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NOT TO BE PUBLISHED

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

NO. 2011-CA-001738-MR

THE CITY OF INDIAN HILLS  
AND LEE CORY

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 10-CI-001537

LOUISVILLE METRO PLANNING  
COMMISSION; G. MURRAY TURNER;  
JANET TURNER; AND G. MURRAY  
TURNER, D/B/A TURNER-STOLL PROPERTY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: LAMBERT, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The City of Indian Hills (City Council) and Lee Cory appeal from a decision by the Jefferson Circuit Court affirming the administrative approval of a subdivision plan by the Louisville Metro Planning Commission. The

appellants claim the approval of the subdivision plan was arbitrary and violated their due process rights.

As background, we discuss the respective roles of the Planning Commission and the City within the Louisville Metro area, and the Planning Commission's method for approving subdivisions. Land usage within the City is partially controlled by the Planning Commission, which makes rulings on land development proposals throughout the Louisville Metro area, and partially controlled by the City. The Planning Commission can adopt subdivision regulations in accordance with KRS 100.273 and KRS 100.281. These regulations must conform to its comprehensive plan. Although the City can pass ordinances relating to land development, its ordinances must be consistent with statutes and the Planning Commission's subdivision regulations.

The Planning Commission or its delegate has the power to approve final subdivision plats. KRS 100.281(1). Approval of a subdivision plat is a ministerial act and, therefore, the Planning Commission or its delegate does not exercise any discretion. *Snyder v. Owensboro*, 528 S.W.2d 663, 664 (Ky.App. 1975). If there is compliance with relevant laws and regulations, a subdivision plat must be approved. *Id.* at 664-665; *Wolf Pen Preservation Ass'n, Inc. v. Louisville & Jefferson County Planning Commission*, 942 S.W.2d 310, 311-312 (Ky.App. 1997).

In the Louisville Metro area, the Planning Commission uses the Case Management System for Development Review (case management system) to

streamline the approval of subdivisions. Applications are assigned a case manager and can be approved at hearings before specified committees within the Planning Commission, or may proceed through a series of hearings before different committees with final approval or denial resting with the full Planning Commission.

In 2007, G. Murray Turner, Janet Turner and G. Murray Turner d/b/a Turner-Stoll Property (the Turners) sought to subdivide 10.1 acres of land into twelve residential building lots and two open space lots, to be known as the Poplar Hill Place Subdivision. The Turners submitted an application for a subdivision with a preliminary plan to the Planning Commission.

Case manager Julia Williams was assigned to oversee the proposed Poplar Hill Place Subdivision plan and submitted the proposal to be reviewed by various governmental subdivisions for compliance with their regulations. Revisions were made to the plan based upon various agency concerns.

Affected property owners received notice of the proposed Poplar Hill Place Subdivision and were invited to attend public meetings. Public comment was invited and the Planning Commission received numerous emails and letters opposing the subdivision proposal. The opposition included neighbors such as Cory, a non-practicing attorney, and the City Council, which passed a resolution opposing the project.

The Technical Review Committee (TRC) hearing was scheduled for August 7, 2007, and then rescheduled for May 6, 2008. At the TRC hearing,

additional compliance requirements were raised, including the project's need for a geotechnical report. Many in the opposition testified regarding potential problems with the plan, its failure to conform to the appearance of the neighborhood and desired changes. Unable to reach a consensus, the TRC made no findings and forwarded the proposal to the Land Development and Transportation Committee (LD&T) for a hearing.

The LD&T hearing was scheduled for May 22, 2008, and then rescheduled for December 19, 2009.<sup>1</sup> At the hearing, the LD&T reviewed a staff report concluding that the proposal satisfied the City's current Land Development Code (LDC), except for the request for a sidewalk waiver. Conflicting evidence was offered as to whether Poplar Hill Road was a public road, whether existing drainage plans and the size of a proposed retention basin were sufficient and whether erosion could be properly prevented. At the end of the meeting, the LD&T agreed to continue the hearing to the Planning Commission to discuss only the issues of drainage, steep slopes, erosion control and whether the road was public or private.

Following the LD&T meeting, Williams and the Planning Commission received numerous emails, letters and other contact from the opposition. On December 7, 2009, Charles C. Cash, Jr., the Planning

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<sup>1</sup> The delays in both the TRC and LD&T hearings resulted from the Planning Commission waiting for a determination at both the circuit court and appellate court levels as to whether the City's Ordinance 06-01, which prohibited all subdivision of land, was void for failing to comply with KRS Chapter 100. The circuit court determined that the ordinance was void and this decision was affirmed on appeal. *City of Indian Hills v. Metts*, 2008-CA-000891-MR, 2009 WL 3047548 (Ky.App. 2009) (unpublished).

Commission's Director of Planning and Design Services, sent an email to opposition members explaining the Planning Commission believed the subdivision plan complied with all applicable codes. However, Cash explained the opposition could urge the City to adopt the 2006 version of the LDC, which would provide additional limitations on developing environmentally sensitive areas.

On January 6, 2010, the City passed Ordinance 10-02 adopting certain sections of the LDC (2006), which included portions of chapters four, six, seven and ten.<sup>2</sup> The adopted portions of chapter four concerned development standards for sites containing inactive cemeteries, environmental constraints, steep slopes, waterways and wetlands, and karst, and a table on erosion prevention and sediment control. The adopted portion of chapter six was only part 6.3.4, which concerned the release or modification of private access easements. The adopted portions of chapter seven governed subdivision regulations. The adopted portions of chapter ten concerned tree canopy and landscaping. Ordinance 10-02 stated it was effective for all pending land use applications that had not received a full hearing before the Planning Commission.

Passage of the ordinance resulted in the delay of the scheduled hearing until January 21. During this delay, the Planning Commission staff advised the Turners of additional requirements under the LDC. The Turners promptly complied with these requirements and accordingly adjusted their proposed subdivision plan. The Planning Commission staff prepared a report

<sup>2</sup> References to the LDC from this point forward will be referring to the portions of the LDC (2006) adopted by the City through Ordinance 10-02.

opining the plan complied with the LDC. It indicated a sidewalk waiver was required to proceed with the plan and recommended the waiver be denied.

At the Planning Commission's January 21, 2010, public hearing on the Poplar Hill Place Subdivision proposal, the Turners again asked that the subdivision plan and sidewalk waiver be approved. The Planning Commission was provided with letters and emails opposing the proposal. Williams reported the project met the requirements for erosion and drainage and all government agencies stated the project was in compliance with their requirements. During this hearing, engineer Greg Eastham testified on behalf of the opposition that the drainage plan was inadequate, not designed to appropriate standards and likely to cause further flooding problems on Blakenbaker Lane. The opposition continued to question whether the proposal complied with the LDC.

After a closed business hearing, the Planning Commission scheduled another hearing for February 4, 2010, on the issue of whether Poplar Hill Road was a private or public road and counsel for both sides were invited to provide their positions on the status of the road. Attorneys for each side submitted detailed memos on this issue on January 28, 2010, which were made part of the record. The memo from the Turners' counsel included relevant documentary evidence from deeds on which the road was mentioned.

On February 2, 2010, the Turners' counsel sent an email to the Jefferson County Attorneys advising the Planning Commission staff, arguing the sidewalk waiver was unnecessary following the adoption of the LDC. By the

following day, two county attorneys specifically agreed with this analysis and forwarded their response to Williams. These emails were made a part of the record. Counsel for the opposition was not copied on the email to the county attorneys, but an email sent by opposition counsel to Turners' counsel indicated they knew and objected to this contact by February 4, 2010.

On February 4, 2010, the day of the hearing, Cory sent an email to Williams requesting certain binding elements be included in the subdivision plans. Williams forwarded this email to the Turners' counsel for a response. The Turners' counsel replied to Williams's email and stated he prepared a set of PowerPoint slides to present at the hearing to demonstrate Poplar Hill Road was a public road. Opposing counsel was not copied on this email.

At the hearing, the Planning Commission received the staff report, heard a summary from Williams, heard the Turners' PowerPoint presentation and testimony from the opponents. The staff report presented to the Planning Commission explained all the technical review issues had been addressed. It explained the Poplar Hill Place Subdivision proposal complied with requirements of the LDC: There were no graveyards, no unstable soils had been identified on the steep slopes, there were no waterways or wetlands found and a karst survey had been conducted and no karst features were found. The staff report opined the subdivision could properly be accessed from Poplar Hill Road. The report accepted Poplar Hill Road was a private road but explained the subdivision parcels had a right to access it. The report also explained the requirement of a sidewalk

waiver was removed after the Turners brought it to the staff's attention because the adopted portions of the LDC did not have a sidewalk requirement.

At the hearing, the opposition's counsel objected to the inclusion of the Turners' PowerPoint slides in the record, arguing the case management system provided for closure of the case file prior to the public meeting. After a vigorous discussion, the Planning Commission passed a resolution allowing all evidence to be considered. The presentation proceeded but, according to the appellants, the Planning Commission sustained the objections to two of the slides, which contained an affidavit from one of the Turners regarding the public status of the road. The remaining slides were derived from evidence in the case file as attachments to the Turners' January 28, 2010, memo.

The Turners' presentation provided evidence the subdivision could properly access Poplar Hill Road whether it was a public or private road. The Turners relied on language contained in various plats that Poplar Hill Road was a "right of way" and "dedicated" to support their contention the road was public.

Alternatively, the Turners argued even if the road was private, the subdivided properties had a right to use Poplar Hill Road because a 1968 rededication deed allowed all parcels to be subdivided and have access to the road.

Members of the opposition testified they believed the road was private. They testified the City did not maintain Poplar Hill Road and they collectively paid for maintenance of the road.



At a closed business session, the Planning Commission found the proposed Poplar Hill Place Subdivision met the requirements of the subdivision regulations and the LDC and determined the proposed subdivision had legal access to Poplar Hill Road. It then approved the subdivision plan subject to certain conditions.

The appellants filed an appeal pursuant to KRS 100.347(2) in the Jefferson Circuit Court alleging their due process rights were violated by the Planning Commission's approval of the subdivision plan. The court upheld the Planning Commission's decision, determining its decision was not arbitrary and the parties received appropriate due process. This appeal followed.

We review the administrative action of the Planning Commission for arbitrariness and can only reverse its decision if the Planning Commission acted beyond its statutory authority, failed to provide due process or made factual findings not supported by the evidence. *American Beauty Homes v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456-457 (Ky. 1964). "At its core, arbitrariness review is concerned primarily with the product of legislative or administrative action, and not with the motive or method which produced it." *Hilltop Basic Resources, Inc., v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (internal quotation and brackets omitted).

Agency decisions are considered reasonable and not arbitrary if they are supported by substantial evidence. *American Beauty Homes*, 379 S.W.2d at 456-457. We do not review commission decisions *de novo* and will not substitute

our judgment for that of a commission even if the facts could support alternative reasonable decisions. *Oldham Farms Development, LLC v. Oldham County Planning and Zoning Commission*, 233 S.W.3d 195, 196 (Ky.App. 2007).

We review questions of law *de novo*. *Keogh v. Woodford County Board of Adjustments*, 243 S.W.3d 369, 372 (Ky.App. 2007). However, when there is room for alternative interpretations, either because a statute is ambiguous or silent on an issue, we give deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing and will not conclude that its interpretation is unreasonable or unlawful. *Commonwealth, ex rel. Stumbo v. Kentucky Public Service Comm'n*, 243 S.W.3d 374, 380 (Ky.App. 2007).

The appellants' first argument is their due process rights were violated because the Planning Commission's approval resulted from *ex parte* contacts which were inappropriate because it was serving a quasi judicial function. The appellants claim two *ex parte* contacts occurred: (1) the email in which counsel for the Turners argued that the sidewalk waiver did not apply; and (2) the PowerPoint presentation on whether there was appropriate access to Poplar Hill Road.

The claim of inappropriate *ex parte* contacts resulting in a potential loss of impartiality of the deciding body is viewed differently if it occurs in an administrative context rather than in a court of law. In the administrative context, quasi adjudicatory determinations are governed by an informal concept of impartiality, which allows the merging of the investigatory and adjudicative roles.

*Hilltop Basic Resources, Inc.*, 180 S.W.3d at 468. “[T]he rule in Kentucky is that . . . *ex parte* contacts make administrative agencies’ decisions voidable, not void *per se.*” *Louisville Gas and Elec. Co. v. Commonwealth, ex rel. Cowan*, 862 S.W.2d 897, 900 (Ky.App. 1993).

If an improper *ex parte* contact has been made, it will void an agency decision where the decision was tainted so as to make it unfair either to the innocent party or to the public interest the agency is supposed to protect. The question of whether a decision has been tainted requires analysis of whether the improper contacts may have influenced the agency’s ultimate decision; whether the contacting party benefitted from the decision; whether the contents of the contact were disclosed; and whether vacation and remand would serve a useful purpose.

*Id.* at 901 (internal citation omitted).

When we apply this analysis to the email contact regarding the sidewalk waiver, it is evident this contact influenced the Planning Commission’s staff report and ultimate decision. It caused the Planning Commission to realize it had been applying the previous LDC to this matter, rather than the current LDC. Therefore, what had been a discretionary matter under the prior LDC, became a ministerial matter under the current LDC because no sidewalks were required. This change in the Planning Commission’s perception of what law applied resulted in a benefit to the Turners. However, we do not believe the Planning Commission’s decision should be vacated. The contents of the contact were disclosed and opposing counsel had the opportunity to respond but failed to do so. The appellants do not claim the law required a sidewalk waiver before the plan

could be approved. Remanding on this issue would serve no purpose because the ultimate result would remain the same.

The record does not support the appellants' claim that the PowerPoint presentation constituted *ex parte* contact. The appellants argue the Planning Commission received copies of the presentation prior to the hearing but do not reference any record support for this assertion. While an *ex parte* email by Turners' counsel referred to the presentation, the print-out of that email does not show the email had any attachments and the email also fails to state the PowerPoint presentation was attached. A written copy of the presentation in the record has a handwritten notation it was received at the hearing. We determine no *ex parte* contact occurred regarding the PowerPoint presentation. However, if such contact occurred, it would be harmless error because the evidence contained in the presentation was already part of the record.

The appellants' second argument is the Planning Commission's administrative process was flawed because the TRC failed to make factual findings and LD&T failed to resolve technical issues as required by the LDC and the Planning Commission's own rules. The appellants assert such a failure requires a new administrative proceeding. We disagree.

The process for approving proposed subdivisions is not as rigid as the appellants suggest. The Planning Commission is responsible for approving subdivisions, but can either exercise this authority directly or delegate it. KRS 100.277(2); KRS 100.282(1); *Snyder*, 528 S.W.2d at 644. The rules governing the

Planning Commission simply provide certain authorization to the TRC and LD&T to take enumerated actions, but do not require them to exercise such delegated power. Any decision ultimately rests with the Planning Commission. *See* LDC 7.2.20 (D) (2006); Bylaws, Louisville Metro Planning Commission, Article III (C), (E), (F) and (G) and Article VII §1(A)(1)(d) and §2(A)(4); Policies, Louisville Metro Planning Commission, 4.07.01; Case Management System for Developmental Review (2006).

The appellants' third argument is that the Planning Commission failed to close the case file prior to the February 4, 2010, public meeting as required by the case management system and, therefore, the evidence presented in the PowerPoint presentation at the public hearing should have been excluded. The appellants misinterpret both the scope and reach of the case management system.

The Planning Commission must follow its own policy that “[a]ll evidence should be presented at the public hearing. No new or additional evidence may be received into the record after the conclusion of the public hearing.” Policies, Louisville Metro Planning Commission, 7.11. It is not required to follow the case management system adopted by the Louisville Metro Planning and Design Services Department and not by the Planning Commission. To the extent these rules may conflict, the Planning Commission must follow its own policies. However, we do not see any true conflict.

The case management system states as follows:

**Case File Complete / Closed**

Prior to a public meeting, the case file will be closed. No additional materials should be added to the case file once this occurs. The purpose for this is to ensure that all interested parties have an opportunity to review the complete case file prior to the meeting. All materials that any interested party wishes to be included in a distribution to the committee, board or commission must be in the file and in the appropriate quantity (if not reproducible in a standard photocopy size).

The closing of the case file prior to a public hearing only governs the inclusion of evidence in the case file and does not prohibit new evidence from being presented at a public hearing. The purpose of closing the file is to allow everyone the opportunity to view and respond to material presented to the Planning Commission. If the material is presented at the hearing, other parties will have an opportunity to respond. Excluding any evidence not already in the case file from being presented at the hearing would defeat the purpose of having a public hearing. Additionally, the appellants had appropriate access to the evidence presented during the PowerPoint presentation, which was already available in the case file.

The appellants' fourth argument is the case management system deprived them of a meaningful opportunity to be heard because the public cannot provide comments until the staff has already decided a project is code compliant and submitted its report, resulting in the arbitrary approval of the subdivision plan. We disagree.

The Planning Commission is authorized to use its staff to conduct a preliminary investigation of an application and such use does not violate due process so long as the staff report produced from such investigation "is composed

of competent evidence, all interested parties are given an opportunity to study and respond to the report, and the party preparing the report is available for examination[.]” *Warren County Citizens for Managed Growth, Inc. v. Board of Commissioners of Bowling Green*, 207 S.W.3d 7, 18 (Ky.App. 2006). There is no due process requirement that staff consult with the public outside the invited public comment and hearing process prior to writing reports.

All evidence indicates the staff reports resulted from a proper investigation of the proposal. Additionally, the staff reports were repeatedly revised and adjusted based upon new information, revisions to the proposal and the passage of Ordinance 10-02. At each hearing, the current staff report was available to all parties, they had an opportunity to respond to it and Williams was available for examination. The opposition received all process due.

The appellants fail to provide any support for their implicit contention that the investigatory phase of subdivision approval must be dealt with in a purely adversarial manner. The appellants were given notice and an opportunity to be heard throughout the entire process and voiced their concerns with vigor.

The appellants’ final argument is the Planning Commission’s decision failed to satisfy the LDC’s standards for steep slopes and failed to release private access easements. We disagree.

There is nothing improper about addressing the steep slope requirements by requiring a geotechnical report for review prior to construction plan approval and submitting a plan for mitigation in accordance with the

geotechnical report. This provision addresses the LDC 4.7.5 requirement of minimum disturbance of steep slopes. The LDC does not mandate a reduction in the number of structures allowable under relevant zoning provisions in order to better protect steep slopes from disturbance.

We also defer to the Planning Commission's determination that the subdivision had appropriate access and interpretation that LDC 6.3.4 was inapplicable. The Planning Commission's decision that the subdivision had appropriate access was supported by substantial evidence. *Oldham Farms Development, LLC. v. Oldham County Planning and Zoning Commission*, 233 S.W.3d 195, 196 (Ky.App. 2007). While the Planning Commission did not specify if appropriate access existed because Poplar Hill Road was public or because the private access easement allowed access by subdivision properties, the appellants did not challenge the Planning Commission's failure to make a factual finding on the status of the road. Regardless of the exact basis of the Planning Commission's finding of access, there was substantial evidence to support access whether the road was public or private.

If the road was public, LDC 6.3.4, the provision requiring the release of private access easements would be inapplicable because no release of private easements would be required for a public road. *See City of Louisville v. Louisville Scrap Material Co., Inc.*, 932 S.W.2d 352, 356 (Ky. 1996) (determining evidence was sufficient to establish that a road had been dedicated as a public right of way because it had been used in an open and unrestricted manner by the public for at



least five years and formal acceptance of the dedication by the city was not required under KRS 82.400(3)).

If the road was private, the Planning Commission's interpretation that the LDC did not apply is entitled to deference. LDC 6.3.4(A) provides for the release of easements created by documents or plats approved by the Planning Commission before a private road can provide access to a subdivision. However, all evidence showed Poplar Hill Road was created prior to the existence of the Planning Commission. Therefore, the staff report's conclusion that no release was needed because the easement was specifically excluded from LDC 6.3.4 is a reasonable interpretation of the ordinance. Because LDC 6.3.4 did not apply, each parcel had access to the Poplar Hill Road based on the deed giving the original parcel access for itself and future subdivisions. Accordingly, approval of the plan was not arbitrary.

We determine due process was afforded the appellants at every stage of the administrative process. The appellants received the fair consideration required prior to the approval of a ministerial matter: "notice, a hearing, sufficient opportunity to present their case, cross-examine the opponents, and opportunity to rebut the opponents' arguments and findings of fact." *Houghham v. Lexington-Fayette Urban County Government*, 29, S.W.3d 370, 373 (Ky.App. 1999). No further process is due.

Accordingly, we affirm the Jefferson Circuit Court's decision upholding the Planning Commission's approval of the Poplar Hill Place Subdivision.

ALL CONCUR.

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