RENDERED: DECEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001246-MR

IAN MEITZEN AND
DONALD L. NAGELEISEN APPELLANTS

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE KATHLEEN S. LAPE, JUDGE
ACTION NO. 16-CI-00056

KENTUCKY BOARD OF ADJUSTMENT,
PLANNING AND DEVELOPMENT
SERVICES OF KENTON COUNTY;
NORTHERN KY. AREA
PLANNING COMMISSION; JESSICA
SWOPE; AIMEE GLOVER AND
VIRGINA DUPONT APPELLEES

<u>OPINION</u>
<u>REVERSING AND REMANDING</u>

** ** ** ** **

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

THOMPSON, JUDGE: Ian Meitzen and Donald L. Nageleisen appeal from the Kenton Circuit Court's order of dismissal and order denying motion to alter,

amend or vacate judgment. The circuit court ruled that it lacked jurisdiction over Meitzen's and Nageleisen's appeal of a Kentucky Board of Adjustment, Planning and Development Services of Kenton County (the Board) decision and denied their motion to amend on the basis that without jurisdiction being established, the Kentucky Rules of Civil Procedure (CR) did not apply. We reverse, because the circuit court misinterpreted what was necessary to establish jurisdiction and should have permitted amendment of the complaint.

In 2015, Jessica Swope and Aimee Glover filed an application for a conditional use permit and driveway variance of five feet with the Board to permit them to operate a commercial nursery school on property owned by Virginia Dupont. The Planning and Development Services of Kenton County (PDS) recommended approval by the Board. At the public meeting held on this matter on December 16, 2015, adjoining property owners Daniel Gaddis, Meitzen and Nageleisen spoke in opposition. Following the hearing, the Board granted Swope's and Glover's application.

On January 13, 2016, Gaddis, Meitzen and Nageleisen filed an appeal with the Kenton Circuit Court pursuant to KRS 100.347 against the Board, PDS, Northern Kentucky Area Planning Commission,[1] Swope, Glover and Dupont.

---

[1] The former name of the PDS.

On February 9, 2016, PDS filed a motion for summary judgment and/or motion to dismiss and the next day Swope and Glover filed a motion for summary judgment and/or for judgment on the pleading. Both motions argued that Gaddis, Meitzen and Nageleisen failed to allege in their complaint that they were injured or aggrieved by the final action of the Board as required for jurisdiction and could not amend their complaint.[2]

On March 21, 2016, Gaddis, Meitzen and Nageleisen responded, arguing that as adjacent property owners, they were injured and aggrieved, and simultaneously filed a motion to amend their complaint along with an amended complaint. In the amended complaint, Gaddis, Meitzen and Nageleisen alleged they were adjoining property owners who were injured and aggrieved by the granting of the conditional use permit. They argued before the Board that it was necessary to construct a turning lane for both north and south bound traffic because the property was located on a dangerous curve and the operation of a daycare center in that location "is a detriment to the health, safety, and welfare of the public and the injured and aggrieved adjacent property owners." Subsequently, Gaddis asked to be dismissed from the action and the circuit court entered an agreed order dismissing him.

[2] PDS's motion also included additional grounds, but as the motion was not granted on those other grounds and it has not filed a cross-appeal we do not consider those grounds.

On June 3, 2016, an order of dismissal was entered as to Meitzen and Nageleisen based upon PDS's motion and Swope's and Glover's motion. The circuit court found it lacked subject matter jurisdiction pursuant to KRS 100.347(1) and *Spencer Cty. Pres., Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327 (Ky.App. 2007). It also ruled that Meitzen and Nageleisen could not amend their faulty complaint pursuant to CR 15.01, after the time for perfection of the appeal expired, because the civil rules did not apply until after the appeal was perfected. The circuit court denied their subsequent motion to alter, amend or vacate.

We review whether the circuit court had jurisdiction to decide the appeal from the Board's decision *de novo* because interpreting a statute is a legal determination. *Basin Energy Co. v. Howard*, 447 S.W.3d 179, 184 (Ky.App. 2014); *Spencer Cty. Pres., Inc.*, 214 S.W.3d at 329.

Appeals from administrative agencies are different from appeals as a matter of right. "[W]hen the right of appeal or the trial court's jurisdiction is codified as a statutory procedure, as it is in KRS 100.347, then the parties are required to strictly follow those procedures." *Triad Dev./Alta Glyne, Inc. v. Gellhaus*, 150 S.W.3d 43, 47 (Ky. 2004). *See Harrison v. Park Hills Bd. of Adjustment*, 330 S.W.3d 89, 97 (Ky.App. 2011). "Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide

the controversy." *Bd. of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978). Stated another way, "the failure to follow the statutory guidelines for an appeal is fatal." *Taylor v. Duke*, 896 S.W.2d 618, 621 (Ky.App. 1995).

While in a typical appeal, CR 15.01 would permit the circuit court to allow an amendment of a pleading, as explained in *Flood*, 581 S.W.2d at 2, the civil rules do not apply in administrative appeals until after the appeal has been perfected.

Substantial compliance is not available to excuse a defect in invoking judicial review of an administrative agency ruling because the statutory requirements for such review are jurisdictional. *Kentucky Unemployment Ins. Comm'n v. Wilson*, 528 S.W.3d 336, 339 (Ky. 2017). *See City of Devondale v. Stallings*, 795 S.W.2d 954, 956-57 (Ky. 1990) (discussing how "substantial compliance" allows for sanctions other than dismissal for non-jurisdictional defects in notices of appeal). Non-jurisdictional defects may be waived. *See Green v. Bourbon Cty. Joint Planning Comm'n*, 637 S.W.2d 626, 631 (Ky. 1982) (allowing waiver of the service of summons).

Jurisdictional defects regarding administrative appeals, such as failing to file a timely notice of appeal and failing to name indispensable parties in a notice of appeal, cannot be remedied through amendment after the time for taking an appeal has expired. *Stallings*, 795 S.W.2d at 957; *Flood*, 581 S.W.2d at 2.

These types of jurisdictional defects are obvious based on the failure to comply with clear statutory requirements.

Accordingly, we must interpret what jurisdictional requirements are contained in KRS 100.347(1), which states as follows:

> Any person or entity claiming to be injured or aggrieved by any final action of the board of adjustment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the action of the board of adjustment, lies. Such appeal shall be taken within thirty (30) days after the final action of the board. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. The board of adjustment shall be a party in any such appeal filed in the Circuit Court.

Based on the clear wording of this statute, to have jurisdiction a party must timely appeal to the proper circuit court and name the board of adjustment as a party. There is nothing in the language of KRS 100.347(1) that requires appealing parties to specifically allege they were "injured or aggrieved" in their complaint in order for the circuit court to have jurisdiction. Instead, we interpret the "injured or aggrieved" language as expressing a standing requirement. If our Court were interpreting this language in the statute for the first time, that would resolve our inquiry on jurisdiction.

However, we must address *Spencer County Preservation* which interpreted the "injured or aggrieved" language in a different subsection of KRS 100.347. The Court there, rather than following the circuit court's ruling that the

appealing party lacked standing, held that appealing parties must claim to be "injured or aggrieved" in their complaint to invoke the circuit court's jurisdiction and explained its reasoning as follows:

> We believe the precise issue before this Court is whether it is mandatory under KRS 100.347(3) for a party to allege in its complaint on appeal to the circuit court that the party has been injured or aggrieved by the final action of the legislative body—in this case—the Spencer County Fiscal Court. Our focus is thus upon interpretation of KRS 100.347(3).
>
> . . .
>
> Upon review of the planning and zoning statutes and given the plain language of KRS 100.347(3), we believe a person or entity must claim in its complaint on appeal to be injured or aggrieved by a final action of a legislative body to pursue an appeal to the circuit court. In its complaint, SCP asserted that it was comprised of owners of property located near the Hochstrasser's property. However, upon thorough review of the complaint, we note that SCP failed to claim that it had been injured or aggrieved by the final action of the Spencer County Fiscal Court and failed to offer any factual allegation to support such claim. In the absence of such a claim or facts in the complaint, a statutory mandate for the exercise of judicial power by the circuit court was not met, and the circuit court was required to dismiss the appeal for want of jurisdiction. *See Board of Adjustments v. Flood,* 581 S.W.2d 1 (Ky. 1978).
>
> As concerns the standing argument, we agree with the authority cited by SCP that Kentucky courts have broadly interpreted the standing requirements set out in KRS 100.347(3). However, our courts have recognized a distinction between capacity to sue—the right to come into court—and standing to sue—the right to the relief

> sought. *Winn v. First Bank of Irvington,* 581 S.W.2d 21 (Ky.App. 1978). In order to have a right to the relief sought under KRS 100.347(3), a person or entity must claim to be injured or aggrieved by an action of the legislative body. There was no such claim presented to the circuit court in this case.
>
> Simply put, it was incumbent upon SCP to claim that it had been injured or aggrieved by the final action of the Spencer Fiscal Court and to allege facts supporting such claim in the complaint. The complaint, effectively being equivalent to a notice of appeal, failed to contain the necessary allegation that is a statutory requirement to pursue an appeal of the fiscal court action. *See Lexington–Fayette County Planning and Zoning Comm'n v. Levas,* 504 S.W.2d 685 (Ky. 1973). Accordingly, we conclude the circuit court properly granted summary judgment.

Spencer Cty. Pres., Inc., 214 S.W.3d at 329–30 (footnotes omitted).

Meitzen and Nageleisen seek to reinterpret *Spencer County Preservation* as only addressing the issue of standing and argue they have standing under *Davis v. Richardson*, 507 S.W.2d 446, 449 (Ky. 1974), which states that adjacent property owners "whose residential property directly confronts the site of the proposed conditional use, are within the definition of 'injured or aggrieved parties[.]'" They also argue that we could interpret *Spencer County Preservation* to allow an either/or inquiry, either parties use the magic words to establish standing, or they allege sufficient facts in their complaint to allege standing, and that if their complaint was deficient in establishing standing, the circuit court should have allowed them to amend their complaint.

PDS opposes this characterization of *Spencer County Preservation* and states that it conclusively requires dismissal for lack of jurisdiction where the complaint fails to specifically state that Meitzen and Nageleisen are injured or aggrieved. PDS argues Meitzen's and Nageleisen's appeal is frivolous and taken in bad faith. Therefore, it argues it is entitled to attorney fees, costs and damages for having to defend this action on appeal pursuant to CR 73.02(4).

We disagree with the holding of *Spencer County Preservation* that failure to specifically allege the party is "injured or aggrieved" deprives the circuit court of jurisdiction. *Spencer County Preservation* interprets KRS 100.347(3) in a hyper technical strict compliance view. In 2015, the Supreme Court in *Farm Bureau Ins. Co. v. Connelly*, 456 S.W.3d 814, 818 (Ky. 2015), ruled that substantial compliance is required except for the failure to file a notice of appeal in a timely manner and the failure to name an indispensable party in the notice of appeal. The parties filed their notice of appeal and named all indispensable parties to the appeal. Nothing more is required.

There is no absolute requirement that we follow *Spencer County Preservation* to apply its reasoning to our interpretation of KRS 100.347(3) because the same language is present in subsections (1), (2) and (3) of KRS 100.347. We hold that for KRS 100.347(1) there is no jurisdictional requirement that parties must use the language they are "injured or aggrieved." Instead, we

hold that for purposes of this subsection, the language "injured or aggrieved" only expresses a requirement for standing.

In the circuit court's order of dismissal, it denied Meitzen's and Nageleisen's motion to amend their complaint. We review the denial of a motion to amend for abuse of discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky.App. 2000). CR 15.01 provides that after a responsive pleading is served "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." In making this determination, the circuit court could consider whether the amendment could cure the complaint's deficiencies, prejudice the opposing party or work an injustice. *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869 (Ky.App. 2007). All these factors weigh in favor of allowing the amendment. Justice clearly requires that leave to amend be granted where Meitzen and Nageleisen properly showed they had standing by alleging they were adjoining property owners who were injured and aggrieved and who spoke in opposition to the conditional use permit and variance,[3] they immediately moved to amend their complaint and the opposing parties would not be prejudiced.

---

[3] *See Davis*, 507 S.W.2d at 448-49. Standing by property owners in similar matters has been broadly interpreted by our Courts. *See Warren Cty. Citizens for Managed Growth, Inc. v. Bd. of Comm'rs of City of Bowling Green*, 207 S.W.3d 7, 12–13 (Ky.App. 2006); *Chandler v. Bullitt Cty. Joint Planning Comm'n*, 125 S.W.3d 851, 853–54 (Ky.App. 2002); *21st Century Dev. Co., LLC v. Watts*, 958 S.W.2d 25, 28–29 (Ky.App. 1997); *City of Beechwood Vill. v. Council of & City of St. Matthews*, 574 S.W.2d 322, 324–25 (Ky.App. 1978).

We decline to award any damages to PDS for the filing of a frivolous appeal because we find that Meitzen's and Nageleisen's appeal was meritorious.

Accordingly, we reverse and remand the Kenton Circuit Court's order of dismissal and order denying motion to alter, amend or vacate judgment and direct that it enter an order granting Meitzen's and Nageleisen's motion to amend their complaint.

LAMBERT, D., JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent. The majority, of course, is free to "disagree with the holding of *Spencer County Preservation*" and even to criticize it. But, disagree or not, *Spencer County Preservation* has been precedent for more than ten years. Until its holding is reversed by the Kentucky Supreme Court, or until this Court reverses the case while sitting *en banc*, we must follow *Spencer County Preservation*.

When it comes to the construction of a statute, "we look first to its language [which, i]f . . . unambiguous, . . . must ordinarily be regarded as conclusive." *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L. Ed. 2d 246 (1981) (citation and internal quotation marks omitted). In *Spencer County Preservation*, we had to "interpret *the language* of KRS 100.347(3) to determine whether, *in perfecting an appeal* of a planning and zoning

decision to the circuit court, a party must allege in its complaint to be injured or aggrieved . . . ." *Spencer County Preservation*, 214 S.W.3d at 329 (emphasis added).

The self-same language that was the issue in *Spencer County Preservation* is the issue here. That language, expressing the premier element necessary for perfecting an administrative appeal, limits appeals to "Any person or entity claiming to be injured or aggrieved by any final action . . . ." KRS 100.347(1), (2), and (3). We called it "plain language" – unambiguous, – and said it meant this: "a person or entity must claim in its complaint on appeal to be injured or aggrieved . . . [and i]n the absence of such a claim . . . the circuit court was required to dismiss the appeal for want of jurisdiction." *Spencer County Preservation*, 214 S.W.3d at 329-30; *id.* at 330 (Petitioner must "claim that it had been injured or aggrieved by the final action of the Spencer Fiscal Court and . . . allege facts supporting such claim in the complaint."). Since 2007, lawyers have been able, and expected, to rely on that precedent, and this Court has followed it.

After *Spencer County Preservation* had been precedent for four years, this Court applied it to interpret the very same language again, this time as it appeared in KRS 100.347(2). We said: "The complaint **did not** include an allegation that [the petitioner] had been **injured or aggrieved** by the final action of the Planning Commission. Thus, it failed to invoke the subject matter jurisdiction

of the circuit court as required by [*Spencer County Preservation v.*] *Beacon Hill.*" *Citizens for Preservation of Jessamine County, LLC v. Jessamine County*, 2010-CA-000722-MR, 2011 WL 1706760, at *5 (Ky. App. May 6, 2011) (emphasis in original).

Counting down by interpreting the same language three times, in section (3), then in section (2), and now in section (1), this Court recants and explodes rules of statutory construction that would otherwise compel a finding consistent with precedent. By some unspecified new rule, the majority says the identical language appearing three places in a statute can have entirely different meanings. The majority does not offer any rationale to explain how it found, within the same statute, separate and irreconcilable legislative intent underlying the exact same language. That is an absurd and inconsistent result. When interpreting statutes, "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *Turkette*, 452 U.S. at 580, 101 S. Ct. at 2527. The majority opinion here does not simply fail to deal with an inconsistency; it creates one.

As Justice Reed from Maysville, Kentucky, said: "The law strives to provide predictability so that knowing men may wisely order their affairs . . . ." *Regan v. People of State of New York*, 349 U.S. 58, 64, 75 S. Ct. 585, 588, 99 L. Ed. 883 (1955). Who could have predicted this opinion? After this Court ascribed identical meaning to identical language when interpreting section (3) and section

(2), we now say the identical language in section (1) means exactly the opposite. That is less predictable than a game of duck, duck, goose – it is duck, duck, and the opposite of duck.

The Kenton Circuit Court faithfully followed the precedent of *Spencer County Preservation*, applying it and other jurisprudence in a model order of this type. We should affirm and, for these reasons, I respectfully dissent.

BRIEFS FOR APPELLANT:

Sherrill Hondorf
Batavia, Ohio

Donald L. Nageleisen
Ft. Mitchell, Kentucky

BRIEF FOR APPELLEES PLANNING AND DEVELOPMENT SERVICES OF KENTON COUNTY AND NORTHERN KY. AREA PLANNING COMMISSION:

Thomas R. Nienaber
Florence, Kentucky

BRIEF FOR APPELLEES JESSICA SWOPE AND AIMEE GLOVER:

Thomas L. Rouse
Erlanger, Kentucky