No. 21-124205-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

BUTLER, KRISTEN, and BOZARTH, SCOTT
Plaintiffs,

v.

SHAWNEE MISSION SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant-Appellee.

ATTORNEY GENERAL DEREK SCHMIDT,
Intervenor-Appellant.

BRIEF OF APPELLANT ATTORNEY GENERAL DEREK SCHMIDT

Appeal from the District Court of Johnson County
Honorable David Hauber, District Judge
District Court Case No. 21-CV-2385

Brant M. Laue, #16857
Solicitor General
Office of the Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Telephone: (785) 296-2215
Fax: (785) 296-6296
E-mail: brant.laue@ag.ks.gov
Attorney for Appellant

TABLE OF CONTENTS AND AUTHORITIES

NATURE OF THE CASE

This is an appeal from a district court order finding portions of 2021 Senate Bill 40 (L. 2021, ch. 7) unconstitutional and declaring the entire bill "unenforceable." The district court inappropriately raised constitutional issues *sua sponte* after it had already determined the issues between the parties. The court then ruled on those constitutional issues even though the legal provisions at issue had expired by their own terms, thus rendering the matter moot. The district court's actions—a self-initiated constitutional controversy over moot questions resulting in a dramatically overbroad decision—were entirely improper. And they have combined to create unnecessary and disruptive confusion about the state of the Kansas Emergency Management Act, K.S.A. 48-920, et seq. The district court should be reversed.

STATEMENT OF THE ISSUES

I. Did the district court improperly raise non-jurisdictional constitutional issues *sua sponte*?

II. Is this case moot since Section 1 of SB 40 no longer has any application to the school district?

III. Is SB 40 constitutional given that political subdivisions of the State have no due process rights that may be violated by state laws and given that SB 40 does not encroach on the judicial power?

IV. If the timelines in SB 40 were unconstitutional, should they be severed from the remainder of the law, as the Legislature intended?

STATEMENT OF FACTS

Plaintiffs Kristen Butler and Scott Bozarth are the parents of children who attend schools in the Shawnee Mission School District. (R. I, 4-7.) Butler and Bozarth invoked new procedures enacted by the Kansas Legislature in SB 40 (effective March 25, 2021) only a few months earlier to seek review of the mask policy imposed by the school district in connection with the COVID-19 health emergency. Among other things, SB 40 provides procedures for those "aggrieved" by a school board policy to receive a hearing before the school board and file a civil action in district court. SB 40, § 1(c)-(d).

In an order denying relief to the plaintiffs, the district court *sua sponte* questioned the constitutionality of SB 40, specifically its requirement that a court hold a hearing within 72 hours of the filing of a petition and the provision directing that the requested relief be granted if the court did not issue an order within 7 days of the hearing. (R. II, 14-19.) The court invited the intervention of the Attorney General to address these constitutional concerns. The Attorney General intervened and filed a brief arguing that the matter was moot because of the expiration of the state of emergency, as well as defending the constitutionality of the law. (R. II, 32-37.)

On July 15, 2021, the district court issued a "Judgment and Final Order After Intervention by the Kansas Attorney General," in which it again dismissed the matter as to the plaintiffs, but the court also declared SB 40 unconstitutional and "unenforceable." (R. II, 66-92.) According to the district court, "SB 40 is

unenforceable through its enforcement provisions because it violates the separation of powers and it deprives the defendant of required due process." (R. II, 92.)

The Attorney General filed a notice of appeal. (R. I, 72.) The district court later denied a motion by the Attorney General to stay its decision pending appeal. (R. I, 74-79.) The Attorney General then filed a motion for a stay with this Court, which this Court granted.

ARGUMENTS AND AUTHORITIES

This Court should reverse the district court's order, which decided constitutional claims that the court improperly raised *sua sponte* in a moot case. If this Court were to reach the merits, the district court's constitutional analysis was wrong, as SB 40 violates neither the Due Process Clause nor the separation of powers. At the very least, there is no reason why the provisions that troubled the district court could not be severed from the remainder of SB 40.

I. The district court improperly raised non-jurisdictional constitutional claims *sua sponte*.

It is fundamentally improper for a district court to *sua sponte* raise non-jurisdictional constitutional issues. *See Frontier Ditch Co. v. Chief Engineer of Div. of Water Resources*, 237 Kan. 857, 864, 704 P.2d 12 (1985) ("While the court may raise issues on its own motions, it is limited to issues of jurisdiction."); *City of Wichita v. Trotter*, No. 122,007, 2021 WL 3020731, at *7 (Kan. App. 2021) (noting "the district court's errant decision to sua sponte raise" a constitutional question); *Huffmier v. Hamilton*, 30 Kan. App. 2d 1163, 1166, 57 P.3d 819 (2002) ("It is error for a trial court to raise, *sua sponte*, nonjurisdictional issues."). "The premise of our

adversarial system is that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *National Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 147 n.10 (2011) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)). Allowing district courts to raise non-jurisdictional claims not advanced by the parties would "erod[e] the principle of party presentation so basic to our system of adjudication." *Arizona v. California*, 530 U.S. 392, 413 (2000); *see also United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation. . . . '[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008))).

It is particularly inappropriate to raise non-jurisdictional issues *sua sponte* when the new issues are constitutional in nature. After all, courts "generally avoid making unnecessary constitutional decisions. Thus, where there is a valid alternative ground for relief, [a] . . . court need not reach constitutional challenges to statutes." *Wilson v. Sebelius*, 276 Kan. 87, 91, 72 P.3d 553 (2003). By the time the district court here questioned the constitutionality of SB 40, it had already denied relief to the plaintiffs as moot and untimely, thus resolving the case. (R. II, 23, 26-27, 30.) It was therefore unnecessary and improper to raise the constitutional issues.

In raising constitutional issues *sua sponte*, the district court abandoned its role as a neutral decisionmaker and became an advocate for its own claims. Indeed, at one point in responding to the Attorney General's standing argument, the district court remarkably stated that *the court* had standing (R. II, 80), thus effectively assuming the role of a party to the case.

Principles of judicial impartiality in fact and in appearance are compromised when a court goes beyond deciding issues raised by the parties and raises constitutional issues on its own, thereby functioning as an advocate for one of the parties or for its own interests. *See* Kansas Code of Judicial Conduct, Rules 1.2 and 2.2 and Comment 1 to Rule 2.2. Indeed, how is a litigant to receive a fair and impartial adjudication of the merits when the individual charged with dispassionately applying the law assumes the role of a litigant while retaining the power to render an ultimate decision on the issues it raised? *See State v. Hargrove*, 48 Kan. App. 2d 522, 547, 293 P.3d 787 (2013) ("The adversary system embodied in this nation's courts operates on the assumption that justice may best be harnessed when the disputants test each other's legal theories and factual portrayals before detached observers—judges or jurors—charged with resolving those disputes.").

Here, the district court raised its own constitutional objections to SB 40 and then proceeded to decide them, serving as the judge in its own cause. This alone warrants reversal. *See Sineneng-Smith*, 140 S. Ct. at 1582 (vacating the judgment below and remanding "for reconsideration shorn of the [new constitutional] inquiry

interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties").

II. Any constitutional challenges to Section 1 of SB 40 are moot and should have been dismissed for lack of standing.

The "judicial power" granted by Article 3 of the Kansas Constitution is limited to the determination of actual controversies. *Baker v. Hayden*, ___ Kan. ___, 490 P.3d 1164, 1169 (2021). This case-or-controversy requirement, which is rooted in the separation of powers, requires that "(a) parties must have standing; (b) issues cannot be moot; (c) issues must be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) issues cannot present a political question." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008).

As the Attorney General argued below, two of these requirements—the lack of mootness and standing—are not satisfied here. (R. II, 32-34, 51-53.) But the district court nevertheless offered an impermissible advisory opinion on the constitutionality of SB 40. (R. II, 68-80.) This Court's review is de novo. *See State v. Sykes*, 311 Kan. 612, 613, 465 P.3d 1152 (2020) (mootness); *Gannon v. State*, 298 Kan. 1107, 1122, 319 P.3d 1196 (2014) (standing).

A. Any constitutional challenges to Section 1 of SB 40 are moot, since the application of that statute to the school district has expired.

The district court's decision to *sua sponte* raise constitutional claims was particularly egregious given that this controversy is moot. Section 1(a) of SB 40 provides that local school boards have authority "[d]uring the state of disaster emergency related to the COVID-19 health emergency described in K.S.A. 2020

Supp. 48-924b, and amendments thereto" to "take any action, issue any order or adopt any policy made or taken in response to such disaster emergency that affects the operation of any school or attendance center of such school district." By the plain text of this provision, any action of a school board taken under this section is limited to the period of the disaster emergency. Section 1(d), which authorizes civil actions seeking to set aside school board actions taken under Section 1(a), therefore only applies during the COVID-19 disaster emergency.

The COVID-19 state of disaster emergency described in K.S.A. 2020 Supp. 48-924b, as amended by SB 40, was declared by the Governor on March 12, 2020, and ultimately extended to June 15, 2021, by the Legislative Coordinating Council (LCC) as authorized by Section 4(a)(5) of SB 40.[1] But the LCC did not extend it beyond that date. As a result, the COVID-19 state of disaster emergency has now ended.

That makes any constitutional challenges to Section 1 of SB 40 moot. The mootness doctrine "recognizes that it is the function of a judicial tribunal to determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case properly before" the court. *State v. Bennett*, 288 Kan. 86, 89, 200 P.3d 455 (2009) (quoting *Bd. of Johnson Cty. Comm'rs v. Duffy*, 259 Kan. 500, 504, 912 P.3d 716 (1996)). Because Section 1 of SB 40 has expired, any "actual controversy has ended," and "the only judgment that could be

[1] The LCC granted a 15-day extension through June 15, 2021, rather than the 30-day extension requested by the Governor, at its meeting on May 28, 2021, which is available at https://www.youtube.com/watch?v=obsRPZuioo0&t=3s.

entered would be ineffectual for any purpose" and "would not impact any of the parties' rights." *McAlister v. City of Fairway*, 289 Kan. 391, 400, 212 P.3d 694 (2002).

Although there is an exception to the mootness doctrine when the issue "is one capable of repetition and one of public importance," *Bennett*, 288 Kan. at 89 (quoting *Duffy*, 259 Kan. at 504), that exception does not apply here. Section 1 of SB 40 only applies during the COVID-19 state of disaster emergency, which has now expired, so by definition the application of Section 1 is not capable of repetition.

The school district originally agreed that this case is moot, noting that "Section 1 of SB 40 has effectively expired, and it has no application with respect to the SMSD Board of Education." (R. II, 8-9.) But after the district court raised its constitutional objections to the law, the school district flip-flopped, arguing that this case is not moot because Section 1 of SB 40 might have some future application to school districts. This argument distorts the text of SB 40. By its plain terms, Section 1 only applies "[d]uring the state of disaster emergency related to the COVID-19 health emergency described in K.S.A. 2020 Supp. 48-924b, and amendments thereto," SB 40, § 1(a)(1). The use of a definite article "the," as well as the entire statutory structure, confirms that this is a reference to the disaster emergency identified in K.S.A. 2020 Supp. 48-924(a), which has expired.

The school district claims that because K.S.A. 2020 Supp. 48-924(b), as amended by SB 40, restricts the Governor from declaring a new emergency based on COVID-19 without approval of the LCC, Section 1 of SB 40 could apply during a

new emergency. But under the plain text of the statute, this would be a "new" disaster emergency, SB 40, § 5(b), not "the" disaster emergency referenced in Section 1 of SB 40. There is no way Section 1 of SB 40, as currently written, will ever apply to the school district again.

The school district also argued below that the Legislature might enact a new law that is the same as or similar to Section 1 of SB 40 at some point in the future. But that is entirely speculative, not something that is sufficiently likely to occur as to justify an exception to the mootness doctrine. Accordingly, any challenge to Section 1 of SB 40 should be rejected as moot.

For its part, the district court held that this case is not moot because other provisions of SB 40 have a current or potentially future application to third parties. (R. II, 70-71.) But the school district could only challenge the constitutionality of Section 1. While SB 40 provides a similar judicial review process for restrictions imposed by other government entities, school districts are not subject to those provisions. If the school district had attempted to challenge them, it would have lacked standing to do so. Unlike other provisions of SB 40, Section 1 only applied during the now-expired disaster emergency, and so a lawsuit under Section 1, which is the only provision of SB 40 at issue here, *cannot* recur under the law as currently written.

Finally, the district court seemed to suggest that this case is not moot based on its conclusion that SB 40 is unconstitutional, writing that "invocation of the mootness doctrine cannot sidestep the significant due process problems and judicial

nullification posed by SB 40." (R. II, 72.) But there is no mootness exception when a court finds a law particularly objectionable. In the absence of an actual controversy, the district court's constitutional musings are nothing more than a prohibited advisory opinion. This Court should hold that any constitutional challenge to Section 1 of SB 40 is moot.

B. The school district lacks standing to challenge SB 40.

Even if this issue were not moot, the school district would still lack standing to challenge the constitutionality of SB 40. As this Court recently explained, "the basis for standing can change as litigation progresses," and a party can lose standing based on changed circumstances, thereby depriving the court of jurisdiction. *Baker*, 490 P.3d at 1171. The expiration of the disaster emergency has extinguished whatever standing the district may have had to challenge SB 40.

To have standing, a party must establish that it has "a personal interest in a court's decision and . . . suffers some actual or threatened injury as a result of the challenged conduct." *Baker*, 490 P.3d at 1173 (quoting *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013)). Since the school district is not currently subject to SB 40, it suffers no present injury. Instead, the school district's argument is that SB 40 might have some application to it in the future. Not only is that wrong for the reasons discussed above, but this speculation is insufficient to provide standing. A threatened injury provides standing only when it is imminent and probable, not conjectural or hypothetical. *See Sierra Club*, 298 Kan. at 33-34 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (allegations of possible future injury do not

satisfy requirements of standing; a "threatened injury must be 'certainly impending' to constitute injury in fact")); *Baker*, 490 P.3d at 1173 ("Requiring a concrete likelihood of future harm reflects Kansas law."). The school district has failed to demonstrate a concrete injury.

In rejecting the Attorney General's standing argument, the district court seemed to believe that once named as a defendant in a case, a party necessarily has standing to raise constitutional challenges. (R. II, 75-78.) That is not the law. "To challenge the constitutionality of a statute," a party—regardless of whether the party is a plaintiff or defendant—"must have been directly affected by the alleged defect, and he or she does not have standing to argue that a statute is unconstitutional as applied to third parties in hypothetical situations." *State v. Coman*, 294 Kan. 84, Syl. ¶3, 273 P.3d 701 (2012); *see also State v. Thompson*, 221 Kan. 165, 172, 558 P.2d 1079 (1976) ("On a number of occasions this court has recognized the rule that unconstitutional governmental action can only be challenged by a person directly affected and such a challenge cannot be made by invoking the rights of others."). Since the school district is no longer affected by Section 1 of SB 40, it no longer has standing to challenge it. The hypothetical application of other provisions of SB 40 to third parties does not provide the school district with standing.

The district court also held that *it* had standing to raise these issues. (R. II, 80.) But standing requires an actual controversy between the *parties*. *See Baker*, 490 P.3d at 1169; *Morrison*, 285 Kan. at 896. The district court cited cases in which

appellate courts raised issues *sua sponte*, but (in addition to the fact that those cases do not apply to district courts) the issues raised in those cases still had an actual effect on the parties. Here, SB 40 no longer applies to the school district. Because no party has standing to challenge the constitutionality of SB 40, any constitutional challenges should have been rejected for lack of standing.

III. SB 40 is constitutional.

If this Court were to reach the merits, it should reverse the district court's determination that "SB 40, particularly its enforcement provision, unconstitutionally deprives the relevant governmental units of due process while also violating the constitutional separation of powers between the judicial and legislative branches." (R. II, 67-68.) While the district court was less than clear about what specific provisions it believed were problematic, its constitutional analysis was limited to the requirement that the requested relief be granted if an order is not issued within 7 days and possibly the requirement that a hearing be held within 72 hours.[2] The Attorney General defended the constitutionality of these provisions below (R. II, 34-36, 54-55), and this Court's review is de novo. *See Matter of A.B.*, 313 Kan. 135, 138, 484 P.3d 226 (2021).

[2] The district court repeatedly used the term "enforcement provisions" without specifying what it meant. If the district court's order is read as finding provisions other than these timelines unconstitutional, it should be reversed for failing to provide any relevant constitutional analysis on those provisions.

A. The school district has no due process rights that SB 40 might violate.

The district court's conclusion that SB 40 violates school districts' due process rights conflicts with U.S. Supreme Court precedent holding that political subdivisions of a State have no due process rights that may be violated by state laws. *See Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."); *Risty v. Chicago, R.I. & Pac. Ry. Co.*, 270 U.S. 378, 390 (1926) ("The power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment."); *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923) ("The city cannot invoke the protection of the Fourteenth Amendment against the state."); *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923) (same); *see also Hous. Auth. of Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1188 (10th Cir. 1991) ("It is well established that a political subdivision may not lodge constitutional complaints against its creating state."); *City of Moore v. Atchison, Topeka, & Santa Fe Ry.*, 699 F.2d 507, 511-12 (10th Cir. 1983) ("[P]olitical subdivisions of a state lack standing to challenge the validity of a state statute on Fourteenth Amendment grounds.").

This Court has applied the same principle as to the Kansas Constitution. *See Gannon v. State*, 298 Kan. 1107, 1133-34, 319 P.3d 1196 (2014) (holding that school districts lack standing to bring a due process claim under Section 18 of the Kansas

Bill of Rights because they are political subdivisions of the State). Accordingly, any claim that SB 40 deprives school districts of due process is without merit.

The school district tried to argue below that this principle is limited to substantive due process claims and does not extend to procedural due process claims. But the cases do not make this distinction. Rather, they broadly assert that local governments cannot assert *any* Fourteenth Amendment challenge to State law. *See Gannon v. State*, 298 Kan. 1107, 1133, 319 P.3d 1196 (2014); *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923); *City of Moore v. Atchison, Topeka, & Santa Fe Ry.*, 699 F.2d 507, 511-12 (10th Cir. 1983). The Kansas Court of Appeals has interpreted the cases in the same way. *See Matter of Ruffin Woodlands, LLC,* No. 120,705, 2020 WL 3579798 at *9-10 (Kan. App. 2020) (unpublished opinion) (rejecting a claim that a statute providing different procedures for taxpayers than for taxing entities violated the Due Process and Equal Protection Clauses of the U.S. Constitution and Section 1 of the Kansas Bill of Rights.) After all, these provisions were designed to protect individual rights from government action, not to protect one part of the government from another.

The district court held that the rule that political subdivisions of a State lack standing to mount a Fourteenth Amendment challenge to state law "does not prevent federal suits under the Supremacy Clause or where the source of the governmental subunit's authority is not federal." (R. II, 75.) But this is not a federal suit under the Supremacy Clause, and *Gannon* makes clear that this rule applies to school districts as political subdivisions of the State. The district court's citation of

Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619 (10th Cir. 1998), conflicts with, rather than supports, its analysis. *Branson* rejected a claim that political subdivisions categorically lack standing to sue their parent States in federal court, but it held that they do lack standing "when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights." *Id.* at 628. Thus, "[i]t is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment." *Id.*

The district court also seemed to believe that this rule is limited to lawsuits brought against the State. But the district court's statement that "*Williams* involved a federal equal protection claim *against* the state" (R. II, 75 (emphasis in original)) is incorrect. *Williams* was a lawsuit between municipalities, through their governing officials, and the receiver of a railroad company. 289 U.S. at 39. Regardless of whether the State is a party to the case, "political subdivisions of a state lack standing to challenge the validity of a state statute on Fourteenth Amendment grounds." *City of Moore*, 699 F.2d at 511-12 (rejecting a constitutional challenge to an Oklahoma law raised by a city in a lawsuit against the ATSF Railroad).

The district court also discussed Article 6 of the Kansas Constitution (R. II, 11-12) and the Kansas Code of Civil Procedure (R. II, 13), but there is no authority for the proposition that those provisions somehow confer constitutional due process

rights, which would arise under the Fourteenth Amendment of the U.S. Constitution or Section 18 of the Kansas Bill of Rights.

Because the school district does not possess due process rights that may be violated by state laws, the district court's holding that SB 40 violates due process should be reversed.

B. SB 40 does not violate the separation of powers by unconstitutionally interfering with the judicial power.

The district court also incorrectly concluded that the timelines in SB 40 violate the separation of powers. The district court based its conclusion on this Court's opinion in *State v. Buser*, 302 Kan. 1 (2015), but the statute at issue in *Buser* was different in a key way. K.S.A. 2014 Supp. 20-3301 required this Court to render a decision within 180 days after a matter was submitted for decision, but it also directed counsel to file a joint request triggering one of two mandated remedies: either "(1) the release of a decision no later than the legislature's deadline; or (2) the establishment of a solid deadline for the release of the opinion." *Buser*, 302 Kan. at 6 (citing K.S.A. 2014 Supp. 20-3301(c)(3)). This process could ultimately lead to a requirement that the Chief Justice set a firm intended decision date. K.S.A. 2014 Supp. 20-3301(c)(3). In finding the statute unconstitutional, this Court analyzed the constitutionality of these remedies and found that they infringed on the judicial power. *Buser*, 302 Kan. at 6 ("We will apply these four *Miller* factors to each of the alternative remedies required of the court in K.S.A. 2014 Supp. 20-3301(c).").

SB 40 does not contain a similar remedial process that might infringe on the judicial power. Rather, it provides that if an order is not issued within seven days of

the hearing, the requested relief seeking to set aside the school board action is automatically granted, which is allowable because school districts, as government entities, are not entitled to the same due process rights as private litigants. Unlike in *Buser*, this remedy affects the school boards, not the courts. In this sense, it is like a speedy trial statute requiring dismissal of the State's case, which does not implicate the separation of powers. Because there is no interference with the judicial power, there is no need to analyze whether this is a significant inference under the four-factor test first laid out in *State ex rel. Schneider v. Bennett*, 219 Kan. 285, Syl. ¶ 5, 547 P.2d 786 (1976).

But even if this four-factor test did apply, SB 40 is not such a significant interference as to violate the separation of powers. To determine whether a significant interference has occurred, "a reviewing court considers: (1) the essential nature of the power being exercised; (2) the degree of control by one branch over another; (3) the objective sought to be attained; and (4) the practical result of blending powers as shown by actual experience over a period of time." *Miller v. Johnson*, 295 Kan. 636, 671, 289 P.3d 1098 (2012). All of these factors favor the constitutionality of SB 40.

First, the essential nature of the power being exercised is legislative. The Legislature has authority under Article 2 of the Kansas Constitution to pass laws governing emergency response as well as protecting the rights of parents and their children. Requiring that relief should be granted from school district pandemic

restrictions unless the school district can adequately justify these restrictions is an exercise of this legislative authority.

Second, SB 40 does not lead to legislative control of the judicial branch. There is no sanction on the court for not issuing a decision within seven days. Rather, the result is that the requested relief against the school district is granted. The Legislature's authority over emergency management by school districts does not encroach on the judicial branch's power.

In addition, the district court exaggerated the requirements of SB 40. It provides that relief is granted only if the court does not issue "an order" within seven days. SB 40, § 1(d)(1). If there are concerns about a district court's ability to write a full opinion within that time frame, the district court could issue an order, however brief, upholding or rejecting the challenged action with a further, more detailed opinion explaining the court's reasons to follow. Or, because SB 40 does not require the order to be final, the court could order preliminary relief subject to further review.

The district court's concern about plaintiffs requesting the production of numerous records, which could take time, is unfounded because SB 40 does not provide for discovery. (R. II, 18.) Rather, it was the school district's burden to present evidence sufficient to allow the district court to conclude that "the action taken, order issued or policy adopted by the board of education is narrowly tailored to respond to the state of disaster emergency and uses the least restrictive means to achieve such purpose." SB 40, § 1(d)(1). The school district should have compiled

such evidence before making an informed, fact-based decision to close a school or issue a mandate requiring certain actions by students or employees.

And to the extent the district court was concerned by the fact that procedures under SB 40 differ from procedures for ordinary civil actions (R. II, 87-88), the Attorney General fails to see how this poses a constitutional problem. Numerous statutory schemes contain their own procedures. *See, e.g.*, K.S.A. 60-3101 *et seq.* (Protection from Abuse Act); K.S.A. 38-2201 *et seq.* (Revised Kansas Code for Care of Children); K.S.A. 59-29a01 *et seq.* (Sexually Violent Predator Act).

Third, the objective sought to be attained is a worthy one. The Legislature adopted the judicial review process in Section 1 of SB 40 to balance the liberty interests of school children and their parents with the need to appropriately respond to the COVID-19 pandemic. If actions taken by local school boards are well-reasoned and supported by evidence, a court should be able to find those actions to be justified within seven days. If a court is unable to determine whether a district's pandemic restrictions are justified within seven days of a hearing, that suggests the restrictions are questionable at best, and the Legislature has reasonably determined that the restrictions should be set aside in those circumstances. Allowing questionable restrictions to remain in effect for a prolonged period would have the effect of a judgment against the students and their parents who are challenging the restrictions, in that the restrictions would remain in effect during the delay, possibly until the end of the emergency. The Legislature reasonably provided that when the question is so close that a court is unable to decide a case

within seven days, judgment should be entered in favor of school children and their rights rather than allowing a de facto win for school districts based on delay.

Fourth, although this particular provision is new, it is similar to other provisions that have not adversely affected the judiciary. Just as SB 40 requires a hearing within 72 hours, numerous other statutes require that a hearing be held within a certain time period. *See, e.g.*, K.S.A. 65-129c(d)(3) (statute predating the COVID pandemic requiring a hearing within 72 hours of a request by a person placed in isolation or quarantine); K.S.A. 38-2243(b) (requiring a temporary custody hearing within 72 hours of a child having been taken into protective custody); K.S.A. 59-a05(b) (requiring the court to hold a probable cause hearing for an alleged sexually violent predator within 72 hours of the person being taken into custody, or as soon as reasonably practicable and agreed upon by parties); K.S.A. 23-3401(c)(1) (requiring a hearing within 21 days of a motion seeking expedited enforcement of visitation rights or parenting time); K.S.A. 60-3106(a) (requiring a hearing within 21 days of the filing of a petition for a protection from abuse order); K.S.A. 38-2273(b) (requiring an appeal from certain orders of a district magistrate judge under the Revised Kansas Code for Care of Children to be heard within 30 days). And the provision granting relief if an order is not issued within seven days is similar to a speedy trial statute, which requires dismissal of the State's criminal case if the defendant is not brought to trial within a specified period of time.

Considered together, these factors confirm that SB 40 does not substantially interfere with the judicial branch so as to violate the separation of powers.

IV. Even if the judicial timelines in SB 40 were unconstitutional, they are severable from the remainder of SB 40.

Although the extent of the district court's order is far from clear, it broadly declares SB 40 "unenforceable" rather than severing the provisions the court held unconstitutional. (R. II, 92.) Whether a statute is severable is a question of law, so this Court's review is de novo. *Cf. State v. Johnson*, 313 Kan. 339, 341, 486 P.3d 544 (2021).

The district court's statement that it invited the Attorney General to address severability in its initial order is incorrect. The only reference to severability in that order was that the "Court notes that SB 40 does contain a severability clause in § 14 to prevent the invalidity of other portions of the act if any portion of the same is declared unconstitutional or invalid." (R. II, 29.) Thus, the Attorney General read the district court's order as an acknowledgment of the severability clause that would apply if necessary. In addition, the Shawnee Mission School District only argued that "the Court should . . . declare that Section 1(d) of SB 40 is unconstitutional and void." (R. II, 49.) The school board did not ask for the entire law to be invalidated. The Attorney General therefore had no expectation that the district court might declare all of SB 40 "unenforceable." After the court did so, the Attorney General did address severability in his motion to stay, and the district court could have remedied its error had it wished to do so. (R. II, 94-95.) But instead, the district court appeared to confuse severability with severance of claims under K.S.A. 60-221. (R. I, 75.)

Under this Court's severability precedents, if this Court were to find any provision of SB 40 unconstitutional, the Court must then determine whether to invalidate the entire statute or to sever the offending provision.[3] *See, e.g.*, *Brennan v. Kansas Ins. Guar. Ass'n*, 293 Kan. 446, 463, 264 P.3d 102 (2011). The question of severability is therefore properly before this Court in the event the Court finds a constitutional violation. Regardless, severability is a pure question of law that can be addressed for the first time on appeal, and the consideration of severability is necessary to serve the ends of justice. *See State v. Patterson*, 311 Kan. 59, 62, 455 P.3d 792 (2020).

Even if the judicial timelines in SB 40 were unconstitutional, there is no reason they cannot be severed from the remainder of SB 40, as the Legislature directed in enacting a severability clause.

> Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that the act would have been passed without the objectionable portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand.

---

[3] Modern severability doctrine has come under criticism in recent years. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2219-20 (2020) (Thomas, J., concurring in part and dissenting in part). As Justice Thomas has observed, the historic practice was that if a court concluded that "a statute was unconstitutional, the court would just decline to enforce the statute in the case before it." *Id.* at 2219. Courts had no power to "strike down a statute." *Id.* at 2220. Under this approach, there was no occasion for the district court here to consider the constitutionality of SB 40 because the court had already concluded that it had no application to this case. The only reason the district court addressed the law's constitutionality was to purport to invalidate it for future cases, which the court lacked authority to do.

Brennan, 293 Kan. at 463. Although a severability clause is not dispositive, it is strong indication of legislative intent. *See Gannon v. State*, 304 Kan. 490, 520, 372 P.3d 1181 (2016); *see also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685-86 (1987) (holding that the inclusion of a severability clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision" and that the objectionable provision can be severed "unless there is strong evidence that Congress intended otherwise").

The purpose of the Legislature in enacting the judicial review provisions of SB 40 was to ensure that pandemic restrictions adopted by government entities are narrowly tailored and are the least restrictive means of responding to the pandemic. Although the Legislature enacted timelines to ensure that cases are decided in a timely manner, the Legislature surely would have intended to keep the underlying review process even without the timelines. Thus, at most, the Court should invalidate only the requirement that a hearing be held within 72 hours and the provision granting the requested relief if the court does not issue an order within 7 days of the hearing, leaving the ability to bring a lawsuit without these timelines. And if only one of these provisions is unconstitutional, the other one should remain effective along with the rest of SB 40.

There certainly is no reason to strike down all of SB 40. SB 40 contains a number of provisions unrelated to the judicial review process, such as adding the Vice President of the Senate as an eighth member of the Legislative Coordinating

Council, SB 40, § 3(a); providing that the Legislative Coordinating Council rather than the State Finance Council may extend a state of disaster emergency, *id.* at § 4(b)(3); allowing multiple 30-day extensions of a disaster emergency, *id.* at § 4(b)(3); changing procedures for animal health emergencies, *id.* at § 4(b)(4); altering the process for legislative review of executive orders, *id.* at § 6(b); and placing limits on the Governor's authority to issue certain executive orders, *id.* at § 6(d). The timelines for a decision have nothing to do with these provisions, which can be severed as the Legislature intended. The district court's statement that "the enforcement provisions *are* the Act" (R. II, 91) is completely wrong.

CONCLUSION

This Court should reverse the district court and order this case dismissed for lack of jurisdiction.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

/s/ Brant M. Laue
Brant M. Laue, #16857
Solicitor General
Dwight R. Carswell, #25111
Deputy Solicitor General
Kurtis K. Wiard, #26373
Assistant Solicitor General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Tel: (785) 296-2215
Fax: (785) 296-6296
E-mail: brant.laue@ag.ks.gov
dwight.carswell@ag.ks.gov
kurtis.wiard@ag.ks.gov
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on August 25, 2021, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was electronically mailed to:

Kristin Butler
6951 Hallet Street
Shawnee, KS 66216
kristinmariebutler@gmail.com
Pro Se Plaintiff

Scott Bozarth
6319 Antioch Road
Merriam, KS 66202
Scott.bozarth@yahoo.com
Pro Se Plaintiff

Gregory P. Goheen
McAnany, Van Cleave & Phillips, P.A.
10 E. Cambridge Circle Dr., Ste. 300
Kansas City, KS 66103
ggoheen@mvplaw.com

Rachel B. England
Shawnee Mission School District
8200 W. 71st Street
Shawnee Mission, KS 66204
rachelengland@smsd.org

Attorneys for Defendant-Appellee

/s/ Brant M. Laue
Brant M. Laue

465 P.3d 1157 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the MATTER OF the Equalization Appeal of RUFFIN WOODLANDS, L.L.C., for the Year 2017 in Wyandotte County, Kansas.

No. 120,705
|
Opinion filed July 2, 2020.

Appeal from Board of Tax Appeals.

Attorneys and Law Firms

Wendy M. Green, assistant counsel, of Unified Government of Wyandotte County/Kansas City, Kansas, for appellant.

Kevin J. Breer and Kelli N. Breer, of Breer Law Firm, LLC, of Westwood, for appellee Ruffin Woodlands, LLC.

Dwight R. Carswell, assistant solicitor general, Toby Crouse, solicitor general, and Derek Schmidt, attorney general, for amicus curiae State of Kansas.

Before Hill, P.J., Buser and Bruns, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Wyandotte County (the County) appeals the Kansas Board of Tax Appeals' (BOTA) decision valuing property owned by Ruffin Woodlands, L.L.C. (Ruffin) at $548,580 for the 2017 tax year. The County first contends that BOTA erred by: (1) finding that it failed to show whether it conducted a "thorough review of the subject property to determine the highest and best use" and (2) relying on the appraisal evidence presented by Ruffin. The County also argues that K.S.A. 74-2426(c)(4)(B) is unconstitutional because of its disparate treatment between a taxpayer's and a taxing authority's rights of appellate review. Upon our review, we find no error by BOTA and hold that the County lacks standing to raise its constitutional claim. Accordingly, we affirm in part and dismiss in part.

FACTUAL AND PROCEDURAL BACKGROUND

Ruffin owns 380.9 acres of property in Wyandotte County known as the Woodlands. The Woodlands is a former dog and horse racing track containing grandstands, dog kennels, horse barns, and other ancillary buildings built in 1989 and 1990. The facility opened in 1989 and featured greyhound racing after the passage of the Kansas Parimutuel Racing Act (Racing Act), K.S.A. 74-8801 et seq. Horse racing was added the following year. The Woodlands was the first racetrack in Kansas regulated by the Kansas Racing and Gaming Commission and was the first legal gambling outlet operated in the Kansas City metropolitan area since the 1930s.

The Woodlands racetracks operated from 1989 until 2008. The Woodlands' annual handle—the total amount of money wagered—in dog and horse racing decreased dramatically during its operation. Between 1990 and 1997, the annual handle in dog racing dropped from $155.2 million to $20.4 million. During that same time, the annual handle in horse racing decreased from $42.2 million to $1.5 million. The decrease in the Woodlands' annual handle coincided with the opening of several casinos in the Kansas City area during the mid-1990s. In the last year that the Woodlands conducted dog and horse racing, the annual handle for each type of racing was $6.1 million and $1.3 million respectively. The Woodlands has remained vacant since it closed operations in 2008.

The Racing Act was enacted in 1987 and has not been repealed. This Racing Act allows organizations to receive a license to conduct horse and greyhound racing. K.S.A. 74-8813. The Racing Act also provides that applicants may receive (1) a facility owner license to own a racetrack facility designed for horse and greyhound racing and (2) a facility manager license to manage a racetrack facility. K.S.A. 74-8815(a) and (b). Licensed organizations may conduct parimutuel wagering on horse and greyhound races at approved racetracks, as well as parimutuel wagering on simulcast horse or greyhound races. K.S.A. 74-8819.

In 2007, the Kansas Legislature enacted the Kansas Expanded Lottery Act (Lottery Act), K.S.A. 74-8733 et seq. This

Lottery Act allowed for electronic gaming machines to be placed at parimutuel licensee locations. K.S.A. 74-8740. But before electronic gaming machines could be placed, the voters of a county were required to approve the placement of such machines in the county. K.S.A. 74-8743. The voters of Wyandotte County approved placement of electronic gaming machines in 2007.

***2** Under the Lottery Act, the racetrack facility manager receives 25% of the net gaming machine income. K.S.A. 74-8747(a)(1). Forty percent of the net gaming machine income is allocated to the State's expanded lottery act revenues fund. K.S.A. 74-8747(a)(8). The other 35% of net income is allocated to certain funds, government entities, and gaming expenses. K.S.A. 74-8747(a)(2)-(7), (9). In contrast to the State's allotted 40% of gaming machine income from parimutuel racetracks, facility managers for State operated casinos are required to provide only 22% of the casino's gaming revenue to the State's expanded lottery act revenues fund. K.S.A. 74-8734(h)(12).

Following the enactment of the Lottery Act, legislation has been frequently introduced seeking to lower the State's allotment of gaming machine income from parimutuel racetracks and increase the income kept by the racetrack. For example, legislation was introduced in 2010 that proposed to reduce the State's allotment from 40% to 22% and increase the racetrack facility manager's distribution to 58% of the income. S.B. 401 (2010). However, this bill and other similar bills have been defeated.

In December 2015, Ruffin purchased the Woodlands for $15 million. At the time of purchase, Ruffin intended to renovate the property's improvements and operate a horse racing facility with slot machines following the passage of favorable parimutuel racetrack gaming bills. Since purchasing the Woodlands, Ruffin has continued to support legislation that would increase the percentage of gaming machine income retained by racetrack facility managers. See, e.g., H.B. 2173 (2017); H.B. 2537 (2016). But, like similar legislation previously introduced, the bills died in committee.

The County retained Kevin Bradshaw to appraise the Woodlands for the 2017 tax year. Using a computer assisted mass appraisal (CAMA) system, Bradshaw valued the property at $7,025,690. Ruffin appealed this value to BOTA where the County had the evidentiary burden to show the validity and correctness of its valuation. See K.S.A. 79-1609. Ruffin retained Valbridge Property Advisors appraiser Bernie Shaner to appraise the property. Shaner valued the property at $540,000.

The County's Appraisal Evidence

At an evidentiary hearing before BOTA, Bradshaw testified that he valued the Woodlands at $7,025,690 by using the cost approach. The cost approach considers the value of the land plus the cost to reproduce the improvements minus the depreciation of the improvements.

In valuing the improvements on the Woodlands, Bradshaw considered that they had not been touched in 10 years. Bradshaw determined that the improvements were in disrepair and had limited value. As a result, Bradshaw applied an economic condition factor of 20%, meaning an 80% reduction in value was initially applied to the improvements. Bradshaw also applied a poor physical and functional rating to the buildings to account for depreciation. Using these adjustments, Bradshaw valued the buildings at $4,979,300. Bradshaw then determined the land had a value of $2,046,390 for a total property valuation of $7,025,690.

The County's valuation was based on Bradshaw's determination that the highest and best use of the Woodlands was its current use as a dog and horse racetrack. Bradshaw explained that under *In re Tax Appeal of Yellow Freight System, Inc.*, 36 Kan. App. 2d 210, 217-19, 137 P.3d 1051 (2006), the County assumes "the current use is [the] highest and best use unless there's reason to believe otherwise." Bradshaw believed that Ruffin intended to continue dog and horse racing because there was no evidence that the buildings were going to be removed. Bradshaw also noted that Ruffin employed a maintenance person to ensure that the improvements did not further deteriorate. However, Bradshaw did not analyze whether operating the Woodlands as a dog and horse racetrack would be financially feasible.

Ruffin's Appraisal Evidence

***3** At the BOTA hearing, Shaner testified regarding the condition of the improvements designed for dog and horse racing. Like Bradshaw, Shaner determined the buildings were in poor condition. Shaner explained that the property was run down and the structures have deteriorated. Shaner noted many deficiencies with the property:

- All the buildings had original roofs, several of which were damaged and leaking.
- Both the horse racing and dog racing facilities had damaged roofs and there was mold contamination in both grandstand buildings.
- The ancillary buildings had exterior wood rot.
- All the buildings had peeling, fading, and/or discolored exterior paint.
- The metal railings and staircases had significant oxidation and rust.
- Several buildings had broken windows and damaged gutters.
- The asphalt and concrete paving used in the parking lots, roads, and sidewalks was cracked and deteriorated.
- The interior of the buildings contained spots of mold and were in poor repair.
- There was peeling vinyl tile from previous flooding.
- There was peeling paint on the ceiling and walls of the grandstand buildings.
- There was damaged drywall and acoustic ceiling tiles from roof leaks.
- The grandstand areas appeared to have been partially demolished before the Woodlands closed.
- The landscaping on the property was overgrown and unkempt.
- The plumbing and mechanical systems have been shut down for so long that problems will likely occur when restarted.
- The heating and cooling systems would likely need total replacement.

Shaner found that using the improvements to continue dog and horse racing was not the highest and best use of the property. Shaner noted that Ruffin purchased the Woodlands with plans to renovate it and reopen it as a horse racing track with slot machines. But Shaner determined that the required improvements to revive the current structures and convert them into a horseracing facility with slot machines would require "an unbelievable amount of renovation." As a result, Shaner concluded that using the Woodlands as a dog and horse racetrack was not physically feasible.

Shaner also determined that dog and horse racing was not a financially feasible use of the property. In reaching this conclusion, Shaner examined the historical and current state of dog and horse racing in Kansas and the United States. Shaner found that the popularity of dog and horse racing declined significantly during the 20th century, in part due to increased competition from casinos. As a result, horse and dog racing would not be financially feasible without supplemental income from slot machines. But slot machines could only make horse and dog racing financially feasible if the State's share of the income under the Lottery Act was reduced. And the Kansas Legislature had rejected recent attempts to reduce the State's share of gaming machine income at parimutuel racetracks. Therefore, Shaner concluded that:

> "[b]ased on a combination of poor property condition, the decline of the greyhound and horse racing industries, and the continued failed passage of legislation that would reduce the state sales tax on slot machines at the subject [property] (from 40% to 22%), the existing improvements do not provide a legally permissible, physically possible, financially feasible, or maximally productive use."

Ultimately, Shaner determined that the highest and best use of the Woodlands was for residential development after removing the current structures. Shaner noted that the possible use as residential subdivision development would conform to the pattern of land use in the market area. After researching the issue, Shaner found that residential development would be financially feasible because the demand would be "sufficient to support construction costs and ensure the timely absorption of additional inventory in this market."

***4** After finding that the highest and best use of the property was for demolition and single-family residential development, Shaner used a sales-comparison approach to determine that the market value of the Woodlands was $540,000 as of January 1, 2017. In calculating the market value, Shaner concluded that the value of the land was $2,970,000 based on comparable land sales. Shaner then subtracted the estimated cost of demolition—$2,430,000—to arrive at the $540,000 market value.

BOTA's Decision

BOTA agreed with Ruffin's evidence and ruled that the appraised value of the commercial portion of the property was $540,000. BOTA also found that an improvement on the residential portion of the property should be appraised at $8,580, for a total appraised value of $548,580. In reaching this valuation, BOTA found that Shaner's analysis was reasonable and agreed that residential development was the property's highest and best use. BOTA noted that "[t]he evidence does not indicate whether the [County] conducted a thorough review of the subject property to determine the highest and best use. Instead, the [County] assumed that the current use is the highest and best use." BOTA rejected the County's highest and best use analysis, finding that "[t]he economic feasibility of horse and dog racing is questionable, and the existing structures have deteriorated to a condition that would be cost prohibitive to restore them."

BOTA also agreed with Shaner's higher appraisal of the land's value, finding that the comparable sales Shaner used were a better indicator of the Woodlands' land value than the sales relied on by the County. Based on its determination that residential development was the highest and best use of the property, BOTA noted that demolition costs needed to be considered in the total appraised value. Finding that Shaner's demolition estimates were reasonable, BOTA concluded that the $540,000 valuation of the racetrack facility and associated land was appropriate.

Petition for Reconsideration

After BOTA issued its opinion, the County filed a petition for reconsideration. In its petition for reconsideration, the County argued that BOTA erred by ignoring its evidence of the highest and best use of the property and instead accepting Ruffin's proposed highest and best use. The County also argued that K.S.A. 74-2426(c)(4)(B) is unconstitutional because of its disparate treatment of a taxpayer's and a county's right to petition for review. BOTA sustained its original order, finding no argument required modification of its opinion and that it lacked jurisdiction to hear the County's constitutional claim. The County appeals.

BOTA'S FINDING THAT THE COUNTY DID NOT CONDUCT A THOROUGH HIGHEST AND BEST USE REVIEW

The County contends BOTA erred when it found "[t]he evidence does not indicate whether the [County] conducted a thorough review of the subject property to determine the highest and best use." The County first argues that this finding was erroneous because it provided sufficient evidence to support its assessment that the current use of the property is the highest and best use. Next, the County argues that BOTA applied the wrong standard under the Uniform Standards of Professional Appraisal Practice (USPAP) in making this finding.

Standards of Review

We review BOTA's decisions under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. K.S.A. 74-2426(c). The County bears the burden of proving the invalidity of BOTA's actions and decision since it is the party asserting such invalidity. K.S.A. 77-621(a)(1); *In re Equalization Appeal of Wagner*, 304 Kan. 587, 597, 372 P.3d 1226 (2016).

***5** K.S.A. 77-621(c) sets out eight standards under which an appellate court may grant relief. In this case, the County cites K.S.A. 77-621(c)(4), (c)(5), (c)(7), and (c)(8) to support its argument that relief should be granted. K.S.A. 77-621(c)(4) allows us to grant relief if an agency "erroneously interpreted or applied the law." K.S.A. 77-621(c)(5) allows us to grant relief if an agency "engaged in an unlawful procedure or has failed to follow prescribed procedure." And K.S.A. 77-621(c)(8) allows us to grant relief if BOTA's action was otherwise "unreasonable, arbitrary or capricious."

The KJRA explains how our court reviews an agency's factual determination. Under K.S.A. 77-621(c)(7) we may grant relief if the agency's action is based on a determination of fact that is not supported "by evidence that is substantial when viewed in light of the record as a whole." The phrase "in light of the record as a whole" includes evidence both supporting and detracting from an agency's finding. K.S.A. 77-621(d). As a result, we must determine whether the evidence supporting the agency's factual findings is substantial considering all the evidence. *Wagner*, 304 Kan. at 599. Evidence is substantial when a reasonable person would accept it as sufficient to support a conclusion. *Geer v. Eby*, 309 Kan. 182, 190, 432 P.3d 1001 (2019). When reviewing the evidence in light of the record as a whole, we do not "reweigh the evidence or engage in de novo review." K.S.A. 77-621(d).

The County's Evidence of Highest and Best Use

The County points out that under Kansas caselaw, Bradshaw's report and testimony provided substantial evidence to support a finding that the current use is the highest and best use of the property. The County reasons that since it provided substantial evidence of the highest and best use, BOTA erred when it determined that "[t]he evidence does not indicate whether the [County] conducted a thorough review of the subject property to determine the highest and best use."

In Kansas, the market value of a subject property is based on its highest and best use. *In re Equalization Appeal of Johnson County Appraiser*, 47 Kan. App. 2d 1074, 1090-92, 283 P.3d 823 (2012). Our court has identified four criteria used to determine the highest and best use of property for determining a tax valuation. The highest and best use must be (1) legally permissible, (2) physically possible, (3) financially feasible, and (4) maximally productive. *Yellow Freight System*, 36 Kan. App. 2d 210, Syl. ¶ 8.

In this case, the County's CAMA report explained that while a property's highest and best use may change over time, the current use is considered the highest and best use if there is no evidence of such change. Bradshaw testified that the County's appraisal assumed the current use was the property's highest and best use because there was no reason to believe otherwise.

As the County suggests, our court has previously held that similar evidence was sufficient to support a finding that a subject property's highest and best use is the property's continuing use. See *Johnson County Appraiser*, 47 Kan. App. 2d at 1090-92; *Yellow Freight System*, 36 Kan. App. 2d at 217-19. But contrary to the County's argument, these cases do not suggest that an appraiser conducts a "thorough review" of a property's highest and best use when the appraiser merely assumes that the current use is the highest and best use. As a result, BOTA did not erroneously apply *Johnson County Appraiser* or *Yellow Freight System* by finding that the County did not conduct a thorough review of the property's highest and best use.

***6** Moreover, BOTA's comment regarding the County's analysis is supported by substantial evidence. Despite its closure in 2008, the County assumed the highest and best use of the Woodlands was a parimutuel racetrack facility for horse and dog racing. No parimutuel racetracks have operated in Kansas since the Woodlands closed in 2008. And Bradshaw admitted that he performed no analysis on whether dog and horse racing would be financially feasible. Accordingly, we find that a reasonable person could agree with BOTA's determination that the County did not conduct a thorough review of the property's highest and best use.

Compliance with USPAP

The County next argues that BOTA applied the wrong standards under the USPAP in finding that "[t]he evidence does not indicate whether the [County] conducted a thorough review of the subject property to determine the highest and best use." After noting that USPAP Standard 6 applies to mass appraisals and USPAP Standards 1 and 2 apply to single-property appraisals, the County claims:

> "The County's report conforms to USPAP Standard 6 and for BOTA to hold the County's report to USPAP Standard 1 or 2 by requiring a thorough highest and best use analysis as if performing a single property appraisal would be a deviation of prescribed procedure or an error of law."

"Kansas law requires all appraisals to be prepared in accordance with USPAP standards." *In re Equalization Appeal of Target Corporation*, 55 Kan. App. 2d 234, 238, 410 P.3d 939 (2017). A failure by BOTA to adhere to the USPAP standards when reaching a determination may constitute a deviation from a prescribed procedure or an error of law. *Johnson County Appraiser*, 47 Kan. App. 2d at 1087.

Standard 6 of the USPAP governs the development and reporting of mass appraisals, whereas USPAP Standards 1 and 2 control the development and reporting of individual appraisals. *Yellow Freight System*, 36 Kan. App. 2d at 214. Since the County valued the Woodlands through a mass appraisal, USPAP Standard 6 applied to its appraisal. As a result, the County did not need to satisfy the requirements of USPAP Standards 1 and 2. See *Johnson County Appraiser*, 47 Kan. App. 2d at 1089-90.

USPAP Standard 6-3(a) provides: "When necessary for credible assignment results, an appraiser must ... identify and analyze the effect on use and value of ... [the] highest and best use of the real estate." USPAP, p. 42 (2016-2017 ed.). The comment to Standard 6-3(a) states that "[i]n considering highest and best use, an appraiser must develop the concept to the extent required for a proper solution to the appraisal problem." USPAP, p. 42 (2016-2017 ed.). When an appraiser provides an opinion of highest and best use, the appraiser must discuss how that opinion was determined in the written

report of mass appraisal. USPAP, Standard 6-8, pp. 45-48 (2016-2017 ed.).

In this case, the County's report addressed highest and best use by noting "[t]he highest and best use of a property may change over time if the character of the neighborhood changes creating demand for a different use. If there is no evidence of such a change, the current use is considered the highest and best use." And at the hearing, Bradshaw explained that he assumed dog and horse racing was the highest and best use because it was the current use. When considering nearly identical circumstances, our court has found that the county's evidence of highest and best use satisfied the requirements of USPAP Standard 6. *Johnson County Appraiser*, 47 Kan. App. 2d at 1091-92.

While the County's evidence may have satisfied the minimum requirements of determining highest and best use in USPAP Standard 6, the County fails to show that BOTA erred by suggesting that the County did not conduct a thorough review of the property's highest and best use. In making the complained-of statement, BOTA did not suggest that the County failed to satisfy USPAP Standard 6 and never implied that it was requiring the County to satisfy USPAP Standards 1 or 2. Instead, the statement was part of BOTA's explanation for why it rejected the County's highest and best use determination in favor of Ruffin's when calculating the property's fair market value. In other words, BOTA did not impermissibly reject the County's highest and best use analysis by finding it violated USPAP standards, it appropriately rejected the County's determination by reasonably finding that Ruffin's analysis was more reliable.

***7** Accordingly, the County failed to show that BOTA erred by finding that "[t]he evidence does not indicate whether the [County] conducted a thorough review of the subject property to determine the highest and best use."

BOTA'S RELIANCE ON RUFFIN'S APPRAISAL EVIDENCE

The County next contends BOTA erred by relying on Shaner's appraisal because (1) his highest and best use analysis was incomplete, and (2) he failed to consider the cost approach and income approach to determine whether his valuation was reasonable.

As previously stated, we may grant relief if the agency (1) erred in interpreting or applying the law, (2) failed to follow prescribed procedures, (3) based its action on a determination of fact not supported by substantial evidence when viewed in light of the entire record, or (4) ruled in a way that was otherwise unreasonable, arbitrary, or capricious. K.S.A. 77-621(c)(4), (c)(5), (c)(7), and (c)(8). The County bears the burden to prove that BOTA's decision is invalid. K.S.A. 77-621(a)(1).

Shaner's Highest and Best Use Analysis

The County first argues that BOTA erred by relying on Shaner's appraisal because he failed to analyze whether any use, other than vacant land held for residential development, would be more productive for the property. The County claims that because of this deficiency, Shaner failed to adequately address the maximum productivity component of the highest and best use analysis. Although the County does not specify which subsection under K.S.A. 77-621 would entitle it to relief, we discern that the County is relying on subsection (c)(8) to suggest that BOTA's reliance on Shaner's highest and best use analysis was unreasonable.

To support its argument, the County relies on an excerpt from *Property Assessment Valuation* produced by the International Association of Assessing Officers, which states that assessing maximum productivity "requires the appraiser to determine which use, from among all uses that are physically possible, legally permissible, and financially feasible, produces the highest rate of return or value to the property being appraised." *Property Assessment Valuation*, International Association of Assessing Officers, p. 31 (3d ed. 2010).

However, contrary to the County's claims, Shaner considered uses other than residential development when determining the highest and best use of the property. Because the property was in disrepair and attendance for dog and horse racing was in decline, Shaner found that resuming horse and dog racing in the existing improvements was not financially feasible. He also considered modifying the existing use by fixing the structures and adding slot machines. But Shaner concluded that such modifications would only be economically beneficial if the State's share of slot machine income was reduced. Still, attempts to lower the State's share have been unsuccessful.

Because the improvements contributed to no economically viable use, Shaner determined that demolition and redevelopment presented the only productive use of the land.

While Shaner noted that the vacant property could allow for numerous potential uses, residential subdivision development would conform to the pattern of land use in the market area.

***8** Shaner's appraisal sufficiently addressed the issue of highest and best use, and BOTA reasonably relied on Shaner's analysis. Although the County asserts that Shaner should have thoroughly analyzed more potential uses, "[t]he highest and best use analysis is not intended to be an exhaustive analysis of every possible use for the subject property." *Property Assessment Valuation*, International Association of Assessing Offices, p. 32 (3d ed. 2010). Notably, our court has found that BOTA appropriately relied on less extensive analysis to determine the issue of highest and best use. See *Yellow Freight System*, 36 Kan. App. 2d at 217-19 (holding that an appraiser's assumption that a property's current use is the highest and best use provides sufficient evidence to support BOTA's determination on the issue).

While questions may exist regarding some of the assumptions underlying Shaner's highest and best use analysis, we find nothing that so undermines it that a reasonable person could not accept his conclusion that the highest and best use of the Woodlands is residential development after removing the current structures. See *In re Equalization Appeal of Target Corporation*, No. 111,602, 2015 WL 2131691, at *4 (Kan. App. 2015) (unpublished opinion). BOTA did not err by relying on Shaner's highest and best use analysis.

Valuation Approaches

The County next argues that BOTA erred by relying on Shaner's appraisal because he failed to analyze the cost approach or the income approach of valuation to determine whether his appraisal was reasonable.

Each parcel of real property must be appraised at its fair market value. K.S.A. 79-501. "Fair market value" is the amount of money that a well-informed buyer would be justified in paying and a well-informed seller would be justified in accepting for the property in an open and competitive market. K.S.A. 79-503a.

There are three recognized approaches for determining the fair market value of property: (1) the sales-comparison approach, which uses sales of comparable properties to estimate value; (2) the cost approach, which uses the cost of the land and replacement of the buildings minus depreciation to estimate value; and (3) the income approach, which uses the anticipated income generated from the property to estimate value. See *Wagner v. State*, 46 Kan. App. 2d 858, 861, 265 P.3d 577 (2011); *In re Tax Appeal of Porter House Apartments*, No. 108,579, 2013 WL 6726257, at *3 (Kan. App. 2013) (unpublished opinion). "All appraisers must consider and apply the three approaches to value in order to determine the fair market value of property when data to perform each approach is readily available." 46 Kan. App. 2d at 861 (quoting PVD Directive No. 98-033). However, utilization of all three approaches may not be appropriate when valuing certain types of property. See *In re Tax Appeal of Porter House Apartments*, 2013 WL 6726257, at *3.

The three valuation approaches are embodied in K.S.A. 79-503a. *Johnson County Appraiser*, 47 Kan. App. 2d at 1087. This statute provides a nonexhaustive list of factors for appraisers to consider in connection with cost and income when valuing property, including:

- The classification of lands and improvements. K.S.A. 79-503a(a).
- The size and location of the property. K.S.A. 79-503a(b)-(c).
- Depreciation, which can include physical deterioration and functional, economic, or social obsolescence. K.S.A. 79-503a(d).
- The cost of reproducing the improvements. K.S.A. 79-503a(e).
- Productivity while taking into consideration all government restrictions. K.S.A. 79-503a(f).
- The property's earning capacity. K.S.A. 79-503a(g).
- Sale value on the open market. K.S.A. 79-503a(i).
- A comparison with the value of property that has known and recognized value. K.S.A. 79-503a(k).

***9** In this case, Shaner considered the factors listed in K.S.A. 79-503a when appraising the Woodlands. Shaner noted that the tract was zoned for agricultural use and a special use permit allowed horse racing and casino use on the property. But Shaner believed that the property could likely

obtain a zoning change to allow for medium-density, single-family residential use given the surrounding uses. In valuing the property, Shaner considered the large size and accessible location of the property.

After examining the physical deterioration of the buildings and economic obsolescence of their intended use for dog and horse racing, Shaner found that the improvements had no remaining economic life. Since continuing use of the current improvements would not be economically productive, Shaner determined that demolition and redevelopment was the highest and best use of the property. Therefore, Shaner valued the property as vacant land after subtracting the cost of demolition.

To value the land, Shaner used the sales-comparison approach, noting that site value is most often estimated using that approach. Shaner did not develop a valuation based on the cost approach or the income approach. He explained that all the approaches to value were considered, but only a land valuation based on the sales-comparison approach was developed given the property's highest and best use.

BOTA reasonably relied on Shaner's appraisal even though he developed a valuation based only on the sales-comparison approach. Given that demolition and redevelopment represent the highest and best use of the property, a well-informed buyer would not be justified in paying more for the costs of reproducing the same buildings that would be removed. Because the cost approach would add the value of the property's improvements to the appraisal, it would not produce the fair market value of the property.

Additionally, Shaner reasonably determined that an income approach was an inappropriate method to value the property. The Woodlands has been closed and has generated no income since 2008. And Shaner determined that continuing the use of the existing improvements or modifying the improvements' current use would not be profitable. Accordingly, Shaner's appraisal provided substantial evidence to support BOTA's valuation even though he relied on the sales-comparison approach.

BOTA did not err by relying on Shaner's appraisal.

CONSTITUTIONALITY OF K.S.A. 74-2426(c)(4)(B)

The County next contends that K.S.A. 74-2426(c)(4)(B) violates its rights under the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, as well as its rights under Section 1 of the Kansas Constitution Bill of Rights. The County claims that the statute violates its due process and equal protection rights because it allows only a taxpayer and not a taxing authority to petition for review in a district court.

Whether a statute is constitutional is a question of law over which we exercise unlimited review. *Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536 (2015). When faced with a constitutional challenge, we presume the statute is constitutional and resolve all doubts in favor of a statute's validity. *State v. McLinn*, 307 Kan. 307, 344, 409 P.3d 1 (2018). Moreover, we must interpret a statute in a manner that renders it constitutional if there is any reasonable way to do so. "Before a statute may be struck down, the constitutional violation must be clear." *Solomon*, 303 Kan. at 523.

***10** In an appeal of an order by BOTA, any aggrieved party may file a petition for review in the Court of Appeals. K.S.A. 74-2426(c)(4)(A). But a taxpayer is given the option to first appeal by filing a petition for review in the district court. K.S.A. 74-2426(c)(4)(B). If a taxpayer chooses to appeal to the district court, the district court must conduct a trial de novo, meaning the court tries the matter anew and decides it independently, based solely on the evidence presented in the district court. See K.S.A. 74-2426(c)(4)(B); *Manzano v. Kansas Dept. of Revenue*, 50 Kan. App. 2d 263, 268, 324 P.3d 321 (2014). The County argues that providing the remedy of a de novo trial before the district court to a taxpayer but not a taxing authority violates its due process and equal protection rights.

However, the County lacks the ability to challenge the constitutionally of K.S.A. 74-2426(c)(4)(B) on Fourteenth Amendment grounds. Our Supreme Court has noted that "local governments do not have standing to invoke the protection of the Fourteenth Amendment to the United States Constitution against the actions of state government." *Gannon v. State*, 298 Kan. 1107, 1133, 319 P.3d 1196 (2014). As a result of this rule, "political subdivisions of a state lack standing to challenge the validity of a state statute on Fourteenth Amendment grounds." *City of Moore v. Atchison, Topeka, & Santa Fe Ry. Co.*, 699 F.2d 507, 511-12 (10th Cir. 1983). Since the County is a political subdivision

of Kansas, see *State ex rel. Tomasic v. Kansas City*, 237 Kan. 572, 585, 701 P.2d 1314 (1985), it lacks standing to challenge the validity of K.S.A. 74-2426(c)(4)(B) on Fourteenth Amendment grounds.

Similarly, the County may not rely on Section 1 of the Kansas Constitution Bill of Rights to challenge the constitutionally of K.S.A. 74-2426(c)(4)(B). This section provides that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rights, § 1.

Our Supreme Court has found that local governments are not "persons" as that term is used in Section 18 of the Kansas Constitution Bill of Rights. *Gannon*, 298 Kan. at 1134. In *Gannon*, the court noted United States Supreme Court caselaw finding that local governments may not invoke Fourteenth Amendment protections against actions of the state. 298 Kan. at 1133. Since Kansas courts typically construe the due process protections of Section 18 to be the same as those guaranteed by the Fourteenth Amendment, the *Gannon* court held that school districts lacked standing to raise a due process claim under Section 18 because they are local governments. 298 Kan. at 1134.

Like Section 18 addressed in *Gannon*, Section 1 of Kansas' Bill of Rights is "given much the same effect as the Equal Protection Clause of the Fourteenth Amendment." *State ex rel. Tomasic*, 237 Kan. at 583. And like in *Gannon*, we construe a political subdivision's ability to invoke Section 1 to challenge the constitutionality of a statute in line with the Fourteenth Amendment and find that it lacks standing to do so. Accordingly, we dismiss the County's constitutional claims for lack of standing. See *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 750, 189 P.3d 494 (2008).

Affirmed in part and dismissed in part.

All Citations

465 P.3d 1157 (Table), 2020 WL 3579798

End of Document