**IN THE COURT OF APPEALS OF TENNESSEE,**
**AT NASHVILLE**

**FILED**

**January 11, 1999**

**Cecil W. Crowson**
**Appellate Court Clerk**

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| **NORMAN HOLZINGER**, | ) | Montgomery County Circuit Court |
| | ) | No. C11-568 |
| Plaintiff/Appellant. | ) | |
| | ) | |
| VS. | ) | C.A. No. 01A01-9711-CV-00685 |
| | ) | |
| **INDUSTRIAL DEVLOPMENT BOARD, OF THE COUNTY OF MONTGOMERY, CITY COUNCIL OF CLARKSVILL, TENNESSEE and CITY OF CLARKSVILLE, TENNESSEE**. | ) | |
| | ) | |
| Defendants/Appellees. | ) | |

From the Circuit Court of Montgomery County at Clarksville.
**Honorable James E. Walton, Judge**

**Robert Clive Marks**, MARKS & MARKS, Clarksville,Tennessee
Attorney for Plaintiff/Appellant.

**F. Evans Harvill**, Clarksville, Tennesse
Attorney for Defendant/Appellee Industrial Development Board of the County of Montgomery.
**David Haines**, Clarksville, Tennessee
Attorney for Defendant/Appellee City of Clarksville

OPINION FILED:

**REVERSED AND REMANDED**

**FARMER, J.**

**HIGHERS, J.**: (Concurs)
**TOMLIN, Sp. J.**: (Concurs)

Plaintiff Norman Holzinger appeals an order of the trial court granting a motion for summary judgment filed by Defendant Industrial Development Board of Montgomery County (IDB). Because we find that the trial court should have dismissed IDB's counterclaim, we reverse the ruling of the trial court.

On May 10, 1995, Holzinger, a real estate developer, entered into a contract with IDB under which Holzinger was granted a nine month option to purchase an eighty-seven acre tract of real property. The parties later extended this option by four months so that it did not expire until June 10, 1996. On June 7, 1996, Holzinger notified IDB that he was exercising his option to purchase the real property and requested that IDB prepare the necessary paper work as soon as possible so that the parties could close the deal. On July 12, 1996, IDB mailed this paper work to Holzinger for his approval and requested that Holzinger advise IDB concerning a possible closing date. After receiving no response from this correspondence, counsel for IDB sent a letter to Holzinger's attorney suggesting that the parties proceed with the closing. When, after seven days, counsel for IDB still had not received a response, he sent a second letter to Holzinger's attorney stating that IDB was ready, willing, and able to close. On August 28, 1996, counsel for Holzinger faxed a letter to IDB's attorney explaining that his client had been ill but would be available to consummate the option within "the next couple of weeks." Finally, on September 11, 1996, counsel for IDB mailed a letter to Holzinger's attorney demanding that they schedule a closing.

Before exercising the option, Holzinger sought to have the real property rezoned for multiple family residential use so that it could be used in the development of an apartment complex. The Clarksville City Council denied Holzinger's zoning request. On May 24, 1996, Holzinger filed a complaint in circuit court against the Clarksville City Council, the City of Clarksville, and IDB, seeking review of the City Council's decision (Holzinger's zoning appeal). No relief was sought against IDB; rather, IDB was named as a defendant by virtue of its ownership of the property. IDB filed an answer and counterclaim, requesting a declaration that, as a result of Holzinger's refusal to close, the option had expired. Holzinger filed a reply to IDB's counterclaim, seeking dismissal of IDB's claim on the grounds of improper joinder. On March 25, 1997, Holzinger filed a separate complaint against the Clarksville City Council, the City of Clarksville, and IDB, seeking damages for injuries sustained as a result of the City Council's denial of his zoning request (Holzinger's

inverse condemnation action). Again, IDB was named as a defendant to this second action because of its ownership of the property but no relief was sought against IDB. On May 27, 1997, IDB filed a motion for summary judgment seeking a judgment as a matter of law with respect to its counterclaim filed in Holzinger's zoning appeal. On June 19, 1997, the City of Clarksville filed a second motion for summary judgment, arguing that if the trial court finds that Holzinger has no rights under the option contract as alleged in IDB's counterclaim, then Holzinger lacks standing to maintain his zoning appeal. Holzinger filed a memorandum in opposition to IDB's motion for summary judgment on July 17, 1997, again stating that IDB's counterclaim was improperly joined. The matter came to be heard on August 22, 1997. During this proceeding, the trial court allowed the parties to present live testimony in addition to oral argument by counsel.[1] At the conclusion of the parties' proof, the trial court granted IDB's motion for summary judgment. The trial court then entered orders dismissing both Holzinger's zoning appeal and his inverse condemnation action for lack of standing. This appeal followed.

On appeal, the questions presented for review, as we perceive them, are as follows: (1) Did the trial court err in failing to dismiss IDB's counterclaim on the grounds of improper joinder, (2) Did the trial court err in granting summary judgment in favor of IDB, and (3) Was the evidentiary hearing conducted on August 22, 1997 a full trial on the merits?

After being named as a defendant to Holzinger's zoning appeal, IDB filed a counterclaim asking the trial court to declare that Holzinger no longer had a right to purchase the real property under the option contract. Holzinger replied to IDB's counterclaim as follows:

> **11. Improper joinder.** Plaintiffs' action is an appeal by writ of certiorari with a special standard of review. The counterclaim of defendant, Industrial Development Board, is a normal action different in nature from an appeal by writ of certiorari. These two claims

[1]We note that this procedure is highly unusual and have doubt regarding whether the allowance of live testimony at a hearing on a motion for summary judgment is even permissible. Under Rule 56 of the Tennessee Rules of Civil Procedure, a motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." T.R.C.P. 56.04. This rule does not authorize and we are aware of no other rule permitting the trial court to consider the testimony of live witnesses in addition to pleadings, depositions, answers to interrogatories, admissions, and affidavits.

> cannot be heard together. They are improperly joined. The counterclaim should be dismissed without prejudice to bringing it as a separate action.

Holzinger reiterated this argument in his memorandum in opposition to IDB's motion for summary judgment. Holzinger did not file a motion to dismiss IDB's counterclaim on the grounds of improper joinder. Nor did the trial court address Holzinger's objection to the joinder of IDB's counterclaim when granting IDB's motion for summary judgment. As a general rule, a defense not raised at the trial court level is waived for purposes of appeal. ***See, e.g., Teague Bros., Inc. v. Martin & Bayley, Inc.***, 750 S.W.2d 152, 156 (Tenn. App. 1987)(citing ***Citizens' Bank & Trust Co. v. Scott & Sanders***, 72 S.W.2d 1064 (Tenn. App. 1933); T.R.C.P. 12.08). Under the pleading standards of the Tennessee Rules of Civil Procedure, however, we must construe Holzinger's reply to IDB's counterclaim liberally so as to do substantial justice. ***See Ezell v. Graves***, 807 S.W.2d 700, 704 (Tenn. App. 1990)(citing T.R.C.P. 8.06). Thus, we find that the objection noted in Holzinger's reply to IDB's counterclaim and Holzinger's memorandum in opposition to IDB's motion for summary judgment was sufficient to preserve Holzinger's right to raise the issue of improper joinder on appeal.

As a general rule, a party must assert as a counterclaim any claim that he or she has against an opposing party if the claim arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. ***See*** T.R.C.P. 13.01. Additionally, a party may, but is not required to, assert as a counterclaim any claim that he or she has against an opposing party that does not arise out of the same transaction or occurrence that is the subject matter of the opposing party's claim. ***See*** T.R.C.P. 13.02. As an exception to this rule, however, a party may not assert a counterclaim when the claim of the opposing party is an appeal to the trial court from a decision rendered during an administrative proceeding. In ***Goodwin v. Metropolitan Bd. of Health***, 656 S.W.2d 383 (Tenn. App. 1983), Goodwin was employed by the Metropolitan Board of Health (Board) as a home health aid. ***See id.*** at 386. After an administrative hearing, the Board terminated her employment. ***See id.*** By writ of certiorari, Goodwin appealed the decision of the Board to the chancery court. ***See id.*** In addition to seeking review of the Board's termination decision, Goodwin's petition also asked the trial court to declare certain regulations promulgated by the Board to be unconstitutional. ***See id.*** We stated as follows:

> Before considering the first issue, we wish to heartily condemn that which appears to us to be a growing practice, i.e., the joinder of an appeal with an original action and the simultaneous consideration of both at the trial level. This Court is of the firm opinion that such procedure is inimical to a proper review in the lower certiorari Court and creates even greater difficulties in the Court of Appeals. The necessity of a separation of appellate review of a matter and trial of another matter ought to be self evident. In the lower Court one is reviewed under appropriate Appellate rules and the other is tried under trial rules. In this Court our scope of review is dependent upon the nature of a proceeding. In this case one matter would be limited by rules of certiorari review and the other would be reviewed under 13(d), Tennessee Rules of Appellate Procedure. Like water and oil, the two will not mix.
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> . . . .
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> We believe that the continued practice of joining appellate jurisdiction and original jurisdiction in one hearing will lead to procedural chaos bogged down in a quagmire of legal conflicts with reasoned law sinking in the quicksands of confusion.
>
> The Chancellor eventually dismissed the Declaratory Judgment aspect of the case, but we hold it should have been dismissed at the very outset.

***Id.*** at 386-87.

Similarly, in ***State ex. rel. Byram v. City of Brentwood***, 833 S.W.2d 500 (Tenn. App. 1991), the Brentwood Planning Commission (Commission) failed to approve a proposed final plat of a subdivision to be built on a piece of real property owned by Byram. ***See id.*** at 501. Byram filed an action in circuit court seeking review of the Commission's decision and damages sustained as a result of the Commission's actions. ***See id.*** Quoting extensively from ***Goodwin***, we noted that it was improper to join Byram's appeal from the decision of the Commission with an original action for damages, holding that the latter should have been dismissed by the trial court prior to its consideration of Byram's appeal. ***See id.*** at 502.

In the instant case, IDB contends that the rule set forth in ***Goodwin*** and followed in ***Byram*** is inapplicable. Specifically, IDB argues that, even though Holzinger sought review of the Board's ruling by writ of certiorari, the trial court should have treated his action as one seeking a declaratory judgment. In support of this argument, IDB cites ***Fallin v. Knox County Bd. of Comm'rs***, 656 S.W.2d 338 (Tenn. 1983). In ***Fallin***, the Knox County Board of Commissioners passed a resolution amending a zoning ordinance that affected the classification of a piece of real

property owned by Joyner. ***See id.*** at 340. Fallin filed a petition for writ of certiorari with the chancery court challenging the resolution. ***See id.*** The court first noted the rule that "[g]enerally, certiorari will not lie to review acts which are purely legislative in character, whether they are performed by an inferior tribunal or board or by an officer." ***Id.*** at 341 (citing 14 Am. Jur. 2d ***Certiorari*** § 19 (1964)). The court then held as follows:

> It is our opinion that an action for declaratory judgment . . . rather than a petition for certiorari is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other legislative action of county, city or other municipal legislative authority enacting or amending zoning legislation. . . .
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> . . . .
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> We wish to point out, however, that the remedy of certiorari . . . will continue to be the proper remedy for one who seeks to overturn the determination of a Board of Zoning Appeals . . . . This distinction in remedies is made because the determinations made by a Board of Zoning Appeals are administrative determinations, judicial or quasi-judicial in nature, and are accompanied by a record of the evidence produced and the proceedings had in a particular case, whereas, the enactment of ordinances or resolutions, creating or amending zoning regulations, is a legislative, rather than an administrative, action and is not ordinarily accompanied by a record of evidence, as in the case of an administrative hearing.

***Id.*** at 342 (citing ***Holdredge v. City of Cleveland***, 402 S.W.2d 709 (Tenn. 1966); ***Reddoch v. Smith***, 379 S.W.2d 641 (Tenn. 1964)).

In the instant case, Holzinger's action is not one seeking to invalidate an ordinance, resolution, or other legislative action. Rather, it is an action asking the trial court to overturn the City Council's denial of his zoning request. The denial of a zoning request is clearly an administrative determination, judicial or quasi-judicial in nature. We thus find that the facts of the present case are distinguishable from those of ***Fallin***. Accordingly, we conclude that Holzinger properly sought relief by writ of certiorari. Under ***Goodwin*** and ***Byram***, an original action for declaratory judgment may not be joined with an appeal by writ of certiorari. Therefore, we must hold that the trial court erred in failing to dismiss IDB's counterclaim for declaratory relief.[2]

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[2]Our ruling should not be read, however, to preclude IDB from asserting its claim as a separate action or as a counterclaim to Holzinger's inverse condemnation action.

In granting IDB's motion for summary judgment, the trial court made no substantive ruling regarding the City Council's denial of Holzinger's zoning request. Rather, the trial court stated as follows:

> I find that the evidence is undisputed that the actions of The Industrial Development Board complied with the terms of the option, that their decisions and actions were reasonable standards that are accepted in the profession. I find that Mr. Holzinger was called upon to close the transaction and for whatever reason did not do so.
>
> Therefore, these matters I have just stated I believe to be matters on which there is no material dispute and that The Industrial Development Board is entitled to a judgment as a matter of law.

This declaration of the trial court is precisely the relief sought in IDB's counterclaim. In fact, the trial court's ruling on IDB's motion for summary judgment is based entirely on its finding that, as a matter of law, IDB is entitled to relief under its counterclaim. Thus, the trial court's ruling on IDB's motion for summary judgment is dependant on the assumption that IDB's counterclaim was properly before the court. We hold that IDB's counterclaim should have been dismissed by the trial court. Thus, we must also reverse the ruling of the trial court granting summary judgment in favor of IDB.

In light of our ruling with respect to the improper joinder of IDB's counterclaim, we deem it unnecessary to discuss any of the remaining issues raised on appeal.

For the foregoing reasons, the ruling of the trial court is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion. The costs of this appeal are assessed to IDB, for which execution may issue if necessary.

FARMER, J.

HIGHERS, J. (Concurs)

TOMLIN, Sp. J. (Concurs)