

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001105-MR

GEORGE M. MURPHY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS STEPHENS, JUDGE
ACTION NO. 98-CI-01626

KENTON COUNTY BOARD OF ADJUSTMENT,
GEORGE NEACK, KENTON COUNTY FISCAL
COURT, KENTON COUNTY MUNICIPAL
PLANNING AND ZONING COMMISSION,
AND ROGER SHROUT

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: BARBER, COMBS, AND McANULTY, JUDGES.

BARBER, JUDGE: Appellant, George Murphy ("Murphy"), seeks review of an order of the Kenton Circuit Court granting summary judgment in favor of Appellees, Kenton County Board of Adjustment ("the Board of Adjustment"), Kenton County Fiscal Court, Kenton County Municipal Planning and Zoning Commission, George Neack, and Roger ShROUT, on the ground that the Board of Adjustment did not act arbitrarily in granting a conditional use permit to Roger ShROUT. We reverse.

On or about March 23, 1998, Appellee, Roger Shrout ("Shrout"), filed an application with the Board of Adjustment requesting a hearing in regard to a conditional use permit to build a golf course in an area zoned A-1 for agricultural use. Murphy is an adjacent landowner.

KRS 100.237 provides that the Board of Adjustment "shall have the power to hear and decide applications for conditional use permits" KRS 100.111(6) defines a conditional use as:

[O]ne which is essential to or would promote the public health, safety, or welfare in one (1) or more zones, but which would impair the integrity and character of the zone in which it is located, or in adjoining zones, unless restrictions on location, size, extent, and character of performance are imposed in addition to those imposed in the zoning regulation.

KRS 100.111(7) defines a conditional use permit as:

[L]egal authorization to undertake a conditional use, issued by the administrative official pursuant to authorization by the board of adjustment, consisting of two (2) parts:

(a) A statement of the factual determination by the board of adjustment which justifies the issuance of the permit; and

(b) A statement of the specific conditions which must be met in order for the use to be permitted;

The record reflects that the Kenton County Zoning Ordinance permits golf courses, "subject to the approval by the Board of Adjustments [sic], as set forth in Sections 9.14 and 18.7 of the zoning ordinance." Section 9.14 of the Kenton County

Zoning Ordinance provides that the Board of Adjustment may authorize a conditional use to be located within any zone in which such conditional use is permitted, if the evidence presented by the applicant is such as to establish, beyond any reasonable doubt:

1. That the proposed use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well being of the neighborhood or the community; and
2. That such use will not be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity. (emphasis added).

On April 20, 1998, a public hearing was held on Shroust's application. The minutes reflect that the proposed site is accessed from Key West Road, a substandard county road. The site access for Key West levels out at a railroad crossing which is signalized, but does not have an automatic crossing gate barrier. The existing site conditions do not comply with the access control regulations for Kenton County. The recommendations of the Northern Kentucky Area Planning Commission Staff were that the conditional use be denied, because:

1. [T]he proposed use at the particular site is **not** necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood or the community; and
2. [S]uch use, as submitted, **will be detrimental** to the health, safety, or general welfare of persons residing or working in the vicinity. (emphasis added)

Following discussion, a motion was made and carried to table the issue "until further meeting when the information is solidified, until we have some plans and specs we can look at" The meeting was then adjourned.

Another public hearing was held on July 20, 1998. The Board of Adjustment had postponed any action to give ShROUT time to get additional information. A memorandum to the Board of Adjustment members regarding the July 20, 1998 meeting from Bruce Wong of the Planning Commission reflects that the existing site conditions do not comply with the Kenton County access control regulations, and that "[i]nformation submitted by the applicant is insufficient and incomplete." The Planning Commission Staff made the same recommendation to deny the conditional use, as it had at the April 20, 1998 hearing.

At the July 20, 1998 hearing, Wong explained that only some additional information had been submitted regarding the proposed road frontage and road access. "Other than that, we don't have anything else in detail." Mr. Neack, the Zoning Administrator, explained ShROUT had accomplished getting the "the railroad [to give] . . . them permission to build the road on access right-of-way," However, according to Wong, "basically we would like to see exactly the access and any improvements in the area What was submitted was insufficient." Wong explained that they did not have enough information about safety of the access and were concerned about the traffic pattern.

Appellant, Murphy, an adjacent landowner, disagreed with Shroust's "figures" in terms of road access. Further discussion at the hearing reflects that:

Mr. Wong stated if the driveway would be inadequate, well we really cannot make a silent judgment because we don't have the information. If we had the information we could come up with an evaluation.

Mr. Crout [Board member] stated I am not understanding you to say that first of all they have to submit plans to you and if they are not adequate, then you are going to say "No, this will not fly."

Mr. Neack [Zoning Administrator] stated that the engineering staff at Area Planning & Zoning does this all the time. They look at what is state and what is not state and how roads check with other roads. They do it all the time. Can Larry Burks people to review it [sic].

Mr. Hoffman [Board Member] stated to review it, but how can you say no? How can you say it is not adequate?

Mr. Neack stated that the Board could say that it would have to pass review successfully at various times.

Mr. Hoffman inquired what is the Board going to judge it against?

Mr. Neack stated whatever they use on any other driveway. They have a set of standard [sic] or the amount of traffic that would be on it, how thick it would have to be and how wide it should be.

Mr. Hoffman asked is there are standards on the driveways.

Mr. Neack said there are standards on the driveways. Actually, it is in the Zoning Ordinance.

Mr. Hoffman stated personally, I don't see how it is going to fit. This is saying yes to something you don't have any sense or control over.

Mr. Shrout asked them if they could say yes with a contingent on it.

Mr. Hoffman asked contingent on what?

Mr. Shrout answered that I provide a road that is adequate. That's what I am saying. He has a statute and ordinance that I have provided.

Mr. Neack stated he thought in order for this to work, you have to have a plan to look at. You cannot just sit here and talk about it. You have to have a plan. You have to look at the plan and take into consideration; does it handle the drain and does it provide safe curves.

Mr. Hoffman stated he doesn't see anything that you could judge it against.

Mr. Neack stated it is still going to depend on traffic volume. I'm not arguing for or against it. It competes with the County. I'm saying if you decide you want to look at it, that plans could be reviewed and you could tell him whether or not it is going to work.

Mr. Hoffman stated that he has a hard time believing that you could put a road through there.

Mr. Murphy [Appellant] stated that he would like to see some survey done on the volume of traffic at that intersection. . . and how it would affect traffic on that railroad track.

Mr. Shrout stated that is another problem if he's waited that long. That's not my problem. If he has existing problems today, then that should be looked at.

Mr. Wong stated that what we could do is a study with the corps of engineers to do a

study to make sure what is proposed is safe and adequate.

Mr. Neack stated the ones I would use and have used for that would be Burgess and Niple office in Lexington and Wilbur Smith in Lexington. They are both excellent.

Mr. Purdon [Board member] stated that she wanted to clarify with Mr. Wong that he was saying there are standards for this type of situation.

Mr. Wong stated that there are standards for a similar situation. We're used to getting a set of plans and also request maybe a type of an engineers [sic] report for the design. The architect would lay out the plans and then they would submit a report, stating you don't need a stacking lane, or you do. We base all our opinions on the engineers [sic] report.

At that juncture, motion was made that the conditional use permit be granted with the condition that plans be submitted to Area Planning and Zoning and approved by them. The Board members voted 2 to 1 to grant the motion. There was no further discussion and the meeting was adjourned.

Murphy appealed to the circuit court which granted Appellees' motion for summary judgment. The circuit court concluded that "KRS 100.237(1) permits the Board to grant a conditional use permit with attached requirements that something be done before the request may be initiated. Therefore, the absence of this plan does not support a conclusion that the Board's decision was arbitrary." Murphy appeals.

KRS 100.237(1) does grant the Board authority to attach conditions "**such as time limitations,**" to its approval of a

permit, by requiring that "one (1) or more things be done before the request can be initiated," (emphasis added). However, we do not construe this language to dispense with the fundamental requirement that the Board make findings of fact based upon substantial evidence. We do not believe that the Legislature intended for permits to be approved by the Board, upon the condition that the applicant would eventually come up with some evidence to justify the request.

The Board of Adjustment is an administrative board performing specified legislative functions relative to zoning. KRS 100.217 et seq. [citations omitted]. Power is delegated to the board by the legislature. The board, consistent with that delegation, must conduct a trial-type hearing and make adjudicative findings of fact to support its legislative decision and to afford a basis for judicial review. In making these findings, the board is not held to strict judicial standards. [citation omitted]. However, the findings must contain sufficient information to afford a meaningful review as to the arbitrariness of the board's decision.

An administrative decision granting relief to one having the burden of proof must be supported by findings based upon substantial evidence. Without such support, the decision is arbitrary and cannot weather judicial review. Arbitrary power is constitutionally condemned in this Commonwealth. Ky. Const. § 2.

Bourbon County Bd. of Adjustment v. Currans, Ky. App., 873 S.W.2d 836, 838 (1994).

Shrout bore the burden of proving that he was entitled to the relief sought, **before** the Board of Adjustments could approve his application for a conditional use. Here, existing

site conditions did not comply with Kenton County access control regulations, the staff twice recommended that the conditional use be denied, and the Board was admittedly unable to evaluate ShROUT's request due to the insufficiency of the information presented, despite having given him the opportunity to present additional information following the April 20, 1998 hearing. Our review of the minutes from the July 20, 1998 public hearing reveals that it is essentially a discussion about the **lack of evidence** before the Board. The Board's decision to grant a conditional use permit, contingent upon ShROUT's furnishing a plan in the future, lacks a substantial evidentiary foundation. By its very definition, a conditional use permit must contain a "statement of the factual determination by the board of adjustment" which justifies its issuance. KRS 100.111(7). The Board acted arbitrarily by granting a conditional use permit upon the "condition" that the applicant obtain evidence to justify its issuance.

We reverse the judgment of the Kenton Circuit Court, and remand the case to the Board of Adjustment with direction to deny the conditional use permit, because the applicant failed to present sufficient evidence. In the event additional information may have been obtained and/or submitted relative to the subject application during the pendency of this appeal, due process requires a public hearing, in accordance with KRS Chapter 100 and

any applicable regulations/ordinances governing the Kenton County Board of Adjustment, before that information can be considered.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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