

RENDERED: AUGUST 8, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001794-MR

SULLIVAN UNIVERSITY SYSTEM, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 05-CI-002612

LOUISVILLE METRO BOARD OF  
ZONING ADMUSTMENT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY, □ SENIOR  
JUDGE.

COMBS, CHIEF JUDGE: The Sullivan University System, Inc., appeals from an  
opinion and order of the Jefferson Circuit Court that affirmed the issuance of a  
violation notice by the Louisville Metro Board of Zoning Adjustment (BOZA or  
the Board). After our review of the law and of the parties' arguments, we conclude

that there was sufficient evidence to support the decision of the Board. Therefore, we affirm the order of the circuit court.

The Sullivan University System, Inc., operates Sullivan University, a private, for-profit, post-secondary institution. It is a career-oriented university serving thousands of students on several campuses around the Commonwealth. Its Louisville campus is based near the intersection of the Watterson Expressway and Bardstown Road. The student library of the Louisville campus is located away from the main campus at 2222 Wendell Avenue. The property involved in this dispute is 3119 Lowell Avenue, a short distance from the library site. The Lowell Avenue property was built as a single-family residence in 1955 and is zoned R-5, single-family residential. Sullivan University acquired the house in 2003.

On December 1, 2004, in response to a neighbor's complaint, Dennis Martin, an officer with the Louisville Metro Inspections, Permits, and Licenses Code Enforcement, visited the property at 3119 Lowell Avenue. Following his inspection, Martin issued a notice to Sullivan that it was in violation of zoning regulations by operating a business on property zoned primarily for residential use. Sullivan filed a timely appeal to BOZA and contended that the property was being used by the University as a library annex, which was a permitted use in the R-5 residential district. According to Sullivan, the library annex housed archives, offices, and a break area for support staff.

On January 24, 2005, BOZA conducted a public hearing pertaining to Sullivan's appeal. A report was prepared by the Board's staff and was made

available to interested parties in advance of the public hearing. That report indicated that a relevant issue before BOZA was whether the purported “library annex” amounted to a “library,” which is a use permitted in the residential district if it is operated by a **non-profit** entity. Following the public hearing, BOZA requested its staff to devote additional research and consideration as to whether Sullivan’s “library annex” qualified as a proper “library.” The hearing was continued until February 21, 2005.

BOZA reconvened the public hearing in February. After reviewing additional evidence and the supplemental report of its staff, the Board was persuaded that the Lowell Avenue property was not being used as a library. Consequently, the Board concluded that the notice of zoning violation had been properly issued and denied Sullivan’s administrative appeal.

On March 22, 2005, Sullivan filed a lawsuit in the Jefferson Circuit Court and alleged that the decision of BOZA to deny its appeal had been arbitrary and capricious. Sullivan contended that the minutes of the public hearing failed to reflect that the decision of the Board had been based “solely on the grounds that the Library Annex operated on the Subject Property was operated by a **for profit entity.**” Complaint at 6. (Emphasis added). Sullivan contested the basis of the agency’s decision as improperly seeking to regulate on the basis of the **ownership** of property rather than its actual **use**.

In its answer denying Sullivan’s allegations, BOZA contended: (1) that it had acted within the scope of its authority; (2) that its decision had been

based upon substantial evidence; and (3) that Sullivan had received due process of law.

The parties submitted extensive briefs in support of their positions. Sullivan contended that the administrative record compelled a contrary result and that, therefore, the failure of the Board to grant its appeal was wholly arbitrary and capricious. Sullivan argued that there was no substantial evidence to support the Board's finding that its use of the property as a "library annex" did not equate to its use as a "library." Additionally, it argued that its status as a for-profit business entity should have had no bearing on the Board's deliberations.

BOZA contended that its decision to uphold the notice of violation was properly supported by evidence presented at the public hearings. The Board emphasized that the actual use of the subject property by the University bore little or no resemblance to any sort of "library." As to the issue of whether the Board had considered Sullivan's University's for-profit status, BOZA claimed that it spoke only through its records, noting that its minutes accurately reflected its finding that the Lowell Avenue property was **not** being used as a library. It claimed that the plain use of the property was the determinative factor and that the for-profit status of the University had not been material to its reasoning.

The matter was submitted, and an opinion and order of the Jefferson Circuit Court were entered on August 6, 2007. The court concluded that the decision of the Board rested upon substantial evidence. This appeal followed.

Sullivan now argues that BOZA wholly and improperly based its decision on Sullivan's for-profit status rather than scrutinizing its actual use under the land development code. Sullivan contends that any consideration of its for-profit status was erroneous as a matter of law.

We are persuaded that the Board's decision to deny Sullivan's appeal was based on evidence indicating that the property was **not being used** as a library. Because this determination was based on substantial evidence, the circuit court did not err by affirming the decision of the Board.

Judicial review of a zoning action is restricted to a determination of whether the contested action was arbitrary. *Warren County Citizens for Managed Growth, Inc. v. Bd. of Comm'rs of City of Bowling Green*, 207 S.W.3d 7 (Ky.App. 2006). In its role as fact-finder, the Board is granted great latitude in its evaluation of the evidence and the credibility of witnesses. *See American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n.*, 379 S.W.2d 450 (Ky. 1964). Reviewing courts are not authorized to conduct a *de novo* review of the administrative decision and must affirm a decision supported by substantial evidence. Substantial evidence is evidence that can induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367 (Ky.App.1971).

Each decision rendered by BOZA must guarantee procedural due process to the parties. The minimum requirements of due process include a hearing; the taking and weighing of evidence; findings of fact based on the

evidence offered; an order supported by substantial evidence; and an opportunity for judicial review of the decision. *Morris v. City of Catlettsburg*, 437 S.W.2d 753 (Ky. 1969). In order for findings of fact to satisfy due process standards, they must “contain sufficient adjudicative facts to permit a court to conduct a meaningful review of the proceedings for the purpose of determining the question of whether the action of the [Board] has or has not been arbitrary.” *Caller v. Ison*, 508 S.W.2d 776, 777 (Ky. 1974).

We are persuaded that the Board’s findings of fact in this case were sufficient to allow for a meaningful review of the adequacy of the proceedings. The essential adjudicative fact before the Board was whether Sullivan’s use of the subject property was a permitted use – that of a library – regardless of its for-profit status as a user. The evidence before the Board indicated that the Lowell Avenue structure housed no literary or other media materials for student or faculty reference or loan. It provided no work space for students or faculty. No staff members were assigned to the building to assist students or faculty with research or to provide any library services whatsoever. Moreover, a Sullivan employee assigned to the property described the house as merely a “computer tech office.” This evidence was more than adequate to support the Board’s decision.

We conclude that BOZA’s decision was supported by substantial evidence and that it was not arbitrary or capricious. Therefore, the trial court did not err by affirming the notice of violation. We affirm the opinion and order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Grover C. Potts, Jr.  
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BRIEF FOR APPELLEE:

Jonathan L. Baker  
Theresa Senninger  
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