

Circuit Court for Montgomery County
Case No. 448055V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1142

September Term, 2018

KIDS ADVENTURES, INC.

v.

FARMLAND CHILD DEVELOPMENT
CENTER, INC.

Meredith,
Berger,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 17, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This dispute arises from a permanent injunction entered by the Circuit Court for Montgomery County involving providers of childcare services, Kids Adventures, Inc. (“Kids Adventures”), appellant, and Farmland Child Development Center, Inc. (“CDC”), appellee. Both parties participated in the application process for permits to operate a before and after school childcare program at Wayside Elementary School (“Wayside”) in Montgomery County.

On appeal, Kids Adventures asserts that the trial court erred when it determined that Montgomery County (“the County”) and the Montgomery County Board of Education (“the Board”) failed to provide priority to non-profit organizations when awarding contracts for before and after school care. In response, CDC asserts that Kids Adventures’ appeal is moot. For the reasons explained herein, we agree with the appellee and dismiss this appeal.

FACTS AND PROCEEDINGS

CDC is a nonprofit, tax exempt corporation, that has operated a before and after school childcare program at Wayside since 1989. CDC’s license to provide before and after school childcare at Wayside was set to terminate on June 15, 2018. Kids Adventures was the successful applicant for a permit to operate a before and after school childcare program at Wayside for the 2018-2019 school year.

The Maryland General Assembly has enacted legislation that addresses before and after school childcare in public schools. County boards are required to “encourage the use of public school facilities for community purposes.” Md. Code (1978, 2018 Repl. Vol.) § 7-108(a) of the Education Article (“ED”). This includes the use of public school facilities

for group childcare programs. *See* ED § 7-109. In Montgomery County, the use of public school facilities for community purposes may be regulated by local law. ED § 7-108(f). Local law may provide for an interagency coordinating board (“ICB”) appointed by the County, which Montgomery County has convened. *Id.* Each county board must “give priority to nonprofit child care programs for use of public school facilities before and after school hours.” ED § 7-109(a)(1).

The disputed regulation, Montgomery County Executive Regulation 6-17AM (“the Regulation”), was adopted by the County Council for Montgomery County on July 25, 2017. Critically, the Resolution has a sunset date of July 30, 2019. It provides a process by which before and after school childcare programs are evaluated and selected for permits to operate in Montgomery County Public Schools.¹ *See* Exec. Reg. 6-17AM. The Board delegated the authority to regulate this process to the Interagency Coordinating Board for the Community Use of Public Facilities (“CUPF”) under the direction of the ICB. *See id.*

Generally, the Regulation requires each school to go through a re-bidding process at least once every 7 years. *Id.* at § 5(a). After the County issues a solicitation for bids from the public, the principal of the particular school assembles a selection committee. *Id.* at § (5)(d). The selection committee then proceeds with the application process in two stages, a written stage and an interview stage. *Id.* at § 5(i)-(o). The selection committee scores each application based on criteria set forth in the Regulation and advertised in the

¹ This Regulation is codified in Chapter 44 of the Code of Montgomery County Regulations. The parties refer mainly to the Regulation itself in their briefs and not the code section, so therefore, we shall cite the Regulation for consistency.

solicitation. *Id.* at § 5(n). The Regulation’s only attempt to comply with ED § 7-109(a)(1) appears in § (5)(l) as follows:

In accordance with Section 7-109 (a) of the Maryland Education Code, the selection committee must give a non-profit entity five (5) additional points to the application of a non-profit entity, in the case of a tie in the award of points between a non-profit and for-profit entity, the selection committee must select the non-profit entity.

Id. at § (5)(l). At the end of the written stage, a minimum of the top three providers with the highest scores proceed to the interview stage. *Id.* at § 5(o)(1). If the incumbent provider is not in the top three, the selection committee may permit it to advance as well. *Id.* at § (5)(o)(2). The applicant with the highest aggregate score at the end of both stages is selected and provided with a permit for the following school year. *Id.* at § 5(o)(7). In practice, the permits are renewed at the end of each school year until the bidding process is required to commence again.

The County published a solicitation for the re-bid process on November 15, 2017, seeking applications for a permit to operate at Wayside for the 2018-2019 school year. Wayside’s principal convened a selection committee of seven individuals, including herself. Thirteen providers applied for a permit for the 2018-2019 school year, including CDC and Kids Adventures. Following the written stage of the application process, Kids Adventures ranked in third place with a total of 600 points from the seven members of the committee. CDC ranked in fourth place with a total of 594 points. CDC, as the incumbent, was invited to proceed to the interview stage. At the conclusion of the interview stage Kids Adventures had received the highest combined score with 1,272 points, and CDC finished

in fourth with 1,159 points. As the provider with the highest score, Kids Adventures was awarded a permit to provide before and after school childcare at Wayside for the 2018-2019 school year.

On May 17, 2018 CDC filed a Complaint for Declaratory Judgment against the County, the Board, and Kids Adventures, alleging that the application process set forth in the Regulation contravened Maryland law by failing to afford priority to nonprofit providers, and that the process actually applied at Wayside was flawed. At the same time, CDC also filed a Motion for Temporary Restraining Order and Preliminary Injunction. On May 18, 2018 the circuit court denied the temporary restraining order and scheduled the preliminary injunction for a hearing.

On May 22, 2018, after a full-day evidentiary hearing, the Circuit Court for Montgomery County granted CDC a preliminary injunction. The circuit court examined the four factors required for the issuance of a preliminary injunction on the record. First, in considering whether CDC was likely to prevail on the merits, the court found that the Regulation was “wholly inadequate” and failed to give non-profits priority as mandated by the General Assembly. The court, therefore, concluded that CDC was likely to succeed on the merits. Second, the trial court evaluated the “balance of convenience determined by whether the greater injury would be done to the defendant.” In evaluating this factor, the trial court was persuaded to preserve the status quo, which was that CDC was the current childcare provider of before and after school care at Wayside and that its contract did not expire until June 15. Third, the court determined that if the status quo was not preserved, irreparable harm would ensue to CDC and to the directive of the General Assembly.

Finally, the court evaluated the public interest. It determined that the public interest in this proceeding was having the will of the General Assembly respected. After conferring with the parties, an order summarizing the trial court's findings was entered on May 25, 2018 that enjoined the County and the Board from enforcing ICB Resolution No. 07-001² and required the County and the Board to adopt procedures in compliance with Md. Code Ann., Educ. § 7-901(a)(1). Kids Adventures did not appeal the trial court's order granting the preliminary injunction.

The circuit court held a status hearing on June 26, 2018. Counsel for the County and the Board informed the court they had reached an agreement with CDC that CDC would provide the before and after school care at Wayside for the 2018-2019 school year. Kids Adventures did not consent to the agreement. The circuit court entered an order vacating the May 25, 2018 preliminary injunction order, and (a) enjoined the County and the Board from issuing a permit to Kids Adventures for the 2018-2019 school year; (b) permitted the County and the Board to issue a permit to CDC during the 2017-2018 school year; (c) permitted the County and the Board to issue permits for the 2018-2019 school year to the remaining providers selected pursuant to the 2017-2018 Selection Process; and (d) permitted the County and the Board to issue permits for the 2018-2019 school year at all other Montgomery County Public Schools to before and after child care incumbent

² The Board, an interested party to this appeal, and a party to the proceedings below, points out that this is a scrivener's error and that the intent of the injunction was to enjoin the Regulation.

providers at schools that did not undergo a 2017-2018 selection process. This appeal followed.

DISCUSSION

A case is moot when there is no longer an *existing* controversy or when there is no longer an effective remedy the Court could grant. *Suter v. Stuckey*, 402 Md. 211, 219 (2007). Appellate courts “do not sit to give opinions on abstract propositions or moot questions, and appeals which present nothing else for decision are dismissed as a matter of course.” *La Valle v. La Valle*, 432 Md. 343, 351-52 (2013) (citing *State v. Ficker*, 266 Md. 500, 506-07 (1972)); *see also State v. Dixon*, 230 Md. App. 273, 277 (2016) (“As a general rule, courts do not entertain moot controversies.”). Only in rare instances will the reviewing court address the merits of a moot case. *Stuckey, supra*, 402 Md. at 220 (“Under certain circumstances, however, [the Court of Appeals] has found it appropriate to address the merits of a moot case . . . [i]f a case implicates a matter of important public policy and is likely to recur but evade review, this court may consider the merits of a moot case.”) (citations omitted).

This appeal is moot because there is no effective remedy that we could possibly grant Kids Adventures.³ First, the underlying regulation and permit, as well as the school year upon which this appeal is based have expired. Further, the Regulation expired on July

³ CDC submits that they should be awarded attorney’s fees under the circumstances that this appeal “is so clearly moot that it lacks substantial justification.” We decline to issue any award of attorney’s fees.

30, 2019 and no longer governs the selection process.⁴ The permanent injunction enjoins the County and the Board from awarding a permit to Kids Adventures for the 2018-2019 school year, which has already concluded. Critically, nothing in the permanent injunction prevents the County or the Board from issuing Kids Adventures a permit after the 2018-2019 school year.⁵

Moreover, Kids Adventures takes issue with findings that the circuit court made when it ruled on CDC's motion for a preliminary injunction. The circuit court's determination that the Regulation failed to give priority to non-profit providers was made solely for the purpose of evaluating one of the factors required for the issuance of a preliminary injunction, namely whether CDC was likely to prevail on the merits at a full trial. The trial court specifically articulated that "... this is for the purposes of a preliminary

⁴ Kids Adventures argues that the expiration of the Regulation is irrelevant because it was awarded a contract for a seven-year term at Wayside. Kids Adventures, however, was awarded with a "permit" as the successful applicant in the selection process. In administering the selection process, CUPF relies on guidelines published by the ICB. Section 2.7 of the Guide for Administration of the Before and After School Childcare Program Selection Process in Public Schools defines the term "permit" as "the document provided to a community group or an individual upon approval of application stating the fees assessed, dates, times and locations reserved for an organization or individual." Section 2.7 additionally provides that "[a] permit cannot exceed 12 months or be transferred to another party. Permit renewals are not automatic." Kids Adventures, therefore, was awarded with a twelve-month permit for the 2018-2019 school year. Thereafter, the circuit court issued a permanent injunction permitting the County and the Board to award the permit to CDC.

⁵ Additionally, the permanent injunction does not mandate that the permit be awarded to CDC. Rather, the permanent injunction "permits" CDC to be awarded a permit for the 2018-2019 school year.

injunction only.” The findings of the preliminary injunction, however, were expressly vacated by the permanent injunction entered on June 26, 2018.

Kids Adventures additionally argues that an exception to the mootness rule applies to this case because there exists an “urgency of establishing a rule of future conduct in matters of important public concern which is both imperative and manifest.” *Hagerstown Reproductive Health Services v. Fritz*, 295 Md. 268, 272 (1983) (citations omitted). The Regulation, however, has expired, along with the permit to operate a before and after school childcare program at Wayside for the 2018-2019 school year. Accordingly, we will not address the merits of this otherwise moot case and dismiss this appeal.

**APPEAL DISMISSED. COSTS TO BE PAID
BY APPELLANT.**