

2018 IL App (1st) 180187-U

No. 1-18-0187

Order filed December 27, 2018

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

RACINE MARATHON, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	
)	No. 17 CH 9271
RAHM EMANUEL, Mayor of the City of Chicago;)	
DEPARTMENT OF BUSINESS AFFAIRS AND)	
CONSUMER PROTECTION; and ROSA ESCARENO,)	
Commissioner,)	Honorable
)	David B. Atkins,
Defendants-Appellees.)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the circuit court's judgment which affirmed a decision by the City of Chicago's Department of Business Affairs and Consumer Protection that prohibited a gas station from selling flavored tobacco products where the property line of the gas station was within 500 feet of the property line of a parcel of land on which a school was located in violation of a local ordinance.

¶ 2 Under the Chicago Municipal Code, Chicago businesses that sell tobacco products are prohibited from selling flavored tobacco products if their location “has a property line within 500 feet of the property line of any public, private, or parochial secondary school.” Chicago Municipal Code 4-64-515(b) (amended Apr. 18, 2018).

¶ 3 Plaintiff Racine Marathon, Inc., (Racine) operates a gas station that sells tobacco products and flavored tobacco products. In April 2016, the City of Chicago’s Department of Business Affairs and Consumer Protection (BACP) sent Racine a notice prohibiting them from selling flavored tobacco products because its gas station was located within 500 feet of a school. Racine requested and obtained a hearing, after which the prohibition was upheld. Racine sought review of the BACP’s decision in the circuit court, which affirmed the prohibition.

¶ 4 Racine now appeals, arguing that, because the school at issue leased only a building on a parcel of land, the BACP failed to meet its burden of proving that the gas station was located within 500 feet of the school where the BACP used the property line of the parcel of land as the endpoint of the measurement rather than the property line of the school itself. For the reasons that follow, we affirm.

¶ 5 I. BACKGROUND

¶ 6 Racine operates a gas station at 1201 West 87th Street in Chicago. Its located at the corner of West 87th Street and South Racine Avenue, and it holds various licenses to sell gasoline, food, liquor and tobacco products, all issued by the City of Chicago (City). Noble Charter School-Hansberry College Prep (Noble Charter) operates a school at 8748 South Aberdeen Street in Chicago on a rectangular parcel of land that is surrounded by West 87th Street to the north, South Aberdeen Street to the east, West 88th Street to the south and South May Street to the west. The rectangular parcel of land is apparently owned by St. Kilian Church

(St. Kilian), who evidently leased a building on the land to Noble Charter. The school's building is located on the eastern half of the parcel of land while the church building is located on the western half. Between the church building and school building, there is a concrete sidewalk that runs north and south.

¶ 7 On April 21, 2016, the BACP sent Racine a notice prohibiting the sale of flavored tobacco products at its gas station because it was located within 500 feet of Noble Charter in violation of a local ordinance. At the time, the local ordinance stated: "No person shall sell, give away, barter, exchange or otherwise deal in flavored tobacco products, samples of such products, or accessories for such products at any location that has a property line within 500 feet of the property line of any public, private, or parochial elementary, middle, or secondary school located in the City of Chicago." Chicago Municipal Code 4-64-180(b) (amended Oct. 28, 2015). Racine subsequently requested a hearing to challenge the prohibition.

¶ 8 On April 19, 2017, the Chicago City Council moved the local ordinance to another section of the Chicago Municipal Code, but changed nothing material in the ordinance for purposes of this appeal. See Chicago Municipal Code 4-64-515(b) (added April 19, 2017).

¶ 9 The following day, Racine's hearing occurred before a BACP hearing officer. Miguel Campos, a supervisor of tax and licenses for the BACP, testified that he had measured the distance from the property line of Racine's gas station (the northeastern most point) to the property line of the parcel of land on which Noble Charter was located (the northwestern most point) using two methods, an online zoning database of the City and Google Maps. Both methods revealed the distance between the property lines was approximately 393 feet. Using the City's online zoning database, Campos was able to observe the distinct parcels of land as well as the buildings located on those lands. Campos stated that he did not use the building of Noble

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Charter itself as an endpoint in measuring, explaining that the ordinance required the measurement to be “from property line to property line” and his understanding of the term property line was the “boundaries of the parcel on which the building is contained.” Additionally, the month prior to the hearing, Campos visited Noble Charter and confirmed it was currently operating as a school. Campos, however, acknowledged that he did not research who legally owned the parcel of land on which Noble Charter was located or the school’s history at that location. The BACP entered into evidence printouts of the maps Campos had utilized from the City’s online zoning database and Google Maps.

¶ 10 Richard Kaplan testified for Racine, stating that he performed a records search of the property where Noble Charter was located. His search revealed that St. Kilian owned the entire parcel of land on which Noble Charter was located. Kaplan also discovered a “lease” purportedly from 2012 in which St. Kilian rented the building on the eastern portion of the property to Noble Charter. Racine entered into evidence three pages from that document. The first page is styled as a letter and dated October 24, 2013, and concerns: “Leases referenced in Exhibit A hereto by and between Catholic Bishop of Chicago, an Illinois corporation sole, as lessor, and Noble Network of Charter Schools, an Illinois not-for-profit corporation, as lessee.” The letter continues and discusses education revenue bonds related to charter schools. The second page is the aforementioned Exhibit A and states in relevant part: “The Lease Agreement dated April 25, 2012, as amended, between [Catholic Bishop of Chicago] and [Noble Network of Charter Schools] regarding the lease of St. Kilian Parish, 8725 South May Street and 8732 and 8748 South Aberdeen Street, Chicago, Illinois 60622 (Auburn Gresham/Hansberry College Prep).” The final page of the document states at the top “Chicago Title Insurance Company,” “Loan Policy (2006)” and “Schedule A (Continued)” and subsequently provides the legal description of

the parcel of land at issue in this appeal. Racine also entered into evidence a land survey of the various properties that showed the distance from the gas station's property line to the property line of St. Kilian was approximately 396 feet. But the distance from the easternmost property line of the gas station to the sidewalk between St. Kilian and Noble Charter was approximately 525 feet.

¶ 11 In the BACP's closing argument, it argued that it was irrelevant that Noble Charter only leased a portion of the entire parcel of land from St. Kilian and asserted it was undisputed that the distance from the property line of the gas station to the property line of the parcel of land on which Noble Charter was located was less than 500 feet. Conversely, Racine argued that the BACP had used the wrong endpoints in its measurement. First, Racine posited that, because it could only sell flavored tobacco in the physical building located on its parcel of land, its building was the proper endpoint, not its property line. Second, Racine posited that the proper endpoint for Noble Charter was not the property line of the parcel of land on which the school was located but rather the premises of Noble Charter itself, which was only what the school had allegedly leased from St. Kilian. Racine accordingly contended that the BACP had failed to meet its burden to prove that its gas station was located within 500 feet of Noble Charter.

¶ 12 Following argument, the BACP hearing officer found that, based on the City's ordinance, the proper measurement was from the property line of Racine's gas station to the property line of the parcel of land on which Noble Charter was located, rather than "from the door of one structure to the door of another structure." With the proper endpoints determined, the hearing officer found the evidence established that the gas station's property line was within 500 feet of Noble Charter's property line. The hearing officer accordingly found the BACP's decision to prohibit Racine from selling flavored tobacco products was appropriate.

¶ 13 Rosa Escareno, the acting commissioner of the BACP, subsequently entered an order accepting the hearing officer's recommendation and affirming Racine's prohibition from selling flavored tobacco products.

¶ 14 Thereafter, Racine filed a complaint for a writ of *certiorari* in the circuit court seeking review of the BACP's decision and naming Rahm Emanuel, the Mayor of the City, the BACP and Escareno as defendants (collectively, defendants). In response, defendants filed the administrative record. The circuit court also stayed the enforcement of the BACP's prohibition until further order.

¶ 15 In the parties' briefing in the circuit court, defendants maintained the same position that the BACP had during the hearing. While Racine also maintained a similar position from the hearing, it was willing to concede that the proper endpoint from its gas station was its property line, not its physical building. The circuit court ultimately denied Racine relief and found the proper endpoints were the gas station's property line to the property line of the parcel of land on which Noble Charter was located. The court accordingly affirmed the decision of the BACP. Racine unsuccessfully moved the court to reconsider and then appealed. The court, however, stayed the enforcement of BACP's prohibition pending Racine's appeal.

¶ 16

II. ANALYSIS

¶ 17 On appeal, Racine contends that, because Noble Charter leased only a building on a parcel of land owned by St. Kilian, the BACP failed to meet its burden of proving that the gas station was located within 500 feet of the school where it used the property line of the parcel of land owned by St. Kilian as the endpoint rather than the property line of Noble Charter itself, or, in other words, the bounds of Noble Charter's leasehold. Racine highlights that, despite Miguel Campos' testimony about the measurements, neither he nor anyone else for the BACP testified to

the actual property line of the school itself. Because the BACP did not present this evidence and Racine's evidence showed that the property line of its gas station to the property occupied by Noble Charter was more than 500 feet, Racine claims that the BACP erred in finding a violation of the ordinance.

¶ 18

A. Standard of Review

¶ 19 Prior to addressing the merits of Racine's appeal, we note that Racine filed its action in the circuit court as a complaint for a writ of *certiorari*. Generally, administrative decisions are reviewed through the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2016)). However, when an administrative agency does not expressly adopt the Administrative Review Law and does not provide for an alternative method of reviewing its decisions, the common law writ of *certiorari* is an available method for litigants seeking review of administrative decisions. *Outcom, Inc. v. Illinois Department of Transportation*, 233 Ill. 2d 324, 333 (2009). Although Racine initially filed its action as a complaint for a writ of *certiorari*, it later argued in the circuit court that the BACP's decision should be reviewed under Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2016)) in light of section 2-14-102 of the Chicago Municipal Code (Code) (Chicago Municipal Code § 2-14-102 (added April 29, 1998)). That section provides that "[a]ny final decision by the department of administrative hearings that a code violation does or does not exist shall constitute a final determination for purposes of judicial review and shall be subject to review under the Illinois Administrative Review Law, except as otherwise may be provided by law for decisions issued prior to the effective date of this ordinance." *Id.* The circuit court appeared to agree.

¶ 20 However, Racine's original characterization of its complaint as a writ of *certiorari* was correct. As noted by defendants in their brief, the BACP is a separate municipal department from

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that of the City's Department of Administrative Hearings. See Chicago Municipal Code § 2-14-010 *et seq.* (amended Feb. 15, 2012) (provisions related to the Department of Administrative Hearings); Chicago Municipal Code § 2-25-010 *et seq.* (added Nov. 19, 2008) (provisions related to the Department of Business Affairs and Consumer Protection). Thus, section 2-14-102 of the Code (Chicago Municipal Code § 2-14-102 (added April 29, 1998)) is inapplicable to decisions by the BACP. Furthermore, no provision of the BACP has expressly adopted the Administrative Review Law and the BACP has not provided for an alternative method of reviewing its decisions. Consequently, a writ of *certiorari* was the proper method for Racine to obtain review of the decision by the BACP. See *Outcom*, 233 Ill. 2d at 333. Despite the distinction between a writ of *certiorari* and review under the Administrative Review Law, the standards of review under both "are essentially the same." *Hanrahan v. Williams*, 174 Ill. 2d 268, 272 (1996). Thus, regardless of whether Racine sought review under the Administrative Review Law or a writ of *certiorari*, the applicable standards and principles are the same. *Johnson v. O'Connor*, 2018 IL App (1st) 171930, ¶ 13.

¶ 21 In an administrative case, we review the decision of the administrative body, here the BACP, rather than that of the circuit court. *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 386 (2010). The plaintiff in an administrative proceeding, here also the BACP, bears the burden of proof. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 533 (2006). To establish an ordinance violation, the prosecuting entity must prove that violation by a preponderance of the evidence. *City of Chicago v. RN Realty, L.P.*, 357 Ill. App. 3d 337, 345 (2005). The applicable standard of review on appeal depends on whether the question presented is one of law, fact, or a mixed question of both law and fact. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 390 (2001). On questions of

fact, the agency’s findings are deemed *prima facie* true and correct and will not be reversed unless they are against the manifest weight of the evidence. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008). In contrast, an agency’s decision on a purely legal issue is entitled to no deference and is reviewed under the *de novo* standard. *Id.* Finally, where there is a mixed question of law and fact, we review the agency’s determination under the clearly erroneous standard. *Id.* at 211. Here, Racine and defendants both agree that our review proceeds under the clearly erroneous standard, meaning they also agree that the question presented is one of both law and fact.

¶ 22 When a mixed question of law and fact is presented, “ ‘the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard.’ ” *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board, State Panel*, 216 Ill. 2d 569, 577 (2005) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). In other words, the question is “whether the rule of law as applied to the established facts is or is not violated.” (Internal quotation marks omitted.) *Cinkus*, 228 Ill. 2d at 211. Under the clearly erroneous standard, we will reverse the agency’s determination only when we are “left with the definite and firm conviction that a mistake has been committed.” *Board of Education of Springfield School District No. 186 v. Attorney General*, 2017 IL 120343, ¶ 68.

¶ 23 B. The BACP’s Decision

¶ 24 At the time Racine received its notice from the BACP, the local ordinance stated:
“No person shall sell, give away, barter, exchange or otherwise deal in flavored tobacco products, samples of such products, or accessories for such products at any location that has a property line within 500 feet of the property line of any

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public, private, or parochial elementary, middle, or secondary school located in the City of Chicago.” Chicago Municipal Code 4-64-180(b) (amended Oct. 28, 2015).

Prior to Racine’s hearing, the Chicago City Council moved the ordinance to another section of the Chicago Municipal Code. See Chicago Municipal Code 4-64-515(b) (added April 19, 2017).

The ordinance was later amended inconsequentially and currently states:

“No licensee engaged in the business of retail tobacco dealer shall sell, give away, barter, exchange, or otherwise deal in flavored tobacco products, flavored tobacco product samples, or accessories for such products at any location that has a property line within 500 feet of the property line of any public, private, or parochial secondary school located in the City of Chicago.” Chicago Municipal Code 4-64-515(b) (added April 18, 2018).

The changes in language between the ordinance as it was in section 4-64-180(b) and now as it is in section 4-64-515(b) is immaterial for purposes of this appeal because Racine has conceded that Noble Charter is a school for purposes of the ordinance.

¶ 25 The City has also promulgated rules related to the sale of flavored tobacco products. See City of Chicago Rules: Tobacco – Flavored Products (last updated Jan. 10, 2017). In section four of those rules, the BACP indicates that the proper measurement for determining whether a business is within 500 feet of a school is “the distance” of “the nearest points between: (1) the property line of each school identified in the notice and (2) the property line of the objector’s place of business.” See City of Chicago Rules: Tobacco – Flavored Products, § 4 (last updated Jan. 10, 2017). The Code also defines “property line” in two ways, first as “the line marking the boundary between any public way and the private property abutting thereon” (Chicago

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Municipal Code 9-4-010 (amended Nov. 21, 2017)) and second, as “[t]he boundary of a *lot*, as shown on a plat of subdivision recorded or registered pursuant to statute or as designated by the *lot’s* owner or developer as the boundary of a parcel of land to be used, developed, or built upon as a unit, under single ownership or control.” (Emphasis in original.) Chicago Municipal Code 17-17-02130 (amended Mar. 29, 2017).

¶ 26 In this case, there are several facts that neither party disputes, namely that Racine is engaged in the business of selling tobacco and as previously mentioned, that Noble Charter is a school for purposes of the ordinance. Additionally, neither party disputes that the distance from the property line of Racine’s gas station to the property line of the parcel of land on which the school is located, *i.e.*, the land purportedly owned by St. Kilian, is less than 500 feet. Likewise, neither party disputes that the distance from the property line of Racine’s gas station to the sidewalk adjacent to Noble Charter’s building is more than 500 feet. Moreover, the parties agree that the clear purpose of the ordinance is to prevent children from being exposed to flavored tobacco products. But what they do dispute is the proper endpoint for measuring the distance to the school for purposes of the ordinance.

¶ 27 At various times in this case, Racine has suggested using the sidewalk adjacent to Noble Charter’s building or the school’s building itself as the endpoint for measuring the distance from the gas station’s property line. However, Racine predominantly relies on the fact that Noble Charter only leased a portion of the parcel of land owned purportedly by St. Kilian, and based on this, Racine argues that the BACP never provided any evidence of where Noble Charter’s property line was relative to the entire parcel of land. According to Racine, the proper endpoint is the bounds of Noble Charter’s precise leasehold rather than the overall boundaries of the property on which it is located. During the hearing, Racine itself entered into evidence what its

witness, Richard Kaplan, called a “lease,” but that document was not actually a lease. The document referenced multiple leases, including one involving Noble Charter and the parcel of land at issue, but the document was not itself a lease. And nothing in that document showed that Noble Charter’s students were to be isolated solely within the school’s building.

¶ 28 Children do not just stay inside a school building during the day. At various points throughout the day, including before school, during lunch, during physical education classes, during breaks and after school, children may be outside the school building itself. This is why the ordinance requires the measurement to be from “the property line of any” school because it reflects the behavior of children at school. The legislative history of the ordinance also reflects this notion. Prior to December 2013, section 4-64-180 of the Code stated: “No person shall sell, give away, barter, exchange, or otherwise deal in tobacco products, tobacco product samples or tobacco accessories at any place *located within 100 feet of any building or other location used primarily as a school*, child care facility, or for the education or recreation of children under 18 years of age.” (Emphasis added.) Chicago Municipal Code 4-64-180 (added Dec. 9, 1992). In December 2013, section 4-64-180 of the Code was amended to include a new subsection (b) related to flavored tobacco products which stated: “No person shall sell, give away, barter, exchange or otherwise deal in flavored tobacco products, samples of such products, or accessories for such products at any location that has a property line within *500 feet of the property line of any public, private, or parochial elementary, middle, or secondary school located in the City of Chicago*.” (Emphasis added.) Chicago Municipal Code 4-64-180(b) (added Dec. 11, 2013). This change in December 2013 reflects a conscious effort by the Chicago City Council to make the endpoint of measuring from the school to be the outer bounds of where children might be at any point during the day, rather than the school building itself, and having

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that location be more than 500 feet away from the property line of a business selling flavored tobacco products.

¶ 29 There is an undeniable purpose of the flavored tobacco ordinance and a conscious decision of the Chicago City Council to draft the ordinance in harmony with the general behavior of children at school. Given that the BACP's burden of proof was only a preponderance of the evidence, from what the evidence at the hearing did show through Miguel Campos' testimony, we cannot say we are left with a definite and firm conviction that the BACP committed a mistake by concluding that the endpoint for measuring the distance to Noble Charter was the property line of the entire parcel of land on which the school was located despite no evidence of the exact boundaries of Noble Charter's leasehold on St. Kilian's property. Consequently, the BACP's decision was not clearly erroneous, and the circuit court properly upheld the BACP's determination.

¶ 30

III. CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County which had affirmed the decision of the BACP.

¶ 32 Affirmed.