RENDERED: DECEMBER 3, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001029-MR

CAROLE ZEIS — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 06-CI-00286

WOODFORD COUNTY FISCAL COURT;
JOSEPH GORMLEY, JUDGE
EXECUTIVE; CARL ROLLINS;
CHARLES WEBBER; JAMES
ALCOKE; LOUIS MCDANNOLD;
TOM TURNER; BOBBY GAFFNER;
JAMES STAPLES; JACKIE BROWN
AND ROBERT J. RADTKE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; WHITE,[1] SENIOR JUDGE.

[1] Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

WHITE, SENIOR JUDGE: Carol Zeis appeals from a Woodford Circuit Court opinion and order of January 21, 2009, and a subsequent order of May 1, 2009, which denied her motion to alter, amend or vacate. At issue is the circuit court's review of a zoning change approved by the Woodford Fiscal Court. Zeis argues that the circuit court was without jurisdiction to enter the orders, and, in the alternative, that its affirmation of the zoning change was clearly erroneous.

This case has a lengthy and complicated procedural history involving the circuit court's review of actions taken by the Woodford Fiscal Court ("Fiscal Court") and the Versailles-Midway-Woodford County Planning and Zoning Commission ("Planning Commission"). On April 10, 2006, George D. Reeves, Jr. and Bonnie Reeves,[2] doing business as Spring Ridge LLC, filed a zone-change application with the Planning Commission. The application requested the rezoning of a thirty-three acre tract located near Nonesuch, Kentucky, from A-1 (Agricultural) to A-4 (Small Community). The application proposed to subdivide the tract into thirteen single-family residential lots.

After a public hearing regarding the proposed zone-change request, the Planning Commission recommended to the Fiscal Court, by a vote of six to three, that the application be denied. As the basis for its decision, the Planning Commission found that (1) granting the zoning change would constitute "spot zoning" and "leap frog zoning" because the property was surrounded on all sides by property zoned for agricultural use and was not contiguous to previously built-

[2] The property was later sold to Robert J. Radtke and he was substituted as a party for Spring Ridge and George and Bonnie Reeves by order of the circuit court on October 9, 2008.

up areas; (2) the development would be contrary to the 2005 Comprehensive Plan Guidelines, which seek to make the center of a small community more useful and meaningful, call for the concentration of growth in appropriate portions of small communities and require that new development complement existing settlement; (3) the applicant had failed to provide a traffic impact study; and (4) the Health Department had failed to provide the certification required by ordinance that each lot could safely support a sewage disposal system. The Commission also found that the applicant had failed to demonstrate compliance with the applicable "open space" requirements and that the applicant failed to provide a basis for waiver from this requirement and failed to make that request in writing.

The Woodford Fiscal Court voted to override the Planning Commission's recommendation and to approve the requested zone change, based upon findings it had gleaned from the record. It also granted a waiver of the "open space" requirement. The "open-space" requirement is found in the Subdivision Regulations and provides that

> [a]t a minimum, open-space (exclusive of retention/detention basin) shall constitute no less than four (4%) percent of the gross area of any subdivision or development site. This open-space shall have at least sixty (60%) percent of its perimeter abutting a public street edge.

The Fiscal Court ordinance stated that "The open space requirement is waived and deemed satisfied contingent upon the natural buffering remaining undisturbed."

Zeis, whose farm is located adjacent to the proposed development, filed an appeal in the Woodford Circuit Court seeking to reverse the action of the Fiscal Court and to reinstate the recommendation made by the Planning Commission. The parties filed cross-motions for summary judgment. The circuit court heard oral arguments and entered an opinion and order on March 21, 2008. It ruled that the power to grant a waiver of the open-space requirement was limited by ordinance to the Planning Commission, and that the Fiscal Court had acted arbitrarily beyond its statutory powers in granting a waiver of the requirement. It remanded the case back to the Fiscal Court, stating that upon remand, the Fiscal Court had the option of adopting the decision of the Commission, or if the Fiscal Court determined that the Commission should reconsider its initial denial of the waiver, it could be remanded back to the Commission for reconsideration.

The opinion concluded that "[s]ince this matter must go back to the Woodford Fiscal Court and because at that proceeding the [Fiscal] Court has the option of reversing themselves and adopting the original action of the Commission or remanding the issue of a waiver of the open space requirements of the ordinance to the Commission, it is unnecessary for the Court to reach the other issues raised in this appeal." The circuit court designated its order as final and appealable. No appeal was filed.

On March 26, 2008, the Woodford County Judge/Executive sent a letter to the Planning Commission, informing its members that the Fiscal Court had voted unanimously to remand the issue of possible waiver of the open space

requirement to the Commission, "assuming the applicant properly and timely submits a written request for that waiver." The letter further directed that

> [a]fter that sole consideration, and the Planning Commission's decision in that regard, the case should be referred back to the fiscal court to vote to either affirm the Planning Commission's previous denial of the zone change request, or to override it and grant the zone change request.

The Planning Commission, however, refused to address the waiver issue. In a letter responding to the Judge/Executive dated March 26, 2008, the Planning Director stated that:

> It is the Planning Commission's policy not to act on requests relating to or concerning the approval of development plans associated with zone changes, including requests for attendant waivers, unless and until the prerequisite zoning has been approved and is in place. Therefore, there will be no action on the possible waiver of open space by the Planning Commission at this time.

The Woodford County Attorney sent copies of both letters to the Reeves's attorney, stating that the Fiscal Court took the position that the letter from the Judge/Executive to the Planning Commission complied with the circuit court's directive. The County Attorney further stated that, in light of the position taken by the Planning Commission, "it would seem that your clients could seek further relief from the Woodford Circuit Court. The fiscal court will not be initiating any such action, but may choose to join with your clients, if they so move."

On June 5, 2008, the Reeveses and Spring Ridge, LLC, filed a pleading in the Woodford Circuit Court, styled "motion to submit for final

decision." It stated that the Planning Commission had correctly pointed out that the role of the Fiscal Court is limited to making determinations regarding zone designation. The motion further stated that the circuit court should make a final decision on the zone change issue. Then, assuming that it affirmed the Fiscal Court's decision to change the zone designation, the Planning Commission would consider the primary development plat, and address whether the open space requirements of the subdivision regulations should be applied to the proposed development.

Zeis moved to dismiss, arguing that the March 21, 2008, order granting summary judgment was final and appealable, that the Reeveses had not filed either an appeal or a motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, and that therefore the circuit court lacked jurisdiction over the matter. The circuit court denied her motion, explaining that it had never ruled whether the decision of the Fiscal Court granting the zoning change was supported by sufficient evidence and that consequently the final and appealable language in the order was erroneous and did not alter its interlocutory nature.

On January 21, 2009, the circuit court entered an opinion ruling that the Fiscal Court had complied with the requirements of KRS 100.213 (which sets forth the requirements for amending a zoning map) and that the zone-change was not arbitrarily granted. In its opinion, the court attempted to clarify its earlier ruling by stressing that the waiver of the open space requirement was not an integral part of the decision of the Fiscal Court. The court explained that although

it had believed that the Fiscal Court's action in waiving the open space requirement was arbitrary under the criteria of *American Beauty Homes Corp. v. Louisville and Jefferson County Planning Commission*, 379 S.W.2d 450 (Ky. 1964), that did not mean that the Fiscal Court acted outside the scope of its powers in granting the zone change request. The court noted that the Planning Commission had indicated that it only considers waivers of open space requirements after a zone change has been approved and that therefore a zoning change is not predicated on whether there has been a waiver of the open space requirements prior to the request.

Zeis filed a motion to alter, amend or vacate. The trial court entered an order denying the motion, and again addressed the import of its first order in the case. It reiterated its view that the waiver of the open space requirement was not within the scope of powers of the Fiscal Court, but concluded that this did not invalidate its approval of the zone change:

> the Court believes that while the section of the ordinance waiving the open space requirements is invalid, the remaining sections of the ordinance are not so dependent on the waiver of the open space requirements that the entire ordinance is rendered invalid.

This appeal by Zeis followed.

Zeis argues that the March 21, 2008, opinion and order of the circuit court was a final and appealable order, and that consequently the court was without jurisdiction to enter its subsequent orders. CR 54.01 defines a final or appealable judgment as "a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." In an action involving

multiple claims or multiple parties, CR 54.02 permits a court to make an otherwise interlocutory order final and appealable if the order includes the following recitations: (1) there is no just reason for delay, and (2) the decision is final. *Peters v. Board of Educ. of Hardin Co.*, 378 S.W.2d 638 (Ky. 1964). A court's failure to include both recitations in the order renders it interlocutory and nonappealable. *Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722, 726 (Ky. 2008).

The standard for determining the finality of an order when reviewing a remand to an administrative agency to carry out the terms of a judgment following reversal of the agency's determination is

> whether the further action is merely ministerial or whether the agency still has the power and the duty to exercise quasi-judicial responsibility with respect to the issues. If all that is left for the agency to do is ministerial, then the order is final even though it contains a direction for remitter to the agency. If, on the other hand, the agency still has the power and the duty to exercise residual discretion, to take proof, or to make an independent record, its function remains quasi-judicial and the order is not final.

Revenue Cabinet, Commonwealth of Ky. v. Moors Resort, Inc., 662 S.W.2d 219, 219 -220 (Ky. 1983) (internal citations omitted).

In the *Moors* case, the circuit court reversed in part a decision of the Board of Tax Appeals and directed it to recompute the amount of some delinquent taxes. The Kentucky Supreme Court ruled that this order was final because it left the Board "no power or duty to exercise residual discretion, to take proof or to

make an independent record[,] and that its only remaining duty "was to comply with the circuit court decree." *Id*.

Unlike the Board in *Moors*, the Fiscal Court in this case was left with the considerable discretionary authority either to reverse entirely its prior determination, or to remand the case to the Planning Commission for further consideration of the waiver issue. Furthermore, the order did not contain the recitation that there was no just cause for delay as required for finality in cases with multiple claims under CR 54.02. Zeis presented more than one claim for relief, and the circuit court's order did not resolve these other claims, which were left pending. Under these circumstances, we agree with the circuit court that it retained jurisdiction to enter its subsequent orders in the case.

In a related argument, Zeis asserts that the Planning Commission's recommendation that the zoning change request be denied became final because the Fiscal Court failed to act within ninety days after the Commission's final action. KRS 100.211(7) provides that "[t]he fiscal court or legislative body shall take final action upon a proposed zoning map amendment within ninety (90) days of the date upon which the planning commission takes its final action upon such proposal." This argument is based entirely upon Zeis's contention that the circuit court order of March 21, 2008, was a final judgment which negated all action taken by the Fiscal Court in overruling the Commission's recommendation. As it stressed in its later orders, however, the circuit court did not find that the Fiscal Court acted arbitrarily in passing the entire ordinance, only that portion relating to

the waiver of the open space requirement, and it remanded only as to that portion. As the circuit court observed, "[w]hile the section of the ordinance waiving the open-space requirements is invalid, the remaining sections of the ordinance are not so dependent on the waiver of open-space requirements that the entire ordinance is rendered invalid."

Zeis also argues that the circuit court erred in considering whether the zone change decision was supported by substantial evidence, since its initial determination of arbitrariness was dispositive. The three grounds that underpin the "necessary and permissible scope" of judicial review of an administrative decision are: "(1) action in excess of granted powers, (2) lack of procedural due process, and (3) lack of substantial evidentiary support[.]" *American Beauty Homes*, 379 S.W.2d at 456. She contends that the circuit court's finding of just one of these factors, that the Fiscal Court had acted in excess of its granted powers in waiving the open space requirement, rendered the entire ordinance invalid. But this conclusion by the circuit court related solely to the open-space waiver issue. The circuit court did not therefore err in proceeding to consider whether substantial evidence supported the zone change.

Zeis's next argument relates to the voting procedure of the Fiscal Court regarding the ordinance. On July 11, 2006, the Fiscal Court voted 6 to 2 to override the Planning Commission's recommendation, and gave first reading to an ordinance amending the zoning map. At the next meeting, on August 8, 2006, the motion to give the ordinance a second reading failed initially because the vote was

only 4 to 3. Another member of the Fiscal Court then arrived. Another vote was taken with a result of 5 to 3 to override the Planning Commission. Zeis argues that the second vote was arbitrary because the Fiscal Court failed to follow proper parliamentary procedure. As the circuit court noted, KRS 100.211(1) provides that "[i]t shall take a majority of the entire legislative body or fiscal court to override the recommendation of the planning commission[,] and KRS 67.078(1) provides that "a majority of a fiscal court shall constitute a quorum and a majority of a quorum shall be sufficient to take action, except that a majority of the fiscal court shall be required to pass an ordinance." The Fiscal Court's action was fully in accordance with these statutes, and Zeis has not provided any specific citations or references to show that the Fiscal Court violated any established voting procedures or guidelines in allowing a second vote.

Finally, Zeis addresses four specific areas where she contends the circuit court erred under both the *American Beauty* standard of review for arbitrariness and KRS 100.213, which requires a map amendment to be in agreement with the comprehensive plan. In reviewing these four sub-arguments, we apply the following standard:

> Basically, the judicial review of an administrative decision provides that those issues are confined to questions of law which are encompassed in the question: "Was the administrative decision arbitrary?" By arbitrary we mean clearly erroneous and by clearly erroneous we mean unsupported by substantial evidence. By unreasonable it is meant that under the evidence or as the record is presented that there is no room for difference of opinion among reasonable minds.

Hilltop Basic Resources, Inc. v. County of Boone, 191 S.W.3d 642, 646 (Ky.App. 2006).

Firstly, Zeis argues that the zoning change application's provision for a new internal street is merely an effort to circumvent the Small Community Zoning Ordinance Amendment. The pertinent section of the Zoning Ordinance requires each lot to have frontage on a county or state road, and encroachment permits to ensure that entrances can be installed and used safely and efficiently for vehicular ingress and egress. The Reeveses' application provided for a single private drive with access from all of the lots to the public road. But each of the lots also has frontage on the public road, as well as an encroachment permit, fully in accordance with the Zoning Ordinance. As the circuit court observed, the Zoning Ordinance does not prohibit the construction of an internal street within a subdivision.

Secondly, Zeis argues that the Fiscal Court failed to refute the Planning Commission's finding that the application was contrary to the Small Community Land Use District Guidelines of the Comprehensive Plan, specifically, those guidelines which exhort planners to "Revitalize the Center;" "Grow out from the center, but very carefully;" and "Preserve the historic and rural character [of the area]." She contends that the Fiscal Court's failure specifically to address these points violated the requirement of KRS 100.213(1) that "[b]efore any map amendment is granted, the planning commission or the legislative body or fiscal

court must find that the map amendment is in agreement with the adopted comprehensive plan[.]" The Fiscal Court is not, however, required to refute the specific recommendations of the planning commission.

> The fiscal court was entitled to review the evidentiary record made before the planning commission and was at liberty to make adjudicative findings different from those found by the commission. Moreover, we are not persuaded . . . that the fiscal court was required to make additional findings indicating exactly why its decision differed from those of the planning commission. There is simply no such requirement.

Hilltop Basic Resources, Inc., S.W.3d 642 at 647.

Thirdly, Zeis argues that there was uncontradicted testimony in the record that the zoning change proposal constituted "spot" zoning and "leap frog" development, because it creates an isolated cul-de-sac which is not connected to the existing community of Nonesuch. Zeis contends that the arrangement also violates a comprehensive plan guideline which states that "New development should connect and relate to the existing settlement." As support for this contention, Zeis relies on *Fritts v. City of Ashland*, 348 S.W.2d 712 (Ky. 1961), in which a property owner sought to rezone a tract in the middle of a residential area to industrial use for a garment factory. The appellate court observed that "It is clear from the record that the zoning change was made because the owners of a garment factory, which had outgrown its existing location in the city, desired to build a new factory on the Wilson tract, and threatened to leave the city unless this tract was made available. There is no pretense that the zoning change was a step in

any coordinated plan for establishment of industrial districts." *Fritts,* 348 S.W.2d at 713 (Ky. 1961). The court went on to urge a more systematic approach to rezoning:

> We think the theory is that after the enactment of the original ordinance there should be a continuous or periodic study of the development of property uses, the nature of population trends, and the commercial and industrial growth, both actual and prospective. On the basis of such study changes may be made intelligently, systematically, and according to a coordinated plan designed to promote zoning objectives. An examination of the multitude of zoning cases that have reached this court leads us to the conclusion that the common practice of zoning agencies, after the adoption of an original ordinance, is simply to wait until some property owner finds an opportunity to acquire a financial advantage by devoting his property to a use other than that for which it is zoned, and then struggle with the question of whether some excuse can be found for complying with his request for a rezoning. The result has been that in most of the rezoning cases reaching the courts there actually has been spot zoning and the courts have upheld or invalidated the change according to how flagrant the violation of true zoning principles has been. It is to be hoped that in the future zoning authorities will give recognition to the fact that an essential feature of zoning is planning.

Id. at 714 -715.

The property at issue in the case before us is being rezoned from one sub-classification, A-1 (Agricultural) to another, A-4 (Small Community) within the same zone. The A-1 sub-classification exists to preserve the rural character of the agriculture service area by promoting agriculture and related uses, while the A-4 sub-classification allows for limited low density residential expansion in rural settlements. As the appellees have pointed out, both sub-classifications have

similar uses. Among the primary uses of A-1 property are single family detached dwellings, agriculture, public parks, forest and conservation areas. A-4 property is to be used primarily for single-family, detached dwellings, general horticultural uses, and non-commercial uses. We agree with the appellees that this rezoning decision does not exhibit the features condemned by the *Fritts* court. It is a relatively gradual modification in accordance with the comprehensive plan, rather than the random and dramatic rezoning of a tract of property at the behest of individual landowners

Fourthly, Zeis contends that the Fiscal Court failed to make any of the required findings under KRS 100.213, which provides, in part, that

> Before any map amendment is granted, the planning commission or the legislative body or fiscal court must find that the map amendment is in agreement with the adopted comprehensive plan, or, in the absence of such a finding, that one (1) or more of the following apply and such finding shall be recorded in the minutes and records of the planning commission or the legislative body or fiscal court:
>
> (a) That the existing zoning classification given to the property is inappropriate and that the proposed zoning classification is appropriate;
>
> (b) That there have been major changes of an economic, physical, or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area.

We have reviewed the Fiscal Court's findings, and agree with the circuit court that they are supported by substantial evidence in the record. The Fiscal Court found,

among other things, that the proposed development supports the objective of limited low-density residential expansion within an established rural settlement and would further strengthen and support the Nonesuch community by providing additional desirable housing; that the existing road can support the new development; that the Woodford County Health Department had completed and approved individual preliminary site evaluations, and that the water district had verified its ability to provide sufficient water for the development. These findings directly addressed many of the concerns underlying the Fiscal Court's decision not to recommend the zoning change. The Woodford Circuit Court's decision to affirm the zoning change was not therefore clearly erroneous.

For the foregoing reasons, the opinion and order of the Woodford Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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