IN THE SUPREME COURT OF MISSOURI

No. SC 86741

FURLONG COMPANIES, INC.

Respondent,

v.

CITY OF KANSAS CITY, MISSOURI,

Appellant.

Appeal from the Circuit Court of the County of Jackson

Division No. 4

The Honorable Justine E. Del Muro

BRIEF AMICUS CURIAE OF MISSOURI MUNICIPAL LEAGUE

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INTEREST OF AMICUS CURIAE

The Missouri Municipal League is an association of approximately 635 municipalities in the State of Missouri. The Municipal League provides a vehicle for cooperation in formulating and promoting municipal policy at all levels of government to enhance the welfare and common interests of municipalities' citizens.

The Municipal League believes that the Court's decision in this case could have a serious impact on the way municipalities go about approving preliminary and final subdivision plats, and the way that plat applicants and members of the public participate in that process. This brief is being filed with the consent of all parties.

JURISDICTIONAL STATEMENT

Amicus Curiae Missouri Municipal League adopts the jurisdictional statement of Appellant City of Kansas City.

STATEMENT OF FACTS

Amicus Curiae Missouri Municipal League adopts the statement of facts of Appellant City of Kansas City.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE IT EXCEEDED ITS SCOPE OF REVIEW BY HEARING THE PROCEEDING DE NOVO IN THAT REVIEW OF A PLAT APPLICATION DENIAL IS LIMITED TO THE INFORMATION PRESENTED TO THE DECIDING BODY.

State ex rel. Westside Dev. Co., Inc. v. Weatherby Lake, 935 S.W.2d 634 (Mo. App. W.D. 1997)

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST THE CITY OF KANSAS CITY ON RESPONDENT'S SUBSTANTIVE DUE PROCESS CLAIM BECAUSE MERE VIOLATIONS OF STATE OR LOCAL LAW CANNOT SUPPORT SUCH A CLAIM IN THAT FAILURE TO APPROVE A PRELIMINARY PLAT IS, AT MOST, AN IMPROPER APPLICATION OF THE CITY'S SUBDIVISION ORDINANCES.

Snowden v. Hughes, 321 U.S. 1, 11, 64 S.Ct. 397, 402, 88 L.Ed. 497 (1944)

Frison v. City of Pagedale, 897 S.W.2d 129, 132 (Mo. App. 1995)

Heritage Development of Minn., Inc. v. Carlson, 269 F. Supp.2d 1155 (D. Minn. 2003)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE IT EXCEEDED ITS SCOPE OF REVIEW BY HEARING THE PROCEEDING DE NOVO IN THAT REVIEW OF A PLAT APPLICATION DENIAL IS LIMITED TO THE INFORMATION PRESENTED TO THE DECIDING BODY.

The trial court erred in conducting a trial *de novo* on Appellant Furlong Companies, Inc.'s ("Furlong") mandamus claim. The court's basis for conducting a trial *de novo* was the erroneous conclusion that Respondent's consideration of Furlong's plat was a noncontested case under the Missouri Administrative Procedure Act ("MAPA"), Ch, 536, RSMo. See Order of Mandamus, dated November 29, 2000 at 1. L.F. 40-41. While this claim was brought as an action seeking a writ of mandamus to compel the Respondent, City of Kansas City, Missouri ("City"), to approve Furlong's preliminary plat, Appellant's First Amended Petition did not seek review under Section 536.150, RSMo. L.F. 8-34.

Mandamus is a remedy used to enforce an established legal right by compelling a public agency to perform a duty required by law. 24 Mo. Practice Series § 12.2 *Mandamus* (West 2001). Characterized as an "extraordinary remedy," mandamus is only appropriate for compelling ministerial actions. See State ex rel. Menkhus v. City of Pevely, 865 S.W.2d 871 (Mo. App. W.D. 1993). Mandamus will not lie to compel the performance of a discretionary act, thus, the threshold issue before the trial court should

have been whether the City could exercise discretion in approving the proposed plat, or whether approval was simply a ministerial act at this stage of the process. See id. at 873. Missouri courts have held that a writ of mandamus is a proper remedy for an individual aggrieved by the denial of a subdivision plat. See e.g., State ex rel. Schaefer v. Cleveland, 847 S.W.2d 867 (Mo. App. E.D. 1992). Once the deciding body has determined that a preliminary plat meets subdivision requirements, that body is without discretion to deny the proposed plat. State ex rel. Westside Dev. Co., Inc. v. Weatherby Lake, 935 S.W.2d 634, 639 (Mo. App. W.D. 1997) (citing Schaefer, 847 S.W.2d at 873). Nevertheless, the deciding body has "considerable discretion in determining whether the subdivision plat meets the standards established by the ordinance." Id. at 640 (citing Schaefer, 847 S.W.2d at 873 and Menkhus, 865 S.W.2d at 874).

Mandamus is not used to adjudicate, but rather to enforce a right already established. State ex rel. Missouri Growth Ass'n v. State Tax Comm'n, 998 S.W.2d 786 (Mo. banc 1999). Therefore, a trial de novo and the taking of additional evidence (evidence which may not have been before the deciding body) goes beyond the court's role with regard to review of the approval or denial of a subdivision plat. When the deciding body has "considerable discretion" to determine whether a submitted preliminary plat meets the ordinance requirements, a writ of mandamus will lie only where the applicant established a legal right to approval before the deciding body by presenting sufficient evidence to the deciding body to show that all requirements of the subdivision ordinance were met. If the court permits the introduction of evidence at trial

that is not presented to the deciding body, the review of that evidence constitutes the exercise by the court of its own "considerable discretion" on whether the subdivision ordinance requirements are met. In essence, the court is not reviewing whether the applicant has established a legal right to approval but whether the applicant can, to the trial court's satisfaction, establish a legal right to approval. Since mandamus is used to execute and to adjudicate, in the context of plats, it follows that a court's review of whether the plat meets the city's subdivision ordinance requirements must be limited to only the information that was before that city's deciding body at the time that decision was made.

This result obviates the need for this Court to decide whether a review of a decision on a subdivision plat, based on the information before the deciding body, must proceed under the Missouri Administrative Procedure Act, either as a contested case or a noncontested case. An action in mandamus is authorized both under the Administrative Procedure Act (Section 536.150) and outside of the Administrative Procedure Act (Ch. 529 and Rule 94). The Municipal League requests that this Court declare that the Missouri Administrative Procedure Act does not apply in this case and that a court's scope of review in mandamus proceedings involving plats is limited to the information that was before the deciding body. See Weatherby Lake (involving a non-Chapter 536 mandamus proceeding to compel the approval of a preliminary subdivision plat). The mere fact that a local government provides an opportunity for citizen input in the decision-making process does not convert the proceeding into a contested case.

Moreover, the Municipal League submits that subdivision plats should also not be treated as noncontested cases because the *de novo* review does not properly account for and respect the deciding body's "considerable discretion" of whether a plat satisfies the requirements and criteria set forth in that entity's subdivision ordinance for plats.

Missouri cases considering a request for mandamus for subdivision plat approval do so without applying MAPA. See e.g., State ex rel. Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972); State ex rel. Westside Dev. Co., Inc. v. Weatherby Lake, supra, State ex rel. Barth Dev. Co., Inc. v. Platte County, 884 S.W.2d 95 (Mo. App. W.D. 1994); State ex rel. Menkhus v. City of Pevely; State ex rel. Schaefer v. Cleveland; State ex rel. Forget v. Franklin County Planning and Zoning Comm'n, 809 S.W.2d 430 (Mo. App. E.D. 1991); Basinger v. Boone County, 783 S.W.2d 496 (Mo. App. W.D. 1990). True, "[r]eview by mandamus . . . under Section 536.150 [is] 'more flexible and adaptable than their common-law predecessors' because the court is allowed 'to hear evidence and to determine the facts relevant to the question at issue.'" I Administrative Law, §7.25 *Statutory Mandamus and Prohibition* (MoBar 3d ed. 2000). However, as noted above, Furlong's Petition did not seek review under Section 536.150, RSMo. Consequently, the trial court erred when it applied the MAPA noncontested case standard of review and conducted a trial *de novo* on Furlong's mandamus action.

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST THE CITY OF KANSAS CITY ON RESPONDENT'S SUBSTANTIVE DUE PROCESS CLAIM BECAUSE MERE VIOLATIONS OF STATE OR LOCAL LAW CANNOT SUPPORT SUCH A CLAIM IN THAT FAILURE TO APPROVE A PRELIMINARY PLAT IS, AT MOST, AN IMPROPER APPLICATION OF ONLY THE CITY'S SUBDIVISION ORDINANCES.

The trial court used the following standard to evaluate substantive due process claims in its Judgment dated November 19, 2002: "[i]n order to assert a substantive due process claim, plaintiffs "must establish that the government action complained of is `truly irrational', that is, something more than . . . arbitrary, capricious, or in violation of state law." L.F. 42-47 (Judgment (emphasis added) (citing Frison v. City of Pagedale, 897 S.W.2d 129, 132 (Mo. App. 1995)).

By Frison's own language, government action that is only a violation of state law cannot rise to the level of truly irrational. Furlong's suit sought to compel the City to approve its preliminary plat. Even if the writ of mandamus was properly issued, Furlong has still only established that the City failed to follow its ordinances in considering/approving a preliminary plat. Whether that failure was rational or irrational, or made in good-faith or in bad-faith is simply not relevant or sufficient to support a substantive due process violation.

The trial court's statement in its November 19, 2002 Judgment that ". . . the court finds the city's conduct to be more than a mere violation of the law but that the action of

the City rose to the level of truly irrational" bootstraps state or local law violations into federal due process violations. L.F. 42-47. It is well-settled, however, that the mere violation of a state or local law does not constitute a federal due process violation. Snowden v. Hughes, 321 U.S. 1, 11, 64 S.Ct. 397, 402, 88 L.Ed. 497 (1944); Swenson v. Trickey, 995 F.2d 132, 135 (8th Cir. 1993) ("[Plaintiff] may not base his § 1983 claim on a violation of the state statute . . . ."); Rozman v. City of Columbia Heights, 268 F.3d 588, 593 (8th Cir. 2001) (en banc) ("misapplication of the City Code does not give rise to a federal substantive due process claim."); Bagley v. Rogerson, 5 F.3d 325, 328 (8th Cir. 1993) ("We have held several times that a violation of state law, without more, does not state a claim under the federal Constitution or 42 U.S.C. § 1983."); Marler v. Missouri State Bd. of Optometry, 102 F.3d 1453, 1457 (8th Cir. 1996) ("We have stated many times, however, that a violation of state law, without more, does not state a claim under the federal Constitution or 42 U.S.C. § 1983."); Meis v. Gunter, 906 F.2d 364, 369 (8th Cir. 1990) (en banc); Smith v. City of Piscayune, 795 F.2d 482, 487 (5th Cir. 1986) ("Converting alleged violation of state law into federal . . . due process claims improperly bootstraps state law into the Constitution."); Morris v. City of Danville, 744 F.2d 1041, 1048 n.9 (4th Cir. 1984) ("We do note, however, that the mere fact that a state agency violates its own procedures does not, *ipso facto*, mean that it has contravened federal due process requirements."); Harris v. Birmingham Bd. of Edu., 817 F.2d 1525 (11th Cir. 1987) ("the violation of a state statute outlining procedure does not necessarily equate to a due process violation under the Federal Constitution."); Cedar Hill Manor v.

Department of Social Services, 145 S.W.3d 447, 451-52 (Mo. App. W.D. 2004) (citing with approval the rule and Snowden v. Hughes).

Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992), is instructive. The case involved the city's adoption of a comprehensive plan and zoning ordinance shortly after the city was incorporated in 1988. The ordinance was invalid because it was adopted at a hearing held thirteen days after notice of the hearing was published instead of fifteen days as required by state law. The plan was invalid because it was not filed with the Recorder of Deeds Office. The City was not aware of the invalidity when it processed a rezoning petition submitted by the plaintiff developer. The developer wanted to buy certain property contingent on the city rezoning it to allow a proposed shopping center. The city denied the request.

The developer then filed suit against the city, its mayor and city council members alleging that they violated its substantive due process rights by enforcing an invalid zoning ordinance against it. The developer further argued that due to the invalidity, the property was not subject to zoning, and the city could not have restricted its development.

The 8th Circuit affirmed the trial court's dismissal for failure to state a claim because a violation of state law - failure to file the plan and give proper notice – does not give rise to a constitutional due process claim. But the court did not stop there. It went on to state that the result would have been the same even if the city knew that the zoning ordinance was invalid and that the previous county zoning did not apply:

> A bad-faith violation of state law remains only a violation of state law. Consequently, we reject the Corporation's assertion that the City's

> enforcement of an invalid zoning ordinance is the kind of "truly irrational" governmental action which gives rise to a substantive-due-process claim. This does not mean that the conduct alleged is not actionable under state law, still less that we approve of it. It means only that no right created by the Due Process Clause of the Fourteenth Amendment has been violated.

Id. at 1105.

This case demonstrates just how firm this well-settled rule is that violating state or local law does not give rise to a due process claim.

The general rule stated in City of Chesterfield and other decisions was followed recently by a federal district court in Minnesota in a case involving the denial of a preliminary plat application. Heritage Development of Minn., Inc. v. Carlson, 269 F. Supp.2d 1155 (D. Minn. 2003). In that case, a city council denied a preliminary plat application. The developer sued the city, arguing that the denial was improper and included a claim for federal substantive due process violation, just like Furlong has done in this case. The court first established that the denial was not improper for reasons based upon certain traffic concerns. What is most important, however, is how the district court would have applied the general rule stated above had the denial been based on improper traffic concerns: "It is important to note that, even if the City Council's denial was premised on an incorrect interpretation or application of law, such a mistake does not rise to the level of a constitutional claim. See, Rozman v. City of Columbia Heights, 268 F.3d 588, 593 (8th Cir. 2001) (en banc) (a misinterpretation or misapplication of a city code does not give rise to a federal substantive due process claim)." 269 F. Supp.2d at 1161.

Here, Furlong filed suit after the City disapproved its preliminary plat application, seeking in part a writ of mandamus compelling the City to approve the plat. Furlong also included a claim for violation of its substantive due process rights as a result of the City's failure to approve the plat. To accept the argument that the City's failure to properly consider a plat under its subdivision ordinance results in the denial of federal constitutional rights is to create constitutional rights out of whole cloth.

Accordingly, this Court should follow the rule of law set forth by the U.S. Supreme Court, and applied in a factually analogous situation in Heritage Development of Minn., Inc. v. Carlson, supra, and hold that failure to approve a preliminary plat is, at most, a violation of state or local law and therefore cannot form the basis of a substantive due process violation.

CONCLUSION

For the foregoing reasons, Amicus Curiae Missouri Municipal League respectfully urges this Court to reverse the trial court's decision. The trial court erred by conducting a de novo proceeding on Respondent's non-Ch. 536 mandamus request and in entering judgment against Appellant on the substantive due process claim. This Court may correct these errors by entering the order the trial court should have entered, Rule 84.14, or remand to the trial court for entry of appropriate orders.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Paul A. Campo, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman, size 13 font, excluding the cover page, the signature block, this Certificate of Compliance and Service and the Appendix, the brief contains 3,210 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using McAfee Virus Scan Program. According to that program, this disk is virus-free.

Two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief were mailed postage pre-paid on the 11th day of July, 2005 to:

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