RENDERED: NOVEMBER 16, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001015-MR

STEVE BROOKS AND SALLY BROOKS; STEVE AND DIANA HAROLD; PAUL GLEASON; EDWART JUTT; SHERYL BETZ; JOE AND JULIE MUDD; MICHAEL AND LISA BUSICK; ALAN AND MARLENE PARDEE; LYNN BOYD; TOM AND MELISSA STEINBOCK; RICHARD AND JANE KAEBLER; RAE ANN ROLEY; PATRICIA STAUGAS; LAWRENCE AND BARBARA MILNAC; JOHN AND BONNIE SWAIN; AND WAYNE AND ROSALYN JENKINS — APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NOS. 08-CI-00797, 10-CI-01192, AND 11-CI-00047

OLDHAM COUNTY PLANNING COMMISSION; KEVIN JEFFRIES, CHAIRPERSON, OLDHAM COUNTY PLANNING COMMISSION; OLDHAM FARMS DEVELOPMENT, LLC.;

COMMISSIONER KEVIN JEFFRIES, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; COMMISSIONER GREG KING, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; COMMISSIONER PAUL CULBERTSON, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; COMMISSIONER JAN HORTON, IN HER OFFICIAL AND INDIVIDUAL CAPACITY; COMMISSIONER DENIA CROSBY, IN HER OFFICIAL AND INDIVIDUAL CAPACITY; COMMISSIONER JOE MCINTYRE, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; COMMISSIONER BOB KLINGENFUS, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; COMMISSIONER JOE MCWILLIAMS, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; COMMISSIONER W.F. POTTS, JR., IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; OLDHAM COUNTY FISCAL COURT; DUANE MURNER, JUDGE EXECUTIVE OF OLDHAM COUNTY FISCAL COURT; OLDHAM COUNTY ENGINEER; BETH STUBER, OLDHAM COUNTY ENGINEER; OLDHAM COUNTY PLANNING AND DEVELOPMENT SERVICES; BRIAN DAVIS, DIRECTOR, OLDHAM COUNTY PLANNING AND DEVELOPMENT SERVICES; CITY OF CRESTWOOD, KENTUCKY; DENNIS DEIBEL, MAYOR OF THE CITY OF CRESTWOOD, KENTUCKY APPELLEES

AND

NO. 2011-CA-001579-MR

OLDHAM FARMS
DEVELOPMENT, LLC; APPELLANT

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NOS. 08-CI-00707, 10-CI-01192, AND 11-CI-00047

SHERYL BETZ; LYNN BOYD;
SALLY BROOKS; STEVE BROOKS;
LISA BUSICK; MICHAEL BUSICK;
PAUL GLEASON; DIANA HAROLD;
STEVE HAROLD; ROSALYN JENKINS;
WAYNE JENKINS; EDWARD JUTT;
JANE KAEBLER; RICHARD KAEBLER;
BARBARA MILNAC; LAWRENCE
MILNAC; JOE MUDD; JULIE MUDD;
ALAN PARDEE; MARLENE PARDEE;
RAE ANN ROLEY; PATRICIA STAUGAS;
MELISSA STEINBOCK; TOM STEINBOCK;
BONNIE SWAIN; AND JOHN SWAIN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The parties appeal from two decisions by the trial court regarding their litigation involving a proposed subdivision development in Oldham County. First, the Appellants in appeal 2011-CA-001015-MR (hereinafter "Brooks

Appellants") appealed from the trial court's grant of summary judgment in favor of Appellees (hereinafter "Oldham Farms Appellees"); second, the Oldham Farms Appellees appeal from the trial court's denial of their motion to require Brooks Appellants to post a supersedeas bond pending appeal when Brooks Appellants did not seek to stay enforcement of the judgment. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm the trial court's grant of summary judgment to Oldham Farms Appellees and we affirm the trial court's denial of Oldham Farms Appellees' motion to require the Brooks Appellants to post a supersedeas bond *sub judice.*

These actions stem from the decisions of the Oldham County Planning Commission (hereinafter the "Commission") regarding the proposed Brentwood subdivision. On June 24, 2008, the Commission denied the application for the Brentwood subdivision. No variances or waivers were requested with the application. The property is described as 247.8 acres located at the northern terminus of Clore Lane and the western terminus of Spring Hill Trace in Crestwood, Oldham County, Kentucky. Oldham Farms Development (hereinafter "Oldham Farms") proposed subdividing the property into 345 single-family residential lots. After a public hearing, the Commission voted on the motion to approve the application and said motion failed on a vote of 5 to 7. Three motions to deny the application were made with the final motion to deny passing 8 to 4.

Oldham Farms then filed a Complaint and Appeal pursuant to Kentucky Revised Statutes (KRS) 100.347(2)[1] and alleged that "substantial and unrefuted evidence presented during the public hearing…demonstrated that the proposed subdivision complied with all applicable Oldham County zoning and subdivision regulations." Oldham Farms alleged the reason given in the final motion to deny the application was that the application did not meet the subdivision ordinances regarding road capacity, without proper citation to the ordinances violated.

Oldham Farms and the Commission then tendered an agreed order, entered July 29, 2008, remanding the matter back to the Commission with directions to approve the proposed subdivision plan and the agreed-to list of eleven conditions. These agreed-to conditions included, among other items, (1) a stipulation that the proposed plan complied with all applicable Oldham County zoning and subdivision regulations; (2) a plan to widen portions of Clore Lane to meet the subdivision regulations for a collector level road; and (3) payment of

[1] KRS 100.347 provides:

> Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall appeal from the final action to the Circuit Court of the county in which the property, which is the subject of the commission's action, lies. Such appeal shall be taken within thirty (30) days after such action. Such action shall not include the commission's recommendations made to other governmental bodies. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. Provided, however, any appeal of a planning commission action granting or denying a variance or conditional use permit authorized by KRS 100.203(5) shall be taken pursuant to this subsection. In such case, the thirty (30) day period for taking an appeal begins to run at the time the legislative body grants or denies the map amendment for the same development. The planning commission shall be a party in any such appeal filed in the Circuit Court.

$345,000 for the county to make improvements to KY-22 and the KY-329 bypass to handle the increased traffic.

The Commission then took up the application again in a special session held July 25, 2008. A vote was taken and the Brentwood application was approved according to the terms of the agreed order, reversing the Commission's original vote. The Brooks Appellants then filed a complaint and appeal of the decision in the trial court, known as the "Brooks Appeal." The Brooks Appeal alleged

violations of KRS 100.171,[2] KRS 61.810,[3] and sections of the subdivision regulations. Brooks Appellants also sought a declaration of rights that the Commission's approval of the plan without submission of a new plan exceeded the authority afforded it by §3.2 of the subdivision regulations.

---

[2] KRS 100.171 states:

> (1) A simple majority of the total membership of a planning commission as established by agreement shall constitute a quorum, except that a planning unit created pursuant to KRS 100.137 may specify in its planning agreement that five (5) members of the planning commission shall constitute a quorum. Any member of a planning commission who has any direct or indirect financial interest in the outcome of any question before the body shall disclose the nature of the interest and shall disqualify himself from voting on the question, and he shall not be counted for the purpose of a quorum. A simple majority vote of all members present where there is a properly constituted quorum shall be necessary to transact any business of the commission, except that a vote of a simple majority of the total membership shall be necessary for the adoption or amendment of the comprehensive plan.
>
> (2) A planning commission may appoint one (1) or more of its members to act as a hearing examiner or examiners to preside over a public hearing and make recommendations to the commission based upon a transcript of record of the hearing.

[3] KRS 61.810 states:

> (1) All meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times, except for the following:
>
> (a) Deliberations for decisions of the Kentucky Parole Board;
>
> (b) Deliberations on the future acquisition or sale of real property by a public agency, but only when publicity would be likely to affect the value of a specific piece of property to be acquired for public use or sold by a public agency;
>
> (c) Discussions of proposed or pending litigation against or on behalf of the public agency;
>
> (d) Grand and petit jury sessions;

On October 29, 2010, the trial court entered an order setting aside the Commission's approval of the Brentwood application and remanded the matter back to the Commission for further proceedings.[4] In this remand order, the court sustained the Commission's motion for partial summary judgment, finding under the Open Meetings Act that the Brooks Appellants had not followed the statutory

---

> (e) Collective bargaining negotiations between public employers and their employees or their representatives;
>
> (f) Discussions or hearings which might lead to the appointment, discipline, or dismissal of an individual employee, member, or student without restricting that employee's, member's, or student's right to a public hearing if requested. This exception shall not be interpreted to permit discussion of general personnel matters in secret;
>
> (g) Discussions between a public agency and a representative of a business entity and discussions concerning a specific proposal, if open discussions would jeopardize the siting, retention, expansion, or upgrading of the business;
>
> (h) State and local cabinet meetings and executive cabinet meetings;
>
> (i) Committees of the General Assembly other than standing committees;
>
> (j) Deliberations of judicial or quasi-judicial bodies regarding individual adjudications or appointments, at which neither the person involved, his representatives, nor any other individual not a member of the agency's governing body or staff is present, but not including any meetings of planning commissions, zoning commissions, or boards of adjustment;
>
> (k) Meetings which federal or state law specifically require to be conducted in privacy;
>
> (l) Meetings which the Constitution provides shall be held in secret; and
>
> (m) That portion of a meeting devoted to a discussion of a specific public record exempted from disclosure under KRS 61.878(1)(m). However, that portion of any public agency meeting shall not be closed to a member of the Kentucky General Assembly.

requirements for notice in KRS 61.846 that would entitle them to relief. However, the court found that the Brooks Appellants had suffered a violation of their due process rights and that proper legal notice had not been given of the July 25, 2008, "special meeting" as required by the Open Meetings Act.

> (2) Any series of less than quorum meetings, where the members attending one (1) or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding the requirements of subsection (1) of this section, shall be subject to the requirements of subsection (1) of this section. Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues.

[4] In so doing, the court further ruled on the pending motions before it, including the Commission's motion for partial summary judgment and motion for protective order to stay depositions, Brooks Appellants' motion for summary judgment, and the motion to release each commissioner from being individually liable. The court sustained in part the Commission's motion for partial summary judgment regarding Brooks Appellants' failure to comply with written notice requirements set forth in KRS 61.846; while the Brooks Appellants argued that the Commission violated the Open Meetings Act, they failed to request remedial action directly to the Commission prior to filing suit.

Next, Oldham Farms submitted a motion for summary judgment arguing that no violations of due process occurred and that the appeal of the Brentwood subdivision approval should be dismissed because there was no evidence to support Brooks Appellants' claims. The court disagreed. The court noted that in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964), the central question was whether the administrative agency acted arbitrarily. The court further concluded that the approval of the subdivision was not a "ministerial act"; nor may due process rights be waived. The court found that there was not proper notice resulting in a due process violation, and denied Oldham Farm's motion for summary judgment. The court declined to address Brooks Appellants' motion for summary judgment arguments, finding them to be moot in light of due process violation. Thus, the Commission's final approval of the Brentwood subdivision was set aside and the matter was remanded for further proceedings. Likewise, the Commission's motion for protective order was rendered moot by the court's decision. The Commission's motion to release the individual commission members from liability in their official capacities was granted since there was no evidence to suggest that the members were acting in bad faith, that there was an objectively reasonable belief that the actions were lawful, and that the possible threat of litigation did not taint the decision. The court also overruled the Brooks Appellants' motion to allow discovery on their 42 U.S.C. §1983 claim since the court could not find deliberate bad faith or intention to deprive plaintiffs of their civil rights and the remand of the case cured the claimed violation of due process.

On October 26, 2010, just days before the remand order of October 29, 2010, was entered, the Commission reviewed and approved a record plat submitted by Oldham Farms that is alleged to have dedicated a new roadway for use by the general public. An action appealing this approval was filed, known as the Boyd I Appeal. Thereafter, on December 14, 2010, the Commission met in regular session and approved the application as required by the agreed order entered in the original Oldham Farms appeal. Again, this matter was appealed, and known as the Boyd II Appeal.

The multiple appeals were consolidated and ruled upon in the court's June 8, 2011, order; the pending motions presented to the trial court then included a motion for reconsideration of the court's October 29, 2010, order; multiple summary judgment motions and a motion to dismiss; and the appeal of the December 14, 2010, application approval.

The court first addressed the motion to reconsider the court's October 29, 2010, order. The court noted that in the remand order, the merits of the agreed order were not addressed when it was remanded for further proceedings consistent with the notice requirements of KRS 61.810 and subdivision regulation §3.2. The court found that the remand order concluded that the decision of the Commission to ratify the agreed order was void, citing to KRS 61.848(5)[5]; moreover, the

[5] KRS 61.848(5) states:

> Any rule, resolution, regulation, ordinance, or other formal action of a public agency without substantial compliance with the requirements of KRS 61.810, 61.815, 61.820, and KRS 61.823 shall be voidable by a court of competent jurisdiction.

remand order was not a judgment on the validity of the agreed order between the parties but instead addressed the due process violation alone. Thus, the court was presented Brooks Appellants' request for a declaration of rights that the denial of the first plan makes it mandatory that Oldham Farms must submit a second plan. And, that the second plan be submitted according to the subdivision regulations and any approval thereof must, to be valid, also meet the procedural requirement of a public hearing. Brooks Appellants cite KRS 100.347 and subdivision §3.1 for their argument that the Commission acted in an arbitrary and capricious manner by not following these mandatory steps after the final decision to deny the plan. Brooks Appellants argued that failure to follow these procedural steps rendered any subsequent decision arbitrary, including the entered agreed order.

Oldham Farms argued that the Commission had the power to enter into the agreed order and that the decision to do so was not arbitrary or capricious, claiming that the approval of the Brentwood plan was a ministerial act which does not require any public participation, citing *Wolf Pen Preservation Ass'n, Inc. v. Louisville & Jefferson County Planning Com'n, Canfield-Knopf Properties, Inc.,* 942 S.W.2d 310, 311 (Ky.App. 1997). Oldham Farms cited to subdivision regulation §3.3 that any preliminary plat that complies with the substantive requirements of the subdivision regulations shall not require a public hearing. Additionally, Oldham Farms argued that it was not required to file any second plan and that the agreed order merely corrects an error by the Commission in rejecting its proposal. The court concluded that the public was indeed entitled to notice in

order to scrutinize the settlement; however, it also concluded that the Commission was not prohibited from settling an appeal by agreed order, given Kentucky's long-standing policy of favoring settlement. The court recognized that Brooks Appellants' burden of proof throughout the litigation was changed due to the entry of the agreed order and the subsequent approval of the plan. However, the court concluded that this should not act as a bar to settlement between the Commission and Oldham Farms.

The court next addressed Brooks Appellants' claim that the approval of the application was not ministerial because the plan violated numerous sections of the subdivision regulations and zoning ordinances. The crux of the allegation was that Clore Lane and Spring Hill Trace do not meet the definition for collector level roads; precluding the approval of the plan as a new subdivision with the average daily traffic flow of Brentwood must be connected to two collector level roads, citing subdivision regulation §5.3.C.(c). Brooks Appellants argued that at a minimum, Oldham Farms was required to seek a waiver of that requirement, citing subdivision regulation §9.1. The application was made without any requests for a variance or waiver of the subdivision regulations. Oldham Farms maintained that the residential street hierarchy in the subdivision regulations was only applicable to roads within the proposed subdivision plan; to find otherwise would preclude the development of any new subdivisions.

During the June 24, 2008, hearing at the Commission, Louise Allen, Administrator, explained that it was the Commission's interpretation that the 2008

version of the subdivision regulations mandated that the only factor to consider for roads serving new development was the pavement width, citing subdivision regulation §7.2D.(3). She stated that driveway spacing and grading included in residential street hierarchy in Article V are not factors for consideration with respect to existing roads. Allen noted that it would be impossible for the Commission to approve an application coming before it if it applied the factors in §5.3 to existing roads servicing the subdivision. Brooks Appellants argued that the regulations in Article V and VII must be read together. They further argued that interpreting the regulations as limiting the consideration factors to pavement width only for roads servicing subdivisions was erroneous.

Upon reviewing the two articles in question, the court concluded that the regulations were ambiguous with respect as to whether Article V applies only to roadways within a proposed subdivision and whether Article VII applies to other existing roadways located outside the development plan. The court further concluded that the Commission's interpretation was not unsupported or unreasonable in light of the language of Articles V and VII. Accordingly, the court agreed with the Commission that there was no requirement that existing streets be classified using the residential street hierarchy found in Article I of the subdivision regulations. Further, the court agreed with the Commission that the only consideration for existing roads was pavement width and mitigation could be considered if the roads did not meet capacity standards. In light of those requirements, the Commission concluded that Spring Hill Trace met the required

pavement width and that Clore Lane would meet the required pavement width with the proposed mitigation. The court in reviewing this found that the Commission did not act in an arbitrary manner.

Thereafter, the court reiterated that the parties had the authority to enter into a settlement in the agreed order and that Oldham Farms was entitled to rely upon the entry of said order. However, the court disagreed with Oldham Farms that no further due process was required prior to approving the plan because this error was corrected upon remand.

The court ultimately granted Oldham Farms' motion to alter, amend, or vacate, to reflect the findings set forth in the June 8, 2011, order and granted Oldham Farms' motion for summary judgment in the Brooks appeal because Oldham Farms was entitled to rely on the agreed order entered by the court and the Commission's stipulation that the plan meets all applicable subdivision regulations was supported by substantial evidence and was not arbitrary. The court found that the December 14, 2010, decision to ratify the agreed order did nothing to change the terms of the agreed order and was a necessary procedural step to confirm with the court's remand order. It is from this detailed order that Brooks Appellants now appeal.

At the outset, we note that the applicable standard of review on appeal of a summary judgment is, "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.

1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest,supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001).

Concerning judicial review of an administrative action, the court in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission,* 379 S.W.2d 450 (Ky. 1964) held:

> Basically, judicial review of administrative action is concerned with the question of arbitrariness….The above three grounds of judicial review, (1) action in excess of granted powers, (2) lack of procedural due process, and (3) lack of substantial evidentiary support, effectually delineate its necessary and permissible scope….In the final analysis all of these issues may be reduced to the ultimate question of whether the action taken by the administrative agency was arbitrary.

American Beauty Homes Corp. at 456-57 (internal citations omitted).

With this in mind we turn to the parties' arguments.

In the first appeal presented by the parties, Brooks Appellants argue: (1) the Brentwood plan violates ordinances and regulations, therefore, the plan cannot be approved as a matter of law; (2) the Brentwood plan had been finally denied by the commission; therefore, it could not be reapproved; (3) the trial court erred when it refused to permit discovery and dismissed Brooks Appellants' claims pursuant to 42 US §1983; and (4) the road plat is void.

Appellees Oldham Farms Development[6] argue: (1) because the preliminary plan satisfies all planning regulations, the law requires approval; (2) the commission's decision at the July 25, 2008, special meeting was in no way arbitrary; (3) the commission had the authority to settle and approve the Oldham

[6] Appellee, the City of Crestwood, also adopts the arguments set forth by Appellees Oldham Farms Development. In addition, the City of Crestwood reiterates that the claims against it involving the acceptance of the connector road were rendered moot, as the trial court found when it concluded that the commission had the power to enter into the agreed order with Oldham Farms and that the parties were bound by it. We believe that this argument is more properly considered with our discussion concerning whether the road plat is void *infra.*

farms plan; (4) no new plan was required; (5) no due process violation occurred;[7] (6) the agreed order was valid; and (7) the road plat was valid.

Appellees Oldham County Fiscal Court, Beth Stuber, and Brian Davis, additionally argue, (1) the planning commission did not exceed its authority by approving the Brentwood plan by way of agreed order; (2) the approval of the Brentwood plan was supported by substantial evidence that the plan fully complies with all relevant ordinances and regulations; (3) the Brentwood plan was not finally denied precluding approval of same; (4) the road plat dedicating the Springhill Trace Connector is not void.

Appellees[8] Kevin Jeffries, Joyce Albertsen, Denia Crosby, Jan Horton, Greg King, Robert Klingenfus, Joseph McIntyre, W.F.Potts, Jr., Paul Culberson, and Joseph McWilliams, in their individual capacities, additionally argue that the trial court did not abuse its discretion when it refused to permit discovery on the issue of the commission members' subjective intent.

We believe these numerous arguments to be properly re-characterized as four issues, namely: (1) whether the Commission acted arbitrarily in concluding that the Brentwood plan did not violate multiple ordinances and regulations and in approving the plan; (2) whether the Commission's first denial of the Brentwood

[7] We agree with the trial court that any due process violation was sufficiently cured upon remand.

[8] Additionally, Appellees Oldham County Fiscal Court, Beth Stuber as County Engineer, Brian Davis (now James Urban) as Planning Director, Duane Murner (now David Voegele) as Judge Executive of Oldham County, and Oldham County Planning and Development Services argue that Brooks Appellants have waived their claims against these Appellees by failing to address same in their brief. We decline to address this argument based on our affirmance of the trial court.

plan resulted in a "final action," requiring a new plan to be submitted, instead of the agreed order settling the matter between Oldham Farms and the Commission and stipulating that the plan complied with the applicable regulations; (3) whether the trial court erred when it refused to permit discovery and dismissed Brooks Appellants' claims pursuant to 42 US §1983; and (4) whether the road plat is void. With these issues in mind we turn to the first issue raised by the parties: whether the Commission acted arbitrarily in concluding that the Brentwood plan did not violate multiple ordinances and regulations and subsequently approved the plan.

First, the Brooks Appellants argue that the Brentwood plan violates multiple ordinances and regulations; therefore, the plan cannot be approved as a matter of law since the Commission acted arbitrarily in approving it. The Oldham Farms Appellees disagree and assert that the plan did not violate any ordinance or regulation. We note that "the approval of subdivision plats is a ministerial act." *Snyder v. Owensboro*, 528 S.W.2d 663, 664 (Ky. 1975). The *Snyder* court explained:

> Our statute, KRS 100.281, specifies requirements for the contents of subdivision regulations. The statute plainly contemplates that specific standards shall be set forth, rather than mere broad generalizations with regard to health, safety, morals and general welfare, or the use of such flexible terms as 'most advantageous development.'
>
> The proposition is generally accepted in other jurisdictions that a mere generalization of matters to be considered in approval of subdivision plats is not sufficient; there must be rules and regulations constituting specific standards to be applied in determining whether approval is to be granted…And the

> power of a planning board to approve or disapprove plats is limited by those rules and regulations….
>
> It follows, therefore, that the approval of subdivision plats is a ministerial act.

Snyder at 664 (internal citations omitted).

In *Commonwealth, ex rel. Stumbo v. Kentucky Public Service Com'n*, 243 S.W.3d 374, 380 (Ky.App. 2007), the court stated:

> The interpretation of a statute is a matter of law. *Commonwealth v. Garnett*, 8 S.W.3d 573, 575–6 (Ky.App.1999). However, while we ultimately review issues of law de novo, we afford deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing. *Board of Trustees of Judicial Form Retirement System v. Attorney General of Com*., 132 S.W.3d 770, 787 (Ky.2003); *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843–845, 104 S.Ct. 2778, 2782–2783, 81 L.Ed.2d 694 (1984) (If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute).

Stumbo at 380.

Oldham Farms Appellees argue that there was no evidence which came forth to show any noncompliance with the regulations; thus, there was substantial evidence to support the Commission's decision to approve the plan per the agreed order.

After our review of the parties' arguments we are in agreement with the trial court that the regulations were ambiguous with respect to the specific issues of whether Article V applies only to roadways within a proposed subdivision and whether Article VII applies to other existing roadways located

outside the development plan. Thus, the question for the court became whether the agency's position is based on a permissible construction of the regulation, bearing in mind that we afford deference to the agency's interpretation of the regulations it is charged with implementing. *See Stumbo* at 380.

We likewise agree with the trial court that the Commission's interpretation was reasonable in light of the language of Articles V and VII; as a result there was no requirement that existing streets be classified using the residential street hierarchy found in Article I of the subdivision regulations. Further, we find reasonable the Commission's interpretation of the regulations which allowed the mitigation offered by the Oldham Farms Appellees to bring the existing roads into compliance with the road capacity standards.

In light of those requirements, the Commission concluded that Spring Hill Trace met the required pavement width and that Clore Lane would meet the required pavement width with the proposed mitigation. *See Snyder* at 664. Thus, we agree with the trial court that the Commission did not act in an arbitrary manner. Finding no error we are compelled to affirm the trial court's grant of summary judgment on this ground.

We now turn to the second issue raised by the parties, whether the Commission's first denial of the Brentwood plan resulted in a "final action," requiring a new plan to be submitted, instead of the agreed order settling the matter between Oldham Farms and the Commission and stipulating that the plan complied with the applicable regulations.

In support of their argument that the Brentwood plan had been finally denied on June 24, 2008, by the Commission with its first decision on this matter, and thus could not be reapproved, the Brooks Appellants' rely on KRS 100.347(5), which states: "For purposes of this chapter, final action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body."

We agree with Brooks Appellants that the disapproval of the Brentwood plan on June 24, 2008, resulted in a final action, which then permitted Oldham Farms to appeal this matter to the circuit court per KRS 100.347(2). However, KRS 100.347 concerns the appeal from a final action and does not delve into the nuances of whether a new plan is required for approval. Brooks Appellants contend that there are no other ordinances or regulations that permit the Commission to simply return to the plan which had been previously denied in a final action, referring this Court to regulations 3.1 and 3.2 in support of their argument.

After carefully reviewing KRS 100.347 and regulations 3.1 and 3.2, we cannot agree with Brooks Appellants' interpretation. Simply stated, the statute and regulations do not forbid the Commission from revisiting a plan after circuit court action has been initiated. While regulation 3.2 requires a new application and a revised plat to be submitted upon disapproval of a plan, the regulation continues on, addressing an appeal to the circuit court and is silent in regards to submission of a new plan. We interpret such to mean that if one does not appeal

the disapproval of a plan, then by necessity a new application and plat must be submitted. However, if an appeal is taken to the circuit court, there is not a requirement for a new application to be submitted.

In addition, the Brooks Appellants argue that when the circuit court entered the agreed order, the validity of the Brentwood plan depended entirely on the validity of the second decision of the Commission because there was nothing in the first decision to support the Brentwood approval. Because the court found the second decision, at the special meeting, to be conducted in violation of Brooks Appellants' due process rights, this invalidated the approval. We believe the crux of this argument to be whether the court had the power to enter the agreed order set out by the parties, in which the Commission stipulated that all ordinances and regulations were followed in the Brentwood plan, necessitating approval of the application.

We agree with the trial court that, "It has long been recognized in this jurisdiction that the parties to a suit have the absolute right to settle their dispute at any time…" *Jones v. Conner*, 915 S.W.2d 756, 757 (Ky.App. 1996). Thus, we fail to see how the Commission and Oldham Farms were precluded from entering a settlement, resulting in the entry of an agreed order.

We now turn to the third issue raised by the parties, whether the trial court erred when it refused to permit discovery and dismissed Brooks Appellants' claims pursuant to 42 US §1983. Brooks Appellants contend that the subjective reasons behind the Commission's approval of the Brentwood plan, namely for the

individual member of the Commission to avoid being sued, bear on whether substantial evidence existed in the record to support said decision and whether the actions of the Commission were arbitrary and capricious, resulting in a violation of Brooks Appellants' due process rights. Moreover, Brooks Appellants argue that under *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006), they were entitled to discovery on the subjective intentions of the Commissioners because it would determine whether the Commissioners were protected by qualified official immunity. Oldham Farms Appellees argue that federal law on this matter is controlling given that the Brooks Appellants pursued a 42 U.S.C. §1983 action and that under federal law, their subjective intentions were irrelevant to their defense of qualified immunity. We agree with Oldham Farms Appellees that federal law is controlling on this issue.

In *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824 (Ky. 2004), the Kentucky Supreme Court was presented multiple immunity issues, including one asserted against a 42 U.S.C. §1983 action:

> *Howlett* states clearly that state treatment of sovereign immunity is not relevant to a determination of whether a party is immune from § 1983 liability because only federal jurisprudence is controlling on this issue.
>
> Accordingly, it is clear that " '[c]onduct by persons acting under color of state law which is wrongful under 42 USC § 1983 ... cannot be immunized by state law.'"

Peerce at 836.

The *Peerce* Court further discussed the appropriateness of an "objective legal reasonableness" test:

> United States Supreme Court precedent in § 1983 cases provides a complete defense for a government official performing discretionary functions so long as his or her actions were reasonably consistent with the rights allegedly violated. Conversely, if the official's actions violated a clearly established right or law, the immunity is lost and the official is liable for the violation. The test is one of "objective legal reasonableness":
>
> > The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent.
>
> When a claim of qualified immunity is asserted on the grounds that the alleged constitutional right violated was not firmly established, the *applicability of the qualified defense is a question of law to be decided prior to discovery*.

Peerce at 837 (emphasis added). *See also Crawford-El v. Britton*, 523 U.S. 574, 588, 118 S. Ct. 1584, 1592, 140 L. Ed. 2d 759 (1998) ("a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense.").

Thus, Oldham Farms Appellees are correct that the subjective intentions of the commissioners are irrelevant to a defense of qualified immunity under a federal

42 U.S.C. §1983 action. Accordingly, we find no error in the trial court's refusal to permit discovery.

Lastly, we turn to the fourth issued raised by the parties concerning whether the road plat is void. On October 26, 2010, the Commission held a public hearing in which it took up consideration of the road plat that ultimately led to the creation of the Springhill Trace Connector.[9] At this hearing, the Commission approved the road plat subject to the Brentwood plan and the Brentwood plan's conditions of approval. Brooks Appellants argue that the creation of Springhill Trace Connector

[9] Brooks Appellants state that Springhill Trace Connector is also allegedly a city road.

is controlled by either KRS 100.277[10] or KRS 82.400.[11] Brooks Appellants argue that the road was not approved per KRS 82.400 and, thus, the road is only valid if it satisfies KRS 100.277. Brooks Appellants assert that the Brentwood plan does not comply with the necessary ordinances and regulations, nor does the road itself comply with the ordinances and regulations and, thus, violates KRS 100.277(4),

[10] KRS 100.277 states:

> (1) All subdivision of land shall receive commission approval.
>
> (2) No person or his agent shall subdivide any land before securing the approval of the planning commission of a plat designating the areas to be subdivided, and no plat of a subdivision of land within the planning unit jurisdiction shall be recorded by the county clerk until the plat has been approved by the commission and the approval entered thereon in writing by the chairman, secretary, or other duly authorized officer of the commission.
>
> (3) No person owning land composing a subdivision, or his agent, shall transfer or sell any lot or parcel of land located within a subdivision by reference to, or by exhibition, or by any other use of a plat of such subdivision, before such plat has received final approval of the planning commission and has been recorded. Any such instrument of transfer or sale shall be void and shall not be subject to be recorded unless the subdivision plat subsequently receives final approval of the planning commission, but all rights of such purchaser to damages are hereby preserved. The description of such lot or parcel by metes and bounds in any instrument of transfer or other document used in the process of selling or transferring same shall not exempt the person attempting to transfer from penalties provided or deprive the purchaser of any rights or remedies he may otherwise have. Provided, however, any person, or his agent, may agree to sell any lot or parcel of land located within a subdivision by reference to an unapproved or unrecorded plat or by reference to a metes and bounds description of such lot and any such executory contract of sale or option to purchase may be recorded and shall be valid and enforceable so long as the subdivision of land contemplated therein is lawful and the subdivision plat subsequently receives final approval of the planning commission.
>
> (4) Any street or other public ground which has been dedicated shall be accepted for maintenance by the legislative body after it has received final plat approval by the planning commission. Any street that has been built in accordance with specific standards set forth in subdivision regulations or by ordinance shall be, by operation of law, automatically accepted for maintenance by a legislative body forty-five (45) days after inspection and

rendering the road void.

Assuming arguendo that the road did not comply with either KRS 100.277 or KRS 82.400, this still does not render the road "illegal," foreclosing the use of the road by the public. Instead, the road would be private, with the owner permitting the public to use said road. Brooks Appellants have not indicated to this

---

final approval.
(5) Any instrument of transfer, sale or contract that would otherwise have been void under this section and under any of its subsections previously, is deemed not to have been void, but merely not subject to be recorded unless the subdivision plat subsequently receives final approval of the planning commission. This subsection shall not apply to instruments of transactions affecting property in counties containing cities of the first class, in consolidated local governments created pursuant to KRS Chapter 67C, or in urban-counties created pursuant to KRS Chapter 67A.

[11] KRS 82.400 states:

> (1) If any person desires to offer for dedication by recorded plat any public way or easement within the jurisdictional limits of the city or a consolidated local government, he or she shall file with the legislative body of the city or a consolidated local government, a map or plat of the territory bounded, intersected, or immediately adjacent to the proposed public way or easement, showing the proposed name, nature, and dimensions of the public way or easement offered for dedication. If the legislative body of the city or a consolidated local government decides the proposed dedication would be beneficial to the public interest and suitable for the immediate or future acceptance of the city or consolidated local government, it shall approve the map or plat, and the mayor shall subscribe a certificate of approval on the map and acknowledge the execution thereof before any public officer authorized to take acknowledgments of deeds. The map or plat may then be recorded in the office of the county clerk.
>
> (2) Except as provided for by ordinance in a consolidated local government, in a city of the first class, or in a county containing a city of the first class, subdivision regulations which have been adopted as provided in KRS Chapter 100, and where streets or public ways as dedicated on the final subdivision plat have been constructed, inspected, and approved in accordance with the subdivision regulations, then the procedure for filing the map or plat with the legislative body of the consolidated local government, city, or county, as the case may be, as required in subsection (1) of this section shall be waived, and the dedicated street or public way shall automatically be deemed beneficial to the public interest and shall be, by operation of law, automatically accepted for maintenance by the consolidated local government, city, or county, respectively, forty-five (45) days after inspection and final approval, and shall be a public way for all purposes,

Court where such use is impermissible; accordingly, we decline to hold that the road be barred from public use.

In the second appeal presented by the parties, Appellees Oldham Farms Development appeal from the trial court's denial of their motion to require Brooks Appellants to post a supersedeas bond pending appeal when Brooks Appellants did not seek to stay enforcement of the judgment nor were the Brooks Appellants granted injunctive relief in the underlying matters.

KRS Chapter 83A, regarding a city's, county's, or consolidated local government's adoption of ordinances notwithstanding.

(3) When any property has been opened to the unrestricted use of the general public for five (5) consecutive years, it shall be conclusively presumed to have been dedicated to the city or consolidated local government as a public way or easement, subject to acceptance by the city or consolidated local government. The city or consolidated local government may, at any time after the expiration of five (5) years from the time the property is opened to the public, pass an ordinance declaring it so dedicated, and accepting the dedication, whereupon it shall be a public way or easement of the city or consolidated local government for all purposes. The lack of an actual dedication to the city or consolidated local government, or of a record title on the part of the city or consolidated local government, shall be no defense against the collection of any tax that may be levied against property abutting thereon for the payment of the cost of any improvement constructed thereon by order of the city or consolidated local government. Nothing herein shall be construed to require the expiration of five (5) years to raise a presumption of dedication in any case where, under any rule of law in force in this state, a dedication would be presumed in less than five (5) years. Provided, however, that property of a railroad company shall not be presumed to be dedicated as a public way or easement under this section or any other rule of law in force in this state unless the company consents to said dedication in writing.

(4) Any person who shall lodge for record in the county clerk's office, and any county clerk or deputy who shall receive for record or permit to be lodged for record, any plat, map, deed, or other instrument contrary to the provisions of this section, shall be fined not less than twenty-five dollars ($25) nor more than one hundred dollars ($100) for each offense.

On appeal, Oldham Farms argue (1) the civil rules require supersedeas bonds where the prevailing party suffers delay damages pending the losing party's appeal; and (2) the court's refusal to require a supersedeas bond essentially deprives Oldham Farms of its constitutional property rights. Brooks Appellants argue that the trial court ruled correctly because Brooks Appellants could not be compelled to post a supersedeas bond when Brooks Appellants have not sought to stay enforcement of the final judgment of the Oldham Circuit Court. With these arguments in mind we turn to the relevant jurisprudence.

At issue, CR 73.04, states in pertinent part: "Whenever an appellant entitled thereto desires a stay on appeal, as provided in Rule 62.03, he may present to the clerk or the court for approval an executed supersedeas bond with good and sufficient surety…."

In interpreting CR 73.04, the court in *Berryman* held: "Since petitioners have not sought to stay the execution of the judgment entered against them, they may not be required to post a supersedeas bond." *Berryman v. Ardery*, 398 S.W.2d 237, 238 (Ky. 1966). We see no reason to deviate from this longstanding elucidated jurisprudence. *Sub judice,* Brooks Appellants did not seek to stay enforcement of the final judgment. In light of *Berryman* and CR 73.04, the trial court correctly denied Oldham Farms' motion to require Brooks Appellants to post a supersedeas bond pending appeal.

Lastly, the Oldham Farms argue that the court's refusal to require a supersedeas bond essentially deprives Oldham Farms of its constitutional property

rights. Specifically, Oldham Farmsargue that failure to require a supersedeas bond renders their property unusable, resulting in an unconstitutional taking. We find such argument to be without merit. Simply stated, the government has not taken private property for public use. *See Commonwealth v. Kelley,* 314 Ky. 581, 584, 236 S.W.2d 695, 696-97 (1951) (discussing when a "taking" occurs, "where private property is taken for public use, or where there is a trespass thereon which amounts to such taking…"); *see also Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 193, 105 S. Ct. 3108, 3120, 87 L. Ed. 2d 126 (1985), citing the Fifth Amendment of the United States Constitution. Accordingly, we affirm because the trial court did not err in denying Oldham Farms' motion to require Brooks Appellants to post a supersedeas bond pending appeal.

In light of the forgoing, we hereby affirm the trial court's grant of summary judgment to Oldham Farms Appellees and the denial of Oldham Farms' motion to require Brooks Appellants to post a supersedeas bond pending appeal.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Michael F. Tigue
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Michael F. Tigue
Louisville, Kentucky

BRIEFS FOR APPELLEES:

Virgina Hamilton Snell
Lisa C. DeJaco
Louisville, Kentucky

ORAL ARGUMENT FOR OLDHAM FARMS DEVELOPMENT, LLC:

Lisa C. DeJaco
Virginia Hamilton Snell
Louisville, Kentucky

ORAL ARGUMENT FOR INDIVIUAL COMMISSION MEMBERS AND OLDHAM COUNTY ENTITIES:

Adam Fuller
Louisville, Kentucky

ORAL ARGUMENT FOR CITY OF CRESTWOOD:

Michelle Turner
Prospect, Kentucky