TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00385-CV

Lisa Risoli, Appellant

v.

Board of Adjustment of the City of Wimberley and the City of Wimberley, Appellees

FROM THE DISTRICT COURT OF HAYS COUNTY, 207TH JUDICIAL DISTRICT
NO. 16-2419, HONORABLE WILLIAM R. HENRY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Lisa Risoli filed a petition for writ of certiorari, application for temporary injunction, and request for declaratory relief, arguing that the Board of Adjustment of the City of Wimberley and the City of Wimberley ("appellees") had improperly revoked the "grandfathered use status" of Risoli's property, barring her from using it as a short-term rental facility. Appellees filed a plea to the jurisdiction, asserting that Risoli had not timely filed her petition under section 211.011 of the local government code. *See* Tex. Loc. Gov't Code § 211.011.[1] The trial court signed an order granting appellees' plea to the jurisdiction, and Risoli filed this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). We reverse the trial court's order and remand the proceeding to the trial court.

[1] The City also filed a counterclaim seeking a temporary injunction, a permanent injunction, and civil penalties for violation of the City's zoning ordinances.

Standard of Review and Controlling Statute

A trial court's decision on a plea to the jurisdiction is reviewed de novo, and the plaintiff's petition is liberally construed in favor of jurisdiction. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *University of Tex. at Austin v. Sampson*, 488 S.W.3d 332, 336 (Tex. App.—Austin 2014), *aff'd*, 500 S.W.3d 380 (Tex. 2016). The governmental unit bears the burden of presenting evidence to support its plea, and if it meets that burden, the nonmovant must show a disputed material fact regarding the jurisdictional issue, which we review by taking as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in her favor. *Miranda*, 133 S.W.3d at 227-28; *Sampson*, 488 S.W.3d at 336.

A person aggrieved by a board of adjustment's decision may seek judicial review by presenting a petition "within 10 days after the date the decision is filed in the board's office." Tex. Loc. Gov't Code § 211.011(b). "*[J]urisdiction* exists '[o]nce a party files a petition within ten (10) days after a zoning board decision . . . .'"[2] *Tellez v. City of Socorro*, 226 S.W.3d 413, 414 (Tex. 2007) (quoting *Davis v. Zoning Bd. of Adjustment*, 865 S.W.2d 941, 942 (Tex. 1993) (per curiam) (if party files petition within ten days after zoning board's decision, court has subject-matter jurisdiction to determine claim)). The controlling question here is whether appellees showed that the City Administrator's letter was the Board's "decision" that was "filed in [its] office."

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[2] In Risoli's second issue, she cites to *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000), arguing that the ten-day filing requirement is not jurisdictional but instead should be one factor considered in a trial court's review of a petition under section 211.011. Due to our resolution of her first issue, we need not consider whether the supreme court's statement in *Tellez v. City of Socorro*, 226 S.W.3d 413 (Tex. 2007), which did not turn on whether the petition was timely, truly means that the timely filing of a petition is jurisdictional. We quote that language simply to show that the supreme court has held that subject-matter jurisdiction exists if a petition is timely filed.

Procedural and Factual Summary[3]

In July 2016, Risoli received a letter from the City Administrator stating that the City was revoking the "grandfathered use" that allowed her to use her property as a short-term rental. Risoli appealed to the Board, which considered the matter at a meeting on September 6, 2016, voting to uphold the revocation of Risoli's grandfathered status. On September 14, the City Administrator wrote a letter to Risoli stating:

> On September 6, 2016, the City of Wimberley Board of Adjustment unanimously voted to uphold the recent determination by the City to eliminate the grandfather status for your existing short-term rental facility located at 310 Summit Loop, Wimberley, Texas.
>
> With the grandfather status no longer in place, please be advised that you are to ***immediately cease operation of the subject short-term rental facility***.

That letter was emailed to Risoli on September 16 and again on October 18. On November 2, Risoli contacted the City Secretary to ask when the minutes from the September Board meeting would be finalized or approved, and on November 5, the City Secretary sent Risoli an email attaching "draft minutes" from that meeting, explaining:

> The Board of Adjustment's September 6, 2016 minutes are attached. It is important to note that these are "DRAFT" minutes and watermarked as such. The Board is scheduled to approve (or amend) these minutes at its next meeting on November 7, 2016. Once approved, the minutes will be uploaded to the City's website.

[3] We take this recitation of the facts from the clerk's record, specifically from appellees' plea to the jurisdiction, its "bench brief," and Risoli's response to the plea.

On November 17, Risoli filed her original petition in the trial court, noting that as of that date, she had not yet received notice that the "draft minutes" had been formally approved, signed, filed, or uploaded to the City's website.

Appellees filed a plea to the jurisdiction arguing that Risoli's petition was untimely filed because her ten-day window for seeking review began to run after the City Administrator's September 14 letter. Appellees contended that the letter summarized the Board's decision and thus constituted the Board's "decision" as contemplated by section 211.011, and that the letter "was filed at City Hall, which is the office where the Board of Adjustment's records were kept and maintained by the City Secretary." In a "bench brief" filed with the trial court,[4] appellees stated that the City has a staff of eight people, all of whom have offices in the same building, and that "'records of [the Board's] examinations and official actions' are filed and maintained by the City Secretary at City Hall, which is the office of the Board of Adjustment for all purposes." They further asserted that the date the Board's decision was "filed 'in the board's office' was on or before September 16, 2016, when the City Administrator prepared and sent a written summary of the Board's decision to Ms. Risoli." Risoli responded that there was no evidence to support appellees' assertions that the letter amounted to a "decision" that was "filed" by the Board, attaching as evidence copies of the emails sent to her by the City Secretary related to the minutes of the September Board meeting.

[4] The bench brief was filed by appellees' attorneys and was not sworn or presented in affidavit form.

Discussion

Neither the letter nor the email show any file stamp or other notation to indicate they were "filed" in any official record, much less in the Board's office. In an unsworn "bench brief," appellees asserted that because the City has a small staff, all of whom office in the same building, and the City Secretary maintains the City's records, the Board's decision was "filed 'in the board's office'" when the "City Administrator prepared and sent a written summary" of the decision. This requires us to assume both that the Board intended the City Administrator's letter to be considered its "decision" and that the letter was officially filed in the Board's records. However, appellees did not present evidence of those facts. It simply provided the letter itself, along with evidence that the letter was sent to Risoli. Risoli, for her part, provided evidence that, as of November 5, the City Secretary did not consider the minutes she had prepared from the September 6 meeting to have been finalized and approved.[5] Risoli filed her petition ten days after the Board's November 7 meeting, relying on the City Secretary's statement that the Board would vote to approve or amend the minutes at that meeting, believing that was the "decision" that started the running of her filing deadline.

The Board cites *Hall v. Board of Adjustment*, 239 S.W.2d 647 (Tex. Civ. App.—San Antonio 1951, no writ), for support for its assertion that the Board's decision was "filed" on or

[5] In their brief, appellees note that in her email asking when the minutes would be finalized, Risoli's attorney did not identify herself as Risoli's representative or ask "what specific information" was being sought from the minutes, asserting that the emails "only established that the city secretary answered a general inquiry about the status of the minutes of a particular meeting" and citing to a statute that bars a governmental body from inquiring into the reason public information is being requested. *See* Tex. Gov't Code § 552.222(b). However, the email from Risoli's counsel to the City Secretary opens with, "It was great speaking with you today." It is not an unreasonable inference to conclude that counsel likely identified herself and the issues in question during that earlier conversation.

before September 16, when Risoli was sent the City Administrator's letter. In *Hall*, the board's minutes were handwritten on the day of the board's decision and then "typed into the minute book" the next day, upon which the ten-day window began to run. *Id*. at 649. The court noted that a "certified copy of these minutes was introduced in evidence" and that the board's acting secretary testified about his transcription and entry of the minutes into the board's public records. *Id.* at 648-49. We have no such evidence in this case that the City Administrator's letter was placed in the Board's public records. Further, the Board's apparent practice, as explained in the City Secretary's emails to Risoli, of approving or amending its minutes at its next meeting gives rise to an inference that the minutes were not entered into the Board's public records until such action occurred. *See id.* ("[w]hen the minutes were prepared by the proper officer and spread upon the pages of the minute book they were sufficient to meet" requirements of section 211.011's predecessor).

Instead, this case closely matches the facts as set out in *East Central Independent School District v. Board of Adjustment*, in which an administrative assistant electronically recorded the board's meeting, transcribing and saving the minutes one week later. 387 S.W.3d 754, 758 (Tex. App.—El Paso 2012, pet. denied). When the board approved the minutes a week later, the assistant posted them to the board's website. *Id*. at 758-59. The board argued that the time to file a petition began running on the date it made its decision, when the meeting was electronically recorded, but the court of appeals disagreed, holding that "the term 'decision' means the board of adjustment's minutes reflecting a vote on a particular question and the records related to that decision." *Id.* at 761-62. In reaching that conclusion, the court looked to statutory provisions governing open meetings and parliamentary procedure that require certain formalities in a governing

body's decision making.[6] *Id*. at 760-62. We believe *East Central* is well-reasoned because, as our sister court noted:

> A party who wishes to appeal should be able to readily determine when a board of adjustment's decision has been filed in the board's office so it can timely file its petition pursuant to Section 211.011(b). This is easily done when, as in this case, the board of adjustment approves its minutes, files them in its office, and posts them online for public access. . . . Were we to hold that the board's decision is the CD created by an employee from the electronic recording of the board's meeting, a party who wished to appeal would not be able to readily determine when that recording has been created or when it is considered by the board of adjustment to have been filed in its office because there is no requirement that notice be given to the parties.

Id. at 761.[7]

Even if we were to take a more liberal view of what can be considered a board's "decision," and assuming without deciding that the City Administrator's letter can be considered such a "decision," there is no evidence that the letter was filed in the Board's office.[8] *See Reynolds*

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[6] The court considered section 211.011 in conjunction with section 211.008, which provides details of how a board of adjustment must function, including the requirement that a board "shall keep minutes of its proceedings that indicate the vote of each member on each question or the fact that a member is absent or fails to vote," that a board "shall keep records of its examinations and other official actions," and that "[t]he minutes and records shall be filed immediately in the board's office and are public records." Tex. Loc. Gov't Code § 211.008(f).

[7] Appellees assert on appeal that the *East Central* court "noted the importance of fair notice so that a party who wishes to appeal can readily determine where the board's decision has been filed," stating that fair notice was not an issue here because Risoli knew about the Board's decision and twice received a copy of the letter. However, *East Central* does not emphasize the need to know *where* a decision is filed but *when* a decision is filed "so it can timely file its petition." *East Cent. Indep. Sch. Dist. v. Board of Adjustment*, 387 S.W.3d 754, 761 (Tex. App.—El Paso 2012, pet. denied). It is not the date a party becomes aware of a decision that matters but instead the date of filing, because that is when section 211.011 specifies that the 10-day filing window begins to run.

[8] We disagree with appellees that their attorney's statements during argument on the plea to the jurisdiction—that "the Wimberley City Hall constitutes the Board's office" and describing the

v. Haws, 741 S.W.2d 582, 585-87 (Tex. App.—Fort Worth 1987, writ denied) (board's "preliminary draft of the decision" was "filed in the Board's office" two months after meeting and corrected version was typed into board's minutes three months later; court of appeals held that preliminary draft was "sufficient to disclose the intention of the Board" so as to trigger filing deadline upon its filing in board's office). Further, assuming that Risoli's statement in her response to appellees' plea that the letter was "filed at City Hall" should be considered a judicial admission that the letter was in fact filed in some formal fashion, this does not amount to evidence that the letter was filed in the *Board's office*. *See* Tex. Loc. Gov't Code § 211.011(b). There was no evidence that a document "filed in City Hall" is considered to have been filed in the records of all City departments, commissions, and boards.[9]

City Administrator's duties and the structure of the City offices—should be taken as evidence, particularly in light of Risoli's attorney's statement that he had not seen any evidence that it was filed in the Board's office or "that it was filed at City Hall." We also disagree with appellees that Risoli's counsel's following statement—that "none of that really matters because the case law is very, very clear that it is not a letter, it is not a summary, it is the actual vote that must be filed"—meant that counsel "confirm[ed] that Risoli did not dispute whether the letter was filed in the [B]oard's office, but only whether the letter constituted the '[B]oard's decision' within the meaning of the statute."

[9] For the first time on appeal, appellees explain that the City Administrator is the City's "officer for public information" under the Public Information Act; cite to various statutes relating to a public-information officer's duties; and cite to the City's ordinances, posted on the City's website, to argue that the City Administrator "is charged with performing the [B]oard's administrative and clerical functions." *See* Wimberley, Tex., Code of Ordinances, § 30.33 (Duty & Powers of City Administrator), available at http://www.cityofwimberley.com, "City Ordinances" tab (Administrator shall, among other duties, "[p]erform administrative tasks required to maintain control of the functions of various departments," "[p]rovide clerical and administrative support" to City's boards, commissions, and committees; attend board, commission, and committee meetings "in order to receive instructions, status reports, and stay apprised of developing municipal policy"; and "[m]aintain a schedule of board, commission, and committee appointments and coordinate the process for evaluating and considering candidates for the boards, commissions, and committees"). However, even if we ignore the fact that these arguments and "evidence" are raised for the first time on appeal, the City's website also describes the role of the City Secretary as "providing administrative

Conclusion

Appellees had the burden of presenting evidence before the trial court to support their plea. *See Miranda*, 133 S.W.3d at 227-28; *Sampson*, 488 S.W.3d at 336. Taking as true all evidence favorable to Risoli and indulging every reasonable inference and resolving any doubts in her favor, as we must, *see Miranda*, 133 S.W.3d at 227-28; *Sampson*, 488 S.W.3d at 336, we hold that the trial court erred in granting appellees' plea to the jurisdiction. We therefore reverse its order granting the plea and remand the cause to the trial court for further proceedings.

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David Puryear, Justice

Before Justices Puryear, Field, and Bourland

Reversed and Remanded

Filed: October 20, 2017

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support at City Council meetings, *maintain[ing] official records for the City including minutes, ordinances, resolutions, legal documents, and contracts*; provid[ing] documents and information to the public and staff as requested; and prepar[ing] updates to the Code of Ordinances." City of Wimberley, City Hall Staff, http://www.cityofwimberley.com/index.asp?SEC=9BFAE642-8498-4515-BCAD-3FF60E40E5DE&Type=B_LIST (emphasis added) (City Administrator, in contrast, is responsible for coordinating enforcement of City ordinances, rules, and procedures; ensuring that policies comply with applicable law; attending board, commission, and committee meetings; managing dissemination of information to public; and overseeing daily employee activities at City Hall). If we view the information contained on the City's website as public information of which we can take judicial notice for the first time on appeal, when considered in a light favorable to Risoli, that information does not support the City's assertions that it was the City Administrator's job to prepare a "Board decision" following the meeting or to file such a decision in the Board's office or other public records.