COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

ESTILL COUNTY ENERGY PARTNERS, LLC, FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO CONSTRUCT A COAL COMBUSTION FACILITY IN ESTILL COUNTY, KENTUCKY	)))))	CASE NO. 2002-00172

DLX'S AND HARRY LAVIERS, JR., TRUSTEE'S MOTION TO DISMISS AND MEMORANDUM

* * * * * * * * *

Come DLX, Inc. ("DLX"), and Harry LaViers, Jr., as Trustee of a Trust established for the benefit of Donald G. LaViers, Stephen D. LaViers, Henry LaViers, IV, and Elizabeth LaViers Owen, all under the Will of Maxie LaViers, deceased (the "Trust")[1], by counsel, and move the Siting Board (a) to dismiss so much of ECEP's application for a construction certificate as pertains to property and property rights held by DLX and the Trust; or (b) to dismiss ECEP's application in its entirety because almost all of the land required for the proposed plant and the best refuse coal is owned by DLX, rendering the application meritless. These motions are supported by the record, by the responses (or non-responses to various data requests, filed testimony and by the following memorandum.

INTRODUCTION

Imagine what it would be like to answer your door one morning and to be told that the

[1] The Trust was created under the will of Maxie LaViers, deceased, which is of record in Will Book J, Page 375, in the Estill County Clerk's Office.

construction crew in your front yard was there to demolish your home and build another pursuant to permits that someone had acquired from the city government. Once you were able to collect your thoughts, one of the first would be to ask how someone who did not own any interest in your property could have obtained the permits in the first place! Such is the case here, except that DLX and the Trust are attempting to see that the construction certificate does not issue as to their interests, so as to prevent further harm.

This motion does not apply to any arguments that either DLX or the Trust have with respect to the Application and its effect on their property, which are reserved and will be addressed in their brief if the Application is not dismissed.

FACTS[2]

The facts have been state at length in DLX's and the Trust's Motion to Intervene, their responses to the Staff's First Data Requests and in their testimony that was filed in the record, which is incorporated herein by reference. However, the primary issues for the purpose of this motion centers upon th following irrefutable facts:

1. ECEP's alleged predecessor in title, Fox Trot Properties, LLC, does not and cannot have any interest in the Refuse Pile Tract nor the Calla Subdivision because:

   a. DLX's deeds to Kentucky Processing Company's deeds do not convey the Refuse Pile Tract nor the Calla Subdivision;

   b. before the auction in KPC's bankruptcy, DLX filed the bankruptcy case and a lis pendens, and a brief synopsis fo DLX's claim was announced prior to the auction, thereby placing any purchaser, such as Fox Trot, on notice;

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[2] All abbreviations and references to the properties in DLX's and the Trust's Motion to Intervene as to the Refuse Pile Tract, the Calla Subdivision, the Sand Hill Properties, the Adverse Tracts (the property and rights owned by DLX and the Trust), the Trust Deed (the tract in the Calla Subdivision that the Trust conveyed to KPC) and to the Plant Property, the Bankruptcy Case (the Kentucky Processing bankruptcy action), KPC (for Kentucky Processing Company), FTP (for Fox Trot Properties, LLC), Calla (for Calla Energy Partners, LLC), and the

c. Fox Trot does not have a deed to the Adverse Tracts, in particular:

i. as to the Refuse Pile Tract, unless the Bankruptcy Court rules in Fox Trot's favor *and* such a judgment becomes final and unappealable; and

ii. as to the Calla Subdivision, because no action is pending and these tracts are specifically excepted and not conveyed in the deeds to Fox Trot's would-be grantor, Kentucky Processing Company.

d. If ECEP's alleged predecessor in title does not have sufficient title in the Refuse Pile Tract and in the Calla Subdivision, then it has nothing to convey or lease to ECEP.

2. ECEP has admitted in its application and in its responses to the Staff's and DLX's Data Requests that it does not have a lease from Fox Trot.

3. Neither DLX nor the Trust have authorized ECEP or Fox Trot to subject their property to the Application and construction certificate.

ECEP has not and cannot establish that it (or Fox Trot, for that matter) has any interest in the Adverse Tracts.

ARGUMENT[3]

ECEP filed its application without a lease or any other grant from Fox Trot, which does not have any interest in the Adverse Tracts. ECEP will undoubtedly ask the Siting Board to issue a construction certificate, even if it contains an exception as to the Adverse Tracts. DLX and the Trust believe that the Board cannot act unless ECEP has a verifiable interest in the property sufficient to allow it to undertake the acts authorized by a construction certificate. There are several reasons why this is so.

[3] Copies of cited cases from other jurisdictions are attached hereto. DLX and the Trust reserve the right to brief additional arguments following the hearing if it is held.

I. THE PUBLIC SERVICE COMMISSION AND THE KENTUCKY STATE BOARD ON ELECTRIC GENERATION AND TRANSMISSION SITING BOARD ARE ADMINISTRATIVE AGENCIES AND CANNOT DECIDE ISSUES PERTAINING TO THE PROPERTY OWNED BY DLX AND THE TRUST.

The Siting Board has already reached this conclusion, as set forth in the July 23, 2004, order to that effect. However, the question remains as to whether it can issue a construction certificate to someone who does not have any interest in the property where the plant is to be constructed nor in a substantial portion of the fuel to be burned therein. *See* Argument II hereinbelow.

A. THE PUBLIC SERVICE COMMISSION AND THE KENTUCKY STATE BOARD ON ELECTRIC GENERATION AND TRANSMISSION SITING BOARD ARE ADMINISTRATIVE AGENCIES AND CANNOT EXERCISE THE JUDICIAL POWER INVESTED IN THE COURTS.

DLX and the Trust incorporate by reference the arguments that are set forth in the corresponding section of their Motion to Intervene.

B. THE UNITED STATES BANKRUPTCY COURT HAS EXCLUSIVE JURISDICTION TO DECIDE ALL MATTERS PERTAINING TO THE REFUSE PILE TRACT AND, POSSIBLY, AS TO THE CALLA SUBDIVISION.

DLX and the Trust incorporate by reference the arguments that are set forth in the corresponding section of their Motion to Intervene.

C. THE KENTUCKY COURTS HAVE EXCLUSIVE JURISDICTION TO DECIDE ISSUES PERTAINING TO REAL ESTATE AND THE TITLE AND ACCESS THERETO.

DLX and the Trust incorporate by reference the arguments that are set forth in the corresponding section of their Motion to Intervene.

D. THE PROCEEDINGS REGARDING THE APPLICATION DO NOT AFFORD DLX AND THE TRUST DUE PROCESS OF LAW AND OTHER RIGHTS GUARANTEED BY THE CONSTITUTIONS OF KENTUCKY AND THE UNITED STATES.

DLX and the Trust incorporate by reference the arguments that are set forth in the corresponding section of their Motion to Intervene.

II. THE SITING BOARD DOES NOT HAVE JURISDICTION NOR AUTHORITY TO GRANT ECEP A CONSTRUCTION CERTIFICATE UNDER KRS § 278.700, *ET SEQ.*

Aside from the foregoing arguments and those pertaining to the separation of powers required by the Kentucky Constitution, the Siting Board can only act to issue a construction certificate concerning specific property if the applicant actually has the property rights necessary to undertake the acts authorized by the construction certificate (the "Requisite Interest"). It may be argued that KRS § 278.010, *et seq.*, does not require any such showing, but that is incorrect and is much different than adjudicating title issues between litigants.

A. KRS § 278.700, ET SEQ., DOES NOT AUTHORIZE THE SITING BOARD TO ISSUE A CONSTRUCTION CERTIFICATE TO A MERCHANT POWER PLANT TO AN APPLICANT THAT DOES NOT HAVE THE PROPERTY RIGHTS NECESSARY TO UNDERTAKE THE ACTS AUTHORIZED BY THE CONSTRUCTION CERTIFICATE.

It seems that it ought to be axiomatic that someone who seeks a construction or building permit ought to demonstrate that they have the right to build the structure if they obtain the permit. Otherwise, the Board could act without any showing that the affected property is actually before it and subject to its jurisdiction.

1. KRS § 278.700, et seq. (the "Act"), recognizes that participants in the permitting process have certain property rights before they have standing to participate.

KRS 278.700, *et seq.*, makes several references to property owners and ownership (emphasis

added by bolding):

- KRS § 278.700(3) "'Person' means any individual, corporation, public corporation, political subdivision, governmental agency, municipality, partnership, cooperative association, trust, estate, two (2) or more persons **having a joint or common interest**...." KRS § 278.706(1) then allows "[a]ny **person** seeking to obtain a construction certificate from the board to construct a merchant electric generating facility shall file an application at the office of the Public Service Commission." A joint or common interest in what? Real property that they own, not in that which they do not.
- KRS § 278.704(2) provides that "[e]xcept as provided in subsections (3), (4), and (5) of this section, no **person** shall commence to construct a merchant electric generating facility unless the exhaust stack of the proposed facility is at least one thousand (1,000) feet from **the property boundary** of any **adjoining property owner** and two thousand (2,000) feet from any residential neighborhood, school, hospital, or nursing home facility. How will anyone really know where a property boundary is until it is surveyed and signed according to law? Once completed, will it not be some evidence of a claim to title by the applicant? The title requirements for adjoining owners cannot be more stringent than those for the applicant lest the enactment fail to equally protect citizens of the Commonwealth.
- KRS § 278.707(2)(c)(1) requires that an applicant give notice to all"**[l]andowners whose property borders the proposed site**." If one must own land to be entitled to notice, what of the applicant?
- Many of the tests and reports that the applicant must prepare and file pursuant to KRS §

278.700, *et seq.*, require that the applicant go upon the property. If the applicant does not have the necessary property rights to do so, then it is a trespasser. Surely the Act does not authorize an applicant to trespass on someone else's property. The Board must infer that the Act requires the applicant have the necessary property rights and, if not, should dismiss the application. If the Board issues a construction certificate, then it has authorized and encouraged ECEP to trespass on DLX's and the Trust's land.

- Finally, KRS § 278.710 requires the Board to consider the aforesaid property rights and issues prior to deciding whether to grant the application.

The definition of "person" is, by itself, sufficient to require an applicant to produce evidence that it holds title to the necessary property rights and the remaining sections confirm that. Should it be determined that this is insufficient, then the requirement exists by implication.

One other related statute is worth mentioning, particularly because ECEP has *not* filed an application regarding any power lines. Under KRS § 278.714(2)(b), an application to construct an unregulated power line must include:

> (b) A **full description of the proposed route** of the transmission line and its appurtenances. The description shall include a map or maps showing:
>
> 1. The location of the proposed line and all proposed structures that will support it;
>
> 2. The **proposed right-of-way limits**;
>
> 3. Existing property lines and the names of **persons who own the property over which the line will cross**....

Title *is* an issue in such an application as are the boundaries and locations, which would require a survey.

ECEP cannot seriously contend that it does not make any difference who owns the property

or that it can merely state that its prospective lessor, Fox Trot, owns the property without producing legal instruments establishing those claims. KRS § 278.700, *et seq.*, requires otherwise.

2. To the extent that KRS § 278.700, *et seq.*, does not explicitly require an applicant to have the property rights necessary to undertake the acts authorized by the construction certificate, then they are implied by law.

Sometimes the basis for agency action is supported by legal inferences that are presumed. Were it not so, then many statutes and regulations would not pass constitutional muster. If the Siting Board should conclude that KRS § 278.700, *et seq.*, does not require that an applicant prove that it has the Requite Interest, then it is possible to save KRS § 278.700, *et seq.*, from being declared unconstitutional by recognizing that said requirements are implicit within the Act.

For example, in *Walsh v. City of Brewer*, 315 A.2d 200 (Me. 1974), an individual filed an application for a license or permit to develop a mobile home park on property that was owned by his mother and his wife. His standing to do so was challenged on the basis that he did not own the land in question. Although the zoning ordinances did not contain any express conditions concerning his eligibility. Nevertheless, the Supreme Court of Maine concluded that:

> [W]hen ... there is lacking a clear, affirmative and express provision to the contrary, such 'title, right or interest' in the land is implicitly a valid precondition of 'standing' to be a proper 'applicant' under the ordinances.
>
> This interpretation appears highly desirable, policy-wise, to ensure that, absent clear and unquestionable legislative expression manifesting a different legislative attitude, governmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulation and control to be undertaken.

Id. at 207. The court then determined whether the plaintiff had the requisite "title, right or interest" - and held that he did not.

The Board must, if necessary, read the act in the same manner and require ECEP to demonstrate whether it has the requisite "title, right or interest" in the Refuse Pile Tract or in the Calla Subdivision to allow it to construct a merchant power plant, burn refuse located on the property and to use the property in connection with these purposes. Construction of a plant and burning the on-site coal will result in significant changes to the realty and will deplete the resources on the property. For those reasons alone ECEP's application must be examined closely, particularly since administrative processes such as zoning are in derogation of the common law and must be strictly construed. *Hamner v. Best*, Ky. App., 656 S.W.2d 253, 255 (1983).

B. ECEP Does Not Have Any Interest in the Refuse Pile Tract or the Calla Subdivision Sufficient to Undertake the Acts Authorized Thereon by a Construction Certificate.[4]

In Kentucky, one must have an interest in the subject property to change the zone, obtain building permits, etc. The leading case is *Hatch v. Fiscal Court of Fayette County*, Ky., 242 S.W.2d 1018 (1951). There, the applicant for a zone change had an option to purchase the property for the erection of a shopping center, and it was argued that this was insufficient to initiate a zone change. The Court held, however, that "courts have recognized the right of an option holder to make an application for a zoning change..." *citing Dunham v. Zoning Board of Westerly*, 26 A.2d 614 (R.I. 1942), and *Wilson v. Township Committee of Union Township*, 9 A.2d 771 (N.J. 1939). 242 S.W.2d at 1022.[5] A key distinction in *Hatch* is that the option was for the express purpose of building the shopping center. Absent that, the developer would not have had the right to begin development until

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[4] Since many of the cases discuss the adequacy of interests in realty concurrently with standing, they will be presented together.

[5] Often, as in *Hatch*, those who wish to purchase property for development include clauses which make the sale contingent on obtaining the change and frequently grant the optionee the authority to pursue it.

after exercising the option. Otherwise, the option would have expired and with it, rendering the zoning board's action hypothetical - somewhat akin to asking a court to render an advisory opini0n on matter that is not yet ripe or justiciable. For that reason, the cases cited in *Hatch* are illuminating.

In *Dunham v. Zoning Board of Westerly*, 26 A.2d 614 (R.I. 1942), a power company wished to build a public utility plant within a residential area and obtained an option to purchase from the owner of the site. The option, however, was not mutually binding. *Id.* at 615-616. Nevertheless, the utility and the landowner filed a petition for the necessary zone change. The opposing adjo9ining property owners maintained that the petition should be denied because the utility "did not have the required legal interest in the land to warrant its application...." *Id.* at 615. The Supreme Court of Rhode Island agreed, but affirmed solely because the owner had joined in the petition:

> **Conceding that Narragansett had no mutually binding contract for the sale and purchase of the land, and therefore had no such legal interest therein as would support an application, in its own right, for special exception under the zoning ordinance**, nevertheless that would not be decisive upon the board's authority in the instant case. The application in question was also made, signed and prosecuted personally before the board by the owner of the land whose right under the ordinance to apply for such an exception is not questioned.

Id. at 615-616 (emphasis added). The new Jersey case and the line of authority upon which it relies is of similar import.

Wilson v. Township Committee of Union Township, 9 A.2d 771 (N.J. 1939), concerned the question of whether one who did not possess an interest in the subject property could apply for a building permit if they offered sufficient proof of a grant of authority from the owner. In concluding that the applicant had established his authority, the New Jersey Supreme Court referred to several other cases, *Krieger v. Scott*, 134 A. 901 (N.J. 1926), *Malone v. Mayor and Aldermen of Jersey City*, 147 A. 571 (1929), and *Slamowitz v. Jelleme*, 130 A. 883 (N.J. 1925), and concluded that they did

not conflict with their holding. *Id.* at 478. Since Kentucky's highest court cited *Wilson* as authoritative and, by implication, the underlying rationale, these cases bear further investigation.

In *Krieger v. Scott*, 134 A. 901 (N.J. 1926), several realtors applied for a zone change as to property that they did not own or have any interest in. In affirming the denial of the permit, the New Jersey Supreme Court stated that:

> It is hardly necessary to say that, unless they were the owners of the property, or had such an interest therein as would entitle them to erect the proposed building thereon, the inspector was justified in refusing to issue a permit....

Id. *Malone* and *Slamowitz* examine whether it is necessary for the optionee to have the owners consent to obtain a building permit prior to closing.

In *Malone v. Mayor and Aldermen of Jersey City*, 147 A. 571 (N.J. 1929), the optionee applied for a building permit, "but merely held an option for its purchase." *Id.* Consequently, his application was denied and he appealed. The New Jersey Supreme Court affirmed, observing:

> Normally no one but the owner or a person authorized by him to do so has a right to erect a building upon a plot of ground owned by the former. No such right vests in a person holding a contract for the purchase of the tract. He may default in the performance of his contract. So, too, the owner may for good cause refuse to perform it on his part. In order to entitle an applicant to the granting of a permit to erect a building upon the land of another, it is necessary for him to show that he had a present right to erect such a building on that land.

Id. at 571-572. In *Slamowitz*, on the other hand, the optionee had the owner's permission and was able to compel the grant of a building permit. 130 A. 883. The rules enunciated in these cases are the law in Kentucky. Accordingly, several rules can be gleaned from *Hatch* and the cases that it cited as authority:

- An optionee can apply for a building permit or zone change prior to closing so long as he or she has the owner's permission; and
- The option must be mutually binding; such that

- The optionee has a present right to undertake the acts contemplated by the permit.
- One who does not have an interest in the property sufficient to undertake the acts contemplated by the permit has no standing.[6]

Other courts have held that void contracts for sale and options that expire before the permitting process is complete cannot serve as the basis for a building permit or zone change. *City of Madison*, 763 S.2d 162 (Miss. 2000)(void contract); *Murray v. Inhabitants of Town of Lincolnville*, 462 A.2d 1983 (Me. 1983)(expired option). Because ECEP may continue to argue that it has the requisite interest or authority, a few additional cases will be of assistance.

ECEP may contend that because Fox Trot is involved in litigation as to the Refuse Pile Tract that it can proceed as to those interests. In *Batchelder v. Planning Board of Yarmouth*, 575 N.E.2d 366 (Mass. App. 1991), the applicant filed for permission to subdivide some land as to which they claimed to be the "owner of record." The problem was that the applicant only owned an undivided 7/28 interest in the subject property and claimed the rest by adverse possession. *Id.* at 367-368. Unfortunately, the adverse possession claim depended upon the outcome of litigation that was never finalized, which caused the Massachusetts Court of Appeals to deny the appeal:

> Therefore, the crucial issue is whether the trial judge erred in ruling that the mere filing of a complaint to register land, based solely upon a claim of title by adverse possession, is not sufficient to clothe the plaintiff with "owner of record" status (as required by the board's regulations, note 5, supra) for purposes of applying for subdivision approval.
> ....
> The effect of such a complaint, if allowed, is to vest title to the land in the petitioner, thereby making ownership certain and indefeasible. G.L. c. 185, § 1(a). *Deacy v. Berberian*, 344 Mass. 321, 328, 182 N.E.2d 514 (1962). **Contrary to the board's contention, however, the mere act of filing a complaint for registration does not, in itself, affect the state of title.** *See* G.L. c. 185, § 36. Here, the trust withdrew its registration complaint before

[6] *Ran court, infra*, at 965; *Murray* at 43.

> the Land Court issued a final decree establishing title to the locus. Therefore, there was no sufficient basis upon which the trust could establish that it was the "record owner" of the locus at the time it submitted the preliminary and definitive plans. Accordingly, the trust had no standing to apply for subdivision approval as of the dates the plans were submitted.

Id. at 369 (emphasis added). Likewise, ECEP cannot argue that the mere existence of the Bankruptcy Case can serve as an interest in real property sufficient to support an application for a construction permit - it is, after all, an inchoate matter which may not be final for several years. There are also public policy reasons underlying this rule:

> Chief among the policy concerns underlying the enactment of the Subdivision Control Law was to ensure the provision of "adequate drainage, sewerage, and water facilities, without harmful effect to adjoining land and to the lots in the subdivision." *Meyer v. Planning Bd. of Westport*, 29 Mass.App.Ct. 167, 170, 558 N.E.2d 994 (1990). *See* G.L. c. 41, § 81M. One of the ways in which this objective is achieved by local planning boards is to secure a covenant from the "owner of record" which provides for the installation of adequate municipal services. G.L. c. 41, § 81U. If the owners of record are not fully identified or if the planning board has been misled as to the record owners, the public would not be protected because the board would be unable to ensure that it would receive a properly executed covenant, or in the event of a modification or amendment of a plan approval, a properly executed consent.

Id. The Siting Board has similar responsibilities to the public, all of which will be for naught if the true owner does not agree to the conditions imposed for the public's protection.

C. ECEP Has Neither Standing Nor the Requisite Authority to Obtain a Construction Certificate.

See the foregoing section.

D. ECEP Has Waived Any Right to Permit Any Portion of the Adverse Tracts.

The Staff, DLX and the Trust submitted data requests to ECEP seeking information about its alleged legal interest in the property and about any surveys that it conducted. *See* ECEP's objections to DLX and the Trust's Data Request Nos. 3 (supporting title instruments), 4 (similar request), 5

(copies of surveys) and 6 (names/addresses of those with knowledge). It also failed to provide adequate responses to the Staff's First Data Request Nos. 10 (deed descriptions and acreage for each parcel) and 11 (deed for each parcel). The same problems exist for Will Herrick's Data Request Nos. 2(a and e)(ownership of the property and supporting documents. Instead, ECEP merely submitted deeds that do not describe the Refuse Pile Tract or the Calla Subdivision, a fact which Fox Trot admitted in the Bankruptcy Case.[7]

It has been held that administrative bodies such as the Siting Board can and should examine the legal instruments by which applicants claim the legal rights that would entitle them to the permits that they seek. In *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993), the board examined and interpreted the underlying deeds to see whether an applicant actually held the easement that would have allowed the applicant to construct a dock. The court concluded that "[t]he board correctly determined that Rancourt did not establish a sufficient legal interest in the right-of-way to entitle her to apply for a permit to place a dock thereon. Accordingly, the decision to revoke her permit should be affirmed." *Id.* at 966.

ECEP should not be rewarded for refusing to answer questions that are material to its application and its application should be dismissed. Conclusory statements as to ownership are meaningless. *See Walsh* at 208.

D. ECEP Has Neither Standing Nor the Requisite Authority to Obtain a Construction Certificate.

See the section IIB, *infra*.

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[7] Fox Trot's and DLX's counsel stipulated to the introduction of Richard Hall's affidavit and survey at the trial in the Bankruptcy Case. The affidavit and the attachments reveal that Kentucky Processing does not have record title to the Adverse tracts. Accordingly, since ECEP claims trough Fox Trot, it is bound thereby.

III. IF THE SITING BOARD GRANTS THE CONSTRUCTION CERTIFICATE AS TO THE ADVERSE TRACTS, THEN IT HAS VIOLATED DLX'S AND THE TRUSTS RIGHTS GUARANTEED TO THEM UNDER THE FEDERAL AND STATE COONSTITUTUTIONS, THE LAWS OF THIS STATE AND THE COMMON LAW.

If the Siting Board allows ECEP to continue with its Application as it pertains to the Refuse Pile Tract or to the Calla Subdivision, then it is depriving them of their property rights guaranteed under the Kentucky and federal constitutions (*see* Motion to Intervene) and to procedural due process. Neither the Trust nor DLX should be compelled to participate in application proceedings concerning their property which they did not authorize. It is also possible that granting ECEP's application may result in an unauthorized taking.

IV. IF THE SITING BOARD GRANTS THE CONSTRUCTION CERTIFICATE AS TO THE ADVERSE TRACTS, THEN IT WILL HAVE ACTED SO AS TO INDUCE ECEP AND ITS PREDECESSORS IN TITLE TO THE ADVERSE TRACTS (IF ANY THERE BE) TO FOMENT LITIGATION AGAINST DLX AND THE TRUST, RENDERING IT LIABLE FOR THE CONSEQUENCES THEREOF.

DLX and the Trust have property rights and plans to use them profitably. At present, that is impossible due to the cloud that ECEP and its supposed lessor, Fox Trot, have placed upon their title. Should they succeed in obtaining a construction certificate from the Board, ECEP will be able to do much more than cloud their title - it may attempt to build a merchant power plant on their land and to burn coal that they won, permanently damaging their property rights and plans. This could have personal implications for the Board.

Kentucky's laws relating to champerty evince the Commonwealth's public policy against fomenting litigation. If the Board grants the application, it will have created a very large carrot to dangle in front of ECEP promising, in essence, that if ECEP and Fox Trot will continue and commence legal actions against DLX and the trust, that they will be rewarded with an unfettered right to construct the plant and burn the coal. Why would the Board wish to take sides in this matter? If it does, DLX and the Trust will have no option but to defend themselves. DLX and the Trust feel that they must reveal that continued consideration of their property as part of the Application could lead to action against the Board.

It is well known that one who aids another in interfering with another's contractual rights is liable to them in tort. DLX and the Trust enjoy a very special kind of property rights guaranteed by certain contracts called deeds. Furthermore, to the extent that a cloud persists as to DLX's and the Trust's titles, which is apparent, they have sustained and will continue to sustain damage. Forcing DLX and the Trust to endure a proceeding instigated by one who does not own *any* interest in the Adverse Tracts is certainly harming DLX and the Trust. ECEP, Fox Trot and their employees have slandered DLX's and the Trust's title to the Refuse Pile Tract and to the Calla Subdivision. Should the Board allow this situation to persist by failing to dismiss as requested and by granting the application, even if conditional, it will not only serve to deepen the wound, but may render the Board a knowing ally of ECEP and, as such, jointly and severally liable for any damages suffered by DLX and the Trust herein. This possibility underscores the wisdom of requiring applicants to possess the interests needed to support the application.

V. KRS § 278.700, *ET SEQ.*, IS UNCONSTITUTIONAL TO THE EXTENT THAT IT DENIES DLX AND THE TRUST THE RIGHTS ENUMERATED HEREIN.

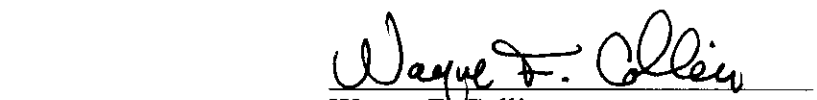
The Act is unconstitutional if it denies or to the extent that it is applied to deny DLX and the Trust any of the rights set forth herein. If the Act is constitutionally deficient, then it will be impossible to grant the Application.

CONCLUSION

ECEP's application should be denied, at least with respect to the property that DLX and the Trust own and for which ECEP and Fox Trot have no deed or lease. As a practical matter, the consequences of granting such permission can be dire for all concerned, including ECEP.

In *Home Depot, U.S.A., Inc. v. Saul Subsidiary Limited Partnership*, Ky. App., _ S.W.3d _, 2004 WL 1699614 (2004), Home Depot wanted to build a detached building instead of connecting it to the Lexington Mall. Although Home Depot prevailed initially, the Court of Appeals reversed and remanded because it concluded that the restriction was binding and required the Fayette Circuit Court to determine the proper remedy. After remand, the Circuit Court ordered Home Depot to demolish its building and it appealed. The Court of Appeals affirmed. Although not yet final, this demonstrates the foolhardiness of proceeding where rights in real estate are in question and not yet final. To grant a construction certificate as to the Refuse Pile Tract and the Calla Subdivision invites a similar, if not more expensive, disaster.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via first class mail or by hand delivery on this the 24th day of August, 2004, to the following:

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Appeals Court of Massachusetts,
Barnstable.

Theron BATCHELDER et al.
v.
PLANNING BOARD OF YARMOUTH; Palmer Davenport, Trustee, Intervener.

No. 89-P-1338.

Argued Jan. 23, 1991.
Decided July 23, 1991.
Further Appellate Review Denied
Sept. 26, 1991.

Application for approval of definitive subdivision plan was approved by the planning board, and owners of abutting property brought action to annul decision. Applicant intervened. The Superior Court, Barnstable County, George C. Keady, Jr., J., entered judgment annuling action of board, and applicant appealed. The Appeals Court, Brown, J., held that: (1) applicant's mere filing of complaint to register land, based solely upon claim of title by adverse possession, was not sufficient to clothe applicant with "owner of record" status required by planning board regulation to apply for approval of definitive subdivision plan, and (2) planning board lacked authority to waive "owner of record" requirement for applicant for definitive subdivision plan.

Affirmed.

West Headnotes

[1] Zoning and Planning ⚖383
414k383 Most Cited Cases

Applicant's mere filing of complaint to register land, based solely upon claim of title by adverse possession, was not sufficient to clothe applicant with "owner of record" status required by planning board regulation to apply for approval of definitive subdivision plan; applicant voluntarily withdrew its land registration complaint to most of land after board's approval of definitive plan. M.G.L.A. c. 41, § 81L; c. 185, §§ 1 et seq., 1(a).

[2] Records ⚖9(1)
326k9(1) Most Cited Cases

[2] Records ⚖9(13)
326k9(13) Most Cited Cases
Effect of complaint to register property based on claim by title of adverse possession, if allowed, is to vest title to land in claimant, thereby making ownership certain and indefeasible, but mere act of filing complaint for registration does not, in itself, affect state of title. M.G.L.A. c. 185, §§ 1 et seq., 1(a), 36.

[3] Zoning and Planning ⚖383
414k383 Most Cited Cases

Planning board lacked authority to waive "owner of record" requirement for applicant for definitive subdivision plan, as waiver would undermine one of principal aims of subdivision control law, which seeks to ensure provision of adequate drainage, sewage, and water facilities, without harmful effect to adjoining land and lots. M.G.L.A. c. 41, §§ 81M, 81R, 81U, 81W.

[4] Zoning and Planning ⚖431
414k431 Most Cited Cases

Although planning board may, when appropriate, waive strict compliance with its rules and regulations, it may not do so unless such waiver is in public interest and not inconsistent with intent and purpose of subdivision control law. M.G.L.A. c. 41, § 81R.

[5] Zoning and Planning ⚖383
414k383 Most Cited Cases

Waiver of planning board's regulations requiring record owner to be applicant for definitive subdivision plan approval, or at minimum to participate in application process by executing forms and appearing at hearing, would undermine one of principal aims of Subdivision Control Law. M.G.L.A. c. 41, §§ 81M, 81R, 81U, 81W.

****367 *104** Matthew J. Dupuy, West Yarmouth, for intervener.

Charles M. Sabatt, Hyannis, for plaintiffs.

Before BROWN, PERRETTA and LAURENCE, JJ.

BROWN, Justice.

This case arises out of an approval by the defendant, planning board of Yarmouth (board), of a defective subdivision plan submitted by the trustees of Davenport Realty Trust (trust) for a development which would adjoin the Blue Rock golf course in Yarmouth. The plaintiffs own property abutting the locus. We are asked to decide whether the trust's ownership interest in the locus was sufficient to obtain approval of its definitive subdivision plan, and if not, whether the board had the power to waive "the requirements

of its regulations relative to the applications [for approval of a subdivision***105** plan] and the presence at any hearing of the owner of record." We conclude that the trust lacked standing to apply for definitive plan approval and that the board's purported waiver of the so-called "owner of record" requirement was inconsistent with the intent and purpose of the Subdivision Control Law. See G.L. c. 41, §§ 81K et seq.

The pertinent facts giving rise to this dispute are as follows. In 1982, the trust filed a complaint in the Land Court to register a parcel of land in South Yarmouth consisting of 6.44 acres (the locus). [FN1] The complaint was based solely on the trust's "claim of title to [the] locus ... by adverse possession." The Land Court, as required by G.L. c. 185, § 37, as appearing in St.1981, c. 658, § 19, referred the complaint for registration to one of its title examiners to "search the records and investigate all facts stated in the complaint or otherwise brought to his notice, and [to] file in the case a report thereon, concluding with a certificate of his opinion upon the title."

> FN1. The locus, owned by the trust since 1962, abuts the Blue Rock golf course.

During the pendency of the registration proceeding, on July 14, 1986, the trust filed an application with the board for approval of a preliminary subdivision plan of the locus. This application identified the trust as the owner of record and was signed by one of its trustees, Dewitt Davenport, in the space reserved for "signature of owner of record." In the space requesting a deed reference for the property, the trust inserted a reference to a deed recorded in the Barnstable registry of deeds in book 4572, ****368** page 155, which covered real property in West Yarmouth more than one mile away from the locus and having no connection with the locus. The application for approval of the preliminary plan was subsequently denied by the board at a meeting held on September 4, 1986. [FN2]

> FN2. As will be seen, we are not faced with the question whether a planning board properly may allow filing of a preliminary plan by a person who expects to own but does not yet have record title.

***106** By an application dated January 16, 1987, the trust filed a plan with the board seeking approval of a definitive plan. The application identified the owner of record as "John Doe, c/o Town of Yarmouth." The title reference provided in the application referred to the docket number assigned to the trust's land registration complaint. The definitive plan was subsequently approved by the board on May 20, 1987, and a certificate of approval was filed with the town clerk on June 1, 1987.

Subsequent to the board's approval of the definitive plan, the Land Court examiner concluded that the trust "did not have good record title to one hundred percent (100%) of [the] locus" as of the date either plan had been submitted. [FN3] The trust thereafter voluntarily withdrew its land registration complaint to all but one-half acre of the locus.

> FN3. The judge found that the trust had "apparently ... acquired by deed dated May 11, 1987, ... good record title to [only] a fractional interest, less than 7/28, in the locus."

On June 10, 1987, the plaintiffs commenced this action to annul the decision of the board approving the definitive plan, alleging that the board's actions were arbitrary and capricious, and in excess of its authority. The trust was allowed to intervene. On July 19, 1989, a judge of the Superior Court entered a judgment annulling the action of the board as having been in excess of its authority. This appeal from that judgment ensued pursuant to G.L. c. 41, § 81BB.

The trial court's duties in hearing and deciding appeals under § 81BB are to conduct a hearing de novo, find the relevant facts, and determine the validity of the planning board's decision. *Fairbairn v. Planning Board of Barnstable*, 5 Mass.App.Ct. 171, 173, 360 N.E.2d 668 (1977). This court will not upset the factual determinations of the lower court unless clearly erroneous.

[1] 1. It is settled that a planning board regulation requiring the applicant for definitive plan approval to be an "owner of record" is a reasonable regulation. *Kuklinska v. Planning Board of Wakefield*, 357 Mass. 123, 129, 256 N.E.2d 601 (1970). We think it important that the "owner" of a site be properly identified on ***107** a definitive plan to be recorded. In *Kuklinska*, the plaintiffs sought to overturn a definitive plan on the ground that the applicant did not own all the land included within the plan. Because the planning board regulation at issue in that case required that the "applicant must be the owner of all the land included in the proposed subdivision," the court held that the definitive plan did not conform to the regulation and was thus invalid. [FN4] The opinion underscored the point that the regulation was consistent with G.L. c. 41, § 81L, as amended by St.1961, c. 331, which defines a subdivision applicant as an "owner or his agent". See also *Hahn v. Planning Board of Stoughton*, 24 Mass.App.Ct. 553, 556, 511 N.E.2d 20 (1987), where this court reiterated that G.L. c. 41, § 81L, defines an applicant as an "owner or his agent," and upheld the validity of a planning board regulation requiring that the applicant must hold record title to the land shown on the plan.

FN4. Implicit in the court's reasoning in the *Kuklinska* decision was the determination that it is reasonable under G.L. c. 41, § 81M, for a planning board to require that an applicant be an owner of record.

Here, the regulations promulgated by the board relating to the requirements for obtaining plan approval are not dissimilar to those at issue in *Kuklinska* and *Hahn.* [FN5] ****369** Therefore, the crucial issue is whether the trial judge erred in ruling that the mere filing of a complaint to register land, based solely upon a claim of title by adverse possession, is not sufficient to clothe the plaintiff with "owner of record" status (as required by the board's regulations, note 5, *supra*) for purposes of applying for subdivision approval.

FN5. Yarmouth planning board regulation § III, par. 312, requires that the "owner or his representative" be present at the hearing. Section III, par. 332, requires that applicants for preliminary plan approval must submit "Form B" which in turn requires "Name of Owner of Record," a title reference from the Barnstable registry of deeds, and a "Signature of Owner of Record." Section III, par. 333(b), requires that the preliminary plan must contain the "names and addresses of the record owner and the applicant" Section III, par. 341(a), states that the applicant must submit copies of a properly executed form C which requires the "Name of Owner of Record," a registry of deeds title reference, and "Signature of Owner of Record." Finally, § III, par. 342(b), requires that the name of the "record owner" be placed on the application for definitive plan approval.

[2] ***108** The defendant filed a complaint to register the property pursuant to G.L. c. 185. The effect of such a complaint, if allowed, is to vest title to the land in the petitioner, thereby making ownership certain and indefeasible. G.L. c. 185, § 1(*a*). *Deacy v. Berberian,* 344 Mass. 321, 328, 182 N.E.2d 514 (1962). Contrary to the board's contention, however, the mere act of filing a complaint for registration does not, in itself, affect the state of title. See G.L. c. 185, § 36. Here, the trust withdrew its registration complaint before the Land Court issued a final decree establishing title to the locus. Therefore, there was no sufficient basis upon which the trust could establish that it was the "record owner" of the locus at the time it submitted the preliminary and definitive plans. Accordingly, the trust had no standing to apply for subdivision approval as of the dates the plans were submitted. [FN6]

FN6. We have no occasion to address the board's argument that the trust's subsequent purchase of a fractional interest in the locus relates back to the time the plans were filed, and thus is sufficient to confer "owner of record" status (see *Kuklinska,* 357 Mass. at 129, 256 N.E.2d 601), because on the date the definitive plan was approved, the trust had title only to a portion of the locus. See note 3, *supra.*

[3][4] 2. The board argues that the trial judge erred as matter of law when it ruled that the board did not have the power to waive its regulation that the "owner of record" must sign its application forms and be present at the hearings. [FN7] We disagree. While it is true that a planning board may, when appropriate, waive strict compliance with its rules and regulations, it may not do so unless such waiver "is in the public interest and not inconsistent with the intent and purpose of the subdivision control law." G.L. c. 41, § 81R, as appearing in St.1953, c. 674, § 7. See *Wheatley v. Planning Bd. of Hingham,* 7 Mass.App.Ct. 435, 440, 388 N.E.2d 315 (1979).

FN7. The trial judge concluded that although the board never specifically waived these requirements of its regulations, "it attempted to do so de facto."

[5] Chief among the policy concerns underlying the enactment of the Subdivision Control Law was to ensure the provision of "adequate drainage, sewerage, and water facilities, without harmful effect to adjoining land and to the lots in the ***109** subdivision." *Meyer v. Planning Bd. of Westport,* 29 Mass.App.Ct. 167, 170, 558 N.E.2d 994 (1990). See G.L. c. 41, § 81M. One of the ways in which this objective is achieved by local planning boards is to secure a covenant from the "owner of record" which provides for the installation of adequate municipal services. G.L. c. 41, § 81U. If the owners of record are not fully identified or if the planning board has been misled as to the record owners, the public would not be protected because the board would be unable to ensure that it would receive a properly executed covenant, or in the event of a modification or amendment of a plan approval, a properly executed consent. G.L. c. 41, § 81W. See *Stoner v. Planning Bd. of Agawam,* 358 Mass. 709, 715, 266 N.E.2d 891 (1971). Therefore, a waiver, as here, of the board's regulations which require the record owner to be the applicant for plan approval, or at a minimum to participate in the application process by executing forms B and C and appearing at the hearing, would undermine one of the principal aims of the statute. ****370** *Wheatley v. Planning Bd. of Hingham, supra.*

Judgment affirmed.

31 Mass.App.Ct. 104, 575 N.E.2d 366

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Supreme Court of Mississippi.

CITY OF MADISON
v.
Steve BRYAN.

No. 97-CA-01205-SCT.

May 11, 2000.
Rehearing Denied July 20, 2000.

Building permit applicant filed bill of exceptions to city's veto of his site plan. The Circuit Court, Madison County, John B. Toney, J., held issue moot and awarded costs and attorney's fees to applicant. City appealed. The Supreme Court, Prather, C.J., held that: (1) applicant who had no interest in property at time of filing bill of exceptions did not have standing, and (2) applicant was not entitled to costs and attorneys fees as Rule 11 sanctions.

Affirmed in part, reversed in part, and remanded.

McRae, J., filed a dissenting opinion in which Diaz, J., joined.

West Headnotes

[1] Zoning and Planning ⚖571
414k571 Most Cited Cases

Building permit applicant did not have standing to appeal city's veto regarding his site plan, as at time applicant filed bill of exceptions with the circuit court applicant was not the owner of the title nor did he have a valid option to purchase, a valid contract to purchase, or a mortgage or any other encumbrance on the property, and thus applicant had no valid interest in the property.

[2] Action ⚖13
13k13 Most Cited Cases

Standing is a jurisdictional issue which may be raised by any party or the court at any time.

[3] Zoning and Planning ⚖571
414k571 Most Cited Cases

For building permit applicant to have standing regarding city's veto of site plan, he had to demonstrate that the city's action had an adverse effect on property in which he had an interest.

[4] Costs ⚖2
102k2 Most Cited Cases

Building permit applicant was not entitled to costs and attorneys fees as Rule 11 sanctions based on city's defense to challenge to veto of site plan, as city ultimately prevailed in court on ground that primary issue in case was moot. Rules Civ.Proc., Rule 11.

[5] Appeal and Error ⚖984(1)
30k984(1) Most Cited Cases

[5] Appeal and Error ⚖984(5)
30k984(5) Most Cited Cases

The standard of review of the trial court's decision to grant costs and attorney fees is abuse of discretion. Rules Civ.Proc., Rule 11.

[6] Costs ⚖2
102k2 Most Cited Cases
The fact that a case is weak is not sufficient to find that it was brought to harass for purposes of Rule 11 sanctions. Rules Civ.Proc., Rule 11.

[7] Costs ⚖2
102k2 Most Cited Cases

A pleading or motion is frivolous within the meaning of Rule 11 only when, objectively speaking, the pleader or movant has no hope of success. Rules Civ.Proc., Rule 11.
***162** John Hedglin, Madison, Attorney for Appellant.

Steven H. Smith, Jackson, Attorney for Appellee.

EN BANC.

PRATHER, Chief Justice, for the Court:

¶ 1. This case comes to this Court on appeal of the City of Madison (the City) regarding Steve Bryan's failed attempt seeking approval by the City to erect an apartment complex to be known as The Madison. After the City failed to act on Bryan's request for a building permit, Bryan appealed, by bill of exceptions, to the Madison County Circuit Court which initially ordered the City to approve Bryan's plan. However, the circuit court ***163** reversed its position and held the issue to be moot. Afterwards, the circuit court, applying Rule 11, awarded costs and attorney's fees to Bryan.

¶ 2. We find that the issue is indeed moot as Bryan did not have a valid option on the property at issue here when he filed his appeal to circuit court. The circuit court was correct

to hold the issue moot, but it abused its discretion in awarding Bryan costs and attorney's fees. The City's defending its actions in circuit court and appealing to this Court were not frivolous, because "a pleading or motion is frivolous within the meaning of Rule 11 only when, objectively speaking, the pleader or movant has no hope of success." *Leaf River Forest Prods., Inc. v. Deakle*, 661 So.2d 188, 195 (Miss.1995). Here, it cannot be said that the City had no hope of success because the City ultimately prevailed, as Bryan had no valid option on the property at the time he filed his third bill of exceptions. It is also questionable whether Bryan met the requirements of Rule 11 or our caselaw which is necessary in order to prevail on the attorney fees issue. Whether the circuit judge in imposing damages against the City actually meant to apply authority other than Rule 11 is unknown, but nonetheless is a legitimate issue. We decline to speculate regarding what authority the circuit court was applying to this case in awarding sanctions. We hold that the circuit court failed to set out sufficient findings of fact, conclusions of law, and clear authority pursuant to our case law in its order awarding costs and attorney's fees. We affirm the circuit court regarding the primary issue being moot, but reverse and remand for a new hearing on the costs and attorney's fees awarded to Bryan.

FACTS

¶ 3. Steve Bryan attempted to obtain the approval of the governing authorities of the City of Madison to build an apartment complex within the City. There have been three bills of exceptions taken by Bryan to the Circuit Court of Madison County. The third bill of exceptions is the subject of this appeal (the previous two were not appealed further than the Circuit Court of Madison County). This appeal concerns a development or site plan for The Madison submitted by Bryan on March 18, 1994. A letter dated April 24, 1995, executed by Kenneth F. Pritchard, owner of the proposed project site of The Madison, indicates that Bryan's option to purchase contract expired on September 30, 1994. After the site plan was submitted, it was reviewed by the City's public works Director, Fire Chief and Southern Consultants, P.E. a project engineer specially employed by the City for this particular project. Their input resulted in the drafting of a revised development plan by Bryan. This revised plan was filed with the City's Planning and Zoning Director on June 8, 1995.

¶ 4. Pursuant to Madison Ordinance 2408.04, the plan was forwarded to Madison's Zoning and Planning Commission which, on June 12, 1995, met for approximately five to six hours and discussed the proposed plan in detail. At the close of the June 12 meeting, the Commission unanimously voted to approve the plan subject to the resolution of six (6) remaining "punch-list" items which would have to be resolved satisfactorily by Bryan.

¶ 5. The plan was placed on the agenda for the June 13, 1995, meeting of the Board of Aldermen and Mayor. Four of the City's five aldermen and the Mayor were present. As the governing body was about to consider Bryan's plan, the Mayor announced that she had decided to remove the item from the agenda and that no action would be taken regarding Bryan's plan. She insisted that she needed to have a transcript of the Planning Committee's meeting before passing on the merits of Bryan's plan.

¶ 6. Thereafter, three of the aldermen (a majority of the board present) voted to replace the item on the agenda. The Mayor then produced a typewritten "Statement ***164** of Objection and Veto" and read the same into the record. There were insufficient votes to override the Mayor's veto.

¶ 7. Aggrieved by the City's inaction, Bryan filed a bill of exceptions on June 23, 1995, and appealed to the Circuit Court of Madison County. On February 7, 1996, the court ordered the City of Madison to immediately issue Bryan a building permit and approve the site plan, staging plan and development plan.

¶ 8. Afterwards, acting on a Motion for Reconsideration on March 28, 1996, the circuit court reversed its prior ruling and held that the issue of the option was moot, as Bryan no longer had a valid option on the property which had since been sold to a third party. However, the circuit court preserved the rights of the parties as to claims for damages, if any. The circuit court, however, did not rule on the lone remaining motion of Bryan for attorney's fees.

¶ 9. Thereafter, on August 29, 1997, the circuit court did rule on Bryan's motion for attorney fees which was filed on February 16, 1996. The circuit court awarded Bryan Rule 11 costs and attorney's fees in the amount of $19,668.45.

STATEMENT OF ISSUES

¶ 10. The City appealed to this Court on September 26, 1997, presenting the following issues for review:

I. UNDER MISSISSIPPI LAW, CAN BRYAN APPEAL AN ALLEGED FAILURE TO ACT BY THE GOVERNING AUTHORITIES OF A MUNICIPALITY TO CIRCUIT COURT?

II. WHERE A MUNICIPAL ORDINANCE IS SUBJECT TO LEGITIMATE DIFFERING INTERPRETATIONS, SHOULD THE INTERPRETATION OF THE CIRCUIT COURT

SUPERCEDE THE INTERPRETATION OF THE MUNICIPAL GOVERNING AUTHORITIES?
III. DO THE GOVERNING AUTHORITIES "WAIVE" THEIR RIGHT TO REVIEW ANY ASPECT OF THE SITE PLAN, INCLUDING THE STAGING PLAN, BY REQUESTING ADDITIONAL INFORMATION RELEVANT TO THE PLAN?
IV. DID BRYAN HAVE STANDING TO PURSUE HIS APPEAL TO CIRCUIT COURT?
V. WAS THERE ANY LEGAL BASIS FOR THE CIRCUIT COURT JUDGE'S AWARD OF ATTORNEY'S FEES AFTER DISMISSING BRYAN'S APPEAL AS BEING MOOT?

¶ 11. Bryan contests the City's argument of lack of standing and that the primary issue is moot. He also argued that the circuit judge was correct to award attorney's fees.

ANALYSIS

¶ 12. Because the issues of standing and whether Bryan's interest in the property was moot control the outcome of the case at bar, only Issues IV and V warrant discussion.

IV.

[1] ¶ 13. Much of the dispute centered around whether Bryan had fully complied with the City's strict zoning requirements regarding his site plan. Each time the aldermen acted, the Mayor vetoed that action, and Bryan appealed. Each instance was clearly a separate legislative act by the City. At the close of the June 12, 1995, meeting of the City of Madison's Zoning and Planning Commission, after a five to six-hour discussion, the plan was approved. However, the "resolution of six (6) punch-list items" by Bryan still remained. In other words, as of June 12, 1995, there still remained six items on the site plan with which Bryan had not complied.

***165** ¶ 14. At the meeting of the Mayor and Board of Aldermen on June 13, 1995, the Mayor remained concerned and wanted a transcript of the Zoning Commission's June 12 th meeting prior to making a determination on this issue. A majority of the Board wanted to proceed, and the Mayor allegedly removed the consideration of the site plan from the agenda and vetoed the Board's action. Regardless, no action was taken on the site plan on June 13, 1995.

¶ 15. The subject of this third bill of exceptions promptly filed by Steve Bryan against the City of Madison concerns its refusal to approve the development or site plan which was submitted to the City on March 17, 1995. As previously noted, the Zoning Commission hearing was conducted on June 12, 1995. Bryan's approval by the Zoning Commission was scheduled for the City's June 13, 1995, meeting. However, Bryan's exclusive six-month contract of March 18, 1994, to purchase the property in question had apparently expired on September 30, 1994. The issues of standing, mootness and res judicata are all raised before this Court for consideration by the City of Madison.

¶ 16. The City argues that Bryan has "no standing when he has no present existent actual title or interest in the property." This Court has said that "[u]nder our authorities there must be a present, existent actionable title or interest which must be completed **at the time the cause of action is filed.**" *Crawford Commercial Constrors., Inc. v. Marine Indus. Residential Insulation, Inc.*, 437 So.2d 15, 16 (Miss.1983) (emphasis added) (citing *American Book Co. v. Vandiver*, 181 Miss. 518, 178 So. 598 (1938)). *See also Shaw v. Shaw*, 603 So.2d 287, 294 (Miss.1992). The City alleges that Bryan did not hold an option to purchase the site at issue at the time he filed his action. There is documentary evidence in this record which establishes that the six-month option contract had in fact expired on September 30, 1994.

¶ 17. This Court has assumed, without specifically being called upon to decide, that optionees have standing to challenge. *See Moore v. Madison County Bd. of Supervisors*, 227 So.2d 862 (Miss.1969)(applicant for rezoning held option on land contingent on changing of zoning to commercial). [FN1] Thus, if Bryan's option had expired before he filed the appeal, then he does not have standing.

> FN1. Other states have specifically held that an option holder has a sufficient property interest to initiate a request for a zoning change. *See Hatch v. Fiscal Court of Fayette County*, 242 S.W.2d 1018, 1022 (Ky.1951); *Humble Oil & Ref. Co. v. Board of Aldermen of Town of Chapel Hill*, 284 N.C. 458, 202 S.E.2d 129 (1974).

¶ 18. The City alleges that a letter dated April 24, 1995, and signed by Kenneth F. Pritchard, President of First Southeast Corporation, owner of the proposed project site, is record evidence that Bryan's option to purchase contract expired on September 30, 1994. Additionally, correspondence from the landowner indicates that Bryan's actions were in violation of his directive that Bryan cease making further representations to third parties regarding the use of the property which is at issue here. Therefore, the City argues that Bryan had no standing to file his bill of exceptions on June 23, 1995.

¶ 19. Bryan responds that he did have standing because he originally filed a site plan on March 18, 1994. Moreover,

Bryan claims he entered into a contract (dated March 22, 1993) to purchase one-half of the property in question, which ran through April 1, 1995. Furthermore, Bryan alleges that only after the City refused to approve his original site plan submission was he required to enter the contract relied upon by the City above. Thus, he claims that the City is taking "advantage of the delay inevitably and lamentably attendant upon the appellate process so as to render moot, what would otherwise be a live and justiciable controversy." ***166***City of Durant v. Humphreys County Mem'l Hosp.*, 587 So.2d 244, 249 (Miss.1991). Whether Bryan ever fully complied with required zoning and building requirements of the City has always been in dispute, and remained so at the very end of this controversy, as noted by the "punch list" of six items remaining to be complied with as late as the June 12, 1995 meeting of the Zoning Commission.

[2][3] ¶ 20. "Standing" is a jurisdictional issue which may be raised by any party or the Court at any time. *Williams v. Stevens*, 390 So.2d 1012, 1014 (Miss.1980). In order for Bryan to have standing in this matter, he must demonstrate that the City's action had an adverse effect on property in which he has an interest. *White Cypress Lakes Dev. Corp. v. Hertz*, 541 So.2d 1031, 1034 (Miss.1989). We find that when Bryan filed his bill of exceptions with the circuit court on June 23, 1995, the record reveals that he was not the owner of the title, nor did he have valid option to purchase, a valid contract to purchase, or a mortgage or any other encumbrance upon the property. Therefore, Bryan did not have standing to appeal.

¶ 21. Alternatively and regardless of Bryan's original standing, the record is clear (and Bryan admits) that Bryan's option to purchase the site expired before the case ever made it to this Court. Even considering the latter date of April 1, 1995, submitted by Bryan as the date of expiration of his option to purchase, the contract still would have expired over two months before the submission to the Zoning Commission for a hearing and consideration of the site plan, therefore, Bryan had no valid interest.

¶ 22. This Court has held that it will not adjudicate moot questions. *Bradley v. State*, 355 So.2d 675, 676 (Miss.1978) (detainee's petition for habeas corpus was moot when detainee's sentence expired); *Stevens Enters., Inc. v. McDonnell*, 226 Miss. 826, 827, 85 So.2d 468 (1956)(where sheriff had already sold all of taxpayer's property under sales tax warrant, action to enjoin sheriff from proceeding further with sale was moot); *Sheldon v. Ladner*, 205 Miss. 264, 270, 38 So.2d 718, 719 (1949) (where general election had already passed, appeal from dismissal of mandamus petition seeking to compel Secretary of State to place only petitioners' names on ballot was dismissed as moot).

¶ 23. Furthermore, this Court has held that "[c]ases in which an actual controversy existed at trial but the controversy has expired at the time of review, become moot. We have held that the review procedure should not be allowed for the purpose of settling abstract or academic questions, and that we have no power to issue advisory opinions." *Allred v. Webb*, 641 So.2d 1218, 1220 (Miss.1994). *See also Insured Sav. & Loan Ass'n v. State ex rel. Patterson*, 242 Miss. 547, 135 So.2d 703 (1961); *McLendon v. Laird*, 211 Miss. 662, 52 So.2d 497 (1951). Such is the situation here as we find that Bryan had no valid option at the time he appealed to circuit court. [FN2]

> FN2. Bryan also filed suit against the City in the United States District Court for the Southern District of Mississippi and that suit has already been decided. *Bryan v. City of Madison,* No. 3:97-cv-73WS (S.D.Miss. Mar. 31, 1999), *appeal pending,* 5 th Cir. No. 99-60305. The district court, citing the circuit court's order finding the issue was moot, also ruled, inter alia that the issue of the option to build The Madison was moot, because the property was sold to a third party who had a different purpose in mind for the property at issue here.

¶ 24. On March 28, 1996, the lower court, acting upon a Motion for Reconsideration, held the issue of the option was moot due to the sale of the property to a third party. We therefore affirm the lower court and agree that the primary issue regarding the option is moot.

V.

[4] ¶ 25. Next, we consider the issue of whether costs and attorney fees were properly awarded subsequent to the circuit court ruling that the primary issue was ***167** moot. We note at the outset that the circuit court stated that it was imposing damages by authority of M.R.C.P. 11.

[5] ¶ 26. The standard of review of the circuit court's decision to grant costs and attorney fees is abuse of discretion. *Wallace v. Jones*, 572 So.2d 371 (Miss.1990). *See also Vicksburg Refin., Inc. v. Energy Resources, Ltd.*, 512 So.2d 901 (Miss.1987); *Ladner v. Ladner*, 436 So.2d 1366, 1370 (Miss.1983).

[6] ¶ 27. The City argues that since on motion for reconsideration the lower court ruled that in fact the issue of the option was moot due to the sale of the property in question to a third party, therefore, Bryan is not entitled to

attorney fees. In order to prevail, Bryan has a two fold standard to meet. M.R.C.P. 11 authorizes monetary sanctions to pay the non-offending party's reasonable expense, including attorney fees. M.R.C.P. 11(b). In *Leaf River Forest Prods., Inc. v. Deakle*, 661 So.2d 188, 195 (Miss.1995), this Court held that "Sanctions under M.R.C.P. 11 'are warranted when the pleading or motion is 1) frivolous or 2) is filed for the purpose of harassment or delay.' " This Court has stated that "Though a case may be weak or "light-headed," that is not sufficient to label it frivolous. *Nichols v. Munn*, 565 So.2d 1132, 1137 (Miss.1990). The fact that a case is weak is not sufficient to find that it was brought to harass. *Brown v. Hartford Ins. Co.*, 606 So.2d 122, 127 (Miss.1992). Here the City did not bring the action in circuit court, but rather, Bryan appealed by bill of exceptions from the City's supposed inaction on his request for a building permit to construct The Madison apartments. Nor can we allow ourselves to be influenced by the two prior bill of exceptions mentioned, as they are not before us, but rather only Bryan's third bill of exceptions and motion for attorney fees. Besides, although trial courts do have inherent authority to award damages such as costs and attorney fees, not all misconduct would warrant such an award. In *Aeroglide Corp. v. Whitehead*, 433 So.2d 952 (Miss.1983), involving allegations of misconduct by defense counsel during cross-examination which caused a mistrial, and trial counsel submitted their costs and attorney fees lost due to the mistrial and defense counsel's actions, this Court stated:

> We agree with the learned trial judge that all courts possess the inherent authority to control the proceedings before them including the conduct of the participants....Upon the narrow issue presented we hold that the inherent authority of the trial court did not extend to awarding of damages as in a tort action for litigation expenses irretrievably lost under the facts presented herein.

Id. at 953. The case at bar is likened somewhat to *Whitehead*, in that Bryan alleges that because of the City's actions he has suffered and incurred costs and attorney fees to which he is entitled to be awarded by the trial court. The trial court awarded such costs and attorney fees by applying Rule 11 sanctions against the City. As in *Whitehead*, here, misconduct by the City, if any, may not necessarily warrant an award of costs and attorney's fees. Bryan complains that the City stalled his attempted construction of The Madison to the point that he no longer possessed a valid option on the property. However, the record also reflects that some of the delay can be attributed to Bryan who, for some unknown reason, did not even proceed with the construction of The Madison project when it was initially approved by the City. Subsequently, many citizens surrounding the project began to strongly voice their objections about The Madison project to the Mayor and Board of Aldermen which may have contributed to some of the subsequent events which occurred, due to the Mayor and some board members responding to their citizens' concerns about the project.

[7] ¶ 28. Whether the pleading or motion is frivolous is the first standard which Bryan must meet in order to prevail. This Court has held that "[A] pleading or motion ***168** is frivolous within the meaning of Rule 11 only when, objectively speaking, the pleader or movant has no hope of success." *Leaf River*, 661 So.2d at 195 (citing *Stevens v. Lake*, 615 So.2d 1177, 1184 (Miss.1993)(quoting *Tricon Metals & Servs., Inc. v. Topp*, 537 So.2d 1331, 1335 (Miss.1989))).

¶ 29. Regarding the second standard required, we note that the *Leaf River* Court stated further, "The second standard, a claim interposed for harassment or delay, generally cannot be met: 'where a plaintiff has a viable claim.' " *Id.* at 195 (citing *Stringer v. Lucas*, 608 So.2d 1351, 1359 (Miss.1992) (quoting *Bean v. Broussard*, 587 So.2d 908, 913 (Miss.1991))). The City's appeal "can hardly be considered frivolous," as clearly there was reasonable hope of success, even though "a case is weak." *Brown*, 606 So.2d at 127. Here, in fact the City ultimately prevailed in the circuit court on the primary issue of the building permit which was the subject of the bill of exceptions. Five months after that ruling that the circuit court allowed costs and attorney fees applying Rule 11 sanctions on an issue that was moot. This Court, in *Jackson County Sch. Bd. v. Osborn*, 605 So.2d 731, 734 (Miss.1992), held that if the underlying case is moot, the issue of awarding attorney's fees is moot. In the case at bar, the record reflects that at the time Bryan filed this third bill of exceptions on June 25, 1995, in fact, he did not have a valid option on the property as his option expired September 30, 1994. *Osborn* thus appears to be very analogous to the case at bar, if not controlling law, regarding award of attorney's fees to a losing party where the underlying issue is moot.

¶ 30. We also note that in its short order, the lower court failed to cite sufficient reasons in support of clear authority for the award of costs and attorney fees pursuant to Rule 11. The lower court only mentioned its memorandum opinion and order of February 7, 1996, which upon examination, is of little or no help as to the court's reasoning, authority, or support for awarding costs and sanctions. Additionally, the comments of the lower court refer to all three of the bills of exception in imposing sanctions, when, as previously noted, each bill of exception is a separate distinct legislative act of the City. The cause of action before this Court only involves the third bill of exceptions. Yet, the circuit judge should not be faulted in this difficult, close and convoluted case. The

issue of whether the City violated its ordinance or state law is indeed a debatable factual issue for the lower court to decide, and both parties presented contrastive evidence in support of their respective positions. The more difficult question however is: On what authority did the lower court impose sanctions? We note that the circuit judge stated that he was imposing sanctions based upon Rule 11. Whether the circuit judge erred in that choice of Rule 11 and actually meant some other authority as suggested by the dissent is unknown. [FN3] Apparently, the City and Bryan believed that the trial judge actually utilized Rule 11 since both parties' briefs solely cite to Rule 11 sanctions. We would have to speculate from this order as to sufficient support and clear authority, in view of our case law, that the trial court found for imposing sanctions upon the City. This we decline to do.

> FN3. The dissent claims that the circuit judge's order contained a typographical error in imposing "Rule 11" sanctions, and that damages were partially awarded to Bryan as recompense for the City's wrongdoing per *City of Durant v. Laws Constr. Co.*, 721 So.2d 598 (Miss.1998). Such claims only further support the majority view that this Court cannot determine with any degree of certainty under what support and authority the trial court was imposing sanctions against the City.

¶ 31. Therefore, we reverse and remand the trial judge's award of costs and attorney's fees under Rule 11 in the amount of $19,668.45 for the reasons cited above. We also must find that the lower court abused its discretion in failing to cite sufficient ***169** findings of fact, conclusions of law and clear authority in support of its award of sanctions.

CONCLUSION

¶ 32. This Court thus finds that the issue of the validity of Bryan's option was indeed moot when he filed his bill of exceptions in the circuit court. Bryan had no valid option at that time. The circuit court ultimately on Motion for Reconsideration, found that the issue was moot. We, therefore, affirm the lower court's ultimate order dismissing the case as moot, but we reverse the lower court's award of costs and attorney's fees and remand this case for a new hearing and decision by the lower court regarding any award of costs and attorney's fees to Bryan.

¶ 33. **AFFIRMED IN PART; REVERSED AND REMANDED IN PART.**

PITTMAN AND BANKS, P.JJ., MILLS, WALLER AND COBB, JJ., CONCUR. McRAE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ, J. SMITH, J., NOT PARTICIPATING.

McRAE, Justice, dissenting:

¶ 34. Because I agree with the lower court's sanctioning the City of Madison for violating its own ordinance, for failing to treat its citizens fairly, for engaging in a decade-long campaign of delay to avoid issuing a permit until such time as the developer lost his interest in the property, and for forcing the developer to file three appeals to the circuit court to get the city to comply with its own ordinances, I dissent. At the very least, Bryan should have been reimbursed for monies spent in his efforts to have the City of Madison comply with its own laws governing the issuance of building permits. The fact that Bryan no longer possessed an interest in the property (due to the City's repeated delays) did not make the City's actions any less arbitrary and capricious. For this Court to reverse those sanctions awarded Bryan merely rewards Mayor Hawkins and the City of Madison for their misdeeds and will serve only to encourage local governments to abuse their powers, results I find unconscionable.

¶ 35. Before I delineate my specific objections to the majority's opinion, I feel it is necessary to set forth the procedural background of this case. Not only do I disagree with the majority's disposition of this case, I part company with the majority as well when it comes to interpreting exactly what happened below. Specifically, the majority does not understand that the lower court's finding that the dispute was moot did not erase the wrongs done to Bryan in his quest for final approval of the apartment complex. Bryan was subsequently assessed sanctions damages by the court for those wrongs. The permit to develop an apartment complex was no longer an issue because of the arbitrary and capricious manner of the City's long delays in issuing a permit, which caused the permit issue to become moot. Notwithstanding the fact that the permit became moot, Bryan was damaged and entitled to sanctions.

¶ 36. For over a decade, Steve Bryan has been trying to obtain the approval of the governing authorities of the City of Madison to build an apartment complex within an area of the City zoned for apartments. Madison's refusal to process Bryan's various applications engendered the filing of three bills of exceptions. Three times the circuit court found that Madison was not treating Bryan fairly in pursuing his project.

¶ 37. The lower court undertook the Herculean task of chronicling the odyssey Bryan was forced to undertake by the City, and it did it well as evidenced by a close review of

the following pertinent portion of the lower court's March 23, 1995, order:

> Within the city limits of Madison lies a certain parcel of land, (approximately 55 acres, more or less), being situated in the northwest quadrant of the intersection ***170** of Highway 463, (Main Street) and Locust Lane just east of the intersection of Highway 463 and Interstate 55. Bryan does not own the land, but rather had secured an option to purchase it when he began his fight with city hall. (Due to the delays in gaining permission to proceed with the project, the option has lapsed. Bryan still has standing to appeal.)
>
> The City first dealt with the land on May 8, 1987, when the Mayor and the Board of Aldermen took up the matter of re-zoning the property to allow multi-use of the parcel. The owner's request was approved and the land was rezoned to allow the construction of apartments.
>
> On July 3, 1990, pursuant to its statutory duty, the City adopted a comprehensive plan for the physical development of the entire municipality. The plan addressed residential, commercial, and industrial development; parks, open spaces and recreation; street and road improvements and community facilities. The plan was thorough and detailed. It provided for the construction of single family dwellings *as well as apartments*. The subject property was, according to the plan, to be eventually developed as an apartment complex.
>
> In early 1991, Bryan approached the City with his plans for the construction of "The Madison," an apartment development containing over 500 units. The plans were considered and on March 5, 1991, the Mayor and Board *approved* the proposal with minimal conditions relating to certain improvements on Locust Lane. On May 7, 1991, the City *approved* the architectural design of the project. There was no objection to the height of any of the buildings by the City. For reasons known only to Bryan, he didn't begin construction at the time and, consequently, his authorization to proceed lapsed.
>
> On December 17, 1991, the City adopted its "1992 Zoning Ordinance and Official Zoning Map", a comprehensive re-zoning procedure for the entire city, repealing all prior or inconsistent ordinances and having an effective date of January 16, 1992. The zoning of the subject property was confirmed as "R-5", the proper zoning for *apartment development,* and in accord with the City's long-range Comprehensive Plan.
>
> After that things began to change in Madison. Subsequently Madison experienced growth and development substantially in accord with the Comprehensive Plan. Single-family homes were built in planned subdivisions. The population of Madison grew. The politics changed.
>
> In response to petitions from residents near the subject property, the Mayor and Board attempted a rather unusual maneuver. The City voted to make application to itself to rezone the property so as to prohibit the construction of apartments. *This action was taken by the City despite the strenuous objections of the owners of the land and despite the fact that Bryan had already been given permission by the City to proceed with the project!*
>
> As the City's Zoning Ordinance requires, the application to re-zone was submitted to the City Zoning Commission for its review. On September 13, 1993, after a full hearing, the Zoning Commission recommended that the application for re-zoning should be disapproved; that the property was zoned properly and should remain zoned "R-5" for apartment development. On September 21, 1993 the City again considered Bryan's site plan for construction of "The Madison". (Bryan had applied for a building permit and the Board conducted its obligatory site plan review at a regular meeting). The aldermen, by a vote of 3/2 approved the site plan and the issuance of a building permit. Immediately thereafter on September 30, the Mayor filed her veto and objections to the actions of the Board. An override attempt was fruitless. ***171** Bryan appealed to this Court for relief. Giving the City the benefit of every doubt, this Court dismissed Bryan's appeal and returned the matter to the Mayor and Board for further review of Bryan's building plans.
>
> Now returning to the **City's bizarre rezoning attempt;** a political action group calling themselves the "Madison Homeowners Association," appealed the decision of the Zoning Commission to the Mayor and Board. Thereafter the matter was set for a public hearing on November 1, 1993. Following a lengthy and thorough discussion of the issues presented by the application the Board voted 3 to 2 to deny the rezoning. The Mayor declared the application "denied" and adjourned the meeting.
>
> Two days later, on November 3, 1993, the Mayor and four Board members met. In a blatant attempt to circumvent the City's zoning ordinances, the Mayor declared the prior November 1 vote on the rezoning application invalid and called for another vote. **The re-zoning issue did not appear on the agenda nor were the interested parties, (the landowner and developer) given any notice that the matter was subject to another vote.**
>
> Two of the aldermen present (to their credit) properly objected to this illegal procedure and stood to leave the room. The mayor quickly counted those as "abstaining votes" and as affirmative votes on the issue. The Mayor then announced that the re-zoning had passed by a majority vote. The landowners appealed the City's actions. This Court reversed the improper actions of the City by Order entered February 10, 1994.

> On March 18, 1994, Bryan submitted a new site plan with accompanying documents to the City. On April 7, 1994, Bryan submitted amendments and modifications to the site plan. The City took the extraordinary step of hiring a special engineering firm to review the plans.
> On April 25, 1994, the City's Planning and Zoning Commission voted to approve the site plan for "The Madison" subject to certain conditions suggested by both Bryan and the private engineering firm hired by the City.
> On May 3, the Mayor and Board took up the matter of the site plan. The board had before it data from the City's Director of Public Works and Zoning Administrator, Southern Consultants and Bryan's revised site plan. No action was taken and the matter was continued until the next regular meeting.
> On May 17, 1994, the Board predictably voted 3/2 to approve the site plan and directed city personnel to proceed with review of construction plans and issuance of a building permit for the apartment complex. Again, the Mayor vetoed the Board action. Bryan appealed. This Court remanded the matter to the City with instructions to treat Bryan "fairly". (See Memorandum Opinion and Order, March 23, 1995. * * *)
> On April 18, 1995, the Mayor and Board of Aldermen of the City of Madison, met and considered waiving a 35 foot building height limitation contained in the City's Zoning Ordinance with regard to the construction of Appellant's proposed apartment complex. The Board voted 3-1 in favor of such waiver. The Mayor exercised her right of veto and the proposed waiver failed. Also, as part of the site review process, and at the same meeting, the City revisited an earlier vote requiring Appellant's proposed plans be sent to the Southern Building Institute for further review. Again, the vote was 3-2 to cancel such review. Again the Mayor vetoed the Board's actions. * * * *

(emphases in bold added; emphasis in italics in original). [FN4]

> FN4. The court issued an order on April 26, 1995, resolving the issue on the height of the buildings.

***172** ¶ 38. The bill of exceptions decided by the circuit court's March 23, 1995, order dealt with the City's remaining "reasons" for not approving Bryan's site plan. Those issues involved a 35 foot height restriction, Bryan's alleged failure to file a subdivision plat, water meters, etc. Toward the end of its March 23, 1995, order, the court added a warning to the City of Madison:

> Finally, a word of caution to the City; Bryan is lawfully entitled to develop this property as an apartment complex provided he comply with the City's ordinances relating to construction. The land is zoned for that purpose and multi-family development is in harmony with the long-range development plans adopted by the City years ago. **The site plan review process may not be used as a device by which to improperly interfere with the property rights of a landowner.**
> Bryan appears to have substantially complied with an extraordinary construction review process. Undoubtedly he has invested much in terms of time, effort and money in his attempts to acquire permission to proceed with his project. The City should deal with him fairly.

(emphasis added).

¶ 39. If the City had heeded the court's advice to treat Bryan fairly, the court's March 23, 1995, order would have resolved all of the City's remaining objections to Bryan's site plan. But, once again, the City managed to stonewall the project.

¶ 40. Specifically, the City failed to approve the issuance of a building permit after Bryan's plan had been unanimously approved, albeit subject to the resolution of six punch list items, at a June 12, 1995, meeting of Madison's Zoning and Planning Commission.

¶ 41. Bryan's plan was placed on the agenda for the June 13, 1995, meeting of the Board of Aldermen and Mayor. Four of the City's five aldermen and the Mayor were present. As the governing body was about to consider Bryan's plan, the Mayor suddenly announced that she had decided to remove the item from the agenda and that no action would be taken regarding Bryan's plan. She insisted that she needed to have a transcript of the Planning Committee's meeting before passing on the merits of Bryan's plan.

¶ 42. Immediately thereafter, three of the aldermen (a majority of the board) voted to reinstate the item on the agenda. The Mayor then produced a previously prepared typewritten "Statement of Objection and Veto" and read the same into the record. [FN5] There were insufficient votes to override the Mayor's veto.

> FN5. Mayor Hawkins read from the memo as follows: "Pursuant to the authority of the Mississippi Code Annotated 21-3-15, I hereby exercise my right to file a statement of objection and veto that certain action taken by the Board of Aldermen of the City of Madison, Mississippi, on June 13, 1995, wherein the board by a vote of three to one voted to reinstate consideration of the staging plan for "the Madison" apartments after its removal from the agenda, and in support of this veto, I would show the following. Number one, the staging plan was the subject of a five-hour meeting

> of the Madison Planning Commission last night where numerous substantive and important matters were discussed. Number two, since a court reporter was present and a transcript of the hearing can be obtained, I feel it would be in the best interests of the city for the board and me to obtain a copy of the transcript prior to any action on the staging plan. Consideration of this will be at the first meeting in July. It will not cause any undue delay to the developer when compared with the benefit of having a transcript available."

¶ 43. Aggrieved by the City's inaction, Bryan filed a bill of exceptions and appealed to the Circuit Court of Madison County. On February 6, 1996, [FN6] the court ordered the City of Madison to immediately issue Bryan a building permit and approve the site plan, staging plan and development plan. "A Circuit Court will not, in the normal course, substitute its judgment for that of City leaders," the Court wrote.

> FN6. The order was filed February 7, 1996.

> ***173 However, when elected officials of a City government are unwilling or unable to properly attend to the duties of public office, or when municipal officials become paralyzed by political pressure exercised by a vocal majority, then it is appropriate for this Court to step aside and do what the municipal government, under the law, ought to have done.**
> The staging or development plan submitted by Bryan, the same one unanimously approved by Madison's Planning Commission, will be approved. **This Court finds that the City was required by Section 2408.05 of its ordinance to address Bryan's plans at its June 13, 1995 meeting;** that the City, by and through its Mayor, violated the ordinance by removing the item from the agenda and refusing to consider the same; **that the actions with regard to Bryan were unreasonable, arbitrary or capricious;** that the City is now estopped from objecting to or otherwise denying, in whole or in part, the staging or development plans; and that the City should bear any and all costs associated with this appeal.
> (emphasis added).

¶ 44. Shortly after this order was issued, the City of Madison moved for reconsideration of the court's order on the grounds that Bryan's option had expired and that the plan was now moot. After a hearing, the lower court, having no other choice, agreed with the City that the issue of the permit was moot since Bryan no longer had any interest in the property. See Circuit Court's order of March 28, 1996. However, the circuit court further ordered "**that the rights of the parties to claims for damages, if any, are hereby preserved.**" (emphasis added). On August 29, 1997, the court awarded Bryan $19,668.45 primarily for attorneys fees and costs. [FN7] In so doing, the court stated that the award was made pursuant to its February 7, 1996, order-- the order in which the court took the city to task for having "become paralyzed by political pressure exercised by a vocal majority."

> FN7. Bryan's itemization of expenses is attached as an exhibit to this opinion.[971205a-g.jpg]

¶ 45. The March 28, 1996, order in which the lower court found the controversy to be moot, did not, as the majority writes, have the effect of reversing the court's earlier rulings in this case; it merely relieved the Board of Aldermen from having to issue a building permit to Bryan. The lower court clearly did not intend, in finding the controversy moot, to reward Madison for its misconduct in unfairly obstructing Bryan's project. That is, in finding the controversy moot, the lower court did not reverse its finding that Mayor Hawkins usurped her authority when she removed Bryan's plan from consideration by the Board. While the lower court clearly had reason to find that the issue of the permit was moot, the City's actions in obstructing Bryan's plan could still be addressed via damages. [FN8] Indeed, the lower court's order dismissing the appeal specifically stated "that the rights of the parties as to claims for damages, if any, are hereby preserved."

> FN8. This is not as incongruous as it may seem at first blush. For example, in *Anderson v. United States Dep't of Health & Human Servs.*, 3 F.3d 1383 (10 th Cir.1993), the plaintiff sued under the Freedom of Information Act in order to obtain government documents. The case was dismissed as moot when the government produced the requested documents. This did not moot plaintiff's claims for attorneys fees nor did it make the government right in withholding the requested information.

¶ 46. Bryan requested that he be awarded damages in the form of the attorneys fees he expended in pursuing his case. The court, per order of August 29, 1997--some five months after dismissing the appeal as moot (but preserving the issue of damages including attorney fees) assessed Bryan attorney fees and costs in the amount of $19,668.45. It was doing so, the court stated, pursuant to the court's Memorandum ***174** Opinion and Order filed February 7, 1996. The February 7 order was the order in which the court held that the City and specifically, the Mayor were wrong to remove Bryan's plan from the Board's agenda. Damages in the form of reimbursement for attorneys fees expended were awarded to

Bryan as recompense for the City's wrongdoing and not, as the majority contends, for a Rule 11 frivolous defense to an appeal or bill of exceptions.

¶ 47. The circuit court was correct in its February 7, 1996, ruling when it found that the Mayor was wrong to disallow a vote on Bryan's plan. Miss.Code Ann. § 21-3-15 (1990) provides the authority under which a mayor may veto actions by the Board of Aldermen. That section sets forth the "Duties of the mayor" and gives the mayor the right to veto any ordinance.

¶ 48. The action of the Board of Aldermen in voting to place Bryan's plan on the June 13, 1995, agenda was a procedural action outside the power of the Mayor to veto. If the Mayor is permitted to control whether the Board is permitted to even consider a specific matter, the Mayor can control the outcome. This would hardly seem to be a correct reading of the law. The Mayor was wrong in vetoing this item as it was a procedural matter.

¶ 49. The fact that Bryan no longer owned the property which was the subject of the vote did not magically transform Mayor Hawkins's wrongs into rights. [FN9] Nor did the lower court reverse its previous decision that the Mayor erred in removing Bryan's plan from the agenda.

> FN9. Indeed, once the plan met with the approval of the Planning Committee, the City of Madison did not have the discretion to withhold a building permit if the proposed building met the applicable building codes and ordinances. *Thompson v. Mayfield*, 204 So.2d 878 (Miss.1967) (where all building codes and zoning ordinances are complied with, the city did not have the discretion to deny a building permit); *Berry v. Embrey*, 238 Miss. 819, 120 So.2d 165 (1960) (A permit to erect a structure which conforms to building regulations cannot be denied because of proposed use where not zoned against such use); 83 Am.Jur.2d *Zoning and Planning* § 650, at 550 (1992)("Generally speaking, a municipality is without authority to deny a permit for a currently legal use."); 101A C.J.S. *Zoning and Planning* § 195, at 576-77 (1979)("Broadly stated, while a property owner does not have an absolute right to obtain a permit to use land in a manner contemplated by existing zoning ordinance, a permit may not be denied unless there is a showing that the public health, safety, or welfare is in danger."). In *City of Jackson v. Sunray DX Oil Co.*, 197 So.2d 882 (Miss.1967), the landowner sought a permit to construct a service station. The city refused to grant the permit even though the land had been zoned commercial and there were other service stations in the area. This Court, stating that "the commercial owner is as entitled to the full use of his property as is his residential counterpart," held that the city had no discretion to deny the permit absent proof that the station would constitute a nuisance in fact.

¶ 50. A party seeking to overturn an erroneous decision of the board of aldermen (or city council) may sue not only to correct the error but to obtain damages, if any, caused by the decision. Where circumstances preclude an award of specific performance, a party may be awarded monetary damages instead. For instance, in *City of Durant v. Laws Constr. Co.*, 721 So.2d 598 (Miss.1998), the unsuccessful bidder on a city construction project appealed via a bill of exceptions to the circuit court claiming that the lowest bidder's bid should have been rejected because of the failure of that bidder to comply with the legal requirements. [FN10] Rather than wait for a decision on the appeal, the city proceeded with the illegal award of the contract and, by the time of the hearing, the project was near completion. Since the circuit court could not order the project awarded to Laws, the circuit court determined that Laws was entitled to recover damages in an amount of $168,495.00 in compensatory damages and $15,978.95 in attorneys fees and costs. On appeal, this Court affirmed. ***175** "If meaningful damages are not allowed then the legislative intent of the statutory bidding laws that public contracts are to be awarded on a purely competitive basis cannot be carried out." *City of Durant*, 721 So.2d at 606.

> FN10. The bid was illegal in that it did not include the certificate of responsibility number on the exterior of the envelope. *City of Durant*, 721 So.2d at 600.

¶ 51. In this case, the circuit court may not have been able to require the City of Madison to issue a building permit but only because, due to the passage of time, Bryan no longer had an interest in the land he sought to have developed. But the Court could sanction the City for its failure to abide by the Court's order and, as in *City of Durant*, the plaintiff can be compensated in dollars.

¶ 52. The City did not prevail in the sense that the lower court determined the City's actions to have been right. The lower court specifically found, as it should have, that the City's actions in delaying the vote on Bryan's permit were wrong as well as arbitrary and capricious and that Bryan was entitled to damages as a result of the City's wrongfully delaying the project even after the Court's March 23, 1995, opinion resolved all of the City's remaining objections to the

plan. The record demonstrates that there was ample evidence to support the lower court's award of damages for the City's wrongdoing to Bryan. First of all, there was the fact that Bryan had been trying for a period of ten years to obtain the approval of the governing authorities of the City of Madison to build an apartment complex. The record demonstrates that the City of Madison stalled Bryan at every opportunity. The mayor vetoed the Board's vote to place Bryan's building permit on the agenda even though Miss.Code Ann. § 21-3-15 (1990) does not give veto power to the mayor over "procedural actions governing the conduct of the council's meetings...." Finally, there was the fact that the area in which Bryan proposed to build his apartment complex was zoned for multi-family housing. A city does not have the discretion to deny a building permit for a project where it complies with the applicable codes and ordinances. [FN11] All of these factors support the lower court's award of damages to Bryan.

> FN11. *See Thompson v. Mayfield,* 204 So.2d 878 (Miss.1967) (where all building codes and zoning ordinances are complied with, the city did not have the discretion to deny a building permit); *City of Jackson v. Sunray DX Oil Co.,* 197 So.2d 882 (Miss.1967) (the city had no discretion to deny permit for gas station in area zoned commercial absent proof that the station would constitute a nuisance in fact); *Berry v. Embrey,* 238 Miss. 819, 120 So.2d 165 (1960) (A permit to erect a structure which conforms to building regulations cannot be denied because of proposed use where not zoned against such use);83 Am.Jur.2d *Zoning and Planning* § 650, at 550 (1992)("Generally speaking, a municipality is without authority to deny a permit for a currently legal use."); 101A C.J.S. *Zoning and Planning* § 195, at 576-77 (1979)("Broadly stated, while a property owner does not have an absolute right to obtain a permit to use land in a manner contemplated by existing zoning ordinance, a permit may not be denied unless there is a showing that the public health, safety, or welfare is in danger.").

¶ 53. The majority has attempted to limit what the lower court may do with this case on remand by implying that Rule 11 sanctions in this case were not warranted. When the lower court referred to Rule 11 in its order awarding attorneys fees to Bryan, the lower court no doubt misspoke. [FN12] The attorneys fees awarded against the City of Madison were not granted as a result of a frivolous appeal; they were awarded for the City's wrongful action in delaying approval of Bryan's site ***176** plan even after the court's March and April, 1995, orders resolving what should have been all of the remaining obstacles to approval. The lower court's award of damages to Bryan specifically referred to the court's earlier, February 7, 1996, order in which the court found that the City of Madison had erred in denying Bryan his building permit. Indeed, the court's award of $19,668.45 was for all attorneys fees expended by Bryan after the Court's March 23, 1995 order since, at that point, all of the issues had been resolved. (See attachment.) [FN13]

> FN12. The fact that Judge Toney misspoke when referring to Rule 11 is supported by the fact that the court's award of attorneys fees was not limited to just those fees spent prosecuting the bill of exceptions. The court awarded Bryan attorneys fees for all legal fees incurred since April 26, 1995. April 26, 1995, is the date on which the lower court issued an order that was to have resolved all the hurdles blocking approval of Bryan's development. The attorneys fees awarded, then, represent damages for the City's continued opposition to the plan after it became clear that the City could no longer, at least legally, do so. If the damages were truly Rule 11 damages, they would have been limited to those amounts expended on the last bill of exceptions.
>
> FN13. Attached is a letter from Steve Smith of Taylor, Covington & Smith detailing the costs expended by his firm in representation of Steve Bryan's interests. This letter details the roadblocks Bryan encountered throughout this case and contains a thorough itemization of all fees and costs expended. Bryan also presented documentation of all his payments to his law firm, including copies of each check.

¶ 54. Clearly, sanctions were warranted in this case albeit not Rule 11 damages. Indeed, it would seem that Bryan may have been entitled to more than just attorney's fees in the way of damages as a result of the illegal actions of the City of Madison. [FN14] Given the nature of the City's misdeeds as well as the amount of money that Bryan could have claimed as damages as a result of the City's illegal actions, the City of Madison should rejoice that the damages awarded were as insignificant as they were.

> FN14. This is not an action under 42 U.S.C. § 1983 or § 1985.

¶ 55. The lower court's confusion in characterizing the sanctions in this case is understandable given the dual role that the lower court plays when it hears a bill of exceptions.

In determining the correctness of the city's actions, the circuit court is acting as an appellate court pursuant to Miss.Code Ann. § 11-51-75. However, where the court concludes that damages are warranted and in determining the amount of damages (as in *City of Durant, supra),* it is acting more as a fact finder to whom we owe some deference.

¶ 56. There are ways in which a city may legitimately control the use of property within its boundaries. The City of Madison, however, chose not to utilize those methods and instead embarked on a decade-long effort to stonewall Bryan's apartment complex. To the extent that the majority's opinion endorses Madison's conduct, it does a grave disservice to citizens who seek to be treated fairly by their local elected officials. For the majority to hold that Bryan was not entitled to the sanctions assessed by the lower court leaves him having been wronged without a remedy and rewards a city for doing an injustice to its citizenry.

¶ 57. Even if this Court did award Bryan attorneys fees and costs, $19,668.45 would only be a drop in the bucket compared to the $62,786.90 that he expended during the staging plan and development appeal period, plus all the costs incurred since March 18, 1994.

¶ 58. Instead, this Court sends back Bryan's case to a new judge. [FN15] A judge who will be expected to better explain exactly what Judge Toney meant in his order. It will be interesting to see if a new judge, who has had no previous involvement in this case, can read Judge Toney's mind any better than the majority.

FN15. Judge Toney did not run for reelection.

¶ 59. For all of these reasons, I dissent.

DIAZ, J., JOINS THIS OPINION.

763 So.2d 162

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C

Supreme Court of Rhode Island.

DUNHAM et al.
v.
ZONING BOARD OF TOWN OF WESTERLY.

M. P. No. 787.

June 5, 1942.

Proceeding by Roger F. Dunham and others for a writ of certiorari to review a decision of the Zoning Board of the Town of Westerly, granting a permit for location and operation of a central station light or power plant on land in a residential district.

Petition denied and dismissed, and decision affirmed.

West Headnotes

Zoning and Planning ⚖389
414k389 Most Cited Cases
(Formerly 268k621.32)

A town zoning ordinance, authorizing special permit for location of central station light or power plant in industrial district, did not impliedly forbid town zoning board from entertaining application or permit to locate such a plant in residential district under provision of ordinance authorizing board to permit location of public utility plant in any use district.

Zoning and Planning ⚖389
414k389 Most Cited Cases
(Formerly 268k621.32)

On certiorari, Supreme Court will not disturb town zoning board's decision, granting permit to locate central station light or power plant on land in residential district, on ground that prospective operation of such plant would amount to private nuisance.

Zoning and Planning ⚖514
414k514 Most Cited Cases
(Formerly 268k621.26)

The provisions of special enabling act for zoning in town of Westerly that zoning ordinance must be made in accord with comprehensive development plan, conform to existing character of each section of town, and be designed to protect residence sections from noise, smoke, and other unwholesome conditions, did not preclude town council from authorizing zoning board to grant permit for location of light or power plant in residential district, in view of provisions authorizing council to appoint zoning board with power to authorize variances from and special exceptions to terms of ordinance. Pub.Laws 1922, c. 2299, § 1, as amended by Pub.Laws 1925, c. 746, § 1, and § 9(c), as added by Pub.Laws 1925, c. 746, § 2.

Zoning and Planning ⚖514
414k514 Most Cited Cases
(Formerly 268k621.32)

Under the town of Westerly zoning enabling act, giving town zoning board power to authorize variances from terms of zoning ordinance where literal enforcement thereof will result in unnecessary hardship, but not requiring showing of such hardship in clause authorizing board to make special exceptions in certain enumerated cases, applicants for permit to locate light or power plant in residential district under special exception of public utility plants in zoning ordinance need not show special case of unusual hardship. Pub.Laws 1922, c. 2299, § 9(c, d), as added by Pub.Laws 1925, c. 746, § 2.

Zoning and Planning ⚖532
414k532 Most Cited Cases
(Formerly 268k621.41)

A town zoning board had authority to grant permit for location of light or power plant on land in residential district under special exception in zoning ordinance on application by both landowner and electric company holding option to purchase land, though such company had no mutually binding contract for sale and purchase thereof and hence no such legal interest therein as would support such application in its own right.

Zoning and Planning ⚖702
414k702 Most Cited Cases
(Formerly 268k621.54)

On certiorari, a municipal zoning board's decision will not be disturbed by Supreme Court, unless it is unsupported by legal evidence and is arbitrary.

Zoning and Planning ⚖708
414k708 Most Cited Cases
(Formerly 268k621.55)

Where town zoning board considered all evidence on application for permit to locate central station light or power plant on land in residential district under exception of public utility plants in zoning ordinance, viewed proposed location and applicants' property, as well as similar stations, and then

granted application subject to certain conditions for protection of neighboring property against substantial injury, Supreme Court on certiorari, cannot disturb such decision as unsupported by legal evidence and wholly arbitrary and unreasonable.

***614** Tillinghast, Collins & Tanner, Harold E. Staples, and Horace L. Weller, all of Providence, for petitioners.

Ira Lloyd Letts, of Providence, John J. Dunn, of Westerly, and Andrew P. Quinn and Alan P. Cusick, both of Providence, for respondents W. R. Dower and Narragansett Electric Co.

M. Walter Flynn, of Westerly, for respondent Zoning Board.

John Ferguson, of Westerly, Town Sol., for other respondents.

***615** FLYNN, Chief Justice.

This is a petition for a writ of certiorari to review the action of the zoning board of the town of Westerly in granting, under a special exception to the zoning ordinance, a permit for the location and operation of a "public utility plant" on land which was in a residential district. The applicants for the permit before the zoning board were W. Russell Dower, owner of the land, and The Narragansett Electric Company, a public utility corporation of Rhode Island, which held an option to purchase this land. The petitioners here are certain taxpayers and owners of land variously situated in the town of Westerly, who objected before the respondent board to the granting of such exception. Pursuant to the writ the records of the zoning board have been certified to this court.

From these records the following facts appear: W. Russell Dower was the owner of approximately eight and one half acres of land situated on the Pawcatuck River about half way between the business district of Westerly and Watch Hill, a residential and summer recreation part of that town. This land was entirely within an area that had been designated, under the zoning ordinance, as a residence "B" district. The Narragansett Electric Company, hereafter called Narragansett, became interested in the land as a site for a proposed public utility plant, which was in fact a "central station, light or power plant", if a special exception to the zoning ordinance could be obtained to permit the location and operation of such a plant in this residential district. Accordingly Narragansett paid to the owner $500 for an option, which obligated the owner to deliver a deed to this land upon payment of $7,500 but which did not obligate Narragansett to purchase it at that or any other price.

The owner and Narragansett on September 8, 1941, filed a written application with the respondent zoning board requesting that a special exception under the zoning ordinance be granted to permit the construction and operation of such a plant. The pertinent part of chap. 22, sec. 23 B, Westerly ordinances 1925, as amended by chap. 66, section 1, Westerly ordinances 1930, authorized the zoning board to: "2. Permit the location in any use district of a state or municipal building, college building, boat house, bath house, office building, *public utility plant,* ice house, aviation field ***." (Italics ours.)

The zoning board gave public notice of the application and held several hearings thereon at which the petitioners were given full opportunity to be heard personally and by counsel. At the hearings a great deal of oral evidence and many exhibits were introduced on behalf of the applicants and the objectors. The board visited, for purposes of information, one of Narragansett's central station plants in Providence and also viewed the land upon which the proposed plant was to be located and the neighboring properties of petitioners. Thereupon, after arguments by counsel representing the applicants and objectors respectively, the board rendered a written decision in which the application was granted subject to certain conditions therein set forth, which purported to protect the neighboring property against substantial injury from the location and operation of the proposed plant.

The petitioners here contend, in substance, that:

(1) Narragansett did not have the required legal interest in the land to warrant its application for a special exception under the ordinance.

(2) The respondent board, as a matter of law, had no authority under the enabling act and ordinance to entertain or grant the instant application for a special exception.

(3) Assuming the board had such authority, it was incumbent upon the applicants to affirmatively prove (a) that the granting of such exception was necessary in order that the spirit of the ordinance should be observed and substantial justice done (enabling act, sec. 9 (c); (b) that "owing to special conditions" refusal to grant the exception would result in unnecessary hardship to a person entitled to complain thereof (enabling act, sec. 9 (c); (c) that the public convenience and welfare would be substantially served (ordinance sec. 23 B); (d) that the appropriate use of neighboring property would not be substantially or permanently injured (ordinance sec. 23 B); and, as to these four requirements, there was either no evidence or the proof was overwhelmingly to the contrary.

(4) The conditions attached by the zoning board to the granting of the permit would not be effective to prevent substantial and permanent injury to the neighboring land of the petitioners.

[1] Conceding that Narragansett had no mutually binding contract for the sale and purchase of the land, and therefore had ***616** no such legal interest therein as would support an application, in its own right, for special exception under the zoning ordinance, nevertheless that would not be decisive upon the board's authority in the instant case. The application in question was also made, signed and prosecuted personally before the board by the owner of the land whose right under the ordinance to apply for such an exception is not questioned.

[2] Petitioners secondly contend that the zoning board was, as a matter of law, wholly without jurisdiction to entertain or grant this special exception because it was forbidden by the terms of the Westerly enabling act, Public Laws 1922, chap. 2299, as amended by P.L.1925, chap. 746. This is not the general zoning statute found in G.L.1938, chap. 342, but is a special enabling act for zoning in the town of Westerly.

Petitioners argue that the town council of Westerly was authorized by section 1 of that act to adopt a zoning ordinance, but that such ordinance must be made "in accord with a comprehensive development plan" and must conform, among other things, "to the *existing* character of each section of the town and its peculiar suitability for particular uses and *with a view to conserving the value of buildings*"; and that such regulations must be designed, among other things, "to protect residence sections from traffic, *noise, smoke, fumes* and *other unwholesome conditions* and influences; *** to *promote* a *wholesome* and *agreeable home environment*; *** to promote *** the conservation of exceptional natural physical features, *trees, waters, stream courses* and other natural resources." (Italics theirs) From these requirements and the nature of the use applied for, they conclude that the board, as a matter of law, had no jurisdiction.

This argument, however, overlooks the fact that the same enabling act, P.L.1925, chap. 746, sec. 9, authorized the town council to appoint a zoning board to have, among others, the following powers: "(c) To authorize upon application in specific cases such variance from the terms of any such ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of such ordinance will result in unnecessary hardship, and so that the spirit of such ordinance shall be observed and substantial justice done. (d) To authorize on application in specific cases under general rules laid down in such ordinances special exceptions to the terms of any such ordinance; and to pass upon applications for the approval of proposed sub-divisions of land into building lots and such other matters as are referred to it or upon which it is required to pass under such ordinances."

Since the legality of this enabling act has not been questioned, we are constrained to give effect to its express provisions. Therefore, we do not agree that, as a matter of law, the town council was precluded by the terms of the Westerly enabling act from authorizing the zoning board to grant a special exception as provided in the ordinance.

[3] The petitioners next contend that by the terms of the zoning ordinance the board was prohibited from permitting a central station, light or power plant in this residential district. The general ordinance of 1925, sec. 5 A 13, permitted a central station, light or power plant, as a matter of right, in an industrial district. The amendment in 1927 to this zoning ordinance removed a "central station, light or power plant" from the uses permitted as a matter of right in an industrial district and transferred it, together with fifteen other industrial uses, to "B. Special Permit Uses" within an industrial district. These required a special permit as provided in sec. 23 B 1.

They argue that this confirms the clear intent to restrict the erection and operation of a central station, light or power plant exclusively to the industrial use district. This argument would be persuasive if both the original and the amended ordinance had not included the following provision: "Section 23. Zoning Board. A. Organization. *** B. Special Exceptions. When in its judgment the public convenience and welfare will be substantially served and the appropriate use of neighboring property will not be substantially or permanently injured, the zoning board may, in a specific case, after public notice and hearing and subject to appropriate conditions and safeguards, authorize special exceptions to the regulations herein established as follows: 1. Permit the location of a special permit use as listed in subdivision B of section 5 in any part of an industrial district; 2. Permit the location in any use district of a state or municipal ***617** building, college building, boat house, bath house, office building, *public utility plant,* ice house, aviation field, amusement park, fair grounds, circus grounds, crematory, cemetery, penal or correctional institution, sanitarium for the insane or feeble-minded, hospital for contagious or infectious diseases, sewage disposal or treatment plant, garbage disposal plant, refuse dump, stone quarry, stone cutting plant, gravel or sand pit ***." (Italics ours)

It is under this last provision that the application for a

special exception was made by the applicants and was granted by the board. The petitioners concede that the ordinary meaning of the general term, "public utility plant", included the special term, "central station, light or power plant"; but they contend that, according to certain rules of statutory construction, the designation of the particular plant in the industrial district requires that it be excluded from the meaning to be given a public utility plant as used later under sec. 23 B. In support of this contention they cite certain cases and rules of statutory construction whereby all portions of an act or ordinance are to be given effect, so far as possible, and where general and special terms appear in the same connection, the general term is to be construed as excluding the special term.

As we view it, the petitioners' contention would cut down, by mere implication, the plain, comprehensive and express powers that were given to the board by the enabling act and ordinance. Unless such an implication is necessary, we are of the opinion that the express provisions in the ordinance, if otherwise legal, should be given effect. In our opinion, the implication contended for by the petitioners is not a necessary one.

On the contrary, both provisions can stand and be given reasonable effect because they are not really inconsistent. There may be some redundancy or overlapping as to the grant of authority in sec. 23 B when applied to the industrial district uses which were covered in Sec. 5 A; but not as to the authority to grant special permits as therein enumerated in districts other than industrial. Nor do we find that the general and special terms are used in the same connection. They appear to have been used at different places in the ordinance having different immediate purposes in view. Hence the cases cited and the rules of construction relied on by petitioners are not applicable here. While the petitioners' argument may have force from a practical standpoint, nevertheless we are dealing here with a question of jurisdiction as a matter of law. On that basis and in view of the express, comprehensive language of sec. 23 B, we cannot say that the board was forbidden by the terms of the ordinance to entertain the application for this special exception.

[4] The petitioners next contend that, assuming that the board had such jurisdiction, there was either no evidence to support the decision or the evidence failed to prove particularly the four conditions which petitioners urge were necessary. Two of these conditions, previously referred to, namely, that the applicants must show that it was a special case of unusual hardship and that the application was not contrary to the spirit of the act and ordinance, are answerable by the express provisions of the Westerly enabling act. As previously quoted, this act specifically authorized the zoning board to make such exceptions in certain special cases therein set forth. While sec. 9 (c) of the act expressly required a showing of unusual hardship in the case of an application for a variance, it significantly omitted such a requirement in the very next clause, sec. 9 (d), when authorizing the board to make special exceptions in special cases therein enumerated.

[5] The case of Heffernan v. Zoning Board of Review, 50 R.I. 26, 144 A. 674, relied upon by the petitioners, involved a request for a variance and also was brought under a different zoning ordinance which did not have the same specific provisions concerning a variance and a special exception that are controlling in the Westerly enabling act. Therefore the Heffernan case and cases following that citation are not controlling in the specific circumstances presented here. The other two conditions asserted by petitioners are supported by argument that is based on the alleged failure of the applicants to discharge the burden of proof more than upon an alleged total lack of legal evidence. In this state, however, we have followed consistently the rule that on certiorari the decision of a zoning board will not be disturbed unless it is unsupported by legal evidence and is arbitrary. In the instant case we have examined the evidence, not for the purposes of ourselves weighing it, but to see if there was legal evidence to support the decision. There was some, though not much, legal ***618** evidence to establish that such a plant would substantially serve the public convenience and general welfare; and there was conflicting evidence upon the question whether the proposed plant would substantially injure, in value and otherwise, the neighboring properties of the petitioners.

[6] The board considered all of the evidence, viewed the proposed location and the properties of the petitioners, as well as a similar central station, light or power plant, before rendering its decision. It then granted the application, subject however to the fulfillment of certain conditions which, in the judgment of the board, were desirable to protect the neighboring property against substantial injury. In these circumstances, we cannot say that the decision was unsupported by any legal evidence and that it was wholly arbitrary and unreasonable.

[7] The petitioners finally contend that the conditions imposed by the board would not in fact prevent substantial and permanent injury to the petitioners' neighboring properties. The answer to this contention, so far as this proceeding is concerned, is that the board, after hearings and after visits to the properties, have decided otherwise, and until a plant is constructed and operated it would be almost impossible for us, as a matter of law, to decide to the

contrary. If we understand the argument correctly, petitioners ask that we conclude that the prospective operation of this plant would clearly amount to a private nuisance. If this be so, they will not be deprived of a suitable remedy merely because a permit under the zoning ordinance has been granted, since such a permit would not grant any right to operate a private nuisance.

Upon a consideration of all the provisions of the special Westerly enabling act and ordinance, and upon the conflicting evidence, and considering the conditions attached to the permit, we cannot say that the respondent board was wholly without jurisdiction, in the first instance, or that the exercise of that jurisdiction was unsupported by any legal evidence and was wholly unreasonable and arbitrary.

The petition for the writ of certiorari is denied and dismissed. The decision of the respondent board is affirmed, and the papers in the case are ordered sent back to the respondent board.

68 R.I. 88, 26 A.2d 614

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C

Court of Appeals of Kentucky.

HATCH et al.
v.
FISCAL COURT OF FAYETTE COUNTY et al.

Oct. 19, 1951.

Maurice A. Hatch and others brought action against the Fiscal Court of Fayette County and the City of Lexington and Fayette County Planning and Zoning Commission for a declaration that act of commission in reclassifying a residence 'B' district to a business 'A' district was illegal, and George Young intervened. The Fayette Circuit Court of Fayette County, Chester D. Adams, J., entered a judgment for the defendants, and the plaintiffs appealed. The Court of Appeals, Stewart, J., held that it would presume that action of commission was valid in absence of anything in petition to indicate that commission acted otherwise than within the framework of the law.

Judgment affirmed.

Latimer, J., dissented.

West Headnotes

[1] Administrative Law and Procedure ⚖763
15Ak763 Most Cited Cases

Courts have inherent power to prevent an administrative body from proceeding illegally, arbitrarily and capriciously to the injury of another.

[2] Administrative Law and Procedure ⚖656
15Ak656 Most Cited Cases

Fact that statute is silent as to the granting of any right of judicial review of a finding of an administrative body, does not give courts unlimited power to review the acts of the administrative body.

[3] Administrative Law and Procedure ⚖763
15Ak763 Most Cited Cases

[3] Zoning and Planning ⚖604
414k604 Most Cited Cases
(Formerly 268k601(17))

Court can interfere with act of city and county zoning commission in reclassifying zone from residence to business classification only if and when it is shown that zoning commission has violated some specific duty placed on it by statute or if and when it is clearly demonstrated that commission acted illegally, arbitrarily, and capriciously. KRS 100.360(3).

[4] Administrative Law and Procedure ⚖749
15Ak749 Most Cited Cases

[4] Zoning and Planning ⚖676
414k676 Most Cited Cases
(Formerly 268k601(17))

In every case involving judicial review of proceedings before a zoning commission, presumption is that action of commission was reasonable and was carried out according to law.

[5] Administrative Law and Procedure ⚖763
15Ak763 Most Cited Cases

[5] Administrative Law and Procedure ⚖784.1
15Ak784.1 Most Cited Cases
(Formerly 15Ak784)

[5] Zoning and Planning ⚖610
414k610 Most Cited Cases
(Formerly 268k601(17))

Courts will not question the wisdom of the findings of a zoning commission, nor will courts interfere with final report of such a body in absence of a specific showing that it has acted unreasonably and arbitrarily.

[6] Administrative Law and Procedure ⚖749
15Ak749 Most Cited Cases

[6] Administrative Law and Procedure ⚖763
15Ak763 Most Cited Cases

[6] Zoning and Planning ⚖604
414k604 Most Cited Cases
(Formerly 268k601(17))

Where there was nothing in petition of owners of realty to indicate that city and county zoning commission acted otherwise than within the framework of the law in arriving at its decision to reclassify residence "B" district to a business "A" classification, court was required to presume that action of commission was valid and could not disturb the act of the commission. KRS 100.360(3).

[7] Administrative Law and Procedure ⚖475
15Ak475 Most Cited Cases

[7] Administrative Law and Procedure ⚖749
15Ak749 Most Cited Cases

[7] Zoning and Planning ⚖193
414k193 Most Cited Cases
(Formerly 268k601(13))

[7] Zoning and Planning ⚖745.1
414k745.1 Most Cited Cases
(Formerly 414k745, 268k601(17))

Fiscal Court was not required to hear any evidence in order to accept report of city and county zoning commission reclassifying a residence "B" district to a business "A" district, and therefore Court of Appeals could not assume that the Fiscal Court acted illegally, arbitrarily, and capriciously in accepting the report of the commission. KRS 100.360(3).

[8] Administrative Law and Procedure ⚖450.1
15Ak450.1 Most Cited Cases
(Formerly 15Ak450)

[8] Zoning and Planning ⚖192
414k192 Most Cited Cases
(Formerly 268k601(13))

Holder of option to purchase realty had right to make application to city and county zoning commission to have residence "B" district reclassified to a business "A" district. KRS 100.360(3).

***1019** Scott Reed and Job D. Turner, Jr., Lexington, for appellants.

Stoll, Keenon & Park, and Paul H. Mansfield, all of Lexington, for appellees.

STEWART, Justice.

This is a 'class suit' whereby appellants, plaintiffs below, attack the final report of the City of Lexington and Fayette County Planning and Zoning Commission, hereafter called Zoning Commission, in rezoning a tract of undeveloped land on the southernmost edge of Lexington from Residence 'B' to Business 'A' classification. Action before the Zoning Commission was initiated by one George Young who had contracted to buy the land for the erection thereon of a shopping center, provided the property could be reclassified for that purpose. Appellants are lot owners in a subdivision that, together with the tract in controversy, had previously been placed in a residential category by the Zoning Commission. They objected to the proposed change and presented before the Zoning ***1020** Commission a petition signed by the owners of more than twenty per cent of the number of lots in the area and located within 200 feet of the tract, protesting against any variance. After a hearing, the Zoning Commission unanimously approved the reclassification of the property for business purposes and referred its finding to the Fayette County Fiscal Court for approval or disapproval, as the property is located outside the city limits of Lexington. The Fiscal Court approved the final report of the Zoning Commission by a three to one vote and entered a resolution to that effect.

Appellants then filed in the circuit court a petition against the Zoning Commission and the Fiscal Court for a declaration of rights. George Young, who had made the original application for the change, intervened by petition. Appellees, defendants below, demurred generally to the petition and appellants filed special and general demurrers to the intervening petition of Young. The demurrer to the petition was sustained and the special and general demurrers to the intervening petition were overruled. The objectors to the rezoning, declining to plead further, appeal from the judgment adverse to them.

The principal question to be decided is whether the petition states ultimate facts and not mere conclusions. The terminal line between a conclusion of law and a question of fact is not always easy to draw, as was said in 41 Am.Jur., Pleading, Sec. 18, p. 302: 'The line of demarcation between questions of fact and conclusions of law, is not easy to draw in all cases, and it is difficult to formulate a definition that will always describe a conclusion of law so as to distinguish it from a pleadable, ultimate fact. In many cases, it is the means by which the result is to be reached that is determinative of the question whether a given allegation is one or the other.'

Appellants first allege that the action of the Zoning Commission in approving the application of George Young 'was illegal, arbitrary and capricious in that there was no substantial evidence to support the application for the change, and further that the applicant, George Young, did not show that a change of zone was to the best interest of the public generally, and did not establish that the proposed change had any substantial relation, or any relation whatsoever to the public health, morals, safety and welfare of the community * * *.' Continuing, they next aver that 'by the illegal, arbitrary and capricious granting of the application by the defendants, the defendants encouraged congestion in the streets and increased the danger of fire in the community, and promoted the overcrowding of land, and the plaintiffs state that there are no adequate facilities for transportation, water, gas and sewage to serve a business

area in this locality.'

KRS 100.360(3) provides as follows: 'All plans, maps, regulations, and restrictions adopted by the commission shall be made in accordance with a comprehensive design to promote the public health, safety, morals or general welfare * * *, by securing safety from fire, panic or other dangers, or by providing adequate light and air, or by preventing overcrowding of land, or by avoiding the undue concentration of population, or by facilitating the adequate provision of transportation, water, sewerage, schools, parks, playgrounds or other public requirements. All regulations and restrictions shall be made with reasonable consideration of the character of each zone or district affected, and its peculiar suitability for particular uses.'

When we compare the above quoted allegations with the foregoing statutory provision, we note the studied effort on the part of the pleader to mesh the averments with the legal requirements in such a manner as to make out a case of noncompliance with the statute on the part of the Zoning Commission. The petition does not state that the Zoning Commission failed to hold a regular meeting, pursuant to due notice, with a sufficient quorum present to transact business, in order to consider and act upon the application for the rezoning change and to hear any objections thereto. Moreover, the final report is assailed, not because the Zoning Commission failed or refused to give ear to all the evidence that was presented to it during its session, ***1021** but because, as it is claimed, the evidence introduced was not of a substantial character to sustain the finding of the Zoning Commission. When the petition pleads that George Young did not show or establish that the change was for the best interest of the public generally and that the rezoning had no relation whatever to the public health, morals, safety and welfare of the community, this is another assumption by the pleader that the Zoning Commission did not give due consideration at the hearing to this phase of the case. The remaining portion of the above pleading shifts from cause to effect. The petition describes the ill effects that will flow, as appellants contend, from the rezoning, all because of the illegal, arbitrary and capricious act of the Zoning Commission in granting the application.

[1][2][3] There is no statutory provision specifically authorizing a review by the circuit court of the finding of a zoning commission of a second class city. However, it is undisputed that courts have the inherent power to prevent an administrative body from proceeding illegally, arbitrarily and capriciously to the injury of another. See 58 Am.Jur., Zoning, Sec. 171, p. 1033. We do not share the view of appellants that where a statute is silent as to the granting of any right of judicial review of the acts of an administrative body the power of the courts to review its acts is unlimited. In the instant case, we are of the opinion that a court can only interfere if and when it is shown that the Zoning Commission has violated some specific duty placed upon it by statute, or, to state the same idea differently, if and when it is clearly demonstrated that the members thereof acted illegally, arbitrarily and capriciously.

[4][5] In every case involving the judicial review of the proceedings before a zoning commission the presumption is that the action of the commission was reasonable and was carried out according to law. Moreover, courts will not question the wisdom of the findings of a zoning commission, nor will courts interfere with the final report of such a body in the absence of a specific showing that it has acted unreasonably and arbitrarily. In the case of City of Springfield v. Kable, 306 Ill.App. 616, 29 N.E.2d 675, 677, the validity of a zoning ordinance was challenged by charging that the ordinance was, among other things, an unreasonable and unlawful use by the city of its police power and that there was no justification for the zoning ordinance as regards the promotion of public health, safety, morals and the general welfare. The court, in holding such statements conclusions of law, said: '* * * The presumption is in favor of the validity of a zoning ordinance, and it is incumbent upon the property owner attacking it to affirmatively and clearly show its unreasonableness. * * * Where the unreasonableness of restrictions is not clearly shown, the court will not substitute its judgment for that of the group to whom the determination was entrusted by the legislature.'

See also Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016.

[6] There is nothing in the petition to indicate that the Zoning Commission acted otherwise than within the framework of the law in arriving at its decision and we must therefore presume that its action was valid. The general averment that this body at any time acted illegally, arbitrarily and capriciously is a mere conclusion of law.

The petition finally alleges 'that the defendant, Fiscal Court of Fayette County, Kentucky, and the defendant members thereof, illegally, arbitrarily, capriciously and without valid and legal evidence, or any evidence, approved the finding' of the Zoning Commission.

KRS 100.410 provides that the final report of the commission, in so far as it affects property outside the city limits of a second class city, shall not become effective until approved by an order or resolution of the fiscal court of the county in which such property is located. The fiscal court

may approve or disapprove the report but it may not make any change therein.

[7] In examining the statutory provision just mentioned it is obvious that the Fiscal Court was not required to hear any ***1022** evidence in order to accept or reject the report of the Zoning Commission; therefore, we cannot assume that it acted illegally, arbitrarily and capriciously if it had no formal hearing before it adopted the zoning change. Here again the allegation is a conclusion of law.

[8] Appellants contend that George Young could not properly initiate the action before the Zoning Commission for the reason that he merely held an option to buy the land in controversy. This argument is without merit, as courts have recognized the right of an option holder to make an application for a zoning change. Dunham v. Board of Adjustment of Town of Westerly, 68 R.I. 88, 26 A.2d 614; Wilson v. Township Committee of Union Township, 123 N.J.L. 474, 9 A.2d 771.

It follows that the circuit court properly sustained the demurrer to the petition and overruled the special and general demurrers to the intervening petition.

Wherefore, the judgment is affirmed.

LATIMER, J., dissenting.

242 S.W.2d 1018

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Only the Westlaw citation is currently available.

THIS OPINION IS NOT FINAL AND SHALL NOT BE CITED AS AUTHORITY IN ANY COURTS OF THE COMMONWEALTH OF KENTUCKY.

Court of Appeals of Kentucky.

HOME DEPOT, U.S.A., INC., Appellant
v.
SAUL SUBSIDIARY I LIMITED PARTNERSHIP, a Maryland Limited Partnership,
Appellee.

Nos. 2002-CA-002118-MR, 2003-CA-001148-MR.

July 30, 2004.

Background: Adjoining landowner brought action for mandatory injunction against neighbor to enforce covenants requiring development of both properties as a single mall, thereby compelling neighbor to remove existing freestanding retail store on its property. The Fayette Circuit Court entered judgment for neighbor, and adjoining landowner appealed. The Court of Appeals reversed and remanded. On remand, the Circuit Court, Mary C. Noble, J., issued a mandatory injunction for removal of the offending structure and replacement of the original structure. Neighbor appealed.

Holdings: The Court of Appeals, Dyche, J., held that:
(1) trial judge was not required to recuse herself, and
(2) mandatory injunction would lie to compel removal of freestanding retail store.

Affirmed.

[1] Judges ⚖49(1)

227k49(1) Most Cited Cases

[1] Judges ⚖49(2)
227k49(2) Most Cited Cases

Trial judge was not subject to recusal for presiding over mediation in dispute over covenants by landowner and neighbor, or by stating that case might be passed to another judge if mediation were unsuccessful; neighbor suggested or acquiesced in mediation, and made no showing of bias or partiality. KRS 26A.020(1); Sup.Ct.Rules, Rule 4.300, Code of Judicial Conduct, Canon 3(B)(7)(d).

[2] Judges ⚖39

227k39 Most Cited Cases

Recusal statute is an adequate and expedient procedure to review those cases where a judge has declined to disqualify himself or herself. KRS 26A.020(1).

[3] Judges ⚖49(1)
227k49(1) Most Cited Cases

Recusal statute serves as a safeguard available to defendants for a determination before trial of the existence of any alleged partiality by the trial court. KRS 26A.020(1).

[4] Injunction ⚖62(3)
212k62(3) Most Cited Cases

Mandatory injunction would lie to compel neighbor to remove freestanding retail store from its premises; adjacent landowner's and neighbor's predecessors in title entered into agreement containing covenants requiring both properties to be developed as a single mall, neighbor acknowledged agreement and covenants, and neighbor violated those covenants.
Phillip D. Scott, Michael L. Ades, Anne A. Chesnut, Greenebaum Doll & McDonald PLLC, Lexington, KY, for Appellant.

William M. Lear, Jr., Steven B. Loy, Stoll, Keenon & Park, LLP, Lexington, KY, for Appellee.

Before BUCKINGHAM, DYCHE, and TAYLOR, Judges.

OPINION

DYCHE, Judge.

***1** The parties to this appeal own adjoining tracts of real estate upon which Lexington Mall was developed in the 1970's. The mall prospered for several years but eventually fell upon hard times in the mid-1990's. The dispute herein centers upon the mutual covenants contained in the original agreement that the parties' predecessors in title entered into which permitted the development of the mall (the 1969 agreement), and the enforcement of those covenants. The Fayette Circuit Court, on remand from this court in an earlier appeal, adjudged that Home Depot breached those covenants and ordered the demolition of Home Depot's store on the mall property. Home Depot, as one might expect, does not want to lose a valuable, thriving retail business, and it therefore appeals. We affirm.

In order for the mall to be developed on the separately-owned, but contiguous, properties, the parties' predecessors in title entered into the 1969 agreement, a

comprehensive plan setting out mutual restrictive covenants concerning the use of their respective properties. These covenants included provisions mandating the development of the properties

> as one (1) mall-type shopping center, compatibly designed and providing entrances into each other's main area.... The parking area shown on the plan shall be used by the owners of the property described ... as a joint parking area and the means of ingress and egress shown thereon shall be used as joint means of ingress and egress.

The 1969 agreement, however, also recognized that the properties would be "separately developed."

The present dispute began prior to Home Depot's purchase of its tract. Home Depot's intention to construct a freestanding store on a joint parking area within its tract caused Saul to object that such a use would violate the 1969 agreement and the covenants therein in several ways. Saul initiated this litigation prior to Home Depot's taking title to its tract, seeking, among other things, a permanent injunction against Home Depot's stated purpose.

Although Home Depot acknowledged that the original covenants existed, it nevertheless proceeded with its purchase of the tract, demolition of a part of the mall located on its tract, and construction of its new, freestanding store thereon. No injunction was issued, and the trial court eventually ruled in favor of Home Depot, holding that its construction did not violate the covenants. This court reversed, finding **both** parties to be bound by the original agreement, not just Saul, as the trial court originally held. This action was remanded to the trial court "for a determination of the proper remedy for violation of said restrictions." The Supreme Court of Kentucky denied discretionary review.

The original trial judge was recused on remand, and the new judge conducted extensive mediation sessions in an effort to resolve the matter. The parties came close to an agreement, but the negotiations ultimately failed, and the trial court issued an opinion holding that no evidentiary hearing was required, and that Home Depot had made a deliberate business decision to proceed with its project while the original appeal was pending, knowing the "risk involved yet making a deliberate choice to proceed." The court further found that Saul's monetary damages could not be reasonably calculated, that its discretion was extremely narrow, and that Kentucky appellate decisions compelled the enforcement of the covenants. The court issued a mandatory injunction for removal of the offending structure and replacement of the original structure, allowed one year for compliance, but granted Home Depot ninety days within which to make a proposal as to how it could conform without demolition. No acceptable plan was presented, and final judgment was entered. This appeal followed.

***2** [1] Home Depot first argues that the trial judge should have recused herself, on its motion, after having conducted mediation sessions in an attempt to resolve this matter by settlement. Home Depot maintains that it was deprived of due process in that "the decision the Court entered was all based on information outside the record, shared in confidence, and without any evidentiary hearing ..."; that "[m]ediation predisposes the decision-maker to the result"; and that "[t]he judicial code and other authorities forbid what the judge did here."

[2][3] KRS 26A.020(1) provides for pre-trial recusal of a judge upon showing of partiality.

> This statute is an adequate and expedient procedure to review those cases where a judge has declined to disqualify himself or herself. KRS 26A.020(1) serves as a safeguard available to defendants for a determination before trial of the existence of any alleged partiality by the trial court. Second, Petitioner has a constitutional right of appeal from an adverse sentencing decision.

Foster v. Overstreet, Ky., 905 S.W.2d 504, 505 (1995). *See also Wilson v. Commonwealth*, Ky., 836 S.W.2d 872, 886 (1992), *overruled on other grounds by St. Clair v. Roark*, Ky., 10 S.W.3d 482, 487 (1999). Home Depot did not pursue this pre-trial remedy.

We disagree that the trial judge was compelled to recuse herself after having conducted mediation in this matter. Our Code of Judicial Conduct specifically provides for such action. Canon 3(B)(7)(d) provides, "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge." Home Depot suggested or acquiesced in the trial court's mediation efforts. Home Depot has made no showing of bias or partiality, and we can find none. Absent such showing, the trial court's hint that it might pass this case to another judge if mediation happened to be unsuccessful is insufficient ground to require recusal. *Lovett v. Commonwealth*, Ky.App., 858 S.W.2d 205 (1993).

[4] Home Depot next argues that the trial court erred in issuing the mandatory injunction rather than granting other relief to Saul. Home Depot claims that the trial court did not consider the equities of the matter before granting equitable relief to Saul, and that the decision was "clear error." We disagree. The equities in this case revolve around the uncontradicted facts that Home Depot knew of Saul's objections before it bought its tract; that Saul had initiated this action to stop Home Depot from continuing with its plans to violate the 1969 agreement before construction

began on Home Depot's new building; that Saul made no actions which could be construed as waiver of its rights under the 1969 agreement; that Home Depot made a "business decision" to proceed with the construction despite these facts; and that no viable and effective alternative was proposed by Home Depot. Home Depot's injuries herein, if any, are in the nature of self-inflicted.

***3** The trial court cited *Marshall v. Adams*, Ky., 447 S.W.2d 57 (1969), as authority for its decision:

> "If there is a negative covenant, ... the court has no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction, that the thing shall not be done. In such a case the injunction does nothing more than give a sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of the balance of convenience or inconvenience or of the amount of damage or injury: it is the specific performance by the court of that negative bargain which the parties have made, with their eyes open, between themselves."

447 S.W.2d at 59-60, citing *Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194, 49 L.R.A.N.S. 186 (1913).

Home Depot attempts to distinguish this case from the present, claiming that the trial court's reliance thereon is "reversible error for myriad reasons...." We disagree and find that case to be particularly apt. Home Depot's predecessor in title entered into the 1969 agreement; Home Depot acknowledged its existence, as well as the existence of the covenants; Home Depot violated those covenants. The trial court's decision was not error or an abuse of discretion.

As an aside, Home Depot has urged us to revisit the merits of the first appeal, claiming that we can, and should, "reverse [our] own decision as clear and palpable error." We decline the invitation.

Home Depot's final argument is that the trial court erred in failing to enforce the settlement between the parties. As the record indicates, and the parties acknowledged in various pleadings and exhibits in the record, there never was an actual agreement. Although the parties were apparently close to agreement, there was no culmination of the process, and therefore nothing to enforce.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

2004 WL 1699614 (Ky.App.)

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C

Supreme Court of New Jersey.

KRIEGER et al.
v.
SCOTT, Building Inspector, et al.

No. 73.

Nov. 16, 1926.

West Headnotes

Zoning and Planning ⚿383
414k383 Most Cited Cases
(Formerly 268k621.41, 268k621)

Building inspector may refuse to issue permit to others than owners of property, though reason for refusal affords no support therefor.

Mandamus on the relation of Harry Krieger and others against John G. Scott, Building Inspector, and the City of East Orange.

Peremptory writ refused.

****901** Argued May term, 1926, ***942** before GUMMERE, C. J., and TRENCHARD and MINTURN, Jj.

Walter C. Ellis, of Newark, for respondents.

PER CURIAM.

The relators applied to Scott, the building inspector of the city of East Orange, for a permit to erect a two-story brick structure, containing six stores on the first floor and four living apartments on the second, on a plot of ground fronting on William street, in that municipality. The permit was refused on the sole ground that it violated the zoning ordinance of the city. An alternative writ having been allowed, the case came on to be heard on the question of whether a peremptory writ should issue.

Our examination of the record discloses that neither the alternative writ nor the agreed state of facts show that the relators are the owners of the property on which they proposed to erect the building referred to in their application, or that they had any interest whatever therein. It is hardly necessary to say that, unless they were the owners of the property, or had such an interest therein as would entitle them to erect the proposed building thereon, the inspector was justified in refusing to issue a permit, although the reason for his refusal afforded no support for his action.

We conclude, therefore, that, for the reason indicated, a peremptory writ should be refused.

4 N.J. Misc. 942, 134 A. 901

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C

Supreme Court of New Jersey.

MALONE et al.
v.
MAYOR AND ALDERMEN OF JERSEY CITY et al.

No. 65.

Nov. 4, 1929.

Mandamus by Anna B. Malone and others against the Mayor and Aldermen of Jersey City and others. On demurrer to the return to an alternative writ.

Judgment on demurrer.

West Headnotes

Zoning and Planning ⇐383
414k383 Most Cited Cases
(Formerly 268k621.41, 268k621)

Refusal of permit to erect apartment house, held proper, where applicant was not owner of land, but merely held contract for purchase.

****571** Argued January term, 1929, ***956** before GUMMERE, C. J., and PARKER, J.

Mark A. Sullivan, of Jersey City, for relators.

Frank J. Reardon and Mark Townsend, Jr., both of Jersey City, for respondents.

PER CURIAM.

The relators, Anna B. Malone and Harry Goldowsky, by this proceeding seek to compel the municipality of Jersey City to issue to Goldowsky a permit for the erection of a 46-family brick apartment house upon a plot of ground located on Jewett avenue, Jersey City, of which Mrs. Malone is the owner. The two relators entered into a contract for the sale of this plot of ground by Mrs. Malone to Goldowsky, and the latter, subsequent to the execution of the contract, applied for the permit to erect the apartment house. The application was denied upon the ground that a large majority of the property owners in the neighborhood had protested against the erection of such a building. The relators thereupon applied for and were allowed an alternative writ of mandamus to review the validity of this municipal action.

In our opinion, the refusal to grant the permit was proper, even if the reason upon which such refusal was based was not sound. As has already been stated, the applicant for the permit was not the owner of the land, but merely held a contract for its purchase. Normally no one but the owner or a person authorized by him to do so has a right to erect a building upon a plot of ground owned by the former. No such right vests in a person holding a contract for the purchase of the tract. He may default in the performance of his contract. ***957** So, too, the owner may for good cause refuse to perform it on his part. In order to entitle an applicant to the granting of a permit to erect a building upon the land of another, it is necessary for him to show that he had a present right to erect such a building on that ****572** land. This case is barren of any proof that such a right was conferred upon Goldowsky by Mrs. Malone; and, such fundamental fact not having been shown to exist, the refusal to grant the permit was proper.

The defendants are entitled to judgment upon the demurrer to their return.

7 N.J. Misc. 955, 147 A. 571

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Supreme Judicial Court of Maine.

James C. MURRAY II et al.
v.
INHABITANTS OF THE TOWN OF LINCOLNVILLE et al.

Argued May 6, 1983.
Decided July 1, 1983.

Abutting property owners challenged administrative actions granting permission to prospective purchasers of adjoining tract to construct 44-unit condominium development on such land. The Superior Court, Waldo County, rejected abutters' claims, and their appeals were consolidated. The Supreme Judicial Court, McKusick, C.J., held that: (1) prospective purchasers' contract to purchase the property in question did not constitute agreement to sell land in unapproved subdivision in violation of statute prohibiting same, in that such contract required purchasers to obtain subdivision approval prior to closing, and (2) such contract gave prospective purchasers sufficient title, right or interest in the land to seek development permission from planning authorities.

Judgments affirmed as modified.

West Headnotes

[1] Zoning and Planning ⚖372.2
414k372.2 Most Cited Cases

[1] Zoning and Planning ⚖375.1
414k375.1 Most Cited Cases
(Formerly 414k375)

Contract to purchase real estate, although subject property was land in unapproved subdivision, did not constitute agreement to sell land in unapproved subdivision in violation of statute prohibiting same, in that provision of such contract required purchasers to obtain approval of subdivision plan prior to closing date specified in the contract, and thus, prospective purchasers were not deprived of standing to apply for subdivision approval. 30 M.R.S.A. § 4956, subd. 4; 38 M.R.S.A. § 484.

[2] Contracts ⚖105
95k105 Most Cited Cases

[2] Licenses ⚖38.7
238k38.7 Most Cited Cases
(Formerly 238k39)

Fact that performance called for by contract would violate state law if undertaken without some license or permit does not render such contract invalid or unenforceable on its face, even if there is no specific promise to obtain necessary permission.

[3] Zoning and Planning ⚖383
414k383 Most Cited Cases

Applicant for license or permit to use property in certain ways must have kind of relationship to the site that gives him legally cognizable expectation of having power to use such site in ways that would be authorized by the permit or license he seeks; such principle is intended to prevent applicant from wasting administrative agency's time by applying for permit or license that he would have no legally protected right to use.

[4] Zoning and Planning ⚖383
414k383 Most Cited Cases

That contract to purchase real estate is made conditional upon purchaser's obtaining subdivision approval does not mean that it is insufficient to confer administrative standing upon purchaser to seek permission to develop his contracted-for land.

[5] Zoning and Planning ⚖375.1
414k375.1 Most Cited Cases
(Formerly 414k375)

A conditional contract to buy land gives purchaser standing to seek permission to develop or otherwise use that land so long as condition does not operate to make entire contract revocable at whim of vendor.

[6] Zoning and Planning ⚖383
414k383 Most Cited Cases

Contract to purchase real estate gave prospective purchasers sufficient "title, right, or interest" in land they had contracted to purchase to seek development permission for that land from Board of Environmental Protection and town planning board. 30 M.R.S.A. § 4956, subd. 4; 38 M.R.S.A. § 484.

***41** W.R. Hulbert (orally), Lincolnville, Joseph B. Pellicani, Rockland, for plaintiffs.

Calderwood, Ingraham & Gibbons, Paul L. Gibbons (orally), Terry W. Calderwood, Camden, for Town of Lincolnville Planning Bd.

Verrill & Dana, Michael T. Healy (orally), Portland, for

Robert P. Bahre.

James E. Tierney, Atty. Gen., Christine Foster (orally), Augusta, for Bd. of Environmental Protection.

Before McKUSICK, C.J., GODFREY, ROBERTS and CARTER, JJ., and DUFRESNE and ARCHIBALD, A.R.JJ.

McKUSICK, Chief Justice.

Both James C. Murray II and Frank W. Kibbe ("the abutters") own property in the Town of Lincolnville adjoining the tract of land of about 23 acres that is the focus of this lawsuit. In separate administrative proceedings, Robert P. Bahre was granted permission by the Maine Board of Environmental Protection ("BEP") and the Lincolnville Planning Board ("Planning Board") to construct a 44-unit condominium development on the land. The abutters challenged both administrative actions in the Superior Court (Waldo County). In a single decision and order, the Superior Court rejected their arguments in both cases, and the abutters have come to this court on timely appeals, which are here consolidated. Their sole claim on appeal is that Bahre lacked any "right, title or interest" in the land he proposed to develop and that he therefore lacked "administrative standing" to seek and win development approval from the BEP or the Planning Board. We hold that Bahre's contract to purchase the 23- acre tract, conditioned upon the seller's obligation to obtain any necessary subdivision approval, conferred upon him the requisite standing before the administrative agencies. We therefore deny the abutters' appeals.

Since 1971, the land in question has been owned by Gilbert Harmon as trustee for the Land-Ho Real Estate Trust. On May 27, 1981, Harmon entered into a "Contract for the Sale of Real Estate" with Bahre and his wife Sandra. The contract recited that the Bahres had paid Harmon $10,000 as an "earnest money deposit" toward a total purchase price of $260,000. The contract went on to state, in paragraph 3:

> The seller represents that the premises are not part of a subdivision, or if part of a subdivision, the seller has obtained or will obtain approval of the subdivision from appropriate state and local agencies. Failure of the seller to obtain approval of a subdivision plan, prior to the closing date, shall entitle the purchasers at their option to withdraw all monies deposited by them pursuant to this Agreement and be relieved of all obligations.

On June 8, 1981, Bahre applied to the Planning Board under 30 M.R.S.A. § 4956 (1978) for permission to subdivide his contracted-for land into 44 condominium units. [FN1] ***42** On June 18, Bahre applied to the BEP under the Site Location Act, 38 M.R.S.A. §§ 481-489 (1978 & Supp. 1982-1983) for its permission to carry out the proposed condominium development. [FN2]

> FN1. Section 4956(1) defines a "subdivision" as "the division of a tract or parcel of land into 3 or more lots within any 5-year period, which period begins after September 22, 1971 ...." Section 4956(4) states:
> No person, firm, corporation or other legal entity may sell, lease, develop, build upon or convey for consideration, offer or agree to sell, lease, develop, build upon or convey for consideration any land in a subdivision which has not been approved by the municipal reviewing authority of the municipality where the subdivision is located and recorded in the proper registry of deeds ....
> The Town of Lincolnville's municipal reviewing authority is its Planning Board.
>
> FN2. "Development" is defined in 38 M.R.S.A. § 482(2) (1978) as "any state, municipal, quasi-municipal, educational, charitable, commercial or industrial development, including subdivisions, which occupies a land or water area in excess of 20 acres ...." The statute goes on to state:
> No person shall construct or cause to be constructed or operate or cause to be operated, or in the case of a subdivision sell, offer for sale, or cause to be sold, any development requiring approval under section 483 without first having obtained approval for such construction, operation or sale from the Board of Environmental Protection.

Appearing at public hearings in opposition to the development, the abutters argued to both the Planning Board and the BEP that Harmon, the owner of the land, needed subdivision approval himself before he could sell the subject property. They pointed out that the 23 acres Bahre wanted to buy were part of a larger parcel purchased by Harmon in 1971, and that Harmon had, in 1975 and 1976, conveyed out two small lots from the original parcel without obtaining subdivision approval from the Lincolnville authorities.

The Planning Board "tabled" Bahre's application on June 19, 1981, and no action was taken on it until November 9. On that day, the Planning Board approved Gilbert Harmon's application for subdivision approval to sell to Bahre [FN3] and "untabled" Bahre's own pending application. On

December 22, 1981, the Planning Board voted unanimously to approve Bahre's condominium proposal.

> FN3. Harmon's application was filed on September 17, 1981.

On January 27, 1982, the BEP issued an order finding that Bahre's proposal met all of the criteria listed in 38 M.R.S.A. § 484 and that Bahre had "sufficient title, right or interest to the property to have standing" before the BEP. The order approved Bahre's application subject to various conditions specified by the BEP. A modified order, issued on May 12, 1982, changed some of the conditions imposed on the developer but otherwise left the BEP's findings intact.

[1] The crux of the abutters' claim is that the "Contract for the Sale of Real Estate" between Harmon and the Bahres was void because at the time it was executed it violated 30 M.R.S.A. § 4956(4). Since a void contract is a legal nullity, they argue, the document gave Bahre no "independently existing relationship to regulated land in the nature of a 'title, right or interest' in it which confers legal power to use it, or control its use." *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me.1974). Therefore, the abutters contend, Bahre had no standing to apply to the BEP or to the Planning Board in June of 1981 for permission to develop the land he sought to purchase.

[2] The abutters' argument, however, fails at its inception because the contract signed by Harmon and the Bahres did not violate section 4956(4) when made. The statute states, in pertinent part:

> No person ... or other legal entity may sell ... or convey for consideration, offer or agree to sell ... or convey for consideration any land in a subdivision which has not been approved by the municipal reviewing authority of the municipality where the subdivision is located.

Although the 23-acre lot that the Bahres wished to purchase was "land in a subdivision," and although the subdivision had not been approved by the Planning Board when the contract between Harmon and the Bahres was signed, that contract did not ***43** constitute an agreement to sell land in an unapproved subdivision, nor did it contemplate the sale of unapproved subdivision land. Instead, it embodied an agreement to sell land in an approved subdivision, and contemplated a sale that would conform to the requirements of section 4956(4). Paragraph 3 of the contract required the seller, Harmon, to "obtain approval of a subdivision plan" prior to the closing date specified in the document. We cannot read section 4956 to prohibit the making of a contract for the sale of land in a subdivision that is unapproved at the time of the making of the contract, where the agreement by its terms requires the seller to obtain subdivision approval before the sale is consummated. [FN4] The proposed seller and purchasers did not violate section 4956(4) when they entered into their May 27, 1981, contract for the sale of real estate. [FN5] That valid contract conferred standing upon Robert Bahre to seek administrative approval for his condominium development from the BEP and the Planning Board.

> FN4. Paragraph 3 specified that failure of the seller to obtain proper subdivision approval would not automatically abrogate the contract, but instead would give the purchasers an *option* to be relieved of their obligations. We recognize that this provision could conceivably result in the sale going forward without the necessary subdivision approval having been procured. That is not what happened in this case, however. And the fact that the performance called for by a contract would violate state law if undertaken without some license or permit does not render the contract invalid or unenforceable on its face, even if there is no specific promise to obtain the necessary permission. *See generally* 6 A. Corbin, *Corbin on Contracts* § 1347 (1962).
>
> FN5. We therefore need not decide whether a contract executed in violation of section 4956 would be "void," as the abutters claim, or merely "voidable," as appellees assert.

[3][4] The concept of administrative standing was explained in *Walsh v. City of Brewer*, 315 A.2d at 207, as an "indispensable and valid condition for 'applicant' eligibility." An applicant for a license or permit to use property in certain ways must have "the kind of relationship to the ... site," *id.*, that gives him a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license he seeks. This principle is intended to prevent an applicant from wasting an administrative agency's time by applying for a permit or license that he would have no legally protected right to use. *Walsh* suggests that whatever the applicant relies on for his "authority" to use the land in the ways permitted by the permit he seeks must be legally enforceable and not revocable "at any moment, at the will of the owners." *Id.* Bahre's rights under the conditional purchase contract satisfy those criteria. A breach by Harmon of his contractual obligation to convey the land to the Bahres would have entitled them to specific enforcement of the contract in the courts. *See O'Halloran v. Oechslie*, 402 A.2d 67, 70 (Me.1979). That the contract is made conditional upon the seller's obtaining subdivision approval does not mean that it is insufficient to confer administrative

standing upon the purchaser to seek permission to develop his contracted-for land. The fact that the Bahres could opt out of the purchase under certain circumstances does not deprive them of standing, any more than the owner of property in fee simple could be said to lack standing because he has the right to sell his land at any time.

Our holding today comports fully with the result reached by most courts faced with a question similar to the one here presented. *See, e.g., Arant v. Board of Adjustment of City of Montgomery*, 271 Ala. 600, 604, 126 So.2d 100, 104 (1960) ("the petitioner ... as equitable owner of the property under a contract to purchase conditioned on the grant of the variance, is entitled to apply for it"); *Gray v. Board of Supervisors of County of Stanislaus*, 154 Cal.App.2d 700, 316 P.2d 678 (1956); *City of Baltimore v. Cohn*, 204 Md. 523, 529, 105 A.2d 482, 485 (1954); *Carson v. Board of Appeals of Lexington*, 321 Mass. 649, 75 N.E.2d 116 (1947); *Burr v. City of Keene*, 105 N.H. 228, 230, 196 A.2d 63, 65 (1963) ***44** ("The prospective purchasers were the real parties in interest and the only ones who could furnish the information which the board needed in order to make its decision"); *Humble Oil & Refining Co. v. Board of Aldermen of Town of Chapel Hill*, 284 N.C. 458, 465, 202 S.E.2d 129, 134 (1974) ("a prospective vendee under contract to purchase the property to be affected by the granting of a zoning variance or a special use permit is a proper party to apply therefor ... and the fact that he is bound to take the property only if a zoning variance or special use permit is granted does not deprive him of such standing"); *O'Neill v. Philadelphia Zoning Board of Adjustment*, 384 Pa. 379, 387, 120 A.2d 901, 905 (1956) ("an equitable owner under a conditional contract to purchase stands in the same position as a legal owner in seeking a variance").

[5] The cited cases all involved purchase contracts conditioned upon the *buyer's* ability to secure the desired license, permit, or variance for the development of the land that the buyer sought to purchase, while the Harmon-Bahre contract was conditioned upon the *seller's* obtaining subdivision approval. A single principle applies to both fact patterns, however: a conditional contract to buy land gives the buyer standing to seek permission to develop or otherwise use that land so long as the condition does not operate to make the entire contract revocable at the whim of the seller.

[6] There is no such problem in the case at bar. By the terms of paragraph 3, it was the Bahres, not Harmon, who would have had the option to "be relieved of all obligations" if Harmon failed to secure subdivision approval for the sale. The contract therefore gave Bahre sufficient "title, right, or interest" in the land he had contracted to purchase to seek development permission for that land from the BEP and the Planning Board. Bahre had standing to apply to those agencies from the moment the contract was signed.

The entry [FN6] is:

> FN6. In both cases the Superior Court's order was "that Plaintiffs' appeal is denied." Although the intent of the order is made perfectly clear from examination of the court's opinion, the judgments must be modified to comply with M.R.Civ.P. 80B(c), which delimits the judgment in suits to review governmental action:
> The judgment of the court may affirm, reverse, or modify the decision under review or may remand the case to the governmental agency for further proceedings.

Judgment of the Superior Court in case No. CV-82-3 is modified to read, "Decision of Town of Lincolnville Planning Board affirmed"; as so modified, that judgment is affirmed.

Judgment of the Superior Court in case No. CV-82-49 modified to read, "Decision of Board of Environmental Protection affirmed"; as so modified, that judgment is affirmed.

All concurring.

462 A.2d 40

END OF DOCUMENT

C

Supreme Judicial Court of Maine.

Sally Ann RANCOURT
v.
TOWN OF GLENBURN, et al.

Argued Nov. 5, 1993.
Decided Dec. 28, 1993.

Permit holder appealed decision of zoning board of appeals revoking her permit to construct dock at end of right-of-way to lake. The Superior Court, Penobscot County, Mead, J., dismissed for lack of standing, and permit holder appealed. The Supreme Judicial Court, Roberts, J., held that: (1) permit holder who did not participate in proceedings that resulted in revocation nonetheless had standing to appeal, and (2) board was justified in finding that permit holder did not establish sufficient legal interest in right-of-way to entitle her to apply for permit to place dock on right-of-way.

Judgment of dismissal vacated; remanded for entry of judgment affirming decision of board of appeals revoking permit.

West Headnotes

[1] Zoning and Planning ⚖571
414k571 Most Cited Cases

Permit holder who did not appear or otherwise participate before zoning board of appeals nonetheless had standing to appeal decision of board revoking her permit; permit holder was essential party to complaint challenging either issuance or revocation of permit. 30-A M.R.S.A. § 2691, subd. 3, par. G.

[2] Zoning and Planning ⚖572
414k572 Most Cited Cases

Holder of revoked permit who seeks judicial review is limited to issues actually considered by zoning board of appeals in revoking permit.

[3] Zoning and Planning ⚖605
414k605 Most Cited Cases

[3] Zoning and Planning ⚖621
414k621 Most Cited Cases
[3] Zoning and Planning ⚖703
414k703 Most Cited Cases

Supreme Judicial Court reviews decision of zoning board of appeals revoking permit directly for abuse of discretion, error of law, or findings unsupported by substantial evidence in record.

[4] Zoning and Planning ⚖685
414k685 Most Cited Cases

As party bearing burden of proof before zoning board of appeals, permit holder had to demonstrate that evidence compelled board to find that her application met requirements of law.

[5] Zoning and Planning ⚖383
414k383 Most Cited Cases

Evidence supported finding that permit holder did not establish sufficient legal interest in right-of-way to entitle her to apply for permit to place dock at end of right-of-way; although deed granted right of ingress and egress to lake, it did not indicate whether such access included right to place dock at end of right-of-way, and there was no showing that original developer intended to allow each of 60 non-shorefront owners to place dock on one of five rights-of-way.

[6] Deeds ⚖120
120k120 Most Cited Cases

Scope of interest in land conveyed by deed is determined solely from language of deed, if that language is unambiguous.

***964** Joel A. Dearborn (orally), Ferris, Dearborn & Willey, Brewer, for plaintiff.

Robert E. Miller (orally), Spencer, Zmistowski & Miller, Old Town, Thomas Russell (orally), Mitchell & Stearns, Bangor, for defendants.

Before ROBERTS, GLASSMAN, CLIFFORD, COLLINS, RUDMAN and DANA, JJ.

ROBERTS, Justice.

[1] Sally Ann Rancourt appeals from a judgment entered in the Superior Court (Penobscot ***965** County, *Mead, J.*) dismissing for lack of standing her appeal from a decision of the Glenburn Board of Appeals. She contends that "party," as used in 30-A M.R.S.A. § 2691(3)(G) (Pamph.1992), should include a permit holder whose permit has been revoked by a zoning board of appeals, regardless whether that person appeared or otherwise participated before the board. Because a permit holder is an essential party to a complaint challenging either the issuance or revocation of a

permit, we vacate the dismissal of Rancourt's appeal, but direct the entry of a judgment against her on the merits.

We have not previously addressed the question whether a permit holder who does not appear, personally or through counsel, or otherwise participate in a proceeding before a zoning board of appeals has standing to challenge in the Superior Court the board's revocation of the permit. Our interpretation of "party" as used in 30-A M.R.S.A. § 2691(3)(G) has arisen only in the context of litigation initiated by persons other than the permittee, *e.g.*, *Singal v. City of Bangor*, 440 A.2d 1048, 1050-51 (Me.1982), or by an applicant who participated in the board's hearing, *e.g.*, *New England Herald Dev. Group v. Town of Falmouth*, 521 A.2d 693, 695-96 (Me.1987). We conclude, however, that because a permit holder is an essential party to a complaint challenging either the issuance or revocation of a permit, such a permit holder necessarily has standing to seek judicial review of the permit's revocation, despite the failure to participate before the board. *See Centamore v. Commissioner, Dep't of Human Services*, 634 A.2d 950 (Me.1993).

[2] We recognize that our decision today might be interpreted as encouraging permittees not to participate at the municipal level. On the contrary, anyone who bothers to obtain a permit should have sufficient self-interest to defend it. Moreover, the holder of a revoked permit who seeks judicial review will be limited to the issues actually considered by the board. *Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14, 20 n. 7 (Me.1981). We are confident that occasions when the permit holder fails to appear before the board and yet subsequently seeks judicial review will be exceedingly rare.

[3][4][5] Reaching the merits, we review the board's decision directly for abuse of discretion, error of law, or findings unsupported by substantial evidence in the record. *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898, 903 (Me.1993). As the party bearing the burden of proof before the board, Rancourt must demonstrate that the evidence compelled the board to find that her application met the requirements of the law. *Tompkins v. City of Presque Isle*, 571 A.2d 235, 236 (Me.1990). She has failed to meet that burden.

In order to be eligible to apply for a permit, one must have the type of relationship to a site "that gives ... a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license [sought]." *Murray v. Town of Lincolnville*, 462 A.2d 40, 43 (Me.1983). Here the board found that Rancourt did not have a "sufficient legal interest" in a right-of-way leading to Pushaw Lake to entitle her to apply for a permit to place a dock on the right-of-way. Two clauses in Rancourt's deed granted a right of "ingress and egress" to Pushaw Lake, as well as "any and all other rights, easements, privileges and appurtenances" attached to her property. The board interpreted those clauses in light of the original developer's site plan.

[6] The scope of an interest in land conveyed by deed is determined solely from the language of the deed, if that language is unambiguous. *Badger v. Hill*, 404 A.2d 222, 225 (Me.1979). The first clause in Rancourt's deed does not indicate whether "ingress and egress" includes the right to place a dock at the end of the right-of-way. When the purposes of an express easement are not specifically stated, a court must "ascertain the objectively manifested intention of the parties in light of circumstances in existence recently prior to the execution of the conveyance." *Englishmans Bay Co. v. Jackson*, 340 A.2d 198, 200 (Me.1975).

The only evidence of intent relates to that of the developer in 1936. At that time, the site plan showed five rights-of-way, ranging in width from twenty to twenty-five feet, that provided access to the lake for more than 60 ***966** non-shorefront property owners. Rancourt has pointed to no evidence to suggest that the developer intended to allow each of those owners to place a dock on the rights-of-way. On the contrary, testimony presented to the board revealed that Rancourt's dock alone, which she placed on the right-of-way before her permit became final, interfered with other property owners' access to the lake. *See Morgan v. Boyes*, 65 Me. 124, 125 (1876) (owner of right-of-way may not "materially impair, nor unreasonably interfere with its use as a way").

The board correctly determined that Rancourt did not establish a sufficient legal interest in the right-of-way to entitle her to apply for a permit to place a dock thereon. Accordingly, the decision to revoke her permit should be affirmed.

The entry is:

Judgment of dismissal vacated.

Remanded for entry of a judgment affirming the decision of the Glenburn Board of Appeals.

All concurring.

635 A.2d 964

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C

Supreme Court of New Jersey.

SLAMOWITZ et al.
v.
JELLEME, Inspector of Buildings, et al.

No. 248.

Nov. 17, 1925.

Mandamus by Nathan Slamowitz and another to compel issuance of building permit by John Jelleme, Inspector of Buildings of the City of Passaic, and the Board of Adjustment thereof. On rule to show cause.

Rule made absolute, to end that peremptory writ may issue.

West Headnotes

[1] Zoning and Planning ⚖383
414k383 Most Cited Cases
(Formerly 268k621.41)

Application for building permit may be made by persons having contract to purchase land, with consent and approval of owner.

[2] Zoning and Planning ⚖431
414k431 Most Cited Cases
(Formerly 268k621.40)

Persons applying for building permit to city building inspector, board of commissioners, and board of adjustment, successively, held to have followed necessary steps to obtain permit.

[3] Mandamus ⚖3(8)
250k3(8) Most Cited Cases

Persons applying to city board of commissioners for building permit after building inspector's refusal thereof, and subsequently to adjustment board, to which referred by commissioners, *held* not precluded from obtaining mandamus to compel issuance of permit on ground that they did not exhaust their remedies by appeal.

[4] Zoning and Planning ⚖444
414k444 Most Cited Cases
(Formerly 268k621.44)

Constitutional rights of applicants for building permit, which building inspector refused solely on ground that zoning ordinance forbade erection of apartment house on applicants' lands, are not triable before city board of adjustment.

****883 *1169** Argued October term, 1925, before TRENCHARD, KATZENBACH, and LLOYD, Jj.

Ward & McGinnis, of Paterson, for relators.

Thomas E. Duffy and Frederick S. Ranzenhofer, both of Passaic, for respondents.

PER CURIAM.

A rule was issued in this case requiring the respondents to show cause why a peremptory or alternative writ of mandamus should not be awarded to compel the issuance of a building permit to the relators. Under permission granted in the rule depositions have been taken from which it appears that the relators has a contract to purchase from one Swan certain lands in the city of Passaic, and that they, with the consent of Swan, made application to the defendant Jelleme as building inspector of Passaic for a permit to erect an apartment house. The application was refused by the inspector on the ground that the relators would not be permitted to build an apartment house on the lot because of the provisions of a zoning ordinance. The application was for a two family apartment house, and the plans therefor ***1170** were in the possession of the relators, but the inspector refused to examine them. Further application to the board of commissioners of the city was made, and the relators were informed that a board of adjustment was about to be created before whom they could appear. Upon the creation of this board the relators applied for a permit, and were again denied. It is apparent from the depositions taken that this refusal was based solely on the ground that to grant a permit would be in violation of a zoning ordinance forbidding the erection of apartment houses on lands located as were those of the relators.

[1][2][3][4] In the defendants' brief it is sought to sustain this refusal on several grounds: (1) That the relators were not the owners of the property at the time they made application. The application, however, was made with the consent and approval of the owner, and is controlled by the case of Reimer v. Dallas (N. J. Sup.) 129 A. 390. (2) That the relators did not follow the necessary steps ****884** to get a building permit. We think the evidence discloses to the contrary. (3) That the relators did not exhaust their remedies by appeal. This point is wholly without merit. Upon the refusal by the building inspector relators made application to the board of commissioners, were referred to an adjustment board to be created, and to this board they

applied, and were again refused. What more they could have done it is difficult to conceive. The last step, however, they were not obliged to take. The constitutional rights of the relators were not triable before that body (Losick v. Binda, 130 A. 537, No. 102 of the May term, 1925, Court of Errors and Appeals), and these rights are settled by the case of Ignaciunas v. Risley, 99 N. J. Law, 389, 125 A. 121, in the Court of Errors and Appeals, and in this court by Nelson Building Co. v. Binda (N. J. Sup.) 128 A. 618.

The rule to show cause will be made absolute to the end that a peremptory writ of mandamus may issue.

3 N.J. Misc. 1169, 130 A. 883

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Supreme Judicial Court of Maine.

Thomas T. WALSH
v.
CITY OF BREWER et al.

Feb. 5, 1974.

Action seeking declaratory judgment that plaintiff was entitled to issuance of a license and permit to develop and operate a mobile home park. The Superior Court, Penobscot County, rendered judgment for plaintiff, and defendants appealed. The Supreme Judicial Court, Wernick, J., held that plaintiff, who was not record title holder of tract and who merely asserted that he had authority to develop tract as mobile home park, lacked both 'standing' to qualify as a proper applicant for license, permit or certificate of occupancy and standing to sue, that plaintiff could not properly achieve standing for judicial interposition on the ground that regadless of his right to be an applicant he had in fact been an applicant and had been dealt with as such and had expended large sums of money in developing tract where the governmental officials and agencies were in no respect at fault as wrongfully having induced plaintiff to be a de facto applicant or by encouraging him to continue processing of de facto application and that the same deficiency constituting plaintiff's lack of standing to sue concomitantly gave rise to lack of subject-matter jurisdiction in the superior court and that such defect could be raised for first time on appeal.

Appeal sustained; case remanded for presentation of additional evidence.

Webber, J., sat at argument but retired before the decision was rendered.

West Headnotes

[1] Zoning and Planning ⚖383
414k383 Most Cited Cases

When there is lacking a clear, affirmative and express provision to the contrary, some "title, right or interest" in the land is implicitly a valid precondition of standing to be a proper applicant, under zoning or other land use regulations, including mobile home park ordinances, for a license, permit or certificate.

[2] Administrative Law and Procedure ⚖450.1
15Ak450.1 Most Cited Cases
(Formerly 15Ak450)

Absent clear and unquestionable legislative expression manifesting a different legislative attitude, governmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are "strangers" to the particular governmental regulation and control being undertaken, i. e., officials and agencies should be required to deal only with those who have the requisite "standing."

[3] Zoning and Planning ⚖383
414k383 Most Cited Cases

Stipulation that at all times plaintiff had authority from legal owners to propose and develop mobile home park on site was insufficient to establish that plaintiff had sufficient title, right or interest in the tract to qualify him as a proper applicant for a license, permit or certificate of occupancy under mobile home park and zoning ordinances; plaintiff had not established the requisite standing.

[4] Zoning and Planning ⚖383
414k383 Most Cited Cases

[4] Zoning and Planning ⚖571
414k571 Most Cited Cases

If plaintiff's "authority" to develop tract as mobile home park arose by virtue of some fiduciary relationship which would establish a legally cognizable interest in the land, as distinguished from mere permission to deal with the land, plaintiff would have had sufficient standing to qualify as a proper applicant for a license, permit or certificate of occupancy and, consequently, would have had standing to bring suit challenging various actions and inactions of local officials in regard to applications. 14 M.R.S.A. § 5951 et seq.

[5] Declaratory Judgment ⚖300
118Ak300 Most Cited Cases

Since plaintiff, who sought declaration that he was entitled to license and permit to construct and operate mobile home park, lacked "standing" in the first instance to invoke, and have continually operative in his behalf, the administrative function by which it was calculated that regulatory license, permits or certificates would be issued, plaintiff also lacked standing to sue. 14 M.R.S.A. § 5951 et seq.

[6] Declaratory Judgment ⚖300
118Ak300 Most Cited Cases

Plaintiff, who sought declaration that he was entitled to license and permit to operate mobile home park but who lacked standing to be a proper applicant for a license or

permit because he had not shown sufficient title, right or interest in subject land, could not properly achieve standing for judicial intervention on ground that he had been a de facto applicant, that preliminary action had been taken on his de facto application and that in the interim he had expended large sums of money in developing tract where various governmental officials and agencies were in no respect at fault as wrongfully having induced plaintiff to be a de facto applicant since plaintiff never disclosed details of his relationship to tract, legal title to which was in his wife and mother.

[7] Appeal and Error ⚖169
30k169 Most Cited Cases

Generally, an issue raised for the first time at the appellate stage will be denied cognizance in the appellate review of the case.

[8] Appeal and Error ⚖174
30k174 Most Cited Cases
(Formerly 30k74)

Whether a plaintiff's lack of standing, as a deficiency raised for the first time on appeal, is to be held effective against a plaintiff's interest cannot be settled by pronouncement of a general rule that standing is, or is not, the kind of issue which may be raised for the first time on the appellate level; the answer must depend on the special and distinctive features of each case.

[9] Declaratory Judgment ⚖273
118Ak273 Most Cited Cases

The declaratory judgment authority of the Superior Court as conferred by the Declaratory Judgment Act does not establish the subject-matter jurisdiction by which the superior court achieves power to act; subject-matter jurisdiction by the Superior Court does not derive from the label attached to the initial pleading, be it one for declaratory judgment or otherwise, but from the substantive gravamen of the complaint. 14 M.R.S.A. § 5951 et seq.

[10] Appeal and Error ⚖174
30k174 Most Cited Cases

Since plaintiff, seeking declaration that he was entitled to license and permit to construct and operate mobile home park, not only lacked "standing" to be a proper applicant under subject ordinances but also lacked standing to sue because he failed to establish any title, right or interest in subject tract, such deficiency concomitantly gave rise to lack of equity subject-matter jurisdiction in Superior Court; such lack of subject-matter jurisdiction could be raised for first time on appeal. 14 M.R.S.A. § 5951 et seq.

[11] Courts ⚖37(2)
106k37(2) Most Cited Cases

Lack of subject-matter jurisdiction is always open at any stage of the proceedings.

[12] Declaratory Judgment ⚖300
118Ak300 Most Cited Cases

[12] Zoning and Planning ⚖383
414k383 Most Cited Cases
If plaintiff, who was not record title owner of subject tract but who sought declaration that he was entitled to permit and license to operate and develop mobile home park, were able to establish that he had interest in the site, such as a resulting trust beneficiary, such interest could adequately give standing both to sue and to seek the license and permit. 14 M.R.S.A. § 5951 et seq.
***202** Edward H. Keith, Bangor, for plaintiff.

Libhart & Ferris, by Wayne P. Libhart, Brewer, for defendants.

Before DUFRESNE, C. J., and WEBBER, WEATHERBEE, POMEROY, WERNICK and ARCHIBALD, JJ.

WERNICK, Justice.

Plaintiff, Thomas T. Walsh, instituted an action in the Superior Court (Penobscot County) and achieved judgment in his favor. The defendants[FN1] have appealed from the judgment.

> FN1. The defendants are: (1) the Municipality, City of Brewer; (2) Paul R. England, Rudolph O. Marcoux, Gerald D. Robertson, Avis J. McKechnie and Arthur P. Doe (who had been elected the members of the Brewer City Council at the Brewer Municipal Election held on October 12, 1970) acting in their capacities as the City Council of Brewer; (3) Charles F. Guild, Jr., Arthur W. Fowler, Jr., Albert M. Tennett, Wyman P. Gerry, Lendal C. Mahoney, and Richard E. Brooks in their capacities as the members constituting the Brewer Planning Board; (4) Harry Woodhead in his capacity as City Engineer of the City of Brewer; (5) William L. Wetherbee in his capacity as the City Building Inspector; (6) Raymond E. Wood in

his capacity as Chief of the Brewer Fire Department; (7) Ralph W. Willoughby in his capacity as Chief of the Brewer Police Department; and (8) Charles W. Heddericg in his capacity as the City Health Officer.

Plaintiff filed his complaint on September 29, 1970, and was permitted to amend, on November 25, 1970, by substituting a new complaint, designated 'Complaint for Declaratory Judgment', which included additional allegations concerning events occurring after the action had been commenced.

Basically, plaintiff claimed legal rights (1) to a license for a mobile home park on Eastern Avenue in Brewer under the City's 'Mobile Home Park, Trailer Park and Camping Park' (hereinafter 'Mobile Home Park') ordinance and (2) to a permit from the Zoning Board of Appeals approving the project, as required by the 'Zoning' ordinance. Plaintiff asserted that various acts, and omissions to act, by defendants had deprived him of such license and permit to which he was legally entitled and thus he had been wronged by defendants. Plaintiff prayed, inter alia, that the Court enter a declaratory judgment that plaintiff (1)

'. . . is entitled to the issuance of a license to operate a mobile home park as proposed by him in his plan submitted to the Planning Board of the City of Brewer'

and (2)

'. . . is entitled under the zoning ordinance to the issuance of a permit to operate (such) . . . mobile home park . . ..'

Since we conclude, as hereinafter more fully explained, that on the record before us plaintiff lacks 'standing to sue', we sustain the appeal of defendants and remand the case to the Superior Court for further proceedings.

I

Plaintiff's interest in developing a mobile home park in Brewer began in the spring of 1969.

The Brewer Mobile Home Park ordinance (Chapter 25 of the City Ordinances), enacted on March 10, 1969, had declared it

'. . . unlawful for any person to maintain or operate within the limits of the City of Brewer, any . . ., mobile home park . . ., unless such person shall first obtain from the licensing authority, (the Brewer City Council) a license therefor.'

***203** Prerequisite to the issuance of such license were

'favorable recommendations in writing, from the Planning Board, the Building Inspector, Health Officer, Chief of Police and Chief of the Fire Department.' (Section 302)

The Brewer Zoning ordinance (Chapter 24 of the City Ordinances), as it read in 1969 and at all times prior to November 12, 1970, placed the Eastern Avenue site of the mobile home park in the 'single residence and farming' zone district. In that zone a mobile home park is

'. . . permitted with the favorable recommendation of the Planning Board and after final approval of the (Zoning) Board of Appeals',

subject to the further conditions that any mobile home park shall be set back 200 feet from any right-of-way line and otherwise conform to requirements of the Mobile Home Park ordinance.

On April 28, 1970, plaintiff filed an application for a mobile home park license with the Brewer City Clerk, Arthur Verow. The Clerk forthwith referred the application to the Planning Board.

Plaintiff-his wife, Patricia A. Walsh accompanying him-first met with the Planning Board at the beginning of May, 1970.

On May 16, 1970 plaintiff and a surveyor whom he had engaged to assist him, Dana W. Bartlett, attended another meeting of the Planning Board. At this meeting the Board 'approved' a plan for a mobile home park on Eastern Avenue

'with the qualification that 'final layouts and engineering arrangements should meet with the approval of the City Engineer and the Consultant Planner' (Mr. Hans Klunder).'

Plaintiff was given a list which, over and above 'the regular requirements', included special requirements relating to the 'State Plan', the manner and placement of mobile homes on both interior and exterior lots and distances to separate the western boundary and the eastern line of the property from any mobile home.

Plaintiff and Mr. Bartlett conferred on various occasions thereafter with the City Engineer (defendant, Harry Woodhead) and the Planning Consultant, Mr. Klunder.

On June 4, 1970 plaintiff filed with the Building Inspector (defendant, William L. Wetherbee) a request, addressed to the Zoning Board of Appeals, for

'permission to construct and operate a mobile home park of approximately 100 units, on Walsh Property located on the northerly side of Eastern Avenue.'

The Building Inspector informed plaintiff that this request to the Zoning Board of Appeals would not be considered at the June meeting of the Board-to avoid giving the impression that the Board was 'rushing it through.'

On June 22, 1970 the Planning Board held another meeting at which the Eastern Avenue mobile home park project was

on the agenda. The Planning Board had received a memorandum from Mr. Klunder, the City's Consultant Planner, in which he had expressed reservations about use of the property for a mobile home park but nevertheless indicated that 'the latest layout of the proposed park was adequate.' Plaintiff did not attend this June 22, 1970 meeting. Many Brewer residents were present, however, and voiced opposition to the mobile home project. The meeting produced no action by the Planning Board.

At a meeting of the City Council on June 29, 1970, a number of residents protested against the mobile home park being contemplated for Eastern Avenue. Plaintiff was not in attendance. At this meeting, the City Council passed an

> 'order . . . directing the City Solicitor to prepare a revision of the Mobile Home Park Ordinance (Chapter 25).'

***204** At the beginning of July, 1970, plaintiff and his attorney were informed that, upon the direction of the Assistant City Solicitor, the Zoning Board of Appeals would postpone hearing the request of plaintiff for a mobile home park on Eastern Avenue

> 'until such time as they had been formally notified that the Planning Board had finally approved the plan.'

The Planning Board held a meeting on July 6, 1970 at which plaintiff submitted the latest revision of a plan for the mobile home park. Approximately 200 persons expressed strong opposition. The Planning Board took no action. Thereafter, it continued with non-action during several months while the Brewer City Council proceeded to amend both the Brewer Mobile Home Park and Zoning ordinances.

A proposed revision of the Mobile Home Park ordinance was first presented to the City Council on July 13, 1970. Plaintiff appeared and objected to some of the modifications proposed. Suspending its rules, the City Council gave the revision first and second readings. At a special meeting held on July 20, 1970 the City Council again suspended its rules and gave final passage to a revised Mobile Home Park ordinance. It became effective July 30, 1970. The revised Mobile Home Park ordinance would permit a mobile home park on the Eastern Avenue site consisting of not more than 45 mobile home lots and would thus effectively frustrate the project envisioned by plaintiff, which involved 100 mobile home lots.

On September 10, 1970, the City Council received a proposed amendment to the Brewer Zoning ordinance placing the Eastern Avenue tract in the 'single residence' zone in which use for a mobile home park was prohibited. The proposed amendment was submitted to the Planning Board. On October 28, 1970, the Planning Board advised the City Council that it did not recommend the change of the zone. Nevertheless, at a special meeting on November 2, 1970, the City Council suspended its rules, gave the amendment a first and second reading and, again suspending its rules, passed the amendment to be engrossed and finally enacted it, effective November 12, 1970.

It was because this amendment to the Zoning ordinance became effective after plaintiff had instituted his Court action that plaintiff was allowed to substitute a new complaint including allegations concerning the amendment to the Zoning ordinance and the interrelationships between it and the prior action of the Council in revising the Mobile Home Park ordinance. Plaintiff charged that the City Council had a

> 'purpose of preventing the development of the mobile home park proposed by the Plaintiff',

which it put into effect, thereby precluding

> '. . . the Planning Board, the Building Inspector, the City Engineer, the Chief of the Fire Department, and Chief of Police and the Health Officer from taking further action upon Plaintiff's license application.'

After a full hearing, the presiding Justice found: (1)

> '(p)laintiff was unable to get a written statement from the Planning Board either recommending or disapproving his proposal'

and (2)

> '(t)here appears to be no justification for the Planning Board's refusal to act.'

The presiding Justice further determined, as ultimate conclusions of law, that (1)

> 'The amendment to Chapter 24 (Zoning Ordinance) enacted on November 2, 1970 is not applicable to Plaintiff's application (regarding the Eastern Avenue site at issue) . . . nor to any subsequent application by Plaintiff for a license to operate under Chapter 25 (the Mobile Home Park, etc. Ordinance) or for a building permit under Section 1201 or a ***205** certificate of occupancy under Section 1202 of Chapter 24, in relation to said site';

and (2)

> 'The amendment to Chapter 25 (Mobile Home Park, etc. Ordinance) enacted on July 20, 1970, is not applicable . . . to any application by Plaintiff for any exception, license, permit or certificate (as) mentioned . . . (in conclusion (1)) above, in relation to said site.'

Accordingly, the presiding Justice ordered the Brewer Planning Board to (1)

> '. . . resume consideration of Plaintiff's application . . . as to the proposed site and to apply thereto the provisions of both Chapter 24 and Chapter 25 as they existed prior to July 20, 1970';

and (2)

'. . . within a reasonable time . . ., signify in writing either their favorable recommendation or their refusal to recommend with the reasons therefor.'

The presiding Justice made the same order directed to the Zoning Board of Appeals

'should the Plaintiff apply to them for final approval . . ..'

Additionally, the presiding Justice issued directives to the Planning Board, the Zoning Board and the other defendant officials of the City of Brewer to be effective should the administrative processes, as ordered by him to be resumed, produce particular results favorable to plaintiff's position.

II

On appeal, defendants maintain that the action must be dismissed because plaintiff lacks 'standing to sue.' This issue was not raised before the presiding Justice; it is presented for the first time at the appellate level.

The facts relevant to the 'standing' question are these. The complaint alleges the relationship of plaintiff to the Eastern Avenue site in question to be only: (1) plaintiff 'is a resident of Brewer'; (2) plaintiff filed 'applications' for the development and operation of a mobile home park on the Eastern Avenue site in connection with which he consulted with various City officers and agencies; and (3) plaintiff expended considerable sums of money for planning, preparation of plans, surveys and engineering. At hearing, it developed that: (1) at all tiems relevant the record legal title to the Eastern Avenue tract was not in the plaintiff but was in Beatrice Walsh, his mother, and Patricia Walsh, his wife; (2) plaintiff had never revealed in any of the applications filed by him, or in any of his various contacts or communications with the agencies or personnel of the City of Brewer, any details of his relationship to the Eastern Avenue tract or, specifically, that persons other than he were its legal owners-with the consequence that, as the parties stipulated at hearing,

'the only notice that the City, or any of the Defendants, would have had as to the record title, is whatever might ne disclosed by the tax records of the City';

and (3) the only relationship borne by plaintiff to the Eastern Avenue site is that

'at all times the Plaintiff . . . had authority from . . . (the legal owners) to propose and develop and operate a mobile home park on that site, with all related utilities and appurtenances.'

In the case law of Maine, and generally in the decisions of other jurisdictions, 'standing to sue' has been applied in varying contexts causing it to have a plurality of meanings. It has been used in relation to the question of whether persons lacking a specially protected right, or who have not suffered injury uniquely different from that sustaiend by the public generally, may achieve a Court adjudication as to so-called 'public wrongs.' 'Standing' has ***206** been called upon as the concept to explain that judicial power is constitutionally confined to 'cases or controversies' and to indicate that a party's relationship to a case, were it to be recognized as conferring standing, could result in an improper 'advisory opinion.' 'Standing' has been utilized in conjunction with the problem of whether a party is presenting issues which are 'ripe' for judicial evaluation. 'Standing' has brought into focus the question of whether parties are the proper persons to be afforded 'judicial review' of administrative or other governmental action. 'Standing' has been invoked as a preliminary facet of the question of the Court's 'subject-matter jurisdiction.' Or 'standing' has been the phraseology to express that a Court is exercising a 'judicial restraint' to decline consideration of cases or issues which, for a multiplicity of reasons, may be deemed inappropriate for consideration by a Court.[FN2]

> FN2. In Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) Chief Justice Warren observed that 'standing 'serves, on occasion, as a shorthand expression for all the various elements of justiciability. " (p. 99, 88 S.Ct. p. 1952)
> Professor Kenneth Clup Davis has characterized the case law of 'standing to sue' as a 'confused logic-chopping about bewildering technicalities.' (Davis, Standing: Taxpayers and Others, 35 U. of Chicago L.Rev. 601, 628)

To avoid difficulties which can arise from these many connotations of the single phrase 'standing to sue', we commence analysis of the 'standing' issue, as it may appear to have rational bearing in the case at bar, by concentrating on the presiding Justice's conception of the gravamen of plaintiff's complaint-as revealed by him in his opinion and the particular concrete relief he saw fit to provide in plaintiff's behalf.

Assuming the Brewer Mobile Home Park and Zoning ordinances, as well as the purported amendments to them, to be constitutional and otherwise legally valid, [FN3] the presiding Justice recognized that plaintiff had at least a potential legal entitlement to the license and permission to which plaintiff claimed rights. The presiding Justice further concluded that various actions and omissions to act by governmental officials had impaired plaintiff in his undertaking to assert and ultimately realize these potential entitlement and, precisely for this reason, plaintiff ahd been wronged. The presiding Justice deemed it necessary,

therefore, to intervene in the administrative processes by issuing directives concerning their future course and the manner in which they should be conducted-thus to provide needed protections to the plaintiff in his efforts to make his potential legal entitlemens ana ctuality.

> FN3. The complaint of plaintiff attacked the constitutionality and other legality of the entirety of the Mobile Home Park ordinance, including its purported revision. It also claimed unconstitutional that part of the Zoning ordinance which prohibited the use of land in the 'single residence' zone for mobile homes. Finally, the complaint charged illegality of the amendment to the Zoning ordinance purporting to remove the Eastern Avenue tract of land from its original classification as lying in the 'single residence and farming' zone district (in which a mobile home park was conditionally permitted) and to rezone it into the 'single residence' zone (in which mobile homes were unconditionally prohibited).
> As to all of these allegations in the complaint, the presiding Justice said:
> 'In view of the long-standing policy in this State by which the trial court generally refrains from pronouncing a statute unconstitutional, and in view of the answers which this Court makes . . ., it is unnecessary to a resolution of this case to provide answers . . . (concerning the aforesaid assaults upon the constitutionality, or legality in other respects, of the ordinances, in whole or in part, or the amendments thereto).'

On such approach by the presiding Justice, the question of plaintiff's lack of Court 'standing' becomes interwoven with, and dependent upon, an antecedent question: whether plaintiff had lawful 'standing' in the underlying administrative processes through which-by the mechanisms ***207** of licensing, permits and certificates-important governmental regulation of the use of land in the City of Brewer for mobile home parks was, in part, effectuated. More concretely, the question is whether plaintiff had the kind of relationship to the Eastern Avenue site which the Brewer Mobile Home Park and Zoning ordinances recognized as sufficiently germane to the scope of their regulation to confer status upon the plaintiff as a proper 'applicant' for a license, permit or certificate of occupancy.

On this subject the Brewer Mobile Home Park and Zoning ordinances omit express specification of any factors by which a person is granted, or denied, eligibility to be an 'applicant.' We cannot escape the conclusion, however, that the totality of the provisions of each ordinance reveals a basic conception from which emerges, implicitly, at least one indispensable and valid condition for 'applicant' eligibility.

[1][2] The essence of the ordinances is the regulation and control of the use of land. The Mobile Home Park ordinance is directed to one kind of use-that involved in the 'maintenance' or 'operation' of a Mobile Home Park. The Zoning ordinance is concerned with the multitudinous uses, generally, to which land may be put-including 'the construction of buildings and premises.' As directed to the regulation and control of the use of land, the ordinances contain provisions dealing not only with land as such, as an 'object' of use, but also with 'persons' as the 'subject-users' of land. A 'person' in thus germane to the regulatory scope of the ordinances insofar as he has an independently existing relationship to regulated land in the nature of a 'title, right or interest' in it which confers lawful power to use it, or control its use. See: Packham v. Zoning Board of Review of the City of Cranston, 103 R.I. 467, 238 A.2d 387 (1968); Gallagher v. Zoning Board of Review of the City of Pawtucket, 95 R.I. 225, 186 A.2d 325 (1962); Cf. Smedberg et al. v. Moxie Dam Company, 148 Me. 302, 92 A.2d 606 (1952). [FN4]

> FN4. In reaching this conclusion, we intimate no opinion that it would exceed the lawful authority of a municipality plainly and expressly to authorize persons who lack 'title, right or interest' in the land to be recognized as 'applicants' for the licenses, permits or certificates by which the ordinances effect governmental regulation. We here decide only that when, as in the instances of the Brewer Mobile Home Park and Zoning ordinances, there is lacking a clear, affirmative and express provision to the contrary, such 'title, right or interest' in the land is implicitly a valid pre-condition of 'standing' to be a proper 'applicant' under the ordinances.
> This interpretation appears reasonable and highly desirable, policy-wise, to ensure that, absent clear and unquestionable legislative expression manifesting a different legislative attitude, governmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulation and control being undertaken.

The record before us discloses a lack of any such 'title, right or interest' of the plaintiff in the Eastern Avenue tract-unless it be found in the stipulation that:

> 'at all times the Plaintiff . . . had authority from . . . (the legal owners) to propose and develop and operate a

mobile home park on that site, with all related utilities and appurtenances.'

[3][4] We conclude that so bare a statement of 'authority' fails to establish that plaintiff had a 'title, right or interest' in the land qualifying him as a proper 'applicant' for a license, permit or certificate of occupancy under the Brewer Mobile Home Park and Zoning ordinances. Nothing indicates that the 'authority' has a significant duration and is not revocable at any moment, at the will of the owners. The stipulation is silent on whether the 'authority' derives from a written instrument or merely from casual and informal oral acquiescence which, in turn, suggests doubts concerning its legal enforcibility. ***208** Finally, there is only a conclusory expression of 'authority' without indication of its exact nature and source-whether as arising by virtue of a fiduciary relationship which would establish legally cognizable interests in the land, as distinguished from a mere permission to deal with the land (in which latter case, the 'authority' would be insufficient to render plaintiff eligible, within the contemplation of the ordinances, to be an 'applicant' in his own name and right).

We find the present record, therefore, insufficient to show that plaintiff was eligible as an 'applicant' for a license, permit or certificate within the special and distinctive regulatory concerns manifested in the City of Brewer Mobile Home Park and Zoning ordinances. Cf. Packham v. Zoning Board of Review of the City of Cranston, 103 R.I. 467, 238 A.2d 387 (1968).

[5] Thus lacking 'standing' in the first instance to invoke, and have continuingly operative in his behalf, the administrative functioning by which it was calculated that regulatory licenses, permits or certificates shall be issued, plaintiff must lack 'standing to sue' and call upon a Court to provide indirectly precisely those administrative processes to which he had been validly denied direct and original access by the provisions of the controlling ordinances. A contrary conclusion would yield a contradiction in terms, or, at least, a pragmatic incongruity too gross to be worthy of judicial acceptance.

[6] Neither can plaintiff properly achieve 'standing' for Court interposition on the grounds that regardless of his right to be an 'applicant', (1) plaintiff had in fact been an 'applicant', (2) various of the defendants consulted with him and took at least preliminary action concerning his 'de facto' applications for license and Zoning Board of Appeals' permission, and (3) while these administrative processes were in fact occurring in direct relationship to plaintiff, plaintiff expended large sums of money

'. . . in developing . . . (a) Mobile Home Park Plan, including, but not limited to money expended for planning, preparation of plans, surveying and engineering.'

The record reveals that the defendant governmental officials and agencies were in no respect at fault-as wrongfully having induced plaintiff to be such 'de facto' applicant or encouraged him to continue the processing of his 'de facto' applications in the course of which plaintiff spent large sums of money. Plaintiff had never disclosed to any of the defendants the details of his relationship to the Eastern Avenue tract. Specifically, plaintiff did not reveal that persons other than he (having the name 'Walsh') were the record owners of legal title to the property. Instead, plaintiff misleadingly described the Eastern Avenue site as 'the Walsh' property. Hence, it is not arguable that defendants had legal 'notice' that plaintiff lacked requisite eligibility to be an 'applicant' for license or Zoning Board of Appeals' permission.

That plaintiff's legally unauthorized applications were in face allowed to continue in the administrative processes was thus solely and fully the responsibility of the plaintiff. For this reason, the substantial amounts of money expended by plaintiff in connection with the 'follow through' of his applications must be looked upon as gratuitous action by the plaintiff; and if it turns out to be a loss to plaintiff, it is a loss attributable to plaintiff's own fault. As such, it cannot afford plaintiff a basis to suggest as arguable that although he lacked legally authorized eligibility as an 'applicant', dictates of fairness (in terms of alleged estoppel, waiver or otherwise) should yield a substitute rationale by which plaintiff's 'de facto' applications and the 'de facto' processing of them may be held ***209** sufficient to give plaintiff 'standing to sue.'[FN5]

> FN5. Our concern to explain that governmental officials had played no wrongful part in the 'de facto' filing and processing of the applications, in connection with which plaintiff had expended large sums of money, is not to be taken as a suggestion that were such facts affirmatively established, plaintiff would have 'standing' in the present case. On this point we intimate no opinion, and none should be inferred.

III

Since defendants are correct in their assertion that plaintiff is here without proper 'standing',[FN6] we confront the question whether the failure of defendants to raise the 'standing' deficiency earlier should induce this Court to refrain from recognizing and applying it at the appellate

level.

> FN6. We have not overlooked that this conclusion has been reached on the premise that the provisions of the Brewer Mobile Home and Zoning ordinances, and of the amendments to them, are legally valid.
> The result remains the same on the hypothesis that the attacks upon the legal validity of the ordinances and amendments thereto, as made in plaintiff's complaint, have merit.
> If it be taken as open to plaintiff to contest the validity of the entirety of the Mobile Home Park ordinance and its revision in the same proceeding in which he has sought benefits under the ordinance, but see Snelson v. Culton et al., 141 Me. 242, 248, 42 A.2d 505 (1945), and even if all of plaintiff's claims of ordinance invalidity are sustained, there would remain legally intact, and operative, the requirement of the Zoning ordinance-insofar as the Eastern Avenue tract would, in any event, lie in the 'single residence and farming' zone-that a mobile home park is a permitted use only upon '. . . the favorable recommendation of the Planning Board and after final approval of the (Zoning) Board of Appeals.' Hence, without need that a decision be made as to plaintiff's assertions of unconstitutionality, or other illegality, plaintiff would continue to lack 'standing to sue' in the instant proceedings-in which plaintiff claims legal entitlement to final approval by the Zoning Board of Appeals-because plaintiff is not recognized under the Brewer Zoning ordinance as an eligible 'applicant', in the first instance, for such approval.

[7] It is an acknowledged principle, and one generally followed by this Court as necessary to a sound appellate practice, that an issue raised for the first time at the appellate stage will be denied cognizance in the appellate review of the case. Reville v. Reville, Me., 289 A.2d 695 (1972); Younie v. State, Me., 281 A.2d 446 (1971); Frost v. Lucey, Me., 231 A.2d 441 (1967).

Simultaneously, however, and as we have observed (ante at pp. 205, 206), we cannot ignore that 'standing'-to borrow a characterization of Chief Justice Warren in a closely analogous context-has

> '. . . an iceberg quality, containing beneath . . . (the) surface simplicity submerged complexities . . .' (See: Flast v. Cohen, 392 U.S. 83, 94, 88 S.Ct. 1942, 1949, 20 L.Ed.2d 947 (1968))

There 'complexities', produced by the shifting content attributed to 'standing', indicate the wisdom of the warning of Mr. Justice Douglas:

> '(g)eneralizations about standing to sue are largely worthless as such.' Data Processing Service v. Camp, 397 U.S. 150, 151, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970)

[8] In the case at bar, therefore, whether plaintiff's lack of 'standing', as a deficiency raised for the first time on appeal, shall be held effective against plaintiff's interests cannot be settled by the pronouncement of a general rule that 'standing' is, or is not, the kind of issue which may be raised for the first time at the appellate level. The answer must depend on the special and distinctive features of this case.

[9] On such an approach we stress initially that plaintiff's resort, here, to the 'declaratory judgment' authority of the Superior Court, as conferred by Maine's ***210** 'Declaratory Judgments Act', 14 M.R.S.A. s 5951 et seq., does not establish a subjectmatter jurisdiction by which the Superior Court achieves power to act.

> 'The purpose of (the Declaratory Judgments Act) . . . is not to enlarge the jurisdiction of the courts to which it is applicable but to provide a more adequate and flexible remedy in cases where jurisdiction already exists.' Maine Broadcasting Company, Inc. v. Eastern Trust & Banking Company et al., 142 Me. 220, 223, 49 A.2d 224, 225 (1946);

Sears, Roebuck and Company v. City of Portland et al., 144 Me. 250, 68 A.2d 12 (1949); Clapperton v. United States Fidelity & Guaranty Company, 148 Me. 257, 262, 263, 92 A.2d 336 (1952); Cf. Lund ex rel. Wilbur v. Pratt, Me., 308 A.2d 554 (1973).

Notwithstanding, therefore, that plaintiff has called his complaint a 'Complaint for Declaratory Judgment', the subject-matter jurisdiction of the Superior Court derives not from the label but from the substantive gravamen of the complaint.

Essentially, the complaint invokes the traditional equity subject-matter jurisdiction of the Superior Court. It attacks administrative action, and non-action, as well as the activity of the legislative body of the City of Brewer in amending the City ordinances, on the basis that such governmental conduct had impaired property rights of the plaintiff irreparably, insofar as the 'law' jurisdiction of the Superior Court fails to provide an adequate remedy by which plaintiff may achieve the ultimate issuance of the license, permit or certificate to which he claims legal entitlement.[FN7]

> FN7. It seems most unrealistic to interpret plaintiff's complaint, or the approach taken to it by the presiding Justice, to involve the subjectmatter

> jurisdiction of the Superior Court as 'sounding' in traditional 'mandamus.' Here, the administrative processes by which licenses, permits or certificates for mobile homes are issued are discretionary (as distinguished from 'ministerial') functions. Similarly, the activities of the Brewer City Council in enacting amendments to its ordinances are 'legislative' and, therefore, surely other than 'ministerial.' In view of the established principles which deny a 'law' (as in 'mandamaus') subject-matter jurisdiction to the Superior Court to intervene to control the manner in which an administrative or legislative 'discretion' shall be exercised, or the particular decision which shall be forthcoming from it, (absent a special factor of manifest injustice) Chequinn Corporation v. Mullen et al., 159 Me. 375, 193 A.2d 432 (1963), it would seem unreasonable to believe that plaintiff had intended to confront such obstacle which he does not face by invoking the Superior Court's equity jurisdiction.

It would appear that the presiding Justice likewise conceived that it was the Court's equity subject-matter jurisdiction which plaintiff had brought into play since the presiding Justice saw fit to give plaintiff a remedy which was in practical effect the equivalent of a comprehensive mandatory injunction. (see ante, pp. 204, 205)

Unless, however, it is alleged, and made to appear, that plaintiff has a relationship to the land qualifying him as a proper 'applicant' under the regulatory ordinances-on the basis of which it becomes at least arguable that plaintiff (upon appropriate findings that he has fulfilled all other regulatory requirements) has legal entitlement to a license and permit which could constitute the 'property' rights cognizable in a Court of equity,-there is absent a necessary condition of equity subject-matter jurisdiction.

[10][11] In short, here, precisely the deficiency constituting plaintiff's lack of 'standing to sue' concomitantly gives rise to a lack of subject-matter jurisdiction in the Court. Although in our analysis we have chosen to posture plaintiff's lack of appropriate relationship to the Eastern Avenue site in a primary mold of 'lack of standing', and even were we inclined to reject 'standing' as a matter properly cognizable when questioned for the first time at the appellate level, in any event, the Court's lack of subject-matter jurisdiction persists; and lack of subject-matter jurisdiction***211** is always open at any stage of the proceedings. Cushman Co. et al. v. Mackesy et al., 135 Me. 490, 200 A. 505 (1938); Stinson v. Taylor, 137 Me. 332, 17 A.2d 760 (1941); and Green v. State, Me., 245 A.2d 147 (1968). See: Frost v. Lucey, Me., 231 A.2d 441, 446 (1967).

Because of this unique feature-that the inadequacy of the plaintiff's relationship to the Eastern Avenue site causes not only the lack of 'standing' in plaintiff but also deprives the Court of the equity subjectmatter jurisdiction on the basis of which plaintiff has sought the Superior Court's intervention and that Court has seen fit to act-we shall here take cognizance of the deficiency at the appellate level within an analytical cloak of 'standing' (which we deem to be conceptually antecedent to the consideration of whether a Court has a jurisdiction of the subject-matter) notwithstanding that defendants had failed to assert it (as a 'standing' issue or otherwise) prior to the appellate level.

[12] Simultaneously, however, we believe that in the circumstances the interests of justice require that plaintiff be not entirely foreclosed but be given opportunity in the Superior Court to present such additional evidence (as might be available) concerning the concrete details of the 'authority' conferred upon him by the record legal title holders of the Eastern Avenue property. Surely, counsel stipulated such 'authority' on the basis of some underlying facts known to the parties and counsel but, unfortunately, not disclosed to us on the record. Moreover, at the oral argument representations were made that if it became critical, plaintiff might be able to establish that he had an interest in the Eastern Avenue site as a 'resulting trust' beneficiary; and such interest could be adequate to give him 'standing.'

The case will, therefore, be returned to the Superior Court for the presentation of additional evidence bearing upon whether plaintiff has a 'title, right or interest' in the Eastern Avenue site sufficient, in accordance with this opinion, to provide plaintiff with 'standing to sue.' After such evidence (if any) has been introduced, the presiding Justice may, in light of the evidence presented or otherwise, take such action, or conduct such further proceedings, not inconsistent with this opinion, as he thinks necessary or appropriate.

The entry is:

Appeal sustained. Case remanded to the Superior Court for the presentation of additional evidence in accordance with the opinion herein; and for such other and further proceedings, not inconsistent with this opinion, as the presiding Justice may find necessary or appropriate.

WEBBER, J., sat at argument but retired before the decision was rendered.

All Justices concurring.

315 A.2d 200

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C

Supreme Court of New Jersey.

WILSON et al.
v.
TOWNSHIP COMMITTEE OF UNION TP., UNION COUNTY et al.

No. 225.

Dec. 14, 1939.

Certiorari by Ella J. Wilson and others against the Township Committee of the Township of Union, in the County of Union, and David Ratzman and others to review the issuance of a building permit recommended by the Board of Adjustment of the Township of Union and granted by the Township Committee and issued by the building inspector to David Ratzman.

Judgment for respondents and writ dismissed.

West Headnotes

[1] Zoning and Planning ⚖534
414k534 Most Cited Cases
(Formerly 268k621.42, 268k621)
The board of adjustment of township of Union was not deprived of jurisdiction to make a recommendation to township committee recommending a variation from requirements of a zoning ordinance on theory that there had been improper service of notice of proceedings before board on interested property owners where complaining owners were present at meeting of board when question was before board for consideration and waived informality of notice, which had been given by registered mail, and did not claim that notice was not received. N.J.S.A. 40:55-44.

[2] Zoning and Planning ⚖541
414k541 Most Cited Cases
(Formerly 268k621.43, 268k621)

That board of adjustment of township of Union, while acting with respect to application for variation from requirements of a zoning ordinance, swore no witnesses, took no testimony, and received nothing in evidence by way of documents or exhibits touching matter under consideration, did not deprive board of power to recommend variation where board made recommendation only after inspection of site of proposed building and a consideration of neighborhood, generally, and plans and specifications of proposed building were attached to application for variation. N.J.S.A. 40:55-39, subd. c, 40:55-44.

[3] Zoning and Planning ⚖541
414k541 Most Cited Cases
(Formerly 268k621.43, 268k621)

[3] Administrative Law and Procedure ⚖463.1
15Ak463.1 Most Cited Cases
(Formerly 15Ak463)

As respects action of board of adjustment of township of Union in recommending to township committee that a variance from requirements of a zoning ordinance be granted, it was not necessary that witnesses be sworn in proceedings before board. N.J.S.A. 40:55-39, subd. c.

[4] Zoning and Planning ⚖532
414k532 Most Cited Cases
(Formerly 268k621.41, 268k621)

That applicant for variation from requirements of a zoning ordinance did not own the land in question was immaterial as respects granting of application by township committee of township of Union, after variation had been recommended by board of adjustment, where applicant's verified application expressly showed authority to make application for permit.

[5] Zoning and Planning ⚖544
414k544 Most Cited Cases
(Formerly 268k621.47, 268k621)

The action of township committee of township of Union in granting a building permit, after variation from requirements of a zoning ordinance had been recommended by board of adjustment, was not illegal on ground that there was no finding that refusal of variance to ordinance would work unnecessary hardship on applicant, where resolutions of appropriate municipal authorities found that change would not be contrary to popular interest, and authorities had approved petition for variation from requirements of ordinance without any dissenting voice.

[6] Zoning and Planning ⚖708
414k708 Most Cited Cases
(Formerly 268k621.54, 268k621)
Where prosecutors in certiorari proceeding to review issuance of a building permit recommended by board of adjustment of township of Union and granted by township committee had consented to Supreme Court's order to take depositions, prosecutors could not successfully contend that depositions did not sustain findings of board recommending that a variation from requirements of a zoning ordinance be

granted, when depositions showed that all of the testimony taken referred to proceedings of board prior to resolution recommending variance. N.J.S.A. 2:81-8.

[7] Certiorari ⇐65
73k65 Most Cited Cases

[7] Certiorari ⇐68
73k68 Most Cited Cases

Where action of a statutory tribunal is under review in a certiorari proceeding, Supreme Court should determine disputed questions of fact as well as law and inquire into the facts by depositions taken on notice or in such other manner as is the practice of the court. R.S.1937, 2:81-8.

[8] Zoning and Planning ⇐436.1
414k436.1 Most Cited Cases
(Formerly 414k436, 268k621.51, 268k621)

Where record in certiorari proceeding to review issuance of a building permit recommended by board of adjustment of township of Union and granted by township committee did not indicate that prosecutors offered themselves as witnesses or requested that they be sworn at proceedings before board, prosecutors were not denied their day in court on theory that no witnesses were sworn or heard on their behalf before board. N.J.S.A. 40:55-39, subd. c, 40:55-44.

**772 Argued October Term, 1939, *474 before BROGAN, C. J., and DONGES and PORTER, Jj.

*475 Julius Kwalick, of Elizabeth, for prosecutors.

Charles Wagner, of Elizabeth, for defendants Township Committee of Union Tp., Board of Adjustment of Union Tp., and Building Inspector of Union Tp.

Connolly & Hueston, of Elizabeth, for defendant David Ratzman.

BROGAN, Chief Justice.

A writ of certiorari was allowed to review the issuance of a building permit 'recommended by the Board of Adjustment of the Township of Union * * * granted by the Township Committee of the Township of Union * * * and issued by the building inspector * * * on August 24, 1938, to David Ratzman.'

The state of case contains a return to the writ and in addition depositions, the taking of which was allowed by order of the Supreme Court, consented to by counsel for all the parties.

The action complained of is that a variance to the zoning ordinance of the Township of Union was ordered by the municipal authorities; and the resolution of the Board of Adjustment, recommending to the Township Committee 'the granting of the variation' of the zoning ordinance 'so as to permit the erection of a gasoline station' on certain lots on North Avenue, as well as the resolution of the Township Committee approving 'the said recommendation of the Board of Adjustment for a variance in the zoning ordinance of Union Township so as to permit the erection of a gasoline station upon lots' on North Avenue, etc., are under review.

The situation existing prior to the variation challenged was that David Ratzman agreed, in writing, to buy said lots from Harry Dill, owner thereof, but only on condition that a permit to erect a gasoline station was obtained. The Building Inspector having refused to issue such building permit, an application for variation from the requirements of the zoning ordinance, verified by Ratzman, was made stating that he had been authorized by Dill, the owner of the land, to *476 make the application in his behalf. The matter was placed before the Board of Adjustment.

At a meeting of that Board on July 11, 1938, all of the present prosecutors owning property within a radius of two hundred feet appeared by counsel. Objections to the variance were heard and discussed. No witnesses were sworn. The matter was put off for a week, at which time the Board passed one of the resolutions under review, recommending to the Township Committee that the variance be granted. The resolution recites 'that the Board members inspected the premises involved.' Counsel for the prosecutors was present when this resolution was adopted.

This recommendation had the consideration of the Township Committee at its meeting on July 26; decision was reserved 'pending further investigation,' etc. Subsequently, on August 23, the recommendation of the Board of Adjustment was adopted. In the resolution approving the said recommendation it is recited that the governing body had considered the objections, had made investigation of the locality and the adjacent territory, and taken into account 'the applicable facts and circumstances.' The depositions taken make it quite clear that each of the municipal bodies, whose resolutions are under review, did in fact survey and inspect the neighborhood to be affected by the proposed variance.

The prosecutors argue five reasons for reversal which will be dealt with in the order in which they are argued.

[1] First, it is said that the Board of Adjustment was without jurisdiction to make the recommendation for the change

because of improper service of notice on interested property owners. The statute, R.S. 40:55- 44, N.J.S.A. 40:55-44, requires five days' notice of the time and place for hearing before an adjustment board. It is conceded in the brief of prosecutors that notice was given by registered mail and also that counsel, when the matter was before the Board, 'waived the informality of the notice given,' but the argument is that even though counsel did waive any alleged irregularity in the matter of notice, none the less the Board of Adjustment could not acquire jurisdiction ***477** by his act. There is no merit in this contention. Notice was admitted. In no instance is it claimed that notice was not received. ****773** Alexander v. Rekoon, 104 N.J.L. 1, 139 A. 796; McKenna v. Harrington Co., 96 N.J.Eq. 700, 126 A. 532; Wilson v. Trenton, 53 N.J.L. 645, 23 A. 278, 16 L.R.A. 200.

[2][3] Second, it is argued that the Board of Adjustment swore no witnesses, took no testimony, and received nothing in evidence by way of documents, or exhibits touching the matter then under consideration. Moreover it is contended that there was nothing before the Board to show 'that a literal enforcement of the ordinance would work undue hardship or be out of keeping with the general purpose of the zoning ordinance.' This argument is made out of the provisions of the pertinent statute, P.L.1928, Chap. 274, p. 701, R.S. 40:55-39, subd. c, N.J.S.A. 40:55-39, subd. c. Reliance is placed on the case of Fonda v. O'Donohue, 109 N.J.L. 584, 163 A. 2, which held that it was unlawful for the board of adjustment to allow a variance in a zoning ordinance without legal evidence before it. The rule laid down in that case is not applicable to the facts and circumstances exhibited here, for the reason that there is unchallenged proof that the Board of Adjustment made its recommendation only after an inspection of the site and a consideration of the neighborhood generally. In the Fonda case, supra, 109 N.J.L. at page 587, 163 A. at page 4, the learned opinion writer says, 'So far as appears the board made no inspection of the premises or the neighborhood.' That is not the case here; the exact opposite is the fact. Nor does the prosecutors' argument under this point take any support from the case of Schnell v. Township of Ocean, 120 N.J.L. 194, 198 A. 759, which, so far as pertinent, held that the decision of such board must be based on legal evidence. What the board did in this case was, in our view, in harmony with the finding of this court in Amon v. Rahway, 117 N.J.L. 589, 190 A. 506, 508, approving the judgment of the Rahway adjustment board founded on 'the practical and sensible method of examining the physical conditions on the ground.' Nor is it necessary that witnesses be sworn in matters of this kind. The statute does not so require. Cf. Amon v. Rahway, supra. The case of Schnell v. Township of Ocean, supra, was manifestly ***478** decided upon the provisions of the ordinance of that municipality as a reading of the opinion will disclose. And the ordinance explicitly provided a standard of procedure for the Board of Adjustment which is lacking in the ordinance under consideration. But the prosecutors contend that the rule in the Amon case does not apply conversely. In that case a variation was refused, and the argument is that the board of adjustment, by looking at the premises, cannot visualize the change that will result in the erection of a building. However, the fact is overlooked that in matters of this kind plans and specifications must be presented with these applications and the return to the writ indicates the said exhibits were attached to the application; and that is about all that can be presented in matters of this kind. It takes no more imagination or pre-vision to conclude that a variance should be refused than it does in looking over a location and the neighborhood to conclude that a variance should be allowed. We find no merit in this point.

[4] Third, it is argued that the respondent, Ratzman, should not have the permit since he does not own the land in question and has shown no authority to make application for a building permit. We are not persuaded by this argument. In part, this reason for reversal is contrary to fact because, as has been mentioned above, the verified application of Ratzman expressly showed his authority to make the application for the permit. This view is not in conflict with our judgment in Krieger v. Scott, 134 A. 901, 14 N.J.Misc. 942, or Malone v. Jersey City, 147 A. 579, 7 N.J.Misc. 955, upon which prosecutors rely. Rather these cases support our view. See also Slamowitz et al. v. Jelleme, 130 A. 883, 3 N.J.Misc. 1169, and cases cited therein.

[5] Fourth, it is further contended that the action was illegal because there was no finding that the refusal of the variance to the ordinance would work unnecessary hardship on the applicant. The several resolutions that have been mentioned are a complete answer to this argument. The municipal authorities, to whom the law entrusts matters of this kind, affirmatively approved the petition for variation of the ordinance. Implicit in their resolutions is the finding that the ***479** change will not be 'contrary to the popular interest' and in neither municipal body was there any dissenting voice.

[6][7] Fifth, it is argued that the depositions taken cannot sustain the findings of the Board of Adjustment which were arrived at prior to the taking of the testimony of the several members of the municipal ****774** body. It is sufficient to say that the order to take depositions was made with the consent of the parties who now complain about it and, moreover, it is everyday practice that where the action of a statutory tribunal, as here, is under review that the court shall determine disputed questions of fact as well as law and

inquire into the facts by depositions taken on notice or in such other manner as is the practice of the court. R.S. 2:81-8, N.J.S.A. 2:81-8. A reading of the depositions makes it clear that all of the testimony taken referred to the proceedings of the board prior to the resolution recommending variance and this also was true in the case of the Township Committee.

[8] The prosecutors conclude by saying that they were denied their day in court as no witnesses were sworn or heard on their behalf. The answer is they might have been and that there is nothing in the record to indicate that the prosecutors offered themselves as witnesses or requested that they be sworn.

We conclude that the respondents are entitled to judgment. The writ will be dismissed with costs.

123 N.J.L. 474, 38 Gummere 474, 9 A.2d 771

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