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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000185-MR

BUTCHERTOWN NEIGHBORHOOD ASSOCIATION, INC., ANDREW CORNELIUS, DAVID PAIGE, AND ELIZABETH PAIGE — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 10-CI-006457

LOUISVILLE METRO BOARD OF ZONING ADJUSTMENT; LOUISVILLE METRO GOVERNMENT; JBS USA, LLC; AND SWIFT PORK COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellants, Butchertown Neighborhood Association, and residents Andrew Cornelius, David Paige and Elizabeth Paige (collectively "the Association"), appeal from an order of the Jefferson Circuit Court dismissing their

complaint for judicial review, as well as a declaration of rights, against Appellees, the Louisville Metro Board of Zoning Adjustment ("Board"), Louisville Metro Government, JBS USA, LLC and Swift Pork Company. For the reasons set forth herein, we affirm.

JBS is the owner of Swift Pork Company, the last remaining slaughterhouse located on a central corridor of downtown Louisville, Kentucky, known as Butchertown. The land on which the facility sits was originally part of the Bourbon Stock Yards, a major livestock exchange that began operating in 1834. The facility is located in the M-3 zone with a conditional use permit ("CUP") originally issued in 1969, that allows "[t]he operation of industrial meat packaging plants, including the slaughtering of animals, the processing, packaging and storing of meats, the operation of feedlots, the storing of hair and hides, and the rendering & storage of offal." In 1981, the JBS's CUP was modified to allow for the construction of an animal stunning and bleeding facility on the conditions that the facility proposed in the modified CUP was developed in strict compliance with the approved development plan and that any further expansion of the facility had to be approved by the Board.

In the fall of 2008, without first applying for and obtaining a further modification of its CUP, JBS began construction on large hog offloading enclosures. On January 12, 2009, a code enforcement officer with the Louisville Metro Office of Inspections, Permits and Licensing noticed the construction and issued a Stop Work Order. JBS ceased construction and thereafter filed an

application with the Board for a modified CUP ("MCUP") requesting approval for (1) the installation of a replacement boiler in a boiler room expansion building; and (2) a 4,008 square foot hog unloading chute enclosure.

On August 31, 2009, the Board held a public hearing on JBS's application, during which the Association and its member residents presented testimony objecting to the MCUP. Specifically, the residents complained that JBS had increased its daily processing capacity over the years to approximately 10,000 hogs per day and that the excessive noise and odor emanating from the facility negatively affected their lives. JBS, however, presented evidence that the proposed unloading chute was designed to eliminate the animals' exposure to inclement weather and would allow them to travel from the trucks to the plant with less shock to their systems, thereby reducing noise and odors.

Following the hearing, the Board voted to approve JBS's request for an MCUP to allow for installation of the new boiler on the conditions that (1) "[t]he new boiler [would] be 1 (one) 50,000 lb. per hour boiler to replace the same that exist[ed] with the total boiler capacity not exceeding 175,000 lbs per hour;" and (2) "the applicant will restrict the extra capacity gained by the new boiler room expansion in that storage of animals or meat products in the boiler rooms are forbidden. Neither the existing boiler room nor the boiler expansion structure shall be used for storage of animals, animal carcasses, meat products or meat by-products of any kind, whether refrigerated or not." Further, the Board also approved an MCUP for the construction of the unloading chute subject to three

conditions. The first two conditions were that: (1) the maximum number of hogs slaughtered per day, on a six-day rolling average, could not exceed 10,500 and (2) slaughtering was to be defined as "[t]he operation of killing hogs and eviscerating carcasses, all of which is conducted under the observation of the USDA Federal Safety Inspection Service." The third condition required that:

> The applicant [JBS] pay for and plant landscaping and or hardscaping either on their site (if possible) and within the Butchertown Neighborhood in the amount of $137,500.00. The determination of the placement and selection of landscaping will be in collaboration with the Butchertown Neighborhood Association, JBS-Swift, Planning & Design's staff landscape architect. All pertinent agency staff and others listed above will report back to the Board within 90 days to discuss the landscape/hardscape plan.

Despite the Board's approval, on September 30, 2009, JBS filed an appeal in the Jefferson Circuit Court, arguing that the Board acted arbitrarily and in excess of its statutory and regulatory power by including Condition No. 3 in the MCUP approving the hog chute, that such violated JBS's due process rights, and that it was imposed without substantial evidence to support it. By opinion and order entered June 1, 2010, Judge Cowan agreed that the $137,500 landscaping condition was "unconstitutionally arbitrary" and was "without substantial evidence to support it."

> When the record is considered as a whole, it is practically indisputable that the Board imposed the landscaping requirement arbitrarily by deciding that JBS should pay for starting construction on the chute before obtaining the necessary government approvals. This is most clearly evidenced by the fact the Board imposed the amount of

> JBS' payment by determining that JBS completed 25 percent of the chute before seeking the MCUP and building permits, then multiplying the total cost of the project by the percent of completion to arrive at the $137,500.00 worth of landscaping. It is difficult to imagine a more arbitrary exercise of regulatory power, and the Court therefore finds that the Board's imposition of Condition No. 3 on JBS is unconstitutionally arbitrary . . . .

Judge Cowan further ruled that there was no authority to sever the unconstitutional condition from the remainder of the MCUP and thus "revers[ed] the Board's final order and remand[ed] the matter . . . for further proceedings." Judge Cowan's decision was not appealed by any party herein.

Subsequently, at its next regularly scheduled meeting on July 19, 2010, the Board discussed how to proceed in light of Judge Cowan's order and ultimately scheduled a public hearing to be held on November 15, 2010, for reconsideration of JBS's hog chute MCUP application. However, shortly after the July board meeting, the Association began complaining to the Board that JBS was approaching the one-year statutory deadline[1] to exercise the 2009 MCUP and that JBS had not sought an extension. Thereafter, in response to the Association's complaints and despite Judge Cowan's ruling reversing the Board's approval of the MCUP, JBS requested that "the Board set a time period for the exercise of the conditional use permit following the Board's hearing on November 15, 2010; in

[1] KRS 100.237(3) provides that a conditional use permit must be exercised "within the time limit set by the board, or within one (1) year if no specific time limit has been set, ..."

the event that an appeal is filed the time period should begin at the conclusion of the appeal."

On Friday August 13, 2010, the Board revised its agenda for its regular hearing on the following Monday to include consideration of JBS's request. Although counsel for JBS received notice of the hearing, the Association alleged that it did not. During the August 16th hearing, the Board granted JBS's request for an extension of time to exercise the MCUP until six months after all future potential litigation related to the MCUP had been exhausted.

On September 15, 2010, the Association filed the complaint for judicial review and declaration of rights at issue herein. Pursuant to KRS 100.347,[2] the Association sought review of the Board's final action of August 16, 2010, arguing that such violated KRS Chapter 100 and the Louisville Metro Land Development Code ("LDC"), as well as the Association's statutory rights under KRS 61.820, and deprived them of their procedural and substantive due process rights under the Kentucky Constitution. In addition, pursuant to KRS 418.040, KRS 100.237, and LDC §11.5A.1(C), the Association sought a declaration that (1) the August 2009 MCUP expired by operation of law on August 31, 2010; (2) the Board's August 16th consideration of JBS's request for an extension violated Kentucky's Open Meetings Act, the Board's own policies and procedures, and denied the Association due process; (3) as of September 1, 2010, there was no valid CUP

[2] KRS 100.347(2) states: "Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall appeal from the final action to the Circuit Court of the county in which the property, which is the subject of the commission's action, lies."

authorizing JBS to engage in any animal slaughtering and rendering activities at the Butchertown facility; and (4) if JBS intended to continue its operations it was required to apply for a new original CUP in compliance with all requirements for such application.

In lieu of filing an answer, JBS filed a motion to dismiss for failure to state a claim upon which relief could be granted, arguing that Judge Cowan had declared Condition No. 3 unconstitutional, thus voiding the entire chute MCUP as a matter of law. As such, any action taken by the Board on August 16th was of no consequence and could not be declared valid or invalid, or in violation of the Association's rights. JBS further argued that the Association did not have the right to bring separate claims for declaratory and injunctive relief because KRS 100.347 provided an adequate remedy, and finally that there was no violation of the Open Meetings Act because KRS 61.820 only requires a public agency to make its schedule of regular meetings available to the public.

On January 24, 2014, the trial court entered a memorandum and order granting JBS's motion to dismiss on the grounds that Judge Cowan's 2010 decision invalided the 2009 chute MCUP. Specifically, the trial court ruled:

> JBS's construction of the pig offloading enclosure in compliance with the MCUP was contingent upon its ability to comply with all three conditions imposed by the Board. Judge Cowan's finding that Condition No. 3 was unconstitutional and the resulting reversal and remand nullified the Board's approval of the MCUP, such that it was impossible for JBS to exercise the MCUP until after the Board could conduct a hearing on remand. Thus it does not appear that JBS holds an MCUP relating to the

> construction of the pig offloading enclosure upon which it could have legally taken action.
>
> Likewise, as Judge Cowan noted in his opinion, JBS also sought an order granting the MCUP without the imposition of Condition No. 3. In denying the request, Judge Cowan indicated that JBS cited no authority to support the court's severance of the unconstitutional condition from the MCUP. While not so stating, it is apparent that Judge Cowan recognized that the Circuit Court on appeal did not have the authority or jurisdiction to modify the MCUP as approved by the board. . . .
>
> The one-year time limitation on the performance of the MCUP became inapplicable upon remand until after the Board could have a public hearing for reconsideration of the conditions and approval of the MCUP. Therefore, no extension was necessary or even legally possible. As such, it is of no consequence that JBS did not exercise the permit within one year from August 31, 2009; . . . or that the Board granted JBS's request for an extension of time at its August 16, 2010 hearing and those actions cannot be declared invalid or in violation of Plaintiff's rights. Likewise, any failure of the Board to provide proper notice to Plaintiffs that it would consider JBS's request at its scheduled August 16, 2010 hearing is of no consequence and cannot be declared invalid or in violation of Plaintiff's rights. Accordingly, Plaintiffs' Complaint fails to state a claim upon which relief can be granted and the claims asserted therein will be dismissed as a matter of law.

This appeal ensued.

In Kentucky, a motion to dismiss for failure to state a claim upon which relief can be granted should be granted only if "it appears to a certainty that the claimant is entitled to no relief under any state of facts which could be proved in support of the claim." *Kevin Tucker & Assoc. v. Scott & Ritter*, 842 S.W.2d 873 (Ky. App. 1992), *overruled on other grounds in Degener v. Hall Contracting*

Corp., 27 S.W.3d 775 (Ky. 2000); *see also Pari-Mutuel Clerks' Union of Kentucky Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When a trial court considers a motion to dismiss "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987). In evaluating a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must restrict its review of the record to the pleadings. CR 12.02. Finally, as noted in *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010),

> Since a motion to dismiss for failure to state a claim upon which relief can be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*.

On appeal, the Association argues that this Court must determine whether (1) an administrative appeal properly perfected pursuant to KRS 100.347, or a properly stated caused of action for declaratory relief, may be dismissed at the pleadings stage pursuant to CR 12.02(f) for failure to state a claim upon which relief may be granted; (2) JBS should be estopped from reversing the legal positions they advanced below; (3) a voluntary appeal by a successful applicant for an MCUP nullifies the entire preexisting CUP where the applicant has already availed itself of the permit's benefits; and (4) whether the statutory one-year time period to exercise a CUP approved by a Board of Zoning Adjustment is tolled where a successful applicant challenges the conditions of approval while simultaneously availing itself of the benefits.

We believe that the threshold issue in this matter is the effect Judge Cowan's opinion and order had on the validity of the MCUP. The Association contends that, contrary to the trial court's finding, Judge Cowan's ruling that Condition No. 3 was unconstitutional did not render the entire MCUP void. The Association points out that Kentucky law favors severing any unconstitutional part of an enactment and preserving the remaining parts, and thus contends that only Condition No. 3 was voided by the opinion and order. KRS 466.090; *Martin v. Commonwealth*, 96 S.W.3d 38, 58 (Ky. 2003), *cert. denied*, 539 U.S. 928 (2003). We must disagree.

The Association's position wholly ignores the plain language of Judge Cowan's opinion and order, which unequivocally states that "the final order of the Louisville Metro Board of Zoning Adjustment is REVERSED and the matter is remanded for further proceedings . . . ." Moreover, Judge Cowan specifically denied JBS's request to sever the unconstitutional condition noting that "where the Circuit Court determines that the administrative action was taken arbitrarily, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" (*Citing Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky. App. 1997)).

Although the Association now seeks to debate in this Court whether Condition No. 3 should or should not have been severed from the remainder of the MCUP, Judge Cowan's decision was not appealed by any party herein and is not subject to review in this Court. We simply cannot reach any conclusion other than

that Judge Cowan's order reversed, in totality, the Board's approval of the chute MCUP. Accordingly, we must agree with JBS that any valid MCUP with respect to the chute enclosure ceased to exist after June 1, 2010. It necessarily follows then, that anything related to the MCUP after Judge Cowan's remand, particularly any action the Board took on August 16, 2010, was of no consequence and, as noted by the trial court, could neither be deemed invalid nor violative of the Association's rights.

The Association contends that JBS should be estopped from denying the validity of the 2009 MCUP because such is inconsistent with its earlier position in the administrative proceedings. Specifically, the Association takes issue with JBS's offer to post a $137,500 bond as well as its request for a date certain to exercise the chute MCUP after the matter was remanded by Judge Cowan. We have to agree with JBS, however, that the actions it took were "out of an abundance of caution" and were logical in light of a possible appeal of Judge Cowan's opinion. Certainly, JBS's request for an extension was made in direct response to the Association's complaint that it had failed to timely exercise the MCUP.

Nor do we find any merit in the Association's contention that JBS should be estopped from denying the validity of the 2009 MCUP because it affirmatively availed itself of the benefits of such by completing the boiler room expansion. Interestingly, this argument belies the Association's claim below that JBS failed to timely exercise the MCUP or request an extension of such. Notwithstanding, as

the trial court pointed out, the Board approved two separate requests by JBS – one for the replacement boiler expansion, which was not appealed, and one for the unloading chute enclosure. Each approval followed a separate Board discussion and vote, and each approval was based upon separate specific conditions. We are of the opinion that JBS's replacement of the boiler pursuant to one MCUP was not an acceptance of the benefits of the separate chute MCUP.

The foundation of the Association's argument in this Court is that it properly perfected an administrative appeal pursuant to KRS 100.347 and stated a cause of action for declaratory relief. In so arguing, it cites to the decision by our Supreme Court in *Board of Adjustments of the City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978), wherein the Court stated, "It is as plain as a billboard that the legislature has granted to persons aggrieved by the final action of the board of adjustments the grace of appeal to the circuit court provided they perfect that appeal . . . ." Indeed, KRS 100.347 provides that "[a]ny person or entity claiming to be injured or aggrieved by any final action of the board of adjustment" is entitled to judicial review. The failure in the Association's position, however, lies in the fact that it could not have been injured or aggrieved by the Board's action on a void MCUP. In other words, there can be no claim for relief from an action that was invalid to begin with.

Contrary to the Association's arguments, administrative appeals pursuant to KRS 100.347 may properly be dismissed for failure to state a claim upon which

relief can be granted pursuant to CR 12.02.[3] We conclude that the trial court herein properly determined that, even construing all of the pleadings in favor of the Association, "it appears to a certainty that [it would be] entitled to no relief under any state of facts which could be proved in support of its claim" in light of Judge Cowan's opinion and order. *See Kevin Tucker & Associates*, 842 S.W.2d at 873 (*Citing Spencer v. Woods*, 282 S.W.2d 851 (Ky. 1955)). Once the Board's decision on the chute MCUP was reversed because it was predicated on an unconstitutional condition, the Association could not have been aggrieved by any subsequent actions taken with respect to it.

For the reasons set forth herein, we affirm the memorandum and order of the Jefferson Circuit Court granting the CR 12.02(f) motion to dismiss for the Association's failure to state a claim upon which relief can be granted.

ALL CONCUR.

[3] *See Power v. Cynthiana-Harrison County-Berry Board of Adjustments Members*, 2011-CA-000471 (March 30, 2012).

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