



Court: Shawnee County District Court
Case Number: 2022-CV-000304
Case Title: Plains Modern Inc vs. Laura Kelly
Type: MEMORANDUM DECISION AND ORDER

SO ORDERED.

A handwritten signature in black ink, appearing to read "T. Watson", is written over a large, stylized circular flourish.

/s/ Honorable Teresa L Watson, District Court Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE**

PLAINS MODERN, INC.,

Petitioner

2022-CV-304

LAURA KELLY, in her official capacity
as Governor of the State of Kansas,

Respondent

MEMORANDUM DECISION AND ORDER

Petitioner Plains Modern, Inc., seeks judicial review of the decision of Laura Kelly, Governor of the State of Kansas, regarding demolition of the Docking State Office Building in Topeka. The Court approved the parties' agreement to bifurcate the issues in this case and present first the question of whether this Court has subject matter jurisdiction over Plains Modern's petition. This encompasses three issues: 1) whether the petition was timely filed; 2) whether Plains Modern has standing to challenge the Governor's decision; and 3) whether 75-2724 applies to the legislative decision to demolish and reconstruct the Docking Building. In this order, the Court will address only the question of whether the petition was timely filed because it is dispositive.

STATEMENT OF FACTS

1. The Docking Building is located at 915 SW Harrison in Topeka, Kansas. It is owned by the State of Kansas and is included in the National Register of Historic Places as of January 20, 2022.
2. Through the enactment of L. 2019, Ch. 68, § 141, an omnibus appropriations bill, the Kansas legislature directed that the Department of Administration make expenditures to:

develop the following plans, options, information and cost estimates, as applicable, concerning the Docking state office building: (1) Preserve and upgrade, as needed, the existing energy center of the Docking state office building; (2) selective deconstruction of the existing building above grade; (3) selective deconstruction of the existing building to four stories and retain and develop uses for four stories; (4) redevelopment of a renovated Docking state office building, including adding additional stories; (5) demolish the Docking state office building and build a new facility including, but not limited to, the following: Multi-story options that meet the needs of the Kansas highway patrol and the capitol police at the end of their existing office leases, or other agencies; reserved off street parking; first floor classrooms and meeting rooms; and retain on-site art elements of the building; (6) retain on-site recognition of former Governor Robert Docking; (7) explore the possibility of public/private partnerships to use space for residential units and related retail; and (8) explore the possibility of office space for the city of Topeka or Shawnee county agencies: Provided, That all plans, options and cost estimates shall review energy efficiency and parking needs as a part of such information: Provided further, That the above agency shall consult with the Kansas preservation alliance and any Topeka or Shawnee county economic development agencies on uses for the building: And provided further, That when reviewing deconstruction, explore possibilities to recycle or salvage materials: And provided further, That the above agency shall prepare and submit a report detailing the various plans and options for such building and the updated plans to the joint committee on state building construction, the senate ways and means committee and the house of representatives appropriations committee on or before January 13, 2020.

3. State Finance Council Resolution 21-740, dated December 17, 2021, approved the capital improvement project to renovate the Docking Building. The Resolution stated:

THEREFORE, BE IT RESOLVED THAT the State Finance Council, by the Governor and a majority vote of its legislative members thereof, makes the above findings and approves the two capital improvement projects mentioned above, subject to the conditions herein.

4. The “conditions herein” for the capital improvement project references “the condition that the Docking state office building will be three floors of office space/meeting space.”
5. Secretary of Administration DeAngela Burns-Wallace sent a memo dated February 1, 2022, to Jennie Chinn, then the executive director of the Kansas State Historical Society and the State Historic Preservation Officer (“SHPO”), stating:

In your role as the State Historic Preservation Officer (SHPO), I am writing today to provide formal notice that the Department of Administration has received authorization to reconstruct the Docking State Office Building. As required by a proviso in the FY 2021 budget, the State Finance Council approved reconstruction of Docking to a 3-story building on December 17th, 2021. At this time, the Department of Administration is beginning the initial phases of planning. If any additional steps are required or if you need any additional information as the project begins, please let me know.

6. Chinn, as the SHPO, sent a memo dated February 15, 2022, to the Secretary. It said:

We received your memo dated February 1, 2022, and reviewed the proposed project in accordance with the state preservation statute K.S.A. 75-2724. The law requires the State Historic Preservation Officer (SHPO) be given the opportunity to comment on proposed projects affecting properties listed in the National Register of Historic Places and/or the Register of Kansas Places. The SHPO is charged only with determining whether the projects will damage or

destroy historic resources. The proposed project consists of demolishing the existing Docking Building and reconstructing it as a 3-story building. This will destroy the historic building and cause it to be removed from the National Register of Historic Places.

7. The memo said “the demolition project may proceed” if the conditions set out in K.S.A. 25-2724 are met, including certain findings made by the Governor, and provision of five days’ notice by certified mail to the SHPO before beginning demolition of the building.

8. Governor Kelly wrote Chinn a letter dated March 31, 2022, stating in pertinent parts:

- In accordance with K.S.A. 75-2724 and K.A.R. 118-3-1, I have considered all relevant factors and find that there are no feasible and prudent alternatives to the remodel and that all planning has been done to minimize harm to the Docking State Office Building.

- Please note that this letter is not intended as nor should be interpreted as any waiver of the argument that the proposed remodel was done in accordance with the requirements of FY 2019 Budget, Sec. 141 of Ch. 68 of the 2019 Session Laws, and such legislative language demonstrates intent that the remodel of the Docking State Office Building would not be subject to the requirements of K.S.A. 75-2724. As noted below and in the attached exhibits, there was a lengthy and detailed process for review and approval of the proposed remodel of the Docking State Office Building.

- Pursuant to K.S.A. 75-2724, this letter constitutes notice of my determination, after comprehensive review of state office space needs, a commitment to retain some of the historic elements of the building, and review of all other relevant factors, that there are no feasible and prudent alternatives to the proposed remodel of the Docking State Office Building, and that the remodel includes all possible planning to minimize the harm to the Docking State Office Building. Any review of this determination shall be in accordance with K.S.A. 75-2724(b) and the Kansas Judicial Review Act. The Agency Officer to receive service of a petition for judicial review on behalf of the agency is Justin Whitten, General Counsel for the Office of the Governor.

9. The letter was addressed to:

Jennie Chinn
Executive Director
State Historic Preservation Officer
Kansas Historical Society
6425 SW 6th Avenue
Topeka, KS 66615-1099

It was mailed to Chinn by United States Postal Service certified mail, with return receipt requested, on March 31, 2022. The receipt shows that the letter was received at the address listed on April 1, 2022, and signed for by an individual named Mark Cole.

10. Chinn fell on April 4, 2022, was hospitalized, and died on April 23, 2022.
11. Patrick Zollner, Deputy State Historic Preservation Officer, sent a memo dated April 22, 2022, to Governor Kelly, stating:

As required by Kansas Administration Regulation 118-3-13, we acknowledge receipt of your letter received via certified mail on April 19, 2022, setting forth your findings concerning the proposed project. Please be advised that this acknowledgement concludes the role of this agency under the state preservation statute, K.S.A. 75-2724. We remain, however, ready to assist the Department of Administration as needed and as requested regarding any history-related aspects of the new facility.

Please submit any comments or questions regarding this review to Patrick Zollner at 785-272-8681, ext. 217; Patrick.zollner@ks.gov.

12. The March 31, 2022, letter was not published, and Governor Kelly did not mail or deliver a copy of the letter to a member or representative of Plains Modern before May 1, 2022.
13. Plains Modern filed the instant petition for judicial review on May 17, 2022.

14. Plains Modern is a Kansas not for profit corporation formed on May 9, 2022. Plains Modern’s purpose is preserving and protecting the integrity of modern buildings in Kansas and the surrounding region, specifically the Docking Building.
15. Plains Modern does not have stockholders but does have approximately 56 “members.”
16. A few of these members submitted affidavits in support of the petition for judicial review. The affiants do not specify the dates of their membership in Plains Modern. The affiants state that they own and/or operate commercial businesses and/or property in the vicinity of the Docking Building. The affiants state their belief that the reconstruction project will decrease foot traffic in the area, impair access to the businesses, detract from the historic nature of the neighborhood, and decrease business revenue and property values because the building will have fewer floors.

CONCLUSIONS OF LAW

This is an appeal of an agency action pursuant to the Kansas Judicial Review Act (“KJRA”), K.S.A. 77-601, *et seq.* Governor Kelly first argues that this Court does not have subject matter jurisdiction over the appeal because Plains Modern did not timely file its petition for judicial review. Timely filing of a petition is a prerequisite to judicial review under the KJRA. K.S.A. 77-607(a)(3). “Subject matter jurisdiction is vested by statute and establishes the court's authority to hear and decide a particular type of action.” *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009). Interpretation of statutes, and the existence of jurisdiction pursuant to those statutes, are questions of law. *Id.*

A review of certain statutes and a regulation is necessary to frame the Court's analysis of jurisdiction in this matter. K.S.A. 75-2724 addresses the preservation of historic properties. It says in pertinent part:

(a) **The state or any political subdivision of the state, or any instrumentality thereof, shall not undertake any project which will damage or destroy any historic property included in the national register of historic places or the state register of historic places until the state historic preservation officer has been given notice, as provided herein, and an opportunity to investigate and comment upon the proposed project.** Notice to the state historic preservation officer shall be given by the state or any political subdivision of the state when the proposed project, or any portion thereof, directly involves an historic property. Notwithstanding the notice herein required, nothing in this section shall be interpreted as limiting the authority of the state historic preservation officer to investigate, comment and make the determinations otherwise permitted by this section on a project directly involving an historic property. The state historic preservation officer may solicit the advice and recommendations of the historic sites board of review with respect to such project and may direct that a public hearing or hearings be held thereon. Any public hearing or hearings held pursuant to this subsection or held pursuant to authority delegated by the state historical preservation officer under subsection (e) or (f) shall be held within 60 days from the date of receipt of notice by the state historical preservation officer from the state or any political subdivision of the state as provided herein. **If the state historic preservation officer determines, with or without having been given notice of the proposed project, that the proposed project will damage or destroy any historic property included in the national register of historic places or the state register of historic places, the project shall not proceed until:**

- (1) **The governor, in the case of a project of the state or an instrumentality thereof, or the governing body of the political subdivision, in the case of a project of a political subdivision or an instrumentality thereof, has made a determination, based on a consideration of all relevant factors, that there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm to such historic property resulting from such use; and**
- (2) **five days' notice of such determination has been given, by certified mail, to the state historic preservation officer.**

(b) Any person aggrieved by the determination of the governor pursuant to this section may seek review of such determination in accordance with the Kansas judicial review act. Any person aggrieved by the determination of a governing body pursuant to this section may seek review of such determination in accordance with K.S.A. 60-2101, and amendments thereto.

(c) The failure of the state historic preservation officer to initiate an investigation of any proposed project within 30 days from the date of receipt of notice thereof shall constitute such officer's approval of such project. (Emphasis added.)

K.A.R. 118-3-13 says:

After a governmental entity notifies the state historic preservation officer that the governing body has complied with K.S.A. 75-2715, *et seq.*, and amendments thereto, and has made the proper findings, the governing body's decision shall be reviewed by the state historic preservation officer within five working days of receipt of notice. The findings of the governing body shall be reviewed by the state historic preservation officer, and determination of whether or not further action is required shall be made by this individual. Acknowledgement that the state historic preservation officer received the governing body's findings shall be provided to the governing body.

Consistent with the requirements of K.S.A. 75-2724(a), on February 1, 2022, the Secretary of Administration sent a memo to the SHPO providing notice that the State Finance Council approved reconstruction of the Docking Building to a three-story structure, and the Department of Administration would begin the initial planning phase of the project. The SHPO responded to the Secretary in a memo dated February 15, 2022. The SHPO acknowledged receipt of the Secretary's February 1, 2022, memo and asserted that reconstruction of the Docking Building "would destroy the historic building and cause it to be removed from the National Register of Historic Places" but that the demolition project may proceed if the conditions set forth in K.S.A. 75-2724 were met.

Governor Kelly responded to the SHPO in a letter dated March 31, 2022. Consistent with the requirements of K.S.A. 75-2724(a)(1), the Governor said she determined, based on consideration of all relevant factors, that there is no feasible and prudent alternative to the proposal

to reconstruct the Docking Building and that the project includes all possible planning to minimize harm to the property. The letter was sent by certified mail with return receipt requested to the SHPO. The receipt shows that the letter was received on April 1, 2022. In a memo dated April 22, 2022, to Governor Kelly, the Deputy SHPO acknowledged receipt of the Governor's letter and that this "concludes the role of this agency under the state preservation statute, K.S.A. 75-2724."

K.S.A. 75-2724(b) allows "[a]ny person aggrieved by the determination of the governor" to seek review of it under the KJRA. The SHPO did not appeal the Governor's determination. Plains Modern purported to appeal the Governor's decision by filing the instant petition for judicial review on May 17, 2022. Putting aside the question of whether Plains Modern was a "person aggrieved by the determination," the Court will consider the timing of Plains Modern's petition.

A petition for judicial review of a final agency order must be filed within 30 days after service of the order. K.S.A. 77-613(b). "If a petition is not filed within this 30-day period, a court does not have jurisdiction to consider the appeal." *Gilliam v. Kansas State Fair Bd.*, 62 Kan. App. 2d 236, 241-42, 511 P.3d 969 (2022). Service is complete upon mailing. Three days are added to the period for filing a petition for judicial review where the final order was mailed. K.S.A. 77-613(e). Adding three days makes no difference because Plains Modern's petition for review was filed well beyond the 30 (or 33) day timeframe.

K.S.A. 77-613(d) says "[a] petition for judicial review of agency action **other than a rule and regulation or final order** shall be filed within 30 days after the agency action," with two exceptions. (Emphasis added.) Plains Modern argues that the time to file a petition was extended under the second exception found in K.S.A. 77-613(d)(2). That provision extends the time to file a petition "during any period that the petitioner did not know and was under no duty to discover,

or did not know and was under a duty to discover but could not reasonably have discovered, that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this act.”

But if the Governor’s letter was a final order, the exception in K.S.A. 77-613(d)(2) cannot be applied. An order is “an agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of one or more specific persons.” K.S.A. 77-602(e). “Final agency action means the whole or a part of any agency action other than nonfinal agency action.” K.S.A. 77-607(b)(1). “Nonfinal agency action means the whole or a part of an agency determination, investigation, proceeding, hearing, conference or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural or intermediate with regard to subsequent agency action of that agency or another agency.” K.S.A. 77-607(b)(2).

K.S.A. 75-2724(a) says that after the SHPO has determined that the proposed project will damage or destroy any historic property included in the national register of historic places or the state register of historic places, the project shall not proceed until the Governor makes findings as required by K.S.A. 75-2724(a)(1) and provides five days’ notice of her determination by certified mail to the SHPO. These things occurred on March 31, 2022, and there was nothing more to be done for the project to move forward.

Plains Modern argues that the Governor’s decision was not a final order because K.A.R. 118-3-13 requires the SHPO to acknowledge receipt of the Governor’s decision and review it within five working days to determine “whether or not further action is required.” The regulation does not specify what further action is contemplated or by whom, but it likely refers to the SHPO’s

ability to seek judicial review of the Governor's determination under K.S.A. 75-2724(b). There is nothing in the statute or the regulation that conditions continuation of a demolition project on the SHPO's review of the Governor's determination or any other subsequent act by the SHPO. Thus, the Governor's determination is a final order, and the exception in K.S.A. 77-613(d)(2) does not apply to extend the time for Plains Modern to file a petition for review.

Plains Modern next argues that the Governor's failure to provide Plains Modern or its members notice of the March 31, 2022, letter was a violation of state and federal procedural due process rights, thus her decision is void. "The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. In reviewing a procedural due process claim, the court first must determine whether a protected liberty or property interest is involved. If so, the court then must determine the nature and extent of the process which is due." *State v. N.R.*, 314 Kan. 98, 113, 495 P.3d 16 (2021), *cert. denied* 142 S. Ct. 1678 (2022). The analysis is the same under our state and federal constitutions. *State v. Boysaw*, 309 Kan. 526, 537-38, 439 P.3d 909 (2019).

Plains Modern's argument is essentially that it was deprived of its ability to timely appeal the Governor's decision under the KJRA because the Governor did not provide notice of the letter decision to anyone other than the SHPO. Yet that is all that the statute requires. "The right to appeal is neither a vested nor a constitutional right. It is entirely statutory." *Cincinnati Ins. Co. v. Karns*, 52 Kan. App. 2d 846, 848, 379 P.3d 399 (2016). And "courts have jurisdiction to entertain an appeal only if the appeal is taken within the time limitations and in the manner prescribed by the applicable statutes." *Bd. of Cnty. Comm'rs of Sedgwick Cnty. v. City of Park City*, 293 Kan. 107, 111, 260 P.3d 387 (2011). Plains Modern asks for an exception based on principles of equity and

public policy supporting historic preservation, see K.S.A. 75-2715, but this Court has “no authority to create equitable exceptions to jurisdictional requirements” under the unique circumstances doctrine or any other. *Park City*, 293 Kan. at 120. This is enough to defeat Plains Modern’s procedural due process argument.

Even so, Plains Modern does not demonstrate a protected property interest held by the entity (which did not exist until more than a month after the Governor’s decision) or its members sufficient to trigger procedural due process rights. Procedural due process does not protect entitlements “where the identity of the alleged entitlement is vague. A protected property right must have some ascertainable monetary value.” *Landmark Nat. Bank v. Kesler*, 289 Kan. 528, 544-45, 216 P.3d 158 (2009). Neither indirect monetary benefits nor a claim of entitlement to a particular procedure constitute a protected property interest. *Id.* The interests identified by members of Plains Modern in the affidavits are vague and indirect. This is another reason to reject the due process argument.

There are no Kansas cases directly on point. But in a similar vein, the interests of one landowner in retaining the zoning of a neighboring property are not considered direct enough to merit procedural due process protection. See *Stebbins v. City of Overland Park*, 2012 WL 1759401, *4 (Kan.App. 2012) (unpublished). Loosely defined future business plans are likewise not a protected property interest in the zoning context. *Id.* (landowners “have no property right in anticipated use of land”); and *Houston v. Bd. of City Comm’rs of City of Wichita*, 218 Kan. 323, 333, 543 P.2d 1010 (1975) (because “a governing body can constitutionally zone an existing business out of existence, it can surely zone against a use which is merely contemplated at some indefinite time in the future”).

Plains Modern failed to file its petition for judicial review within the statutory timeframe, depriving this Court of subject matter jurisdiction. Plains Modern is not entitled to relief based on principles of procedural due process. Because the appeal must be dismissed on this basis, the Court will not address the remaining issues.

CONCLUSION

For the reasons set forth above, this Court lacks subject matter jurisdiction over Plains Modern's appeal of the Governor's decision. The petition for judicial review is dismissed.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically providing notice to counsel of record.

/s Angela Cox
Administrative Assistant