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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001733-MR
AND
NO. 2010-CA-001736-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 09-CI-01418

THE BOARD OF EDUCATION OF THE
BELLEVUE INDEPENDENT SCHOOL
DISTRICT — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CAPERTON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant and Cross-Appellee, the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (hereinafter "Cabinet") appeals the July 1, 2010, order of the Campbell Circuit Court, ruling

that the Cabinet could not enforce the Billboard Act against one of its own political subdivisions, in this case, the Appellee and Cross-Appellant, the Board of Education of the Bellevue Independent School District,[1] and from the lower court's determination that a commercial lease constitutes a "government function" by a local school district. The School District cross-appeals, arguing that the trial court committed reversible error by not remanding the agency proceeding back to the Cabinet with directions to grant the School District's application for an Advertising Devise Permit, and to issue the permit. Upon review of the record, the arguments of the parties, and the applicable law, we reverse the July 1, 2010, order of the Campbell Circuit Court, and remand to the circuit court with instruction to reinstate the Cabinet's final order of September 2, 2009, and affirm the lower court's denial of the School District's request for remand.

The School District initiated a revenue raising project for the construction and operation of a static billboard upon its real property located on Tiger Street in Bellevue,[2] Kentucky, adjacent to Interstate Highway 471. The Billboard Project was undertaken in conjunction with Norton Outdoor advertising (hereinafter "Norton"). Norton and the School District entered into a lease agreement on June 20, 2007, in furtherance of the Billboard Project. The parties thereafter entered into a letter amendment to the lease agreement on April 25, 2008. The lease agreement, as amended, provided various contractual terms

[1] It is undisputed that the School District is an agency of state government. *See* Kentucky Revised Statutes (KRS) 160.160.

[2] Bellevue is a city of the fourth class. *See* KRS 81.010(4).

including that the School District would receive rent in the amount of $16,000.00 per annum for fifteen years.[3] The amendment also reiterated that the School District had the right to use a portion of the Billboard Project for its own purposes:

> This [amendment] is to confirm the Bellevue Independent School District's right to periodic, school-related use of advertising space on both sides of the proposed static sign on Tiger Street pursuant to the lease agreement between your School District and Norton Outdoor once your School District's permit application has been approved by KDOT.
>
> Bellevue Independent School District has retained certain rights to periodic display of school and student-related advertising content on one or both faces of the advertising sign covered by this lease agreement that will be specific as to student activity, school system public relations, and/or school-related athletic or other school-related events or programs that are supportive of the Bellevue Independent School District and its students.

In the course of seeking a permit for erection of the billboard, the Board applied to the Planning Commission for a zone change pursuant to KRS 100.324(4),[4] which was denied. Counsel for the Board also requested that the City

[3] In the event that the Cabinet ultimately approves the billboard, the annual rent to the School District would increase to $44,000. The School District would also receive 500 8-second advertising spots per day.

[4] KRS 100.324(4) states that, "Any proposal for acquisition or disposition of land for public facilities, or changes in the character, location, or extent of structures or land for public facilities, excluding state and federal highway and public utilities and common carriers by rail mentioned in this section, shall be referred to the commission to be reviewed in light of its agreement with the comprehensive plan, and the commission shall, within sixty (60) days from the date of its receipt, review the project and advise the referring body whether the project is in accordance with the comprehensive plan. If it disapproves of the project, it shall state the reasons for disapproval in writing and make suggestions for changes which will, in its opinion, better accomplish the objectives of the comprehensive plan. No permit required for construction or occupancy of such public facilities shall be issued until the expiration of the sixty (60) day period or until the planning commission issues its report, whichever occurs first."

of Bellevue (hereinafter "City") issue a building permit in reliance upon KRS 100.361(2).[5] On November 28, 2007, the City issued the permit, which was conditional upon compliance with the regulations of the Kentucky Transportation Cabinet. The Board then applied for a permit from the Cabinet.

As the Billboard Project was to be located within 660 feet of I-471 and would be visible from the highway, 603 Kentucky Administrative Regulations (KAR) 3:080 Section 4(1) required the Board to apply for an Advertising Device Permit. On January 30, 2008, the Board submitted the application to the Cabinet, along with plans, technical data, copies of the permit, and the City's letter explaining the circumstances under which the permit had been issued to the Board.

On June 24, 2008, the Cabinet sent a letter to the Board formally denying the permit because the location did not comply with 603 KAR 3:080 Section 4(2)(A)(1)(b)(iii) which requires that a billboard comply with local zoning. The Board filed an appeal pursuant to KRS 13B and the hearing officer upheld the

[5] KRS 100.361(2) provides that, "Nothing in this chapter shall impair the sovereignty of the Commonwealth of Kentucky over its political subdivisions. Any proposal affecting land use by any department, commission, board, authority, agency, or instrumentality of state government shall not require approval of the local planning unit. However, adequate information concerning the proposals shall be furnished to the planning commission by the department, commission, board, authority, agency, or instrumentality of state government. If the state proposes to acquire, construct, alter, or lease any land or structure to be used as a penal institution or correctional facility, and the proposed use is inconsistent with or contrary to local planning regulations or the comprehensive plan for the area, the secretary of the Justice and Public Safety Cabinet, or his or her designee, shall notify, in accordance with KRS 424.180, the planning commission, the local governing body who has jurisdiction over the area involved, and the general public of the state's proposals for the area, and he or she shall hold a public hearing on the proposals within the area at least ninety (90) days prior to commencing the acquisition, construction, alteration, or leasing. A final report on the public hearing shall be submitted to the Governor and members of the General Assembly within twenty-five (25) days of the public hearing, and prior to commencing any construction, alteration, acquisition, or leasing of such property or facilities.

denial on the grounds that the site did not comport with local zoning. Prior to formally denying the application, the Cabinet's Executive Director wrote to the Board's attorney to elaborate upon the reason for the forthcoming denial. The letter explained the Cabinet's belief that the exemption from local zoning for state agencies like school districts applies only where, in the Cabinet's opinion, the school district is engaging in "school-related activities." Income generation was found not to be such an activity:

> It is our understanding … that the school district proposes to contract with Norton, which will sell advertising on the billboard, thus generating income for the district, and providing a certain amount of advertising for school-related purposes … [T]his makes the proposal more palatable … The question still remains whether this billboard meets the requirements of 603 KAR 3:080§4(2)(A)(1)(b)(iii).
>
> We are aware that the City of Bellevue advised the school district that the proposed billboard did not comply with applicable city zoning regulations and that nonetheless, the city issued a building permit on the basis that the school district is exempt from local zoning. It is the Cabinet's position that the exemption from local zoning afforded the school district pertains to school-related activities, and not to a commercial billboard, the primary purpose of which is to generate income. Therefore, at this time and for the above reasons, the Cabinet must deny the Bellevue school district application.

Following the Cabinet's formal denial, the Board sought review by the Campbell Circuit Court of the Cabinet's final order adopting the hearing officer's opinion.

The trial court entered a judgment reversing and remanding the final order to the Cabinet for further proceedings in which the Cabinet could not deny

the application on the grounds of: (i) failure to comply with local planning and zoning regulations or ordinances, and (ii) the Billboard Project not constituting a governmental function. Therein, the trial court held that:

> (1)The School District is exempt from local planning and zoning ordinances or regulations under KRS 100.361(2) for any proposal affecting land use by the School District, including the Billboard Project.
>
> (2)The scope of the School District's exemption from local zoning at KRS 100.361(2) extends to "any proposal affecting land use," and not merely to decisions related to the location of its physical plants.
>
> (3)Perceived uses of school property not in compliance with local zoning are to be remediated at the ballot box.
>
> (4)The Cabinet committed reversible error by failing to give credence to the City's planning commission's decision to issue the permit because school districts are exempt from local zoning approval under KRS 100.361.
> (5)The Cabinet was not permitted to deny the application on the ground that the Billboard project violated the City's zoning ordinances and regulations because the School District is exempt from them.
>
> (6)Raising revenue is a lawful governmental function for school districts under KRS 158.290(1) because it promotes public education.
>
> (7)The School District acted within its management discretion under KRS 158.290(1) in undertaking the Billboard Project, as its lease with Norton Outdoor Advertising, Inc. will raise revenue to be used in direct furtherance of the School District's educational mission.

The Board filed a motion to alter, amend, or vacate, asking the court to require immediate issuance of the permit as opposed to a remand for consideration of the

application in accordance with the court's findings. That motion was denied, and this appeal and cross-appeal followed.

Prior to addressing the arguments raised by the parties on appeal and cross-appeal, we note that our review of the final order and judgment is authorized by KRS 13B.160. Further, our review of the Cabinet's final orders is governed by KRS 13B.150. We note that this Court may not substitute its judgment for that of the Cabinet as to the weight of the evidence on questions of fact, but may either affirm the final order or reverse it, either in whole or in part. *Freeman v. St. Andrew Orthodox Church, Inc.*, 294 S.W.3d 425, 428 (Ky. 2009). A reviewing court acts within its authority in reversing the Cabinet if it finds that the final order violates statutory provisions; exceeds the Cabinet's statutory authority; is without substantial evidence on the whole record; is arbitrary, capricious, or characterized by an abuse of discretion; or is deficient as otherwise provided by law. *Id.* We review the arguments of the parties with these standards in mind.

On appeal, the Cabinet first argues that entering into a simple commercial lease is not a governmental function. The Cabinet correctly notes that in response to the proliferation of billboards along the nation's highways, Congress passed the Federal Highway Beautification Act, codified at 23 United States Code (U.S.C.) §131 et seq. It requires states to adopt "effective controls" of billboards and junkyards. Kentucky passed its Billboard Act[6] to comply with this mandate. 603 KAR 3:080 was adopted for purposes of administration of the Act. The

[6] *See* KRS 178.830 to 177.890.

Cabinet argues that KRS 100.361(2) was intended for the purpose of allowing school boards to place their physical plants in the location they deemed best, and not *carte blanche* authority to use their property in any manner they desired.

The Cabinet next argues that the examples of leases referenced by the circuit court in its order were of sites approved by local zoning authorities. The Cabinet notes that in those cases, the cities in which the leases existed approved of the projects at issue. The Cabinet asserts that the matter *sub judice* is distinguishable, insofar as the sign location is not zoned industrial or commercial, and the use conflicts with the comprehensive plan. Specifically, the Cabinet draws this court's attention to the circuit court's emphasis on the presence of a billboard located on the grounds of the City of Newport schools, also near I-471. Again, the Cabinet argues that the situation *sub judice* is distinguishable, insofar as the Newport billboard is in a different city, a different zone, and was approved by the Newport zoning authority. The Cabinet states that in the instant case the site does not allow billboards, a zone change was denied, and the proposed sign was found at a hearing to not comply with the comprehensive plan.

Finally, the Cabinet argues that building and leasing a billboard serves no legitimate government function. The Cabinet acknowledges that while school boards have the authority to build schools, athletic fields, gymnasiums, theaters, bus garages, and the parking lots that serve them, these are logically connected to the school itself. A billboard, the Cabinet argues, is not. The Cabinet asserts that reliance upon KRS 100.361(2) must be limited to public facilities as defined by the

zoning statutes in KRS 100.111(19),[7] and reasonably related thereto. The Cabinet asserts that a billboard is not a public facility and does not fall under the auspices of this statute.

In response, the Board argues that because it raises funds in a myriad of ways to supplement its tax revenue as well as its state and federal aid, then fundraising is one of its "government functions." Thus, the Board argues that leasing ground to Norton is one of its governmental functions and that, accordingly, KRS 100.361(2) should control, and that it qualifies for the exemption contained therein.

Having reviewed the record and applicable law, this Court is of the opinion that this matter depends entirely upon how broadly the exemption contained in KRS 100.361(2) is construed. Ultimately, upon review of that provision, applicable caselaw, and the record herein, we believe that the court below construed too broadly the statutory exemption from planning and zoning regulations.

The court below held that "Kentucky courts have acknowledged that education is an integral part of state government, and activities in direct furtherance of education will be deemed governmental, not proprietary." In drawing that conclusion, the court relied heavily upon the holding of our Kentucky Supreme Court in *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883

[7] KRS 100.111(19) provides that, "'Public facility' means any use of land whether publicly or privately owned for transportation, utilities, or communications, or for the benefit of the general public, including, but not limited to libraries, streets, schools, fire or police stations, county buildings, recreational centers including parks, and cemeteries."

(Ky. 2009). In that opinion Justice Abramson addressed the public policy relating to governmental immunity, stating:

> Given this underpinning, governmental immunity shields state agencies from liability for damages only for those acts which constitute governmental functions, i.e., public acts integral in some way to state government. The immunity does not extend, however, to agency acts which serve merely proprietary ends, i.e., non-integral undertakings of a sort private persons or businesses might engage in for profit.

Prater at 887.

Other cases, cases concerning zoning in this Commonwealth, place emphasis upon the facility at issue serving "governmental functions integral in some way to state government" in order to qualify for a zoning exemption.[8] While the School District argues that its fundraising efforts are a "governmental function" because they raise revenue for educational operations, this Court finds that there is a fundamental difference between school fundraising and a commercial venture.[9]

If the order of the court below were allowed to stand, unintended and certainly unwanted consequences might result. Indeed, the court's decision, not confined only to school boards, could be utilized by any water district, sewer district, municipality, or other local governmental body in the Commonwealth to

[8] *See City of Louisville Bd. of Zoning Adjustment v. Gailor*, 920 S.W.2d 887 (Ky.App. 1996)(correctional facility); *Hopkinsville-Christian County Planning Commission v. Christian County Bd. of Education*, 903 S.W.2d 531 (Ky.App. 1995)(school athletic field); and *Edelen v. County of Nelson*, 723 S.W.2d 887 (Ky.App. 1987)(county jail).

[9] Having so stated, this Court would not find construction of the billboard to be problematic in and of itself if it were to comply with all of the laws to which a commercial venture of an individual must necessarily comply, without the need for exemption, as was apparently the case with construction of a similar billboard on the property of Newport High School. However, such was not the case *sub judice*.

engage in any number of activities for profit without concern for orderly land use planning, effectively allowing these entities to sell their land use exemption to the highest bidder. Without question, this provides a commercial entity, such as Norton, with an unfair commercial advantage over its competitors because it can utilize the district's exemptions from regulations while its competitors could not.

In its brief to this Court, the School District attempts to argue, pursuant to *Scott County Board of Education v. McMillen*, 270 Ky. 483, 109 S.W.2d 1201 (Ky.App. 1937), that the General Assembly conferred broad powers upon boards of education which included the power and authority to alienate their interest in real estate. Therein, our Kentucky Supreme Court held that:

> In view of such empowering statutes, in the late case of *Bellamy v. Board of Education*, 225 Ky. 447, 74 S.W.2d 920, where they were considered and interpreted, it was held that the County Board of Education was thereby expressly vested with the broad power and authority to control, buy, and sell real estate for school sites, and to control and manage all public school property of its district; and further, that it has the right to sue such school funds and property to promote public education in such ways as it should, in the exercise of its judgment and discretion, deem necessary and proper, and that looking to such end, it might convey school property to a holding corporation, although title to school property is technically vested in the Commonwealth.

Id. at 1203-1204. Having reviewed *McMillen*, this Court is of the opinion that while it may be true that the School District has the authority to alienate its property, it does not follow that any property so alienated would remain subject to exemptions that the school would otherwise have had if it had not alienated the

property. Thus, while a school may choose to alienate its property and can use its property for the purpose of promoting public education, it is not thereby authorized to use its governmental status to procure an exemption to confer upon its leasee involved in a commercial venture. Simply put, the School District has, without question, a certain advantage in commercial matters. However, it cannot confer that advantage onto a non-governmental commercial entity and thereby give that entity governmental immunity from laws to which it would otherwise be subject. Accordingly, for the foregoing reasons, we decline to adopt the circuit court's view that "fundraising" of the commercial nature attempted in this instance is a "governmental function" entitled to exemption.[10]

As its second basis for appeal, the Cabinet argues that even if being a commercial landlord is a government function, the Cabinet may enforce the Billboard Act. In support of that assertion, the Cabinet argues that: (1) the Billboard Act is not preempted by KRS 100.361(2); (2) the Commonwealth did not limit its own authority; and (3) even if the local zoning approved the Board's request, the Commonwealth could deny the permit. In response, the School District argues that no conflict exists between the Billboard Act and KRS 100.361(2).

[10] Finally, as we have noted, the Billboard Act was created in response to the federal Highway Beautification Act of 1965. As set forth in that Act, federal highway funding for any state that fails to adopt "effective controls" of outdoor advertising devices and junkyards along the interstate and primary highway system is to be reduced by "amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such a state under section 104 of this title [23 U.S.C. § 104], until such time as such State shall provide for such effective control." 23 U.S.C. § 103(b). Certainly, this sanction has been applied in the past, and could well result in the deprivation of significant funding for the state were the order of the court below allowed to stand.

Having determined that the exemption set forth in KRS 100.361(2) was construed too broadly *sub judice*, we decline to address these issues further herein. Likewise, we decline to address the arguments of the parties concerning whether or not the Billboard Act and KRS 100.324 can be reconciled because we have declined to find that a billboard is a public facility entitled to KRS 100.361(2) exemption. Thus, the statutes are not in conflict.

Having so found for the reasons set forth hereinabove, and being of the opinion that reversal of the court's July 1, 2010, order is appropriate, we need not address the issues raised by the School District on cross-appeal. Accordingly, we decline to review that matter further herein, and affirm the court's denial of the School District's motion to alter or amend the judgment.

Wherefore, for the foregoing reasons, we hereby reverse the July 1, 2010, order of the Campbell Circuit Court, and remand to the circuit court with instruction to reinstate the Kentucky Transportation Cabinet's final order of September 2, 2009.

ACREE, JUDGE, CONCURS IN RESULT ONLY.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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