IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 9, 2007 Session

CONSOLIDATED WASTE SYSTEMS, L.L.C. v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

Appeal from the Circuit Court for Davidson County
No. 01C895 Walter C. Kurtz, Judge

No. M2006-01345-COA-R3-CV - Filed November 29, 2007

The developer of a "construction and demolition" landfill appeals the denial of its application for a permit to construct the landfill. When the developer first applied for a permit in 1999 to develop the landfill, the Metropolitan Government denied the application based upon two zoning ordinances. In the lawsuit that ensued, the trial court found the ordinances unconstitutional. In the appeal that followed, this Court affirmed the trial court and issued a stay of 150 days to afford the Metropolitan Government the opportunity to cure the constitutional infirmities. The Metropolitan Government timely amended one of the ordinances in 2003, but not the other ordinance, believing the amendment to that ordinance cured the constitutional infirmities identified in the first appeal. Following the post-remand amendments to the ordinance, the developer renewed its request for a permit to construct the landfill. The Metropolitan Government again denied the permit, this time stating the landfill would violate Section 17.16.110(A)(2) of the Metro Code because the property was zoned in a district that permitted construction and demolition landfills with "conditions" and the proposed landfill did not meet the requisite conditions for two reasons. The landfill was within 100 feet of a property line for a residential area, and it was within 2000 feet of a park. Believing the Metropolitan Government had not cured the constitutional infirmities, the developer filed a motion to compel the Metropolitan Government to issue the twice-requested permit. After analyzing the two relevant ordinances and this court's opinion in the first appeal, the trial court concluded that the Metropolitan Government had cured all constitutional infirmities. It also concluded that the proposed landfill did not meet the requisite conditions for the reasons stated by the Metropolitan Government, and thus, affirmed the denial of the permit. We have determined, as the trial court did, that the Metropolitan Government cured the constitutional infirmities and find no error with the determination that the plaintiff did not meet the requisite conditions for a construction and demolition landfill. Accordingly, we affirm.

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

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., joined. WILLIAM B. CAIN, J., did not participate.

James L. Murphy, III and Colin J. Carnahan, Nashville, Tennessee, for the appellant, Consolidated Waste System, LLC.

Thomas G. Cross and Lora Barkenbus Fox, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville and Davidson County.

OPINION

This is the second appeal of a dispute between a developer of a landfill, Consolidated Waste Systems, L.L.C., and the Metropolitan Government of Nashville, Davidson County, Tennessee. The dispute arises from the denial of an application for a permit to begin construction of landfill on a tract of land comprised of 138 acres situated on Cinder Road in Davidson County.

In 1999, Consolidated obtained an option to purchase the property, which was in an "Industrial Restricted" zoning district. From the beginning, Consolidated planned to develop a landfill for the disposal of construction and demolition debris on the 138 acre site. The industry classifies this type of landfill as a "construction and demolition landfill" (hereinafter a "C & D landfill"). After obtaining an option to purchase the property, Consolidated also entered into a lease on the property, which expressly authorized Consolidated to commence preparatory work for the construction of the C & D landfill.[1]

When Consolidated optioned the property it was a prime location for the development of a C & D landfill because the property was located in a zoning district that permitted a C & D landfill as a matter of right.[2] In furtherance of its plan, Consolidated applied to the Tennessee Department of Environment and Conservation ("TDEC") for a solid waste disposal facility permit on December 29, 1999. The Department issued a permit for construction of the C & D landfill on December 13, 2000.

One month prior to the submission of Consolidated's application to TDEC, the first of the two zoning ordinances at issue was introduced before the Metropolitan Council. This occurred on November 16, 1999. The proposed ordinance prohibited the development of a C & D landfill within two (2) miles[3] of a school or park. Significant to the issues presented in the first appeal, the prohibition did not pertain to all landfills, only to zoning districts where a C & D landfill was permitted as an "exception with conditions." (We refer to this ordinance as the "buffer ordinance," as it provided a buffer between a C & D landfill and schools and parks).

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[1] The lease was signed in February of 2000.

[2] The property was located in an Industrial Restricted zoning district, which meant that Consolidated could develop a C & D landfill without needing to obtain a special exception or variance.

[3] Originally the proposed buffer zone was to be three (3) miles; however, the buffer was subsequently changed to two (2) miles.

Even though the property was less than two miles from a park, the buffer ordinance, standing alone, would not have adversely impacted Consolidated's plan to develop a C & D landfill on the property. The zoning problem for Consolidated, however, arose from the combined effect of the buffer ordinance and a second ordinance that was introduced on February 1, 2000. The second ordinance – which we refer to as the "table ordinance"[4] – did two things. One, it amended the zoning table so that a C & D landfill was permissible in an Industrial Restricted zoning district only if it met certain conditions (which is a zoning protocol referred to as "permissible with conditions"). Two, C & D landfills were no longer permitted within the new two-mile buffer zone established by the buffer ordinance. Both ordinances passed in the Council on March 21, 2000 and were signed by the Mayor on March 27, 2000. Thereafter, a C & D landfill was only permissible in an Industrial Restricted zoning district *if* the landfill met certain conditions, *and* the boundary line of the property was not within the two miles of a school or park. Unfortunately for Consolidated, the property was within the prohibited range.

In October of 2000, the Metro Department of Codes Administration notified Consolidated that the proposed landfill met every requirement of applicable provisions of the zoning code but one. It was located within two miles of a park. It was because of the landfill's proximity to the park, the Codes Department explained, Consolidated would not be issued a permit for construction of the proposed C & D landfill. The October 2000 letter also stated that the proposed landfill met every other requirement of applicable provisions of the zoning code and listed those requirements.

Thereafter, Consolidated filed this action challenging the amendments to the zoning ordinances on several grounds. Those relevant to this appeal include the allegation that the ordinances constituted exclusionary zoning because, Consolidated contended, the ordinances were intended to and had the effect of precluding C & D landfills anywhere in the county, they deprived Consolidated of its interest in the property in violation of constitutional provisions requiring substantive due process, and they deprived Consolidated of equal protection of the laws. The trial court decided the issues on summary judgment. In pertinent part the trial court held that the ordinances did not constitute exclusionary zoning; however, it determined that the ordinances were facially unconstitutional as violative of substantive due process and equal protection.[5] Being dissatisfied with the ruling, the Metropolitan Government perfected an appeal to this Court on Oct. 17, 2002. In the first appeal we affirmed the trial court's finding the amended ordinances to be unconstitutional and remanded the matter for further proceedings. *See Consol. Waste Sys., LLC v.*

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[4]We refer to the ordinance as the "table" ordinance because the zoning requirements applicable to the various zoning districts are set out in a table, or grid, of intersecting rows and columns. The table was amended by the ordinance so that C & D landfills in IR zoning districts are only permitted with conditions.

[5]In the first trial, Consolidated was successful in having the trial court declare the ordinances unconstitutional as violative of substantive due process and equal protection; however, the trial court refused to grant an injunction prohibiting the enforcement of the ordinances to award damages based on the finding Consolidated had a limited interest in the property. The trial court also awarded attorney's fees to Consolidated. Both parties appealed. The Metropolitan Government appealed the award of attorney's fees and the court's holding that the ordinances were unconstitutional. Consolidated appealed the decision the ordinances did not constitute exclusionary zoning. For a thorough explanation of the relevant facts and procedures relating to the first appeal see *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville and Davidson County*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005).

Metro. Gov't of Nashville and Davidson County, No. M2002-02582-COA-R3-CV, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005) (hereinafter "*Consolidated I* ").

Following remand, the Metropolitan Government promulgated Ordinance BL2002-1173,[6] which amended the buffer ordinance, Section 17.16.110 of the Metropolitan Code, by reducing the buffer zone from "two miles" to "two thousand feet."[7] As a result of the amendment to the zoning ordinance, C & D landfills could not be located within two thousand feet of a school or park in "Permitted with Conditions" zoned districts ("PC districts"). Although the Metropolitan Government substantially amended the buffer ordinance, it did not amend the companion table ordinance.

Thereafter, Consolidated applied for a grading permit in preparation for construction of the planned C & D landfill. The application however met the same fate as the previous application, as Metro denied the requested permit in a letter dated March 7, 2006. The letter provided a detailed explanation of the reasons for the decision to deny the application. As the letter explained, C & D landfills in IR areas are only "Permitted with Conditions" and Consolidated's proposed C & D landfill did not meet the conditions. Two reasons were provided. One, the landfill was within 100 feet of a property line for a residential area. Second, the landfill would be within 2000 feet of a park. It was for these reasons, the letter explained, the proposed C & D landfill would violate Section 17.16.110(A)(2) of the Metro Code.

Following receipt of the latest denial letter, Consolidated filed a motion in the trial court to require the Metropolitan Government to issue the requested permit.[8] In support of its motion, Consolidated contended that both ordinances had been found to be unconstitutional, yet only one of the two offending ordinances had been amended; therefore, the Metropolitan Government was relying on unconstitutional provisions to deny the requested permit. In response, the Metropolitan Government argued that the buffer ordinance contained the constitutional infirmities, and all of the infirmities had been cured.

The motion to require the issuance of the permit came on for hearing before the trial court, following which the court concluded that the "constitutional infirmities were contained in Ordinance No. BL99-86," the buffer ordinance, not the table ordinance, and that the Metropolitan Government had "corrected the constitutional infirmities in the buffer ordinance." The trial court went on to conclude that the Metropolitan Government was "therefore in compliance with the declaratory judgment issued in this case." As a consequence of the above rulings, the trial court denied Consolidated's motion.

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[6]The Metro Code's citation section and the parties both reference this bill as BL2002-1173; however, the ordinance tracking legislative history documents identify the provision as BL2002-1171.

[7]The provision also applied the school and park restriction to medical waste facilities and applied a counter-restriction on the building of any park or school within 200 feet of any landfill.

[8]Consolidated first moved for contempt. The motion was denied.

Following the adverse ruling, Consolidated perfected this appeal contending: (1) the trial court erred by failing to follow the law of the case and the previous final judgment of this Court, in which we determined that the zoning ordinances at issue were unconstitutional; and (2) the trial court erred by invading the province of the legislature and impermissibly attempted to manufacture legislative action where none was taken by the legislative body.

STANDARD OF REVIEW

This appeal presents a question of law relating to the trial court's application of this Court's previous Opinion on the constitutionality of the buffer ordinance and the table ordinance. Consequently, this appeal involves only issues of law, and we review the trial court's conclusions *de novo*, with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn.1997).

ANALYSIS

Despite the extensive procedural history of this case, we are presented with two relatively straightforward issues. The first issue to be addressed is whether the previous ruling by the trial court that "the ordinances" were unconstitutional, which ruling was affirmed by this Court in the first appeal, constitutes the law of the case. If it is not the law of the case, the second issue is whether the Metropolitan Government cured the constitutional infirmities addressed in the first appeal.[9] We will first address Consolidated's "law of the case" argument.

Consolidated relies on the previous holdings in this matter that "*the ordinances* in question violate the substantive due process and equal protection guarantees in both the United States and Tennessee Constitutions" to make its law of the case argument. (emphasis added). Specifically, Consolidated contends the trial court and this court found *both ordinances* unconstitutional, that the Metropolitan Government did not amend the table ordinance following remand, and thus, the unconstitutionality of the unamended table ordinance is the law of the case, which cannot be re-litigated.

In making this argument, Consolidated places great emphasis on the holding in *Memphis Publishing Company v. Tennessee Petroleum Underground Storage Tank Board*, 975 S.W.2d 303 (Tenn. 1998). We, however, find that Consolidated's reliance on *Memphis Publishing* and the law of the case doctrine is misplaced. This is because the law of the case doctrine is not a compulsory rule nor is it without exceptions. To the contrary, it is a "discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited." *Memphis Publ'g Co.*, 975 S.W.2d at 306 (citing *Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 90 (Tenn. Ct. App. 1996). Moreover, neither

[9] Consolidated also contends the trial court erred by invading the province of the legislature by attempting to manufacture legislative action where none was taken by the legislative body. This issue is premised on the contention the trial court changes its position that the unamended table ordinance is unconstitutional. We have concluded that this issue is entirely dependent on the law of the case issue and is rendered moot by our holding herein. Thus, it is not discussed.

the trial court nor this Court made an express determination that the table ordinance standing alone was unconstitutional.

The law of the case doctrine is explained in detail in *Memphis Publishing*, which provides in pertinent part:

> The phrase "law of the case" refers to a legal doctrine which generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case. 5 Am. Jur. 2d *Appellate Review* § 605 (1995). In other words, under the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal. *Life & Casualty Ins. Co. v. Jett*, 175 Tenn. 295, 299, 133 S.W.2d 997, 998-99 (1939); *Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 90 (Tenn. App. 1996). The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that were necessarily decided by implication. *Ladd*, 939 S.W.2d at 90 (citing other authority). **The doctrine does not apply to dicta**. *Ridley v. Haiman*, 164 Tenn. 239, 248-49, 47 S.W.2d 750, 752-53 (1932); *Ladd*, 939 S.W.2d at 90.
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> The law of the case doctrine is not a constitutional mandate nor a limitation on the power of a court. 5 Am. Jur. 2d *Appellate Review* § 605 (1995); *Ladd*, 939 S.W.2d at 90. Rather, it is a longstanding discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited. *Ladd*, 939 S.W.2d at 90 (citing other cases). . . .

Memphis Publ'g Co., 975 S.W.2d at 306 (emphasis added).

The Supreme Court went on to explain that "when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand." *Id.* (citing *Miller*, *supra*, ¶ 0.404[1]). Significant to this appeal, however, the Court recognized that there are "circumstances which may justify reconsideration of an issue which was [an] issue decided in a prior appeal." *Id.* Moreover, it recognized the doctrine "*does not apply to dicta*." *Id.* (citing *Ridley v. Haiman*, 164 Tenn. 239, 248-49, 47 S.W.2d 750, 752-53 (1932); *Ladd*, 939 S.W.2d at 90) (emphasis added).

For the law of the case doctrine to apply to the constitutionality of the table ordinance, the trial court and this Court must have determined the constitutionality of the table ordinance either by express language or by implication. *See Memphis Publ'g Co.*, 975 S.W.2d at 306 (citing *Ladd*, 939 S.W.2d at 90). The scope of the trial court's initial declaratory judgment ruling on the unconstitutionality of "the ordinances," which this Court affirmed in the first appeal, is put in concise perspective by the trial court in its order following remand. In the May 26, 2004 Order, the trial court explained its initial ruling in detail. As the trial court explained:

> There were two constitutional infirmities identified by [the trial court's] declaratory judgment ruling in this lawsuit – a due process violation (*that the conditions of the buffer were irrational and arbitrary* in that a two-mile buffer distance from parks and schools was excessive) and an equal protection violation (*that the conditions of the buffer were irrational and arbitrary* because they imposed more stringent development standards on construction and demolition ("C & D") landfills than on other types of landfills likely to have similar or worse effects on health and safety). *These constitutional infirmities were contained in Ordinance No. BL99-86 (the "buffer ordinance")*, which set the impermissible conditions. *Ordinance No. BL2000-171* (*the "table ordinance*"*)*, which merely changed C & D landfills from a "permitted" use to a use "permitted with conditions", *did not contain impermissible conditions*. The Court of Appeals upheld this Court's ruling identifying the constitutional infirmities. (emphasis added).

The trial court went on to conclude that the Metropolitan Government had corrected the constitutional infirmities in the buffer ordinance and, therefore, was in compliance with the declaratory judgment issued in this case and the mandate of this Court. Moreover, and significant to the second issue, is that the trial court found that "[n]o evidence has been presented that the 'new' buffer ordinance, which sets the current conditions that construction and demolition landfills must comply with, has any constitutional defects." Finally, the trial court found Consolidated's argument that the Metropolitan Government was out of compliance with its ruling in this case because it is still using the "table ordinance," to be without merit because, as the trial court determined, the table ordinance "did not contain any constitutional defects."

Consolidated has correctly argued that this Court affirmed the trial court's previous ruling that "the ordinances" were unconstitutional. Although correct, the important fact that is missing is that the trial court's initial ruling, and our affirmance in the first appeal, was based on the combined effect of the two ordinances, not the constitutionality of the table ordinance standing alone. Significantly, the constitutionality of the table ordinance, standing alone, was not the issue in *Consolidated I* and neither this Court nor the trial court in the initial proceedings, endeavored to analyze the constitutionality of the table ordinance independent of the buffer ordinance. This is most evident from a close review of the opinion in *Consolidated I* and the trial court's order following remand.

The law of the case doctrine generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case. *See Memphis Publ'g Co.*, 975 S.W.2d at 306 (citing 5 Am. Jur. 2d *Appellate Review* § 605 (1995)). The use of the phrase "the ordinances" in *Consolidated I* notwithstanding, the constitutionality of the table ordinance standing alone was never an issue in the prior appeal. Thus, any perceived ruling as to its constitutionality, as Consolidated would contend, would be no more than dicta, and dicta cannot constitute the law of the case. *See Memphis Publ'g Co.*, 975 S.W.2d at 306 (citing *Ridley*, 47 S.W.2d at 752-53; *Ladd*, 939 S.W.2d at 90) (holding the law of the case doctrine does not apply to dicta).

The only constitutional infirmities identified in the trial court's initial declaratory judgment ruling and our affirmance of that ruling were found in the buffer ordinance. By amendment to the

buffer ordinance, the Metropolitan Government successfully removed all constitutional infirmities identified in *Consolidated I*. We therefore affirm the ruling of the trial court in all respects.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant Consolidated Waste Systems, L.L.C.

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FRANK G. CLEMENT, JR., JUDGE