

IN THE COURT OF APPEALS 4/22/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00395 COA

BOARD OF SUPERVISORS OF JACKSON COUNTY, MISSISSIPPI

APPELLANT

v.

BUTLER SERVICES OF MISSISSIPPI, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES W. BACKSTROM

COURT FROM WHICH APPEALED: CIRCUIT COURT OF JACKSON COUNTY

ATTORNEYS FOR APPELLANT:

ROBERT H. OSWALD

KEVIN C. BRADLEY

ATTORNEYS FOR APPELLEE:

W. LEE WATT

A. KELLY SESSOMS

NATURE OF THE CASE: CIVIL -- ACTION AGAINST THE BOARD FOR INJUNCTIVE RELIEF TO PROHIBIT IT FROM RESCINDING, ALTERING, OR MODIFYING A SPECIAL USE ZONING PERMIT IT HAD PREVIOUSLY GRANTED TO BUTLER SERVICES, INC.

TRIAL COURT DISPOSITION: ENJOINED BOARD FROM RESCINDING, ALTERING, OR MODIFYING A SPECIAL USE ZONING PERMIT IT HAD PREVIOUSLY GRANTED TO

BUTLER SERVICES, INC.

EN BANC

COLEMAN, J., FOR THE COURT

The Board of Supervisors of Jackson County ("the Board") appeals from an order of the Jackson County Circuit Court which enjoined it from rescinding, modifying, or altering a special zoning exception that it had previously granted to Butler Services of Mississippi, Inc. ("Butler"). This Court finds that the circuit court erred when it so enjoined the Board and therefore vacates that order and renders judgment for the Board.

I. FACTS

On July 25, 1969, pursuant to the authority which the predecessor of Section 17-1-11 of the Mississippi Code of 1972 granted it, the Board adopted a zoning ordinance for Jackson County. During the latter part of 1991, Butler applied to the Jackson County Planning Commission ("the Commission") for a special exception "to construct lined land treatment cells for processing drilling muds to remove salt water and related fluids and permit to excavate as necessary." These drilling muds consisted of earth, saltwater, lubricants and various minerals that had either been utilized or encountered during the oil drilling process. The treatment facility was to be located on a parcel of land which was within an area that had been zoned for agricultural use. Butler had obtained a permit from the Mississippi Department of Environmental Quality in 1985 to pump these drilling materials under ground as part of Butler's "land farming operation," which the Jackson County Zoning Ordinance permitted.

The special exemption which Butler requested applied to only one hundred and sixty acres of its land, all of which it had leased. Butler proposed to construct twenty lined land treatment cells, each to contain five acres and to be fully lined, on these 160 acres. Butler intended to dump the drilling muds from well-drilling activity into these treatment cells as a part of its process of rendering them environmentally benign. Not one of these drilling substances had been classified as a "hazardous" material by any governmental agency. On December 18, 1991, after a full public hearing on the matter, the Commission denied Butler's application for the special exception.

Butler appealed the Commission's denial of its application to the Board. On March 2, 1992, the Board reversed the Commission's denial and granted Butler the special exception. There was no appeal taken from the Board's decision to the Jackson County Circuit Court as permitted by Section 11-51-75 of the Mississippi Code of 1972.

More than one year later, in November, 1993, a group of landowners known as the East Jackson County Association of Concerned Citizens ("EJCACC") appeared before the Board. EJCACC's members owned land within the vicinity of Butler's proposed facility and they opposed the construction of Butler's facility for the treatment of the drilling muds. As a consequence of EJCACC's appearance, the Board purported to remand the matter of Butler's special exception to the Commission for its "reconsideration." After the remand to the Commission, EJCACC submitted

its request that Butler's special exception be revoked directly to the Commission. On December 15, 1993, the Commission went into executive session to consider EJCACC's request and, after the end of that session, unanimously decided to take no further action on EJCACC's request to revoke Butler's special exception. It then adjourned its meeting.

On December 28, 1993, EJCACC filed its notice of appeal of the Commission's December 15, 1993, decision, to the Board. As a result, the Board scheduled a public hearing for February 14, 1994, to hear EJCACC's appeal. On February 10, 1994, Butler submitted to the Board its Response and Objections to Hearing.

II. Litigation

On February 11, 1994, without waiting for the Board's reaction to its Response and Objections to Hearing, and before the Board conducted its hearing scheduled for February 10, Butler filed a Petition for Temporary Restraining Order, Preliminary and Permanent Injunction in the Circuit Court of Jackson County. Later that same day, the circuit court issued a temporary restraining order in which it found and adjudicated as follows:

[T]he Court . . . does find that immediate and irreparable injury, loss and damage to [Butler] may occur if the February 14, 1994, hearing before the Board . . . goes forward. Therefore, the Court orders that the Board be temporarily restrained from altering or reconsidering the Special Exception granted to Butler Services until further order of this Court. This Order does not restrict in any way public access to the Board . . . and specifically does not restrict comment or discussion on the subject of [Butler] and/or its Special Exception.

The circuit judge who issued the TRO then ordered that "a consolidated hearing on the Preliminary and Permanent Injunction will be on Friday, February 18, 1994, at 1:30 p.m."

On February 14, the EJCACC filed their Motion for Joinder and/or Leave to Intervene. As the result of EJCACC's motion to intervene, on February 18, 1994, the circuit court entered an order by which it extended the original period of the temporary restraining order by an additional ten days to March 3. On March 1, 1994, the circuit court denied EJCACC's motion to intervene. That same day, the circuit court rendered its order by which it permanently enjoined the Board from taking any action to rescind, alter, modify or abridge Butler's special exception. In that order, the circuit court found, opined, and adjudicated as follows:

1. That on or about March 2, 1992, the Board . . . approved a Special Exception (PC #2150) for [Butler].
2. That no appeal of the grant of the Special Exception was perfected within the time allowed by law; thus, the Board[']s . . . decision granting the Special Exception is a valid and binding judgment and not subject to collateral attack.
3. That although the Board . . . has broad statutory authority over local zoning matters, including hearing comment or discussion by the general public as to all local zoning

concerns, it is without jurisdiction in this matter to take any action to rescind alter, modify, or abridge the Special Exception previously granted to [Butler].

4. That the Board . . . is not prohibited from taking any lawful action with respect to the Special Exception previously granted to [Butler].

5. That should the board . . . decide to take any action with respect to the Special Exception of [Butler], it must do so in accordance with the applicable law and follow the appropriate legal procedures in seeking a review of [Butler's] constitutionally protected property rights.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Board . . . shall be, and hereby is permanently enjoined, subject to the provisions of the above paragraphs four and five, from taking any action to rescind, alter, modify, abridge, or otherwise affect [Butler's] Special Exception (PC# 2150).

SO ORDERED, this the 1st day of March, 1994.

The circuit court found that because no appeal had been taken from the Boards's original grant of the special exception to Butler on March 2, 1992, Butler's special exception should be accorded the finality of a final judgment. The circuit court then concluded that Butler received a vested property interest in its special exception. The Board now appeals from this final order, which the circuit court rendered on March 1, 1992, and entered the next day on March 2, 1994.

III. ISSUES

Quoted verbatim from the Board's appellate brief, the issues the Board raises are the following:

I. Whether a board of supervisors can take action to alter, amend, modify or rescind a previously granted special exception.

II. Whether the granting of a special exception by a board of supervisors, pursuant to a county zoning ordinance, creates a vested property right in the grantee.

III. Whether a circuit court can enjoin the actions of a board of supervisors exercised in their judicial capacity.

IV. Consideration and Resolution of the Issues

The first two issues raised by the Board involve the merits of the controversy. The Board argues that it had the statutory authority pursuant to Section 17-1-11 of the Mississippi Code of 1972 to rescind or alter Butler's special exception. In response, Butler first argues that the Board had no legal

authority to modify or to rescind its special exception. It then asserts that had the Board taken action to modify or to rescind its special exception, that action by the Board would have abridged Butler's constitutionally protected property interests in its special exception. Butler's argument rests on the proposition that the Board's original grant of a special exception on March 2, 1992, was a judicial or quasi-judicial act. Thus, Butler argues that when no appeal was taken within the ten days following the Board's March 2, 1992, pursuant to Section 11-51-75 of the Mississippi Code, the special exception became something akin to a final judgment which should be given a *res judicata* effect. Butler contends that this finality of the Board's grant of the special exception on March 2, 1992, created a protected property interest in the special exception which the Board had no legal authority to rescind or alter. Butler cites numerous authorities from both this and other jurisdictions to support its argument on this issue. *See, e.g., Gatlin v. Cook*, 380 So. 2d 236, 237-238 (Miss. 1980); *Shannon Chair Co. v. City of Houston*, 295 So. 2d 753, 754-55 (Miss. 1974); *State, ex rel. Casale v. McLean*, 569 N.E.2d 475, 477 (Ohio 1991); *Morton v. Mayor and Council of Township of Clark*, 245 A.2d 377, 381-86 (N.J. Super. Ct. Law Div. 1968); *Black v. Westside Development Co.*, 126 S.E. 2d 901, 902 (Ga. Ct. App. 1962).

Notwithstanding our recitation of the foregoing summary of the litigants' arguments on the first two issues, this Court finds that the third issue: "Whether a circuit court can enjoin the actions of a board of supervisors exercised in their judicial capacity," disposes of this appeal without our having to resolve the first two issues. In other words, was the injunction that the circuit court issued against the Board in the case *sub judice* the correct remedy for Butler to pursue?

The Mississippi Supreme Court answered that question, "No," in *Moore v. Sanders*, 558 So. 2d 1383 (Miss. 1990). In *Moore*, Robert E. Moore was elected to the Leflore County Board of Supervisors from that county's second district. *Id.* at 1383. After Moore had been elected, the Leflore County Election Commissioner from the second district filed a complaint with the Leflore County Board of Supervisors in which he alleged that Moore had moved out of the second district. *Id.* After a foray into the United States District Court to seek injunctive relief to prohibit the Leflore County Board of Supervisors from acting on the election commissioner's complaint, that court abstained from removing Moore from office and dismissed his complaint for injunctive relief. *Id.* After the United States District Court dismissed Moore's suit, the board of supervisors conducted a full evidentiary hearing on the matter of whether Moore was a resident of the county's second district. *Id.* The board of supervisors ruled that Moore was indeed no longer a resident of the second district and declared Moore's office to be vacant. *Id.*

As did Butler in the circuit court in the case *sub judice*, Moore filed a complaint for injunctive relief in the Leflore County Chancery Court, which ultimately denied his complaint after a hearing on its merits. *Id.* at 1384. On appeal, the Leflore County Board of Supervisors argued that the real issue in the case was "whether the Chancery Court had jurisdiction when there are adequate remedies at law available, specifically appeal of the decision to the Circuit Court under [Section 11-51-75 of the Mississippi Code of 1972]." *Id.* The Mississippi Supreme Court affirmed the chancellor's denial of Moore's request for injunctive relief. That court both explained and opined:

Plaintiff bears the burden of showing the prerequisites for obtaining the extraordinary relief of preliminary injunction *Inadequacy of the remedy at law is the basis upon which the power of injunction is exercised.* V. Griffith, Mississippi Chancery Practice, § 434 (2

ed. 1950). Injunction will not issue when the complainants have a complete and adequate remedy by appeal. Id. § 436. [Section 11-51-75 of the Mississippi Code of 1972] provides that any person aggrieved by a decision of the board of supervisors may appeal to the circuit court. *This is an adequate remedy at law*, which Moore in fact pursued. *See Havens v. Brown*, 132 Miss. 747, 96 So. 405 (1923) (Appellees sought an injunction restraining the collection of a school tax fixed by the board of supervisors. In denying injunctive relief, the court noted that no appeal to the circuit court, as provided by statute, was taken); *Biloxi-Pascagoula Real Estate Board v. Miss. Regional Housing Authority*, 231 Miss. 89, 94 So. 2d 793 (1957) (Suit to enjoin housing authority from constructing public housing was dismissed as a collateral attack on a board resolution from which no appeal was taken); *Stone, State Tax Comm. v. Kerr*, 194 Miss. 646, 10 So.2d 845 (1943) (Injunctive relief denied where statute provides that the circuit court shall have jurisdiction in an action to recover any tax improperly collected).

It is clear that the statutory method of appeal to the circuit court afforded Moore a plain, adequate, speedy, and complete remedy for a judicial determination of his right. Therefore the action of the chancery court in denying Moore's request for injunctive relief is affirmed.

Moore, 558 So. 2d at 1385 (some citations omitted) (emphasis added).

In the case *sub judice* we think it equally clear that "the statutory method of appeal to the circuit court afforded [Butler] a plain, adequate, speedy, and complete remedy for a judicial determination of [its right to continue to have its special exception]. *See Moore*, 558 So. 2d at 1385.

Had the Board in the case *sub judice* met and either rescinded or altered Butler's special exception, Section 11-51-75 of the Mississippi Code of 1972 gave Butler ten days within which to appeal the Board's decision to the Circuit Court of Jackson County. In its appeal, Butler could then have raised the issues which are also contained in this appeal, *i. e.* whether the Board had the power to alter, amend, modify, or rescind its previously granted special exception and whether Butler had a property interest in its special exception of such magnitude as to warrant due process protection under the constitution. Moreover, additional issues might well arise in the course of the Board's hearing of the EJCACC's complaint to rescind Butler's special exception such as whether that organization had standing to complain of the Board's grant of the special exception.

V. Conclusion

Injunctive relief is available only in the absence of an adequate remedy at law. The burden of persuasion that no remedy at law is adequate rests on the plaintiff who seeks injunctive relief. The Mississippi Supreme Court has held that an appeal of a board's decision to the circuit court pursuant to Section 11-51-75 of the Mississippi Code of 1972 affords an adequate remedy of law for those persons who are aggrieved by the decision reached by a board of supervisors. We hold that Section 11-51-75 of the Mississippi Code of 1972 provided Butler an adequate remedy of law. Therefore, the

circuit judge erred when he enjoined permanently the Board "from taking any action to rescind, alter, modify, abridge, or otherwise affect [Butler's] Special Exception (PC# 2150)." Thus, we reverse the circuit court's final order dated March 1, 1994, and rendered March 2, 1994, by which it enjoined permanently the Board of Supervisors "from taking any action to rescind, alter, modify, abridge, or otherwise affect [Butler's] Special Exception (PC# 2150)" and render judgment for the Board of Supervisors of Jackson County.

THE ORDER WHICH THE CIRCUIT COURT OF JACKSON COUNTY RENDERED ON MARCH 1, 1994, AND ENTERED ON MARCH 2, 1994, BY WHICH IT PERMANENTLY ENJOINED THE BOARD OF SUPERVISORS "FROM TAKING ANY ACTION TO RESCIND, ALTER, MODIFY, ABRIDGE, OR OTHERWISE AFFECT [BUTLER'S] SPECIAL EXCEPTION (PC# 2150)" IS REVERSED AND RENDERED. COSTS ARE ASSESSED TO APPELLEE, BUTLER SERVICES OF MISSISSIPPI, INC.

McMILLIN AND THOMAS, P.JJ., DIAZ, KING, AND SOUTHWICK, JJ., CONCUR.

HERRING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, C.J., AND PAYNE, J.

HINKEBEIN, J., NOT PARTICIPATING.

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HERRING, J., DISSENTING:

With deference to my colleagues, I must dissent. In its conclusion, the majority states that "[i]njunctive relief is available only in the absence of an adequate remedy at law." As stated by the textwriter:

[T]he substantive prerequisites for obtaining an equity remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend upon traditional principles of equity jurisdiction.

11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2941 (1973). *See also* the comment to Mississippi Rule of Civil Procedure 65, which essentially says the same thing, and also states:

The circumstances in which a preliminary injunction may be granted are not prescribed by these rules; the grant or denial of a preliminary injunction remains a matter for the trial court's discretion, exercised in conformity with traditional equity practice.

Indeed,

Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the Court's discretion.

11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2942 (1973). *See also* *Stringer v. United States*, 471 F.2d 381, 384 (5th Cir. 1973), *cert. denied*, 93 S. Ct. 2775, 412 U.S. 943, 376 L.2d 404. A case frequently cited by both state and federal courts as setting forth the basic guidelines to consider prior to the issuance of a preliminary injunction is *Canal Auth. of State of Florida v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974), which states:

The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not deserve the public interest.

See also America Elec. v. Singarayar, 530 So. 2d 1319, 1324 (Miss. 1988), which cites *Canal Authority* and endorses the weighing of the four factors mentioned above, prior to the issuance of a preliminary injunction. It is noteworthy that our supreme court went on to make reference to Mississippi Rule of Civil Procedure 65, and stated: "As Rule 65 had been derived in concept and wording from prior federal practice, we flesh out our rule by reference to federal standards. *Bourn v. Tomlinson Interest, Inc.*, 456 So. 2d 747, 749 (Miss. 1984); *Foster v. State*, 508 So. 2d 1111, 1117 (Miss. 1987)."

The factors to be balanced in determining whether to grant a preliminary injunction are in many respects similar to those to be considered in determining whether to issue a permanent injunction. 11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2942 (1973). While the majority is generally correct in stating that injunctive relief should be denied if there exists an adequate remedy at law, nevertheless, the four factors mentioned above should be weighed and balanced prior to a determination being made as to whether the proposed legal remedy is adequate.

Although the fundamental fairness of preventing irremediable harm to a party is an important factor on a preliminary injunction application, the most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.

Id. § 2947.

Our supreme court has not been reluctant to authorize actions seeking injunctive relief against public bodies where potential irreparable harm or the public interest is involved. For example, *see Canton Farm Equip., Inc. v. Richardson*, 501 So. 2d 1098, 1102, 1103 (Miss. 1987), where a challenge was made in chancery court by a heavy equipment vendor to a rejection by board of supervisors of a low bid for the sale to the county of two backhoes. The supervisors moved to dismiss on the ground that the plaintiff had "a full and adequate remedy at law," pursuant to Section 11-51-75 of the Mississippi Code of 1972. After the trial court agreed with the supervisors and dismissed the action, the supreme court reversed and held that the equipment dealer could maintain an equitable action against the county to require the county to accept the bid of the plaintiff for sales to the county of two backhoes. In *Robinson v. Indianola Mun. Separate Sch. Dist.*, 467 So. 2d 911, 918 (Miss. 1985) the chancellor denied injunctive relief against a state school district on the ground of sovereign immunity. Once again, the supreme court reversed, holding:

[A] private individual cannot ordinarily maintain an action with respect to the enforcement of a zoning regulation, except where the use constitutes a nuisance per se or the individual has suffered or is threatened with special damage, i.e., injury or threat of injury of a special or peculiar nature amounting to a private wrong affecting his personal or property rights.

Robinson, 467 So. 2d at 918. *See also* 101-A C.J.S. *Zoning and Land Planning* § 344(b) (1954).

Moreover, in *Kynerd v. City of Meridian*, 366 So. 2d 1088 (Miss. 1979), the supreme court held that a governmental body was bound by its own zoning ordinance and was required to follow its ordinance in granting a variance to a special exception, including proper public notice. *See also Noble v. Scheffler*, 529 So. 2d 902, 907 (Miss. 1988).

Thus, it is clear that injunctive relief is available to curtail the activities of governmental bodies in zoning matters under certain circumstances. In the present case, the Appellee spent hundreds of thousands of dollars in pre-construction activities, after receiving its special exception, without objection and after a public hearing held over one and one-half years prior to the protestations of adjoining landowners.

In this situation, the trial court obviously concluded that irreparable harm would have been sustained by plaintiff if the injunction had not been issued and that plaintiff's due process rights had been violated. In my opinion, Section 11-51-75 does not provide an adequate remedy at law in this action, especially since the Appellant had already received its special exception to the zoning ordinance, and relied heavily upon it, long before the board of supervisors attempted to "remand" the action to its planning commission for reconsideration. In other words, the board acted *ultra vires* in an attempt to reconsider its original decision, rather than entertaining a new action brought by the landowners. *See generally* 101A C.J.S. *Zoning and Land Planning* § 190 (1954). Moreover, the action of the circuit court, while characterized as an injunction, might best be described as an old *writ of prohibition*, which is granted when an inferior tribunal or quasi-judicial body is acting without, or in excess of its authority. 73 C.J.S. *Prohibition* § 22 (1954). *See also* M.R.C.P. § 81(e); *Gatlin v. Cook*, 380 So. 2d 236, 238 (Miss. 1980).

BRIDGES, C.J., AND PAYNE, J., JOIN THIS SEPARATE WRITTEN OPINION.