RENDERED: September 24, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2003-CA-001153-MR & 2003-CA-001229-MR

CITY OF OAKLAND, A PUBLIC ENTITY;
BILLY MANSFIELD, INDIVIDUALLY AND
AS MAYOR OF THE CITY OF OAKLAND;
AND GAYLA CISSELL, INDIVIDUALLY — APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 02-CI-01124

BOARD OF COMMISSIONERS OF CITY
OF BOWLING GREEN, KENTUCKY; CITY-
COUNTY PLANNING COMMISSION OF
WARREN COUNTY, KENTUCKY; BOWLING
GREEN AREA ECONOMIC DEVELOPMENT
AUTHORITY, INC.; SOUTH CENTRAL
KENTUCKY REGIONAL DEVELOPMENT
AUTHORITY, INC.; AND WARREN COUNTY
CITIZENS FOR MANAGED GROWTH — APPELLEES/CROSS-APPELLANTS

AND: NO. 2003-CA-001177-MR

WARREN COUNTY CITIZENS FOR
MANAGED GROWTH, INC.; J.R. STUCKI,
INDIVIDUALLY AND AS CHAIRMAN; AND
JAMES HAROLD SMITH, INDIVIDUALLY,
AND AS VICE-CHAIRMAN — APPELLANTS

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 02-CI-01124

CITY OF OAKLAND; BOARD OF
COMMISIONERS OF CITY OF
BOWLING GREEN, KENTUCKY;
BOWLING GREEN AREA ECONOMIC
DEVELOPMENT AUTHORITY, INC.;
CITY-COUNTY PLANNING COMMISSION
OF WARREN COUNTY, KENTUCKY;
BILLY MANSFIELD, INDIVIDUALLY AND
AS MAYOR OF THE CITY OF OAKLAND;
GAYLA CISSELL; SOUTH CENTRAL KENTUCKY
REGIONAL DEVELOPMENT AUTHORITY, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; AND MILLER, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: These appeals and the cross-appeal are taken from a judgment of the Warren Circuit Court that affirmed a controversial zoning decision of the Board of Commissioners of the City of Bowling Green (the Board). In agreement with the recommendation of the City-County Planning Commission (The Planning Commission) of Warren County, Kentucky, the Board enacted an ordinance re-zoning two parcels of real property in order to accommodate industrial development. The zoning request

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

had been made by the appellees, Bowling Green Area Economic Development Authority, Inc. (BGAEDA), and South Central Kentucky Regional Development Authority, Inc., (SCKRDA), representing the landowners, collectively.

The City of Oakland, a small city near Bowling Green; its mayor, Billy Mansfield (in his official capacity and individually); and Gayla Cissell, a resident of Oakland (collectively, the City of Oakland), allege that the re-zoning of 153 acres of farmland for use as an industrial park fails to conform to the county's Comprehensive Plan. They also contend that the recommendation of the Planning Commission approving the change was not supported by substantial evidence. Finally, they believe that they were denied due process by the Planning Commission. After examining each of these arguments, we have found no error. Thus, we affirm.

In their cross-appeal, the landowners object to the court's ruling that the City of Oakland had standing to challenge the Board's decision permitting the map amendment. The City of Oakland and the residences of both Mayor Mansfield and Gayla Cissell are all located approximately four miles beyond the City of Bowling Green. Because of this distance, the landowners argue that the court erred in concluding that these

appellants were sufficiently aggrieved (as contemplated by KRS[2] 100.347) to qualify for judicial review of the Board's action.

The Warren County Citizens for Managed Growth, James Harold Smith, and J.R. Stucki (collectively "WCCMG"), have also appealed. They challenge the court's denial of their motion to intervene as plaintiffs in the action that was commenced by the City of Oakland. Because of our resolution of the issues raised in the appeal of the City of Oakland, we need not address the merits of either the cross-appeal involving the landowners' standing or the denial of intervention challenged by WCCMG's appeal.

On April 8, 2002, the landowners filed an application to re-zone two tracts of land –- one tract consisting of 36 acres and another comprised of 117 acres. The proposed map amendment represented the first phase in the development of a large industrial park designed to attract business and to create jobs in Bowling Green. Zoned "agricultural," the tracts had been recently annexed by the City of Bowling Green and were separated by a nine-acre tract already zoned "heavy industrial." The owners sought re-zoning of the smaller 36-acre tract to a "light industrial" classification; they requested a change to "heavy industrial" zoning on the remaining 117-acre tract.

[2] Kentucky Revised Statutes.

A report prepared by the staff of the Planning Commission recommended approval of the proposed map amendments. After receiving the staff report, the Planning Commission held public hearings on four different days in May 2002. Numerous persons testified at the hearings -- both for and against the re-zoning. Many expressed concern about the harmful environmental impact likely to result from the proposed industrial complex. At the conclusion of the hearings, the record reports the following disposition by the Commission:

> The motion was made . . . and seconded . . . to approve the proposed zoning map amendment, together with and conditioned upon the General Development Plan . . . based on the findings of fact as presented in the staff report, and the testimony presented in this public hearing, that the zoning map amendment is in agreement with the adopted Comprehensive Plan, policies G-4, LU-1B, 1E, 2E, 2F, 2H, and 7A-2 though 5 and 7 through 11, EN-2D, 2E, 4A, 4C and 5A; TR-2B, 2C, and 7; and EC-1 through 4 and further request that the findings of fact and recommendation include a summary of the evidence and testimony presented by the proponents and/or opponents of the proposed amendment. <u>This motion was approved by six (6) yeas and five (5) nays</u>. (Emphasis added.)

On July 2, 2002, after receiving the Planning Commission's recommendation by a close vote, <u>a unanimous Board</u> passed an ordinance re-zoning the two tracts. On July 25, 2002, the City of Oakland sought review in timely fashion of the Board's decision in the Warren Circuit Court pursuant to KRS

100.347. On September 25, 2002, 85 days after the Board's adoption of the ordinance, WCCMG moved for leave to intervene as plaintiffs pursuant to CR[3] 24.01.

Relying on Board of Adjustment of City of Richmond v. Flood, Ky., 581 S.W.1 (1979), the court concluded that the motion to intervene, which was filed more than thirty days following the Board's final action, was not timely. The court also concluded that regardless of the statutory period for seeking judicial review of a zoning ordinance, WCCMG's delay in attempting to intervene further justified the denial of its motion.

WCCMG did not appeal from the order of October 8, 2002, denying its motion to intervene. However, on January 22, 2003, it moved the circuit court to reconsider its order. After reviewing the record, reading the briefs filed by the parties, and hearing oral arguments by all of the parties and WCCMG, the Warren Circuit Court entered its final order on May 6, 2003. It denied WCCMG's motion for reconsideration and affirmed the Board's zoning decision.

In its final judgment, the court determined that the Board's action was based on substantial evidence and that the City of Oakland had received due process from the Planning

[3] Kentucky Rules of Civil Procedure.

Commission. Rendering a comprehensive and thoughtful opinion, it summarized its appellate role succinctly as follows:

> The Court laments that the hereinbefore-described modification of the subject acreage and its natural drainage patterns could collapse sinkholes, contaminate groundwater and air, or otherwise diminish the verdant brilliance of one of Kentucky's most productive agricultural counties. However, pursuant to the applicable standard of review and in view of the foregoing legal analysis, it is not the Court's place to substitute its independent judgment for that of an agency of another branch of government. This is especially the case where arbitrariness is not established and the disputed decision is supported by substantial evidence. The Board and/or the Planning Commission, even if they wished, could not impose upon this Court the unenviable administrative duty to render a discretionary decision as to whether the instant rezoning should be approved. It follows that [the City of Oakland] cannot now do so by the fiction of an appeal that would require the Court to effectively adjudicate upon administrative and discretionary, rather than judicial, considerations. The Planning Commission has spoken. The Board has spoken. The Court finds nothing arbitrary in these vocalizations.

(Circuit Court's opinion, p. 16.)

In seeking review in this Court, the City of Oakland raises the same arguments that it raised in the Warren Circuit Court. First, it argues that the loss of prime farmland does not conform to the Comprehensive Plan as required by KRS 100.213(1); on the contrary, it is detrimental to the Plan's

stated goal of preserving such land. (Appellant's brief, p. 25.) It also alleges that the zoning change is "wholly unnecessary" since Bowling Green has a significant amount of property already zoned for industrial development that is not being utilized. (Id. at p. 26.)

The City of Oakland next argues that the re-zoning does not comply with the Plan's "concerns with, and attempts to deal with, the karst geology" of the site. (Id.) It argues that expert testimony provided by Dr. Nicholas Crawford and relied upon by the Planning Commission was "inadequate and insufficient" and that it "failed to demonstrate that the [re-zoning] would not detrimentally affect the Mammoth Cave system." (Id., p. 27.)

Finally, the City of Oakland has raised issues implicating due process considerations. It contends that the landowners did not consult with all the surrounding property owners prior to applying for the map amendment as required by the Comprehensive Plan. It also alleges that the Planning Commission failed to make adequate findings of fact.

Before addressing the merits of the appeal, we note that the City of Oakland has not complied with CR 76.12(4)(c)(v), which requires a statement "at the beginning of [each] argument . . . with reference to the record showing whether the issue was properly preserved for review and, if so,

in what manner." Even more troublesome is the fact that the record before us does not contain the original evidentiary record compiled before the Planning Commission. This evidence (including the videotaped recordings of the twenty-four hours of public hearings and the numerous exhibits) was reviewed by the circuit court. However, the parties entered into an agreed order stipulating that the videotapes and the exhibits be removed from the record maintained by the Warren Circuit Court Clerk before the record was certified to this Court. Assuming that these evidentiary materials have been returned to the circuit court clerk as provided in the agreed order, we note that there has been no motion to supplement the record on appeal.

By resort to the detailed and copious minutes of the public hearings conducted by the Planning Commission, we believe that we can properly address the issues presented to us -- despite the unavailability of the items omitted from the record by agreed order of the parties. We note at the outset that the motives, reasoning, and judgment of the Board in approving the re-zoning must be afforded great deference. Evangelical Lutheran Good Samaritan Society, Inc. v. Albert Oil Co., Ky., 969 S.W.2d 691, 694 (1998). This Court may not substitute its judgment or discretion for that of the Board. Our inquiry is limited to considering whether the Board's decision to amend the

zoning map was arbitrary. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 456 (1964); Minton v. Fiscal Court of Jefferson County, Ky.App., 850 S.W.2d 52 (1992). A decision by a legislative body to change the zoning classification of property may not be deemed to be arbitrary if it is based on substantial evidence. City of Louisville v. McDonald, Ky., 470 S.W.2d 173, 178 (1971).

After reviewing the evidence presented to the Planning Commission, we agree with the circuit court that the action taken by the Board was "plainly supported" by substantial evidence. (Circuit Court's opinion, p. 13.) Specific evidence supporting the Board's action included the written report prepared by Andy Gillies, the Executive Director of the Planning Commission, along with his extensive testimony at the public hearings. Gillies acknowledged that one of the goals of the Comprehensive Plan was preservation of farmland. However, he testified that other competing goals also contained in the Comprehensive Plan included the ability to provide diversified employment opportunities for the citizens of the area, to maintain the growth of existing businesses, and to attract new industry. Gillies and other witnesses addressed the need for more industrially zoned areas, a need that Bowling Green is unable to meet without expansion.

Both Gillies and Dr. Crawford addressed the concerns about the environment and the threat of underground water pollution. Dr. Crawford testified extensively about the proposed storm sewer system that the owners were required to install as one of the conditions -- or binding elements -- of the re-zoning. Dr. Crawford was unable to assure that use of the area as an industrial park would never result in groundwater contamination. Nevertheless, he testified that the most scrupulous efforts would be implemented to prevent contamination of the environment. Other witnesses testified about the city's need to improve local job opportunities by attracting more industry.

The debate at the hearings was hotly contested. And the vote recommending re-zoning was close: 6 to 5. However, those opposed to the map amendment have not demonstrated that the evidence was not sufficient to support the finding of the Planning Commission that the proposal was in harmony with the Comprehensive Plan. The element of arbitrariness was not established.

The City of Oakland also contends that it was not afforded the proper due process to which it was entitled by the administrative body. It alleges that the landowners failed to comply with the Plan's requirement that it consult with surrounding property owners prior to submitting a zoning change

request. The testimony of Margaret Grissom, President and C.E.O. of BGAEDA, ably supports the findings of the circuit court that the landowners did indeed consult with and provided notice of the hearing to the **adjoining** land owners. The court determined that the interests of other property owners in the area were satisfied by media advertisements and signs placed on the properties.

Neither the property of the City of Oakland nor that of the two individual appellants adjoins the two tracts in dispute. As noted earlier, all of this property is approximately four miles distant from the farmland at issue. The City of Oakland takes exception to the fact that its opinion was not sought during the planning stages for the major industrial development so close to its boundaries. We are nonetheless convinced that the term "surrounding property owners" as used in the Comprehensive Plan was not intended to require proponents of zoning changes to consult with property owners as remotely removed from a subject area as is the City of Oakland. We find no error in the court's determination that the City of Oakland received all the process to which it was reasonably due.

Finally, the City of Oakland has complained about the sufficiency of the findings of the Planning Commission. While those findings were somewhat conclusory, any arguable deficiency

was cured by the incorporation of the report prepared by its staff. That report contained findings that the proposed map amendment agreed with numerous, relevant sections of the Comprehensive Plan. See, Danville-Boyle County Planning and Zoning Commission v. Prall, Ky. 840 S.W.2d 205 (1992).

We conclude that the circuit court did not err in affirming the decision of the Board. Thus, we believe that the issue of the standing on the part of the City of Oakland to seek judicial review is moot.

We also decline to address the merits of the appeal brought by WCCMG, a not-for-profit corporation committed to protecting the environment. WCCMG was represented by counsel before the Planning Commission. Many of its members actively participated in the proceedings conducted by that agency. WCCMG did not seek review of the Board's re-zoning decision pursuant to KRS 100.347. It elected instead to intervene in the appeal of the City of Oakland.

When its original motion to intervene was denied, WCCMG had the right to file an immediate appeal in this Court. City of Henderson v. Todd, Ky., 314 S.W.2d 948 (1958). However, it waited for more than three months and then asked the circuit court to reconsider its previous order denying intervention. By that point, the parties had completed their briefs, and the matter was ready for submission.

In arguing for reconsideration, WCCMG did not seek to propose any additional argument before the circuit court. It candidly conceded that it had nothing to add to the arguments already made by the City of Oakland. WCCMG argued that it merely wanted to intervene in order to preserve its right to appeal from any adverse decision of the circuit court.

We perceive no abuse in the court's denial of WCCMG's motions. By its own admission, the interests of WCCMG were adequately represented by other parties. All arguments that it might have advanced were raised by the City of Oakland. Those arguments were considered and rejected by the circuit court and now have been weighed again and rejected by this Court. Even if the trial court had committed error in denying the motions to intervene (and we hold that it did not), such alleged error resulted in no harm to WCCMG.

We affirm the judgment of the Warren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS APPELLEE CITY OF OAKLAND:

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BRIEF FOR APPELLANT WCCMG:

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BRIEF FOR APPELLEE BOARD OF COMMISSIONERS OF CITY OF BOWLING GREEN:

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BRIEF FOR APPELLEE CITY-COUNTY PLANNING COMMISSION OF WARREN COUNTY, KENTUCKY

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