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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Forty Three Investments, LLC

v.

The Water Works Board of the City of Birmingham

Appeal from Jefferson Circuit Court
(CV-17-3)

MOORE, Judge.

Forty Three Investments, LLC ("the applicant"), which is owned by Randy Goggins, appeals from a judgment entered by the Jefferson Circuit Court ("the circuit court") "dismiss[ing], without prejudice," the applicant's request, pursuant to Ala.

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Code 1975, § 18-3-1 et seq., for an order condemning certain property owned by the Water Works Board of the City of Birmingham ("the board").¹ We affirm the circuit court's judgment.

Procedural History

On March 14, 2016, the applicant filed, pursuant to § 18-3-1, an application in the Jefferson Probate Court ("the probate court") seeking a right of private condemnation of certain land owned by the board. The applicant asserted that "it is the owner of a tract of land located in Jefferson County, Alabama, no part of which tract is reasonably adjacent or contiguous to a public road or highway," and that "it is necessary that [the] [a]pplicant acquire a right-of-way across the [the board's property] for the purpose of ingress and egress to [the applicant's] real property which will give [the] [a]pplicant access to a public road." On May 11, 2016, the board responded to the application.

An evidentiary hearing was held on September 1, 2016. Thereafter, on December 12, 2016, the probate court entered an

¹In the proceedings below, the applicant and Goggins were often referred to interchangeably.

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order denying, in part, the application. On January 11, 2017, the applicant filed its notice of appeal in the probate court.

On March 5, 2018, the board filed, in the circuit court, an amended response to the application. On March 12, 2018, the applicant filed an amendment to the application. Upon the board's motion, that amendment was dismissed by the circuit court on May 10, 2018.

After a trial, the circuit court entered a judgment on January 23, 2019, providing, in pertinent part:

"[The applicant] owns approximately 160 acres of land in unincorporated Jefferson County, Alabama. [The] Application seeks to condemn [certain] property [owned by] the Board

"The Board's Property is wholly located in the municipal limits of the City of Birmingham. ...

".....

"... [T]he Board argues that Ala. Code § 18-3-1, et seq. (1975) -- the very statute under which this action originated, requires the [applicant] to obtain permission from the Birmingham Planning Commission, as well as the City of Birmingham, before implementing a condemnation action of this type in Probate Court. The [applicant] contends that such Planning Commission approval is moot, because granting access over the New Road to [the applicant] would not trigger any municipal controls.

".....

"The Court first will first turn its attention to the issue of subject matter jurisdiction. Code of Alabama, 1975, § 18-3-1 et seq. reads, in pertinent part:

"'... The owner of any tract or body of land, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from the municipal government and the planning board of such municipality.'

"Additionally, Ala. Code 1975, § 18-3-3 et seq. requires that such condemnation actions be filed in Probate Court.

"The [board] contends that this Court lacks subject matter jurisdiction because the [applicant] did not initiate this action by first obtaining the consent of the Birmingham Planning Commission and the City of Birmingham. The [applicant] refutes this argument and proclaims that neither the Planning Commission nor the City's approval is warranted. The gravaman of this argument seems to be that since municipal ordinances would not be triggered by this condemnation, then such approval is moot. The [applicant] neither cites any authority, nor adduced any testimony to support this argument.

"In Key v. Ellis, et al., 973 So. 2d 359 (Ala. Civ. App. 2007), the Alabama Court of Civil Appeals held that the Planning Commission requirement, set out in Ala. Code 1975, § 18-3-1 et seq., was only inapplicable to land-locked condemnations, if the land in question did not lie within the corporate limits of a municipality. In that case, the Planning

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Commission requirement was not triggered only because the land in question was situated in unincorporated Blount County.

"Accordingly, the Court finds that the [applicant] did not exhaust those administrative remedies, i.e., Planning Commission and local municipal approval, as set out in Ala. Code 1975, § 18-3-1 et seq.

"Based on the foregoing, it is therefore ORDERED, ADJUDGED and DECREED that judgment is hereby rendered in favor of the [board]. This matter is hereby DISMISSED, without prejudice."

(Capitalization in original.)

On February 12, 2019, the circuit court amended the order "to include footnotes that were electronically inadvertently omitted." Footnote 2 in the judgment explained: "The court could find neither statutory nor primary authority that explains which tenement (servient or dominant) must lie within the corporate limits of a municipality before the approval requirement of § 18-3-1 is triggered."

On February 15, 2019, the applicant filed a postjudgment motion, arguing, among other things, that, because the applicant's property is outside the municipal limits of the City of Birmingham, written approval under § 18-3-1 is not required. That motion was denied by operation of law on May 16, 2019. See Rule 59.1, Ala. R. Civ. P.

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On June 24, 2019, the applicant appealed to the Alabama Supreme Court; that court transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7.

Discussion

On appeal, the applicant first argues that the circuit court erred in dismissing the application for failure to obtain written approval under § 18-3-1. The applicant argues that, because its property is outside the municipal limits of the City of Birmingham, such approval is not required.

Section 18-3-1 provides:

"The owner of any tract or body of land, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from the municipal government and the planning board of such municipality."

In Hawkins v. Griffin, 512 So. 2d 109 (Ala. Civ. App. 1987), this court discussed the application and legislative history of § 18-3-1 as follows:

"Both the Probate Court of Marshall County and the Circuit Court of Marshall County condemned the property for a private right-of-way easement and awarded the owners \$1,000 as compensation for the land condemned plus all costs. Gerald Hawkins,

Brooks Hawkins, and the Federal Land Bank of New Orleans, argue that the award is erroneous because section 18-3-1, [Ala.] Code 1975, does not provide a mechanism by which lands located outside a municipality may be condemned. Because the condemned land is situated outside a municipality, they argue that the condemnation was improperly entered.

"Section 18-3-1, [Ala.] Code 1975, reads as follows:

"'The owner of any tract or body of land, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from the municipal government and the planning board of such municipality.'

"Prior to the enactment of this section, the applicable statute was found at Title 19, Section 56, Code 1940 (recomp. 1958). It read:

"'The owner of any tract or body of land, outside the corporate limits of a municipality, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way not exceeding in width thirty feet over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto.'

"The language of Section 18-3-1, [Ala.] Code 1975 (prior to its 1982 amendment), clearly provides that the owner of a tract of land not within a

municipality can obtain a right-of-way over the lands of another if his lands are not adjacent to a public road. Bull v. Salsman, 435 So. 2d 27 (Ala. 1983). In 1982 the legislature amended this section of the Code by deleting therefrom the phrase 'outside the corporate limits of a municipality,' and adding the phrase 'provided written approval is obtained from the municipal government and the planning board of such municipality.'

"The plaintiffs argue that the change in the statute was prompted by the legislature's desire to give the owners of land within a municipality the same right to condemn private rights-of-way as possessed by landowners located outside a municipality.

"A basic rule of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the language of the statute. Ex parte Holladay, 466 So. 2d 956 (Ala. 1985). In divining the legislative intent:

"'[C]ourts may look to the history of a statute and the purpose sought to be accomplished, conditions which led to its enactment, ends to be accomplished and evils to be remedied; a rational, sensible and liberal construction with due consideration of the practical effect should be reached in ascertaining a dubious legislative intent.'

"State v. T.R. Miller Mill Co., 272 Ala. 135, 130 So. 2d 185 (1961).

"Although inartfully drafted, section 18-3-1, [Ala.] Code 1975, as amended, appears to be the result of an effort by the legislature to permit those landowners within the boundaries of municipalities who have no access to a public road or street to condemn private rights-of-way just as

landlocked landowners outside municipalities are permitted to so condemn. That such was the purpose of the legislation in question appears from the deletion in the forerunner of section 18-3-1 of the language 'outside the corporate limits of a municipality'; the introductory language in the act amending section 18-3-1, which is 'to provide further for said acquisition' (1982 Ala. Acts No. 82-784); and the added language in section 18-3-1, as amended, requiring written approval of the municipal government and the planning board of such municipality.

"After giving the two Code sections in question a rational, sensible, and liberal construction, we conclude that the legislature intended to permit landlocked owners in municipalities to obtain private rights-of-way over the lands of others to the nearest public road or street and did not intend to deprive landlocked owners outside municipalities of the same right, which they had possessed for many years."

512 So. 2d at 110-11.²

We recognize that the discussion in Hawkins does not answer the precise question presented in this case -- whether the property of the applicant must be within the municipality or whether the property sought to be condemned must be within the municipality in order for the written-approval provision of § 18-3-1 to apply. However, it does present guidance as to how to undertake the construction of the provision.

²This court's interpretation in Hawkins of the amendment to § 18-3-1 was approved by the Alabama Supreme Court in Lockridge v. Adrian, 638 So. 2d 766, 767 n.2 (Ala. 1994).

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Simply looking at the language of § 18-3-1, it seems to read that any applicant seeking a private condemnation of property must obtain approval of the municipal government and planning board. However, if a municipality will not be affected, it is not rational that an applicant would have to seek approval because it would be impossible to determine which municipal government and planning board must approve the application. As noted in Hawkins, "the legislature intended to permit landlocked owners in municipalities to obtain private rights-of-way over the lands of others to the nearest public road or street and did not intend to deprive landlocked owners outside municipalities of the same right, which they had possessed for many years." 512 So. 2d at 111. Regarding an owner of landlocked property whose land is outside a municipality who is seeking to condemn land within a municipality, the most rational construction of § 18-3-1 is that approval must be granted by the government and the planning board of the municipality in which the property that stands to be affected, i.e., the property that stands to be condemned, is located. Therefore, we conclude that the

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circuit court did not err in entering a judgment in favor of the board.

Conclusion

Based on the foregoing, we affirm the circuit court's judgment.

AFFIRMED.

Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.