

# **Commonwealth of Kentucky**

## **Court of Appeals**

NO. 2002-CA-001806-MR

ALCORP, INC.

APPELLANT

APPEAL FROM THE FRANKLIN CIRCUIT COURT  
HON. WILLIAM L. GRAHAM, JUDGE  
CIVIL ACTION NO. 01-CI-01190

TERESA A. BARTON; JILL E. ROBINSON,  
MAGISTRATE IN FRANKLIN COUNTY; PHILIP  
W. KRING, MAGISTRATE IN FRANKLIN COUNTY;  
HOWARD R. DAWSON, MAGISTRATE IN FRANKLIN  
COUNTY; IRA W. FANNIN, MAGISTRATE IN  
FRANKLIN COUNTY; HUSTON WELLS, MAGISTRATE  
IN FRANKLIN COUNTY; J.W. LUTTRELL,  
MAGISTRATE IN FRANKLIN COUNTY; JAMES E.  
BOYD, COUNTY ATTORNEY IN FRANKLIN COUNTY;  
AND FRANKLIN COUNTY FISCAL COURT

APPELLEES

### OPINION AFFIRMING

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BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: Alcorp, Inc. (Alcorp) appeals from the dismissal of its statutory administrative appeal and petition for declaratory judgment by the Franklin Circuit Court. Alcorp filed both the administrative appeal and the petition for declaratory judgment after the Franklin County Fiscal Court

(Fiscal Court) voted down a motion to adopt a zone map amendment sought by Alcorp. Alcorp claims that the circuit court erred in dismissing its administrative appeal because Alcorp failed to name the Fiscal Court as a party pursuant to Kentucky Revised Statutes (KRS) 100.347(3). Alcorp also claims that the circuit court erroneously dismissed its petition for declaratory judgment on the basis that a judgment on the merits would amount to an advisory opinion. After reviewing the record and the arguments of the parties, we conclude that the circuit court properly dismissed all of Alcorp's claims. We therefore affirm.

In March 2001, Alcorp filed an application with the Frankfort-Franklin County Planning Commission (Planning Commission) seeking a zoning classification change. On April 16, 2001, the Planning Commission voted to recommend approval of the proposed amendment to the Fiscal Court. The Fiscal Court then considered the proposed amendment, and on May 17, 2001, approved on first reading Ordinance No. 9, 2001 Series. However, on June 1, 2001, at the second reading, the Fiscal Court voted 4-3 not to adopt the proposed ordinance. The Fiscal Court next considered a second ordinance to deny the zone change request, Ordinance No. 17, 2001 Series. First reading was given to this second ordinance on July 19, 2001. The second reading, at which time the Fiscal Court voted to deny the zoning amendment, was held on August 9, 2001.

On September 5, 2001, Alcorp filed an administrative appeal pursuant to KRS 100.347 and a petition for declaration of rights in Franklin Circuit Court. Alcorp did not name the Fiscal Court as a party in the caption of its filing. Alcorp did, however, name as a party each member of the Fiscal Court individually in the members' official capacity, affected service of process on each member, and identified the Fiscal Court as a defendant in several paragraphs of the appeal.

Because Alcorp failed to properly name the Fiscal Court as a party pursuant to KRS 100.347(3), on September 11, 2001, the Appellees filed a motion to dismiss for failure to perfect the appeal within the thirty-day period required under the statute. In response, Alcorp attempted on October 1, 2001, to amend its pleading pursuant to Rules of Civil Procedure (CR) 15.01 to include the Fiscal Court as a party. The circuit court ultimately rejected this amendment on the basis that the Rules of Civil Procedure do not apply in this situation until the appeal is perfected.

The circuit court granted the Appellees' motion to dismiss the administrative appeal on January 3, 2002, holding that strict compliance with KRS 100.347(3) is required. However, this order specifically retained the petition for declaration of rights included in the original complaint. Following additional argument concerning the declaratory

judgment portion of the complaint, the petition for declaratory judgment was dismissed on May 2, 2002. Because the Fiscal Court was not a party to the lawsuit, the circuit court held that issuing a declaratory judgment on the proposed zone change would constitute an advisory opinion. Alcorp next moved to alter, amend, or vacate the judgment. On July 30, 2002, the circuit court denied Alcorp's motion. This appeal followed.

Alcorp first argues that the circuit court erred in dismissing its administrative appeal. It claims that the circuit court did have jurisdiction over the Fiscal Court pursuant to KRS 100.347. Because Alcorp's administrative appeal was not perfected within thirty days of the final action of the Planning Commission as required by KRS 100.347(3), we disagree.

Appeal to the courts from actions of administrative agencies is not as a matter of right. Further, "[w]hen grace to appeal is granted by statute, a strict compliance with its terms is required." Board of Adjustments of City of Richmond v. Flood, Ky., 581 S.W.2d 1, 2 (1978)(See also Taylor v. Duke, Ky. App., 896 S.W.2d 618 (1995); Kentucky Unemployment Ins. Com'n v. Providian Agency Group, Inc., Ky. App. 981 S.W.2d 138 (1998)). An appeal pursuant to KRS 100.347 thus requires strict compliance with the terms of that statute.

KRS 100.347(3) provides as follows:

Any person or entity claiming to be *injured or aggrieved* by any final action of the legislative body of any city, county, consolidated local government or urban-county government, relating to a map amendment *shall* appeal from the action to the Circuit Court of the county in which the property, which is the subject of the map amendment, lies. Such appeal *shall* be taken within thirty (30) days after the final action of the legislative body. *All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. The legislative body shall be a party in any such appeal filed in the Circuit Court.* (emphasis added).

This statute unambiguously provides that Alcorp had to name the Fiscal Court as a party when appealing the denial of its proposed zone change amendment. Flood clearly establishes this principle and addresses all of the issues raised by Alcorp concerning its administrative appeal.

We disagree with Alcorp's contention that Flood is distinguishable from the present case. To the contrary, Flood is squarely on point. In this case, as in Flood, the legislative body whose decision was being challenged was not named as a party to the circuit court appeal as required under KRS 100.347. In Flood, the Supreme Court held that the circuit court did not have jurisdiction to hear the appeal. Flood thus makes clear that under KRS 100.347, the grace of appeal to the circuit court mandatorily requires the appellant to perfect that appeal by filing it in the circuit court, including the

legislative body as a party, within thirty days. Flood, 581 S.W.2d at 2.

In the present case, the Fiscal Court approved on August 9, 2001, an ordinance denying the zone change request. KRS 100.347(5) defines final action as follows: "For purposes of this chapter, final action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body." Even assuming August 9, 2001, as the date of final action, which allows Alcorp the latest date possible to perfect its appeal, the requirements of KRS 100.347 are not met. Alcorp filed its appeal and petition for declaration of rights on September 5, 2001, without properly naming the Fiscal Court as a party. On September 8, 2001, the thirty-day limitations period expired and the Fiscal Court still had not been named as a party. Thus, Alcorp's failure to name the Fiscal Court as a party within the thirty-day limitations period was fatal to its appeal because one of the conditions precedent to the exercise of judicial power by the circuit court was not met and it was required to dismiss the appeal for want of jurisdiction.

Alcorp's argument that the circuit court did have jurisdiction of its statutory appeal and that Flood is distinguishable is unpersuasive. Alcorp contends that because the Fiscal Court was included as a defendant in the body of the

complaint and because each member of the Fiscal Court was served individually, that the requirement to include the legislative body as a party under KRS 100.347 was satisfied by virtue of notice pleading principles. However, as discussed above, an appeal under KRS 100.347, or any administrative appeal, requires strict compliance with the terms of the statute permitting the administrative appeal. Flood, supra. Merely providing implied notice of the appeal is not sufficient to constitute an attempt to include the Fiscal Court as a party. CR 10.01 states, concerning the form of pleading in general, that “[i]n the complaint the style of the action *shall* include the names of *all* the parties[.]” (emphasis added). If a party is not included, the complaint does not comply with CR 10.01 and dismissal of the action is required if the opposing party timely objects. McCoy v. Western Baptist Hospital, Ky. App., 628 S.W.2d 634, 636 (1981). These principles, together with Flood, persuade us that the circuit court properly dismissed Alcorp’s appeal.

Alcorp’s next two arguments are so related that they will be addressed together. In these arguments, Alcorp contends that the circuit court erroneously dismissed its petition for declaratory judgment because the Fiscal Court was properly made a party to that claim. We disagree with this contention and affirm the circuit court’s dismissal of Alcorp’s petition for declaratory judgment.

Alcorp's petition for declaratory judgment sought to have the Fiscal Court's actions pertaining to the proposed amendment subsequent to July 16, 2001 declared void. Alcorp argues this is required under KRS 100.211(1), which prescribes that unless a majority of the Fiscal Court "votes to override the planning commission's recommendation" or "the zoning map amendment shall be deemed to have passed by operation of law."

However, the portions of Alcorp's complaint pertaining to its petition for a declaration of rights merely allege grounds for an appeal under KRS 100.347(3). Alcorp could have raised all of the issues included in its original and amended actions styled "Appeal and Complaint for Declaration of Rights" in an appeal under KRS 100.347(3). Alcorp is thus attempting, in effect, to raise issues via a petition for declaratory judgment that were appealable under KRS 100.347.

As previously noted, appeal must be taken and the legislative body must be named as a party within thirty days of the final action of the legislative body whose decision is being appealed from under KRS 100.347(3). That did not occur here. As a result, albeit on different grounds, we affirm the circuit court's dismissal of Alcorp's petition for declaration of rights.

Alcorp relies on Greater Cincinnati Marine Service, Inc. v. City of Ludlow, Ky., 602 S.W.2d 427 (1980) for the

proposition that in an action containing a statutory appeal from an administrative agency and a petition for declaratory judgment, a defective statutory appeal may be dismissed and the declaratory judgment allowed to stand alone. Alcorp misinterprets Greater Cincinnati Marine as it applies to the case at bar, however. Greater Cincinnati Marine does not save Alcorp's petition for declaratory judgment from dismissal.

Greater Cincinnati Marine involved a statutory appeal from a decision of the Board of Adjustments under KRS 100.347 and a petition for declaratory judgment. The appeal was dismissed for failure to comply with KRS 100.347. The petition for a declaratory judgment was retained, however, and was held to not be subject to the requirements of KRS 100.347. The Supreme Court in Greater Cincinnati Marine makes it clear that they only reach this result because the appellant's filing, "judged by its content, is far more than an appeal under the aegis of KRS 100.347(2)." Id at 429. To this end, the Court stated, "It is clear that if the complaint filed by Marine is *simply an appeal* from the decision of the Board of Adjustments, the failure to join the planning commission is *fatal*." Id at 428. (emphasis added).

Alcorp's original and amended "Appeal and Complaint for Declaration of Rights" are not "far more than an appeal under . . . KRS 100.347(2)." Id at 429. Alcorp's argument that

it was aggrieved by actions of the Fiscal Court occurring after its amendment took effect by operation of law falls within the purview of KRS 100.347. KRS 100.347(3) states, "Any person or entity claiming to be injured or aggrieved by any final action of the legislative body . . . shall appeal from the action to the Circuit Court[.]" Alcorp claims to have been aggrieved by a final action of the Fiscal Court occurring after July 16, 2001. If the same allegations with respect to the jurisdiction of the Fiscal Court over Alcorp's proposed amendment were raised in a statutory appeal, their propriety would be undoubted.

Alcorp thus finds itself in a situation where its petition for a declaratory judgment, judged by its contents, is merely an appeal. As a result, Greater Cincinnati Marine does not apply in the manner Alcorp urges, and strict adherence with KRS 100.347 is required. Given this context, we must again recognize that, "[s]ince 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." Taylor v. Duke, Ky. App., 896 S.W.2d 618, 621 (1995). (See Frisby v. Board of Education of Boyle County, Ky. App., 707 S.W.2d 359 (1986); Flood, supra.) Dismissal of Alcorp's alleged petition for declaratory judgment by the circuit court was thus proper.

The final argument raised by Alcorp is that the misnomer rule discussed in Jones v. Baptist Healthcare System, Inc., Ky. App., 964 S.W.2d 805 (1997), applies in the case at bar. Alcorp argues that this rule requires its declaratory judgment action not be dismissed. We disagree, and therefore affirm the circuit court's order on this issue.

Because, as previously noted, all of Alcorp's arguments on appeal are barred since the requirements of KRS 100.347 are not satisfied, the misnomer rule does not apply in this case. The misnomer rule is concerned with mitigating potential harshness of CR 15.03 on the relation back of amendments. Alcorp's attempted amendment is not of concern in this appeal because it clearly falls outside the thirty-day limitation required by KRS 100.347(3). The misnomer rule thus does not apply in this situation and strict application of the statute in an appeal by grace requires this result.

In summary, appeal of a Fiscal Court's decision under KRS 100.347(3) requires strict compliance with that statute. Alcorp failed to comply with its requirements, thus requiring dismissal of its statutory appeal. Alcorp's declaratory judgment action also required dismissal because it was merely an appeal when judged on its terms and did not comply with KRS 100.347.

For the foregoing reasons the order of the Franklin Circuit Court dismissing Appellant Alcorp's statutory appeal and declaratory judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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