IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 14, 2003 Session

CONSOLIDATED WASTE SYSTEMS, LLC v. SOLID WASTE REGION BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, ET AL *and* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE v. SOLID WASTE DISPOSAL CONTROL BOARD, ET AL.

Appeal from the Chancery Court for Davidson County
No. 00-4014-I, Irvin Kilcrease, Chancellor &
No. 00-1799-II, Claudia Bonnyman, Sp. Chancellor

Nos. M2002-00560-COA-R3-CV & M2001-01662-COA-R3-CV - Filed July 2, 2003

This appeal involves two chancery court cases concerning the proper interpretation of Tennessee Code Annotated section 68-211-814. From a decision dismissing their counterclaims, the Metropolitan Government Solid Waste Region Board and Sherard Caffey Edington appeal. From a decision affirming the State's issuance of a Class IV landfill permit, the Metropolitan Government appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and L. CRAIG JOHNSON, SP. J., joined.

Thomas G. Cross, John L. Kennedy and Daniel W. Champney, Nashville, Tennessee, for the appellant, The Metropolitan Government of Nashville and Davidson County.

Joe W. McCaleb, Hendersonville, Tennessee, Frank M. Fly, Murfreesboro, Tennessee, and Thomas F. Bloom, Nashville, Tennessee, for the intervenor/appellant, Sherard Caffey Edington.

Thomas G. Cross, Daniel W. Champney and John L. Kennedy, Nashville, Tennessee, for the respondent/appellee, Solid Waste Region Board of The Metropolitan Government of Nashville and Davidson County.

James L. Murphy, III, Nashville, Tennessee, for the petitioner/appellee, Consolidated Waste Systems, LLC.

Sohnia Whitney Hong and R. Stephen Jobe, Nashville, Tennessee, for the defendant/appellee, Tennessee Department of Environment and Conservation.

OPINION

This appeal involves the consolidation of two cases concerning the same administrative action of the Solid Waste Region Board of Metropolitan Nashville and Davidson County ["the Region Board"] on Consolidated Waste Systems, LLC's ["CWS"] application for permission to construct a Class IV construction and demolition landfill in the community of Old Hickory. CWS initiated the permit process by filing an application with the Division of Solid Waste Management of the Tennessee Department of Environment and Conservation on December 29, 1999. Pursuant to the Solid Waste Management Act of 1991, CWS caused a copy of that petition to be filed with the Region Board. *See* Tenn. Code Ann. § 68-211-814(b)(2)(A)(2001). Also consistent with the Act the Region Board conducted a public hearing for the purposes of considering the application consistent with its Region Plan of Solid Waste Management. Tenn. Code Ann. § 68-211-814(a)(1).

The Region Board conducted its hearing on May 11, 2000. At the hearing on CWS's application, several citizens of Old Hickory, Lakewood and the surrounding community gave statements in opposition to the establishment of the landfill. Residents and council members provided oral and written statements in support of rejecting the application. Among those arguing for rejection were the appellant, Sherard Edington, counsel Courtney Hollins Edington, and Lorette Geyer and her husband, Richard Geyer. Although the Region Board was comprised of fifteen members, only nine were present. CWS, for its part, presented evidence suggesting a need for the landfill in light of decreased life expectancies for other facilities in the region and the need for a recycling facility, in light of the Region Plan's 25% waste reduction policy. According to the administrative record, the Region Board Chair, April Ingram, abstained from voting on the application, reducing the number of voting board members to eight.

After more than an hour of discussion concerning Old Hickory's need for another Class IV landfill, whether the landfill would be located in a flood plain, whether the landfill encroached upon burial grounds, and the nature of the site as a 'landfill only' or a 'landfill/recycling facility,' the Board entertained the first of what would be three motions regarding whether the application should be granted or rejected. The first motion was to reject the application. This motion to reject met with a four-four tie vote. The members who had voted for rejection of the application voiced their concern about the doubts presented to the Board concerning the location and nature of the landfill and the need for such a landfill. Two more votes were taken - one to accept and one more to reject. Both resulted in four-four ties. At no time did the Region Board Chair vote to break the tie. The Region Board issued no formal ruling rejecting the application as non-compliant with the Region's waste disposal plan. Likewise, no formal ruling issued approving the application.

On May 12, 2000, the Board Chair forwarded a letter to the Commissioner of Environment and Conservation. In that letter the Chair reported that "it may be concluded that no decision was reached by this board on the Cumberland Corners' application within the ninety-day time frame mandated by T.C.A. § 68-211-814(b)(2)(A)." CWS filed the first and only petition for judicial review of the Region Board proceedings on June 9, 2000. In that petition, CWS averred that the Region Board had either failed to act, as provided in section 814, within the required ninety day

period or, in the alternative, should the court find that the failure to approve amounted to a rejection of the application, that the Region Board acted arbitrarily and capriciously, and the rejection is unsupported by substantial or material evidence consistent with the standard of judicial review enunciated in Tennessee Code Annotated section 4-5-322.

The Region Board responded to that petition on July 14, 2000. On July 28, Appellant Edington filed his motion to intervene in this case, number 00-1799-II. Mr. Eddington sought an order remanding the case to the Region Board for a vote or, in the alternative, to declare that the tie vote constituted a rejection of the petition.

On October 19, while its original petition for judicial review was still pending, CWS filed an application with the State Control Board seeking a ruling vindicating the Commissioner's authority to issue a permit without an affirmative vote granting the application. On December 5, the State Control Board held that the Region Board lost its opportunity to decide within the statutory ninety day period and, as a result, the Commissioner had the authority to issue the landfill permit. Consistent with that ruling, the Commissioner issued the permit on December 13, 2000.

As a result, Metro filed its Petition for Writ of Certiorari challenging the actions of the Control Board and Commissioner as arbitrary and capricious, and seeking a declaration that CWS's application with the Control Board was not timely filed. This Petition for Writ of Certiorari in case number 00-4014-I was filed simultaneously with the Solid Waste Region Board's motion to amend response and to assert a counter claim in case number 00-1799-II. That counterclaim sought an injunction against CWS from taking further actions based on the permit issued by the Commissioner.

On February 6, 2001, CWS nonsuited its petition for judicial review in case number 00-1799-II. Edington and Metro opposed the nonsuit and filed motions to continue the litigation. CWS filed a response in opposition to intervenor's motion to continue litigation, which the trial court considered as a motion to dismiss for failure to state a claim under Tennessee Rules of Civil Procedure 12.02. On May 25, 2001, the chancery court filed its Memorandum and Order dismissing the counter claims in case number 00-1799-II, finding in pertinent part:

> T.C.A. §68-211-814(b)(2)(B) requires written analysis by the Region Board for a rejection to occur: the legislation places a burden upon the Region Board to show in writing why the application is inconsistent with its own solid waste disposal plan. Further, the statute makes clear that pursuant to T.C.A. §68-211-814(b)(2)(B) the Region Board *shall* make a decision about the application during a 90 day period. The Region Board did not carry these burdens. It did not express an intent to reject the application. The opportunity to exercise decision making power over the application for this permit by the Region Board was lost with the lapse of the ninety day statutory period.
>
> The Region Board's response and counterclaim admit that it failed to have a quorum at two meetings during which it expected to vote on the application and that it did not vote on those dates. It admits that the Region Board members voted

(resulting in a tie vote) but complains that moving the application decision to the commissioner (five months after the Region Board's tie vote) kept the Region board from voting again. No authority is cited by the Region Board for a remand and supplemental vote. Instead, the Region Board argues that its demand for another vote survives the Rule 41 dismissal taken by Consolidated.

For purposes of this motion, this court finds that the tie vote was not a rejection of the application which, pursuant to T.C.A. §68-211-814(b)(2)(C) could prevent the Commissioner from granting the permit. The ninety (90) day period for voting by the Region Board lapsed in May 2000.

The Court applied the rules of statutory construction to reach these conclusions. "Legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language..." JoAnn White Mooney v. Joe Sneed 30 S.W. 3d 304, 306, (Tenn. 2000) (citing State v. Pettris 986 S.W.2d 540, 544 (Tenn. 1999)).

When considering a Motion to Dismiss pursuant to Rule 12.02(b) of the Tennessee Rules of Civil Procedure, the trial court must accept all of the factual allegations in the complaint as true, and construe the complaint liberally in favor of the plaintiff. See, Wallace v. National Bank of Commerce, 938 S.W.2d 684 (Tenn. 1996). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See, Coulter v. Hendricks, 918 S.W.2d 424 (Tenn. App. 1995). The Region Board asserts no set of facts to support its claim that the Region Board should retain the power to control the application decision after the ninety (90) day lapse. Regardless of the permit outcome before the Commissioner, there is no authority to show that Consolidated deprived the [Region] Board of its vote or its power to vote. The Region Board's counterclaim is dismissed.

The Intervenor participated as an aggrieved party in the role of defendant. Its answer is captioned "Response by Intervenor to Petition for Judicial Review." This Response seeks an order sending the permit application back to the Region Board for a vote, or for a declaration that a tie vote by the Region Board is a rejection of the application. For all the reasons set forth above, the Intervenors fail to state a claim and are dismissed as parties pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure.

This lawsuit was begun and then dismissed by Consolidated. Court costs are taxed to Consolidated.

It is so ORDERED.

From this order Sherard Edington appeals, asserting as error the trial court's determination that the tie vote of the Region Board was not a rejection of the application and that the Commissioner had authority to issue a permit without the approval of the Region Board.

On February 15, 2002, the chancery court entered its memorandum in case no. 00-4014-I holding that the Control Board's actions were supported by substantial and material evidence and

affirming the Control Board's finding that the Commissioner did have authority to issue the permit. In support of this order, the trial court relied, as did the Control Board, on section 68-211-814(b)(2)(A) requiring a final decision on the application within ninety days of the filing of said application. From this order Metro appealed. These cases were consolidated for argument and disposition because both involve the same issues, the effect of the tie votes in the Region Board and the resulting authority and jurisdiction of the Control Board and the Commissioner.

For his part, Edington argues that Roberts Rules of Order, the commonly recognized source for parliamentary procedure, provides that affirmative motions pass only upon a majority vote. He asserts that failure of CWS's application to receive such a majority vote has the effect of a rejection of the application. Metro joins in this argument only so far as to say that the application before the Board was not approved. Absent such approval, Metro argues the Commissioner of the Department of Environment and Conservation and the Control Board respectively did not have jurisdiction to pass upon CWS's application. CWS, the State Control Board, and the Commissioner, for their part, assert that since the Region Board deadlocked and issued no formal findings approving or rejecting the application, no action was taken by the Board. CWS's Petition for Judicial Review and the Metro Region Board's Petition for Writ of Certiorari were both resolved by the trial court in favor of CWS and the State Control Board and the Commissioner. The controlling issue, the result of the four four tie vote, is a question of law. As such, it receives de novo review with no presumption of correctness. Tenn. R. App. P. 13; *see Winchester v. Little*, 996 S.W.2d 818, 822 (Tenn. Ct. App. 1998).

The Metro Region Board was created as a result of the Solid Waste Management Act of 1991. The statute providing for the Region Board's existence devolved upon the Board power concomitant to the Department of Environment and Conservation. The statutory purpose of that legislation was to require local participation in the solid waste management and flow control policies of the state, to reduce inter county flow of solid waste, to encourage local responsibility for locally generated solid waste. *See* Tenn. Code Ann. § 68-211-101, *et seq*.(2002). As the Region Board argues, the statutes do provide "after the plan is approved the region must approve an application for a permit for a solid waste disposal facility or incinerator within the region as is consistent with the Region's disposal needs before any permit is issued by the Commissioner pursuant to this Chapter." *See* Tenn. Code Ann. § 68-211-814(b)(1)(D)(2001). However, the statute also provides, in part:

> The region shall render a decision on the application within ninety (90) days after receipt of a complete application. The region shall immediately notify the Commissioner of its acceptance or rejection of an application.
> This provision is immediately followed by:
> (B) The region may reject an application for a new solid waste disposal facility or incinerator or expansion of an existing solid waste disposal facility or incinerator within the region *only upon determining that the application is inconsistent with the solid waste management plan adopted by the county or region* and approved by the department, and the region shall document in writing the specific grounds on which the application is inconsistent with such plan.

Tenn. Code Ann. § 68-211-814(b)(2)(B)(2001)(emphasis added).

When the Region Board, with eight voting members present and a chairperson who abstained from voting, had first voted on a Motion to Reject, which resulted in four affirmative votes, four negative votes, and an abstention, a motion to adopt was made. This motion resulted in four votes in the affirmative, four votes in the negative with the chairperson abstaining. After this second tie vote was taken a very pertinent question was posed to metropolitan legal counsel present for the meeting.

"Unidentified Speaker: Does failure to approve constitute a disapproval in the statute?

Ms. Knight: No, it does not. First of all, the first decision was to reject. Your first decision was to reject, but not to approve, and the second decision was a failure to approve, and failure to approve - - a rejection is required if there is a rejection based on the failure to meet the requirements of the plan.

So without that - - without specifically setting it up in writing the reasons why he's failing to meet the requirements of the plan, it's not a valid decision."

Following this imminently correct advice, a second Motion to Reject resulted in four votes in the affirmative, four votes in the negative and another abstention by the chair.

As determined by the State Control Board, the Commissioner and the Chancellor, Tennessee Code Annotated section 68-211-814(b)(2)(B)(2001) is susceptible of no other reasonable construction than that given to the Region Board by metropolitan legal counsel.

The authority of the Region Board as well as the Control Board is statutory. In construing the application of this statute, courts are required to give effect to every section wherever possible in order to avoid a statutory nullity. *See Tidwell v. Collins*, 522 S.W.2d 674 at 676 (Tenn. 1975). The statute by its terms places three essential requirements upon the Region Board. First, the Region Board is to issue a decision accepting or rejecting a permit within ninety days after the application is filed. Second, the Region Board must accept and approve applications which are consistent with the Region plan for waste management. Third, should the Region Board find that an application is inconsistent with that plan, the Board is to reject that application in writing, listing the material facts and legal conclusions which result in the denial. It is also clear from the face of the statute, that the power of the Region Board is co-existent with the power of the State Control Board with the exceptions of the aforementioned requirments. Edington and the Metro Region Board would argue that Roberts' Rules of Order dispenses with the statutory requirements of an approval or a rejection as contemplated by the statutes. Such a result would render the provisions of the statute meaningless. Neither chancery court decision resulted in such a finding, and both decisions are affirmed in their entirety. The costs of this appeal are taxed 75% against the Metropolitan Government of Nashville and 25% against Sherard Caffey Edington. The causes are remanded to their respective trial courts for further proceedings as may be necessary consistent with this opinion.

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WILLIAM B. CAIN, JUDGE