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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000341-MR

CHRIS ORR; JOHN POHLMAN;
DONNA ALLEN; DAVID ALLEN;
DEBBY HALL; BILL CAYWOOD;
PISGAH HISTORIC NEIGHBORHOOD ASSOCIATION;
AND HUNTERTOWN ROAD ALLIANCE,
AN UNINCORPORATED ASSOCIATION — APPELLANTS

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 99-CI-00288

VERSAILLES-MIDWAY-WOODFORD COUNTY
BOARD OF ADJUSTMENT; VERSAILLES-MIDWAY-
WOODFORD COUNTY PLANNING AND ZONING
COMMISSION; JACK KAIN; AND STEVE CALLER — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Chris Orr, John Pohlman, Donna Allen, David Allen, Debby Hall, Bill Caywood, the Pisgah Historic Neighborhood Association, and the Huntertown Road Alliance, an unincorporated association, (hereinafter collectively referred to as HRA) have appealed from an order of the Woodford Circuit Court entered on

January 18, 2001. The trial court rejected all of HRA's claims and denied its CR[1] 59.05 motion to alter, amend, or vacate judgment. Having concluded that HRA received all the process it was due under the law and that no prejudicial error occurred, we affirm.

The facts and procedural history of this case are both lengthy and complex. At some time prior to October of 1999, Jack Kain Ford, Inc., one of the appellees herein, submitted a development plan to Pattie Wilson, the Woodford County Zoning Administrator, seeking permission to build an automobile dealership on the parcel of land which is the subject of this dispute. The tract of land had been zoned "B-3 Planned Shopping Center" since approximately 1971. Wilson determined that an automobile dealership would be a permissible use for property with a B-3 designation and recommended that Kain's development plan be approved. HRA appealed that recommendation to the Versailles-Midway-Woodford County Board of Adjustments, another one of the appellees herein. On October 4, 1999, the Board held a public hearing to consider HRA's appeal. Several HRA members, as well as other interested residents from the area, presented testimony opposing Wilson's recommendation. At the close of the hearing, the Board voted unanimously (5-0) to uphold Wilson's interpretation of the zoning ordinance and her recommendation to approve the development plan.

[1]Kentucky Rules of Civil Procedure.

On October 14, 1999, at a regularly scheduled meeting of the Versailles-Midway-Woodford County Planning and Zoning Commission, also one of the appellees herein, the Planning Commission considered Kain's request to approve its development plan. The chairman of the Planning Commission stated at the outset that it was an open meeting, meaning the public was welcome to stay and observe, but that it would not be a public hearing, i.e., there would not be an opportunity for residents to voice their opposition to the development plan as they had previously done before the Board. However, the Planning Commission did acknowledge that the record contained letters from those opposed to the development plan, including one from HRA. A representative from Kain was present to answer questions from the Planning Commission regarding the septic system and possible traffic problems. Diane Zimmerman, a traffic engineer, also provided testimony concerning the probable impact on traffic flow. At the conclusion of this hearing, the Planning Commission voted 6-3 to approve Kain's submitted development plan.

On November 3, 1999, HRA filed an "Appeal and Complaint" in Woodford Circuit Court pursuant to KRS[2] 100.347 and KRS 418.040. HRA's "Appeal and Complaint" named as defendants, the Board and its members; Jack Kain Ford, Inc.; Jack Kain, as president of Jack Kain Ford, Inc., and as the applicant seeking approval of the development plan; and Steve Caller, as the owner of the parcel of land at issue. HRA filed an amended "Appeal and

[2]Kentucky Revised Statutes.

Complaint" nine days later, adding the Planning Commission and its members as defendants. In an order entered on January 5, 2000, the trial court dismissed the "Appeal and Complaint" on the grounds that HRA had failed to comply with KRS 100.347(4).[3] The trial court ruled that KRS 100.347(4) requires that the owner or owners of the property in question be named as a party to an appeal to circuit court. Since HRA in its appeal had named Caller as the owner, but had failed to name two other co-owners of the property, the trial court ruled that HRA had failed to comply with the statute.

HRA then filed a CR 59.05 motion to alter, amend, or vacate the January 5, 2000, order, which had dismissed its action. On March 7, 2000, the trial court granted this motion and modified the previous order. Specifically, the trial court ruled that while the appeal portion of the action, which had been brought pursuant to KRS 100.347, had been properly dismissed due to HRA's failure to name all three owners of the property as parties, the complaint portion of the action, which had been brought pursuant to KRS 418.040, should not have been dismissed. The trial court ruled that HRA's procedural due process claims under both the United States Constitution and the Kentucky Constitution could go forward.

[3]Judge James C. Cantrill was presiding in this case when the dismissal order was signed on December 31, 1999. Judge Paul F. Isaacs succeeded Judge Cantrill in January 2000, and presided over this case from that point forward.

The appellees then filed a series of motions, asking that the trial court grant summary judgment[4] on certain issues, and requesting that HRA's remaining claims be dismissed for failure to state an actionable claim.[5] Subsequently, in an order entered on August 2, 2000, the trial court ruled as follows:

> 1. That factual disputes remained as to whether Board members had preconceived opinions concerning the development plan before the October 4, 1999, hearing began. Since there was a genuine issue as to a material fact as to whether HRA had been denied procedural due process on this issue, summary judgment was improper.
>
> 2. That the record of the October 4, 1999, hearing clearly refuted HRA's claims that it had not been afforded the opportunity to make its position known to the Board. Therefore, since there had been no procedural due process deprivation, the trial court granted summary judgment in favor of the appellees on this issue.
>
> 3. That the record clearly refuted HRA's claims that the Board had denied HRA an opportunity to present evidence in support of its position on the proposed development plan. Since there was no evidence of a denial of procedural due process, summary judgment in favor of the appellees was proper on this issue.
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> 4. That contrary to HRA's claims, the record showed the Planning Commission did consider the impact on traffic in the area if the development plan was approved, and that there was insufficient evidence before the Planning Commission that would have warranted a rejection of the plan on those grounds. Summary judgment in favor of the appellees on this issue was therefore proper.

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[4]CR 56.02.

[5]CR 12.03.

> 5. That contrary to HRA's claims, the Planning Commission was not required to conduct an evidentiary-type hearing before approving Kain's development plan. Therefore, summary judgment in favor of the appellees on this issue was proper.

A bench trial was set for August 4, 2000, for the parties to present evidence on the sole issue of whether the Board members had preconceived opinions concerning the development plan prior to the October 4, 1999, hearing. The trial court entered an opinion and order on November 14, 2000, which included extensive findings of fact and concluded that while one member of the Board may have had a preconceived opinion, the other members of the Board did not, and that they had instead based their decisions only upon the evidence presented. The trial court then concluded that HRA had not been denied procedural due process.

HRA then filed a CR 59.05 motion to alter, amend or vacate the trial court's order entered on November 14, 2000. On January 18, 2001, the trial court denied HRA's CR 59.05 motion and reaffirmed its prior interlocutory rulings in its March 7, 2000, August 2, 2000, and November 14, 2000, orders. This appeal followed.

Before we address HRA's claims of error, we first turn to the appellees' argument that Judge Cantrill's order entered on January 5, 2000, was correct in dismissing HRA's entire "Appeal and Complaint," and that Judge Isaacs subsequently erred by modifying that order to allow HRA's procedural due process claims to go forward. As will be evident from our subsequent

discussion, we believe Judge Isaacs correctly ruled that HRA's due process claims could survive the dismissal of the other claims.

In Board of Adjustments v. Flood,[6] our Supreme Court discussed what is required when appealing from a decision of an administrative agency:

> There is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, a strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy.

Under KRS 100.347(4), when a party wishes to appeal a decision of either a board of adjustments or a planning commission, the statute mandates that:

> (4) The owner of the subject property and applicants who initiated the proceeding shall be made parties to the appeal. Other persons speaking at the public hearing are not required to be made parties to such appeal.

It is not disputed that in its "Appeal and Complaint," HRA failed to name all of the owners of the parcel of land which is the subject of this dispute. Hence, absent strict compliance with KRS 100.347(4), the jurisdiction of the circuit court was not invoked. HRA was therefore precluded from appealing the decisions of the Board or the Planning Commission regarding whether the proposed automobile dealership was a permissible use.

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[6]Ky., 581 S.W.2d 1, 2 (1978).

Accordingly, we conclude that the portion of HRA's "Appeal and Complaint" which sought review of these determinations was properly dismissed.

However, HRA also claimed it its "Appeal and Complaint" that it had been deprived of procedural due process under both the United States Constitution and the Kentucky Constitution, based on allegations related to how the proceedings before the Board and the Planning Commission were conducted. In Greater Cincinnati Marine Service, Inc. v. Ludlow,[7] our Supreme Court stated:

> It is clear that the complaint, judged by its content, is far more than an appeal under the aegis of KRS 100.347(2). It includes a petition for a declaration of rights, setting out numerous grounds for relief. Therefore, the requirement that the planning commission be joined as a party is applicable only to the part of the complaint which sought review of the decision of the Board of Adjustments.

Similarly, HRA's "Appeal and Complaint" not only sought review of the decisions of the Board and the Planning Commission pursuant to KRS 100.347, it also set out other grounds for relief, including a petition for a declaration of rights pursuant to KRS 418.040. The appellees argue that HRA's procedural due process claims "only thinly veil its real objection" which, according to the appellees, is HRA's disagreement with the decisions made by the Board and the Planning Commission regarding

[7]Ky., 602 S.W.2d 427, 429 (1980).

Kain's development plan. We do not agree with the appellees' characterization.

Our review of HRA's "Appeal and Complaint" reveals that HRA not only objected to what the Board and the Planning Commission ultimately decided in approving Kain's development plan, it also strongly objected to how these administrative bodies went about reaching those decisions. Throughout its "Appeal and Complaint," HRA points to instances in which it claims that it was denied a fair opportunity to be heard.[8] These constitutional issues are not concerned with the substance of the results, but rather how the results were reached. Accordingly, we agree with Judge Isaacs's determination that HRA's constitutional procedural due process claims could survive, even though the appeals brought pursuant to KRS 100.347 were properly dismissed.

We now turn to HRA's claims of error. HRA first argues that the trial court erred in granting summary judgment in favor of the appellees on the issue of whether the Planning Commission was required to conduct a public, evidentiary-type hearing before approving Kain's development plan. According to HRA, the failure of the Planning Commission to conduct such a hearing deprived HRA of procedural due process. Before we address HRA's argument in detail, we will provide a brief

[8] See City of Louisville v. McDonald, Ky., 470 S.W.2d 173, 176 (1971) (holding that "procedural due process is required in the proceedings of an administrative body performing zoning functions").

discussion of the proper procedure for reviewing a trial court's granting of summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[9] In Paintsville Hospital Co. v. Rose,[10] the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."[11] The standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law.[12] There is no requirement that the appellate court defer to the trial court

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[9]CR 56.03.

[10]Ky., 683 S.W.2d 255 (1985).

[11]Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

[12]Scrifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

since factual findings are not at issue.[13] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[14] Applying these principles to the case at bar, we conclude that summary judgment in favor of the appellees was proper on the issue of whether a public, evidentiary-type hearing was required.

HRA makes the following argument in support of its position that the Planning Commission erred by not conducting an evidentiary-type hearing:

> In the case before the court, the zoning for the subject property occurred thirty years ago when Woodford County adopted county-wide planning and zoning. At that time, there was no requirement that a conceptual development plan must be part of a rezoning application. The requirement for a conceptual development plan was added to the Woodford County Zoning Ordinance after the subject property received the B-3 designation. . . [footnote omitted] [citation to record omitted].
>
> [W]here a zoning ordinance is amended to add the requirement of a conceptual development plan to the rezoning procedure, [ ] consideration of the legal sufficiency of the conceptual development plan must follow the same procedure as with any other aspect of a rezoning decision, including the requirement that the conceptual development plan must be subject to a public hearing.

We are not persuaded by this argument.

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[13]Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

[14]Steelvest, supra at 480.

Although none of the following cases appear to be directly on point, collectively, the cases lead us to the conclusion that an evidentiary-type hearing was not required. In Danville-Boyle County Planning and Zoning Commission v. Prall,[15] our Supreme Court stated:

> The application to diminish the green space buffer zone and to erect a 3,600 square foot office building thereon is, in effect, not a request for rezoning or map amendment. It is to be considered only as an expansion of activities within the geographical area which had heretofore been rezoned. Thus, entitlement to due process is questionable.
>
> We agree with the cogent dissent in the Court of Appeals opinion which opined that the Pralls had the only hearing to which they were entitled when the original zone was changed from A-1 (agriculture) to C-2 (neighborhood commercial), with the Planned Unit Development.

The case sub judice presents an analogous situation. Kain was not asking for a rezoning of the land in question. Instead, Kain was merely presenting a development plan for what was ultimately found to be a permissible use under the existing zoning classification. Therefore, a public, evidentiary-type hearing was not required.

HRA's reliance on this Court's decision in Davis v. Board of Commissioners,[16] is misplaced. In Davis, this Court found error when a planning commission granted a request for rezoning, without requiring the party to present a proper

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[15]Ky., 840 S.W.2d 205, 207 (1992).

[16]Ky.App., 995 S.W.2d 404 (1999).

development plan as the local ordinance required. In the case sub judice, no request for rezoning was made. The property had been zoned B-3 for approximately 28 years; and Kain was merely attempting to use the land in accordance with that designation.[17]

Further, in Snyder v. City of Owensboro,[18] this Court stated:

> The proposition is generally accepted in other jurisdictions that a mere generalization of matters to be considered in approval of subdivision plats is not sufficient; there must be rules and regulations constituting specific standards to be applied in determining whether approval is to be granted. And the power of a planning board to approve or disapprove plats is limited by those rules and regulations [citations omitted].
>
> It follows, therefore, that the approval of subdivision plats is a ministerial act. That our statute so intends is made obvious by the provision of KRS 100.281 that the planning commission may delegate to its secretary or any other officer or employe[e] the power to approve plats [emphases original] [citations omitted].
>
> The appellees herein, OMPC and others, cite some of our Kentucky cases dealing with the granting of variances from zoning regulations. Of necessity, the granting of variances, based on factors such as hardship, requires the exercise of some discretion. That is not so, however, in the determination of the fact of whether there is a compliance with regulations, as in the case of approval of subdivision plats [emphases original].

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[17]Of course, HRA strongly protests the determination that an automobile dealership is an appropriate use for property zoned B-3; but as discussed previously, this issue was not property appealed to the circuit court.

[18]Ky., 528 S.W.2d 663, 664 (1975).

Similarly, the approval of a development plan is a ministerial act, involving only the application of already enacted zoning laws to a proposed development plan. Hence, in approving Kain's development plan, the Planning Commission was not exercising its discretion, it was merely applying the existing zoning laws to Kain's submitted development plan. The Planning Commission's action could therefore be characterized as ministerial. We find support for this position from at least one prior decision.

In City of Georgetown v. Deevco, Inc.,[19] the former Court of Appeals suggested that in approving a development plan, a planning commission is generally limited to considering only whether the proposed development plan is appropriate under the already existing zoning classifications:

> Apparently it is appellants' position that the Commission has some sort of floating power to disapprove a land-use plan if in its opinion traffic problems will be created. These problems are properly taken into consideration when the zoning plan is adopted, but we find no authority granted the Commission to reconsider them every time a property owner seeks to use his land in conformity with the zoning regulations [emphasis original].

The foregoing cases compel the conclusion that the Planning Commission was not required to conduct a public, evidentiary-type hearing before approving Kain's development plan. Therefore, we hold that the Planning Commission correctly reached its decision by examining Kain's proposed development plan in light of the zoning laws already in existence.

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[19]Ky., 451 S.W.2d 422, 424 (1970).

Accordingly, since there is no genuine issue as to any material fact concerning the occurrence of a procedural due process violation, we conclude that the trial court was correct as a matter of law in awarding summary judgment to the appellees.

HRA next argues that it was deprived of procedural due process, because some of the Board members had preconceived opinions on how they were going to vote before the October 4, 1999, hearing was held. Specifically, HRA argues:

> One requirement of due process is an impartial decision-maker. [HRA] allege[s] that [it was] denied a fair hearing before the Board of Adjustments because that Board was improperly influenced by the person whose decision was being appealed - and the lawyer who advised the Zoning [A]dministrator was also advising the body hearing the appeal - and where [HRA] supported that claim with affidavits that evidence that certain members of the Board admitted that they voted as they were told to by the attorney whose advice was being appealed, [HRA's] allegation of an unconstitutionally biased decision-maker should have prevented the circuit court from granting summary judgment against [HRA] concerning the conduct of the hearing. . . .

These claims of alleged procedural due process violations are without merit. In determining whether the Board members had preconceived opinions concerning Kain's development plan before voting, and whether there had been improper influence on the Board members, the trial court did not grant the appellees summary judgment. Instead, the trial court specifically found that genuine issues of material fact precluded an award of summary judgment on these issues, and that a bench trial was therefore necessary to resolve these factual disputes. Following

this bench trial, the trial court made numerous findings of fact and concluded that HRA's procedural due process claims were without merit. We hold that the trial court's findings of fact were supported by substantial evidence and thus not clearly erroneous, and that it correctly applied the law to those factual findings.

In its order entered on November 14, 2000, the trial court stated that "[a]s a neutral outside observer, this Court is convinced of the goodwill and dedication of both parties, and finds no evidence of tampering with or outside influence on the Board." The trial court also found that "the members of the Board, with the possible exception of Mr. Jones, decided this case based solely on the evidence presented to them at the hearing and did not decide the case prior to the hearing." The trial court reasoned that even if Jones did have a preconceived opinion on the matter, the result of the vote would have been the same.[20] These findings of fact by the trial court are supported by substantial evidence in the record and thus not clearly erroneous, and cannot be set aside.[21]

Among the evidence presented to the trial court during the bench trial held on August 4, 2000, was the following:

> 1. Samuel Dozier, a member of the Board, testified that his decision to affirm Wilson's interpretation of the zoning ordinance was based upon evidence presented

[20]As mentioned above, the board's decision to approve Kain's development plan was unanimous (5-0).

[21]See CR 52.01.

at the hearing, and upon an information packet provided by Wilson before the meeting.[22] He stated that he would not hesitate to reject Wilson's interpretation if the evidence presented at the hearing warranted it.

2. David Prewitt, a member of the Board, testified that his decision to affirm Wilson's interpretation was based on the evidence at the hearing and the information packet given to him before the hearing. He stated that there had been no prior discussions between the Board members concerning the matter and that he would likewise have no problem in rejecting Wilson's interpretation if the evidence warranted such a decision.

3. Robert Jackson, chairman of the Board, testified that his decision was based upon the evidence at the hearing, materials that he had reviewed, and the text of the zoning ordinance. He stated that there had been no discussions between Board members concerning this matter before the night of the hearing and that there was no indication that any Board member had pre-judged the issue prior to the hearing.

4. Eugene Borland, a Board member, testified that his decision was based upon evidence at the hearing and that he did not believe that any of the evidence presented warranted a rejection of Wilson's interpretation. He stated that there had been no discussions prior to the hearing between Board members concerning this matter.

5. Pattie Wilson testified that, in order to maintain credibility, she "[strove] very hard" not to influence members of the Board, and that she did not have discussions with any Board members concerning this matter before the night of the hearing.

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[22]Wilson testified that information packets are given to the Board members as background factual information so they can come to the meeting with a clearer understanding of the issues. She stated that these packets are not intended to influence the decision of the Board members.

In light of this evidence, we cannot say that the trial court clearly erred in finding that the Board members had not been improperly influenced and that the Board members had not pre-judged the appropriateness of Kain's development plan. There was substantial evidence presented to the trial court which refuted HRA's claims that it had been denied an impartial decision-maker. Accordingly, we conclude that the trial court did not err in ruling that HRA had not been denied procedural due process in this regard.

HRA next argues that it was denied procedural due process, because certain evidence at the hearing before the Board was deemed to be "irrelevant" by the Board's advising counsel. Specifically, HRA argues:

> HRA sought a fair opportunity to prove that "new and used automobile sales" was precisely the kind of retail activity permitted in the B-4 district but not appropriate in other zones such as a B-3 neighborhood shopping center... As a result of Mr. Butler's[23] advice to the Zoning [A]dministrator, Ms. Wilson, and as a result of his advice to the Board of Adjustments before [HRA] was given a chance to speak, and his repeated advice that the Zoning Ordinance section on Intent was not relevant, [HRA] was denied a fair hearing before the Board of Adjustments.

In its order entered on August 2, 2000, the trial court found that the record refuted HRA's claims that it had been denied an opportunity to present relevant evidence, and it granted summary judgment in favor of the appellees. We agree that summary judgment was proper.

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[23]Timothy Butler was the advising attorney to the Board.

Our review of the record of the hearing conducted before the Board on October 4, 1999, shows that contrary to HRA's claims, it was in fact able to present evidence to the Board regarding why it believed that an automobile dealership was an impermissible use in a B-3 zone. Chris Orr and Jenny Given, both members of HRA, each spoke at the hearing and presented arguments to the Board. Both Orr and Given suggested to the Board that, in their opinion, the "Intent" section of the zoning ordinance was relevant and that under their interpretation of the ordinances, an automobile dealership was an improper use. We agree with the following summation made by the trial court in describing the presentation of evidence at the hearing:

> In reviewing [the minutes of the hearing] quite thoroughly and looking for examples of [HRA] being denied an opportunity to make their arguments and to present their position on this matter, the Court can find no example where [HRA was] prevented from presenting any information they desired to introduce or argue to the Board. There was considerable give-and-take between the members of the Board and the representatives of [HRA] about the nature of the decision to be made, and what was appropriate for the Board to consider. It appears to this Court that the Board was very liberal in allowing as much information as proper to be presented. The fact that the information offered by [HRA] was not considered persuasive by the Board does not mean that there wasn't an opportunity to present their side of the case.

HRA has failed to point to any evidence in the record which raises a genuine issue as to any material fact in support of its claim that it was in fact denied an opportunity to present relevant evidence. Nor did HRA allege that it needed additional

time to produce any such evidence. Once the appellees presented evidence showing that despite the allegations in HRA's pleadings, there was no genuine issue as to any material fact, it was incumbent upon HRA to refute this evidence with evidence of its own to avoid summary judgment.[24] Since HRA failed to do so, we conclude that summary judgment was proper.

HRA's objections on this issue are more properly characterized as a disagreement on how the zoning ordinances should have been interpreted, rather than on how the hearing itself should have been conducted. Indeed, HRA devotes a good portion of its brief to an explanation of why it believes the "Intent" section of the zoning ordinance was relevant, as well as to how HRA believes the ordinance should have been interpreted. However, disagreements with board decisions are properly brought under an appeal pursuant to KRS 100.347. As stated earlier, HRA failed to follow the appeal procedures set forth in KRS 100.347. The mandates of this statute cannot be circumvented by merely couching arguments in terms of alleged procedural due process violations. Accordingly, we hold that summary judgment was proper on this issue as there was no genuine issue as to a material fact and the appellees were entitled to judgment as a matter of law.

Finally, HRA argues that the trial court improperly granted summary judgment in favor of the appellees on the issue of whether the Planning Commission wrongfully approved Kain's

[24]See Neal v. Welker, Ky., 426 S.W.2d 476, 479 (1968).

development plan, without considering HRA's argument that traffic conditions would be made unsafe if the plan were approved. Specifically, HRA argues:

> The circuit court recognized that in Deevco, the Planning Commission had heard evidence on the traffic impacts, and that the Court of Appeals recognized that if there was evidence that traffic congestion constitutes a nuisance or a safety factor, that could be a justifiable reason for denial of the plan. However, after recognizing that this issue depended on the weight of the evidence, and that [HRA] was before the court seeking the opportunity to present such evidence, the circuit court proceeded to decide the factual question, without allowing [HRA] a chance to present [its] case.

According to HRA, this action by the trial court resulted in a denial of procedural due process. We disagree.

In Deevco, supra, discussed above, the former Court of Appeals discussed what a party would need to show before a planning commission could deny a property owner lawful use of his property:

> Assuming, however, that the Commission has some regulatory control over land use in a zoned area, it cannot deny the right of a property owner to conduct a lawful business on his premises which is permissible under the zoning plan, even if traffic congestion is increased. Parkrite Auto Park v. Shea, 314 Ky. 520, 235 S.W.2d 986 [(1950)]. In 75 A.L.R.2d 168, 286, many cases are cited for the proposition that:
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> > "Under most circumstances, the denial of an application for the erection or operation of a gasoline filling station in a zone in which such use is not forbidden by the zoning ordinance is regarded as arbitrary and unreasonable."

> The foregoing cases stand for the proposition that a property owner has a legal right to conduct a lawful business which is permissible under a prevailing zoning ordinance and he cannot be deprived of that right except for most impelling reasons [citations omitted].[25]

We have already held in this case that a planning commission is not required to hold a public, evidentiary-type hearing when approving or rejecting a proposed development plan. While Deevco states that there may be some situations which arise where a planning commission may consider whether an "impelling reason" exists that would warrant a rejection of an otherwise lawful use, the record herein does not contain such an impelling reason.

While the Planning Commission at its meeting on October 14, 1999, did consider testimony from a traffic engineer, wherein she stated that a traffic report showed that any increase in traffic would be negligible, this information was submitted as a part of the development plan. It was proper for the Planning Commission to consider this additional information in voting on whether the proposed development plan was permissible under the zoning laws. The procedures followed by the Planning Commission did not fall short of the requirements of constitutional procedural due process. The Planning Commission was not required to conduct an evidentiary-type hearing, and the additional information provided concerning an increase in traffic was appropriate as a part of the development plan's expected impact on traffic.

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[25]Deevco, supra at 424.

For the foregoing reasons, the order of the Woodford Circuit Court is affirmed.

ALL CONCUR.

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