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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000059-DG

CITY OF AUDUBON PARK — APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 15-XX-000026

LOUISVILLE REGIONAL AIRPORT AUTHORITY AND ITS EXECUTIVE DIRECTOR, CHARLES T. MILLER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, D., JUDGE: In an opinion and order dated December 16, 2015, the Jefferson Circuit Court affirmed the Jefferson District Court's invalidation of a City of Audubon Park ("Audubon Park") municipal ordinance. The ordinance prohibited anyone from seeking to acquire an easement within Audubon Park's boundaries without first obtaining a permit before encumbering their real property. The Circuit Court affirmed the District Court finding that Audubon Park exceeded

its statutory and constitutional authority by enacting the ordinance. After review, we affirm.

I. BACKGROUND

Audubon Park is a city located near the airport in Jefferson County, Kentucky.[1] The Louisville Regional Airport Authority ("LRAA") oversees the airport's operations. Backed by a federal program, the LRAA began seeking noise-abatement easements from several Audubon Park residents in August 2011. In exchange for the easements, the LRAA offered to install certain sound-insulating improvements, such as windows and doors, in the residents' homes.

In December 2013, Audubon Park passed an ordinance proscribing any attempt to solicit or otherwise acquire an easement within the city limits without first obtaining a permit from the Mayor's office. The full text of the ordinance provided as follows:

> Section 11-10.01. General Provision. It shall be unlawful to offer, solicit or accept any easement or other legal encumbrance that would compromise the character of the City by sanctioning emissions of noise or other pollutants, or the risk of injury or property damage, or any other nuisance or intrusion defined elsewhere in this Code of Ordinances, beyond the minimum required for the provision of essential public utilities to its residences.
> Section 11-10.02. Permit. No individual, organization or agency may seek any easement within the corporate boundaries of the City without first obtaining a permit from the Mayor or designee. No easement executed in the absence of such permit shall be considered as having legal effect.

[1] Before Kentucky Revised Statute (KRS) 81.005 took effect on January 1, 2015, Audubon Park was a city of the fifth class.

In response, the LRAA and 13 property owners jointly applied to Dorn Crawford, the Audubon Park Mayor, for easement permits. All applications were denied. A month later, Audubon Park also issued the LRAA a citation for violating the ordinance. The citation carried with it a $13,000 fine. According to the citation, assisting the property owners during the application process without prior approval from the Mayor's office constituted an unauthorized solicitation of an easement.

The LRAA subsequently challenged the citation before the Audubon Park Code Enforcement Board. The LRAA first claimed that it was entitled to sovereign immunity and thus shielded from any penalty imposed by Audubon Park. The LRAA then attacked the validity of the ordinance itself. In support of this position, the LRAA argued that Audubon Park, as a city of the fifth class, improperly enacted a land use regulation contrary to KRS 100.173(3).[2] The LRAA further characterized the ordinance as an unconstitutional prior restraint on the right of free speech and an unconstitutional *ex post facto* regulation. Regardless, the Board upheld the citation.

Although unsuccessful in its administrative appeal, the LRAA prevailed in both lower courts. The Jefferson District Court and Jefferson Circuit Court both accepted the LRAA's First Amendment argument. The Circuit Court also held that sovereign immunity applied. We granted discretionary review.

[2] This statute was amended effective January 2015. We did not give the amended version retroactive effect. We instead reviewed the version as it read at the time the ordinance was passed.

II. STANDARD OF REVIEW

Whether public entities enjoy immunity is a legal question reviewed *de novo*. *Louisville/Jefferson County Metro Government v. Cowan*, 508 S.W.3d 107, 109 (Ky. App. 2016). Statutory interpretation is likewise reviewed under the *de novo* standard. *City of Bowling Green v. Helbig*, 399 S.W.3d 445, 447 (Ky. App. 2012). Appellate courts construe the statutory text according to its "normal, ordinary, everyday meaning." *Stephenson v. Woodward*, 182 S.W.3d 162, 170 (Ky. 2005). Moreover, when the legislature prescribes a particular mode of exercising a power, it implicitly excludes unenumerated modes. *Allen v. Hollingsworth*, 246 Ky. 812, 6 S.W.2d 530, 532 (1933).

III. DISCUSSION

On appeal, Audubon Park defends its ordinance and counters that the LRAA is the party that exceeded its lawful authority. Audubon Park further argues that the ordinance passes constitutional muster because it prevented the LRAA from deceiving the public and because it only penalized the LRAA prospectively. For the following reasons, Kentucky law compels this Court to invalidate the ordinance as applied to the LRAA.

1. **Immunity extends to the LRAA**

Although Audubon Park concedes that the LRAA is a "local air board" established by Louisville Metro under KRS 183.132, it disputes that the LRAA is an agent of the state. Instead, Audubon Park argues that the LRAA, as merely a "body established by local government," enjoys only limited immunity

from tort claims. Audubon Park also disputes the extent of an air board's statutory authority to acquire easements from residents. We will address these positions in turn.

First, the LRAA is an agent of the state entitled to the same immunity as the Commonwealth. *See Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 104 (Ky. 2009) (local air boards perform integral state government functions and are immune when established by a parent entity that enjoys sovereign immunity); *see also Jewish Hosp. Healthcare Services, Inc. v. Louisville/Jefferson County Metro Government*, 270 S.W.3d 904, 907 (Ky. App. 2008) (holding Louisville Metro entitled to immunity unless statute to contrary).

Second, this immunity is not limited to tort actions, but applies equally when a municipal ordinance attempts to limit an air board's ability to perform an integral government function within its statutory authority. *See Boyle v. Campbell*, 450 S.W.2d 265, 268 (Ky. 1970) (state statutes trump conflicting municipal ordinances). A conflict exists between a statutory grant of authority and a municipal ordinance if:

> (1)[t]he subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

Commonwealth v. Do, Inc., 674 S.W.2d 519, 521 (Ky. 1984).

Third, KRS 183.133(4) provides a local air board with the authority to acquire any property, or rights therein, necessary for operating airports through the following means: "contract, lease, purchase, gift, condemnation or otherwise." This statute has been interpreted to give an air board limited eminent domain power. *See City of Bowling Green v. Cooksey*, 858 S.W.2d 190, 192 (Ky. App. 1992). In *Cooksey*, this Court narrowly construed the Kentucky Eminent Domain Act, KRS Chapter 416, *et seq.*, to hold that air boards cannot always acquire fee simple title to condemned property. Rather, it was decided that if the target property could be utilized through non-possessory means such as a privilege or easement—the ownership interest sought must reflect that limited utility.

Here, the LRAA did not have to obtain a permit from the mayor before attempting to acquire the easements. The specific grant of eminent domain power in KRS 183.133(4) established a ceiling, rather than a floor, which precluded a municipal ordinance from restricting an air board's effort to acquire proportional, non-possessory interests in land through mutual contract. Holding otherwise would allow the ordinance to "prohibit[] what the statute expressly permits." *Kentucky Restaurant Association v. Louisville/Jefferson County Metro Government*, 501 S.W.3d 425, 428 (Ky. 2016). Accordingly, both the fine and the ordinance as applied to the LRAA are invalid.

2. **The ordinance violated Free Speech**

The right of an individual to engage in free speech is guaranteed by the First Amendment to the United States Constitution and Section Eight of the Kentucky Constitution. *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 954 (Ky. 1991). The right is far from absolute, however, and the government may regulate speech "if the regulation is within the public interest." *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740, 743 (Ky. 1999). One area where the public interest is rarely served is when the government attempts to impose a "prior restraint" on speech. *See Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (describing prior restraints on speech as "the least tolerable infringement on First Amendment rights"). "A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials." *Blue Movies, Inc. v. Louisville/Jefferson County Metro Government*, 317 S.W.3d 23, 35 (Ky. 2010). And, our Supreme Court has recognized "a heavy presumption against their constitutional validity." *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302, 306 (Ky. 2010) (internal quotes and citations omitted).

Here, the ordinance is a prior restraint on speech. It proscribes the act of soliciting an easement without prior approval from the mayor or his designee. Accordingly, the ordinance must have been adopted to achieve a compelling government interest by the least restrictive means available.

According to Audubon Park, the government interest achieved by the ordinance is the elimination of misleading or otherwise deceptive representations by the LRAA. This is hardly compelling in light of the statutory authority

conferred on the LRAA to acquire property. Moreover, even if it were a compelling interest, requiring any individual, much less a duly established air board, to obtain a permit from the Mayor before attempting to buy or sell an interest in property is not narrowly tailored to eliminate deceptive speech. The law does not presume bad faith in business transactions, nor does it allow the government to anticipatorily determine fact from fiction.

Based on the foregoing, the ordinance is invalid and the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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