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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001460-MR

CITIZENS FOR PRESERVATION
OF JESSAMINE COUNTY, LLC — APPELLANT

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 06-CI-00525

COOPER DEVELOPMENT, LLC; JESSAMINE COUNTY/CITY OF WILMORE JOINT PLANNING COMMISSION; PETER BEATY, CHAIRMAN; CHARLES KESTEL, JR., JOSEPH L. POAGE, CHARLES FULLER, JANE BALL, JAMES McKINNEY, DWIGHT WINTER, ANNETTE SPARKS, ISAIAH SUIRBROOK, DON COLLIVER, IN THEIR CAPACITIES AS MEMBERS OF THE JESSAMINE COUNTY/CITY OF WILMORE JOINT PLANNING COMMISSION — APPELLEES

OPINION
AFFIRMING IN PART, AND
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

VANMETER, JUDGE: The issues before us relate to a landowner's right to proceed with a cluster development as a permitted use within an agriculturally zoned area. For the reasons stated hereafter, we affirm in part, and reverse and remand in part, the decision of the Jessamine Circuit Court.

Appellee landowner Cooper Development, LLC (Cooper) filed an application with appellee Jessamine County/City of Wilmore Joint Planning Commission (Planning Commission) seeking to proceed with a proposed cluster development of 45 residential lots on a 155.46-acre tract in Jessamine County as a permitted use within an agricultural zone. Appellant Citizens for Preservation of Jessamine County, LLC (Citizens) opposed the development, and a hearing was conducted before the Planning Commission.

Cooper produced extensive evidence to support its application. Citizens asserted, however, that the property's development would harm both the operation of an adjacent horse farm, and the ongoing efforts to preserve the agricultural nature of the surrounding community. Private citizens and owners of neighboring properties spoke both in favor of and against the proposed development. The Planning Commission then made the following findings and conclusions before denying Cooper's application:

FINDINGS OF FACT

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

1. A Special Meeting to consider the Application of Cooper Development, LLC for approval of a preliminary plat for a proposed cluster development of 155.46 acres of land owned by it, presently zoned A-1 and located approximately one-mile north of the junction of U.S. highway 68 and Kentucky highway 29, to be called "Barkley Woods, Unit 7", was held on Tuesday, May 30, 2006.

2. The application proposed sub-dividing the land into 45, one acre lots for single-family residences, with the remaining land, less proposed roads, to be reserved for agricultural or open space usage. Fourteen of the proposed lots would be considered "additional lots in exchange for demolition or removal" of existing, habitable dwellings, pursuant to section 1.8 of the Zoning Ordinance.

3. The land is bordered on the west by existing U.S. highway 68; on the east by Jessamine Creek and Foxtale Farm; on the south by existing Barkley Woods Subdivision (R-1); and on the north by existing A-1 zoned properties, which are either being used for agricultural (i.e. equine) or residential purposes as permitted uses in the A-1 zone.

4. The land is located in a scenic area of Jessamine County that contains, both historically and presently, a large concentration of horse farm operations, including several of world reknown, such as for example, Almahurst Stud and Ramsey Farm.

5. The land is covered in at least three different types of soil at varying depths, with karst substrata and sinkholes of various sizes, including one very large one on the north west side bordering U.S. 68 which is encompassed within the proposed septic drip field treatment area.

6. The 100-year flood plain for Jessamine Creek, which flows the length of the land's eastern boundary, encroaches on the proposed development in general,

and in particular, on at least one of the proposed lots as shown on the submitted preliminary plat.

7. Conflicting proof was presented regarding the relative demand for cluster development lots in Jessamine County at the present time. There are at least 21, currently-approved cluster developments. There may be as many as 54.9% of those lots currently on the market for sale, being held for resale or currently being built upon for resale. In any event, it appears that there is more supply than demand.

8. Conflicting proof was presented whether there was adequate proposed screening to protect the scenic viewsheds of adjoiners or whether, overall, the proposal adequately minimized visibility of cluster lots from adjacent property or public right-of-ways. However, Applicants did not submit a landscape and buffering plan per se, pursuant to Section 3.224(A)(iii)(I)(vii), p.15c, of the Zoning Ordinance.

CONCLUSIONS OF LAW

Based on all the findings made above, it is the conclusion of the Jessamine County-City of Wilmore Joint Planning Commission that the application by Cooper Development, LLC, for approval of a preliminary plat, should be denied, and it makes the following conclusions of law in support thereof:

1. Although a cluster development is a permitted use in an A-1 zone, pursuant to our Zoning Ordinance, it is equally clear that the Commission is vested with exercise of its sound discretion whether to permit it or not based upon application of the general principles of the Comprehensive Plan and whether the proposal complies with the letter and spirit of the cluster development portions of the Ordinance. It is simply not a rubber stamp, taking ministerial action, mandated to approve every cluster development proposed.

2. It appears that the evidence as a whole shows that the general principles of the Comprehensive Plan to adequately protect and preserve natural and scenic features (including viewsheds), to promote activities to enhance and take advantage of Jessamine County'[s] history and culture, to recognize agribusiness as an important industry and encourage its diversification and expansion, and to only permit cluster developments to allow environmentally and agriculturally productive areas to be protected and to remain undeveloped, are not being adequately met by this proposal for these following reasons specifically, among others: (a) its location in an area of the county adjacent to and in the vicinity of existing, historic and significant equine operations, which undoubtably [sic] potentially impacts the continued viability of the adjacent horse farms and impacts future usage of horse farm operations in the vicinity; (b) its impact on scenic watersheds, both natural and of adjoining landowners; and (c) its conversion of prime agricultural land to residential usage in such a way by design which makes the remaining acreage more likely to be used as "open space" versus actual, continued agricultural usage.

3. The applicant bears the burden of demonstrating the adequacy of the proposed infrastructure for the development at the time of hearing, including the proposed disposal of sewage. Applicants failed to so demonstrate that its septic system is adequate in that it proposes a drip drain field over top of an existing sinkhole, with covering soils that may not be of adequate depth, using a method rarely used or tested by experience in the Bluegrass karst topography; thereby creating a not insignificant risk of future problems of release of effluent and contamination of groundwater.

4. The applicant failed to submit a landscape and buffering plan that shows adequate protections to minimize visibility of the development from adjoiner landowners and/or right-of-ways.

5. It appears that there is no compelling need at the present time for additional cluster development lots in Jessamine County. Supply of such lots exceeds demand; therefore, this development is premature. Since actual agricultural usage preservation is the goal of the Zoning Ordinance in the A-1 zone whenever possible, when a proposed development appears to be premature, Section 3.224(A)(iii)(1)(viii), at p.15d, requires it to be discouraged.

6. Finally, it is important to note that the [sic] it is not perhaps any one of the reasons individually that has caused the Commission to reach its ultimate conclusion; but the entirety of the evidence as a whole measured on balance that sways it to conclude that this proposal should be denied at the present time. Time and circumstances may change; however at the present time the negatives outweigh the positives and, ultimately, it is the applicant that bears the burden of convincing the Commission that the soundness of its proposal meets the letter, spirit and intent of the Comprehensive Plan and the Zoning Ordinance and it has failed to do so.

Cooper appealed to the Jessamine Circuit Court, which reversed the Planning Commission's decision and approved the requested land use.[2] This appeal followed.

Judicial review of an administrative agency's decision is limited to determining whether (1) the agency exceeded its granted powers, (2) the parties were afforded procedural due process, and (3) the agency's decision was supported

[2] The record shows that in September 2006, Cooper and the Planning Commission entered into a settlement agreement, "subject to any resolution of this cause of action by the Court that contradicts said approval[,]" whereby Cooper agreed to enhance the landscape screening of the property, and to dismiss its circuit court claims against the Planning Commission, in exchange for the Planning Commission's reconsideration and approval of Cooper's application for a cluster development. Thus, the Planning Commission is not a party to this proceeding. On November 6, 2006, the trial court entered an order declaring that it would adjudicate whether the Planning Commission's decision "was arbitrary and capricious and/or not supported by the evidence . . . without regard to the proposed Settlement Agreement[.]"

by substantial evidence. *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n,* 379 S.W.2d 450, 456 (Ky. 1964). A court's review of an administrative decision is not *de novo,* but instead turns on a determination of whether the decision was arbitrary or capricious, based on the record made before the administrative agency. *Id.* at 456-57. *See also City of Louisville v. Kavanaugh,* 495 S.W.2d 502, 505 (Ky. 1973); *Oldham Farms Dev., LLC v. Oldham County Planning & Zoning Comm'n,* 233 S.W.3d 195, 196 (Ky.App. 2007). An administrative decision is arbitrary, and therefore clearly erroneous, if it is not supported by substantial evidence. *Fritz v. Lexington-Fayette Urban County Gov't,* 986 S.W.2d 456, 458 (Ky.App. 1998). Substantial evidence is defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chem. Co.,* 474 S.W.2d 367, 369 (Ky. 1971). A reviewing court may not consider new or additional evidence, or substitute its judgment as to the weight of the evidence or credibility of the witnesses, in place of the administrative findings of fact. *Kentucky Bd. of Nursing v. Ward,* 890 S.W.2d 641, 642 (Ky.App. 1994). An administrative agency's factual findings may not be disturbed if they are supported by substantial evidence. *Danville-Boyle County Planning Comm'n v. Centre Estates,* 190 S.W.3d 354, 359 (Ky.App. 2006).

Section 6.6 of the Jessamine County Comprehensive Plan acknowledges that although "agriculture is the encouraged land use" and additional cluster subdivisions are discouraged, "[c]luster or 5-acre lot subdivisions are land

uses allowed by right in the General Agriculture Zone (A-1)." The definitions section of the Jessamine County Cluster Development Standards (Standards) defines a cluster development in pertinent part as follows:

> The use of Agricultural and/or Conservation lands whereby twenty percent (20%) of such land, not to include road acreage, may be developed into single-family dwelling lots of one (1) acre or more. The lots should be grouped closely together along the access road, which cannot be an existing public road. Eighty percent (80%) of the Agricultural and/or Conservation lands involved remains agricultural and is prohibited from future development. The residual farmland, (i.e., that which is not utilized for single-family dwelling units), may be owned jointly or in common by the owners of the building lots, or an association of the owners of the subdivision, or a person or entity who does not necessarily own a dwelling unit within the subdivision.
>
> Additional, one acre lots may be granted for the development in exchange for demolition or removal of legally existing, habitable dwellings on the Parent Tract in excess of those currently permitted by this Ordinance.

The Standards also define maximum residential density and provide individual lot standards relating to location, landscaping, sewage disposal and other issues. Because "[a]gricultural preservation [is] the intent of these regulations the premature subdivision or development of land shall be discouraged[,]" and cluster development deed restrictions must limit "the use of the [80%] reserved acreage to agricultural use or open space use." Standards Sections 3.224(b)(viii) and (xii).

We agree with the trial court that contrary to Citizens' claim, in Jessamine County a cluster development is not a hybrid combination of agricultural and residential zoning which warrants unique treatment. Further, a

request for a cluster development permit is not analogous to a request for rezoning. Instead, as stated by the trial court, a Jessamine County cluster development is a specifically authorized, "permitted use within an agricultural zone. In other words, it is a subdivision of land, not a zone change." *See Cetrulo v. City of Park Hills,* 524 S.W.2d 628, 629 (Ky. 1975). The Planning Commission's power to approve or disapprove the requested cluster development is limited by the applicable rules and regulations, and amounts to a ministerial act. *Wolf Pen Preservation Ass'n, Inc. v. Louisville & Jefferson County Planning Comm'n,* 942 S.W.2d 310 (Ky.App. 1997). Thus, the issue before the Planning Commission was not whether a cluster development should be allowed on the agriculturally-zoned tract, but instead whether the proposed development plan satisfied the Jessamine County standards applicable to cluster developments. Once those standards were met, the landowner had the right to proceed with a cluster development. The trial court therefore correctly found that the Planning Commission erred when it concluded that it was vested with the discretion to permit or deny the proposed development plan based on the Comprehensive Plan's general principles and spirit, or based on its perception of the need for the cluster development in the community.

Further, the trial court did not err by rejecting the Planning Commission's conclusion that Cooper's application should be denied because its design converted "prime agricultural land to residential usage" in a way which made "the remaining acreage more likely to be used as 'open space' versus actual, continued agricultural usage." Standards Sections 3.224(b)(xii)(a) and (b)

specifically provide that all cluster subdivision plats and deeds must restrict 80% of the reserved acreage "to agricultural use or open space use." Moreover, the cluster development definition specifies that "lots should be grouped closely together along the access road, which cannot be an existing public road." Any alleged intent to require landowners to either group all lots in a single confined portion of the property, or to reserve the remaining acreage as a single undeveloped block for agricultural use, was not unambiguously expressed in the standards. Thus, any issues relating to the practicality of using the remaining space for agricultural pursuits were irrelevant. As no evidence contradicted Cooper's assertion that 80% of the tract would be reserved for agricultural use or open space, the restriction set out in Standards Section 3.224(b)(xii)(a) and (b) was satisfied. The trial court therefore correctly concluded that the Planning Commission acted arbitrarily and exceeded its authority by rejecting Cooper's application on this ground.

Because the Planning Commission exceeded its authority by reviewing the merits of whether the proposed cluster development should be permitted, the trial court correctly found that the Planning Commission also erred when reaching several other conclusions, as set out above. More specifically, in Conclusions (2), (5) and (6) the Planning Commission acted arbitrarily and exceeded its authority by reviewing the plan in light of whether it was consistent with the goal of controlling development, whether a compelling need existed for

the development, and whether the development was consistent with the spirit and intent of the Comprehensive Plan.

However, we agree with Citizens that the trial court clearly erred in several other respects, including by making several *de novo* findings of fact. Those findings included that the demolition of certain "older residential units" on the development property would, "without question, . . . improve the overall character of the area[,]" that the immediate area's "overall character . . . is now residential[,]" that stub streets in an adjacent cluster development "obviously" indicated the Planning Commission's anticipation of this property's future development, and that the nearby Barkley Estates is a "long standing agricultural subdivision." Such findings should be set aside on remand.

Further, the trial court erred by finding that the Planning Commission acted arbitrarily regarding the issue of sewage disposal. The Planning Commission concluded that Cooper failed to meet its burden under Standards Section 3.224(b)(ix) to prove the adequacy of the proposed septic waste system, which the Planning Commission described as involving

> a drip drain field over top of an existing sinkhole, with covering soils that may not be of adequate depth, using a method rarely used or tested by experience in the Bluegrass karst topography; thereby creating a not insignificant risk of future problems of release of effluent and contamination of groundwater.

The record shows that Cooper's witness was a geotech civil engineer who evaluated the subsurface conditions and designed a cluster septic system for the

proposed development. He examined geologic survey maps, considered soil depth, evaluated subsurface conditions in the proposed development area, and tested soil and water quality at various locations. The engineer testified that the use of cluster septic systems had been approved by the state and local governments, that such systems were more expensive but more environmentally sound than individual septic tanks, and that they were good alternatives in locations with limited space or karst topography. Finally, he noted that an advantage of the proposed cluster system was that it would be maintained by a regulated and certified public utility company, rather than by individual property owners.

Citizens' evidence included the testimony of a landscape architect and a letter from an engineering consulting firm. The landscape architect expressed concerns about the location of the proposed underground drip field near sinkholes on the property. He opined that agriculture would be severely limited in the drip field area, and that the nine-acre drip field area should be included as part of the developed acreage. Further, the letter from the engineering consulting firm described the system as "experimental" and urged that it be "used with caution and designed according to specific standards." The letter did not address the suitability of the specific proposed location, except to note that a "more suitable location should be selected for the drip field to avoid sinkholes."

Regardless of whether a panel of this court might have weighed the relative strength and credibility of each party's evidence differently if sitting as the trier of fact, we cannot conclude that the Planning Commission's rejection of the

sewage disposal plan was not supported by substantial evidence. It follows that the trial court erred by substituting its own findings for those of the Planning Commission.

The trial court also erred by concluding that the Planning Commission arbitrarily found that Cooper failed to satisfy its burden of submitting the requisite "landscape and buffering plan per se" to show "adequate protections to minimize visibility of the development from adjoiner landowners and/or rights-of-way." Standards Section 3.224(b)(vii) specifies in part:

> In order to minimize visibility of cluster lots from adjacent property or public rights-of-way, all cluster lots shall take advantage of existing trees, shrubs and greenery which provides natural screening from roads and adjacent property where feasible. Applicants shall submit a landscape and buffering plan in addition to existing screening. The plan as approved by the Planning Commission shall be shown on the final plat of record of the cluster.

Here, Cooper's Exhibit H showed a proposed plat incorporating the installation of a multitude of trees, and the only deficiency listed in the Planning Commission's May 2005 Staff Report was Cooper's failure to propose certain landscape screening. Cooper responded by stipulating that it would plant "additional screening material." In addition, its plans for additional landscaping were discussed during the hearing. Nevertheless, a specific "landscape and buffering plan," incorporating all of the additional screening and landscaping materials, apparently was not included in the record prior to the Planning Commission's decision. Even if Cooper's submissions could have been found adequate, the

evidence was sufficient to support the Planning Commission's finding that at the time of the hearing, the submitted plan was inadequate to satisfy the applicable standards. The trial court therefore erred by substituting its own opinion for that of the Planning Commission.

Further, the trial court erroneously substituted its opinion for that of the Planning Commission regarding the location of one or more residential lots within a flood plain. Although the Planning Commission did not specifically address this issue in its conclusions, Cooper did not dispute the Planning Commission's factual finding that the 100-year flood plain encroached upon "at least one of the proposed lots" shown on the preliminary plat. Moreover, the parties did not dispute that the applicable subdivision regulation prohibits the residential use of land which is subject to flooding. Nevertheless, the trial court found that

> it appears uncontroverted that the provision has been interpreted to prevent residential lots which lie entirely in the flood plain. As long as each lot is large enough to properly accommodate a dwelling and any necessary septic field, the Planning Commission has approved those lots. That longstanding policy no doubt explains why the flood plain issue was not mentioned in the Commission's Conclusions as a reason for denying the application.

Since the record of the proceedings includes no evidence, discussion or findings by the Planning Commission regarding such policy interpretation, the trial court's substitution of its opinion for that of the Planning Commission was erroneous.

Finally, Citizens asserts that the trial court erroneously precluded it from "conducting discovery and litigating related claims raised in [its] answer and crossclaim." The record shows that on November 6, 2006, the trial court consolidated Citizens' separate crossclaim and counterclaim with the instant proceeding. On January 22, 2007, the trial court ordered the crossclaim to be held in abeyance pending the resolution of this appeal. Any issues relating to the crossclaim are not properly before us and will not be addressed in this appeal.

This matter is affirmed in part, and reversed and remanded in part for further proceedings consistent with the views stated herein.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

David Russell Marshall
Nicholasville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE COOPER DEVELOPMENT, LLC:

Robert L. Gullette, Jr.
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