

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001976-MR

ROBERT L. CLARK
AND BETTY J. CLARK

APPELLANTS

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTELEN, JUDGE
ACTION NO. 1999-CI-00070

DAVIESS COUNTY,
A POLITICAL SUBDIVISION OF
THE COMMONWEALTH OF KENTUCKY;
DAVIESS FISCAL COURT, THE
LEGISLATIVE BODY OF DAVIESS COUNTY;
REID HAIRE, IN HIS OFFICIAL CAPACITY AS
DAVIESS COUNTY JUDGE/EXECUTIVE;
BRUCE KUNZE, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF THE DAVIESS FISCAL COURT
MIKE RINEY, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF THE DAVIESS FISCAL COURT;
JIM LAMBERT, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF THE DAVIESS FISCAL COURT;
OWENSBORO METROPOLITAN PLANNING COMMISSION;
RICK HOBGOOD, IN HIS OFFICIAL CAPACITY AS
A MEMBER OF THE OWENSBORO METROPOLITAN PLANNING
COMMISSION; ROBERT HOSKINS, IN HIS OFFICIAL
CAPACITY AS A MEMBER OF THE OWENSBORO
METROPOLITAN PLANNING COMMISSION;
MIKE ARMSTRONG, IN HIS OFFICIAL
CAPACITY AS A MEMBER OF THE OWENSBORO METROPOLITAN
PLANNING COMMISSION; DREW KIRKLAND, IN HIS
OFFICIAL CAPACITY AS A MEMBER OF THE OWENSBORO
METROPOLITAN PLANNING COMMISSION;
IRVIN ROGERS, IN HIS OFFICIAL CAPACITY AS
A MEMBER OF THE OWENSBORO METROPOLITAN PLANNING
COMMISSION; NICK CAMBRON, IN HIS OFFICIAL
CAPACITY AS A MEMBER OF THE OWENSBORO
METROPOLITAN PLANNING COMMISSION;
DAVE APPLEBY, IN HIS OFFICIAL CAPACITY AS
A MEMBER OF THE OWENSBORO METROPOLITAN PLANNING

COMMISSION; JUDY DIXON, IN HER OFFICIAL CAPACITY
AS A MEMBER OF THE OWENSBORO METROPOLITAN
PLANNING COMMISSION; C.A. PANTLE, JR.,
IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE OWENSBORO
METROPOLITAN PLANNING COMMISSION;
MARK SCHMIDT, IN HIS OFFICIAL CAPACITY AS
A MEMBER OF THE OWENSBORO METROPOLITAN PLANNING
COMMISSION;
IBOK, LLC;
AND JOE A. HARPER, SR.

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: This is an appeal from a judgment by the Daviess Circuit Court upholding an ordinance which granted a zoning map amendment. The adjoining property owners argue that the decision to waive the applicable driveway spacing standards for the applicants' development plan was arbitrary. They further contend that the trial court abused its discretion by denying a motion to amend their complaint to raise an issue regarding an alleged conflict of interest by a member of the Planning Commission. We find that the decision of the Planning Commission to waive the driveway spacing standards was within its discretion and was supported by substantial evidence. We also find that the trial court did not abuse its discretion in denying the motion to amend the complaint. Hence, we affirm.

Joe A. Harper, Sr. owned a 11.833 acre tract of land located at the intersection of Kentucky Highway 54 and Fairview Drive in Daviess County, Kentucky (the subject property). In 1988, he entered into a contract to sell that property to Ibok,

LLC. Pursuant to that contract, Harper and Ibok filed an application with the Owensboro Metropolitan Planning Commission (the Planning Commission) for a map amendment. Harper and Ibok sought to change the subject property's zoning classification from A-U (Urban Agricultural) and B-4 (General Business), so that all of the property would be zoned B-4.

The only real objection to the proposed zoning amendment concerned access to the subject property. The planning staff objected to the rezoning because the access points requested by Harper and Ibok did not comply with the guidelines set out in the Comprehensive Plan. The Access Management Manual, adopted by the Comprehensive Plan, requires that street intersections and driveways on minor arterial roadways be spaced a minimum of 500 feet apart. The subject property's frontage on Highway 54 was not sufficient to meet this standard. The planning staff recommended that access to the subject property be limited to Fairview Drive. The planning staff also noted that the proposed access from Fairview Drive was less than 500 feet from the intersection with Highway 54. The planning staff recommended that this access point be located at least 500 feet from the intersection. In response, Harper and Ibok modified their request for an access point from Highway 54, eventually agreeing that it be limited to a "right-turn-in-only" access. They further requested that the spacing requirements for the access points on Highway 54 and Fairview Drive be waived accordingly.

On November 12, 1998, the Planning Commission held a public hearing on the application. Various adjoining landowners, including the appellants, Robert L. and Betty J. Clark, spoke at the hearing. The Planning Commission heard testimony from its planning staff regarding its concerns about access to the development. In addition, Frank Gianotti, an expert witness who specializes in traffic and site engineering, testified on behalf of Harper and Ibok. Mr. Gianotti complimented the Planning Commission on adopting access management guidelines, but he recommended that strict compliance is not always appropriate. He stated that adhering to the minimum standards would actually result in greater safety hazards and disturbances in the flow of traffic. In the case of the proposed "right-turn-in-only" access from Highway 54, he stated that the spacing requirements in the Access Manual did not adequately address such special entrances, and that this limited entrance would improve traffic flow. With regard to the entrance on Fairview Drive, Mr. Gianotti testified that strict compliance with the spacing requirements would necessitate an inordinate curvature of the access road within the development.

Following the hearing, the Planning Commission voted 5-3 to recommend approval of the map amendment. The Planning Commission set forth 9 conditions which would have to be met by the applicants. Two of the conditions, No. 8 and No. 9, are at issue:

8. Access to Fairview Drive shall be limited to a single access point located a minimum of 413 feet from KY 54; and

9. Access to KY 54 shall be limited to a single access point located a minimum of 300 feet from Fairview Drive. This access point shall be designated with a deceleration/storage lane, and designated for right-turn ingress only.

On December 16, 1998, the Daviess County Fiscal Court introduced and held a first reading on an ordinance adopting the Planning Commission's recommendations. On December 23, 1998, the Fiscal Court held a second reading on the ordinance, and formally approved the map amendment. Pursuant to KRS 100.347, on January 19, 1999, the Clarks filed an action in the Daviess Circuit Court challenging the ordinance, arguing that the decision by the Planning Commission and the Fiscal Court to waive the spacing requirements was arbitrary, and was not supported by substantial evidence.

The matter was submitted to the circuit court on briefs and oral arguments by counsel, and upon the Planning Commission's record. In a footnote to their April 16, 1999, brief to the trial court, the Clarks alleged that Mike Armstrong, a Planning Commission member who moved for approval of the rezoning, had significant financial dealings with Independence Bank of Kentucky. The Bank is owned by the same persons who own or control Ibok. Thus, the Clarks suggested that Commissioner Armstrong's conflict of interest tainted the proceedings before the Planning Commission. However, the text of the Clark's brief primarily focused on their argument that the Planning Commission's waiver of the access standards was arbitrary, and it did not further raise the alleged conflict of interest issue.

The Clark's filed a motion to amend their complaint on June 10, seeking to raise the conflict of interest issue.

On June 23, the trial court entered an order upholding the rezoning. The court found that the Planning Commission and the Fiscal Court's decision to waive the spacing requirements was supported by adequate findings of fact based upon substantial evidence.¹ The trial court further found that the standards set out in the Access Management Manual are guidelines, and the Planning Commission acted within its discretion by departing from those standards in this case. In a separate order entered on August 10, 1999, the trial court denied the Clark's motion to amend their complaint, concluding that the conflict of interest issue was not raised in a timely manner. This appeal followed.

In most cases involving an appeal from a zoning map amendment proceeding, the appellate court is presented with the question of whether the decision to grant the rezoning of the property was arbitrary. In this case, however, the Clarks do not challenge the validity of the map amendment. Rather, they first argue that the decisions by the Fiscal Court and by the Planning Commission to waive the applicable access standards were arbitrary. They assert that the driveway and spacing standards set out in the Access Management Manual are mandatory. The trial court rejected this interpretation, noting that the Manual had been incorporated into the Comprehensive Plan. Although a zoning agency is required to consider the Comprehensive Plan, its

¹ The trial court also found that the Clarks' appeal was timely under KRS 100.347(2). This issue has not been raised in the current appeal.

elements and requirements when deciding whether to approve a zoning map amendment, the zoning agency is not bound to follow every detail of that plan. Ward v. Knippenberg, Ky., 416 S.W.2d 746 (1967).

The Access Management Manual was developed in 1991 through the joint efforts of the Kentucky Department of Highways, the Green River Area Development District, and the Planning Commission. In 1991, the Planning Commission incorporated the Access Management Manual into the Comprehensive Plan for Daviess County. The Manual states that it is intended to serve as a policy guideline for directing highway and street development in the Owensboro and Daviess County Area.

There is a dispute between the parties concerning whether the Access Management Manual has been formally adopted by the City of Owensboro and Daviess County as part of the Zoning Ordinance. It appears from the record before the trial court that in 1996, Owensboro and Daviess County incorporated the standards set out in the Access Management Manual into its Zoning Ordinance.² Nevertheless, the Access Management Manual itself allows for discretionary application of the standards. By implication, the Zoning Ordinance's reference to the Manual also incorporates this discretion.

² Section 13.21 of the Amended Zoning Ordinance provides:

Access to building developments located along arterial or major collector streets in the Owensboro Urban Service Area shall be subject to the driveway spacing standards and the policies for applying those standards, as specified in the adopted "Access Management Manual for the Owensboro-Daviess County Urban Area."

Nonetheless, the Clarks argue that compliance with the spacing standards set out in the Access Manual are ministerial in nature. We disagree. This is not a case involving approval of a subdivision plat. Approval of a subdivision plat is a ministerial act. Snyder v. Owensboro, Ky., 528 S.W.2d 663, 664 (1975). The function of the planning commission in such cases is to determine whether the proposed use is permitted under the existing zoning classification, and if the proposed plat complies with the zoning and subdivision regulations. In contrast, KRS 100.211(1) places the decision to grant a map amendment within the discretion of the local legislative body. See also, McKinstry v. Wells, Ky. App., 548 S.W.2d 169, 175 (1977).

The primary issues presented by the Clarks are whether the Planning Commission's decision to waive the standard set out in the Access Manual was supported by substantial evidence, and whether the Planning Commission made sufficient factual findings to support that decision. KRS 100.213 sets out the findings of fact which the Planning Commission must make to grant a map amendment. The Planning Commission must find that the map amendment is in agreement with the adopted comprehensive plan, or, in the absence of such a finding, that one or more of the following apply:

- (a) That the existing zoning classification given to the property is inappropriate and that the proposed zoning classification is appropriate; or
- (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.

In the present case there is no dispute that the change in the zoning classification for the subject property is in agreement with the Comprehensive Plan. The only question is whether the decision to waive the driveway spacing standards was in agreement with the Comprehensive Plan. The Clarks concede that there was evidence presented at the public hearing which could have supported such a finding. In particular, the testimony from Mr. Gianotti would justify the Planning Commission's decision to waive strict compliance with the minimum spacing standards set forth in the Access Manual. However, the Clarks contend that the Planning Commission's failure to make an adjudicative factual finding on this issue renders the decision invalid.

The Planning Commission found that the proposed zone change and development plan were in conformance with all applicable guidelines of the Comprehensive plan. Consequently, there was no need to make any findings concerning the inappropriateness of the existing zoning classification or whether there had been major economic, physical, or social changes which altered the basic character of the area and justified reclassification. Minton v. Fiscal Court of Jefferson County, Ky. App., 850 S.W.2d 52, 56 (1992). Yet because the driveway spacing guidelines have been adopted as part of the Comprehensive Plan, KRS 100.213 requires the Planning Commission to make a factual finding either that the proposed development is in conformity with those standards, or that the circumstances justify a waiver of those standards.

In Findings Number 3 and 4, the Planning Commission found that:

3. The applicant's proposal is a logical zoning expansion because the subject property is contiguous to and includes existing B-4 General Business zones, would not significantly increase the extent of the B-4 General business zone within the area, and would not overburden roadway capacity or other necessary urban services that are available or planned in the affected area, if previously cited improvements to traffic capacity are provided; and
4. Submission of a development plan reflecting the conditions cited above will achieve compliance with the Comprehensive Plan, Zoning Ordinance and Subdivision Regulations. Without said plan, the proposal would not comply with the Comprehensive Plan, Zoning Ordinance, and Subdivision Regulations.

The Clarks take issue with the sufficiency of these findings, asserting that they are merely general and conclusory statements which do not directly support the decision to waive the access spacing standards. In Caller v. Ison, Ky., 508 S.W.2d 776 (1974), it was held that a mere parroting of the words of the statute was not a sufficient finding of fact in a zoning matter to justify a map amendment zoning change. The finding of an ultimate fact which is unaccompanied by a finding of any basic facts which support the ultimate finding often renders appellate review impossible. The reviewing court has no way to determine whether the ultimate finding was made arbitrarily if it does not have before it the facts upon which the finding was based. City of Beechwood Village v. Council of and City of St. Matthews, Ky. App., 574 S.W.2d 322, 324 (1978).

The Planning Commission's factual findings in this case were rudimentary.³ However, they do more than merely parrot the language of the statute or state an ultimate conclusion. The Planning Commission found that the access conditions attached to approval of the development plan would not overburden roadway capacity or other necessary urban services, and they will achieve compliance with the guidelines set out in the Comprehensive Plan, the Zoning Ordinance and the Subdivision Regulations. Although greater specificity might be preferable, these findings are adequate to afford meaningful appellate review. Furthermore, the record before the Planning Commission is sufficient to reflect the elements necessary for judicial review to determine whether the ultimate action was arbitrary. City of Louisville v. McDonald, Ky., 470 S.W.2d 173, 179 (1971). Based upon the record as a whole, we believe the Planning Commission's findings were supported by substantial evidence, and therefore are not arbitrary.

Lastly, the Clarks contend that the trial court erred in denying their motion to file the amended complaint, which raised the issue of Commissioner Armstrong's alleged conflict of interest. Harper and Ibok argue that the circuit court lacked jurisdiction to review the conflict of interest issue. The trial court agreed, finding that the conflict of interest issue raised

³ It should be noted that the document containing the Planning Commission's findings of fact is not the minutes of the November 12, 1998 hearing. Rather, it is the formal recommendation which was forwarded to the Fiscal Court. The Recommendation includes the "applicable excerpts of minutes of above meeting", which is actually just the transcript of the hearing. Although this seems procedurally irregular, that issue has not been raised in this appeal.

by the Clarks in their amended complaint is beyond the scope of the court's review under KRS 100.347. The trial court stated that it is limited to determining whether the Planning Commission and the Fiscal Court acted arbitrarily, and it has no power to conduct a *de novo* hearing. Although we agree with the trial court's statement of law, we believe that the court below interpreted the issue of arbitrariness too narrowly.

The action of an administrative body will be considered arbitrary if: (1) the proceedings before the body did not afford procedural due process; or (2) the action of the body was not supported by substantial evidence heard by it. Morris v. City of Catlettsburg, Ky., 437 S.W.2d 753, 755 (1969). Due process includes the right to have the matter considered by an unbiased decision-maker. Hart County Board of Education v. Broady, Ky. App., 577 S.W.2d 423, 426 (1979). We agree with the circuit court that it has no power to conduct a *de novo* trial. Morris v. City of Catlettsburg, Ky., 437 S.W.2d 753, 755 (1969). However, the purpose of this rule is to prevent the court from substituting its judgment in discretionary, legislative matters. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 455 (1964). The Clarks are not asking the courts to conduct a *de novo* review of the propriety of the map amendment. Rather, the Clarks seek a review of whether the procedure by which the map amendment was granted comported with due process. This is a matter which is within the jurisdiction of the courts.

The trial court also noted that had Commissioner Armstrong recused himself from the proceedings, the measure would have passed nevertheless by a vote of 4-3. However, given the due process considerations at issue, this fact is not necessarily controlling. In the recent case of LaGrange City Council v. Hall Brothers Co. of Oldham County, Inc., Ky. App., 3 S.W.3d 765 (1999), this Court invalidated the vote of a person who was statutorily not qualified to sit on the local legislative body. In that case, the actual bias or conflict of interest of that member was not at issue. Thus, the votes of the remaining members of the planning commission were not tainted. However, where there was an alleged failure to disclose a direct conflict of interest, we believe that the interests of due process require closer scrutiny.

Ultimately, this matter comes down to the trial court's determination that the Clarks did not bring their motion to amend the complaint in a timely manner. At the time they filed their motion, the Clarks could only amend their complaint by leave of the court. CR 15.01. After a motion for summary judgment has been made, a motion to amend a pleading rests in the sound discretion of the trial court, and its ruling will not be disturbed unless an abuse of discretion is clearly shown. Johnston v. Staples, Ky., 408 S.W.2d 206, 207 (1966). The timeliness of their cause of action was a legitimate consideration.

The Clarks alleged that Commissioner Armstrong failed to disclose his financial dealings with Independence Bank. We

agree that their failure to raise the issue before the Planning Commission or in their original complaint did not preclude consideration of the issue. Yet as the trial court pointed out, the Clarks were aware of the issue at least as early as April 16, 1999, as evidenced by their reference to the issue in a footnote of their brief. However, they did not file a motion to amend their complaint until June 10 - some eight weeks later. By that time, the case had been briefed, argued and submitted to the trial court for a decision. Given these circumstances, we cannot say that the trial court abused its discretion in finding that the issue was not timely raised.

Moreover, even assuming that the Clarks were diligent in bringing this issue to the attention of the trial court, the factual basis for their claim that Commissioner Armstrong was biased is inadequate. KRS 100.171 requires that "[a]ny member of a planning commission who has a direct or indirect financial interest in the outcome of any question before the body shall disclose the nature of the interest and shall disqualify himself from voting on the question," The purpose of this section is to prevent direct and indirect financial enrichment to a planning commission member or his business associates who have property or matters for consideration by the commission. City-County Planning Commission of Warren County v. Jackson, Ky. App. 610 S.W.2d 930, 932 (1981).

The Clarks allege that Armstrong had sold a tract of land to Independence Bank six weeks before the Planning Commission hearing, and that he had borrowed substantial sums of

money from Independence Bank. It is conceded that Independence Bank is a separately held entity from Ibok. There is no allegation that Commissioner Armstrong stood to benefit personally from approval of the map amendment. The Clarks do not allege that the real property which Commissioner Armstrong sold to Independence Bank would be affected by the map amendment. Furthermore, the loans at issue consist of several real estate mortgages taken out by Commissioner Armstrong and his wife between June 1998 and February 1999. There is nothing in the record to suggest that Commissioner Armstrong's relationship with Independence Bank was any more than that of a customer of the bank.

The mere fact that Commissioner Armstrong had a business relationship with an entity related to the zoning applicant is not sufficient to raise an inference of bias. There is no allegation that Commissioner Armstrong's relationship with Independence Bank would be affected by his decision to approve Ibok's application for a map amendment. Even accepting all of the facts alleged by the Clarks as true, we cannot find that justice required the trial court to grant their motion to amend the complaint raising the additional cause of action.

Accordingly, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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ET AL.:

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