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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000957-MR

BEAR CREEK CAPITAL, LLC, AND BUTTERMILK TOWNE CENTER, LLC — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 04-CI-00630

TOEBBEN, LTD., MATTHIAS TOEBBEN, JOHN C. SHERMAN, AND BARBARA SHERMAN — APPELLEES

AND:

NO. 2005-CA-001010-MR
AND
NO. 2005-CA-001132-MR

KENTUCKY PRIVATE ACTIVITY BOND ALLOCATION COMMITTEE — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 04-CI-00630

TOEBBEN,LTD., MATTHIAS TOEBBEN, JOHN C. SHERMAN, AND BARBARA SHERMAN, PLAINTIFFS, AND KENTUCKY ECONOMIC DEVELOPMENT FINANCE AUTHORITY, COMMONWEALTH OF KENTUCKY, CITY OF CRESCENT SPRINGS, KENTUCKY; CLAIRE MORICONI, NICK BERRY; MIKE DAUGHERTY; JIM COLLETT; DALE RAMSEY; SCOTT SANTANGELO; TOM VERGAMINI, BEAR CREEK CAPITAL, LLC; COUNTY OF KENTON, KENTUCKY; KENTON COUNTY BOARD OF EDUCATION; KENTUCKY COUNTY PUBLIC LIBRARY BOARD; NORTHERN KENTUCKY AREA PLANNING COMMISSION; NORTHERN KENTUCKY INDEPENDENT DISTRICT HEALTH DEPARTMENT; KENTON COUNTY COOPERATIVE EXTENSION SERVICE; LASALLE BANK NATIONAL ASSOCIATION; AND BUTTERMILK TOWNE CENTER, LLC — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: ABRAMSON AND STUMBO, JUDGES; KNOPF,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: Bear Creek Capital, LLC (Bear Creek), a real estate developer and property manager, and the Kentucky Private Activity Bond Allocation Committee (KPABAC or the Bond Allocation Committee), a state agency responsible for approving certain industrial revenue bonds, appeal from a March 31, 2005 summary judgment of the Franklin Circuit Court vacating the Bond Allocation Committee's approval of bonds proposed by Crescent Springs (the City), a fourth class city in Kenton County, to finance a Bear Creek development in the City. Bear Creek and KPABAC contend that the circuit court exceeded the proper scope of review by disturbing a final administrative

[1] Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

determination and by substituting its judgment for that of the Bond Allocation Committee. Although we agree that the circuit court's proffered reasons do not justify setting aside the Bond Allocation Committee's decision, we are compelled to note a mandatory basis for such action: namely, the City's failure to give the statutorily required notice of the public hearing on its bond proposal. That failure prevented the Bond Allocation Committee's jurisdiction from attaching and renders its approval of the City's proposal void. Accordingly, we affirm on different grounds the circuit court's invalidation of KPABAC's approval, but reverse the circuit court's order of remand.

The pertinent facts are not in dispute, and the parties thus agree that disposition by summary judgment is appropriate. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky. 1991). This matter begins with Kentucky Revised Statute (KRS) 103.210, which authorizes "any city or county" in Kentucky to "borrow money and issue negotiable bonds for the purpose of defraying the cost of acquiring any industrial building." Pursuant to this statute, in October 2003 the City passed Resolution No. 2003-3, whereby it proposed to issue as much as $56,000,000.00 in industrial revenue bonds for the construction of a shopping center-restaurant-office complex, to be known as Buttermilk Towne Center. The project would occupy an approximately fifty acre tract located generally within an area of the City bounded by Beechwood Road, Anderson Road, the railroad right-of-way, and the Buttermilk Pike. The City contracted with Bear Creek to build the complex, which the City would then own and lease to Bear Creek to manage. Bear Creek's lease payments were projected to be sufficient to meet the City's bond obligations, which would be secured only by those payments and the subject realty. As required by KRS 103.2101, the City applied to the Bond Allocation

Committee for approval of its proposed bonds, and on November 17, 2003 the Committee held a public hearing to consider the proposal. Bear Creek was the only participant at the hearing. Following Bear Creek's presentation in support of the proposed bonds, the Bond Allocation Committee voted to approve.

Several months later, in May 2004, opponents of this project, Toebben, Ltd.; Matthias Toebben; and John and Barbara Sherman (Toebben or the Opponents), brought suit seeking a declaration that the City's proposed bond issue was invalid because, among other alleged reasons, KPABAC's approval did not comport with statutory limitations on such revenue bonds. The Opponents also complained that because the City's ownership would remove the property from the *ad valorem* tax rolls, and because the City's agreement with Bear Creek did not include a payment-in-lieu-of-taxes (PILOT) provision to replace lost county tax revenues, the project was essentially being financed by the many county taxing districts, such as the school board and the public library, which would lose tax revenues from the property for the twenty-five year life of the bonds. To preserve this issue, the Opponents named as nominal defendants several of the affected county taxing districts including the Kenton County Public Library Board and the Kenton County Board of Education.

On August 9, 2004, while the matter was still pending before the circuit court, the City passed Resolution 2004-11, which purported to authorize the issuance of project bonds for the Buttermilk Towne Center Project. On August 31, 2004, bonds were issued, and the subject realty was transferred to the City.

The matter continued in the circuit court, however, and as noted above, the court ultimately agreed with Toebben that the Bond Allocation Committee had not given

this bond proposal the statutorily required degree of scrutiny and so vacated the Committee's approval of the bonds and remanded the matter to the Committee to review the City's proposal anew. In its March 31, 2005 summary judgment, the circuit court expressed concern about the scant evidence upon which the Bond Allocation Committee had apparently relied and in particular about the lack of evidence that the Committee had considered the project's impact on the county taxing districts. On appeal, Bear Creek and KPABAC contend that the circuit court improperly overturned a final administrative decision.

We reject, initially, Bear Creek and KPABAC's characterization of the Bond Allocation Committee's decisions as quasi-legislative and thus subject, at most, to rational basis review. The Committee's bond approval decisions are legislative in the same sense that zoning amendment decisions were deemed legislative in *American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission,* 379 S.W.2d 450 (Ky. 1964): *i.e.,* they are administrative decisions for which the courts may not substitute their independent judgment by subjecting the agency's decision to *de novo* review. The Bond Allocation Committee's decisions are nevertheless adjudicative as that term is discussed in *City of Louisville v. McDonald,* 470 S.W.2d 173 (Ky. 1971), and so are subject to judicial standards of due process. As the *McDonald* court explained,

> when the local legislative body [here the agency] is used as a vehicle not to make generally applicable law, rules or policy, but to decide whether a particular individual as a result of a factual situation peculiar to his situation is or is not entitled to some form of relief, then the so-called legislative body must act in accordance with the basic requirements of due process as are applicable generally.

Id. at 178. Here, clearly, the Bond Allocation Committee is not engaged in general rule or policy making, but is concerned, rather, with the application of the state's development policies (as expressed, for example, in the opening phrases of KRS 103.210 and in KRS 103.2101(1)(a-e)) to a particular bond issuer and a particular developer's request for relief—bond approval—in light of a particular factual situation. Under *McDonald,* this is adjudication, not legislation, and thus the Bond Allocation Committee's decisions are subject to the administrative rules, particularly those in KRS Chapter 13B, governing such adjudications.

That said, however, we agree with Bear Creek and KPABAC that the Committee's decisions are not subject to review or attack except within established standards regarding the preservation of error, exhaustion of administrative remedies, and finality of decisions. *See e.g., Rapier v. Philpot,* 130 S.W.3d 560 (Ky. 2004) (discussing the preservation and exhaustion requirements); *Baptist Hospital, Inc. v. Humana of Kentucky, Inc.,* 672 S.W.2d 669 (Ky.App. 1984) (disallowing a direct appeal from a final administrative adjudication where the would-be appellant had failed to participate in the administrative proceedings). In particular, absent some reopening provision such as CR 60.02 or KRS 342.125 (applicable in Workers' Compensation proceedings), our highest court has held that, like judgments of a court, a final administrative decision made by an agency acting in an adjudicative capacity is open to collateral attack only "on the ground that the decision is invalid and void for lack of jurisdiction over the person or over the subject matter, or because the determination attacked was not the act of the body vested with power to make the determination." *Department of Conservation v. Sowders,* 244 S.W.2d 464, 467-68 (Ky. 1951) (citation and internal quotation marks omitted); *see also*

Skinner v. Morrow, 318 S.W.2d 419 (Ky. 1958) (discussing the limitations on collateral attack with respect to judgments).

In this case, Toebben did not appear at the Bond Allocation Committee's November 17, 2003 hearing on the City's application and did not appeal from the Committee's decision to grant the application entered in the minutes of that meeting. We note that KRS Chapter 103, the chapter creating the Bond Allocation Committee, does not provide either for administrative review or for an appeal from Committee rulings. The general administrative appeal statute, KRS 13B.140, governs, therefore, and that statute imposes a thirty day limitations period for appeals to a court from final administrative rulings. It is not clear from this record precisely when the Committee's decision should be deemed final, but Toebben does not dispute that finality attached more than thirty days before its May 2004 complaint. In any event, the complaint is not an appeal of the KPABAC decision, but instead challenges the validity of the City's bond resolution primarily by collaterally attacking the Bond Allocation Committee's ruling. As noted, that collateral attack should have been limited to a determination of whether the Committee had jurisdiction and whether its jurisdiction had been properly invoked. We agree with Bear Creek and KPABAC that the trial court erred by instead applying the standard of review applicable to a direct appeal, *i.e.* "was the administrative decision arbitrary?" *American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission,* 379 S.W.2d at 457.

The error does not require reversal, however, because even under the more limited review available upon collateral attack, the Bond Allocation Committee's ruling is void due to a lack of jurisdiction. Specifically, defective notice of the Committee's

November 17, 2003 public hearing renders void any action taken at that hearing. This conclusion is the inevitable result of a plain reading of the applicable statutes and case law.

As the parties note, KRS 103.2101 provides that "[t]he agency or unit of government proposing the issuance of the bonds shall, not less than thirty (30) days before the date of the [KPABAC] hearing, publish notice of the hearing *in the manner required by KRS Chapter 424*" (emphasis supplied). KRS 424.140 provides in part that "[a]ny advertisement of a hearing, meeting or examination shall state the time, place and purpose of the same." In an attempt to comply with this requirement, on October 17, 2003, thirty days before the scheduled hearing, the City published in *The Kentucky Post* a classified advertisement giving the time and place of the Committee hearing and a brief description of the hearing's purpose.[2] We agree with Toebben that by referring merely to "50 acres of variable use land," and thus failing to identify specifically the proposed development property, the advertisement did not give adequate notice of the hearing's purpose.

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[2] The entire notice read as follows: "Notice is hereby given that a public hearing will be held by the Kentucky Private Activity Bond Allocation Committee on Monday, November 17, 2003, at 2:30 p.m., in the Committee's meeting room, Room 386, Capitol Annex, Frankfort, Kentucky 40601. This hearing is for the purpose of considering the approval of the issuance of not to exceed $56,000,000 Industrial Building Revenue Bonds (Bear Creek Capital, LLC Project), Series 2003 (the "Bonds") of the City of Crescent Springs, Kentucky (the "City"). If the bonds are approved, the proceeds will be used to finance a portion of the costs of the acquisition, construction and equipping of industrial building facilities for the revitalization or redevelopment of the City's downtown business district by addition of a new retail shopping center. Said shopping center shall consist of several new commercial office, retail and outlet buildings, with a total square footage of approximately 437,000. The buildings will be built on 50 acres of variable use land, including residential, and will be owned by the City and leased to and operated by Bear Creek Capital, LLC, a Kentucky limited liability company. THE BONDS SHALL NOT CONSTITUTE A DEBT OR PLEDGE OF THE FAITH AND CREDIT OF THE TAXING POWER OF THE CITY. Interested persons are invited to attend this public hearing and will be given an opportunity to express their views concerning the proposed project. This notice is given pursuant to Section 103.2101 of the Kentucky Revised Statutes."

More importantly, KRS 424.130 provides that

> (1) . . . *[N]otwithstanding any provision of existing law providing for different times or periods of publication, the times and periods of publications of advertisements required by law to be made in a newspaper shall be as follows*:
> * * * *
> (d) Any advertisement . . . for the purpose of informing the public . . . of a public hearing . . . shall be published at least once but may be published two (2) or more times, provided that one (1) publication occurs not less than seven (7) days nor more than twenty-one (21) days before the [hearing].

(Emphasis supplied.) The combined effect of this statute and KRS 103.2101 is a requirement of at least two notices of the Bond Allocation Committee's public hearing, one not less than thirty days and another between seven and twenty-one days prior to the hearing. This double notice requirement makes sense given, on the one hand, the public importance of the Committee's decisions, and on the other, the limited effectiveness of newspaper notices. *Cf.* Amy F. Cerciello, "The Use of PILOT Financing to Develop Manhattan's Far West Side," 32 *Fordham Urb. L. J.* 795, 814 (2005) (discussing the limited taxpayer protection provided by newspaper-noticed hearings). In any event, there is no dispute that the City failed to issue the second notice, and our Supreme Court has held that a failure to comply with the notice requirements of KRS 424.130 amounts to "a jurisdictional defect, which renders all subsequent proceedings under such notice void." *City of Okolona v. Lindsey,* 706 S.W.2d 835, 836 (Ky. 1986) (citation and internal quotation marks omitted). Thus, because the Bond Allocation Committee's jurisdiction was not properly invoked, its approval of the City's bond proposal is subject to collateral attack and is void on that ground. Moreover, this jurisdictional defect may appropriately be addressed by this Court *sua sponte. Privett v. Clendenin,* 52 S.W.3d 530 (Ky. 2001); *Priestly v. Priestly,* 949 S.W.2d 594 (Ky. 1997).

Bear Creek contests this reading of KRS 424.130 and contends that subsection (1)(e) rather than subsection (1)(d) is the provision of that statute that applies to notice of KPABAC hearings. We disagree. As noted, KRS 424.130(1)(d) applies expressly to notice of "public hearings." Subsection (1)(e) applies to notice of acts or events where

> the day upon or by which, or the period within which, an act may or shall be done or a right exercised, or an event may or shall take place, is to be determined by computing time *from* the day of publication of an advertisement.

(emphasis supplied[3]). The day of the KPABAC hearing is not determined by computing time from the day of notice, and thus this subsection does not apply. The hearing, rather, is scheduled by the Committee prior to notice, and notice is to be provided accordingly. Because it is notice of a public hearing, it must conform to the requirements of KRS 424.130(1)(d), which the notice in this case did not do. Thus, although we depart from its reasoning, we agree with the circuit court that KPABAC's approval of the City's bond proposal cannot stand.

The circuit court erred, however, by remanding the matter to the Committee. Under *City of Okolona v. Lindsey,* the City's application to KPABAC must be deemed invalid from its inception. 706 S.W.2d at 836-37. Remand to the Committee is not proper, therefore, because there is no Committee proceeding that could be continued on remand. Remand to the Committee is also precluded by our determination

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[3] As enacted in 1960, this provision of the statute reads "from the day of publication." This phrase has not subsequently been amended, but in 1988, when the phrase was reprinted in conjunction with the amendment of another subsection, the word "for" was substituted for the word "from," rendering the phrase "for the day of publication." This scrivener's error has been retained in subsequent reprintings. We have quoted the statute as it was enacted.

that the Committee's decision was not directly, but only collaterally before the circuit court on its review.[4]

Bear Creek seeks to defend the *status quo* by noting that KRS 58.190 provides that actions challenging the validity of ordinances or resolutions authorizing bonds must be brought within thirty days of "the date on which notice of the adoption of said ordinance or resolution is published in accordance with KRS Chapter 424," or "shall be forever barred." As noted above, the City proposed these bonds by resolution in October 2003, and Toebben filed its action challenging the proposal in May 2004, before any bonds had been authorized, on the ground, among others, that the proposed bonds were "to finance a project that does not comply with the requirements . . . set forth in KRS Chapter 103." Also as noted, notwithstanding Toebben's challenge, in August 2004 the City passed Resolution 2004-11, which purports to authorize the issuance of the project bonds. Notice of this resolution was published in *The Kentucky Post* on August 10, 2004. On September 27, 2004, more than thirty days later, Toebben moved to amend its complaint to reflect and challenge that subsequent action by the City. Bear Creek contends that Toebben's action is now barred under KRS 58.190, because its Motion to Amend fell outside the statute's thirty-day period of repose. We disagree.

As the circuit court found, Toebben's original complaint, filed months before any possible KRS 58.190 deadline, adequately preserved its action. By the time Toebben filed its complaint, in May 2004, the City had already issued its resolution proposing this project and the bonds to fund it, had contracted with Bear Creek to develop the project, and had apparently acquired KPABAC approval to move forward.

[4] Because there is to be no remand, we need not address whether, to effectuate a remand, the Committee could be ordered to provide Toebben with individual notice of the City's hearing. Toebben is not otherwise entitled to preferential notice pursuant to KRS 103.2101.

The project and the bond proposal had become specific and imminent enough to create a case and controversy cognizable in a declaratory judgment action. Toebben was not obliged to wait, therefore, for the City's resolution authorizing the bonds before bringing its challenge, and the City's authorization of the bonds in the face of Toebben's challenge did not somehow negate the action already pending and require Toebben to plead anew. Bear Creek raises the specter of a disrupted bond market if Toebben's "untimely" challenge is allowed to go forward, but to the extent that anyone has affected bondholder expectations in this case, it was the City by proceeding with its bond resolution in the face of Toebben's suit. The trial court did not err by ruling that the suit was timely under KRS 58.190.

Finally, Toebben contends by way of cross-appeal that the City's bond proposal runs afoul of Kentucky Constitution § 184, which provides in part that "any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose." Toebben maintains that by removing the development property from the *ad valorem* tax rolls, the City has in effect diverted school board taxes to a non-educational purpose. Because we are invalidating the bonds for other reasons, we decline to address this issue, which has not been thoroughly briefed either before the circuit court or this Court and on which the circuit court did not rule.

In sum, the City's attempt to invoke the jurisdiction of KPABAC to approve its revenue bond proposal failed because the City failed to publish notice of the public hearing as required by statute. The Bond Allocation Committee's approval is void, therefore, as is the City's subsequent bond resolution that relies on that approval.

Accordingly, we affirm that portion of the March 31, 2005 order of the Franklin Circuit Court that invalidates KPABAC's ruling, but reverse that portion that would remand the matter to KPABAC for additional proceedings.

ALL CONCUR.

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