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SUPREME COURT GRANTED DISCRETIONARY REVIEW: MAY 13, 2009
(FILE NO. 2008-SC-0599-DG)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000233-DG

HIGHVIEW MANOR ASSOCIATION, LLC;
TIM WEDDINGTON, D/B/A PRESTON STREET
GROUP, LLC; LORENA HENNINGER, D/B/A NEW
SILVER HEIGHTS BINGO; S. RANDOLPH
SCHEEN III; AND J.C. YEAGER — APPELLANTS

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE W. DOUGLAS KEMPER, JUDGE
ACTION NO. 06-XX-000021

LOUISVILLE METRO HEALTH DEPARTMENT — APPELLEE

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: We accepted discretionary review in this matter to determine the scope of a district court's authority to review a decision of a local code

enforcement pursuant to KRS 65.8831. The underlying matter involves citations and fines imposed against bingo hall owners by the Louisville-Jefferson County Metro Government's Code Enforcement Board for violations of the Smoke Free Law, Louisville Metro Ordinance No. 123-2005. Because we disagree with the Jefferson Circuit Court's ruling as to what the Jefferson District Court's scope of review encompasses, we must reverse in part, vacate in part, and remand.

In late 2005, the Louisville Metro Health Department investigated complaints related to smoking at several bingo establishments, including Highview Manor Association, LLC; Okolona Enterprises, Inc. (New Silver Heights Bingo); Preston Street Group, LLC; Stephen Drive LLC; and Jay's Place, Inc. (collectively, "the facilities"). As a result of the investigations, which uncovered people smoking, ashtrays on tables, and a lack of no-smoking signage, the facilities were issued citations. The owners of the facilities sought hearings before the Louisville/Jefferson County Metro Code Enforcement Board of Appeals. Following hearings in January 2006, the Code Enforcement Board upheld the issuance of the citations and imposed a $50 fine per facility. Each facility filed a complaint in Jefferson District Court seeking review of the citation and penalty imposed, arguing that they were exempt from application of the Smoke Free Law. The five complaints were eventually consolidated due to their common questions of law and fact. The facilities argued that they were exempt from application of the Smoke Free Law, as they leased their premises to charitable organizations that conducted bingo games as authorized by KRS 238.500, *et seq*., and thus were

private organizations. Furthermore, the facilities asserted that the decisions were subject to *de novo* review in the district court. In response, the Health Department argued that the private organization exception did not apply, as there was no evidence that the facilities were not open to the general public, and that the district court was limited to a review of the record created before the code enforcement board.

The district court entered its Findings and Order on April 26, 2006. In the order, the district court found that a conflict existed in the statutes regarding its jurisdiction: KRS 24A.010 provides that it does not have appellate jurisdiction, while KRS 65.8831 provides that in an appeal of a decision of the code enforcement board, the district court is limited to a review of the record the board created. The district court determined that it had original jurisdiction of the matter. The district court further determined that the facilities were exempt from enforcement of the Smoke Free Law and that the charitable organizations that rented the bingo halls were exempt.

The health department sought review of the district court's order in the Jefferson Circuit Court. In its statement of appeal, the health department asserted that the district court misconstrued the scope and nature of its review of the code enforcement board's orders, and then ignored evidence of the board's proceedings in the record when it concluded that the facilities were exempt from the Smoke Free Law due to the private organization exemption. The facilities responded to the health department's arguments in their counterstatement of appeal. On

December 26, 2006, the circuit court issued its Opinion and Order reversing the district court's ruling in part and remanding. The circuit court determined that the district court was limited in its review to the record created by the code enforcement board and a determination as to whether its decision was supported by substantial evidence. In addition, the circuit court held that the district court exceeded its authority when it made a finding as to the general applicability of the Smoke Free Law. On remand, the district court was directed to review the code enforcement board's rulings for arbitrariness. The facilities moved this Court for discretionary review, citing the need to resolve the confusion created by the conflicting statutes and their effects on judicial standards of review. We accepted review of this matter.

In their brief, the facilities first attack the constitutionality of the subsection of the code enforcement ordinance allowing for appeals to the Jefferson District Court, as the district court has no appellate jurisdiction. Next, the facilities argue the circuit court improperly held that the district court's review was limited to a determination as to whether the code enforcement board's decision was based upon substantial evidence of record, rather than a *de novo* review, and that the district court did not have the authority to make findings as to the general applicability of the law.

Initially, we hold that the facilities' claim that a portion of the ordinance is unconstitutional is not properly before this Court, as this issue was not properly preserved. The facilities did not raise the issue of the constitutionality of

the subsection of the ordinance providing for an appeal to the district court until they filed their brief in this Court. This issue was not raised before the district court, the circuit court, or even in the facilities' motion for discretionary review. An appellant is not permitted or entitled to raise issues for the first time on appeal. *Chambers v. City of Newport*, 101 S.W.3d 904, 906 (Ky. App. 2002).

Additionally,

there is nothing in the lower court's record or in the appellate record to establish that the facilities notified the Attorney General that they were contesting the constitutionality of this ordinance. *See* KRS 418.075; *Maney v. Mary Chiles Hospital*, 785 S.W.2d 480 (Ky. 1990). While we recognize that KRS 418.075 specifically references actions in which the constitutional validity of a *statute* is involved, we believe the implication of the application of the ordinance before us presents an analogous situation.

We shall now turn to the merits of this appeal, looking first to the applicable statutes and ordinances underlying this case, starting with the Kentucky Constitution. The district court was established in § 113 of the Kentucky Constitution, which provides in pertinent part that "[t]he district court shall be a court of limited jurisdiction and shall exercise original jurisdiction as may be provided by the General Assembly." Ky. Const. § 113(6). Following the dictates of this section, the General Assembly enacted KRS 24A.010, detailing the jurisdiction of the district court:

(1) The District Court is a court of limited jurisdiction; it has original jurisdiction in all matters specified in KRS 24A.110 to 24A.130.

(2) The District Court may be authorized by law to adjudicate the actions or decisions of local administrative agencies, special districts, or boards. Such adjudication shall not constitute an appeal but an original action.

(3) The District Court has no appellate jurisdiction.

(4) The District Court is a court of record.

(5) The District Court is a court of continuous session. Sessions of the District Court may be scheduled at times, including nights, weekends, and holidays, and at such locations, as may be convenient, subject to the direction of the Supreme Court by rule or order.

In KRS Chapter 65, the General Assembly authorized the creation of code enforcement boards. These administrative boards, which are created by the legislative body of a local government (KRS 65.8808), have "the authority to issue remedial orders and impose civil fines in order to provide an equitable, expeditious, effective, and inexpensive method of ensuring compliance with the ordinances in force in local governments." KRS 65.8801. Such boards have the power to adopt rules and regulations; conduct hearings to determine when a local government ordinance has been violated, for which violators, witnesses, and evidence may be subpoenaed; take testimony; make findings and issue orders; and impose civil fines. KRS 65.8821. The General Assembly also provided for appeals from final orders of a code enforcement board in KRS 65.8831:

> (1) An appeal from any final order issued by a code enforcement board may be made to the District Court of the county in which the local government is located within thirty (30) days of the date the order is issued. The appeal shall be initiated by the filing of a complaint and a copy of the board's order in the same manner as any civil action under the Rules of Civil Procedure. The appeal shall be limited to a review of the record created before the code enforcement board.
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> (2) A judgment of the District Court may be appealed to the Circuit Court in accordance with the Rules of Civil Procedure.
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> (3) If no appeal from a final order of a code enforcement board is filed within the time period set forth in this section, the code enforcement board's order shall be deemed final for all purposes.

Pursuant to KRS Chapter 65, the Louisville Metro Government created its own Code Enforcement Board. Louisville Metro Code of Ordinances (LMCO) § 32.275, *et seq*. Specifically related to this case, the metro government provided for appeals in LMCO § 32.286, which essentially mimics KRS 65.8831(1):

> (A) An appeal from any final order of the Code Enforcement Board may be made to the Jefferson County District Court within 30 days of the date the order is issued. The appeal shall be initiated by the filing of a complaint and a copy of the Code Enforcement Board's order in the same manner as any civil action under the Kentucky Rules of Civil Procedure.

In 2005, the Louisville Metro Government enacted the Smoke Free Law, Ordinance No. 123-2005. The purpose of the ordinance, which prohibits

smoking in all buildings that are open to the public, is "to serve the public health, safety and general welfare[.]" LMCO § 90.01. The ordinance enumerates several exceptions to the prohibition. These exceptions permit smoking in such places as any dwelling, a room or hall used for a private social function not open to the public, retail tobacco stores and tobacco warehouses, facilities that are operated by private organizations, freestanding bars, and enclosed smoking areas. LMCO § 90.03. A duty is placed upon the owner of the building or establishment to post "No Smoking" signs, remove all ashtrays where smoking is prohibited, and request that smokers not smoke in no-smoking areas. LMCO §§ 90.04, 90.05. The Louisville Metro Health Department is responsible for enforcing the Smoke Free Law by issuing citations. LMCO § 90.06. Any violation of the Smoke Free Law is classified as a civil offense and is enforced through the Louisville Metro Government's code enforcement board. LMCO § 90.07.

The primary issue before this Court is the district court's scope of review of the code enforcement board's final order and a perceived conflict between the statutory definitions of a district court's powers. The facilities agree with the district court's interpretation of the statutes, which is that the district court has no appellate jurisdiction and thus must consider such orders on a *de novo* basis. The health department agrees with the circuit court's interpretation, which is that the district court may only review such orders for arbitrariness.

Both the health department and the circuit court relied upon this Court's opinion of *Trimble Fiscal Court v. Snyder*, 866 S.W.2d 124 (Ky. App.

1993), in which a panel of this Court addressed the appropriate type of review a circuit court must use in considering the actions of a fiscal court related to the closing of a county road. The analysis addressed the interpretation of KRS 23A.010(4), in which the General Assembly authorized the circuit court to review decisions of administrative agencies, but stated such review was not an appeal, but an original action. The Court looked to the nature of the local governing body's action to determine whether it was acting in a legislative or adjudicatory capacity. Actions taken in the former capacity would permit a *de novo* trial, while a review of those taken in the latter capacity would be limited to determining whether the decision was arbitrary. The Court also stated that "calling the proceeding an original action does not convert the review of a local legislative body's decision into a trial *de novo*. Rather, the proper standard of review is that applicable to all such matters." *Id*. at 127. The facilities assert that *Snyder* is not applicable in the present matter, as circuit courts are afforded appellate jurisdiction, unlike district courts. Our independent research has uncovered at least two statutes (KRS 82.620, addressing parking violation citations; and KRS 82.625, addressing impoundment) that provide for an appeal to the district court from a hearing board's determination. However, in both instances the General Assembly provided that "[t]he action [in district court] shall be tried de novo[.]" KRS 82.620(4), KRS 82.625(5)(e).

We have reviewed the statutes and ordinance at issue in the present matter. Based upon this review, we hold that the statutes and ordinance may be interpreted in a way that eliminates any conflict. At the outset, we note that "[i]t is

presumed that the Legislature was cognizant of preexisting statutes at the time it enacted a later statute on the same subject matter." *Shewmaker v. Commonwealth*, 30 S.W.3d 807, 809 (Ky. App. 2000). Therefore, we must presume that the General Assembly (and, in turn, the Louisville Metro Government) was aware that the district court had no appellate jurisdiction pursuant to KRS 24A.010(3) when it enacted KRS 65.8831, which limited the district court to a review of the record created before the code enforcement board. In our view, the district court is not permitted to conduct a *de novo* trial, but instead is merely permitted to review only that evidence and testimony introduced before the code enforcement board. The district court may not take additional evidence, but must confine itself to the board's record. It is incumbent upon the code enforcement board to ensure that its record is sufficient to provide for meaningful review. Because it does not have appellate jurisdiction, the district court may conduct a *de novo* review of that evidence and is not confined to a determination as to whether the board's decision was arbitrary. Therefore, the circuit court erred when it held that the district court could only review the board's action for arbitrariness. Accordingly, we must reverse the circuit court's holding in this regard and remand this matter to the circuit court to address the merits of the district court's decision, which must be supported by the board's record.

We shall only briefly address the issue of whether the district court erred in making a finding as to the general applicability of the Smoke Free Law to the charitable organizations that rent the facilities at issue in this case. After the

briefs were filed in the present case, this Court rendered an opinion addressing the private organization exemption contained within the Lexington-Fayette Urban County Government's smoking ban ordinance. *Lafayette Football Boosters, Inc. v. Commonwealth*, 232 S.W.3d 550 (Ky. App. 2007). This Court specifically addressed the effect opening the bingo halls to the public had on the private organization exemption. The Court noted that there were two similar exemptions. One exempted a room or hall used for a private function. In order for this exemption to apply, the event must be closed to the public. The second exempted private organizations, but did not put any limitation on whether the general public may attend events held by such organizations. The Court noted that "the L-FUCG had the opportunity to restrict the private organization exemption to facilities operated by private organizations that are [closed] to the public. Their failure to do so implies no such intent to do so." *Id.* at 557. The Court concluded that the ordinance permitted "a private organization to operate a facility and to invite the public inside without transforming that facility into a building that is open to the public for purposes of the L-FUCG smoking ban." *Id*. Louisville Metro Government's Smoke Free Law, like the Lexington ordinance, does not limit the exemption for private organizations to events that are closed to the public. We need not address this issue as we must first permit the circuit court to address whether the district court's finding that the "private organization" exemption applied to the facilities was correct based upon a review of the code enforcement board's record. Therefore, we vacate the circuit court's reversal of the district

court's decision on this issue.

On remand, the circuit court shall first determine whether the district court properly concluded that the organizations operating the bingo games were private organizations. If so, then the circuit court must next determine whether the district court properly applied the private organization exemption to the owners of the respective facilities.

For the foregoing reasons, the Jefferson Circuit Court's Opinion and Order is hereby reversed in part and vacated in part, and this matter is remanded to the circuit court for further proceedings consistent with this opinion.

ALL CONCUR.

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