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# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-000994-MR

CAMPBELL COUNTY FISCAL COURT;
STEPHEN PENDERY, JUDGE EXECUTIVE;
DAVID OTTO, CAMPBELL COUNTY
COMMISSIONER; MARK HAYDEN, CAMPBELL
COUNTY COMMISSIONER; KENNETH
RECHTIN, CAMPBELL COUNTY COMMISSIONER;
PETER J. KLEAR, CAMPBELL COUNTY PLANNING
AND ZONING COMMISSION DIRECTOR;
AND THE CAMPBELL COUNTY PLANNING
AND ZONING COMMISSION AND/OR
REVIEW BOARD — APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NOS. 05-CI-00886 AND 05-CI-01254

PAUL NASH; PAT NASH;
CLIFFORD TORLINE; AND
TOBY TORLINE — APPELLEES

AND NO. 2007-CA-001065-MR

PAUL NASH; PAT NASH; CLIFFORD TORLINE; AND TOBY TORLINE — CROSS-APPELLANTS

v.

CROSS-APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NOS. 05-CI-00886 AND 05-CI-01254

CAMPBELL COUNTY FISCAL COURT; STEPHEN PENDERY, JUDGE EXECUTIVE INDIVIDUALLY AND OFFICIALLY; DAVE OTTO, CAMPBELL COUNTY COMMISSIONER INDIVIDUALLY AND OFFICIALLY; KEN RECHTIN, CAMPBELL COUNTY COMMISSIONER INDIVIDUALLY AND OFFICIALLY; PETER J. KLEAR, CAMPBELL COUNTY PLANNING AND ZONING COMMISSION DIRECTOR; THE CAMPBELL COUNTY PLANNING AND ZONING COMMISSION AND/OR REVIEW BOARD; AND JACK SNODGRASS, CAMPBELL COUNTY CLERK — CROSS-APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

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

VANMETER, JUDGE: The Campbell County Fiscal Court and the named county officials (collectively referred to as appellants) appeal from the Campbell Circuit Court's orders declaring unconstitutional Campbell County Ordinances Nos. O-18-04 and O-20-04. Appellants argue that the trial court erred by holding that the Fiscal Court lacked the authority to enact the ordinances, and by holding that the

[1] Senior Judge Michael L. Henry 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.

ordinances were preempted by the agricultural supremacy clause, were void for vagueness, and interfered with the duties of the county clerk and the Property Valuation Administrator (PVA). Property owners Paul Nash, Pat Nash, Clifford Torline, and Toby Torline cross-appeal from the same orders, arguing that they are entitled to attorneys' fees and damages and that the trial court erred by finding that certain parties were entitled to immunity. For the following reasons, we vacate and remand.

**Facts.**

In August 2004, the Fiscal Court adopted Ordinance Nos. O-18-04 and O-20-04. As appellants state in their brief, those ordinances essentially "give the Fiscal Court's designated agent the ability to make a threshold determination as to whether a proposed division of land is or is not a 'subdivision' within the meaning of [KRS] 100.111(22)." Specifically, Ordinance No. O-18-04 directs, in pertinent part, as follows:

> 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 Administration and/or recording by the Campbell County Clerk where such land divisions 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.
>
> The Campbell County Fiscal Court shall also designate a review board to which appeals of official action or decision rendered from the aforementioned designated agent can be taken. Any person claiming to be injuriously affected or aggrieved by official action of the designated agent may appeal that action or decision to the designated review board. Such appeal shall be taken within thirty (30) calendar days after the action or decision of the designated agent.

Ordinance No. O-20-04 names the Campbell County Director of Planning and Zoning (Commission Director) as the "designated agent," and the Campbell County and Municipal Planning and Zoning Commission (Commission) as the "review board." The Commission Director testified by deposition that the Fiscal Court passed these ordinances in an effort to prevent situations in which individuals had no access to their property or homeowners expected but had no access to water, sewer, electric, roadway, postal delivery, 911 or other services.[2]

**Paul and Pat Nash.**

Paul and Pat Nash own a farm in Campbell County, Kentucky. To divide their farm into five tracts, the Nashes had their farm surveyed in August

[2] The Commission also adopted these ordinances as a part of its subdivision regulations. Campbell County, Ky., Subdivision Regulations, § 4.0(A)20, § 8.9 (http://www.campbellcounty.ky.gov/NR/rdonlyres/46CF6D4C-6F4C-4635-89B7-561B3F8E832D/0/CampbellCountySubdivisionRegulations.pdf).

2003 and had deeds to themselves prepared.[3] The Nashes obtained property identification numbers (PIDNs) from the Campbell County PVA, and the five tracts were placed on the Campbell County tax rolls. However, when the Nashes presented the five deeds for recording, the Campbell County Clerk refused to record the deeds and directed the Nashes to contact the county attorney.[4] The Nashes made several other unsuccessful attempts to record the deeds prior to August 2004.

In August and September 2004, the Fiscal Court passed Ordinance Nos. O-18-04 and O-20-04, as described above. When the Nashes once again attempted to record their deeds, the clerk's office advised them of the new ordinances. The Nashes thereafter resubmitted the deeds and other paperwork in an effort to comply with the ordinances at issue. However, the Commission Director denied the Nashes' proposed land division on the ground it amounted to a "subdivision," as defined in KRS 100.111(22), which the Commission had not approved as required by KRS 100.277(1). The Commission Director determined that the subdivision did not qualify for the KRS 100.111(22) agricultural

[3] Appellants assert that ultimately the Nashes intended to live on one tract, transfer three tracts to their children, and sell one tract to the general public.

[4] The tendered deeds referred to and included as an exhibit a plat for the Nashes' property, which plat had not been approved by the Commission. Since a deed which refers to or exhibits a plat of an unapproved subdivision "shall be void and shall not be subject to be recorded[,]" KRS 100.277(3), the record is sufficiently clear that the county clerk properly refused to record the deeds and referred the Nashes and their counsel to the county attorney. Contrary to the implication of the dissenting opinion, the county clerk did not arbitrarily or capriciously refuse to record the deeds. Any suggestion that our decision grants a county clerk the unfettered discretion to refuse to record lawful deeds, mortgages, financing statements, or judgment liens is misplaced.

exemption since the Nashes indicated that they planned to sell one tract, that they might lease or offer the remaining property for sale to the general public, and that the subdivision involved a new street.

**Clifford and Toby Torline.**

Clifford and Toby Torline own a farm in Campbell County, Kentucky, which they also desire to divide into five tracts. The Torline property is a landlocked parcel of approximately thirty-five acres, with access to a state highway by means of a private easement across neighboring property. In July 2005, the Torlines had their farm surveyed and proposed to create five tracts for themselves and their children, all of which were to be serviced by a roadway with a forty-foot wide access and utility easement. The Torlines submitted five deeds and the accompanying paperwork to the Commission Director, who denied the proposed land division on many of the same grounds used to deny the Nashes' proposed land division. Specifically, the Commission Director determined that proposal was for a "subdivision," as defined in KRS 100.111(22), which the Commission had not approved as required by KRS 100.277(1). The subdivision did not qualify for the KRS 100.111(22) agricultural exemption since the Torlines indicated that they might lease or offer the property for sale to the general public. Further, the Commission Director found that the subdivision involved a new street, and it did not "include frontage along a public right-of-way with a dedicated and accepted public street."

**Circuit Court Action.**

Both the Nashes and the Torlines filed administrative appeals in accordance with Ordinance No. O-18-04, but they abandoned those appeals in favor of actions seeking declarations of rights or declaratory judgments by the Campbell Circuit Court. After the trial court consolidated the actions and discovery was completed, appellants moved for summary judgment, and the Nashes and Torlines moved for a declaration of their rights. The trial court held that the two ordinances were unconstitutional because they "eliminated" the agricultural supremacy clause of KRS 100.203(4) and were vague as applied. The court further held that the ordinances impermissibly preempted the statutes governing the county clerk, the PVA, and the zoning statute by purporting to dictate the responsibilities of each. Additionally, the court found that Campbell County was immune pursuant to KRS 65.2003, and the Campbell County Clerk, in his official capacity, was entitled to absolute governmental immunity. The county judge-executive and two county commissioners were entitled to absolute legislative immunity in their individual and official capacities. The third county commissioner, who was not a member of the Commission when the ordinances were passed, was entitled to absolute legislative immunity in his official capacity and qualified immunity in his individual capacity. This appeal and cross-appeal followed.[5]

**Authority of the Fiscal Court to Enact the Ordinances**.

[5] Case No. 2007-CA-000994-MR is the appellants' direct appeal; Case No. 2007-CA-001065-MR is the cross-appeal filed by the Nashes and Torlines.

Appellants' first argument is that the trial court erred by failing to hold that KRS 67.083(3)(k) provided the Fiscal Court with the authority to enact the two ordinances at issue.[6] For the reasons stated hereafter, we conclude that the ordinances were properly enacted.

KRS 67.083(3)(k) authorizes a fiscal court to enact ordinances regarding "[p]lanning, zoning, and subdivision control according to the provisions of KRS Chapter 100[.]" The powers granted by KRS 67.083(3) are "liberally construed to provide fiscal courts with broad powers related to governmental functions[,]" unless the power at issue has been "specifically restricted by other legislation." *See Concerned Citizens for Pike County v. County of Pike*, 984 S.W.2d 102, 103 (Ky.App. 1998). Here, KRS Chapter 100 constitutes such restricting legislation. In *Oldham County Planning & Zoning Comm'n v. Courier Commc'ns Corp.*, 722 S.W.2d 904, 907 (Ky.App. 1987), we held that

> [l]ocal zoning authorities such as those similar to the appellants have only those powers expressly provided by statute. They are not invested with a constitutional nor a common law right to regulate property through the passage of local zoning ordinances. Such ordinances are the result of police power vested in the state legislature which in turn may invest in the legislative branch of municipal government a specified portion of that power.

[6] We note the Nashes and Torlines' procedural argument that appellants failed to preserve for appellate review the issue of the Fiscal Court's authority to enact the ordinances in question since their prehearing statement failed specifically to delineate that issue. *See* Kentucky Rules of Civil Procedure (CR) 76.03(8). All the issues in this controversy, however, inextricably involve the authority of a fiscal court to enact the ordinances in question. We therefore believe appellants substantially complied with CR 76.03(8). *See Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 196-97 (Ky. 1994) (holding that the crux of this rule is to insure the appellate court and opposing parties are aware of issues to be presented on appeal, and thus substantial compliance is sufficient).

*See also Bellefonte Land, Inc. v. Bellefonte*, 864 S.W.2d 315, 317 (Ky.App. 1993) (stating that "[w]hen the state has preempted a field, the city must follow that scheme or refrain from planning"). Thus, KRS 67.083(3)(k) affords the Fiscal Court only those planning, zoning and subdivision powers authorized in KRS Chapter 100, which we must examine to determine whether the Fiscal Court had the power to enact the ordinances at issue here.

Under KRS Chapter 100, the General Assembly has determined the manner in which local entities may engage in land use planning. Pursuant to KRS 100.277(1), "[a]ll subdivision of land shall receive [planning] commission approval." Also, pertinent to the matter *sub judice* is KRS 100.111(22), which for purposes of this proceeding defines a "subdivision" in part as being

> 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**.

(Emphasis added.) Further, KRS 100.111(2) defines "agricultural use" as relating to small wineries or certain horse activities, or as involving the use of:

> (a) A tract of at least five (5) contiguous acres for the production of agricultural or horticultural crops, including but not limited to livestock, livestock products, poultry, poultry products, grain, hay, pastures, soybeans, tobacco, timber, orchard fruits, vegetables, flowers, or ornamental plants, including provision for dwellings for persons and their families who are engaged in the agricultural use on the tract, **but not including**

**residential building development for sale or lease to the public[.]**

(Emphasis added.)

In the instant case, the ordinances in question do not explicitly contravene the provisions of KRS Chapter 100. First, KRS 100.277(1) provides that the local planning commission shall approve all subdivisions of land. While the Fiscal Court initially passed the ordinances at issue here, those ordinances provide that the Planning Commission and its Director shall determine whether a proposed division of land is a "subdivision." Regardless of whether the Fiscal Court was in fact vested with the power to enact the ordinances initially, *see* KRS 100.273, the Planning Commission subsequently adopted the text of the ordinances as a part of its subdivision regulations, thereby rendering moot any issue herein regarding the Fiscal Court's exercise of its authority.

Second, the record is clear that appellants attempted to enforce the ordinance by reference to the standards contained in KRS 100.111, in that both the Torlines' and the Nashes' proposed divisions were denied on the grounds that the divisions involved new streets and the potential sale or lease to the public of one or more lots.

Third, we note that KRS 100.273 through 100.292 is subtitled "Subdivision Management." Within these sections are a number of restrictions on subdivisions, including those relating to prior commission approval, KRS 100.277(1), and injunctive relief, KRS 100.291. Further KRS 100.991 provides

penalties for violations. We simply perceive no good reason to require a county to be reactive only after violations of the subdivision regulations occur, as opposed to proactively seeking to avoid future problems. An owner of a piece of property seeking a true division of land for agricultural use, in which the division will result in two or more tracts, of at least five acres each, with no new streets, will be minimally inconvenienced by the required submission of a plat and affidavit to the Planning Commission. Certainly both the Nashes and the Torlines secured the services of surveyors to survey their respective properties, to divide the property into lots, and to survey a means of ingress and egress.

In fact, the proposed divisions of the Nash and the Torline tracts show the necessity for the ordinances in question. The Torlines propose to subdivide their farm into five tracts, all accessed by a forty-foot wide easement. Similarly, the Nashes propose to subdivide their farm into five tracts, three of which have access to a public road, Beck Road, only by means of a twenty-foot wide easement. Both the Nashes and the Torlines argue that farm easements for ingress and egress do not constitute "new streets" within the meaning of KRS 100.111(22). In support of this proposition, they cite Ky. OAG 73-605 and Ky. OAG 72-516. Of course, although persuasive, Kentucky Attorney General opinions are binding on neither the recipients nor the courts. *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky.App. 1991).

KRS 100.111(20) defines "street" as "any vehicular way[.]" We note that words in statutes are to be "construed according to the common and approved

usage of language[.]" KRS 446.080(4). A "vehicle" is a means of transporting or carrying persons or property. *Merriam-Webster's Collegiate Dictionary* 1305 (10th ed. 2002). *See also Black's Law Dictionary* 1551 (7th ed. 1999). A "way" is a thoroughfare leading from one place to another. *Merriam-Webster's* at 1333. Thus, a vehicular way is a passage suitable to use by vehicles.

In this instance, the passageways proposed by both the Nashes and the Torlines for access to the otherwise landlocked parcels are clearly "vehicular ways" and are therefore "streets" within the definition established by KRS 100.111(20). The conclusion that these passageways are "streets" cannot be avoided by a claim that the passageways are not new since they merely follow existing farm roads. The record is devoid of any proof that any persons other than the Nashes or Torlines currently have a right to use these passages. However, once the divisions are made or approved, the other lot owners, and their guests and invitees, will have the right to use the passageways. The attorney general opinions cited by the Nashes and the Torlines, relating to whether the proposed passages would constitute "streets," are not persuasive.[7]

**Agricultural Supremacy Clause**.

[7] We note that in Ky. OAG 72-516, the Attorney General stated "[i]t is difficult to determine what the Legislature had in mind with reference to the term 'street[,]'" paraphrased the definition set out in KRS 100.111, and then stated *"[t]his is a factual situation, however, which should initially be submitted to the planning commission for its consideration*." (Emphasis added.)

Appellants argue that the trial court erred by holding that the ordinances were preempted by the agricultural supremacy clause set out in KRS 100.203(4). We agree.

KRS 100.203(4) provides that cities and counties may not regulate land which is used for agricultural purposes, with four enumerated exceptions not applicable here.[8] The rationale for the trial court's holding that the ordinances violated the provisions of this statute is not clear, although presumably the holding was dictated by the fact that the division of the property was in tracts which each had five or more acres. However, a presumption that five-acre tracts are devoted to agricultural uses is not a natural or logical extension of KRS 100.111(22). *Green v. Bourbon County Joint Planning Comm'n*, 637 S.W.2d 626, 629 (Ky. 1982).[9] While the Nashes and the Torlines argue, and apparently the trial court believed, that "five acres" is a magic number for determining an agricultural division, we do not believe that is necessarily the case.

In *Grannis v. Schroder*, 978 S.W.2d 328 (Ky.App. 1997), this court discussed KRS 100.203(4), the "agricultural supremacy clause," and noted that this

[8] Cities and counties may require land used for agricultural purposes to have setback lines. KRS 100.203(4)(a). They may also regulate the use of agricultural land in flood plains, in regard to the installation of mobile homes and other dwellings, and as pertains to the conditional use of tracts for certain activities involving horses. KRS 100.203(4)(b)–(d).

[9] At the time *Green* was decided, KRS 100.111(22) defined subdivision and stated "that a division of land for agricultural purposes into lots of parcels of five (5) acres, or more, and not involving a new street shall not be deemed a subdivision." In 1982, the General Assembly amended the statute to create a new subsection defining "agricultural use," including the five-acre tract minimum and the definition of agricultural or horticultural crops, KRS 100.111(2), and redefining "subdivision" to exclude "a division of land for agricultural use and not involving a new street[.]" 1982 Ky. Acts ch. 306, §1.

provision "does not simply make a farm a legal nonconforming use but takes it outside the zoning ordinances' jurisdiction, although not outside the master or comprehensive plan." In *Grannis*, one issue was whether the board of adjustment erred in finding that the property owner used the majority of his property for agricultural purposes, since he only occasionally cut hay on the property. In addressing this issue, the court discussed KRS 100.203 at length, as follows:

> Chapter 100 of the Kentucky Revised Statutes is commonly referred to as the enabling act for planning and zoning. Under KRS 100.203, cities and counties may enact zoning regulations. However, Section 4 of KRS 100.203 specifically exempts land used for agriculture from zoning regulations - except for setbacks, use of flood plains, and mobile homes. This "agricultural supremacy clause" (KRS 100.203(4)) does not simply make a farm a legal nonconforming use but takes it outside the zoning ordinances' jurisdiction, although not outside the master or comprehensive plan. That is an important distinction because by exempting agricultural land from application of the zoning ordinance, the provisions of KRS 100.203, which deals with changes in nonconforming uses, do not apply. A community can still plan, even develop, a comprehensive or master plan, and go so far as to adopt a zoning map including all the property in its jurisdiction, whether used for agriculture or not. However, as long as the land is used for agricultural purposes, the adopted zoning regulations (except for the three exceptions above) do not apply or attach to the property. Zoning ordinances frequently include agricultural zones in both the text and the map. The ordinance covering Schroder's property, ZO, Section 671A Agricultural Zone (A-1U) Unincorporated Areas, is typical and includes agricultural activities, including a single family farm residence, as a permitted principal use. Technically, it is not necessary to list these uses because of the agricultural supremacy clause, but as a practical matter, it makes the zoning ordinance easier to read and all inclusive.

Agricultural zones, like the A-1U zone in question here, typically include some nonagricultural uses as principal permitted uses, such as hospitals, day cares, and churches. Some nonagricultural uses are listed as conditional uses in the A-1U zone, like recreational facilities, slaughterhouses, feedlots, and home occupations. *Id.* These uses, also being nonagricultural in the sense that they are not typical farming operations, are subject to the BOA's approval which may be given subject to certain conditions as the BOA did in Schroder's case. *See* KRS 100.237. Under the local ordinance, a home occupation is allowed in an A-1U zone *if* the home occupation is an agricultural home occupation. ZO, 671A Agricultural Zone (A-1U) Unincorporated Areas, § 3. Conditional Uses: d. agricultural home occupations. Under the ZO, Article 2, Section 200, an agricultural home occupation is defined as:

> An occupation conducted in a dwelling unit or an accessory building, as a conditional use in an Agricultural Zone, provided that:
>
> . . . .
>
> 4. An agricultural home occupation may be conducted in an accessory building provided that the use is clearly *incidental and subordinate to* the land's principal *agricultural use.* (Emphasis added.)

This brings us back to what an agricultural use is, or when land is being used for agricultural purposes under the agricultural supremacy clause of KRS 100.203(4). KRS 100.111(2) defines an agricultural use to mean:

> the use of a tract of at least five (5) contiguous acres for the production of agricultural or horticultural crops, including but not limited to livestock, livestock

> products, poultry, poultry products, grain, *hay,* pastures, soybeans, tobacco, timber, orchard fruits, vegetables, flowers or ornamental plants, including provision for dwellings for persons and their families who are engaged in the above agricultural use on the tract, but not including residential building development for sale or lease to the public[.] (Emphasis added.)

The Schroders have over five contiguous acres, including a dwelling, and they produce hay. There is no requirement that a person make the best agricultural use or be efficient in the operation of a farm. Some farmers don't like cattle, horses, or any animals. Some ranchers don't like growing crops. Some people consider farming a career, while others treat it as a hobby or a second job. One owner may decide to bushhog the fields, while another may decide to allow nature to take its course and encourage gradual reforestation. Adjacent owners may have mixed uses on one tract, and a single crop may be produced on another. Some crops, like hay, may be harvested twice a year, while others, like some trees, may produce only one harvest per generation. None of these scenarios is less agricultural or silvicultural than another, although their intensity, efficiency, and profitability may all be different. The Schroders have produced hay in the past, but even if they decide to allow nature to reclaim all but an area immediately around the house, and six acres around the barn, it does not mean that the agricultural use is now incidental or subordinate to the home occupation. Again, the other twenty or so acres are being used, albeit not very wisely from a farmer's point of view. But eventually, the land may produce timber, firewood, flowers, ornamental plants, or wildlife habitats, which again may be a poor choice, but is undeniably an agricultural use. In a few years, the owner may decide to cut everything down and raise cattle or even ostriches. The point is that a user of agricultural land can change one agricultural use to another with impunity. KRS 413.072, enacted after Schroder's request, guarantees the right to change without being labeled a nuisance, trespass, or *zoning violation.*

978 S.W.2d at 330-31 (footnote omitted).

We have quoted at length from *Grannis* because we think the important distinction between it and this case is that *Grannis* dealt with the restrictions on agricultural use in an agricultural zone. In the instant case, we disagree that the Campbell County ordinances place a restriction on agricultural use in an agricultural zone. Our reading of the ordinances is that they instead address the division, platting and transfer of property, as opposed to the use to which property is put. *See Green v. Bourbon County Joint Planning Comm'n*, 637 S.W.2d at 629. Moreover, the ordinances do not restrict in any way the agricultural uses to which the Nashes and Torlines may subject their respective properties. Instead, for the purposes of our review, the ordinances simply provide that if a property owner intends to make an ostensible agricultural division which the owner claims is exempt from Planning Commission review, he or she must first submit a copy of the proposed division and an affidavit to the Planning Commission. As previously noted, a true agricultural division involving two or more tracts of land, with at least five acres each and no new streets, will be minimally impacted.

**Violation of Ky. Const. § 2.**

The Nashes and the Torlines argue that the ordinances operate arbitrarily in violation of Ky. Const. § 2, since they do not provide for "trial type hearings" as required by *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982). The ordinances, as adopted by the Planning Commission, state that "[a]ny subdivider claiming to be aggrieved by any actions of the Planning Commission's duly authorized representative may appeal such actions to the Planning Commission." Campbell County, Ky., Subdivision Regulations § 8.9. Additionally, KRS 100.347 provides for an appeal from the final action of the Planning Commission to the circuit court. Clearly, a review mechanism is set in place. Thus, on its face, the subdivision review process does not appear arbitrary or violative of due process.

Kentucky case law appears to support the proposition that any such Planning Commission appeal must comport with minimal standards of procedural due process by providing protections such as a hearing, the presentation of evidence, and a decision supported by substantial evidence. *See Danville-Boyle County Planning & Zoning Comm'n v. Prall*, 840 S.W.2d 205, 207-08 (Ky. 1992); *Kaelin*, 643 S.W.2d at 591-92; *City of Louisville v. McDonald*, 470 S.W.2d 173, 177 (Ky. 1971). However, we also note that in the context of an administrative hearing, due process is a flexible process. *Prall*, 840 S.W.2d at 207. At this point, the record is unclear as to what course any hearing before the Planning Commission ultimately would have taken since both the Nashes and the Torlines

opted to dismiss their respective appeals before that body. This claim is therefore not ripe for any decision, and we will not address it further.

**Vagueness**.

The trial court further found, without elaboration, that the Campbell County ordinances are vague because of how they are applied. In *Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745, 753-54 (Ky. 2004), the Kentucky Supreme Court delineated the void-for-vagueness doctrine, as follows:

> As long as an ordinance or statute can be reasonably understood by those affected by the ordinance and they can reasonably understand what the statute requires of them, it is not unconstitutionally vague. *See Gurnee v. Lexington-Fayette Urban County Government*, Ky.App., 6 S.W.3d 852 (1999). Vagueness involves a "man on the street" approach. The challenged statute must provide "fair warning" to the public and "explicit standards" for those who apply it in order to pass constitutional muster. *Hardin v. Commonwealth*, Ky., 573 S.W.2d 657 (1978).
>
> . . . .
>
> "[A] proper analysis of a statute claimed to be facially unconstitutional for vagueness is whether a person disposed to obey the law could determine with reasonable certainty from the language used whether contemplated conduct would amount to a violation." *Commonwealth v. Foley*, Ky., 798 S.W.2d 947, 951 (1990), *overruled on other grounds by Martin v. Commonwealth*, Ky., 96 S.W.3d 38 (2003). *See also Gurnee*, *supra* at 856 (1999) ("The fact that a statute . . . is susceptible to more than one interpretation does not require a holding that the statute is unconstitutional if, as the circuit court determined, those who are affected by the statute can reasonably understand what the statute

> requires of them."); *Sasaki v. Commonwealth*, Ky., 485 S.W.2d 897, 901 (1972) ("The accepted test in determining the required precision of statutory language imposing criminal liability is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."). The "void for vagueness" doctrine, therefore, attempts to ensure fairness by requiring an enactment to provide: (1) "fair notice" to persons and entities subject to it regarding what conduct it prohibits; and (2) sufficient standards to those charged with enforcing it so as to avoid arbitrary and discriminatory application. *State Board for Elementary Education v. Howard*, Ky., 834 S.W.2d 657, 662 (1992) ("In reviewing the standard for vagueness, this Court and the United States Supreme Court have followed two general principles underlying the concept of vagueness. First, a statute is impermissibly vague if it does not place someone to whom it applies on actual notice as to what conduct is prohibited; and second, a statute is impermissibly vague if it is written in a manner that encourages arbitrary and discriminatory enforcement."); *Hardin*, *supra* at 660; *Commonwealth v. Kash*, Ky.App., 967 S.W.2d 37, 42 (1997) ("The void-for-vagueness doctrine emanates from the due process provisions of the United States and Kentucky Constitutions. To survive vagueness analysis a statute must provide 'fair notice' of prohibited conduct and contain 'reason-ably clear' [sic] guidelines to thwart 'arbitrary and discriminatory enforcement.' " (citations omitted)); *Raines v. Commonwealth*, Ky.App., 731 S.W.2d 3, 4 (1987).

In this instance, the Campbell County ordinance, while not explicitly referring to KRS Chapter 100, cannot be considered in a vacuum. And, in fact, the record in this case reveals that appellants undertook to enforce the ordinance in conformity with KRS Chapter 100. The prohibited activity is the subdivision of tracts of land into nonagricultural lots, for resale, and/or with the inclusion of one

or more new streets. The ordinance provides fair notice and a mechanism for review by the Planning Commission, and the standards for its enforcement are sufficiently clear to avoid arbitrary and discriminatory application. The trial court erred by finding the ordinances to be impermissibly vague.

**Interference with the Duties of County Clerk and Property Valuation Administrator.**

The trial court also ruled that the ordinances impermissibly interfered with the statutory duties of the county clerk and the PVA, including the county clerk's duty to record lawful deeds under KRS 382.110 and KRS 382.335, and the PVA's duty to "maintain lists of all real property additions[10] . . . to the property tax rolls for the county" under KRS 132.015. This ruling, however, ignores that under KRS 100.277, a planning commission is authorized to approve plats of subdivisions of land, such approval must be obtained before plats may be recorded, and instruments referring to unapproved plats or subdivisions are void. Thus, we agree with appellants that the ordinances in question actually assist the county clerk and the PVA in properly performing their statutorily required duties.

Since we hold that the trial court erred in holding the Campbell County ordinances void, it follows that the ordinances are enforceable. We therefore need not address the issues raised in the Nashes' and Torlines' cross-appeal with respect to any liability of appellants for enforcing the ordinances. The

[10] Under KRS 132.010(8)(f), "real property additions" means "[p]roperty created by the subdivision of unimproved property[.]"

Campbell Circuit Court's order is vacated, and this matter is remanded to that court with directions to grant appellants' motion for summary judgment in their favor.

HENRY, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully dissent from that portion of the majority's opinion regarding the duties of the county clerk to lawfully record deeds, and the validity of the ordinance which imposes a requirement in addition to those imposed by statute. My disagreement with the majority is with its interpretation of our recording statutes and those pertaining to planning and zoning.

KRS 382.110(1) states:

> All deeds, mortgages and other instruments required by law to be recorded to be effectual against purchasers without notice, or creditors, shall be recorded in the county clerk's office of the county in which the property conveyed, or the greater part thereof, is located.

The requirements for a deed to be recordable are set forth in KRS 382.335, which contains no reference to prior approval of a plat by the planning and zoning commission nor does it vest any discretion in the county clerk to reject a deed that conforms to the statute's requirements.

Although stated in the infancy of our jurisprudence, in *Wulftange v. McCollom*, 7 Ky. L.Rptr. 334, 83 Ky. 361 (1885), the court appropriately characterized the duty of the clerk to record a deed as a ministerial act. "An act is

ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion." *County of Harlan v. Appalachian Regional Healthcare*, 85 S.W.3d 607, 613 (Ky. 2002).

Consistency and predictability throughout the Commonwealth are essential to the preservation of our recording statutes. If each county in this Commonwealth is allowed to impose its unique requirements and limitations on deeds, security interests, mortgages, judgment liens, and other instruments, we will have no consistency. If, as the majority opines, the recording of a deed or other instrument for the purpose of lien priority is subject to the discretion of the county clerk, those who seek to preserve priority are subject to a potentially arbitrary and capricious decision of the clerk, and as a result, financial losses.

I believe that all requirements for recording a deed should properly be designated in KRS Chapter 382 and that the majority erroneously relies upon KRS 100.277 to permit the clerk to deny the recording of a deed. A review of the index of Michie's Kentucky Revised Statutes finds no reference to KRS 100.277 under the subject matter of recordation of deeds. For those reasons, it is my belief that KRS 100.277 relating to planning and zoning commissions does not apply as a bar to the recording of a deed by a county clerk.

In this case, the deeds complied with the statutory requirements set forth by the legislature. Therefore, the clerk was mandated to record the deed. Any issue relative to the legal status of the property described in the deed is subject to interpretation by the planning and zoning commission and ultimately to judicial

interpretation. For example, other remedies available to the county and planning and zoning commission are direct litigation or the refusal to approve a building permit for any use of the property until such time as the property conforms to the rules and regulations of the county and its planning and zoning commission.

The ordinance which purports to alter the requirements for recording deeds and the corresponding ministerial duty upon the county clerk to record deeds is contrary to the dictates of the legislature and, therefore, unlawful.

BRIEF FOR APPELLANTS/CROSS-APPELLEES CAMPBELL COUNTY FISCAL COURT; STEPHEN PENDERY, JUDGE EXECUTIVE; DAVID OTTO, CAMPBELL COUNTY COMMISSIONER; MARK HAYDEN, CAMPBELL COUNTY COMMISSIONER; KENNETH RECHTIN, CAMPBELL COUNTY COMMISSIONER; PETER J. KLEAR, CAMPBELL COUNTY PLANNING AND ZONING COMMISSION DIRECTOR;
AND THE CAMPBELL COUNTY PLANNING AND ZONING COMMISSION AND/OR REVIEW BOARD:

Jeffrey C. Mando
Covington, Kentucky

BRIEF FOR CROSS-APPELLEE JACK SNODGRASS, CAMPBELL COUNTY CLERK:

Michael P. Cussen
Cincinnati, Ohio

BRIEF FOR APPELLEES/CROSS-APPELLANTS:

Robert E. Blau
Cold Spring, Kentucky