

COPY

IN THE SUPERIOR COURT OF MADISON COUNTY
STATE OF GEORGIA

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MADISON COUNTY
2015-2056
14MV00696

COMMERCE INVESTMENT
OPPORTUNITIES, INC., d/b/a
IVIE FUNERAL HOME
DANIELSVILLE CHAPEL and
FAMILY WORSHIP CENTER, INC.

CIVIL ACTION

Plaintiffs

vs

FILE NO. 14MV696-M

EDDIE PRITCHETT and
ANTHONY DOVE,

Defendants

PROPOSED ORDER

The Plaintiffs filed an action for a writ of mandamus or in the alternative a declaratory judgment against Anthony Dove, Chairman of the Board of Commissioners and Eddie Pritchett, formerly the Chief Building Inspector, of Madison County, Georgia. Mr. Pritchett resigned as building inspector after filing and service of this action.

On or about March 31, 2014, the Plaintiffs, the owner and lessee of certain property lying in Madison County, Georgia, applied for a building permit to install and operate a cremation machine at their funeral home. The Madison County Zoning Administrator, the one authorized and directed by the Zoning Ordinance to interpret the provisions of the ordinance, issued a zoning certification to the Plaintiffs certifying that a cremation machine was a permitted use under the existing zoning classification of Plaintiffs' business, i.e. a "funeral home and mortuary".

A building permit was issued and the Plaintiffs proceeded to purchase and install at considerable expense a free standing cremation machine within its existing building. After requesting a final inspection, the Chief Building Inspector, conducted an inspection of the machine, found nothing improper or defective, but failed to issue a certificate of completion because of a direct order from Anthony Dove, Commission Chairman. Consequently, this action ensued.

The matter came on for hearing on February 6, 2015 with the Honorable Stephen E. Boswell, presiding. The Zoning Administrator of the county, Linda Fortson, testified that after conducting research, she was convinced that a cremation machine was proper for a funeral home under the existing zoning ordinance. The Defendant Anthony Dove testified that he disagreed with the zoning administrator but had conducted no personal research and based his opinion on numerous emails that he had received on the issue. The named Defendant Eddie Pritchett testified that but for the order of the Chairman Anthony Dove, he would have issued a certificate of completion.

The crux of this case comes down to an interpretation of the zoning ordinance and in particular the permitted use of "funeral home".

First, several observations: One, "... the general rule is that the owner of land has the right to use it for any lawful purpose. Restrictions upon an owner's use of land must be clearly established and must be strictly construed. Moreover, any doubt concerning restrictions on private property are not favored in Georgia." *Jones v Morris*, 325 Ga. App. 65, 67 (2013). While the Defendant has repeatedly argued that Madison County government should not be required to accept cremation, the true issue is whether Madison County government properly restricted the use of Plaintiffs' property to deny them the right to the use of a cremation machine in their funeral business. Two, the Defendants have argued that there is no mention of "cremation" in the Zoning Ordinance, but likewise there is no mention of embalming, burial, floral sales, transporting dead bodies, viewing dead bodies or worship or eulogy services. Interestingly, the Chairman only selects cremation as the service not included in the use of "funeral home" and appears to have no problems with burial, selling caskets, embalming and the like. Finally, the

Defendants have argued that the Plaintiff may at some point decide to provide only cremation at the funeral home, if that service is permitted. This is no more likely than the business becoming exclusively an embalming station, a casket retailer or wholesaler, or exclusively a hearst service. Plaintiff Sammy Highsmith has testified that numerous funeral homes in the area which have crematories as part of their funeral homes including funeral businesses in Athens, Hartwell, Elberton, Baldwin, Cornelia and Cumming, Georgia. For the following reasons this Court concludes that the Zoning Certification issued to the Plaintiffs was valid and that the Plaintiffs should be authorized to operate the installed cremation machine.

I. The Zoning Certification issued to the Plaintiffs was valid as a matter of law.

Section 12.1 of the Zoning Ordinance vests in the Zoning Administrator the duty of interpreting and enforcing the provisions of the zoning ordinance. No other person or official is given that right. (Article XIII provides for a procedure to appeal the decisions of the zoning administrator but there is no issue of appeal in this case).

The instant case is not a situation where the Zoning Administrator has determined something far afield from the ordinary and logical understanding of an appropriate and incidental service of a funeral home. If the Zoning Administrator, for example, certified that a poultry operation or a carwash was included in the term "funeral home", this would be a totally different situation. In those cases clearly the interpretations would be wrong, and a true issue would result as to whether the Zoning Certification was valid.

Regardless of the fact that the Zoning Ordinance vests in the Zoning Administrator the exclusive right to interpret the ordinance, a reasonable case, separate from the authority of the Zoning Administrator, can be made that the Zoning administrator was correct. A funeral home is the business that makes provisions for the final disposition of a dead body. The Georgia legislature in laws codified a OCGA §§ 10-14-3(17) and 43-18-1(10) regulating "Cemeteries and Funeral Services" and "Funeral Directors and Establishments, Embalmers, and Crematories" defines "funeral services" as follows:

"[means] any service relating to the transportation, embalming, *cremation*, and interment of a deceased human being . . ."

"The definition set forth at Paragraph 10 entitled "Funeral or funeral service means the observances, services, or ceremonies held for dead human bodies and includes any service relating to the transportation, embalming, cremation, and interment of a deceased human body."

Since funeral homes provide funeral services, it is apparent that utilizing the plain and ordinary meaning of the term "funeral home" will include by ordinary definition and by statutory definition at least a reasonable claim that cremation is included in the permitted use of a "funeral home".

Additionally, under OCGA §43-18-71 anyone engaged in the funeral business whether or not it includes a crematory must have a licensed funeral director who is in full and continuous charge of the establishment. Like burial, cremation follows "hand-in-glove" with the other requirements and services of a funeral home.

"The construction of a zoning ordinance is a question of law for the courts. In construing such an ordinance, we consider the general rule that the owner of land in fee has the right to use the property for any lawful purpose. Since zoning ordinances restrict an owner's right to freely use his property, they are in derogation of common law. Thus, they must be strictly construed in favor of the property owner and never extended beyond their plain and explicit terms. Any restrictions must be clearly established, and ambiguities in the language construed in favor of the free use of the property." *Henry v Cherokee County*, 290 Ga. App. 355, 356 (2008).

Where a term is ambiguous, the Court will employ the rules of construction in interpreting the language. The first rule is to engage the "four corners" of the ordinance to attempt to determine the intent of the legislation. Here there is nothing in the four corners of the document to assist in interpreting the term in dispute. Where the legislation itself provides no assistance, the Court will employ the ordinary and logical meaning of the ambiguous terms. Where, as in the instant case, there is a possible claim

that ordinary and logical meanings do not resolve the issue and doubt remains, the ordinance should be interpreted in favor of the property owner.

In the case of *Fayette County v Seagraves*, 245 Ga. 196 (1980), the Court considered the term "structure" in a zoning ordinance, and whether the term included items attached thereto, the Georgia Supreme Court in concluding that the term structure was broad enough to encompass the items attached declared at Page 197 as follows:

"Georgia follows a majority of states in holding that zoning ordinances should be strictly construed in favor of the property owner, and ambiguities in the language of the zoning ordinances should be resolved in favor of the free use of the property."

The same rule was followed in the case of *JWIC, Inc v City of Sylvester*, 278 Ga. 416 (2004). In that case the landowner appealed a decision of the trial court ruling that the zoning ordinance did not permit apartments in restricted office-industrial district. In reversing the trial court's decision, the Georgia Supreme Court held:

"Contrary to the trial court's ruling, we conclude that apartments are a permitted use in the RO-I district as a matter of right. In this regard, the decisive rule of construction in this case is that ambiguities in a zoning ordinance must be resolved in favor of the property owner."

The Zoning Administrator who is the one person charged with the responsibility of interpreting the provisions of the ordinance and the one person under the ordinance who can issue a zoning certification concluded that a crematory was included in the term "funeral home" just as one would conclude burial, embalming, and transporting dead bodies to be included in the permitted use. The State legislature has defined funeral service to include *cremation*. The conclusion seems evident that the zoning ordinance authorizes the utilization of a crematory under the permitted use of a funeral home.

Nevertheless, in the event that such a conclusion is not clear and undisputable, a reasonable claim can be advanced that the permitted use includes a crematory. If this be the case, the conclusion must be that the meaning of the term "funeral home" is in doubt and under Georgia law, the doubt should be resolved in favor of the property owner and the free use of the property.

To hold otherwise, where terms in the ordinance are ambiguous, is to place the property owner in a position where he cannot reasonably ascertain the permitted uses in a given zoning district and be certain of the validity of his zoning certification and building permit. Such uncertainty will create economic and financial chaos. If a landowner or lender, for that matter, has no means, other than a court action, to determine the validity of his zoning certification and building permit, commercial activity will be seriously retarded and sources of financing will be unavailable or significantly limited. The only appropriate means of resolving this dilemma is to conclude, as the law provides, that where there is doubt of the meaning of a term in the zoning ordinance, that term should be construed reasonably but in favor of the property owner and the free use of his property.

II The Plaintiffs Acquired Vested Rights Upon the Issue of a Valid Permit

“Where a landowner makes a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of the permit.” *Barker v County of Forsyth*, 248 Ga. 73, 76 (1981).” *WMM Properties, Inc. v Cobb County*, 255 Ga. App. 436, 438(1986).

“Once a building permit has issued, a landowner has a right to develop the property pursuant to that permit (during its term or for a reasonable time after its issuance if no term is specified), notwithstanding a zoning or regulatory change subsequent to the issuance of the building permit, and notwithstanding the fact that there has been no substantial expenditure of funds in reliance upon the building permit.” *WMM Properties, Inc., supra* at 438.

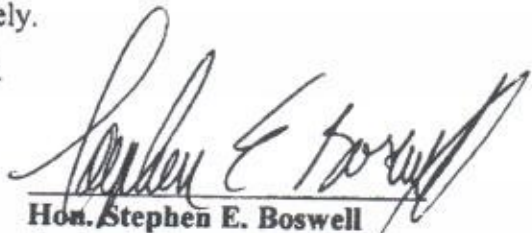
The Plaintiffs were, in fact, issued a valid permit, and they received assurances from zoning officials that their project complied with the existing zoning requirements. Relying on these assurances, the Plaintiffs expended substantial sums of money to

purchase and install their cremation machine. As such they acquired vested rights which entitled them to a certificate of completion, once the machine was properly installed.

It is therefore ordered and adjudged that the Plaintiffs' application for a writ of mandamus be and is hereby granted and the Certificate of Completion for the operation of Plaintiffs' cremation machine be issued immediately.

SO ORDERED this 4 day of February, 2015.

March



Hon. Stephen E. Boswell
Senior Judge
Georgia Superior Courts

Presented by:

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