RENDERED: JUNE 24, 2022; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-1024-MR

BOBBY JONES APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 17-CI-00039

WEST LIBERTY PLANNING AND
ZONING COMMISSION APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CETRULO, AND L. THOMPSON, JUDGES.

CETRULO, JUDGE: Appellant Bobby Jones ("Jones") appeals an order of the Morgan Circuit Court dismissing his claim against Appellee West Liberty Planning and Zoning Commission ("the Commission") for lack of subject matter jurisdiction due to Jones's failure to timely appeal. After careful review, we affirm.

BACKGROUND

While we appreciate that Jones finds the facts of this case as "nothing less than extraordinary," we will describe them as "clear and concise." In 1999, Jones and his wife, Ducey, purchased a parcel of land located within the West Liberty city limits; Jones operated this parcel as a trailer park until the spring of 2012. In March 2012, a tornado moved through the city of West Liberty damaging and/or destroying various structures in the area.[1] Jones declared the storm and its effects as a "major disaster worthy of national attention for at least 15 minutes." Jones argues that prior to the storm, the trailer park had been operating pursuant to a non-conforming use regulation within West Liberty's zoning code. After the storm, Jones sought to re-establish his trailer park by petitioning the Commission for a non-conforming use permit. The Commission sent Jones a letter, dated May 16, 2012, stating:

> As requested, this letter is in response to your letter presented to the West Liberty Planning and Zoning Commission concerning the Jones property located on Prestonburg Street in West Liberty, utilized as a Mobile Home Park. In accordance with the West Liberty Planning and Zoning Ordinance (relevant portions attached), the reestablishment of a mobile home park is prohibited.

[1] Jones does not clarify what specific damage the storm did to the trailer park but argues a general need to rebuild.

For almost five years, Jones did not appeal – nor in any legal way challenge – the Commission's decision. In March 2017, Jones filed a complaint in Morgan Circuit Court alleging that the trailer park should have been "grandfathered in" by the Commission for continued use consistent with the past "thirty to forty years." Jones argued that the Commission's letter, without a hearing, qualified as a denial of his due process rights; and Jones requested equitable tolling of the statute of limitations. After minimal discovery, the Commission filed a "Motion to Dismiss, Or in the Alternative, Motion for Summary Judgment" in September 2017. In October 2017, Jones filed his response. In August 2021,[2] the court entered an "Order of Dismissal" granting[3] the Commission's motion to dismiss due to a lack of subject matter jurisdiction. This appeal followed.

STANDARD OF REVIEW

"[S]ubject-matter jurisdiction involves a court's ability to hear a type of case[.]" *Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010). Kentucky law adheres "to the proposition that subject-matter jurisdiction depends on whether a court has the ability to hear 'this kind of case,' instead of 'this case.'" *Id*. at

[2] The reason for this delay is not clear from the record.

[3] The order on appeal, and at various times, the parties, used the term "sustained."

705-06. "Jurisdiction is a question of law, and our review is *de novo*." *Commonwealth v. B.H.*, 548 S.W.3d 238, 242 (Ky. 2018) (citation omitted).

ANALYSIS

On appeal, Jones argues (1) the circuit court did indeed have subject matter jurisdiction, and (2) the circuit court erred by not equitably tolling the statute of limitations.[4] We will address each matter in turn and include additional facts as necessary.

First, Jones contends that the circuit court "bought hook, line and sinker into the Commission's argument . . . that Jones's Complaint was nothing more than an attempt at an appeal of the Commission's ruling that Jones cannot continue his land use as a nonconforming use[.]" Unfortunately for Jones, we went fishing in that same pond.

"[A] court is deprived of subject matter jurisdiction only in cases where the court has not been given any power to do anything at all." *Gordon v. NKC Hospitals, Inc.*, 887 S.W.2d 360, 362 (Ky. 1994) (internal quotation marks and citations omitted). Here, under these circumstances, Kentucky law deprives the circuit court of its "power" after 30 days:

> Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall

[4] Jones also challenges the circuit court's findings of fact as they relate to a summary judgment order, but the order on appeal is an order granting a *motion to dismiss*; therefore, it is not necessary for our analysis to address the existence of an issue of material fact.

> appeal from the final action to the Circuit Court of the county in which the property, which is the subject of the commission's action, lies. *Such appeal shall be taken within thirty (30) days* after such action. Such action shall not include the commission's recommendations made to other governmental bodies. *All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review*.

KRS[5] 100.347(2) (emphasis added).

Kentucky courts have not interpreted this 30-day appeal requirement as a mere suggestion. *Taylor v. Duke*, 896 S.W.2d 618, 621 (Ky. App. 1995) ("Since an appeal from an administrative decision is a matter of legislative grace and not a right, the failure to follow the statutory guidelines for an appeal is fatal."). This strict compliance requirement is not new law.

> There is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, a strict compliance with its terms is required. 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. *Kentucky Utilities Co. v. Farmers Rural Electric Corporative Cooperation*, Ky., 361 S.W.2d 300 (1962); *Roberts v. Watts*, Ky., 258 S.W.2d 513 (1953).

Bd. of Adjustments of City of Richmond v. Flood, 581 S.W.2d 1, 2 (Ky. 1978).

Here, we agree with the circuit court's application of KRS 100.347(2) and its strict adherence. The order of dismissal on appeal stated:

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[5] Kentucky Revised Statutes.

> [T]here is no dispute that the adverse action of the [Commission], which is the subject of the Complaint was taken on May 16, 2012, as evidenced by the letter filed of record and attached to the Complaint. There is further no dispute that the Complaint in this matter was not filed until March 15, 2017. Consequently, the Complaint was not filed within thirty (30) days of the date of the [Commission's] action. In fact, such Complaint was filed almost five (5) years after the date of the [Commission's] action. [Jones'] compliance with the applicable statute is not optional.

(Page break and emphasis omitted.)

Jones might have had valid arguments as to why the Commission was in error when it rejected Jones' non-conforming use request, but those arguments needed to be made within 30 days, not, as here, more than 1500 days later. Subsequently, Jones argues that public policy – the need for affordable housing in West Liberty – somehow invokes an equitable tolling of the 30-day appeal requirement but does not correlate or substantiate that argument.

Jones cites to *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 255, 136 S. Ct. 750, 755, 193 L. Ed. 2d 652 (2016), to establish the necessary elements of equitable tolling: "(1) that [the litigant] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." (Citation omitted.) However – although he supplied the standard himself – Jones does not explain how he has been diligently pursuing his rights nor what prevented him from timely filing. Jones does not give a clear

answer as to why his complaint was filed almost five years after the Commission's letter, nor any steps he took in the intervening time to retain and/or regain his non-conforming usage rights. Again, we agree with the circuit court:

> The application of equitable tolling was suggested, yet no basis for equitable tolling exists. As noted, [Jones] waited almost five (5) years to bring this matter before the Circuit Court. He has presented no evidence that he was without the ability to act or deprived of the ability to act. Per [Jones], an appeal was not filed right away as he believed such an appeal would be futile. More particularly, [Jones] stated that since he was not granted a hearing before the [Commission], he did not feel as though he would receive due process. Of course, the very lack of due process [Jones] complains of is at the heart of the appeals process. No grounds exist to excuse the filing of a timely appeal. . . .
>
> [I]f the relief sought is of the nature designed for the appeals process, the appeals process must be utilized. Thus, as the Court of Appeals directly stated, "Where the statute affords an adequate remedy, a separate declaratory judgment action is not appropriate." *Warren County Citizens for Managed Growth, Inc. v. Board of Com*[*m*]*'rs of City of Bowling Green*, 207 S.W.3d 7, 17 (Ky. App. 2006).

Jones argues that "there should be a change in the existing law . . . and that the doctrine of equitable estoppel [should apply] in a scenario where there has been mass destruction of housing, or the equitable estoppel law of Kentucky should be extended to cover the situation at hand." However, we are a reviewing court bound by the plain language of the statute. *See Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017); *see also Revenue Cabinet v.*

O'Daniel, 153 S.W.3d 815, 819 (Ky. 2005). Additionally, we are bound by the doctrine of vertical stare decisis, the principle that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction. *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019). Accordingly, we must turn our view up to the billboard:

> It is as plain as a billboard that the legislature has granted to persons aggrieved by the final action of the board of adjustments the grace of appeal to the circuit court provided they perfect that appeal by filing it in the circuit court, including the planning commission as a party, within thirty days.

Flood, 581 S.W.2d at 2.

CONCLUSION

We agree with the circuit court's ruling. Therefore, the failure to follow the statutory guideline is fatal and cause for equitable tolling has not been established. Based upon the foregoing, the order of dismissal of the Morgan Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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