

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001571-MR

COX'S SMOKERS OUTLET IX, L.L.C. AND
WILLIAM K. GRANTZ

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 10-CI-01860

COMMONWEALTH OF KENTUCKY;
DEPARTMENT OF ALCOHOLIC BEVERAGE
CONTROL, (INCLUDING THE ALCOHOLIC
BEVERAGE CONTROL BOARD); CITY OF
ST. MATTHEWS; JAMES L. "JIM" KING,
CITY ADMINISTRATOR FOR CITY OF
ST. MATTHEWS, LOUISVILLE/JEFFERSON
METRO COUNTY GOVERNMENT;
LOUISVILLE-METRO ALCOHOLIC
BEVERAGE CONTROL; KROGER LIMITED
PARTNERSHIP I; AND KRGP, INC.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: Cox's Smokers Outlet, LLC (Cox's) and William K. Grantz, a member of Cox's, appeal from the circuit court's summary judgment in favor of the appellees. Having reviewed the record, the arguments of the parties, and the relevant law, we reverse and remand.

FACTS

Cox's operates a liquor store on Hubbards Lane in St. Matthews, Kentucky. On October 1, 2010, Kroger Limited Partnership I, through its general partner, KRGP, Inc. (collectively Kroger), properly published notice of its intent to apply for a retail package liquor license for premises located on Hubbards Lane across from Cox's.

St. Matthews Ordinance § 111.15(E) provides, in pertinent part, that: "no retail by the package liquor license shall be granted or issued to any licensee for any location within 700 feet of any existing premises licensed" to sell package liquor. Cox's filed a protest with the Department of Alcoholic Beverage Control, arguing the proposed Kroger liquor store would be less than 700 feet from Cox's and thus would not qualify for a license. In addition to filing its protest, Cox's requested a due process hearing before the Alcoholic Beverage Control Board. The Department acknowledged receipt of the protest but stated the Board would not conduct a hearing.

James L. King, the city administrator for St. Matthews, measured the distance between Cox's and the proposed Kroger liquor store and determined it

exceeded the 700 feet limit. He then issued a city package liquor license. The Louisville-Metro Alcoholic Beverage Control and the Department followed suit, issuing county and state package liquor licenses respectively.

Cox's then took two steps. First, it filed an administrative appeal with the Board pursuant to Kentucky Revised Statutes (KRS) 241.200, arguing the licenses had been improperly issued. The Board or the Department determined the Board had no jurisdiction to hear Cox's appeal and dismissed it.

Second, Cox's filed a complaint and amended complaint (collectively, the complaint) in Franklin Circuit Court appealing the decision of the licensing authorities to issue package liquor licenses to Kroger. Cox's also appealed the Board's refusal to hold the pre-issuance hearing and to hear its KRS 241.200 post-issuance appeal.

The Department and Kroger filed motions to dismiss Cox's complaint, arguing that the circuit court lacked jurisdiction because the issuance of the liquor licenses did not amount to an appealable final order; that the Board properly refused to hold Cox's requested pre-issuance hearing, as Cox had no right to request such a hearing; and that the Board properly refused to hear Cox's appeal because Cox's had no right to appeal the issuance of the licenses.

The circuit court entered summary judgment in favor of the appellees, finding that Cox's had no right to appeal the granting of a liquor license and that Cox's had no right to a pre-issuance hearing before the Board. It is from this summary judgment that Cox's appeals.

When Cox's filed this appeal in August 2011, *Beverage Warehouse, Inc. v. Com., Dept. of Alcoholic Beverage Control*, 382 S.W.3d 34, 39 (Ky. App. 2011), was pending before a different panel of this Court. The Court rendered an opinion in the *Beverage Warehouse* case in October 2011. The appellees therein sought discretionary review before the Supreme Court of Kentucky. Because this appeal presented similar, if not identical, issues, we placed it in abeyance pending a decision by the Supreme Court in *Beverage Warehouse*. On November 14, 2012, the Supreme Court denied discretionary review; consequently, we removed this appeal from abeyance. Because *Beverage Warehouse* is now final and published, we are bound by its dictates and therefore rely on it.

STANDARD OF REVIEW

[T]he issues presented require statutory interpretation, [therefore] our review is subject to the *de novo* standard. *Commonwealth v. Garnett*, 8 S.W.3d 573 (Ky. App. 1999). Upon review, we are bound by a number of statutory construction principles.

It is the court's responsibility to "ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not expressed." *Metzinger v. Kentucky Retirement Systems*, 299 S.W.3d 541, 546 (Ky. 2009) (quoting *Flying J. Travel Plaza v. Commonwealth*, 928 S.W.2d 344, 347 (Ky. 1996)). Furthermore, the courts "may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001). "[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002).

ANALYSIS

Because we believe *Beverage Warehouse* is controlling precedent, we first summarize the facts therein. *Beverage Warehouse* arose from the issuance of a liquor license to Liquor Barn, a retail package liquor store in St. Matthews. As Cox's did herein, Beverage Warehouse protested the issuance of that license, arguing Liquor Barn was within 700 feet of Beverage Warehouse. King, who was also St. Matthews' city administrator during that dispute, initially agreed the two stores would be too close to each other, and he denied the license application. However, upon remeasuring the distance between the two stores, King determined that they were more than 800 feet apart, and he issued the license. Just as Cox's did in the case now before us, Beverage Warehouse requested a pre-issuance hearing, which the Board denied, so Beverage Warehouse filed a complaint in circuit court.¹

The circuit court held there was no statutory authority for the Board to hold a pre-issuance due process hearing at the request of a competitor. Furthermore, the court held that, because there had been no hearing by the Board, there was no final order subject to an appeal to circuit court. However, the circuit court in *Beverage Warehouse*, unlike the circuit court herein, found that Beverage Warehouse did have the right to appeal the issuance of the licenses to the Board pursuant to KRS 241.200. Therefore, the court "found that the Board erred when it dismissed

¹ *Beverage Warehouse* took a somewhat different procedural path from this case before reaching this Court, but the difference in those paths is of no significance.

Beverage Warehouse’s appeal for lack of jurisdiction and remanded the case to the [Board] for an evidentiary hearing.” *Id.* at 39. This Court affirmed.

As in *Beverage Warehouse*, Cox’s attempted to stop Kroger from opening its liquor store through three avenues: (1) an original action in circuit court seeking an order requiring the Board to hold a pre-issuance due process hearing; (2) a direct appeal to circuit court contesting the legitimacy of the issuance of the licenses; and (3) an appeal to circuit court of the Board’s denial without a hearing of Cox’s post-issuance appeal. In *Beverage Warehouse*, we determined the circuit court’s remand to the Board for a post-issuance hearing “granted the relief requested[,]” and issues involving the other avenues of relief were therefore “moot.” *Id.* at 39. Because of the similarity between this appeal and *Beverage Warehouse*, we likewise start with an analysis of the third avenue of relief, entitlement to a hearing before the Board on a post-issuance appeal.

As the appellants did in *Beverage Warehouse*, the appellees herein argue the right to appeal to the Board from a decision to issue or not issue a license by a city administrator is limited to applicants and licensees. For the reasons set forth in *Beverage Warehouse*, we disagree.

As we noted in *Beverage Warehouse*, “[w]hen a statute confers a right to appeal and is remedial in nature, we liberally construe it in favor of its remedial purpose.” *Id.* at 43. KRS 241.200, which provides for appeal to the Board from a city administrator’s issuance of a license, “does not name a particular person or entity that may appeal.” *Id.* If the legislature had “intended to limit an appeal to

an applicant or a licensee, it could have used limiting language as in other statutes providing for appeals.” *Id.* at 43-44 (footnote omitted). Because no such limiting language is present, the right to appeal created in KRS 241.200 is not limited to licensees or applicants but is available to non-licensees and non-applicants such as Cox’s.

Likewise, we disagree with the appellees’ argument that the issuance of a license is not an order subject to appeal to the Board. As we held in *Beverage Warehouse*:

The term “order” [in KRS 241.200] is not modified by the term “final” as in KRS 243.560 and, therefore, the administrator’s order does not have to be entered following an evidentiary hearing. Instead, the statute is broadly written and does not limit the issues to be presented but merely refers to “[m]atters at issue.” Had the legislature intended to restrict the . . . orders appealable, it would have included language similar to that contained in KRS 243.560.

Id. at 44.

Pursuant to this passage, we reverse the circuit court’s finding that Cox’s is not entitled to a post-issuance hearing on appeal before the Board. Having made that determination, we address the remaining issues raised on appeal.

The Department argues the circuit court lacked jurisdiction to hear Cox’s appeal because Cox’s failed to join an indispensable party, the Board. As we held in *Beverage Warehouse*, “the Board is not . . . separate from the [Department] but is controlled by and exists as a part of the [Department]. Therefore, the designation of the [Department] as a party was sufficient to confer subject matter

jurisdiction” on the circuit court. *Id.* at 41. Thus, Cox’s failure to timely name the Board as a party in circuit court was not fatal to the circuit court action.

Kroger argues the doctrine of “honest error” applies and, regardless of Cox’s right to a hearing on appeal to the Board, Kroger is entitled to retain the licenses issued. The honest error doctrine provides that, “when an administrative official errs in good faith and a property owner relies on such action, the governmental entity is estopped from enforcing its regulations to the detriment of the property owner.” *Id.* at 46. However, as we noted in *Beverage Warehouse*, whether King acted in good faith and whether Kroger, knowing of Cox’s opposition, was justified in proceeding in reliance on King’s actions, are issues to be decided by the Board on remand. *Id.*

Finally, we note that there is an issue regarding the method of measurement used by King in determining the distance between the Kroger liquor store and Cox’s. As with the issues of good faith and reliance, this is an issue to be resolved by the Board on remand.

CONCLUSION

For the reasons set forth above and as set forth more fully in *Beverage Warehouse*, the judgment of the circuit court is reversed, and this matter is remanded for a hearing before the Board.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES
DEPARTMENT OF ALCOHOLIC
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BRIEF FOR APPELLEES KROGER
LIMITED PARTNERSHIP I AND
KRGP, INC.:

Kenneth S. Handmaker
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BRIEFS FOR APPELLEES
ALCOHOLIC BEVERAGE
CONTROL BOARD; CITY OF ST.
MATTHEWS; JAMES L. KING,
CITY ADMINISTRATOR FOR CITY
OF ST. MATTHEWS,
LOUISVILLE/JEFFERSON METRO
COUNTY GOVERNMENT; AND
LOUISVILLE-METRO
ALCOHOLIC BEVERAGE
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No Briefs Filed