

RENDERED: December 20, 1996; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-0472-MR

JOHN R. FRITZ and MARY LOUISE
McCONATHY FRITZ, his wife, and
BELLERIVE DEVELOPMENT CORP., a
Kentucky corporation

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 94-CI-3692

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT;
LEXINGTON-FAYETTE URBAN COUNTY COUNCIL;
TERESA ANN ISAAC, Vice Mayor, CHARLES W.
ELLINGER, D.D.S., DAVID B. STEVENS, M.D.,
GEORGE A. BROWN, JR., ROBERT R. JEFFERSON,
KATHY PRATT, ISABEL YATES, FERNITA WALLACE,
BOBBY FLYNN, WILLY FOGLE, FRED V. BROWN,
ROY DURBIN, SANDY SHAFER, JACK E. HILLARD,
and GLORIA MARTIN, in their official capacity
as individual members of the Lexington-Fayette
Urban County Council; PAM MILLER, in her official
capacity as Mayor of the Government; LEXINGTON-
FAYETTE URBAN COUNTY PLANNING COMMISSION; and
WALTER W. MAY, Chairman, ANITA MADDEN, LESLIE
PATTERSON VOSE, ROSE M. LUCAS, ROBERT D. KELLY,
DWIGHT PRICE, DR. THOMAS M. COOPER, MARTY HOWARD,
SARAH GREGG, GEORGE L. LOGAN and CHARLIE MASON,
in their official capacity as members of the
Planning Commission

APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is a planning and zoning case which alleges error in denying a zone change request which was not in accordance with the comprehensive plan of the Lexington-Fayette Urban County Government.

The appellants filed an application to rezone approximately 48 acres of land, located on the northeast corner of the intersection of Man O' War Boulevard and Nicholasville Road and extending as far north as Tiverton way, from A-U (agricultural-urban) and R-1D (single family residential) to B-6P (planned shopping center), P-11 (professional office) and R-1D (single family residential). The proposed development is adjacent to an existing residential neighborhood to the east and a Minit Mart and a church to the north. The land directly across Nicholasville Road from the proposed development, on the northwest corner of the intersection, is currently vacant but designated in the 1988 Fayette-Urban County Comprehensive Plan to be zoned I-1 (wholesale business). The land directly across Man O' War Boulevard from the proposed development, on the southeast corner of the intersection, is currently zoned A-U.

The 1988 Comprehensive Plan recommends that the appellants' property be zoned for medium and high density residential use. The Comprehensive Plan also recommends residential uses all along the east side of Nicholasville Road (two miles) from just south of Reynolds Road to the county line. The west side of Nicholasville Road, from Tiverton Way to the county line, is designated for employment centers, a zone

classification which contemplates nearby residential uses in order to control land-use concentrations and minimize traffic movements. The Plan recommends confining commercial growth to the designated commercial corridor, the west side of Nicholasville Road (to minimize negative impacts on neighborhoods).

The Planning Commission conducted a public hearing on September 15, 1994 and found the zone change requests were in disagreement with the Comprehensive Plan, voting 8-0 to disapprove the change. The Lexington-Fayette Urban County Government held a hearing on November 10, 1994 and voted 10 to 1 to disapprove the zone change. The circuit court affirmed and appellants appeal to us contending: The Council's refusal to rezone is arbitrary in that the wrong standard of review was used, the existing zoning was inappropriate, and the Council failed to follow KRS 100.213; and the 1988 Comprehensive Plan was not updated in a timely manner as required by KRS 100.197, which causes all its decisions to be arbitrary.

Since all zoning is mandated to follow the comprehensive plan (KRS 100.201 and KRS 100.213(1)(a) and (b)), we will address the second argument first. The appellants are correct when they cite KRS 100.197 for requiring continuing review and updates of the comprehensive plan. In the scheme of planning and zoning, the General Assembly adopted KRS 100.197, which recognizes that our society is constantly changing. It required review and updates or amendments at least every five

years for "social, economic, technical, and physical advancements or changes." However, even if the planning commission and legislative body do not timely review the plan, it does not become inapplicable or arbitrary as a matter of law. KRS 100.197(2) provides the consequences for failures to timely update:

. . . If the review is not performed, any property owner in the planning unit may file suit in the Circuit Court. If the Circuit Court finds that the review has not been performed, it shall order the planning commission, or the legislative body in the case of the statement of goals and objectives element, to perform the review, and it may set a schedule or deadline of not less than nine (9) months for the completion of the review. No comprehensive plan shall be declared invalid by the Circuit Court unless the planning commission fails to perform the review according to the court's schedule or deadline. The procedure set forth in this section shall be the exclusive remedy for failure to perform the review.

We agree with the circuit court that even if the comprehensive plan has not been timely updated, that does not make the refusal to rezone arbitrary.

The second issue is the standard of review for zoning cases. KRS 100.213 provides that before a zone change request is granted (map amendment), the planning commission or respective legislative body, must find either that the request is in agreement with the comprehensive plan or that the existing zoning classification is inappropriate and that the proposed zoning classification is appropriate; or that there have been major changes of an economic, physical, or social nature in the area

which were not anticipated in the current comprehensive plan and which substantially alter the character of the area.

The planning commission and the legislative body each conducted a public hearing to consider the request. Evidence was introduced by both sides. Much of the evidence was conflicting which meant a judgment call had to be made in order to make findings of fact. In Kaelin v. City of Louisville, Ky., 643 S.W.2d 590 (1982), our Supreme Court labeled zoning change requests as trial-type hearings for the purpose of determining the adjudicative facts necessary to decide whether or not to grant the zone change. As such, the taking and weighing of evidence is necessary with "[a] finding of fact based upon an evaluation of the evidence and conclusions supported by substantial evidence." (Emphasis added.) Id. at 591. The circuit court's review is authorized by KRS 100.347 and American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). The question on review is whether the administrative agency's decision is supported by substantial evidence; otherwise it's classified as arbitrary. Id. at 456. In Danville-Boyle County Planning and Zoning Commission v. Prall, Ky., 840 S.W.2d 205 (1992), our Supreme Court held that in planning and zoning cases, the property owner has the burden of proof, and judicial review is limited to the question of whether the administrative decision was arbitrary. "By arbitrary we mean clearly erroneous and by

clearly erroneous we mean unsupported by substantial evidence." Id. at 208.

City of Louisville v. McDonald, Ky., 470 S.W.2d 173 (1971) teaches us that when the legislative body denies the requested change, the property owner must show the decision was "arbitrary," and whether an action is arbitrary depends on whether the proponents of change can show "[n]o rational connection between that action and the purpose for which the body's power to act exists." Id. at 178. The question then becomes "[w]hether or not the evidence shows a compelling need for the rezoning sought or clearly demonstrates that the existing zoning is no longer appropriate." Id. at 179. McDonald, supra, establishes us what a property owner needs to show in order to be entitled to a zone change. KRS 100.213 teaches us that to get the requested zone change, the proponent must also show that the proposed zoning classification is appropriate. Appellants cannot read McDonald in a vacuum.

Using these standards of review, was the decision to deny the requested zone changes arbitrary? We agree with the circuit court that it was not. The circuit court did find that the existing A-U zoning classification was inappropriate, but did not find the comprehensive plan's recommended residential zoning classifications were inappropriate, or that there was a compelling need for the rezoning sought. From a planning point of view, those are consistent findings, especially in a transitional area. That is so because Chapter 100 of the

Kentucky Revised Statutes mandates that the planning commission prepare a "comprehensive" plan which serves as a guide for public and private development in the most appropriate manner (KRS 100.193). This master plan for an area is comprehensive in that numerous and extensive elements or studies are to be considered (KRS 100.187) in formulating and adopting the plan. By nature, a comprehensive plan speaks to future development even though it takes into consideration the current land uses. The comprehensive plan can include a current land-use plan or map which the legislative body can zone appropriately (KRS 100.201, 100.203). The comprehensive plan, however, looks beyond current uses, to the future, and is constantly undergoing review (KRS 100.197). Zoning changes are allowed if they are in accordance with the comprehensive plan (KRS 100.213) or if the plan is out of touch with reality (KRS 100.213(1)(a) & (b)), and there is a compelling need for the proposed change (McDonald, supra, and KRS 100.213). Even if the property or use is exempt from zoning under the "agricultural supremacy clause" of KRS 100.203(4) or KRS 413.072(2), or the use is exempt through case law (City of Louisville Board of Zoning Adjustment and U.S. Corrections Corporation v. Gailor, Ky. App., 920 S.W.2d 887 (1996); and City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994)), the comprehensive plan must still consider future changes and make recommendations. Sometimes, as in the case of governmental units, even though they may be exempted from following zoning requirements, they still have to submit their

proposals to the local planning commission for its review and recommendations. See KRS 100.361(2), and City of Louisville Board of Zoning Adjustment and U.S. Corrections Corporation v. Gailor, supra.

Returning to the appellants' requests for zoning map changes, we agree with the circuit court that the extensive legislative findings, after the November 10, 1994 hearing, were supported by substantial evidence and that the appellants were not able to show arbitrariness or a compelling need for their requests. For these reasons, the judgment of the Fayette Circuit Court is affirmed.

EMBERTON, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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William M. Lear, Jr.
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ORAL ARGUMENT FOR APPELLANT:

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BRIEF FOR APPELLEE:

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