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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000358-MR

JOHN BACKER; AND BEAZER
HOMES INVESTMENTS, LLC

APPELLANTS

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 06-CI-00397

WOODFORD COUNTY; WOODFORD COUNTY FISCAL COURT; MEMBERS OF THE WOODFORD COUNTY FISCAL COURT: MAGISTRATE CARL ROLLINS; MAGISTRATE JACKIE BROWN; MAGISTRATE JAMES E. STAPLES; MAGISTRATE TOMMY TURNER; MAGISTRATE CHARLES "BONES" WEBBER; AND MAGISTRATE JAMES R. ALCOKE, IN THEIR OFFICIAL CAPACITIES; WOODFORD COUNTY MAGISTRATE LEWIS "BUDDY" MCDANNOLD, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; MAGISTRATE BOBBY GAFFNEY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; COUNTY CHIEF EXECUTIVE JOE D. GORMLEY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; THE VERSAILLES-MIDWAY-WOODFORD COUNTY PLANNING AND ZONING COMMISSION AND ITS MEMBERS IN THEIR OFFICIAL CAPACITIES: ROBERT BLANKENSHIP, JIM BOGGS, GERALD DOTSON, CARL ELLIS, JOEL EVANS, GAY GLENN, JIM HUME, MARK MCDONALD, AND J.D. WOLF; THE WOODFORD COALITION; AND BACKER FARM, LLC

APPELLEES

OPINION
AFFIRMING

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BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

BUCKINGHAM, SENIOR JUDGE: John Backer and Beazer Homes Investments, LLC (hereinafter referred to collectively as “Backer”), appeal from a summary judgment upholding the Woodford Fiscal Court’s denial of an application for a zoning change and a judgment on the pleadings in favor of three fiscal court members individually. Backer argues that: (1) he was entitled to depose the fiscal court members to discover the facts upon which they relied in voting on the application; (2) the fiscal court denied him procedural due process; and (3) the trial court improperly granted judgment on the pleadings to the individuals. We affirm.

Backer owns 300 acres of farmland in Woodford County and had planned to sell the land to Beazer Homes Investments for the purpose of development. Beazer had planned to convert the property into a mixed-use development consisting of 562 single-family residences, 240 townhomes, 100 apartment units, and 90,000 square feet of retail space. The proposed development required a zoning change from A-1 agricultural to R-1B residential. On April 7, 2006, Backer applied to the Versailles-Midway-Woodford County Planning and Zoning Commission for the necessary zoning change.

The planning commission held three hearings on the application. Proponents and opponents presented evidence on several aspects of the planned development. The issue of traffic consequences became the primary contested issue.

Backer hired an engineer, Tim Sorenson, to testify before the planning commission and to present a traffic study detailing the likely traffic consequences

of the proposed development. Sorenson first testified before the planning commission on June 22, 2006, at which time Henry Graddy, counsel for the opponent group Woodford Coalition, did not cross-examine Sorenson. Graddy complained that he did not have the opportunity to effectively cross-examine Sorenson because he had not been provided with a copy of the traffic study despite having requested one several months earlier.

At the hearing on July 22, 2006, the Woodford Coalition presented testimony from another engineer, Adam Kirk, to rebut Sorenson's conclusions. At the hearing on August 10, 2006, Backer recalled Sorenson as a witness to rebut Kirk's testimony, and at that time Graddy cross-examined Sorenson. The planning commission later voted 5 to 3 to recommend approval of Backer's zoning change application.

On October 9, 2006, while the proceedings before the fiscal court were pending, and unbeknownst to the members of the fiscal court, Graddy contacted the Woodford County Attorney by letter and complained that he had not had a fair opportunity to present evidence to the planning commission on the issue of traffic consequences. Graddy requested the county attorney's assistance in securing a public hearing before the fiscal court on that limited issue. The next day, Graddy appeared at the public comment portion of a fiscal court meeting and requested that the fiscal court hold an evidentiary hearing on the issue of traffic consequences. The fiscal court scheduled an evidentiary hearing for November 14, 2006.

Upon learning of the scheduled evidentiary hearing, Bruce Simpson, Backer's attorney at that time, appeared at the fiscal court meeting on October 24, 2006, and complained that Graddy had not notified him prior to appearing at the October 10 meeting. Simpson also filed a written motion requesting that the November 14 hearing be canceled. Although it did not act immediately, the fiscal court eventually canceled the hearing.

In the meantime, Simpson asserted that three members of the fiscal court, Magistrate Bobby Gaffney, Magistrate Buddy McDannold, and County Judge-Executive Joe Gormley, were improperly interested in the property and/or biased against the zoning change application and requested that they recuse themselves. The county attorney investigated Simpson's allegations and determined that there was no basis upon which to believe that the members were improperly interested in the property or biased against the zoning change. The county attorney reported his findings at the fiscal court meeting on November 14, 2006. While the county attorney was investigating Simpson's allegations, Graddy sent the members of the fiscal court copies of a traffic study by another traffic expert, Nick Stamatiadias, as well as proposed findings of fact for the fiscal court to adopt.

The fiscal court adopted a resolution overriding the recommendation of the planning commission and denied Backer's application for a zoning change. The fiscal court made extensive findings of fact and also stated that it based its

decision on the record before the planning commission and did not rely on the traffic study that Graddy had sent to fiscal court members.

Backer filed an appeal and complaint in Woodford Circuit Court and also asserted claims against Magistrates McDannold and Gaffney and County Judge-Executive Gormley in their individual capacities. Magistrates McDannold and Gaffney and County Judge-Executive Gormley moved for judgment on the pleadings. While that motion was pending, Backer sought to depose them as well as Magistrates Tommy Turner and Jackie Brown. The trial court granted judgment on the pleadings in favor of the three fiscal court members and issued a protective order prohibiting the taking of their depositions.

Subsequently, the parties filed cross-motions for summary judgment. The trial court granted summary judgment in favor of Woodford County and against Backer. Backer filed a motion to alter, amend, or vacate, which the trial court denied. This appeal followed.

Backer first argues that he was entitled to depose the five members of the fiscal court to ascertain the basis upon which they relied in casting their votes. Backer argues that the speech and debate clauses of the Kentucky Constitution and U.S. Constitution, upon which the trial court relied, neither shields fiscal court members from being questioned about their deliberations nor applies to fiscal court members.

The parties did not cite any authority directly on point which addresses the issue of whether members of a county fiscal court may be deposed in

a circuit court action alleging that the granting or denying of a zoning change application was arbitrary. *Jefferson County Fiscal Court v. Shake*, 82 S.W.3d 917 (Ky. 2002), however, bears some similarity to this case.²

The facts in *Shake* reveal that an owner and a developer of land sought a zoning change for undeveloped land, and a planning commission recommended the change to the Jefferson County Fiscal Court. As in this case, the fiscal court in *Shake* overruled the planning commission's approval and denied the change. The owner and developer appealed the denial to the Jefferson Circuit Court and sought to take the discovery depositions of a county commissioner and four members of his staff. The fiscal court sought a protective order arguing that deposing its members violated the separation of powers doctrine. The circuit court denied the motion for a protective order, and the fiscal court sought a writ of prohibition from the Court of Appeals. The Court of Appeals denied the petition for a writ on the grounds that there was an adequate remedy by appeal.

The Kentucky Supreme Court affirmed the denial of the writ by the Court of Appeals, citing *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964). *Shake*, 82 S.W.3d at 919. In *American Beauty Homes*, the Court had held that “[n]o new or additional evidence would be admissible on appeal except to determine what state of facts the Commission acted on, or possibly to establish the violation of some legal right with respect to a matter not in issue in proceedings before the

² The *Shake* case was not cited by the parties in their briefs.

Commission.” *American Beauty Homes*, 379 S.W.2d at 457-58 (internal citations omitted).

The Court in *Shake* reasoned that because the county commissioner acknowledged that he had been improperly contacted by persons attempting to influence his vote in violation of a specific city ordinance, the commissioner could be deposed to determine whether some legal right of the zoning applicants had been violated. *Id.* at 919-20. The Court stated that “[t]he Ordinance would be meaningless without a means of enforcement when there is probable cause to believe a violation has occurred.” *Id.*

There are limits to the judicial review of zoning change determinations, however. In *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464 (Ky. 2005), the Kentucky Supreme Court explained that:

[S]ince zoning determinations are purely the responsibility and function of the legislative branch of government, such determinations are not subject to review by the judiciary except for the limited purpose of considering whether such determinations are arbitrary. Arbitrariness review is limited to the consideration of three basic questions: (1) whether an action was taken in excess of granted powers, (2) whether affected parties were afforded procedural due process, and (3) whether determinations are supported by substantial evidentiary support. [Internal citations omitted].

Id. at 467. The Court further stated:

The fundamental requirement of procedural due process is simply that all affected parties be given “the opportunity to be heard at a meaningful time and in a meaningful manner.” Procedural due process in the administrative or legislative setting has widely been

understood to encompass “a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party’s constitutional rights are involved, a judicial review of the administrative action.” [Internal citations omitted].

Id. at 469.

Additionally, the Court in *Hilltop Basic Resources* held that “the ‘right to an impartial tribunal’ is nowhere to be found” in the list of procedural due process requirements in an administrative or legislative setting. *Id.* But, the Court cautioned that

However, decisions makers are not free to be biased or prejudicial when performing nonjudicial functions. To the contrary, any bias or prejudicial conduct which demonstrates “malice, fraud, or corruption” is expressly prohibited as arbitrary. Furthermore, decisions tainted by conflict of interest or blatant favoritism are also prohibited as arbitrary. [Internal citations omitted].

Id.

In addressing the issue of whether Backer could depose the magistrates, the trial court held that “the taking of depositions of individual local legislators is clearly prohibited by Section 43 of Kentucky’s Constitution and Article 1, Section 6 of the United States Constitution.” The court further stated that “simply making those allegations does not allow Appellants/Plaintiffs to circumvent the prohibitions against questioning legislators concerning their official acts in this or any proceedings.” The court apparently relied on *Jacobs v. Underwood*, 484 S.W.2d 855 (Ky. 1972), in making this determination. In *Jacobs*,

the Court held that KRS 84.050(5), a statute that has since been repealed, “made the legislative immunity in Kentucky absolute for members of secondary legislative bodies.” *Jacobs*, 484 S.W.2d at 857.

We disagree with the trial court’s conclusion that deposing members of a county fiscal court is prohibited by the Kentucky Constitution and U.S. Constitution. Section 43 of the Kentucky Constitution provides in part that “for any speech or debate in either House they [members of the General Assembly] shall not be questioned in any other place.”³ In holding that this provision also applies to secondary legislative bodies (such as city councils or fiscal courts), the Court in *Jacobs* relied on KRS 84.050(5), which has since been repealed. Thus, we agree with Backer that the *Jacobs* case is no longer good authority to support the idea that local legislators are protected from being questioned concerning their decisions. More importantly, as evidenced by the Supreme Court’s holding in the *Shake* case, depositions of fiscal court members are allowed at least in some circumstances.

The question before this court is whether the fiscal court members may be deposed under the circumstances in this case. We believe the answer lies in whether Backer’s allegations of bias are relevant to the determination of arbitrariness. *See Hilltop Basic Resources*, 180 S.W.3d at 469.

³ Similarly, Article 1, Section 6, of the U.S. Constitution provides in part that “for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”

Backer alleged that Magistrate Gaffney was personally interested in the property because he had expressed an interest in buying it; that Magistrate McDannold was biased because he had made a campaign statement indicating that he was generally opposed to development along U.S. Highway 60; and that County Judge-Executive Gormley was biased because he had signed a petition years earlier advocating that current urban services along the highway not be expanded.

Concerning Magistrate Gaffney's alleged interest in purchasing the property, he had been interested in purchasing it several years earlier. The only proof in this regard was an affidavit presented from an individual named Henry Haynes who had engaged Gaffney in conversation concerning the proposed zone change. There was no indication that this interest, or alleged conflict of interest, still existed. Concerning Magistrate McDannold's alleged bias against the zoning change, the only proof was again an affidavit from Henry Haynes who, according to McDannold, had joined him for breakfast one morning even though McDannold had not seen him in years. There is no indication that McDannold should have recused. Concerning County Judge-Executive Gormley's alleged bias because he had signed a petition years before he had become a magistrate and because he had once referred to U.S. Highway 60 as "sacred ground," we again find no basis to support his disqualification to consider the issue as a member of the fiscal court.

As the Kentucky Supreme Court stated in *Hilltop Basic Resources*, "the 'right to an impartial tribunal' is nowhere to be found" in the list of procedural due process requirements. *Id.* at 469.

A legislative decision-maker will not be disqualified simply because he or she has taken a public position on a policy issue related to the dispute, or demonstrated a bias or pre-disposition toward a certain result. . . . But a local legislator is not disqualified unless there is a showing that the legislator is not capable of judging a particular controversy fairly on the basis of its own circumstances.

Warren County Citizens for Managed Growth, Inc. v. Board of Comm'rs of City of Bowling Green, 207 S.W.3d 7, 17 (Ky. App. 2006). We conclude that Backer's allegations are insufficient to constitute "malice, fraud, or corruption" or to constitute a "conflict of interest or blatant favoritism[.]" *Hilltop Basic Resources*, 180 S.W.3d at 469. In the absence of sufficient allegations, the trial court did not abuse its discretion in denying Backer the right to depose the fiscal court members.

Backer next argues that he was denied procedural due process before the fiscal court. Specifically, he argues: (1) that Graddy's *ex parte* contact with the fiscal court violated his rights; (2) that the allowance of additional evidence violated his rights; (3) that the refusal of Magistrates McDannold and Gaffney and County Judge-Executive Gormley to recuse themselves violated his rights; and (4) that the fiscal court's failure to render its own findings indicates that it did not meaningfully consider the zoning change application. We disagree.

In this regard, Backer first argues that Graddy's *ex parte* contact with the fiscal court on October 10, 2006, violated his due process rights. Although Backer maintains that his rights were "unquestionably impacted," the fact is that Graddy simply requested a hearing at the public comment portion of the meeting. Although the court did schedule the hearing, it ultimately canceled it as Backer had

requested. We conclude that Graddy's *ex parte* request for a hearing did not violate Backer's procedural due process rights.

Backer next argues in this regard that the fiscal court's allowance of additional traffic study evidence violated his rights. While Graddy did mail the Stamatiadias traffic study to the fiscal court, the fiscal court stated on the record that it did not consider the evidence but based its decision solely on the record of the planning commission. We conclude that there was no procedural due process violation in this regard.

Backer next asserts that the failure of Magistrates McDannon and Gaffney and County Judge-Executive Gormley to recuse themselves violated procedural due process. We have earlier stated herein that the three fiscal court members were not required to recuse themselves. Even assuming that the three fiscal court members should have recused themselves from considering the zoning change application, it is of no consequence because the fiscal court voted 6 to 2 to deny the zoning change. The absence of three members' votes would still have left a majority vote of 3 to 2 denying the application.

Backer also contends that the fiscal court's failure to issue its own findings indicates that it did not meaningfully consider the zoning application. This argument is not supported by the record. The fiscal court made thorough findings, and the members recited their individual positions into the record. The fiscal court made some findings in support of denying the zoning change that were different from the tendered findings. Most importantly, even if the fiscal court

adopted some or even all of the tendered findings, we are neither cited to nor can we discern any authority prohibiting such a practice. We conclude that there was no violation of procedural due process in this regard.

Backer's last argument is that the trial court erred in granting judgment on the pleadings to three fiscal court members. He asserts that the trial court erred by failing to accept his allegation that the members acted "willfully, maliciously, and outside the scope of their duties" as true for the purposes of deciding the motion.

In the *Hilltop Basic Resources* case, the Kentucky Supreme Court, while noting what the fundamental requirement of procedural due process encompasses, further stated that "[h]owever, decision makers are not free to be biased or prejudicial when performing nonjudicial functions. To the contrary, any bias or prejudicial conduct which demonstrates 'malice, fraud, or corruption' is expressly prohibited as arbitrary." 180 S.W.3d at 469. Backer argues that he alleged such conduct and that the trial court erred in granting the three members of the fiscal court judgment on the pleadings.

We conclude that the trial court correctly decided, based on *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that the fiscal court members were immune from personal liability in connection with their rejection of the proposed zoning change application. "[L]egislators are generally immune from civil or criminal actions for acts committed or statements made in their official capacities." *Wiggins v. Stuart*, 671 S.W.2d 262, 264 (Ky. App. 1984). "Members

of legislative bodies cannot be held personally responsible in civil actions based on their vote cast in the exercise of discretion vested in them by virtue of their office either for or against any particular legislation, at least in the absence of corruption.” *Id.* citing 72 Am. Jur. 2d *States* § 55 (1974).

Assuming the three members acted in the manner alleged by Backer, his remedy was to attack the decision as arbitrary rather than seek personal individual liability against the members of the fiscal court. The trial court did not err by entering judgment on the pleadings in favor of the three fiscal court members.

The judgment of the Woodford Circuit Court is affirmed.

ALL CONCUR.

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