use of the easement.

For the reasons stated herein, the judgment of the trial court is affirmed. Costs are taxed one half to Appellants O'Leary and one half to Appellants Brock.

HIGHERS, J.

CONCUR:

CRAWFORD, P.J., W.S.

FARMER, J.