RENDERED: JULY 5, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001186-MR

JENNIFER ALLEN AND
JUSTIN BROCK APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 16-CI-001048

LOUISVILLE-JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Jennifer Allen and Justin Brock filed a petition for declaration of rights in the Jefferson Circuit Court seeking damages and declaratory relief alleging the Louisville-Jefferson County Metropolitan Sewer District (MSD) arbitrarily and unconstitutionally failed to provide notice of the

building restrictions attendant to its floodplain ordinance and to provide information before each purchased property in a floodplain that the property had suffered flood damage. We conclude the trial court correctly determined that there was no basis for relief when MSD followed all applicable federal and state laws.

Pursuant to the National Flood Insurance Act of 1968, the federal government created the National Flood Insurance Program (the Program), which enables property owners in certain communities to receive federally-subsidized flood insurance. To determine which communities are eligible, the "Act provides that flood insurance shall not be sold or renewed under the program within the community, unless the community has adopted adequate floodplain management regulations consistent with Federal criteria." 44 Code of Federal Regulations (C.F.R.) §60.1(a). Communities are encouraged to adopt standards more restrictive than the minimum standards. 44 C.F.R. §60.1(d). Louisville Metro is a participant in the Program.

The Program requires that a participating community address "substantial damage" defined as damage sustained by a structure whether the cost of repair would equal or exceed 50% of the market value of the structure before the damage occurred. 44 C.F.R. §59.1. The definition of substantial improvement includes structures that have incurred substantial damage. *Id*. In accordance with 44 C.F.R. §60.3(c)(2), communities must require that all substantial improvements

to residential structures have the lowest floor elevated above the base flood level. *Id*.

Kentucky Revised Statutes (KRS) 151.230 provides for the adoption of rules to manage floodplains. Among other things, the statute authorizes the adoption of local ordinances for the regulation of floodplains. *Id.*

In 1997, the then City of Louisville approved a floodplain ordinance that established floodplain management regulations to comply with the Program. Following the merger of the City of Louisville and Jefferson County, the Louisville Metro Council enacted a revised floodplain ordinance in 2006. Pursuant to the 2006 Floodplain Ordnance, MSD is required to administer its provisions.

Under Section 157.03(c)(1) of the ordinance, a person may not begin development in a floodplain until MSD issues a permit. At issue in this case is Section 157.03(c)(2)(a) which, consistent with federal law, allows MSD to issue a permit for the construction of substantial improvements or the repair of substantial damage only if the residence is elevated at least one foot above the local regulatory base flood elevation. As defined in the ordinance, "substantial damage/improvement" includes:

> Any combination of repairs, reconstruction, alteration, additions or improvements to existing development, taking place during a ten-year rolling period and begun on or after January 1, 2006, in which the cumulative cost equals or exceeds 50% of the market value of the structure.

In other words, if a house sustains damage during a ten-year period that exceeds 50% of its value, MSD is not allowed to issue a permit to address substantial damage unless the house is raised to one foot above the local regulatory base flood elevation, or it must be removed.

In 2011 and well after the 2006 Floodplain Ordinance was in effect, Allen bought her property located at 917 E. Riverside Drive in Louisville. In 2013, Brock purchased his property located at 919 E. Riverside Drive in Louisville. In early 2015, both properties were damaged during a flood event.

When Allen and Brock began to repair the damage to their properties, they did not obtain permits as required by the 2006 Floodplain Ordinance. MSD notified Allen and Brock they were violating the 2006 Floodplain Ordinance and then denied the required permits because the damage to their homes constituted substantial damage that exceed the 50% threshold over the ten-year period set forth in the 2006 Floodplain Ordinance. MSD's determination included flood-damage repair in early 2011, before Allen and Brock purchased their respective properties.

However, after the March 2015 floods, the Louisville Metro Council passed a temporary revision to the 2006 Floodplain Ordinance. Under that revised ordinance, for the period from June 2, 2015 until December 2, 2015, MSD was required to calculate the substantial damage on a per-incident basis, rather than the cumulative ten-year period. If damage on a per-incident basis exceeded 50% of

the value of the home, the home must be brought into compliance. If damage from a single incident did not exceed the 50% threshold, MSD would issue a permit to the owner to make repairs and the owner was not required to raise the elevation of the home.

On November 23, 2015, the Louisville Metro Council again revised the 2006 Floodplain Ordinance. Under that revision, MSD was required to make substantial damage calculations over a one-year period and, therefore, the ten-year and per-incident calculations no longer applied.

After the revisions to the 2006 Floodplain Ordinance, Allen and Brock were authorized to repair the damage to their homes without having to raise the elevation of their homes. On May 29, 2015, MSD issued a permit to Brock to repair his house and, on June 1, 2015, MSD issued a permit to Allen to repair her house without having to raise the elevations of their respective homes.

Although having received permits, Allen and Brock filed this lawsuit. To be clear, they do not allege that the ordinance is unconstitutional. They do allege that MSD should create a system through which prospective purchasers could discover that MSD had assessed significant flood-related damage to a property. They argue that because MSD does not notify current property owners of any damage assessment it makes against property until the cumulative damage exceeds 50% of the appraised value, the sellers of the properties they purchased

did not have any notice of the MSD assessments. In their complaint, Allen and Brock alleged that the absence of a proper notification system is a denial of due process and, therefore, violates Section 2 of the Kentucky Constitution; that it is a taking of property without just compensation in violation of Sections 13 and 242 of the Kentucky Constitution; and that the constitutional violations were undertaken in bad faith, entitling them to attorney fees. Allen and Brock demanded damages, a declaratory judgment and injunctive relief requiring the immediate institution of an adequate notification system.

The trial court granted MSD's motion to dismiss. Despite Allen's and Brock's assertions to the contrary, the trial court addressed their claims for declaratory relief and all other claims for relief. It ruled that Kentucky does not provide for a private cause of action for state constitutional violations. The trial court further ruled that even if such a cause of action were allowed, any claim for money damages was precluded by the Claims Against Local Government Act (CALGA). The trial court also agreed with MSD that its administration of a local floodplain ordinance mandated by federal law does not constitute a taking of property. Allen and Brock appealed.

Pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), when considering MSD's motion to dismiss, the trial court was required to take every material fact in the complaint as true and in a light most favorable to Allen and

Brock. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010). The trial court was not required to make findings of fact because the motion is considered purely as a matter of law. *Id*. "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo." *Id*.

Pursuant to all versions of the floodplain ordinance, MSD maintains information regarding repairs and improvements which is available through an Open Records Act request. KRS 61.872. Those records are released with the street numbers redacted to protect the privacy of the property owners. There is no provision in the ordinance that requires MSD to create a system that provides information about damage calculation in the absence of a request from the public. Nevertheless, Allen and Brock contend that MSD's system of providing flood-related damage information on properties is inadequate.

We first address Allen's and Brock's argument that their rights under Section 2 of the Kentucky Constitution were violated because there was not adequate notice to them that their respective properties had incurred flood-damage prior to their purchase of the property. They assert that had they been so informed, they would not have purchased the properties.

Section 2 of the Kentucky Constitution provides: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." MSD acted arbitrarily if it (1) acted in excess of its statutory powers, (2) denied due-process rights in an administrative proceeding, or (3) its decision lacked evidentiary support. *American Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). MSD did not conduct an administrative proceeding nor is there any challenge to any decision made by the MSD. Moreover, there is no allegation that the MSD did anything other than comply with an ordinance enacted by the Louisville Metro Council. Not only must this Court presume that the 2006 Floodplain Ordinance is constitutional, *Conrad v. Lexington-Fayette Urban County Government*, 659 S.W.2d 190 (Ky. 1983), most importantly, Allen and Brock do not attack the 2006 Floodplain Ordinance on constitutional grounds. Nor do they allege MSD did not comply with that ordinance. In short, MSD could not have acted arbitrarily by complying with a constitutional ordinance. There is no basis for any claim of a Section 2 violation.[1]

---

[1] Although our decision that the facts do not support Allen's and Brock's claim that Section 2 was violated, we note that even if the facts were otherwise, in *St. Luke Hosp., Inc. v. Straub*, 354 S.W.3d 529 (Ky. 2011), the Kentucky Supreme Court held that Kentucky law does not recognize a cause of action for alleged violations of Kentucky constitutional rights. Moreover, because MSD was not required by the 2006 Floodplain Ordinance or its revisions to create a system that provides notice in the absence of an open records request, its decision to not create an alternative notification system would be discretionary and dependent upon how MSD decides to allocate its monetary resources. Therefore, MSD would be immune under the CALGA for any damages

The gist of Allen's and Brock's claim is that MSD should have taken it upon itself to institute a public notification system that is not required by the ordinance and had it done so, they would have known about the flood damage to their homes prior to purchase and would not have purchased their respective homes. Allen's and Brock's claims are unsupported by any legal theory.

Allen and Brock allege that MSD operates a mysterious and secretive assessment program. That is simply untrue. MSD makes flood-related damage assessments public records available for inspection pursuant to an Open Records Act request. Allen and Brock argue that while that is true, MSD's system is inadequate because although it identifies the street, damage assessment and fair market value of the property, the street number is redacted to protect the property owner's property. They contend that absent the street numbers, "there is no way for a prospective purchaser to know whether MSD has assessed flood damage against a particular piece of property."

First, Allen and Brock did not make an open records request to MSD prior to purchasing the property for any information regarding the properties. Had they done so and were dissatisfied with the response including any redactions,

---

alleged by Allen and Brock.

remedies were available under the Open Records Act. KRS 61.880(2) (permitting review by the attorney general); KRS 61.880(5) (permitting appeal to circuit court); KRS 61.882 (permitting the requester to file an action in circuit court). They also would have discovered that, prior to their purchases of the properties, at least some homes on E. Riverside Drive had experienced flood-related damages and with modest inquiry, could have discovered the location of those properties.

Moreover, KRS 324.360 requires that certain information be disclosed to potential buyers by the seller including whether the basement leaks and "[o]ther matters the [real estate] commission deems appropriate." Under 201 Kentucky Administrative Regulation 11:350 Section 3, the seller of real estate is required to disclose whether the home is in a floodplain. That mandatory disclosure by the seller ensures that a prospective buyer is aware that the home is in a floodplain, not MSD's disclosure of any flood-damage assessment contained in its records.

Allen and Brock also claim that by not identifying and notifying prospective purchasers of flood-damaged homes, MSD had "taken" their property without compensation, in violation of Sections 13 and 242 of the Kentucky Constitution. Their attempt to assert a claim for inverse condemnation is strained.

A claim for inverse condemnation is asserted against a "government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain

proceedings are used." *Com., Nat. Res. & Envtl. Prot. Cabinet v. Stearns Coal & Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984). Factors relevant to determining whether an act amounts to a taking including:

> (1)the economic impact of the law on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, (3) the 'character' of the governmental action, that is whether the action is a physical invasion versus a public program adjusting the benefits and burdens of economic life to promote the common good, (4) what uses the regulation permits, (5) that the inclusion of the protected property was not arbitrary or unreasonable, and (6) that judicial review of the agency decision was available.

Id.

In this case, we need not delve into consideration of those factors because to be entitled to compensation for inverse condemnation, "the owner must be deprived of a portion of the 'bundle of rights' in the property *that existed when he obtained title to the property*." *Bobbie Preece Facility v. Com., Dep't of Charitable Gaming*, 71 S.W.3d 99, 104 (Ky.App. 2001) (emphasis added). The government cannot take what the owner never had.

When Allen and Brock purchased their properties, the 2006 Floodplain Ordinance was in effect and the properties subject to its provisions. There was no taking by MSD which merely followed a constitutional ordinance. In fact, the opposite could be said because Allen and Brock received the benefit of

the revisions to the ordinance when they were issued permits without being required to elevate their homes.

Allen and Brock may have been ignorant of the provisions of the 2006 Floodplain Ordinance when they purchased their homes. However, that is not MSD's fault. They were presumably aware that the homes they purchased were in a floodplain. Under Kentucky law they are conclusively presumed to know the state and federal laws applicable to those properties. *Oppenheimer v. Commonwealth*, 305 Ky. 147, 151, 202 S.W.2d 373, 375 (1947).

It may be as Allen and Brock suggest, a better way for MSD to make available to the public flood-related damage information other than through an open records request. That decision is clearly a legislative one and not one for this Court to make.

For the reasons stated, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Randal A. Strobo
Clay Barkley
Louisville, Kentucky

Ben Carter
Louisville, Kentucky

BRIEF FOR APPELLEE:

Samuel D. Hinkle IV
Adam T. Goebel
Louisville, Kentucky