Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-23-00022-CV

CITY OF LIVE OAK and City of Live Oak Board of Adjustment,
Appellants

v.

David **LEE**, Tina Gould, and Steve Jordan,
Appellees

From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 2022-CI-17650
Honorable John D. Gabriel Jr., Judge Presiding

Opinion by: Lori I. Valenzuela, Justice

Sitting: Irene Rios, Justice
Liza A. Rodriguez, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: July 5, 2023

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

In this interlocutory appeal, appellants City of Live Oak ("Live Oak") and City of Live Oak Board of Adjustment ("Live Oak BOA") appeal the trial court's denial of their plea to the jurisdiction. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

In March 2022, Jose A. Castaneda ("Castaneda") began the approval process required to commence construction of a residential garden home at 7815 Forest Dream, Live Oak, Texas

78233 (the "Property"). The Property is subject to a minimum twenty-five-foot rear yard setback. On May 5, 2022, the City of Live Oak erroneously issued a permit allowing Castaneda to begin construction on the Property. Shortly after construction began, appellee David Lee submitted a Resident Code Compliance Violation Report asserting the construction violated the Live Oak City Ordinance requiring a minimum twenty-five-foot rear yard setback, and Castaneda was building within approximately eight feet of Lee's property line.

In response to Lee's complaint, on July 1, 2022, the City of Live Oak issued a stop work order. On August 1, 2022, Castaneda submitted a variance application to the Live Oak BOA. Acknowledging the city's erroneous permit issuance, city staff recommended approval of the variance to avoid imposition of unnecessary and unique hardship on Castaneda. On September 1, 2022, the Live Oak BOA conducted a public hearing to consider, among other things, Castaneda's variance request. After receiving advice from the city attorney in private executive session, the Live Oak BOA granted Castaneda's variance request.

Eight days after the public hearing, appellees—the owners of homes adjacent to the Property—filed their Original Petition and Application for Writ of Certiorari and Restraining Order. On December 14, 2022, appellants filed their plea to the jurisdiction. On January 20, 2023, the trial court signed an order denying appellant's plea to the jurisdiction. This interlocutory appeal follows.

STANDARD OF REVIEW

To establish subject matter jurisdiction, a plaintiff must allege facts that affirmatively demonstrate the court's jurisdiction to hear the claim. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). Whether a court has subject matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We review de novo whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter

jurisdiction. *Id.* Likewise, where jurisdictional facts are undisputed, as here, we review de novo whether the undisputed jurisdictional facts establish the trial court's jurisdiction. *Id.*

DISCUSSION

In four issues, appellants assert the trial court erred in denying appellant's plea to the jurisdiction because (1) appellees did not comply with jurisdictional statutory requirements to seek judicial review; (2) appellees failed to exhaust their administrative remedies; (3) the City of Live Oak is not a proper party; and (4) appellees are not entitled to seek monetary relief.

Is Section 211.011's Writ of Certiorari a Jurisdictional Prerequisite to Suit?

Appellants' first two issues are related. In both issues, appellants assert the statutory requirement to seek judicial review through a writ of certiorari is jurisdictional. TEX. LOCAL GOV'T CODE § 211.011(c)–(d) (discussing writ of certiorari procedure). Because appellees did not obtain a writ, appellants assert the trial court lacked subject-matter jurisdiction. Reframing the first issue, appellants' second issue argues the trial court lacked jurisdiction because, by not obtaining the writ, appellees failed to exhaust their administrative remedies. Applying binding precedent, we conclude the writ of certiorari is not a jurisdictional requirement.

In *Davis v. Zoning Bd. of Adjustment of City of La Porte*, the sole issue before the Supreme Court of Texas was whether the service of a writ of certiorari, as required by section 211.011 of the Texas Local Government Code, is a jurisdictional prerequisite to appeal a zoning board's decision. 865 S.W.2d 941, 942 (Tex. 1993). The supreme court held it is not. Under *Davis*, the sole jurisdictional question posed by Section 211.011 is whether the party seeking judicial review of the zoning board's decision filed a petition within ten days after a zoning board decision. *Id.*; *see also* TEX. LOCAL GOV'T CODE § 211.011(a)–(b) (requiring a verified petition stating the decision of the board of adjustment is illegal in whole or in part and specifying the grounds for illegality to be "presented within 10 days after the date the decision is filed in the board's office.").

Notably, *Davis* confirms there is no specific statutory deadline for the trial court to issue the writ. *Id.*

The Supreme Court of Texas again addressed the issue in *Tellez v. City of Socorro*, 226 S.W.3d 413 (Tex. 2007). The complainant in *Tellez* filed a petition against the City of Socorro (rather than its zoning board), and the complainant's petition failed to specify how the zoning board's decision was illegal. *Id.* at 414. The supreme court determined both were procedural defects and could be waived because they do not affect subject-matter jurisdiction. *Id.* And because the city failed to object to either defect, they were waived. *Id.*

Applying these authorities, the trial court faced only one jurisdictional question: Did appellees file a petition within ten days after the date the Live Oak BOA granted Castaneda's variance request? The undisputed jurisdictional fact answers the question affirmatively. Appellees filed their Original Petition eight days after the Live Oak BOA granted Castaneda's variance request. Having filed a complaint within eight days, appellees properly invoked the trial court's jurisdiction. Because the issuance of a writ of certiorari is not jurisdictional, appellants' first two issues are overruled.

Is the City of Live Oak a Proper Party?

In their third issue, appellants assert Live Oak is not liable in the legal capacity in which it is sued because the City is not the proper governmental entity to address a challenge to its zoning board's decisions. Seemingly conceding the point, appellees emphasize their original petition sought to restrain Live Oak from lifting its stop work order, but only seeks judicial review of the Live Oak BOA's decision under Section 211.011.

"[W]hile the Local Government Code does not specify against whom suit should be filed, its requirements suggest that zoning boards are the proper party as they must be served with the writ, file a verified answer, and pay costs if found to have acted in bad faith." *Tellez*, 226 S.W.3d

at 414. Although in *Tellez*, the city failed to object on the grounds that they were not the proper party, here, Live Oak objected through its plea to the jurisdiction. Because the Live Oak BOA is the proper party for appellees to seek review, we agree with appellants that the trial court erred in failing to dismiss Live Oak. *See id.* We sustain appellants' third issue.

Monetary Relief

In their fourth issue, appellants assert the trial court erred in denying appellants' plea to the jurisdiction because appellees are not entitled to monetary relief. On appeal, appellees state they seek no monetary relief from appellants.

Section 211.011 authorizes the trial court to "reverse or affirm, in whole or in part, or modify the decision that is appealed," and only authorizes a trial court to assess costs against a board if the court determines the board acted with gross negligence, in bad faith, or with malice in making its decision. TEX. LOCAL GOV'T CODE § 211.011(f).

With respect to monetary relief, appellees pleadings state: "**RULE 47 STATEMENT**. [Appellees] seek[] monetary relief of $250,000 or less and non-monetary relief." This statement is one of the five, enumerated statements approved by Rule 47. *See* TEX. R. CIV. P. 47. The purpose of the Rule 47 statement is to allow a determination of whether a suit falls under the expedited actions process governed by Rule 169. *See id.* cmt to 2013 change. Reading the Original Petition as a whole, the Rule 47 statement cannot be reasonably read as a request for monetary relief. However, appellees also seek attorney's fees and costs under Section 211.011(f).

Although it is not clear from the statute's text whether attorney's fees are properly included as recoverable "costs" under Subsection (f), appellants' plea to the jurisdiction did not raise the issue. To preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if not apparent from the context. TEX. R. APP. P. 33.1(a)(1)(A). If a party fails to present the issue to the trial court,

the error is not preserved and cannot be reviewed on appeal. *See Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991). Because recovery of monetary relief was not raised in appellants' plea to the jurisdiction, it is not preserved for our review; however, our determination that the issue is not preserved for this interlocutory appeal should not be read as foreclosing the issue on remand. We overrule appellants' fourth issue.

CONCLUSION

Having sustained appellants' third issue, we reverse in part the order of the trial court and remand this cause to the trial court with instructions to render a judgment of dismissal in favor of the City of Live Oak. The order is affirmed in part as to the City of Live Oak Board of Adjustment and the cause remanded for further proceedings consistent with this opinion.

Lori I. Valenzuela, Justice