

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001307-MR

EDITH V. MARTIN,
Administratrix of the Estate of
WILLIAM DOHERTY;
PAUL D. MARTIN II; and
KIMBERLY MARTIN

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS KNOPF, JUDGE
ACTION NO. 90-CI-08475

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT; and
JEFFERSON COUNTY

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: GUDGEL, Chief Judge; HUDDLESTON and SCHRODER, Judges.

HUDDLESTON, Judge: Edith V. Martin, Administratrix of the Estate of William Doherty, Paul D. Martin II and Kimberly Martin (the appellants) appeal from a summary judgment granted to the Louisville and Jefferson County Metropolitan Sewer District (MSD)¹

¹ The Metropolitan Sewer District (MSD) is a municipal corporation created pursuant to Kentucky Revised Statutes (KRS)
(continued...)

and Jefferson County, Kentucky, which dismissed their complaint seeking damages for MSD's refusal to issue a building permit to allow construction of a single-family dwelling next to a drainage easement on a subdivision lot in Jefferson County. We affirm because of the failure of the appellants to exhaust administrative remedies.

In 1964, William Doherty purchased a tract of undeveloped land located in the Buechel Terrace Subdivision. In 1983, he subdivided the property into seven lots, designated as Tracts A through G. The subdivision plans were reviewed for compliance with Louisville and Jefferson County zoning regulations and were approved by the Jefferson County Department of Public Works and Transportation conditioned upon (1) the relocation of a sewer and drainage easement from the heart of Tract B to the property line separating Tracts A and B, and (2) an increase in the width of the drainage easement from ten to 25 feet.² Doherty was required to post a \$1,000.00 performance bond to ensure that the channel improvement was constructed as shown on the revised plat. In February 1988, administration and enforcement of flood plain regulations was transferred by Jefferson Fiscal Court to MSD. In September 1988, Doherty's subdivision was inspected by MSD which determined that the drainage channel had been properly constructed and that, as a result, the performance bond Doherty had posted should be released.

¹(...continued)
Chapter 76.

² One-half of the drainage easement is on Tract A and the other half is on Tract B.

Between July 1986 and April 1988, building permits for six of the seven lots were approved by the Department of Public Works and Transportation or MSD, and houses were constructed on the lots. In the summer of 1990, Paul and Kimberly Martin contracted to purchase the seventh lot, Tract B, from Doherty and to have him construct a house on the lot. The house was to be 40 feet wide and was to be built on the southeast edge of the drainage easement.

When Doherty applied to MSD for a building permit in July 1990, he met with resistance. Finally, in October of that year, he was advised by letter that MSD would not grant a building permit unless the width of the drainage easement was increased from 25 to 31 feet or unless Doherty had a floodway analysis performed (at an estimated cost of from \$4,000.00 to \$5,000.00) to determine what flood plain area was necessary to convey the waters of a 100-year flood and to demonstrate that the proposed house would not encroach into the floodway. According to MSD's letter:

Buechel Terrace Creek is an intermittent blue-line stream draining a largely developed watershed in excess of 430 acres. A review by MSD staff indicated that for a 4-foot flat bottomed grass channel with 3:1 side slopes, a minimum flow depth of approximately 4.5 feet would be necessary to convey the 100-year design flow. Observations by MSD staff at the site indicate that the existing channel falls far short of providing the necessary flow area. For the channel described above, a minimum channel width of about 31 feet would be necessary

which would require the existing 25-foot drainage easement be enlarged.

Doherty did not seek further administrative relief, but instead filed the present suit against MSD and Jefferson Fiscal Court. The lawsuit was removed to the United States District Court for the Western District of Kentucky at Louisville because of its 42 United States Code (U.S.C.) § 1983 claims stemming from MSD and Jefferson County's alleged taking of property without just compensation, denial of equal protection of the law and violations of substantive and procedural due process. On April 1, 1994, appellants' constitutional claims were dismissed by the District Court without prejudice, except for the substantive due process claim which was dismissed with prejudice.³ Appellants' lawsuit was remanded to Jefferson Circuit Court.

Appellants' remaining claims were that (1) MSD was negligent in its refusal to grant the requested building permit, (2) the actions of MSD constituted a violation of Article 2 of the Kentucky Constitution which prohibits arbitrary conduct by governmental officials, (3) MSD's actions constituted extortion and conspiracy, and (4) MSD violated in numerous ways both the United States and Kentucky Constitutions.

Following extensive discovery and briefing, the circuit court granted summary judgment to MSD and Jefferson County. The

³ The United States District Court found that appellants' claims of a taking without just compensation, denial of equal protection and violation of procedural due process were not ripe for consideration because of the existence of adequate state remedies, such as an inverse condemnation action.

court determined that since there was not a final decision by MSD linking its approval of the building permit solely to the expansion of the drainage easement, a legal taking had not occurred. The court also concluded that because MSD's actions were supported by law, there was no violation of Section 2 of the Kentucky Constitution. And, the court held that the appellants had failed to exhaust their administrative remedies under Article 13(A) (3) of the Jefferson County Floodplain Regulations,⁴ which provides that any party aggrieved by MSD's decision concerning any district or zone boundary may appeal to the Planning Commission. Finally, the court concluded that the record does not support the appellants' claims of conspiracy and extortion, and that KRS Chapter 198B, which, inter alia, provides for the adoption by the Kentucky Board of Housing, Buildings and Construction of a uniform state building code, is inapplicable to this case.

Despite the many issues raised below and on appeal, the critical issue at this juncture is whether the appellants' complaint was properly dismissed because of their failure to exhaust administrative remedies. In holding that the appellants had not exhausted their administrative remedies, the circuit court relied on Article 13(A) (3) of the Floodplain Regulations which provides that:

The Metropolitan Sewer District (MSD) shall resolve disputes concerning any district or zone boundary. MSD shall utilize any base flood elevation and floodway data available from a Federal, State, or other source as

⁴ Text, infra.

criteria for making such judgment. Any party aggrieved by MSD's decision may appeal to the Planning Commission. The burden of proof shall be on the appellant to sustain his contention.

While we do not agree with the circuit court that this appeal is governed by Section 13(A)(3) of the Floodplain Regulations, we do agree that before a circuit court may entertain an aggrieved party's appeal from an administrative agency's decision, the agency's action must be final. One seeking review of an administrative decision must, as was said in Burns v. Peavler,⁵ strictly follow applicable statutory provisions governing appeals from administrative agency decisions. In Burns, building permits were issued to a developer to construct multi-family homes without a zone change being granted. Burns objected to the development, but instead of appealing to the Board of Adjustment, filed suit in circuit court. On appeal, the circuit court's order dismissing Burn's complaint for failure to exhaust administrative remedies was affirmed. In doing so, this Court said that:

Burns was precluded from filing a suit in the circuit court inasmuch as the state statutory scheme mandates that the Board of Adjustment first be allowed to review the action of the enforcement officer. KRS 100.257 and .261.⁶

⁵ Ky. App., 721 S.W.2d 715, 717 (1986).

⁶ Id. at 717. See also Taylor v. Duke, Ky. App., 896 S.W.2d 618, 621 (1995).

Article 13(A)(3) of the Floodplain Regulations is not applicable to the appellants' appeal because there is no district or zone boundary line dispute in this case. The approved plat provided for a 25-foot drainage easement which was required by the Jefferson County Department of Public Works and Transportation, the predecessor to MSD. Now, MSD wants 31 feet, or six more feet from the remaining undeveloped lot (Tract B). That is not a true boundary line dispute. That is a taking. However, not all takings require compensation. We have long recognized that a taking exercised as part of the government's police powers, such as zoning and subdivision regulations, do not require compensation under Section 13 of the Kentucky Constitution. An individual owner of land who wants to develop or subdivide his land may be required to burden his property with rights-of-way, utility easements, parks, etc. to relieve society of the reasonably anticipated burdens to be caused by the development. This is a permissive taking.⁷ However, a developer should not be made to construct or contribute to the cost of public improvements that exceed the burden caused by his development. That is a taking without just compensation.⁸

In this case, the developer submitted a preliminary plat, was told of all the planning controls, and decided to proceed. Before final plat approval, the developer must construct the streets and other public improvements, such as storm water drains, or the developer must post a performance bond which guarantees the

⁷ Lampton v. Pinaire, Ky. App., 610 S.W.2d 915, 919 (1980).

⁸ Lexington-Fayette Urban County Gov't v. Schneider, Ky. App., 849 S.W.2d 557 (1992).

improvements will be built - one way or the other. Here the developer agreed to the 25-foot taking in exchange for the right to subdivide. He agreed to construct the ditch and posted a performance bond. MSD conducted a final inspection and released the bond.

Subsequent reviews by MSD are limited. It can require that no structure be built over its easement or filling, etc. not occur in the drainage ditch as constructed. MSD can make sure that the portion of the lot not obstructed by the floodway easement be elevated out of the flood plain before development. However, on an approved plat, the MSD cannot re-review the easement's width or its construction and demand another six feet or the rebuilding of the ditch. That is a taking without compensation.⁹ If MSD (or its predecessor) made a mistake and actually needed a 31-foot easement when the property was originally subdivided, it cannot now correct its error and burden the last lot with the cost of correcting the mistake. MSD will need to buy the additional land or reconstruct the drainage ditch at its own expense.

Revisiting the facts of this case, we note that MSD regulations are planning controls enacted by authority of KRS Chapter 100. That means that the administrative procedures must conform to the enabling statute.¹⁰ An appeal of the refusal to issue a building permit because of some alleged violation of the final plat is an administrative appeal which is to be decided by

⁹ Hager v. Louisville & Jefferson County Planning & Zoning Com'n, Ky. 261 S.W.2d 619 (1953).

¹⁰ Bellefonte Land, Inc. v. Bellefonte, Ky. App., 864 S.W.2d 315 (1993).

the board of adjustment,¹¹ not by the planning commission.¹² Appeals from the board of adjustment go to the circuit court under KRS 100.347.¹³ The planning commission can decide true boundary line disputes, but this case is not a district or zone boundary dispute. It is an administrative appeal for a ministerial act, similar to Burns v. Peavler.¹⁴ As earlier noted, in Burns, a permit was granted and a property owner objected. This Court held that the granting or denial of a permit was an administrative act which must be appealed first to the board of adjustment and then to circuit court. The failure to follow the statutory scheme amounted to a failure to exhaust administrative remedies, and the case was dismissed even though all the parties agreed that the permit was granted in error.

Thus, while we agree with the circuit court that the appellants have failed to exhaust their administrative remedies, the proper remedy was an appeal to the board of adjustment instead of to the planning commission. Thus, we affirm the circuit court, but on other grounds.¹⁵

SCHRODER, Judge, CONCURS.

GUDGEL, Chief Judge, DISSENTS.

¹¹ KRS 100.257.

¹² Bellefonte Land, Inc., supra, n. 10, at 315.

¹³ Id.

¹⁴ Supra, n. 5.

¹⁵ Bank One, Pikeville v. Commonwealth Natural Resources and Environmental Protection Cabinet, Ky. App., 901 S.W.2d 52, 56 (1995); Vega v. Kosair Charities Committee, Inc., Ky. App., 832 S.W.2d 895, 897 (1992).

BRIEF AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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ON BRIEF:

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