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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001877-MR

JELKA S. JAMES; RICHARD M. JAMES;
NADA J. MAULDIN (F/K/A NADA J. KUNKEL);
AND JELKA JAMES REALTY COMPANY,
A KENTUCKY GENERAL PARTNERSHIP — APPELLANTS

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 1992-CI-00410

DELANEY WOODS HOMEOWNERS ASSOCIATION;
M. FREDERICA GODSHALK;
DEAN WARDEN; SHERRY WARDEN;
SUSAN B. FEAMSTER;
AND JENNIFER PONDER WOLKEN — APPELLEE

AND NO. 1998-CA-001881-MR

JESSAMINE COUNTY-CITY OF WILMORE
JOINT PLANNING COMMISSION; PETER W. BEATY;
KENNETH HOUP; JUDITH M. METCALF;
MELVIN BOWDAN; JOSEPH L. POAGE;
JOHN BLACKFORD; DAVID CROUSE;
C.V. ELLIOTT; CHARLES KESTEL, JR.;
AND WAYNE MCCRAY — APPELLANTS

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE ROBERT W. JACKSON, JUDGE
ACTION NO. 1992-CI-000471

DELANEY WOODS HOMEOWNERS ASSOCIATION;
M. FREDERICA GODSHALK; DEAN WARDEN;

SHERRY WARDEN; SUSAN B. FEAMSTER;
JENNIFER PONDER WOLKEN;
JELKA S. JAMES; RICHARD M. JAMES;
NADA J. MAULDIN (F/K/A NADA J. KUNKEL);
AND JELKA JAMES REALTY COMPANY APPELLEES

AND NO. 1998-CA-001882-MR

JELKA S. JAMES; RICHARD M. JAMES;
NADA J. MAULDIN (F/K/A NADA J. KUNKEL);
AND JELKA JAMES REALTY COMPANY APPELLANTS

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 1992-CI-00471

DELANEY WOODS HOMEOWNERS ASSOCIATION;
M. FREDERICA GODSHALK;
DEAN WARDEN; SHERRY WARDEN;
SUSAN B. FEAMSTER;
AND JENNIFER PONDER WOLKEN;
JESSAMINE COUNTY-CITY OF WILMORE
JOINT PLANNING COMMISSION; PETER W. BEATY;
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JOHN BLACKFORD; DAVID CROUSE;
C.V. ELLIOTT; CHARLES KESTEL, JR.;
AND WAYNE MCCRAY APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING
IN APPEAL NO. 1998-CA-001877
AFFIRMING IN RESULT
IN APPEAL NOS. 1998-CA-001881 AND 1998-CA-001882
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: These are consolidated appeals from a judgment in a declaratory judgment action allowing neighboring property owners to enforce a deed restriction; and from an appeal of a planning commission's approval of a preliminary subdivision plat.

In the declaratory judgment action, we find that the trial court acted correctly by allowing the neighboring property owners to enforce a deed restriction prohibiting subdivision of lots. However, we also find that the trial court interpreted the deed restriction more broadly than permitted by the terms of the covenant. Hence, we affirm in part, reverse in part and remand for further findings of fact and conclusions of law. In the appeal from the trial court's judgment setting aside the approval of the preliminary plat, we find that the trial court misapplied the doctrines of res judicata and collateral estoppel. We further find that the planning commission's record supported its approval of the preliminary plat on several grounds. However, we agree with the trial court that the preliminary plat did not comply with the subdivision regulations in several significant aspects. Hence, we affirm in result.

Factual Summary

In 1978, developers Thomas H. Heilbron and his wife Mary S. Heilbron (Heilbron), and Robert C. Sims and his wife Dorothea R. Sims (Sims) submitted an application for a subdivision plat approval to the Jessamine County-City of Wilmore Joint Planning Commission (the Planning Commission). They proposed to divide a 431 acre tract of land located on Delaney Ferry Road into 32 tracts ranging in size from 5 acres to 67 acres, and to be known as the Delaney Woods Subdivision (Delaney Woods). Following a public hearing on the application, the Planning Commission granted final subdivision approval on June 5, 1979.

Since all of the lots in the development were five acres or larger, as required by the existing A-1 (general agricultural) classification, no zoning change was required. The promotional materials for the subdivision emphasized the benefits of the larger lot sizes, and stated that privacy and security would be provided by having only one point of access into the development and that a gatehouse at the entrance would offer additional security and attractiveness. In addition, Heilbron and Sims adopted certain deed restrictions for Delaney Woods, which were recorded in the Jessamine County Clerk's office on June 8, 1979. Among other things, the deed restrictions specified requirements for construction and appearance of dwellings, fences, mailboxes and landscaping. The twentieth restriction, which is pertinent to this action, provides as follows:

> No lot in Delaney Woods may be subdivided into additional lots without the express written consent of the Developer.

By 1991, Heilbron and Sims completed the sale of most of the property within the subdivision, and brought their partnership to a close. Sims became the owner of Lot No. 20, Unit 3 (Lot 20), consisting of 31.7 acres. On March 25, 1992, the Heilbrons executed a resignation of their position as developers of the Delaney Woods. Prior to this time, the Heilbrons had represented to a number of the Delaney Woods homeowners that they would not consent to further subdivision of any of the lots. However, on the day of their resignation as developers, the Heilbrons wrote to Sims and stated that they held

the position "of neither supporting or opposing any re-subdivision in Delaney Woods."

On March 31, 1992, Sims executed a deed of Lot 20 to Jelka James Realty Company (Jelka James).[1] The conveyance was made subject to "any and all easements, conditions and restrictions affecting the property herein conveyed and contained on any plat or instrument of record . . . ." The day before this transfer Sims executed a document entitled "Consent of Developer Pertaining to Restrictions of Delaney Woods Subdivision." The purpose of this document was to give written consent to divide Lot 20 into separate lots of no less than five acres. The resignation, the deed and the consent were all recorded with the Jessamine County Clerk's office.

At this point, the paths of the respective actions begin to diverge. On August 7, 1992, Jelka James submitted a preliminary subdivision plat application to the Planning Commission. The plat depicted 43.7 acres, comprising all of Lot 20 along with 12 acres of an adjoining farm also owned by Jelka James. Jelka James proposed to divide this property into eight tracts of more than five acres each, and to build an access road along one side of the property. On September 8, 1992, the Planning Commission voted 4-3 to deny approval of the subdivision plat. No appeal was taken from this action.

On September 21, 1992, Jelka James filed a second application for a subdivision plat approval. This application

[1] Jelka James is a Kentucky general partnership, the partners in which are Jelka James, Richard M. James, and Nada J. Kunkel.

proposed to divide only the 31.7 acres of Lot 20 into five lots of more than five acres each. The application also sought permission to construct a public road providing access to the new lots on the north side of Lot 20. The Planning Commission held public hearings on the application on October 13 and November 10, 1992. On December 8, 1992, the Planning Commission voted 5-3 to approve the preliminary plat. However, the approval was based upon the granting of several waivers to provisions of the subdivision regulations, and was made conditional upon filing of corrected water and sewer certificates.

Meanwhile, on October 13, 1992, the Delaney Woods Homeowners' Association, and Delaney Woods homeowners M. Frederica Godshalk, Dean Warden, Sherry Warden, Susan B. Feamster and Jennifer Ponder Wolken (collectively, the Homeowners' Association) filed a declaratory judgment action pursuant to KRS 418.040 in Jessamine Circuit Court (Action No. 1992-CI-00410). The Homeowners Association sought a declaration that Jelka James is prohibited from subdividing Lot 20 based upon: (1) the restrictions recorded in the deeds of the Delaney Woods properties; (2) its failure to obtain the express written consent of all of the original developers (and the invalidity of the resignation of the Heilbrons as developers); and (3) the doctrine of equitable estoppel.

The trial court initially found that a declaratory judgment action was not the proper means to enjoin the approval of the preliminary plat. On appeal, this Court reversed, finding that the trial court erred in finding that this matter was simply a zoning case which must be decided by an administrative agency.

Rather, this Court found that there were genuine issues regarding the deed restrictions and the developers' actions to be decided separately from the zoning questions.[2] On June 24, 1998, the trial court entered a memorandum order finding that the subdivision restrictions constitute reciprocal negative easements which are enforceable by the lot owners who relied on the restrictions in purchasing their properties in the subdivision. The trial court further found that Jelka James is equitably estopped from subdividing Lot 20 based upon the representations previously made by Heilbron and Sims. Jelka James filed a notice of appeal on July 21, 1998. (Appeal No. 1998-CA-001877).

In the other action, the Homeowners' Association also brought an appeal from the Planning Commission's approval of the preliminary plat on December 10, 1992. In an order dated November 23, 1994, the circuit court dismissed the appeal on the ground that it lacked subject matter jurisdiction over an appeal from a preliminary plat. This Court reversed, finding that the Planning Commission's approval of the preliminary action was final, and that the Homeowners' Association was entitled to seek judicial review following the approval pursuant to KRS 100.347.[3]

Upon remand, the trial court found that the Planning Commission had acted arbitrarily in approving the preliminary plat when there was substantial evidence that the application did

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[2] Delaney Woods Homeowners Association, et al. v. James, et al., Ky. App., No. 94-CA-001621 (Not-To-Be Published Opinion rendered 12/15/1995).

[3] Delaney Woods Homeowners Association, et al. v. James, et al., Ky. App., No. 1995-CA-000956 (Not-To-Be- Published Opinion rendered 03/29/1996).

not comply with the subdivision regulation. The trial court further found that the doctrines of res judicata and collateral estoppel bar the Planning Commission from approving the second application because it "was **virtually** identical to the August 7, 1992 application that the Planning Commission previously denied." (Emphasis in original). The Planning Commission filed a notice of appeal from this judgment on July 22, 1998 (Appeal No. 1998-CA-001881). Jelka James also filed a notice of appeal from the trial court's order. (Appeal No. 1998-CA-001882).

The appeal from the declaratory judgment action was consolidated with the appeal and cross-appeal in the zoning action because the same property is involved in all these cases. We shall consider the declaratory judgment appeal first.

Appeal No. 1998-CA-001877

Jelka James appeals from the trial court's order in the declaratory judgment action, finding that the deed restrictions constitute reciprocal negative easements which preclude further subdivision of Lot 20. As a preliminary matter, we hold that the application of the doctrine of reciprocal negative easements does not arise in precisely the manner in which the parties or the trial court contemplated. As explained in First Security National Bank & Trust Company of Lexington v. Peter, Ky., 456 S.W.2d 46 (1970):

> in order for a reciprocal negative easement to arise, there must have been a common owner of the related parcels of land, and in his various grants of the lots he must have included some restriction, either affirmative or negative, for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be similarly treated,

> so that once the plan is effectively put into operation, the burden he has placed upon the land conveyed is by operation of law reciprocally placed upon the land retained.

Id. at 50; *See also* Bellemeade Co. v. Priddle, Ky., 503 S.W.2d 734 (1973).

The doctrine of reciprocal negative easements is a creature of equity. It does not arise from an express covenant, but it is inferred based upon the conduct and representations of the common grantor. In the present case, all of the properties in Delaney Woods, including Lot 20, contain the express restrictive covenant against further subdivision without the express written consent of the developer. As a result, we need not infer the existence of an easement. Rather, we must interpret and apply the express restrictive covenant.

The express terms of that covenant authorize the developers to grant permission to subdivide lots in the Delaney Woods. Jelka James obtained consent from Sims to subdivide Lot 20. Unless the developers' authority to waive the deed restriction is limited in some manner, the Homeowners' Association has no recourse against Jelka James.

The facts of the present case are very similar to those presented in Wright v. Cypress Shores Development Co., Inc., 413 So. 2d 1115 (Ala., 1982). In Wright, the developer, Cypress Shores, platted and recorded a survey of a subdivision. The developer also recorded a declaration of covenants, restrictions and limitations pertaining to that subdivision. In pertinent part, the restrictions limited the use of the properties within the subdivision to single family residential use, and they

imposed building requirements for all residences. In addition, the developer established an Architectural Control Committee, whose function was to determine whether any proposed building plans were in conformity and harmony of external design with the existing structures in the subdivision. The declaration further gave the Architectural Control Committee authority to annul, cancel, amend or modify any restriction set out in the covenants.

Subsequently, a purchaser of two of the lots in the subdivision proposed to build a convenience store on his property. The Architectural Control Committee set aside the restrictions as to those lots. The other property owners in the subdivision brought suit seeking to enforce the restrictions set out in the declaration of covenants.

The Supreme Court of Alabama first noted the traditional view that restrictive covenants accompanied by the retained right in the grantor to revoke or amend them are personal in nature, as opposed to covenants running with the land. The reservation in the grantor to revoke or amend destroys the mutuality or reciprocity of the restrictions. Id. at 1121. However, in more recent cases, the Alabama court noted that a different approach has been taken. Where the owner of a tract of land adopts a general scheme for its improvement, dividing it into lots and conveying these with uniform restrictions as to the purposes for which the lands may be used, such restrictions create equitable easements in favor of the owners of the several lots. Such restrictions are not for the benefit of the grantor alone, but for the benefit of all purchasers. Thus, the reservation of the right to amend restrictions is only one factor

to be considered in determining whether the grantor intended to establish a uniform plan of development, and all of the language in the restrictions should be considered in arriving at the grantor's intention. Id. at 1122.

> One of the most practical tests, supported by common sense and common business experience, is, whether the restriction imposed by the grantor or proprietor upon the granted premises would naturally operate to enhance the value of his adjacent premises, whether retained by him or conveyed to another. If this be so, it is a strong circumstance to indicate that the restriction was not intended for the mere personal benefit of the grantor, but as a permanent servitude beneficial to the owner of the land, whoever he may be, and appendant to the premises. ... The inquiry, in these cases, has generally been, whether the servitudes or restrictions imposed were of such a nature as to operate as an inducement to purchasers; and, if so, the inclination of the courts has been to construe them as appurtenant to the estate, and intended for its protection rather than personal to the grantor. If appurtenant, it of course follows the land, being assignable with it, and each grantee can enforce it in equity against each other grantee having notice of it.

Id., quoting Virgin v. Garrett, 233 Ala. 34, 169 So. 711 (1936).

The court in Wright further stated that an elaborate set of restrictive covenants designed to provide for a general scheme or plan of development is inherently inconsistent with a grantor's reservation of an arbitrary power to waive the restrictions for specific properties. Consequently, the court held that the exercise of a reserved right to alter, amend or repeal restrictions is valid as long as it is exercised in a reasonable manner so as not to destroy the general scheme or plan of development. Id. at 1123-24. Turning to the facts of the case before it, the court found that the language used in the

declaration of covenants indicated that the grantor intended a general scheme or plan of development, and thus he could only amend the restrictions in a reasonable manner consistent with that scheme or plan. The court further found that the Cypress Shores homeowners relied upon the restrictions when purchasing their lots, and that the proposed convenience store would result in a significant reduction in the value of those lots. Consequently, the Supreme Court of Alabama concluded that the Architectural Control Committee's exercise of the power to waive the deed restrictions was unreasonable and void. Id. at 1124.

The analysis by the Supreme Court of Alabama is applicable in this state. Kentucky also followed the traditional view that a reservation by the common grantor of a general power to dispense with the restrictions on particular lots negatives the purpose of uniform development from which the mutuality of right among lot owners in a platted subdivision is deemed to arise. Brueggen v. Boehn, Ky., 344 S.W.2d 404, 405 (1961). Where a grantor reserves the right to alter, modify, or change restrictive covenants, he or she may amend the covenants without the consent of the grantee. A grantor's retention of the right to make exceptions to the restrictions imposed is valid, and hence grantees who purchased with notice of such right cannot complain when exceptions are made pursuant to the powers retained. Id. at 406-07; *See also,* 20 Am. Jur. 2d Covenants, Conditions and Restrictions, § 234, p. 650 (1995).

However, Kentucky also recognizes that the exercise of the power to waive a restrictive covenant in a particular case

must be reasonable and not arbitrary. The determination of whether the exercise of the power to permit or refuse has been reasonable or arbitrary is a factual question to be determined in the light of the circumstances. Factors to be considered include whether the proposed project or use: is not consistent with the general surroundings in the subdivision development; whether it is in harmony with other buildings and structures therein; and it is in compliance with the specific restrictions set out in the plan of development for the subdivision. La Vielle v. Seay, Ky., 412 S.W.2d 587, 593 (1966); *See also*, Annotation, "Validity of Construction of Restrictive Covenant Requiring Consent to Construction on Lot," 40 ALR 3d 864, § 4, pp. 879-81 (1971).

Thus, although the doctrine of reciprocal negative easements does not directly apply because there is an express restrictive covenant in effect, the restrictive covenant in the deed may be treated as an equitable servitude running with the land. The grantor's reservation of the right to waive the restriction will not automatically negate a general scheme or plan of development to destroy the mutuality of rights between the grantor and the grantee. Rather, the question of whether a restrictive condition in a deed is inserted for the benefit of the grantor alone or is for the benefit of common grantees (and those who take under them) is determined by the intention of the parties as ascertained from the deed itself in the light of surrounding circumstances. Brueggen, 344 S.W.2d at 406. This analysis is essentially the same as is necessary to find a reciprocal negative easement.

In this case, the stated purposes of the restrictive covenants are to "maintain uniformity with respect to the use and occupancy of said property in order to enhance and to maintain its value, and to render it more attractive in appearance . . ." The covenants grant a right of action "against any person or persons violating or attempting to violate any covenant either to restrain violation or to recover damages." In addition, the restrictive covenants were to remain in effect until January 1, 1998, [at which time the covenants shall be automatically extended] and for successive periods of ten years thereafter unless a majority of the lot owners agreed by a written and recorded instrument to modify or abolish the covenants. Furthermore, the developer only retained a right to waive the prohibition against subdivision of lots and the requirement that all dwellings shall be of predominately masonry construction. Taken together, these provisions strongly indicate that the restrictive covenants were intended not for the sole benefit of the grantor, but for the benefit of all of the lot owners in Delaney Woods.

However, the trial court interpreted the restrictive covenants in the deed to prohibit any subdivision of lots within Delaney Woods. The plain language of the covenant does not support this interpretation. Rather, restriction 20 merely states that no lot in Delaney Woods may be further subdivided without the consent of the developers. As noted above, the developers' consent must be reasonable and not contrary to the general scheme or plan of development. The Homeowners'

Association may only enforce the covenant against Jelka James if the consent given by Sims was unreasonable.

The trial court found that the Delaney Woods homeowners purchased their lots in reliance upon the restrictive covenants contained in their deeds. The record supports this conclusion. However, the trial court did not find that the proposed subdivision of Lot 20 would be inconsistent with the general scheme or plan of development. Indeed, none of the new lots would be smaller than the minimum five acres set out in the 1979 plat. On the other hand, the proposed road may well be inconsistent with the general scheme of development. Furthermore, the trial court did not make any findings whether the proposed subdivision of Lot 20 would adversely affect the value of the other lots in Delaney Woods. We find that these are issues of fact which must be addressed by the trial court. Accordingly, we must remand this matter for further findings of fact and conclusions of law.

The trial court also found that the Delaney Woods homeowners relied upon the developers' representations, and therefore the doctrine of equitable estoppel is applicable in this case. However, the Homeowners' Association did not make the developers parties to the action below or to this appeal. Consequently, the reasonableness of their consent to the subdivision of Lot 20 is relevant only to the extent that the Homeowners' Association seeks to enforce restrictive covenants which run with the land. Generally, equitable estoppel is applied to transactions where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he

or she acquiesced or accepted benefit. Tarter v. Turpin, Ky., 291 S.W.2d 547, 549 (1956). There was no evidence that Jelka James was a party to or had notice of representations made by the Heilbrons concerning their intention never to permit subdivision of any lot in Delaney Woods. Moreover, any such representation goes well beyond the recorded provisions in the restrictive covenants. *See* Oliver v. Schultz, Ky., 885 S.W.2d 669 (1994). Consequently, we find that the doctrine of equitable estoppel cannot be applied against Jelka James. While the representations made by Heilbron and Sims may be evidence reflecting a common plan or scheme of development, they do not otherwise affect the validity of Sims' consent to subdivide Lot 20.

The Homeowners' Association next argues that the Heilbrons' resignation as developer does not alter the provision in the deed requiring the consent of all of the developers for further subdivision of any lot. Jelka James responds by stating that Sims and Heilbron were entitled to dissolve their partnership at any time. Consequently, they assert that the Heilbrons' resignation as developers operated as an assignment to the Sims of the Heilbrons' right to consent to subdivision of lots.

The restriction at issue prevents subdivision of any lot in Delaney Woods without the express written consent of the developer. The deed restrictions specifically identify the developers by name ("Whereas, Thomas H. and Mary S. Heilbron Robert C. and Dorothea R Sims, hereinafter called 'Developer', . . . are the owners and developers of the property hereinafter

described;. . .”). The question thus presented is whether the Heilbrons’ resignation as developers dispenses with the requirement that they expressly consent to further subdivision of any lot in Delaney Woods.

In essence, the Homeowners’ Association argues that the grantors’ reservation of the right to waive the deed restriction can only be exercised by the named developers. As a result, they assert that the Heilbrons’ resignation effectively extinguishes the reserved right as to Sims. We disagree. By resigning as developers, the Heilbrons’ interest in the covenants came to an end. They no longer have a right to waive the deed restrictions. Richmond v. Pennscott Builders, Inc., 43 Misc. 602, 606, 251 N.Y.S.2d 845, 849-50 (N.Y. Sup. Ct. App. Div., 1964). As the remaining developers, only Sims’ still has a right to grant a waiver of the deed restrictions.[4]

In summary, we find that the trial court correctly interpreted the deed restriction prohibiting further subdivision of any lot in Delaney Woods as an equitable servitude running with the land. However, the trial court did not give effect to

[4] Although the issue is not presented in this case, we note that the deeds do not extend the right to waive restrictions to the developers’ successors and assigns. *See* Rosi v. McCoy, 319 N.C. 589, 356 S.E.2d 586 (1987). In addition, upon expiration of the initial twenty year term, the deeds grant to a majority of the Delaney Woods homeowners the right to determine whether the restrictive covenants would remain in effect, or to modify the covenants. Therefore, it does not appear that the developers’ right to waive the covenants is assignable to a third party, or that it extends beyond the initial term of the covenants. Nonetheless, it appears from the record that Sims has assigned to the Homeowners’ Association their prospective rights to waive the deed restrictions. Consequently, this will not be an issue in the future.

the portion of the covenant permitting the developer to waive the restriction. Therefore, we remand this action to the trial court for further findings of fact and conclusions of law concerning whether the exercise of that consent was reasonable and in accord with the general scheme or plan of development. We further find that following the resignation of the Heilbrons as developers, Sims alone was authorized to grant consent for subdivision of Lot 20.

Appeal Nos. 1998-CA-001881 and 1998-CA-001882

In these appeals, the Planning Commission and Jelka James argue that the trial court erred in reversing the preliminary plat approval submitted by Jelka James. They first argue that the Planning Commission's consideration of Jelka James' second application was not barred by the doctrine of res judicata or collateral estoppel. As correctly pointed out by the trial court, the application of res judicata and collateral estoppel in zoning matters is not clear. The doctrine of res judicata prevents re-litigation of claims. Fiscal Court of Jefferson Co. v. Ogden, Ky. App. 556 S.W.2d 899, 902 (1977). Similarly, the doctrine of collateral estoppel precludes re-litigation of issues previously determined. City of Louisville v. Professional Firefighters Association, Ky., 813 S.W.2d 804, 807 (1991). The purpose for the application of these doctrines is to ensure finality in litigation arising from zoning changes, and to protect the public against repeated and harassing rezoning applications. Fiscal Court of Jefferson County v. Ogden, 556 S.W.2d at 902.

The trial court stated that Jelka James' second application was "virtually identical" to its first application. The trial court based this statement on the fact that the primary difference between the two applications was that the first application included property from twelve acres of an adjoining farm. The problem with the trial court's application of res judicata is that it overlooks the nature of preliminary subdivision plat applications.

Res judicata is most frequently applied in zoning matters to applications for a map amendment. In considering a map amendment, the planning commission exercises a discretionary function. An application for a map amendment seeks to change the zoning classification for the subject property. To grant a map amendment, the planning commission must hold a public hearing and make findings of fact and conclusions of law that: (1) the existing zoning classification is inappropriate and the proposed zoning classification is appropriate; and (2) there have been major changes of an economic, physical, or social nature within the area which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of the area. KRS 100.211, 100.213. Furthermore, the planning commission's recommendation on the map amendment is subject to adoption or rejection by the local legislative body. KRS 100.211(1). If the Planning Commission denied the application previously, the doctrine of res judicata requires the applicant to show that a substantial change of circumstances has occurred from the time of the previous action. Ogden, 556 S.W.2d at 903.

By contrast, approval of a preliminary subdivision plat is a ministerial act. Snyder v. Owensboro, Ky., 528 S.W.2d 663 (1975). A subdivision plat generally does not contemplate a zoning change, but merely a change of use within the permitted zoning classification. The planning commission's role in approval of a subdivision plat is to determine whether the application complies with the applicable zoning regulations. Id. *See also* KRS 100.277. A planning commission's disapproval of a subdivision plat is a finding that the applicant's plat does not comply with the zoning regulations. Thus, the statutes contemplate that the applicant will submit a new plat application to correct the deficiencies. The planning commission can then review the new application to determine whether the amended plat complies with the zoning regulations. *See also* Henry Fischer Builder, Inc. v. Magee, Ky. App., 957 S.W.2d 303 (1997).

Since the planning commission's disapproval of a plat relates only to the application's compliance with the specific provisions of the zoning regulations, res judicata should only apply if the applicant attempts to submit an identical application, or if a new application contains defects which were the basis for the planning commission's prior rejection of the plat. Turning to the facts of this case, the Planning Commission gave a number of reasons for denying Jelka James' first application for a subdivision plat following the public hearing on September 8, 1992. The Planning Commission stated that the proposed subdivision of Lot 20 failed to preserve the existence of community assets and natural features, and that it did not

conform to the restrictive covenants and policies of the Delaney Woods properties. The Planning Commission also expressed concerns about the inclusion of the adjoining property, the adequacy of fire protection and the area was premature for development.

In considering the second application, the Planning Commission concluded that the reduction in area from 43.7 acres to 31.7 acres was sufficient to constitute a change of circumstances warranting consideration of the second application. Thus, the second application was not identical to the first. However, it is unclear whether the second application included deficiencies upon which the Planning Commission based its denial of the first application. Given these circumstances, we find that the doctrines of res judicata and collateral estoppel should not apply to the Planning Commission's consideration of Jelka James' second application. Rather, the reasons given by the Planning Commission when it denied the first application must be addressed in determining the sufficiency of the Planning Commission's approval of the second application.

Jelka James and the Planning Commission argue that the trial court erred in concluding that the Planning Commission acted arbitrarily and unreasonably by granting approval of the application. Judicial review of the Planning Commission's decisions is concerned with the question of arbitrariness. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). The court is not empowered to undertake a *de novo* review of the Planning Commission's actions, but may only determine whether the

commission acted in excess of its statutorily-granted powers, whether procedural due process was afforded, and whether there was substantial evidence in the record to support the commission's findings and recommendations. Id. at 456. If any one of these three elements is not met, the Planning Commission acted arbitrarily. Minton v. Fiscal Court of Jefferson County, Ky. App., 850 S.W.2d 52, 55 (1992).

The ministerial nature of approval of a preliminary plat presents difficulties in an appellate review. The process appears to include both discretionary and ministerial functions. The essence of a discretionary power is that the person or persons exercising it may choose which of several courses will be followed. Franklin County v. Malone, Ky., 957 S.W.2d 195, 201 (1997). In contrast, ministerial acts have been defined as those related to the execution or implementation of policy. City of Frankfort v. Byrns, Ky. App., 817 S.W.2d 462, 465 (1991). However, an act is not necessarily taken out of the class styled ministerial because the officer performing it is vested with a discretion respecting the means or method to be employed. Upchurch v. Clinton County, Ky., 330 S.W.2d 428, 430 (1959).

As a result, the trial court was correct in holding that the Planning Commission is acting in a quasi-judicial capacity when it holds a hearing and makes findings of fact. Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 307 Ky. 362, 210 S.W.2d 771, 773 (1948). So long as the agency's decision is supported by substantial evidence of probative value, it is not arbitrary and must be accepted as binding by the appellate court. Starks v. Kentucky Health

Facilities, Ky. App., 684 S.W.2d 5 (1984). Substantial evidence is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. O'Nan v. Ecklar Moore Express, Inc., Ky., 339 S.W.2d 466 (1960). In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 309 (1972).

At the same time, the trial court was also correct in holding that the decision-making process in approving a subdivision plat is ministerial, not discretionary. The Planning Commission's decision to grant or deny a plat application may not be based upon subjective considerations, but only upon whether the application complies with the specific terms of the zoning and subdivision regulations. Snyder v. Owensboro, 528 S.W.2d at 664. *See also* Wolf Pen Preservation Association, Inc. v. Louisville & Jefferson County Planning Commission, Ky. App., 942 S.W.2d 310, 312 (1997). Thus, the trial court's statement that the Planning Commission has some discretion when considering the evidence, statutes and zoning regulations is correct as it relates to the Planning Commission's findings of fact. However, the Planning Commission's decision to approve the preliminary plat must be based upon objective criteria from the applicable statutes and regulations.[5] Both the trial court and this Court

[5] The trial court and the Planning Commission cite Green v. (continued...)

are authorized to review issues of law on a *de novo* basis. Mill Street Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263, 266 (1990).

In its findings of fact and conclusions of law, the Planning Commission stated that Jelka James' plat complies with all requirements of the subdivision regulations "as waived in part at the request of the applicant." The decision further states that while the water availability and sewage certificates are not in compliance, approval of the plat would be made conditional upon submission of corrected certificates.[6] The trial court found that the Planning Commission's approval of Jelka James' second application was not supported by substantial evidence, in that the evidence showed that the plat violated several of the subdivision regulations. We agree with the trial court's conclusion, although on somewhat different grounds.

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[5](...continued)
Bourbon County Joint Planning Commission, Ky., 637 S.W.2d 626, 629 (1982) and Sladen v. Shawk, Ky. App., 815 S.W.2d 404 (1991) for the proposition that a planning commission has some discretion interpreting the statutes and zoning regulations. However, the issue before the courts in each of these cases was not whether the planning commission could exercise discretion in considering subdivision plats. Rather, the issue presented in these cases was whether the subdivision regulations were contrary to the statutes.

[6] A previous panel of this court found that this matter is ripe for adjudication because the Planning Commission's was not a conditional approval. However, the final paragraph of the Planning Commission's Decision of December 8, 1992 states that the approval of the plat is "contingent upon Jelka James Realty Company correcting the water and sewage certificates on the preliminary plat." Nonetheless, an approval, conditional approval or denial of a preliminary plat application is a final action for purposes of KRS 100.347. Thus, whether the Planning Commission's approval was conditional is not controlling for purposes of finality.

The trial court stated that Section 4.103 of the subdivision regulations allows the Planning Commission to exercise discretion in determining whether to approve a preliminary subdivision plat based on "prematurity for development."[7] To the extent that the regulation allows the Planning Commission to grant or deny a plat application based upon general considerations of "danger or injury to the public health, safety, welfare or prosperity," we find that it is an improper delegation of discretionary authority. Snyder at 665. However, to the extent that Section 4.103 merely requires an applicant to establish that the proposed development includes adequate public services and infrastructure, the regulation sets out reasonably specific standards within the scope of the Planning Commission's ministerial review.

The Homeowners' Association argued, and the trial court agreed, that Jelka James' application violates Section 4.103

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[7] In its entirety, Section 4.103 provides as follows:
Areas Premature for Development

> The Planning Commission may refuse to approve what it considers to be scattered or premature subdivision of land which would involve danger or injury to the public health, safety, welfare, or prosperity by reason of lack of adequate water supply or sewage treatment capacity, schools, fire or police protection, proper drainage, good roads and adequate transportation facilities or other public services; or which would necessitate an excessive expenditure of public funds for the supply of such services such as undue maintenance costs for adequate roads.
>
> If the Commission disapproves a plat due to the prematurity, the applicant may present to the Commission an analysis of the community facilities or services, as required in Section 5.1(c) of the Zoning Ordinance.

because the water and sewage certificates were not in compliance. In addition, the Planning Commission found that the water and sewage certificates were not in compliance with Sections 5.302 and 5.303. As noted above, the Planning Commission conditioned its approval of the preliminary plat upon Jelka James submitting corrected certificates. Since Jelka James will be required to certify the availability of water and sewage treatment prior to approval of the final plat, the Planning Commission was authorized to conditionally approve the plat on this ground.

However, the trial court also found that the plat violated Section 4.103 because there was no evidence addressing the availability of fire protection services to the proposed development. The Planning Commission raised this concern during its consideration of Jelka James' first preliminary plat. The Planning Commission heard no evidence that this deficiency had been remedied since the time of its denial of the first preliminary plat application. Consequently, the trial court correctly held that the preliminary plat violates Section 4.103.

The Homeowners' Association further asserts that Jelka James' application violates Section 4.104, regarding the effect of loss of natural features on value of adjacent properties. The trial court agreed, although it did not state how the plat violated these regulations. The Planning Commission cited to this issue in denying Jelka James' first preliminary plat. However, the transcript of the November 10, 1992 meeting of the Planning Commission shows that this issue was considered. Although the evidence was conflicting, we find that there was

substantial evidence supporting the Planning Commission's decision on this issue.

Nonetheless, we agree with the trial court that the plat violates Section 4.205, which sets requirements for the length and placement of dead-end streets. The proposed new road violates Section 4.205 because it ends closer than 100 feet from the boundary line of Lot 20. (It terminates at the boundary line.) The Planning Commission made no finding that this regulation was not applicable. Furthermore, the road appears to violate the scheme of development set out in the original 1979 subdivision plat. Therefore, we agree with the trial court that the plat did not comply with Section 4.205.

The Homeowners' Association next complains that the Planning Commission waived several subdivision regulations at the request of Jelka James. The Planning Commission appears to use the term "waiver" and "variance" interchangeably. However, the granting of a variance requires specific findings under KRS 100.243. The Planning Commission may conditionally approve a subdivision plat, subject to the applicant's obtaining a variance from certain zoning regulations. Furthermore, the Planning Commission is authorized to consider an application for variances at the same time as an application for preliminary plat approval. KRS 100.281(6)&(7).

There may be specific circumstances under which a planning commission is authorized to waive provisions of the subdivision regulations without treating it as an application for

a variance.[8] The record indicates that the subdivision regulations for Jessamine County and the city of Wilmore contain provisions which were intended to be applied only to urban areas. The Planning Commission's staff report notes that the waivers requested by Jelka James "seem to be 'in-line' with keeping the subdivision 'rural' in nature and appear to have been granted for the developed portions of Delaney Woods."

Yet given the ministerial nature of the plat approval process, we have concerns about the Planning Commission's use of the waiver process. The Planning Commission is not authorized to choose which regulations it will enforce. Nonetheless, we recognize that the waiver process is authorized by the subdivision regulations. Moreover, we have not been referred to any specific regulations which the waivers would violate. Consequently, we find that the waivers granted by the Planning Commission in this case do not invalidate its approval of the preliminary plat.

Based on the foregoing, the trial court correctly found that Jelka James' preliminary plat did not comply with the subdivision regulations. Furthermore, the resolution of the deed restriction issues in the declaratory judgment action may render the plat application process moot.

Accordingly, the judgment of the Jessamine Circuit Court in Action No. 1992-CI-00410 is affirmed in part, reversed in part and remanded for further findings of fact and conclusions

[8] For example: As noted above, subdivision regulation 4.205 sets certain length requirements for dead-end streets. However, the planning commission may waive the length requirement "where geographical or physical features make the limit not feasible."

of law consistent with this opinion. The judgment of the Jessamine Circuit Court in Appeal No. 1992-CI-00471 is affirmed in result.

BUCKINGHAM, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS/ APPELLEES/CROSS-APPELLANTS JELKA S. JAMES, ET AL.:

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