

ARKANSAS COMMISSION ON POLLUTION
CONTROL AND ECOLOGY *v.*
LAND DEVELOPERS, INC.

83-310

680 S.W.2d 909

Supreme Court of Arkansas
Opinion delivered December 10, 1984
[Rehearing denied January 14, 1985.]

1. CONSTITUTIONAL LAW — DE NOVO REVIEW — PROPRIETY TURNS ON CHARACTER OF AFFECTED INTEREST. — The constitutional propriety of de novo review primarily turns upon the character and legal status of the affected interests: If the interests are constitutionally or statutorily preserved, or preserved by private agreement, de novo review is appropriate; if the interests are less than fixed and their existence primarily depends on executive or legislative wisdom, de novo review is inappropriate.
2. HEALTH — POLICE POWER — DETERMINATION OF LANDFILL SITE. — Appellant's determination of the suitability of a site for a landfill falls within its proper police powers to protect the health, safety, and general welfare of the citizens of the state.
3. HEALTH — DETERMINATION OF LANDFILL SITE NOT JUDICIALLY COGNIZABLE. — A determination of the suitability of a site for a landfill is not a determination which is judicially cognizable since the effort to obtain a permit hinges on executive discretion.
4. PROPERTY — OWNERSHIP OR LEASEHOLD ARE NOT NON-TERMINABLE RIGHTS. — Mere ownership, or leasehold, of property which could be utilized for the conduct of business does not constitute a non-terminable right.
5. CONSTITUTIONAL LAW — STATUTE FOUND UNCONSTITUTIONAL. — Ark. Stat. Ann. § 82-1906(7) (Repl. 1976) is unconstitutional to the extent that it authorizes the circuit court to review de novo decisions that hinge on the exercise of executive discretion; but the circuit court has the power to grant relief in appropriate proceedings when the decision is arbitrary, capricious, or unreasonable, and to take additional evidence on any issue.

Appeal from Saline Circuit Court; *John Cole*, Judge;
reversed and remanded.

Phillip Deisch and *James M. McHaney*, for appellant.

Philip W. Ragsdale, and Gibson, Ellis & Arnold, for appellee Land Developers, Inc.

Steve Clark, Att'y Gen., by: E. Jeffery Story, Asst. Att'y Gen., for respondent Judge Cole.

WEBB HUBBELL, Chief Justice. Appellee, Land Developers, Inc., made application to appellant, Arkansas Department of Pollution Control and Ecology for a permit to operate a sanitary landfill. Appellant denied the application, and appellee appealed the decision to the Saline County Circuit Court.

In November, 1983, the trial court ordered that the matter would be heard *de novo*, that either party could supplement the record, and the court would accept such additional evidence as was properly offered. On February 24, 1984, the circuit court ruled that the appellant was without authority to deny the permit and that it should immediately issue the permit. Appellant argues, along with several other points for reversal, that the trial court erred in conducting a trial *de novo*. We agree and reverse and remand.

The circuit court ordered a trial *de novo* pursuant to Ark. Stat. Ann. § 82-1906 — Subdivision 7 (Repl. 1976) which provides:

The appeal shall be heard and determined by the court upon the issues raised by the notice of appeal. . . . The court on its own motion or on application of any party may, in its discretion, take additional evidence on any issue of fact or may try any or all such issues *de novo*, but no jury trial shall be had.

Appellant argues that a *de novo* review is an infringement of executive discretion in violation of Article IV of the Arkansas Constitution. In *Goodall v. Williams*, 271 Ark. 354, 609 S.W.2d 25 (1980), we reviewed the issue of the constitutional propriety of *de novo* review of administrative action by the judiciary. In *Goodall* we said that the constitutional propriety of *de novo* review primarily turns upon the character and legal status of the affected interests. If

the interests are constitutionally or statutorily preserved, or preserved by private agreement, de novo review is appropriate. *Thornbrough v. Williams*, 225 Ark. 709, 284 S.W.2d 641 (1955). If the interests are less than fixed and their existence primarily depends on executive or legislative wisdom, de novo review is inappropriate. *Goodall v. Williams*, supra.

Appellant administers the Solid Waste Management Act, the purpose of which is to regulate the collection and disposal of solid wastes in a manner that will: a) protect the public health and welfare, b) prevent water and air pollution, c) prevent the spread of disease, d) conserve natural resources, and e) enhance the beauty and quality of the environment. Ark. Stat. Ann. § 82-2702 (Repl. 1976). Appellant's determination of the suitability of a site for a landfill falls within its proper police powers to protect the health, safety, and general welfare of the citizens of the state. Such a determination, similar to that for the issuance of a liquor license, is not a determination which is judicially cognizable since the effort to obtain a permit hinges on executive discretion. *Goodall v. Williams*, supra.

Mere ownership, or leasehold, of property which could be utilized for the conduct of business does not constitute a non-terminable right. *Blundell v. City of West Helena*, 258 Ark. 123, 522 S.W.2d 661 (1975). In *Wenderoth v. City of Forth Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971), we said that a statute providing for de novo review of municipal zoning decision violates Article 4 of the Arkansas Constitution. For the same reasons, the right to operate a landfill must be precluded from de novo review.

We hold that Ark. Stat. Ann. § 82-1906-Subdivision 7 (Repl. 1976) is unconstitutional to the extent that it authorizes the circuit court to review de novo the appellant's decision. This does not mean that appellant's decisions are immune from appellate review. The circuit court has the power to grant relief in appropriate proceedings when the decision is arbitrary, capricious, or unreasonable; and to take additional evidence on any issue.

