RENDERED: AUGUST 2, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000325-MR

RITA C. GELLHAUS,
WINSTON L. SHELTON, AND
LAURA S. HALL — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NOS. 00-CI-003933, 94-CI-002642,
and 96-CI-000926

LOUISVILLE AND JEFFERSON COUNTY
PLANNING COMMISSION, JEFFERSON
COUNTY DEPARTMENT OF PUBLIC WORKS,
LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT,
DOMINION HOMES, INC.,
DOMINION HOMES OF KENTUCKY, GP, LLC,
DOMINION HOMES OF KENTUCKY, LTD.,
AND TRIAD DEVELOPMENT/ALTA GLYNE, INC. — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND
REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Appellants Rita C. Gellhaus, Winston L. Shelton, and Laura S. Hall appeal from an opinion and order of the Jefferson Circuit Court dismissing their appeal and civil complaint. The appellees are the Louisville and Jefferson County

Planning Commission (Planning Commission); the Jefferson County Department of Public Works (County Works); the Louisville and Jefferson County Metropolitan Sewer District (MSD); Dominion Homes, Inc.; Dominion Homes of Kentucky, GP, LLC; Dominion Homes of Kentucky, Ltd.; and Triad Development/Alta Glyne, Inc. We affirm in part, reverse in part, and remand.

Litigation in one form or another between some of the parties concerning the subject property began in 1994 and has continued until this date. We believe it would serve no purpose to recite the specifics in this regard, and we will state only the facts relevant in this appeal.

The case involves a proposed subdivision of approximately 117 acres in southeastern Jefferson County near the intersection of Billtown Road and Gene Synder Freeway. The appellants are adjacent property owners who claim that their properties will be adversely affected by the subdivision development. Specifically, the appellants claim that the subdivision will have an adverse environmental impact on their properties because runoff from the development will flow onto their properties and into their lakes and streams.

In 1992, Triad submitted an "innovative" subdivision plan to the Planning Commission. The Planning Commission approved the plan on April 21, 1994, and litigation between the parties began. In 1999, Triad[1] proposed a substitute development

[1] In July 1999, Triad conditionally sold the property to Dominion Homes.

plan. The substitute plan was a standard development plan rather than an innovative plan.

The Planning Commission approved the plan on August 19, 1999, by a vote. The appellants did not appeal the approval within thirty days after the vote. See KRS[2] 100.347(2).

However, the development of the land could not begin until MSD approved a soil and sedimentation control plan and until the County Works director approved the construction plan. The director approved the construction plan on May 18, 2000, and the appellants filed their appeal and civil complaint in the Jefferson Circuit Court on June 17, 2000. The appeal and civil complaint alleged that the final approval of the construction plan was arbitrary and that the appellants were denied due process.[3]

On August 3, 2000, the developers filed a motion to dismiss the appeal and civil complaint for lack of jurisdiction pursuant to CR[4] 12.02(a). Citing KRS 100.347(2) and (5), the developers alleged in their motion that the court did not have jurisdiction to hear the appeal because it was not filed within thirty days of the August 19, 1999, subdivision approval. In addition, the developers asserted that the civil complaint was

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[2] Kentucky Revised Statutes.

[3] The appellants' main complaint with the entire process was that the Planning Commission's earlier approval of the innovative plan required Triad to retain on-site at least the first half-inch of surface water runoff, but the approval of the standard plan did not include surface water retention basins but only dry basins.

[4] Kentucky Rules of Civil Procedure.

indistinguishable from the appeal since it claimed arbitrary approval of the construction plan and a denial of due process, issues raised by the appeal of the administrative decision.

The circuit court conducted a hearing and granted the developers' motion to dismiss. An opinion and order was entered on November 16, 2000, and an order amending the opinion and order was entered on January 17, 2001. The basis of the court's ruling was that it was without jurisdiction to consider the appeal and that the civil complaint stated the same grounds as the appeal. This appeal followed.

The appellants' first argument is that the circuit court erred in holding that it was without jurisdiction to hear the appeal. KRS 100.347(2) states in relevant part as follows:

> Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall appeal from the final action to the Circuit Court of the county in which the property, which is the subject of the commission's action, lies. Such appeal shall be taken within thirty (30) days after such action. Such action shall not include the commission's recommendations made to other governmental bodies. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review.

KRS 100.347(2). Further, KRS 100.347(5) states that "[f]or purposes of this chapter, final action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body."

First, the appellants seem to argue that KRS 100.347(5) applies only to "legislative bodies" as referenced in KRS 100.347(3). In support of their argument, the appellants contend

that KRS 100.347(5) uses the word "body" rather than "commission." We disagree with the appellants and hold that KRS 100.347(5) applies to actions of planning commissions as well as legislative bodies. We believe the word "body" as used in the statute refers to other entities, such as planning commissions, as well as to legislative bodies. Therefore, KRS 100.347(5) relates to KRS 100.347(2) as well as KRS 100.347(3).

Next, the appellants argue that the August 19, 1999, vote by the Planning Commission to approve the developers' subdivision plan was not a "final action" as that term is used in KRS 100.347(5). Rather, the appellants assert that the Planning Commission conditionally voted to approve the plan and then referred it to MSD to develop a surface water management plan as part of a construction plan. According to the appellants, MSD was required to return the construction plan to the Planning Commission for final approval. The appellants state that the commission was then required to take "final action" of approval, which it did through its regulatory designated agent, County Works.[5]

KRS 100.347(5) states the definition of "final action" as, "For purposes of this Chapter, final action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body." See Leslie v. City of Henderson, Ky. App., 797 S.W.2d 718, 719

[5] In explaining this procedure, the appellants have referred to Commission Subdivision Regulations. No citation to the record was given, and we have been unable to locate a copy of such regulations anywhere in the record.

(1990). The subject of the Planning Commission's action was the approval of the subdivision plan. Pursuant to KRS 100.347(5), "final action" occurred on August 19, 1999, the date when the vote was taken to approve the subdivision plan. Thus, by not appealing within thirty days of that date, the matter was not subject to judicial review. KRS 100.347(2). In short, the circuit court ruled correctly in this regard.

The appellants' next argument is that the circuit court erred in dismissing the appellants' civil complaint seeking constitutional review. The circuit court held that its constitutional review for arbitrariness was subject to KRS 100.347. On the other hand, the appellants argue that they sought constitutional review based on arbitrariness of the administrative acts of MSD, County Works, and the Planning Commission following the August 19, 1999, approval of the subdivision plan.

The administrative actions for which the appellants sought constitutional review for arbitrariness occurred after the time for filing an appeal of the final action of the Planning Commission had expired. Although there appears to be no statutory appeal of such alleged arbitrary acts, there is an inherent right of appeal. See American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 456 (1964). Therefore, we conclude that the trial court erred when it dismissed the appellants' constitutional claim concerning the actions of MSD, County Works,

and the Planning Commission following the August 19, 1999, approval of the subdivision plan.

Citing City of Lyndon v. Proud, Ky. App., 898 S.W.2d 534 (1995), the appellees argue that the ministerial actions taken by the administrative agencies following the final action of the Planning Commission are not subject to appeal. We agree that the administrative actions subsequent to the approval by the Planning Commission were ministerial acts. See Snyder v. Owensboro, Ky., 528 S.W.2d 663, 665 (1975). However, "There is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and section (2) of the Constitution prohibits the exercise of arbitrary power." American Beauty Homes, 379 S.W.2d at 456.

We know of no reason why ministerial administrative acts may not be contested as being arbitrary. For example, see Wolf Pen v. Louisville & Jefferson County Planning Commission, Ky. App., 942 S.W.2d 310 (1997). Such ministerial acts may be challenged on such grounds as the regulations were not followed or were misinterpreted.

City of Lyndon v. Proud does not convince us to side with the appellees on this issue. In that case the court held that the passing of a resolution rejecting a recommendation of a planning commission for a zoning change was final on the date it passed and that the administrative task of approving the minutes at the following meeting did not affect finality for purposes of KRS 100.347(5). Id. at 536. In the case *sub judice* the administrative acts following initial subdivision approval

involved considerably more than the approval of minutes from the previous meeting.

Further, appellees urge us to affirm the circuit court's dismissal of their complaint as it relates to the appeal of the later administrative actions because the appellants did not cite any violation of any regulation by any of the administrative agencies. However, the argument overlooks the fact that the issue before us is whether the trial court erred in determining that the appellants did not have the right to appeal the later actions. The merits of the appeal are not before us; in fact, the appellants never had the opportunity to argue the merits of the appeal to the circuit court.

In short, we must reverse and remand the dismissal of the appeal of the later administrative actions. We hold that the developers did have the right to appeal such actions. However, it is not for this court but for the circuit court to determine whether the appeal has any merit or whether it even states sufficient allegations on its face so as to state a claim upon which relief can be granted. See CR 12.02(f).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

SCHRODER, JUDGE, CONCURS WITH RESULT.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. This is a troublesome case. On the one hand, our courts have consistently held that there is an inherent right of review

from orders of administrative agencies, regardless of whether there is an explicit right of appeal, because an agency is prohibited by Section 2 of the Kentucky Constitution from acting arbitrarily.[6] On the other hand, our courts have also consistently emphasized that one seeking review of administrative decisions must strictly follow the applicable procedures. Since an appeal from an administrative decision is a matter of legislative grace and not a right, the failure to follow the statutory guidelines for an appeal is fatal. The cases interpreting KRS 100.347 are clear that parties aggrieved by the actions of a planning commission must bring their grievances to the appropriate appeals panel, administrative or judicial, in a timely fashion.[7] The legislature has given aggrieved parties 30 days from the planning commission's "final action" in which to perfect an appeal.

The first problem is when that final action is deemed to have occurred in the context of approval of a subdivision plat. The peculiar nature of a planning commission's "conditional" approval of a "preliminary" subdivision plat further complicates our analysis. Indeed, it is not at all clear the legislature contemplated that the planning commission would reserve to itself the right to impose conditions subsequent on its approval. KRS 100.347(5) defines "final action" to occur on the calendar date when the vote is taken to approve or disapprove

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[6] American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 456 (1964).

[7] Taylor v. Duke, Ky. App. 896 S.W.2d 618, 621 (1995).

the matter pending before the body. This definition does not suggest that any further administrative action would take place. Likewise, KRS 100.277 requires all subdivision plats to receive planning commission approval. "[N]o plat of a subdivision of land within the planning unit jurisdiction shall be recorded by the county clerk until the plat has been approved by the commission and the approval entered thereon in writing by the chairman, secretary, or other duly authorized officer of the commission" KRS 100.277(2). The language of this statute does not suggest that the planning commission's "final" approval would be conditional.

Nevertheless, I fully agree with the majority that the planning commission's final action must be deemed to occur when it votes to approve the subdivision plat, conditional, preliminary, or otherwise. In practice, all plats when initially submitted are referred to as preliminary. If such plat is preliminarily approved, the developer is empowered to implement the development. This necessarily includes the submission of plans to the relevant agencies to show compliance with the conditions placed upon the approval of the preliminary plat. The preliminary plat is the initial hurdle, while the final plat follows the preliminary plat and complies with it. The conditional approval of a subdivision plan is the most important step in the subdivision regulation process. Final approval of the amended subdivision plan is a clearly foreseeable consequence of the granting of tentative approval. Simply put, there cannot be two final actions for purposes of KRS 100.347, and therefore

the right to review should be deemed to have accrued in relation to the earlier date. Any other interpretation would allow an aggrieved party to sit back while the builder and the community proceed in reliance of the original approval, and seek review of the granting of final approval.

This conclusion leaves unresolved the even thornier question of the appropriate remedy. Furthermore, this is also where I must depart from the rest of the majority opinion. Although there is an inherent right to appeal the allegedly arbitrary ministerial actions, I disagree with the majority that the "civil complaint" filed by the appellants was sufficient to bring the issue before the trial court.

The planning commission's approval of the final plat in this case was based upon satisfaction of the conditions in its initial approval. In turn, that decision was based upon MSD's approval of the developer's soil and sedimentation plan, and the public works' director's approval of the construction plan. MSD and the public works director found that the developer's plans for controlling surface water runoff were adequate to protect the water quality on adjacent properties.

But the planning commission did not undertake an independent review of these findings, nor did it consider whether these findings were based upon substantial evidence. Rather, the planning commission deferred to the expertise of these agencies to ensure compliance with its conditions. Indeed, these findings may well be outside of the scope of the planning commission's expertise to review. Therefore, the property-owner's appeal

cannot be said to be taken from the planning commission's approval of the final plat. That action is merely the triggering event to establish that they have been aggrieved. The property-owner's objections arise from MSD's and the public works director's approval of the developer's plans, although the planning commission would be a necessary party to any action challenging these decisions.

If there is an inherent right to appeal these ministerial decisions, but they are not subject to review under KRS 100.347, how then can they come before the court? The parties do not refer to any statutory authority for an appeal from the decisions of MSD or the public works director, nor can I find any applicable statutory basis for an appeal.[8] If there is an avenue for relief, it could be through a declaratory judgment action. KRS 418.040 allows a plaintiff to seek a declaration of rights when an actual and justiciable controversy exists.[9] Such an action would seem to be the appropriate way of challenging the sufficiency of the evidence underlying the actions taken by MSD and the public works director.

We do not need to reach this issue, however, because the appellants did not bring a declaratory judgment action. The property-owners' appeal pursuant to KRS 100.347 was neither

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[8] KRS 76.180(2) authorizes MSD to develop procedures for the hearing, review, and resolution of citizen's complaints and grievances. Decisions by the hearing officer may be accepted or rejected by MSD's board. However, the approval of a drainage plan is not the type of action which the statute allows review.

[9] Curry v. Coyne, Ky. App., 992 S.W.2d 858, 859 (1998); Bank One Kentucky NA v. Woodfield Financial Consortium LP, Ky. App. 957 S.W.2d 276, 279 (1997).

timely nor appropriate, and the appellants' filing of a civil complaint is not the equivalent of a declaratory judgment action. Under the circumstances, therefore, I must conclude that the trial court properly dismissed the appellant's complaint, and that this matter should not be remanded for further proceedings.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

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JOINT BRIEF FOR APPELLEES, TRIAD DEVELOPMENT/ALTA GLYNE, INC., DOMINION HOMES, INC., DOMINION HOMES OF KENTUCKY, GP, LLC, AND DOMINION HOMES OF KENTUCKY, LTD.:

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