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Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-001859-MR
NO. 2003-CA-001891-MR
NO. 2003-CA-001941-MR

LOGAN COUNTY, KENTUCKY, BY LOGAN FISCAL COURT; SHAKERTOWN REVISITED, INC.; CENTER BAPTIST CHURCH; THE FATHERS OF MERCY; R.V. WOODWARD; JOE E. WOODWARD — APPELLANTS/CROSS-APPELLEES

APPEALS AND CROSS-APPEAL FROM LOGAN CIRCUIT COURT
v. HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 02-CI-00350

APEX ENVIRONMENTAL, LLC. — APPELLEE/CROSS-APPELLANT

AND:

NO. 2004-CA-000099-MR
NO. 2004-CA-000189-MR

APEX ENVIRONMENTAL, LLC — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 03-CI-00368

SHAKERTOWN REVISITED, INC.; CENTER BAPTIST CHURCH; THE FATHERS OF MERCY; R.V. WOODWARD; JOE E. WOODWARD — APPELLEES/CROSS-APPELLANTS

AND

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET — APPELLEE

OPINION AFFIRMING IN NO. 2003-CA-001891-MR, NO. 2003-CA-001941-MR, AND NO. 2003-CA-001859-MR; REVERSING AND REMANDING IN NO. 2004-CA-000099-MR; AND AFFIRMING IN NO. 2004-CA-000189-MR

** ** ** ** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

MILLER, SENIOR JUDGE: These five appeals concern the legality of a "waste transfer station" placed into operation by Apex Environmental, LLC (Apex) in the Logan County community of South Union under a "registered permit-by-rule" issued by the Natural Resources and Environmental Protection Cabinet, Division of Waste Management (Cabinet) pursuant to 401 KAR 47:110. The Logan Circuit Court entered an order upholding the legality of the facility. Logan County, by and through Logan County Fiscal Court, appealed the decision (Case NO. 2003-CA-001859-MR). Facility opponents Shakertown Revisited, Inc.; Center Baptist Church; The Fathers of Mercy; R.V. Woodward; and Joe E. Woodward

[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.

also appealed (Case No. 2003-CA-001891-MR). Apex cross-appealed the decision (Case No. 2003-CA-001941-MR).

Concurrent with the Logan Circuit Court proceedings, opponents of the transfer station filed a petition with the Office of Administrative Hearings seeking revocation of the permit. The Administrative Hearing Officer issued a recommendation that the permit be held invalid because the public notice published by Apex contained an improper address; did not list the actual owner of the subject property at the time the notice was published; and because Apex had not filed its LLC organizational papers with the Secretary of State at the time the notice was published. The Secretary of the Cabinet rejected the Hearing Officer's recommendation and upheld the permit. On appeal, the Franklin Circuit Court reversed the Secretary's decision and held the permit invalid because of improper public notice. Apex appealed that decision (Case 2004-CA-000099-MR) and the opponents of the transfer station filed a protective cross-appeal (Case No. 2004-CA-000189-MR).

Apex is a limited liability company owned and operated by Edward T. Hanks and his wife, Joy Beth Hanks. On March 12, 2002, pursuant to 401 KAR 47:110(5), Apex ran a public notice advertisement in the Russellville newspaper *The News-Democrat & Leader* to the effect that it intended to submit an application to the Cabinet for a registered permit-by-rule transfer station.

The advertisement stated that the proposed facility would be located at "32E Bowling Green Road, South Union, Kentucky, 42283." According to an affidavit filed by Edward T. Hanks, he had been advised by the former owner of the property and the South Union Postmistress that this was the correct address for the property upon which the facility would be located. However, according to affidavits filed by the Director of the Logan County Emergency Operations, Miguel Santiago, and the Magistrate for the District, Wyatt W. Ezell, the correct address of the property is 21 Pleasant View Road, Auburn, Kentucky, 42206.

On March 29, 2002, Apex filed an application with the Cabinet for the transfer station permit. The application identified the location of the proposed facility as 32E Bowling Green Road, South Union. Pursuant to 401 KAR 47:110, the permit became effective on April 8, 2002, five business days after the Cabinet received the application, because it was not denied during that time (the opponents of the facility refer to the permit as having become effective on April 5, 2002). In opposition to the validity of the permit, in addition to the incorrect address, Apex's opponents note that the company did not file its Articles of Organization as a limited liability company with the Secretary of State, and thus did not come into existence, until April 5, 2002. Kentucky Revised Statutes (KRS) 275.020; KRS 271B.2-030(1). They also note that the property

upon which the property was to be located was not conveyed to the Hanks until April 5, 2002, and that the deed was not recorded in the Logan County Court Clerk's office until May 10, 2002.

According to Apex, it began operations on April 8, 2002, immediately following the issuance of the permit. Opponents of the facility allege that operations did not commence until late June or early July 2002. In any event, in May 2002, substantial public opposition to the transfer facility developed. On June 21, 2002, the Logan Fiscal Court passed an ordinance (Ordinance 02.830-6) which would require all solid waste facilities located within Logan County, including the type of facility developed by Apex, to obtain a license from the county. By its own terms, however, the ordinance does not apply to facilities operating prior to its enactment. On October 8, 2002, Ordinance 02.830-6 was amended to set minimum site and construction requirements for the operation of solid waste facilities such as the Apex transfer station. The Apex facility would not qualify for a permit under the amendment because it would violate minimum highway and property-line setback requirements.

A 1995 ordinance (Ordinance 95.830-5) requires a county license for facilities engaged in "recovered waste and recycling operations." However, though their permit authorizes

such activities, it is undisputed that the Apex facility does not intend to participate in recovered waste and recycling activities, and that the 1995 ordinance does not apply.

It appears that following the enactment of the 2002 ordinance, Logan County informed Apex that it was subject to its provisions, but that Apex took the position that it was grandfathered-in because it was operating its facility prior to the effective date of the ordinance. On September 3, 2003, Logan County, by and through Logan Fiscal Court, filed a Complaint in Logan Circuit Court seeking a declaratory judgment and injunctive relief against Apex (Logan Circuit Court Case 02-CI-00350). The complaint sought a judgment determining that Apex was subject to Ordinances 02.830-6 and 95.830-5; a determination that Apex was in violation of the licensing requirements prescribed under the ordinances; and requested an injunction preventing Apex from operating its transfer facility in violation of the ordinances.

In its answer, Apex denied the allegations contained in the complaint. Apex also filed a counterclaim for damages, alleging selective enforcement of the Logan County Ordinances against Apex in violation of the Commerce Clause[2] of the United States Constitution.

[2] U.S. Const. Art. 1 § 8.

On October 11, 2002, Shakertown Revisited, Inc.; Center Baptist Church; The Fathers of Mercy; R.V. Woodward; and Joe E. Woodward (Intervening Plaintiffs) filed a motion to intervene in the proceeding pursuant to Ky. R. Civ. P. (CR) 24.01. On November 13, 2002, the trial court entered an order granting the Intervening Plaintiffs' motion to intervene and permitting the filing of their Intervening Complaint. The Intervening Complaint likewise alleged that the ordinances cited by Logan County in its Complaint were applicable and that Apex was operating the facility in violation thereof. The Intervening Complaint also alleged claims to the effect that Apex's permit was invalid because the March 12, 2002, public notice published by Apex was deficient on the basis the notice contained the wrong address for the facility, and because Apex was not a legal entity at the time of the publication of the notice and at the time it filed its application with the Cabinet.

On October 21, 2002, Logan County filed its First Amended Complaint wherein it added an additional claim that Apex was operating its transfer station illegally on the basis of Logan County Ordinance 86-830.1. Logan County asserted that this ordinance required the obtaining of a franchise or permit issued by Logan County to operate a waste facility such as the Apex transfer station.

The parties eventually filed motions for summary judgment. On March 26, 2003, the trial court entered an order granting Apex partial summary judgment.[3] The order determined that the 1995 ordinance was not applicable because Apex did not propose to recycle or process "recovered wastes" (i.e. recycled wastes) at the facility, and that the 1986 ordinance was unenforceable on the basis that the ordinance did not contain objective criteria for the issuance of a franchise or permit by the county, and was thus in violation of Section 2 of the Kentucky Constitution (which prohibits the exercise of arbitrary power). The order denied summary judgment with respect to the applicability of the 2002 ordinance because there was a genuine issue of material fact regarding whether the grandfather clause of the ordinance applied.

On June 5, 2003, a bench trial was conducted. On August 5, 2003, the trial court entered its Findings of Fact, Conclusions of Law, and Judgment. The order incorporated the trial court's previous determinations that the 1986 ordinance and 1995 ordinance were inapplicable for the reasons stated in the trial court's order of March 26, 2003. The order also determined that Apex had commenced its transfer station operations prior to the effective date of the ordinance.

[3] Though the order is captioned "Order Denying Motions for Summary Judgment," the order, in fact, granted Apex summary judgment on the issues of whether the 1986 and 1995 ordinances were applicable.

Further, the trial court held that the 2002 ordinance was not enforceable against Apex under the principles of the "vested rights doctrine" and "equitable estoppel." In summary, the trial court held that none of the three ordinances cited by the opponents of the facility was applicable, and that the South Union transfer station was operating legally.

Logan County (Case NO. 2003-CA-001859-MR) and the Intervening Plaintiffs (Case No. 2003-CA-001891-MR) subsequently filed their notices of appeal from the trial court's decision. Apex filed a cross-appeal (Case No. 2003-CA-001941-MR) challenging the trial court's dismissal of its claim for damages based upon Logan County's alleged selective enforcement of the waste treatment ordinances.

As events were unfolding in Logan County, in the meantime, on May 30, 2002, Shakertown Revisited, Inc.; Center Baptist Church; The Fathers of Mercy; R.V. Woodward; and Joe E. Woodward filed a petition with the Office of Administrative Hearings to revoke the transfer station permit issued to Apex by the Cabinet (DWM-25793-037). The petition alleged that the issuance of the permit was void because, among other things, the public notice was deficient because it listed the incorrect address for the facility, and because Apex did not file its Articles of Organization papers with the Secretary of State until April 5, 2002, whereas it had published its public notice

and filed its application for a permit prior to that date. The Cabinet and Apex were named as Respondents. The matter was assigned to Hearing Officer Janet C. Thompson.

On September 6, 2002, the Hearing Officer entered her Report and Recommended Order. The Hearing Officer determined, among other things, that because Apex had given the improper location of the facility in its March 12, 2002, public notice, that the permit issued by the Cabinet to Apex was invalid. The Cabinet and Apex filed exceptions to the Hearing Officer's recommendation with the Secretary of the Cabinet. In its exceptions, the Cabinet argued that the Cabinet had acted within its discretion in interpreting the public notice statute as having been met by the notice published by Apex.

On December 11, 2002, the Cabinet Secretary entered an order rejecting the Report and Recommendation of the Hearing Officer and adopting the exceptions filed by the Cabinet; thus upholding the permit issued to Apex. On March 12, 2003, the Cabinet Secretary entered an order making his December 11, 2002, order final and appealable.

Shakertown Revisited, Inc.; Center Baptist Church; The Fathers of Mercy; R.V. Woodward; and Joe E. Woodward subsequently appealed the Cabinet Secretary's decision to Franklin Circuit Court pursuant to KRS 224.10-470 (Franklin Circuit Court Case 03-CI-00368). The Cabinet was named as the

Respondent in the Franklin Circuit Court appeal. Apex was granted leave to intervene as an Intervening Respondent.

Following the submission of briefs by the parties, on December 18, 2003, the Franklin Circuit Court entered an Opinion and Order reversing the Secretary of the Cabinet's order on the basis that Apex had failed to give proper notice when it included the wrong address for the facility in its public notice. The circuit court's decision had the effect of invalidating the permit.

On January 13, 2004, Apex filed its notice of appeal (Case 2004-CA-000099-MR) and on January 26, 2004, Shakertown Revisited, Inc.; Center Baptist Church; The Fathers of Mercy; R.V. Woodward; and Joe E. Woodward filed their notice of cross-appeal for the purpose of preserving issues not addressed by the Franklin Circuit Court (Case 2004-CA-000189-MR).

LOGAN CIRCUIT COURT APPEALS AND CROSS-APPEAL

APPEALS 2003-CA-001891-MR AND 2003-CA-001941-MR

We first address the direct appeals filed by Logan County and the Intervening Plaintiffs, Shakertown Revisited, Inc.; Center Baptist Church; The Fathers of Mercy; R.V. Woodward; and Joe E. Woodward. These parties, who are allied in their opposition to the South Union transfer station, filed a joint brief.

We begin our discussion by noting that this case was tried by the circuit court sitting without a jury. It is before this Court upon the trial court's findings of fact and conclusions of law and upon the record made in the trial court. Accordingly, appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. CR 52.01; Largent v. Largent, 643 S.W.2d 261 (Ky. 1982). The trial court's application of law, is of course, reviewed de novo. Monin v. Monin, 156 S.W.3d 309 (Ky.App. 2004)

First, Logan County and the Intervening Plaintiffs contend that Logan County Ordinance 86-830.1 was applicable to Apex and required Apex to be issued a permit by Logan County Fiscal Court prior to conducting transfer station operations in Logan County.

Ordinance 86-830.1 is captioned "An Ordinance relating to the disposal of solid waste in Logan County, establishing an approved disposal site, and prohibiting unlawful disposal of solid waste." Section 3 of the ordinance is captioned "Prohibited Practices" and states, in relevant part, as follows:

> It shall be prohibited for any person to . . . (5) own or operate a dump except under permit from the Cabinet for Natural Resources and Environmental Protection; (6) engage in the business of collecting, transporting, processing or disposing of solid waste within the County without as

(sic) franchise or permit for the conduct of such business.

In its March 26, 2003, order the trial court determined that the 1986 ordinance was not applicable to Apex on the basis that it violated Section 2 of the Kentucky Constitution in that the ordinance failed to include objective standards for granting a permit and thereby conferred unfettered discretion to the governing body in deciding whether to issue a permit. We agree.

Section 2 of the Constitution provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." "The rule is well established that municipal ordinances, placing restrictions upon lawful conduct or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply." City of Monticello v. Bates, 169 Ky. 258, 183 S.W. 555, 558 (Ky. 1916); *see also* Turner v. Peters, 327 S.W.2d 958 (Ky. 1959);

Motor Vehicle Commission v. The Hertz Corporation, 767 S.W.2d 1, 3 (Ky.App. 1989).

Ordinance No. 86-830.1 does not state where a party desiring to engage in the activities listed in Section 6 of the ordinance is to obtain a permit (we note that Apex had "a permit" issued by the Cabinet, and in that respect had complied with the ordinance) or who is to issue it; nor does it set forth any guidelines, requirements, criteria, or objective standards for the issuance or denial of a permit. Moreover, the ordinance fails to specify the rules and conditions to be observed by a party seeking to obtain a permit. It essentially opens the way for arbitrary discrimination by the municipal authorities between citizens who apply for a permit. We, for that reason, agree with the trial court that the ordinance violates Section 2 of the Kentucky Constitution and may not be applied against Apex.

Logan County and the Intervening Plaintiffs also allege that Apex does not have standing to challenge the validity of the 1986 ordinance because it had failed to first apply for, and then be denied, a permit under the ordinance. We disagree.

It is true that an individual is not allowed to bring a challenge to a law unless he is allegedly being injured by the law. Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459, 473

(Ky. 1998). However, in order to support an action, a party need only have a present and substantial interest in the matter in litigation. Winn v. First Bank of Irvington, 581 S.W.2d 21, 23 (Ky.App. 1978) (citing 59 Am.Jur.2d, Parties, § 28). That is to say, a party must have a real, direct, present and substantial right or interest in the subject matter of the controversy. Id. (citing 67 C.J.S. Parties § 6 (1950 ed.). We are of the opinion that Apex met this requirement.

Moreover, Apex did not unilaterally seek to challenge the 1986 ordinance as a plaintiff. Rather, the challenge was interposed as a defense in an action brought by Logan County seeking to impose the County's interpretation of the ordinance upon Apex's transfer station business. Under the interpretation sought by Logan County, Apex would not be able to operate its transfer operations without the approval of the County, and, as previously noted, the County, an avowed opponent of the facility, would have unfettered discretion in choosing whether to issue the permit.

We are compelled to conclude that Apex had standing to challenge the ordinance in the lawsuit filed against it by Logan County.

Next, Logan County and the Intervening Plaintiffs contend that Apex is subject to Logan County Ordinance 02.830-6 because it was not operating the transfer station prior to June

25, 2002, the effective date of the ordinance, and hence is not grandfathered-in under the grandfather clause of the ordinance.

The 2002 ordinance provides that a party may not operate a solid waste management or facility in Logan or County until the owner/operator, site, and facility have been approved by the Logan County Fiscal Court and a license issued pursuant to the ordinance. The second reading of the ordinance occurred on June 21, 2002, and became effective upon its publication on June 25, 2002. The ordinance was amended effective October 8, 2002, to provide for various prohibitions, including highway and property line set-backs, relating to transfer stations. Under the ordinance, as amended, Apex could not operate its transfer station at the South Union site.

Section G of the ordinance contains a grandfather clause which states, in relevant part, as follows: "The provisions of this Ordinance shall not apply to any solid waste management facility actually operating in the county on [the] date of ENACTMENT of this Ordinance . . . ." The appellants contend that Apex was either not in operation prior to the effective date of the ordinance or was operating illegally because it had not complied with the 1986 Ordinance.

The trial court determined that the 2002 Ordinance was not applicable to Apex on the alternative bases of the vested

rights doctrine and equitable estoppel.[4] However, as the appellants have not challenged the trial court's determinations with regard to the vested rights doctrine and equitable estoppel, we will not discuss those issues. Further, as already noted, the 1986 ordinance is violative of Section 2 of the Kentucky Constitution, so we need only discuss whether Apex was in actual operation prior to the effective date of the 2002 ordinance.

In its August 5, 2003, Findings of Fact, Conclusions of Law and Judgment, the trial court made the following findings of fact concerning whether the Apex South Union facility was actually in operation prior to June 5, 2002:

> Much of the testimony presented at the trial of this matter concerned whether garbage or waste oil was treated at the site prior to passage of the ordinance. . . . [T]he Court finds that some garbage and waste oil were treated at the site in June of 2002 and before the effective date of the ordinance.
>
> Some testimony was produced on behalf of Plaintiffs that it appeared from the standpoint of outside observers that few if any waste treatment operations were conducted in June of 2002. Apex produced evidence that on June 4, 2002 sixteen 55-gallon drums of "oily water and dirt, waste oil" were delivered to the site. The contents of these drums were processed by mixing with sawdust and disposed of by delivery to the Triple M Land Farm in Simpson County, Kentucky on June 21, 2002. Some proof was also produced that 4 tons of

[4] See City of Berea v. Wren, 818 S.W.2d (Ky. App. 1991) for a discussion of these doctrines.

> garbage (known in the trade as “MSW” or “municipal solid waste”) was received at the location on June 7, June 10 and June 24, 2002. During early and mid-June the Apex premises was inspected numerous times by the Division of Waste Management which generated some evidence supporting the claim that some waste treatment operations were taking place. No construction or demolition debris was processed at the site prior to enactment of the ordinance.

As previously noted, this case was tried by the circuit court sitting without a jury. We accordingly may not set aside its findings of fact unless clearly erroneous. CR 52.01; Largent v. Largent, supra. Findings of fact are not clearly erroneous if supported by substantial evidence. *See* Black Motor Company v. Greene, 385 S.W.2d 954 (Ky. 1964). The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972).

While the opponents of the facility presented evidence to the effect that they had monitored the facility and it did not appear that the facility was ever actually in operation prior to June 25, 2002, the trial court accepted the conflicting evidence and testimony of Apex that operations had been conducted at the facility prior to the effective date of the statute. There was substantial evidence in the record, in the

form of testimony and documentary evidence, to support the trial court's finding that operations had commenced prior to the effective date of the ordinance. The grandfather clause of the 2002 ordinance provides only that a facility be "actually operating" to obtain benefit under the clause. The trial court's findings on the issue intimate that this standard was met. This finding is not clearly erroneous, Apex is grandfathered-in under Section G of the 1986 ordinance, and the 2002 ordinance does not apply to its transfer station operations.

CROSS-APPEAL 2003-CA-001859-MR

In its cross-appeal, Apex contends that the case should be remanded for additional proceedings concerning its claims for constitutional violations arising from Logan County's alleged selective enforcement of the 1986 and 2002 Logan County ordinances.

In denying Apex's claim for damages as a result of the actions by the County in this matter the trial court stated that "[t]he Counterclaim is barred by sovereign immunity."

Kentucky counties are cloaked with sovereign immunity. Monroe County v. Rouse, 274 S.W.2d 477, 478 (Ky. 1955). This immunity flows from the Commonwealth's inherent immunity by virtue of a Kentucky county's status as an arm or political

subdivision of the Commonwealth. Id. And unlike municipal immunity, county immunity is not a creation of the courts and can only be waived by the General Assembly. Id.; *see also* Cullinan v. Jefferson County, 418 S.W.2d 407, 409 (Ky. 1967), *overruled on other grounds* by Yanero v. Davis, 65 S.W.3d 510, 527 (Ky. 2001); Haney v. City of Lexington, 386 S.W.2d 738, 742 (Ky. 1965); Lexington-Fayette Urban County Government v. Smolcic, 142 S.W.3d 128 (Ky. 2004).

Apex cites us to no evidence demonstrating that either the General Assembly or Logan County waived sovereign immunity with respect to the cause of action asserted in its counterclaim. The trial court properly concluded that Apex's counterclaim was barred by sovereign immunity.

FRANKLIN CIRCUIT COURT APPEAL AND CROSS-APPEAL

APPEAL 2004-CA-000099-MR

We begin our discussion of the Franklin Circuit Court appeal by resummarizing the proceedings below. On May 30, 2002, The Petitioners Shakertown Revisited, Inc.; Center Baptist Church; The Fathers of Mercy; R.V. Woodward; and Joe E. Woodward[5] filed a petition with the Office of Administrative Hearings to revoke the transfer station permit issued to Apex by the

[5] The Intervening Plaintiffs in the Logan Circuit Court proceedings were the Petitioners in the Franklin Circuit Court proceedings. While we referred to these parties as the "Intervening Plaintiffs" in our discussion of the Logan Circuit Court appeals, we refer to these parties as the "Petitioners" in our discussion of the Franklin Circuit Court appeals.

Cabinet. The issues in the case were eventually narrowed to whether Apex's March 12, 2002, public notice of the transfer station was adequate.

The Hearing Officer determined that in its March 12, 2002, public notice Apex had given the improper location of the facility; that the actual property owner was not listed in the notice; and that the organizational papers for Apex had not been filed with the Secretary of State at the time the public notice was published. The Hearing Officer determined that, as a result, the notice was fatally defective and that the permit issued by the Cabinet to Apex was invalid. The Cabinet and Apex filed exceptions to the Hearing Officer's recommendation with the Secretary of the Cabinet.

On December 11, 2002, the Cabinet Secretary entered an order rejecting the Report and Recommendation of the Hearing Officer, accepting the exceptions filed by the Cabinet, and determining that the public notice was adequate. The Cabinet Secretary's decision was made final by his order of March 12, 2003.

The Franklin Circuit Court reversed the decision of the Cabinet Secretary on the basis that Apex had failed to give proper notice when it included the wrong address for the facility in its public notice. The circuit court's decision had the effect of invalidating the permit.

Apex contends that the Franklin Circuit Court erroneously reversed the Cabinet Secretary for various reasons, to wit: the circuit court applied the wrong standard of review of the Secretary's decision; the circuit court erred by reinterpreting and expanding 401 KAR 47:110(5) to require the emergency response address to be placed in the public notice for registered permits by rule in violation of KRS 13A.130; the Administrative Agency's decision was not given proper deference pursuant to Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). (1984); the circuit court erroneously applied KRS 13B.150 in reversing the Cabinet's decision; the Secretary's decision was supported by substantial evidence; and that the circuit case improperly relied upon Durbin v. Wood, 369 S.W.2d 125 (Ky. 1963).

The basic scope of judicial review of an administrative decision is limited to a determination of whether the agency's action was arbitrary. Bobinchuck v. Levitch, 380 S.W.2d 233 (Ky. 1964). If an administrative agency's findings of fact are supported by substantial evidence of probative value they must be accepted as binding and it must then be determined whether or not the agency has applied the correct rule of law to the facts so found. Kentucky Unemployment Ins. Comm'n v. Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575

(Ky. 2002). The Court of Appeals is authorized to review issues of law involving an administrative agency decision on a de novo basis. Aubrey v. Office of Attorney General, 994 S.W.2d 516 (Ky. App. 1998).

At the risk of redundancy, we observe: if an agency decision is supported by substantial evidence, the "reviewing court must then determine whether the agency applied the correct rule of law to its factual findings." Commonwealth, Department of Education v. Commonwealth, 798 S.W.2d 464, 467 (Ky.App. 1990), *citing* H & S Hardware v. Cecil, 655 S.W.2d 38, 40 (Ky.App. 1983). *See also* KRS 18A.100(5)(d). "If the court finds the correct rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed." Id., *citing* Brown Hotel Company v. Edwards, 365 S.W.2d 299, 302 (Ky. 1963); Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406,410 (Ky.App. 1994). As a general matter the courts give great deference to an agency interpretation of its own regulations and the statutes underlying them. Delta Air Lines, Inc. v. Com., Revenue Cabinet, 689 S.W.2d 14, 20 (Ky. 1985).

On March 12, 2002, pursuant to 401 KAR 47:110(5), Apex ran a public notice advertisement in the Russellville newspaper, *The News-Democrat & Leader*, to the effect that it intended to submit an application with the Cabinet for a registered permit-

by-rule transfer station. The advertisement stated that the proposed facility would be located at "32E Bowling Green Road, South Union, Kentucky, 42283." As previously noted, conflicting evidence identified the correct address as 21 Pleasant View Road, Auburn, Kentucky, 42206.

It appears uncontested that the current proper address for the property upon which the facility is located is the Auburn address. It further appears that the former proper address was the South Union Address. The precise evolution of the address is unclear from the record, but it appears that the change was related to the construction of a new stretch of Highway U.S. 80/68 in the South Union area. It also appears uncontested that the facility is physically located in the unincorporated area known as South Union, and is not located in Auburn, which is an incorporated municipality located approximately four miles from South Union.

401 KAR 47:110(5) provides as follows:

> The owner or operator shall publish a notice two (2) weeks prior to submission of the registration in a daily or weekly newspaper of general circulation where the proposed facility is located. Public notices shall be of a size to include not less than two (2) column widths for advertising and shall be in a display format. The public notice shall contain the following:
>
> (a) Name and address of the owner or operator;
> (b) The type of facility;

(c) A brief description of the business to be conducted; and
(d) Name and address of the facility.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Bingham v. Natural Resources and Environmental Protection Cabinet, Com. of Ky., 761 S.W.2d 627, 629 (Ky.App. 1988) (quoting Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 14, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)).

The Cabinet Secretary determined that the listing of the South Union address in the public notice was proper notice. We believe that this Agency determination must be deferred to under the circumstances in this case. The facility was to be located in the small, unincorporated area known as South Union. The Agency reasonably concluded that the listing of this address was sufficient to place the public on notice of the location of the proposed transfer station such that the public could exercise its right of protest. On the other hand, Auburn is located some four miles from South Union. Hence, comparatively speaking, as noted by the Cabinet and adopted by the Secretary, the South Union address gave a more precise description of the location of the facility than would the Auburn address. As

such, the Agency gave a reasonable interpretation to the address requirement contained in 401 KAR 47:110(5). Accordingly, we must defer to the agency.

We further note that there is no evidence of bad faith on the part of Apex in listing the South Union address. In using the South Union address in the public notice, Apex relied upon information provided by the former owner of the property and the Postmistress of South Union. As we must defer to the agency on this matter, we reverse the determination of the Franklin Circuit Court that the public notice was invalid for listing the incorrect address in the public notice

CROSS-APPEAL 2004-CA-000189-MR

In their protective cross-appeal, Shakertown Revisited, Inc.; Center Baptist Church; The Fathers of Mercy; R.V. Woodward; and Joe E. Woodward, argue that an applicant for a permit-by-rule is required to be in existence at the time notice is published pursuant to 401 KAR 47:110(5) or at the time an application is filed. The public notice was published on March 12, 2002, whereas Apex did not file its organizational papers with the Secretary of Statue until April 5, 2002.

401 KAR 47:110(5) requires that the public notice contain the "Name and address of the owner Operator." The March 12, 2002, notice gave the name and address as "Apex

Environmental – 32E Bowling Green Road, South Union, Kentucky, 42283." As already discussed, the purpose of the notice was to provide the public with information reasonably calculated to give notice of the material facts concerning the transfer facility. Apex was to be the owner and operator of the facility, and that is the information contained in the notice. The public was not prejudiced by the fact that Apex did not file its actual organizational papers with the Secretary of State until some three weeks following the publication of the notice. The Agency's determination that it was proper for Apex to have published its notice and filed its application for a permit prior to filing its organizational papers with the Secretary of State was reasonable, and we will not disturb its interpretation of its own regulation.

The Petitioners also argue that the identification of an incorrect owner of property on which the facility is to be located in the public notice and application affects the adequacy of the notice and application. Apex ran the notice on March 12, 2002, and did not close on the property until April 5, 2002. 401 KAR 47:110(5) does not require that the owner of the property be listed in the public notice. Accordingly, this argument is unpersuasive.

For the foregoing reasons the judgment of the Logan Circuit Court is affirmed.

The judgment of the Franklin Circuit Court is reversed and remanded for entry of a judgment consistent with this opinion.

ALL CONCUR.

BRIEF FOR SHAKERTOWN REVISITED, INC.; CENTER BAPTIST CHURCH; THE FATHERS OF MERCY; R.V. WOODWARD; JOE E. WOODWARD; AND LOGAN COUNTY IN CASE NOS. 2003-CA-0011891-MR, 2003-CA-001941, AND 2003-CA-001859-MR:

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Amanda F. Lisenby
Bowling Green, Kentucky

Thomas A. Noe, III
Russellville, Kentucky

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Lanna Martin Kilgore
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BRIEF FOR SHAKERTOWN REVISITED, INC.; CENTER BAPTIST CHURCH; THE FATHERS OF MERCY; R.V. WOODWARD; AND JOE E. WOODWARD IN CASE NOS. 2004-CA-000099-MR AND 2004-CA-000189:

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