RENDERED: SEPTEMBER 19, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002092-MR

BUTCHER AUCTION GROUP, INC. AND
JAMES LONGSHORE — APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, JUDGE
ACTION NO. 06-CI-00665

CAMPBELL COUNTY FISCAL COURT;
DAN BRAUN (PVA); CAMPBELL COUNTY
PLANNING & ZONING COMMISSION;
MARK HAYDEN; PETER J. KLEAR;
SANDRA MULLIGAN; DAVE OTTO;
STEVE PENDERY; KEN RECHTIN;
JACK SNODGRASS (CLERK); JUSTIN D. VERST — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CAPERTON, JUDGES, ROSENBLUM,[1] SPECIAL JUDGE.

[1] Retired Judge Paul W. Rosenblum presiding as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution.

ROSENBLUM, SPECIAL JUDGE: This appeal arises from a Campbell Circuit Court order granting summary judgment in favor of the Campbell County Fiscal Court; Campbell County Planning & Zoning Commission; Mark Hayden, Ken Rechtin, and Dave Otto, individually and in their official capacities as members of the Campbell Fiscal Court; Peter J. Clear, Campbell County Planning & Zoning Administrator; Justin Verst; Sandra Mulligan; Steve Pendry, individually and in his official capacity as Judge Executive of the Campbell County Fiscal Court; Jack Snodgrass, Campbell County Clerk; and Dan Braun, Property Valuation Administrator (County Appellees).

James Longshore, Butcher Auction Group, Inc. (BAGI), David Butcher and David Dunaway[2] (Appellants), filed a motion in Campbell Circuit Court challenging the legality of Ordinances O-18-04[3] and O-20-04[4], the Fiscal Court's authority to adopt the ordinances, and the discretion afforded by the

[2] An auctioneer for BAGI.

[3] Ordinance No. O-18-04 states, ". . . . Prior to being assigned a Property Identification Number and/or recorded, the Campbell County Fiscal Court shall review, through its designated agent, all survey plats, deeds, or other means used to represent land division submitted for property identification numbers from the Property Valuation Administrator and/or recording by the Campbell County Clerk where such land division are not otherwise reviewed and approved under the Campbell County Subdivision Regulations. When a tract of land is being divided and the property owner alleges an exemption from subdivision review due to proposed agricultural use of the land, the property owner must give written testimony and provide a written notarized affidavit stating exactly what the primary use or uses of the land will be for and that the land will not be used for residential building development for sale or lease to the public. Additionally, the designated agent, on behalf of the Campbell County Fiscal Court, shall require that a statement be placed on the plat, etc. to the effect that the land is not to be used for residential building development for sale or lease to the public. . . . ."

[4] Ordinance No. O-20-04 states, ". . . . The Campbell County Fiscal Court designates the Campbell County Director of Planning & Zoning to serve as the "designated agent" as outlined in Ordinance O-18-04; and, The Campbell County Fiscal Court designates the Campbell County & Municipal Planning & Zoning Commission as the 'review board' as outlined in Ordinance O-18-04."

ordinances. The Appellants also claimed that the Campbell County Fiscal Court effectuated an unlawful taking against them by requiring that the Appellants escrow funds. The Appellants requested reimbursement of the escrow funds as well as reimbursement for late fees incurred as a result of the unreasonable delay caused by the ordinances and the Campbell County Planning and Zoning Commission (the Planning Commission). They also requested punitive damages for mental and emotional distress suffered as a result of malicious intent by the Campbell County Fiscal Court, Planning Commission, County Attorney, County Commissioners, and County Judge Executive (County Appellees). Cross-motions for summary judgment were filed and the Campbell Circuit Court granted summary judgment in favor of the County Appellees. We affirm the judgment of the Campbell Circuit Court.

The Campbell Circuit Court found that the Appellants lacked standing to contest the validity of the ordinances because they never claimed that the land division was for agricultural use nor had they complied with the ordinances. The Campbell Circuit Court found that the Appellants had not been adversely affected by the ordinances. Further, the Campbell Circuit Court found that the Appellants' argument that the County Defendants effectuated an unlawful taking was without merit and that any delay was as a result of their own actions.

James Longshore and his wife (the Longshores) owned a 42 acre tract of land in Campbell County. In August 2005, the Longshores hired BAGI to sell the 42 acre tract. The Longshores and BAGI decided to subdivide the tract into

four smaller parcels. BAGI and the Longshores hired Hicks & Mann to survey and plat the property. Tracts 1, 2, and 3 each consisted of about 6.5 acres and tract 4 consisted of 20.8 acres.

In September 2005, on behalf of the Longshores, Hicks & Mann applied to the Planning Commission for approval of the preliminary plat. Hicks & Mann was notified that the Planning Commission would discuss the application during its October 11, 2005 meeting. In the interim the Planning Commission reviewed the application in conjunction with local subdivision regulations and recommended that the application be approved subject to several conditions.

Due to a miscommunication between Hicks & Mann and BAGI, neither the Longshores nor a representative on their behalf were present at the October 11, 2005 Planning Commission meeting. Therefore, the Planning Commission tabled the application review until its next meeting.

On October 29, 2005, before the Planning Commission had approved the application, BAGI auctioned the four parcels of land. Morris Stock Farms, LLC (Morris Stock Farms) bought tract 1 and Pond Creek Acres, LLC (Pond Creek Acres) bought tracts 2, 3, and 4. Both buyers signed contracts which made the sale of the property "subject to final plat approval by the Campbell County Planning Commission" with closings to occur by December 15, 2005.

After the auction, BAGI's owner, David Butcher, erroneously believed that if the property was divided into only two parcels then approval by the Planning Commission would not be required. Butcher also believed that Pond

Creek Acres would accept tracts 2, 3, and 4 as one parcel rather than three smaller parcels. Therefore, Butcher told Hicks & Mann to withdraw the preliminary plat application from the Planning Commission.

Butcher went to the office of the Campbell County Clerk to record a plat showing the division of the property into two parcels. Butcher was referred by the Campbell County Clerk's Office to the County Property Valuation Administrator (PVA) to obtain parcel identification numbers. At the PVA's office Butcher was advised that parcel identification numbers could not be assigned until the plat had been stamped by the Planning Commission. Butcher was informed that ordinances O-18-14 and O-20-04 would apply if the division was for agricultural use.

Butcher obtained an identification plat application which is required in order to comply with the ordinances. Butcher signed the application on November 29, 2005 noting his belief that the division of the Longshores' property into two tracts did not constitute a subdivision under KRS 100.111(2). On the same day, BAGI received a letter from the attorney for Pond Creek Acres stating that it was unwilling to purchase tracts 2, 3, and 4 as one parcel and that it was not willing to close on the sale of the property without plat approval by the Planning Commission as provided in the contracts. The letter also advised that Pond Creek Acres had no intention of using the property for agricultural purposes. The record is conflicting as to whether or not the identification plat application was presented to the Planning Commission.

In December 2005, the Longshores resubmitted their original preliminary plat application to the Planning Commission. On January 10, 2006, the Planning Commission approved the subdivision but required the Longshores to escrow funds to widen one side of a road to comply with subdivision regulation standards. The Longshores placed $9,080 into an escrow account and the final plat was approved on February 28, 2006. On March 15, 2006, the Longshores and Pond Creek Acres closed on tracts 2, 3, and 4. On March 24, 2006, the Longshores and Morris Stock Farms closed on tract 1. Because the closings were after the December 15, 2005 contract deadline, the Longshores incurred late fees to both Pond Creek Acres and Morris Stock Farms.

On October 16, 2007, the Appellants filed a notice of appeal. Thereafter the Appellants filed a motion for declaratory judgment and relief from final judgment claiming that the court based its ruling upon a misstatement of facts. The Appellants claimed that they did not voluntarily seek the Planning Commission approval. Further the Appellants claimed that they clearly invoked the agricultural exemption. The Campbell Circuit Court denied the motion on the basis that it lacked jurisdiction once the notice of appeal was filed.

Courts must grant a motion for summary judgment when the pleadings, affidavits, depositions, and other evidence "show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." CR[5] 56.02. However, summary judgment is inappropriate unless

[5] Kentucky Rules of Civil Procedure.

the movant demonstrates that on a dispositive aspect of the case there is no genuine issue of material fact. *Steelvest, Inc. v. Scansteel Service Center*, *Inc*., 807 S.W.2d 467, 483 (Ky. 1991). Both the trial court and appellate courts assess such motions, not by weighing the evidence, but by reviewing the record in the light most favorable to the opposing party. *Id*. In this case both parties presented motions for summary judgment and therefore each party has a burden to establish that no genuine issues of material fact exist with respect to their individual positions. *Id*.

The Campbell Circuit Court granted the County Appellees' motion for summary judgment based on a lack of standing to contest the ordinances. "A party must have a judicially recognizable interest in the subject matter of the suit" in order to having standing to bring the suit. *Yeoman v. Commonwealth of Kentucky Health Policy Bd.*, 983 S.W.2d 459, 473 (Ky. 1998). Further, that interest must be specific to the individual plaintiff. A plaintiff must show "an injury distinct from that of the general public in order to have standing to enjoin an official act." *Deters v. Kenton County Public Library*, 168 S.W.3d 62, 63 (Ky.App.2005) (quoting *Fish v. Elliott*, 554 S.W.2d 94, 96 (Ky.App.1977)). The plaintiff's interest in the lawsuit must also be present and substantial as distinguished from a mere expectancy. *Id.* The Appellants contend that the court erred by granting the County Appellees' motion because the evidence does not support the court's conclusions that the Appellants did not comply with the ordinances and thus were not adversely affected by them.

In Kentucky, a property owner who wishes to divide his property may claim that the property is not a subdivision within the meaning of KRS[6] 100.111(22)[7]. Divisions of property that are excluded from the statute are not subject to review by the Planning Commission. However, if the property owner believes that the division meets the definition of a subdivision, the property owner is required to submit the plat for review by the Planning Commission. The property owner alone must decide whether to pursue Planning Commission review immediately or whether to claim an exemption, such as an agricultural use exemption. The ordinances in question only come into play if the owner decides not to pursue Planning Commission review in favor of the claim that the land is for agricultural use. Then the owner must submit evidence to support the agricultural use exemption to the County's designated agent.

A review of the record indicates that the Appellants did not comply with the ordinances. The Appellants did not provide written testimony nor did they provide a written notarized affidavit stating the intended primary use(s) of the property. There was also no written testimony or written notarized affidavit that

[6] Kentucky Revised Statutes.

[7] KRS 100.111 (22) provides: "Subdivision" means the division of a parcel of land into three (3) or more lots or parcels except in a county containing a city of the first, second, or third class or in an urban-county government or consolidated local government where a subdivision means the division of a parcel of land into two (2) or more lots or parcels; for the purpose, whether immediate or future, of sale, lease, or building development, or if a new street is involved, any division of a parcel of land; provided that a division of land for agricultural use and not involving a new street shall not be deemed a subdivision. The term includes resubdivision and when appropriate to the context, shall relate to the process of subdivision or to the land subdivided; any division or redivision of land into parcels of less than one (1) acre occurring within twelve (12) months following a division of the same land shall be deemed a subdivision within the meaning of this section;

the land would not be used for residential building development for sale or lease to the public. Additionally, the plat did not contain a statement to the effect that the land is not to be used for residential building development for sale or lease to the public. It is apparent that the Appellants never sought an agricultural exemption. One who has not been adversely affected by a law does not have standing to challenge it. *Yeoman v. Com. Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998). Because the Appellants were not adversely affected by the ordinances, the trial court correctly ruled that they lacked standing to challenge them.

Because we have found that the Appellants lack standing to challenge the legality of the ordinances, we need not address the issue of immunity from liability pertaining to Pendry, Otto, Hayden, and Rechtin.

The Appellants also claim the ordinances and the Planning Commission created a delay that resulted in the assessment of late fees associated with postponing the closings due to a failure to abide by the contract deadline. However the Circuit Court found that any delay was attributable to the actions of the Appellants rather than the ordinances or the Planning Commission.

We must review a trial court's findings of fact for clear error. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. A review of the record reflects that a miscommunication between Hicks & Mann and Butcher resulted in the Appellants' absence from the original Planning Commission meeting in October 2005. The record also reflects

that the Appellants decided to voluntarily withdraw their preliminary plat application for approval in November 2005, based upon a mistaken assumption that tracts 2, 3, and 4 would be purchased as an undivided whole. Further the record reflects that the buyers insisted on the subdivision process and that the contracts with the buyers required approval of the subdivision. Therefore, the Appellants had to resubmit their application for preliminary plat approval, a step that they neglected to take until December 2005. After receiving the reapplication, the Planning Commission promptly considered the Appellants' preliminary plat and approved it at the next Planning Commission meeting on January 10, 2006. The approval was subject to the condition that the Longshores escrow funds sufficient to widen one side of Wolfe Road. The Appellants failed to provide an estimate regarding the cost of widening Wolfe Road until January 23, 2006. They also failed to submit a final plat application until February 2, 2006 and did not deposit the required escrow funds until February 10, 2006. Because of the Appellants' delays, the Planning Commission was unable to provide final approval of the plat until February 28, 2006. In addition, once the Appellants received approval from the Planning Commission on February 28, 2006, any further delay in closing beyond Feb 28, 2006 until the closing dates cannot be attributed to the County Appellees. Therefore, we find that there was substantial evidence in the record to support the Circuit Court's finding that any delay between the auction and the closings was not attributable to the County Appellees.

The Appellants finally claim that the Circuit Court erred in its finding that the Planning Commission did not effectuate an unlawful taking by requiring Appellants to escrow $9,080 to fund improvements to Wolfe Road. KRS 100.281[8] specifically provides the Planning Commission the authority to condition approval upon the funding of certain public improvements. Further, this Court in *Lampton v. Pinaire*, 610 S.W.2d 915, 919 (Ky.App. 1992), upheld such conditional approvals.

> Public policy nevertheless requires that the one who develops his land for a profit also may be required to bear the cost of additional public facilities made necessary by the development. Local governments are not obligated to develop private property, and indeed, developers must construct streets and other public improvements in a proper manner in order to hold the local government's maintenance costs to a minimum once the dedicated property has been accepted for public purposes. Most local governments barely have funds for necessary maintenance purposes, much less for original construction purposes.
>
> Any substantial development of subdivided

[8] KRS 100.281 (3), (4), (5), and (6) provide :(3) Requirements for the design of streets, blocks, lots, utilities, recreation areas, other facilities, hazardous areas, and areas subject to flooding. Such requirements may deal with all forms of land use including residential, commercial, industrial, and other uses. If the subdivision plat includes a proposal for any street to cross a jurisdictional line out of the planning unit, the commission shall require that notice of the proposal be given to the planning commission serving the planning unit into which the road will cross. If there is no planning unit for that area, the notice shall be given to the affected city or county government;(4) Specifications for the physical improvements of streets, utilities, and other facilities, and the extent to which they shall be installed or dedicated as conditions precedent to approval of any plat, including the provision of good and sufficient surety to insure proper completion of physical improvements; and (5) Specifications for the extent to which land is to be used for public purposes shall be reserved as a condition precedent to approval by the commission of any subdivision plat. The planning commission may require a reservation, not to exceed two (2) years, for parks, open space, school, and other public uses.

> property will create a burden on public utilities and neighboring streets. It makes no sense to allow one to develop property in such a manner as to increase traffic on an abutting street, and then require the authorizing authority to condemn part of the property to provide an adequate thoroughfare. The intent of dedication is not to put an unreasonable burden on the landowner, but to permit him to develop his land without putting an unreasonable burden on others. So long as the taking of a portion of the land, whether on the exterior or from the interior, is based on the reasonably anticipated burdens to be caused by the development, the dedication requirements as a condition precedent to plat approval are not an unconstitutional taking of land without just compensation.

Here, there is no evidence that the funds that the Planning Commission required the Appellants to deposit exceeded the amount necessary to alleviate the reasonably anticipated burdens of the proposed subdivision development. A review of KRS 100.281, *Lampton v. Pinaire*, *supra*, and the record, clearly indicates that the Circuit Court properly determined that the escrowed amount did not constitute an unlawful taking.

Accordingly, we affirm the summary judgment of the Campbell Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ellen M. Longshore
Alexandria, Kentucky

BRIEF FOR APPELLEE:

Jeffrey C. Mando
Jennifer H. Langen
Covington, Kentucky