Circuit Court for Queen Anne's County
Case No. C-17-CV-17-000012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 905

September Term, 2017

HIPPOCRATIC GROWTH, LLC, ET AL.

v.

BOARD OF COUNTY COMMISSIONERS
OF QUEEN ANNE'S COUNTY, ET AL.

Graeff,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: July 9, 2018

In anticipation of receiving a license to dispense medical cannabis, appellants, Hippocratic Growth, LLC, 101 Drummer Drive, LLC, and 111 Scherr Lane, LLC, entered into agreements to open a dispensary at 101 Drummer Drive in Grasonville, Maryland. Hippocratic was awarded preliminary licensing approval in December 2016, and Drummer submitted a building permit application for the property in February 2017. During this time, the Queen Anne's County Commissioners enacted Resolution 17-06, which put a hold on the approval of medical cannabis zoning applications, and Ordinance 17-06, which, among other things, created regulations that required conditional use approval and established set-back requirements for growing operations. Resolution 17-06 was ultimately rescinded. Pursuant to Ordinance 17-06, however, the Planning and Zoning Department denied Drummer's building permit application.

Appellants brought suit against appellees, Queen Anne's County and a number of county officials, challenging the denial of that application.[1] Appellees filed a motion to dismiss, and the circuit court granted the motion. Appellants timely appealed and raise three issues that we have reworded as follows:

I. Did the circuit court err in finding that Hippocratic Growth did not possess a protected property interest in completing Stage 2 of the licensing approval process?

II. Did Resolution 17-06 impose an illegal moratorium on the approval of medical cannabis dispensary zoning applications that deprived appellants of their ability to open a dispensary at the subject property?

[1] Appellees are the Board of County Commissioners of Queen Anne's County (the County); Mark Anderson, Robert Buckey, James Moran, Jack Wilson, Jr., and Stephen Wilson (the individual Commissioners); and Michael Winosky (the Planning Director for the County's Department of Planning and Zoning).

III. Does state legislation preempt Ordinance 17-06?[2]

For the reasons to follow, we affirm the judgments of the circuit court.

BACKGROUND

The Natalie M. LaPrade Medical Cannabis Commission, a sub-agency within the Maryland Department of Health and Mental Hygiene, was authorized by Governor Larry Hogan to develop policies, procedures, guidelines, and regulations to make medical cannabis available to qualifying patients in a safe and effective manner in May 2015. The Commission developed final regulations for growing, processing, and dispensing facilities that August, and it made applications available for growers, processors, and dispensaries the following month.

Hippocratic anticipated that it would receive preliminary licensing approval from the Commission and was optimistic that it could work with zoning officials in Queen Anne's County, who had sent a letter of support on August 25, 2015, to another company applying for a medical cannabis grower's license, Bayside Medical Group, LLC. The

[2] Appellants phrase the questions presented in the following way: (1) "Does appellant Hippocratic Growth, LLC, a successful recipient of preliminary approval to operate a medical cannabis dispensary in Senatorial District 36, possess a protected entitlement property interest in completing Stage 2 licensing approval?" (2) "Did Resolution 17-06 impose an illegal moratorium on the approval of medical cannabis dispensary zoning applications, constituting a zoning regulation that was not enacted in conformance with the requirements of Queen Anne's County Code § 18:125 to -221 and arbitrarily, capriciously and unreasonably deprive appellants of their ability to open a medical cannabis dispensary at the dispensary location?" (3) "Does Queen Anne's County Ordinance 17-06 so restrict the zoning of medical cannabis dispensaries so as to prevent a preliminary dispensary recipient from locating a dispensary in the unincorporated areas of Queen Anne's County within the deadline imposed by COMAR 10.62.25.06, thus interfering and contravening the implementation of the Maryland Medical Cannabis Program?"

County's letter stated: "The Queen Anne's County Commissioners note and approve [Bayside's] application to raise medical marijuana, and wish you success in securing a license for your Bayside Group MD's medical cannabis operation." The letter further noted "that the production and processing [of medical cannabis] is a permitted use in our agricultural zone."

Hippocratic's counsel, however, did not have similar luck. Council met with zoning leadership in August 2015 to discuss the appropriate zoning for a medical cannabis dispensary. According to Hippocratic, zoning officials advised that dispensaries would be treated as retail establishments similar to convenience and drug stores. Hippocratic requested written confirmation of the County's position but never received a response to the request.

On December 9, 2016, the Commission notified Hippocratic that it had been selected to operate a medical cannabis dispensary in Maryland Senate District 36.[3] Ten days later, Hippocratic contacted the Queen Anne's County Planning and Zoning Department requesting a zoning determination letter to send to the Commission. The Department responded that certain County Commissioners were concerned about the proposed dispensary location, and that emergency legislation was being considered. As a result, the Department stated that the County would not issue a zoning determination letter

[3] District 36 is comprised of Queen Anne's County, as well as Kent County, Caroline County, and a portion of Cecil County, including Elkton.

at that time. Appellants filed their initial complaint for mandamus, declaratory judgment, and injunctive relief on January 22, 2017, in the Circuit Court for Queen Anne's County.[4]

The County Commissioners held a special legislative meeting on January 31, 2017, which appellants attended. During the meeting, the Commissioners introduced two pieces of legislation: Resolution 17-06 and Ordinance 17-06. The Resolution prohibited the Planning Department from approving any medical cannabis zoning applications until the County had an opportunity to study the public health, safety, and welfare effects of medical cannabis businesses in order to institute land use policies. The Resolution passed unanimously. As for the Ordinance, it created specific regulations for medical cannabis dispensaries, required conditional use approval, and established set-back requirements for growing operations. It also limited dispensaries to two zoning districts: the Grasonville Gateway and Medical Center district and the Urban Commercial district. The Ordinance was held for a later vote.

In the meantime, on February 28, 2017, Drummer submitted and paid for a building permit application for renovation of 101 Drummer Drive. The application also included architectural, mechanical engineering, and site plan drawings, as well as the Commission's notice awarding Hippocratic preliminary licensing approval.

[4] Appellants filed their first amended complaint on February 2, 2017, to add claims alleging state and federal constitutional violations. Based on federal question jurisdiction, appellees removed the case to the United States District Court for the District of Maryland. Both parties filed dispositive motions. Following a hearing, the district court dismissed the federal claims and remanded the case to the circuit court for consideration of the remaining state law issues.

The County Commissioners held a second hearing on March 28, 2017. On advice of counsel, they rescinded Resolution 17-06. The Commissioners also held a public hearing on Ordinance 17-06, which would pass unanimously the following month.

The Planning Department notified Drummer on May 4, 2017, that its building permit application had been denied pursuant to the Ordinance. Appellants responded by filing their second amended complaint, which raised five causes of action: 1) mandamus, 2) declaratory judgment, 3) preliminary injunctive relief, 4) permanent injunctive relief, and 5) violations of the Maryland Constitution and Maryland Declaration of Rights.

Appellees filed a motion to dismiss the second amended complaint on May 12, 2017. Following a hearing, the circuit court issued a memorandum opinion making a number of findings. First, appellants failed to meet the requirements under Maryland law to assert a claim that they acquired a property interest to develop 101 Drummer Drive and, as a result, cannot meet the burden required to prove either a substantive due process or procedural due process claim. Second, Resolution 17-06 was rescinded, Ordinance 17-06 was validly adopted, and at no time did appellants acquire a vested property right. Third, the Ordinance is valid, applies to the subject property, and is not preempted by any other legislation. Fourth, the County Commissioners possess legislative immunity because the claims against them are based on legislative activities relating to the adoption of the Resolution and the Ordinance. Fifth, and finally, the mandamus, declaratory judgment, and injunctive claims fail because appellants never had a clear right to the relief sought, nor did appellees have a clear duty to authorize a medical cannabis dispensary at the

proposed location. As a result, the circuit court granted appellees' motion to dismiss. This appeal followed.

DISCUSSION

I. Constitutional Arguments

Appellants argue that they have a protected constitutional interest in completing Stage 2 of the Commission's licensing approval process. According to them, upon the Commission's announcement of Hippocratic's preliminary approval on December 9, 2016, they "possessed a vested property interest in a medical cannabis dispensary license that is cognizable under Article 24 of the Maryland Declaration of Rights." This right was violated when appellees passed Resolution 17-06, which had the effect of prohibiting them from completing Stage 2 of the licensing process, and Ordinance 17-06, which imposed zoning regulations so restrictive that identifying a qualifying property in the unincorporated portion of Queen Anne's County became virtually impossible. Appellees, conversely, argue that appellants do not have a vested property interest because they did not obtain a building permit, nor did they make a substantial beginning to reconstruct the building at 101 Drummer Drive. As a result, the circuit court properly found that appellants did not have a colorable constitutional claim.

There are two avenues by which appellants could acquire a constitutionally protected property interest. The first occurs when a party obtains a "vested right" in the existing zoning use. *Powell v. Calvert County*, 368 Md. 400 (2002). The second arises

when a property-holder possesses a "legitimate claim of entitlement" to a permit or approval. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). We shall address each.

In order to obtain a vested right in the existing zoning use that will be constitutionally protected against a later change in the zoning ordinance prohibiting or limiting that use, the owner must: "(1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use." *Powell*, 368 Md. at 411 (citations omitted). Applying that rule to the facts of this case, it is apparent that appellants never acquired a vested property interest: there is no dispute that appellants did not obtain a permit at 101 Drummer Drive, nor did they make a substantial beginning to reconstruct the building at the property such that "the neighborhood may be advised that the land is being devoted to that use." *Id.*

The question then becomes whether appellants have a legitimate claim of interest to a permit or approval. In *Bd. of Regents v. Roth*, the Supreme Court instructed that in order to "have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. "Under this approach, whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks *all* discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property

interest." *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992).

Appellants, relying on *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), maintain that they have a claim of entitlement in a medical cannabis dispensary interest. *Scott* involved a real estate developer who brought an action against county, county council, and various private landowners alleging deprivation of constitutional rights through the wrongful withholding of a building permit. *Id.* at 1411. In analyzing whether state or local law afforded a protected property interest, the court noted that the developer "enjoyed an entitlement to the issuance of a permit upon presentation of an application and plans showing a use expressly permitted under the then-current zoning ordinance." *Id.* at 1418. This entitlement, the court reasoned, extended to the developer "even though he held only an option to purchase the property or similar interest, rather than actual legal title." *Id.* Next, in support of their argument that the Commission lacked discretion to deny the issuance of their building permit, appellants also assert that "[m]ost State licensing programs license everyone who meets the licensing qualifications, and thus would not give rise to the ability to pick some and not others." *Doe v. Alternative Medicine Maryland, LLC*, 455 Md. 377, 392 (2017).

On the other hand, appellees argue that *Siena Corp. v. Mayor and City Council of Rockville Maryland*, 873 F.3d 456 (2017) is controlling. There, Siena sought to build a self-storage facility in Rockville, Maryland, but a zoning amendment prohibited construction of the facility at their desired location. *Id.* at 459. Siena claimed that the

enactment of the amendment amounted to a denial of their due process and equal protection rights under the Fourteenth Amendment. *Id.* After noting that they neither applied for a building permit nor obtained site plan approval, the court held that Siena lacked a claim of entitlement to the permit. *Id.* at 462–63. It explained: "[t]o hold that the issuance of something as important as a building permit is wholly nondiscretionary even before the necessary conditions have been met would handcuff local land use decision-makers to an extraordinary extent. Indeed, it would leave them at the mercy of whatever plans a developer might devise and secure tentative approval of." *Id.* at 462.

At the outset, we note that the developer in *Scott v. Greenville County*, unlike this case, fully complied with the requirements of the zoning ordinance in effect as of the date on which he formally applied. Further, *Scott* was decided under South Carolina law, where a developer is entitled to the issuance of a permit upon presentation of an application showing a use expressly permitted under the then-current zoning ordinance; Maryland, by contrast, requires the developer to complete the process of obtaining a permit. *Doe v. Alternative Medicine Maryland, LLC*, is also distinguishable. *Doe* involved a motion to intervene, which is not at issue here. Additionally, and critically, *Doe* did not involve a constitutional challenge to a zoning ordinance, which is the primary issue for us to decide in this case.

Rather, we agree with appellees that *Siena* is controlling. As the court pointed out in *Siena*, regardless of how the issue is framed—whether the property interest at issue is a

permit license or a medical cannabis dispensary license[5]—the test is the same: a constitutionally cognizable interest requires a "legitimate claim of entitlement" and turns on whether "the local agency lacks *all* discretion to deny issuance of the permit or to withhold its approval." 873 F.3d at 461–62 (citations omitted). A "unilateral expectation" of some property right will not suffice. *Id.* at 461 (citations omitted).

In this case, the Commission's regulations indicate that local zoning authorities wield independent authority in the licensing process. The "Issuance of a License" section of the Commission's regulations provides in pertinent part: "[t]he Commission may issue a dispensary license on a determination that . . . [t]he proposed premises . . . *[c]omply with all zoning and planning requirements*." COMAR 10.62.25.07(B)(3)(b) (emphasis added). Additional evidence of the meaning of the regulations can be found in the "Premises Generally" section, which states that "[t]he premises and operations of a licensee shall *conform to all local zoning and planning requirements.*" COMAR 10.62.27.02(D) (emphasis added). Parallel regulations applicable to processors are found at COMAR 10.62.19.06(B)(3)(b) and 10.62.21.02(B), and to growers at COMAR 10.62.08.07(B)(2)(b) and 10.62.10.02(B).

Maryland courts have made clear that the issuance of a building permit is not a ministerial act unless applications "fully comply with applicable ordinances and

[5] Though it does not alter our analysis, we note that appellants do not have standing to challenge the dispensary license issue because the Commission did not revoke Hippocratic's preapproved status to operate a dispensary. In fact, the opposite is true. During oral argument, appellants conceded that Hippocratic has completed Stage 2 of the licensing process and opened a dispensary at another location in Queen Anne's County.

regulations[.]" *Evans v. Burruss*, 401 Md. 586, 605 (2007); *see also City of Bowie v. Prince George's County*, 384 Md. 413, 440 (2004) (explaining that a ministerial act is one that is "objective in nature," while defining discretion as "the power conferred upon [a public official] by law to act officially under certain circumstances according to the dictates of their own judgment and conscience, and uncontrolled by the judgment or conscience of others"). Plan approvals on which the permits depend "requires planning expertise and the exercise of a broad range of discretion." *County Council of Prince George's County v. Zimmer Dev. Co.*, 444 Md. 490, 558 (2015).

Here, medical cannabis dispensaries are not delineated in the Queen Anne's County Code. Further, the Planning and Zoning Department has yet to make a determination as to what, if anything, a dispensary would be compatible to, and whether or not it would meet the zoning requirements. This lack of certainty in the code is evidence that the zoning regulations are discretionary, not objective in nature, and it explains why appellants' council was keen on requesting written confirmation as to whether medical cannabis dispensaries would be treated similar to convenience and drug stores.

For all of these reasons, we hold that appellants did not acquire a vested property interest, nor did they have a legitimate claim of entitlement to any other cognizable constitutional interest. Therefore, we affirm the dismissal of appellants' claims as to Resolution 17-06 and Ordinance 17-06.

II. Preemption

The remaining issue raised by appellants is that Ordinance 17-06 is preempted by state legislation. Specifically, they argue that the Maryland Medical Cannabis Program's regulatory framework preempts the Ordinance by conflict and implication. Appellees respond that the preemption by conflict argument was not raised in the circuit court, but, in any event, the General Assembly did not intend to preempt local municipalities from exerting zoning control over the medical cannabis industry.

"Under our decisions, state law may preempt local law in one of three ways: 1) preemption by conflict, 2) express preemption, or 3) implied preemption." *Talbot County v. Skipper*, 329 Md. 481, 487–88 (1993) (footnotes omitted). As a general rule, "state law preempts by implication local law where the local law deal[s] with an area in which the [State] Legislature has acted with such force that an intent by the State to occupy the entire field must be implied." *Id.* at 488 (quotations and citation omitted). While there "is no particular formula for determining whether the General Assembly intended to preempt an entire area," the "primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the General Assembly has legislated in the field." *Id.* (quotations and citations omitted). "A local ordinance is pre-empted by conflict when it prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law." *Id.* at 486 n.4.

In this case, it is clear that the General Assembly did not intend to preempt the entire field of zoning law or that Ordinance 17-06 prohibits an activity that is intended to be

permitted by state law where the plain language of the regulations requires dispensaries, growers, and processors to "conform to all local zoning and planning requirements," *supra*. As such, like the circuit court, we hold that there is no preemption (express, implied, by conflict, or otherwise); that Ordinance 17-06 is valid; and it applies to 101 Drummer Drive.

Appellants do not raise any other allegation of error as to their mandamus, declaratory judgment, or injunctive relief claims; nor do we find any error in the circuit court's findings on these claims. We will, therefore, affirm the court's dismissal of appellants' second amended complaint in its entirety.

JUDGMENTS OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.