

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

CAROLYN MILLS, individually and as)
Next Friend of Caitlin Mills and Abigail)
Mills, Minors)
)
Plaintiffs,)
)
v.)
)
CITY OF HAZELWOOD,)
)
Defendant.)

Cause No. 11SL-CC01399
Division 2

ENTRY OF APPEARANCE

COME NOW John M. Hessel, Jayme E. Major and the law firm of Lewis, Rice, & Fingersh, L.C. and hereby enter their appearance on behalf of Defendant City of Hazelwood.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

By 
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Attorneys for Defendant City of Hazelwood

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the following by first class mail, postage prepaid, this 15th day of June, 2011, addressed as follows:

David E. Roland
Freedom Center of Missouri
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St. Louis, MO 63112
Attorneys for Plaintiffs

 _____

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CITY OF HAZELWOOD,)	
)	
Defendant.)	

DEFENDANT’S MOTION TO DISMISS

COMES NOW Defendant City of Hazelwood (the “City”) and, pursuant to Rule 55.27 of the Missouri Rules of Civil Procedure, herein moves this Court to dismiss Plaintiffs’ Petition. In support of this Motion to Dismiss, the City states as follows:

1. Plaintiffs’ Petition seeks equitable relief arising from the City’s denial of Plaintiffs’ home occupation license application to permit the outdoor sale of Girl Scout cookies on their property by two minor children.

2. In support of their claims, Plaintiffs assert that the City’s Director of Public Works misinterpreted the home occupation ordinance and that the City’s prohibition of cookie sales in front of their home violates certain constitutional rights under the United States Constitution and the Missouri Constitution.

3. Section 405.755 of the Hazelwood Zoning Ordinance and RSMo. § 89.090.1(1) clearly establish that the Hazelwood Board of Adjustment has the power and duty to hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of Chapter 405 of the Hazelwood City Code.

4. Plaintiffs failed to seek an administrative appeal of the City's application of the Zoning Code and the City's denial of the application.

5. It is well-established that the failure to exhaust available administrative remedies deprives the court of jurisdiction. *State ex rel. Maynes Const. Co. v. City of Wildwood*, 965 S.W.2d 949, 953 (Mo. App. E.D. 1998); *Normandy School District v. City of Pasadena Hills*, 979 S.W. 2d. 941 (Mo. App. E.D. 1998); *see also McDonald v. City of Brentwood*, 66 S.W.3d. 46, 49 (Mo. App. E.D. 2001); *Begshaw v. City of Independence, Missouri*, 41 S.W.3d. 500, 504 (Mo. App. W.D. 2000); *Boling Concrete Construction Co., Inc. v. Townsend*, 688 S.W.2d. 842, 843 (Mo. App. E.D. 1985).

6. The exhaustion of administrative remedies must occur before bringing suit when a municipality has enacted zoning regulations that provide for a board of adjustment to hear and decide appeals. *Shaffer v. Pacific*, 807 S.W.2d 207, 209 (Mo. App. E.D. 1991); *N.G. Heimos Greenhouse, Inc. v. City of Sunset Hills*, 597 S.W.2d 261, 263 (Mo. App. E.D. 1980).

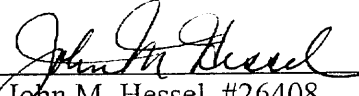
7. Since Plaintiffs have failed to exhaust their administrative remedies, this Court does not have jurisdiction over this matter and Plaintiffs' Petition should be dismissed.

8. In support of this Motion, the City files contemporaneously herewith its Memorandum in Support of its Motion to Dismiss.

WHEREFORE, Defendant City of Hazelwood moves this Court to dismiss Plaintiffs' Petition at Plaintiffs' costs and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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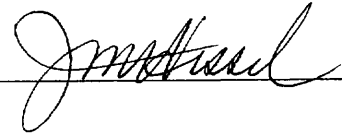
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MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS

Introduction

Plaintiff Carolyn Mills, individually, and as Next Friend of Caitlin Mills and Abigail Mills, Minors (hereinafter “Plaintiffs”) filed a Petition with this Court claiming that the City of Hazelwood (the “City”) improperly applied Section 405.395 of the Hazelwood Zoning Code. Plaintiffs allege that the City’s interpretation of § 405.395 is improper because the selling of cookies in front of their home is not a “home occupation”. Plaintiffs claim that the City’s prohibition against the sale of goods outside of their home deprives them of liberty and property without due process under the Fourteenth Amendment to the U.S. Constitution as well as Article I, Sections 2 and 10 of the Missouri Constitution. Plaintiffs, however, fail to acknowledge that Chapter 405 (entitled the “Zoning Ordinance of the City of Hazelwood, Missouri”) requires any party who may be dissatisfied with the City’s interpretation of its Zoning Code to seek an administrative review through the Board of Adjustment.

Plaintiffs admit that “(w)hile Carolyn Mills did not believe that their cookie stand fell within the scope of Section 405.395 . . .” an application was filed and denied by the City. (Petition at ¶¶ 18a-19). Notwithstanding the objection to the City’s interpretation of the Code

and Plaintiffs' objection to the denial of the home occupation license application, Plaintiffs have not filed an administrative appeal. This Court, therefore, has no jurisdiction over this cause, and, as a matter of law, Plaintiffs' Petition must be dismissed.

I. BACKGROUND

Plaintiffs allege that Caitlin and Abigail Mills are members of a Girl Scout troop that participates in the annual sale of Girl Scout cookies. (Petition at ¶ 9). From 2005 to 2010, Caitlin and Abigail sold cookies from a table set up on their family's property for a few weeks each year in connection with the annual Girl Scout cookie sale. (Petition at ¶¶ 12 - 13). On March 7, 2011, Plaintiffs received a notice from the City stating that the cookie stand violated Hazelwood City Code § 405.395, which regulates home occupations and requires a license that can be obtained through an application process set forth in the City Code. (Petition at ¶ 17). In response, Plaintiffs submitted an application for a license to sell cookies on the property. Plaintiffs' application was denied. (Petition at ¶¶ 18-19).

The Hazelwood Zoning Code specifically provides administrative remedies for any person aggrieved by an interpretation of any provision within the Code or for any person who believes that the denial of an application was improper. Plaintiffs have failed to exhaust their administrative remedies even though they allege that (1) the Director of Public Works (the "Director") improperly interpreted Hazelwood City Code § 405.395, and (2) the City's prohibition of cookie sales is improper and illegal.

In their Petition, Plaintiffs claim that the City's prohibition of the cookie stand "does not serve any legitimate government interest and is without any rational basis related to the public health, safety, and welfare." (Petition at ¶¶ 32, 39). Although the City believes that the relevant

facts demonstrate a public safety concern warranting a denial of the license,¹ the issue must be addressed administratively before it can be reviewed by this Court. Similarly, the Hazelwood Board of Adjustment must address the Director's interpretation of the Code.

II. LEGAL STANDARD

Exhaustion of administrative remedies is a jurisdictional requirement. *See, e.g., Drury Displays v. Richmond Heights*, 922 S.W.2d 793, 797 (Mo. App. E.D. 1996); *N.G. Heimos Greenhouse, Inc. v. City of Sunset Hills*, 597 S.W.2d 261, 263 (Mo. App. E.D. 1980); *State ex rel. J.S. Alberici v. City of Fenton*, 576 S.W.2d 574, 577-78 (Mo. App. E.D. 1979). When exhaustion of administrative remedies is required and a party fails to pursue all administrative remedies, the circuit court is without subject matter jurisdiction and the only recourse is to dismiss the cause. *See, e.g., Green v. City of St. Louis*, 870 S.W.2d 794, 796 (Mo. banc 1994) (“failure to exhaust administrative remedies requires that a party seek all available remedies at the administrative level before applying to the Courts for relief.” (citations omitted)). Exhaustion occurs only when every step of the administrative procedure has been completed. *Parker v. City of St. Joseph*, 167 S.W.3d 219 (Mo. App. W.D. 2005); *Maynes Const. Co. v. City of Wildwood*, 965 S.W.2d 949, 952 note 1 (Mo. App. E.D. 1998).

III. ARGUMENT

In this case, Plaintiffs are challenging the City's denial of the home occupation license, but they have not properly sought review of this decision through the City's administrative process. Plaintiffs' Petition should, therefore, be dismissed because “(T)he exhaustion of

¹ Although not relevant for the purposes of this Motion to Dismiss, the Director of Public Works received information that the sale of over 1,700 boxes of cookies over the course of two weeks had increased traffic, and the Director received complaints from neighbors. In addition, a police report filed by Plaintiffs on March 1, 2009 indicates that the two minors were robbed of approximately \$1,000 while running their cookie stand alone on their property.

administrative remedies is a jurisdictional requirement for a declaratory judgment action.” *N. G. Heimos Greenhouse*, 597 S.W.2d at 263. A party aggrieved by the action or decision of the City or its officers, employees or officials must first exhaust its administrative remedies before it may seek judicial relief. *Maynes Const.*, 965 S.W.2d at 953; *see also State ex rel. Forget v. Franklin County*, 809 S.W.2d 430, 432 (Mo. App. E.D. 1991); *State ex rel. Alberici v. City of Fenton*, 567 S.W.2d at 578. Plaintiffs are not excused from exhausting their administrative remedies by virtue of raising constitutional issues. *See Muth v. Board of Regents of Southwest Missouri State University*, 887 S.W.2d 744, 751 (Mo. App. S.D. 1994) (“To hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue.”).

Missouri courts have clearly held that exhaustion of administrative remedies is a jurisdictional requirement for maintaining a declaratory judgment action. *Shaffer v. Pacific*, 807 S.W.2d 207, 209 (Mo. App. E.D. 1991); *N.G. Heimos Greenhouse, Inc.*, 597 S.W.2d at 263 (finding that a failure to exhaust administrative remedies as set forth in a city’s zoning ordinances warranted a dismissal of the challenge). Chapter 89 of the Missouri Revised Statutes directs cities to enact zoning regulations. RSMo. Chapter 89; *Shaffer v. Pacific*, 807 S.W.2d at 209. Chapter 405 of the Hazelwood Code of Ordinances is “the Zoning Ordinance of the City of Hazelwood, Missouri.” Hazelwood City Code § 405.005. Once a city adopts an ordinance that “provides for a board to hear and decide appeals where there is error in a requirement, decision, or determination made by an administrative official in the enforcement or administration of the [zoning] ordinance,” a party aggrieved by such a decision must, indeed, appeal to the board

provided for in said ordinance before seeking relief in court. *Shaffer v. Pacific*, 807 S.W.2d at 209. The City has, in fact, adopted an ordinance for review as contemplated by *Shaffer*:

The Board of Adjustment has the power and duty to “hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Director of Public Works in the enforcement of... Chapter 405 or of any ordinance adopted pursuant thereto.”

Hazelwood City Code § 405.755.

The requirement for administrative remedy exhaustion is also set out in RSMo. § 89.090.1(1), and it states that a city’s board of adjustment shall “hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of... any ordinance adopted pursuant to [zoning] sections.” The Missouri Court of Appeals has expressly found that appellate procedures outlined in a city code provide an adequate and effective avenue for review of a city’s administrative decisions. *Maynes Const.*, 965 S.W.2d at 954.

Plaintiffs have failed to file an administrative appeal pursuant to Hazelwood City Code § 405.755 or RSMo. § 89.090.1(1). This Court must, therefore, dismiss the instant action for lack of jurisdiction. *See, Shaffer* and *N.G. Heimos Greenhouse, Inc.* Plaintiffs must allow the City an opportunity to review the alleged improper interpretation of the ordinance before seeking relief from this Court. Accordingly, Plaintiffs’ Petition must be dismissed in its entirety.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the City’s Motion and dismiss Plaintiffs’ Petition in its entirety.

Respectfully submitted,

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