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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001246-MR

CITY OF BEREA, KENTUCKY, AND
BEREA CITY PLANNING COMMISSION — APPELLANTS

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 02-CI-01063

BEREA AREA DEVELOPMENT, LLC — APPELLEE

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

BEFORE: COMBS, CHIEF JUDGE; TACKETT AND VANMETER, JUDGES.

TACKETT, JUDGE: The City of Berea ("City") and the Berea City Planning Commission ("Commission") appeal from the decision of the Madison Circuit Court holding that the City could not require Berea Area Development, LLC ("Developer") to build a sidewalk along the driveway of a proposed nursing home. The City and Commission argue on appeal that the Developer's appeal to the circuit court was time-barred under Kentucky Revised Statute (KRS) 100.347; that the Developer is estopped from arguing that the Commission has no authority to require

sidewalks, since the sidewalks were one of the conditions which the Developer agreed to in order to obtain the zoning change; and that the circuit court erred in holding that the City had no authority to require the Developer to build sidewalks. We affirm.

Developer's predecessor in title, Oliver Properties Partnership, sought a zone change from Industrial to R-3 Residential for the purpose of developing a long-term care nursing home. Oliver first applied for the zone change on March 6, 2002. Under the Berea zoning code, a nursing home requires a conditional use permit in an R-3 classified area, so on April 11, 2002, Oliver sought a conditional use permit. The Board of Adjustment met and approved the conditional use provided that Oliver obtain the zoning change. On May 28, 2002, the Commission considered the proposed development plan and approved it with the added provision that it include interior sidewalks from the building to Brooklyn Boulevard. On June 11, 2002, Oliver submitted an amended development plan including these sidewalks, and the Commission granted the zone change accordingly on June 18, 2002. No appeal was taken from the Commission's approval of the change.

Sometime after, Developer purchased the property from Oliver. On August 8, 2002, the Developer applied for an amendment of the development plan. Initially, the request did

not include removal of the sidewalks; instead, this request was added orally at the August 27, 2002 meeting of the Commission. The amendments sought in the August 8 application were granted, but the request to remove the sidewalks was not. On September 18, 2002, Developer filed this action in the Madison Circuit Court, seeking relief from the requirement that it build the sidewalk. The circuit court, after a hearing on April 16, 2003, held that the City and Commission had no authority to require sidewalks and granted the relief sought by the Developer. This appeal followed.

On appeal, the Appellants present three distinct arguments. First, they argue that the appeal taken was time-barred under KRS 100.347, because the "final action" that should have been the subject of an appeal was the June 18, 2002 approval of Oliver's development plan. Second, they argue that the Developer is estopped from arguing that it should not be required to build sidewalks, since the inclusion of the sidewalks was one of the conditions that induced the Commission to approve the zoning change. Last, they argue that the circuit court erred by holding that the Appellants had no authority to require these sidewalks. We affirm.

With respect to the first argument, the law is somewhat murky. KRS 100.347 requires that an appeal must be taken from a final action of a planning commission within 30

days of the final action. The developer argues that the action was not time barred, because they filed an appeal within 30 days of the denial of the requested amendment. The developer further asserts that even if the action is time-barred under KRS 100.347, Fiscal Court of Jefferson Co. v. Don Ridge Land Developing Co., Inc., Ky., 669 S.W.2d 922 (1984), states that they can maintain a separate action for the Appellants' violation of Section 2 of the Kentucky Constitution by attacking the requirement of sidewalks as an arbitrary exercise of power. The Appellants, by turn, respond to that argument by asserting that if the Developer is correct, then a dissatisfied party can always revive a dead right of appeal simply by filing another request for an amendment.

It is worth noting that neither party has much authority to support their respective positions. The Appellants cite none beyond the statute itself, save for a case on detrimental reliance in the context of a contract, which has little relevance to the question of whether the appeal was timely. The Developer, by contrast, cites Leslie v. Henderson, Ky. App., 797 S.W.2d 718, 720 (1990), which dealt with a significantly different factual situation in which an appeal was taken outside of 30 days from the initial approval of the zone change but within 30 days of the second reading and final passage. This Court held that the appeal was timely, because

the action did not truly become final until it was formally enacted at the second reading and final passage. This case involves a completely different situation, in which a developer sought an amendment to the plan after final approval has been granted. It is unclear under what authority the Developer sought this amendment, but the Commission did consider it rather than dismissing it, and in fact granted five of its six requests, denying only the request to remove the sidewalks from the plan altogether. We acknowledge the logic behind the Appellants' position, but also acknowledge that unless the statutory appeal from an application for an amendment to an existing development plan is considered, the Commission's decisions regarding amendments become unappealable, because the "final action" will have occurred after the original zoning change is granted. We therefore hold that the court had subject matter jurisdiction to consider the appeal, as it was timely filed from the date of the denial of the requested amendment. We acknowledge also that the "Complaint and Appeal" filed by the Developer does state a separate cause of action under Section 2 of the Kentucky Constitution, so even if the Developer's statutory appeal was time-barred, under the Kentucky Supreme Court's holding in Fiscal Court of Jefferson County v. Don Ridge Land Developing Co., Inc., Ky., 669 S.W.2d 922 (1984), the

Developer could still maintain this action as essentially a collateral attack on an alleged arbitrary exercise of power.

Turning to the merits of the circuit court's holding that the City and Commission lacked authority to require sidewalks, we note that the Circuit Court's ruling in part hinged on the use of the word "subdivision" in the applicable zoning regulations. The court wrote:

> "The City points to its Subdivision Regulations in support of its contention that it has authority to require the construction of sidewalks along the streets in any commercial development. The difficulty is that this proposed nursing home facility, located in a residential zone, involves neither a commercial facility, a subdivision, or a street.
>
> By definition, this is not a subdivision of land and the requirements applicable to subdivisions are not applicable here. Berea contends that, under its ordinance, a development plan is to be considered a major preliminary subdivision plat. Even so, however, nothing in the Ordinance governing either development plans or subdivision plats requires that sidewalks be constructed on both sides of private driveways. Although Berea's Ordinance clearly contemplates that sidewalks accompany streets in new subdivisions, as previously mentioned, this is neither."

The court concluded that the City had no authority to require a sidewalk on a "private driveway on wholly private property." On appeal, the City contends that the court misinterpreted its zoning ordinances by construing them too

narrowly. However, reviewing the full text of the applicable ordinances, we conclude that the circuit court was not in error in holding that the City had no authority to require the sidewalks.

The court held that because the development was not a subdivision, subdivision regulations did not apply to it. However, the applicable subdivision regulation clearly states that "when a developer is required to obtain permission of the planning commission prior to initiating development in a residential district . . . the developer shall submit to the planning commission a plan or plat of the development thereof which shall be considered as a major preliminary subdivision plat as above. . . ." There is no dispute that the Developer was required to obtain a conditional use permit before building a nursing home. Therefore, the above-cited ordinance applies to this situation. The ordinance clearly states that the development plan will be considered as a major preliminary subdivision plat. There is no exception for property that is not actually subdivided; all such developments, under the ordinance, are considered in the same way as subdivisions. Even so, a complete review of the ordinances applicable to a subdivision reveals no ordinance that authorizes the requirement of a sidewalk on a wholly private driveway on wholly private property. Sidewalks are contemplated on public streets, it is

true, but this case involves a driveway rather than a public street. The City also argues that it has a general authority to require the developer to bear the cost of additional public facilities made necessary by the development, citing Lampton v. Pinaire, Ky. App., 610 S.W.2d 915, 919 (1980). Unfortunately, a review of the Lampton case reveals that the case does not really support their position here. Lampton dealt with a situation where a developer was required to bear the cost of an improvement to a public roadway, where the development would significantly increase traffic on the roadway. While the case does indeed state that public policy requires that a developer be required to bear the cost of additional public facilities made necessary by the development, we do not believe that this is the type of improvement where this policy should apply. In Lampton, the development would otherwise have required the government to condemn additional property for an improvement to the roadway at public expense, due to the increase in use of the roadway created by the private development. It was reasonable to require the developer to bear that cost. In this case, however, the sidewalk is not something that would otherwise be created at public expense; it is desired strictly for public convenience at private expense. Therefore, the principle announced in Lampton is inapplicable here.

Turning now to the argument that the Developer should be estopped from arguing that it should not be required to build sidewalks when the sidewalks were a condition on which the zone change was originally granted, we reject this contention. The Developer is not the party who made this agreement. Rather, this agreement was made by the Developer's predecessor in title, and the City cites no authority under which the Developer, who had no chance to object to the requirement at the time, should be bound by the principle of estoppel to its predecessor's concession to the City. We do not think the principle of detrimental reliance is applicable here, as this is not a contractual agreement but a legislative action, and we have seen no authority that suggests that it should apply.

For the foregoing reasons, the judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

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