

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001214-MR

WILLIAM HUDSON AND
JUDY HUDSON

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 11-CI-00074

HARDIN COUNTY FISCAL COURT,
FORMERLY COMPRISED OF:
HON. HARRY L. BERRY, COUNTY JUDGE EXECUTIVE;
BILL BRANDENBURG, COUNTY COMMISSIONER, DISTRICT A;
GARRY KING, COUNTY COMMISSIONER, DISTRICT B;
BILL HAY, COUNTY COMMISSIONER, DISTRICT C;
AND HARDIN COUNTY FISCAL COURT,
CURRENTLY COMPRISED OF:
HON. HARRY L. BERRY, COUNTY JUDGE EXECUTIVE;
ROY EASTER, COUNTY MAGISTRATE, DISTRICT 1;
DOUG GOODMAN, COUNTY MAGISTRATE, DISTRICT 2;
LISA WILLIAMS, COUNTY MAGISTRATE, DISTRICT 3;
FRED CLEM, JR., COUNTY MAGISTRATE, DISTRICT 4;
BILL WISEMAN, COUNTY MAGISTRATE, DISTRICT 5;
E.G. THOMPSON, COUNTY MAGISTRATE, DISTRICT 6;
DWIGHT MORGAN, COUNTY MAGISTRATE, DISTRICT 7;
GARRY KING, COUNTY MAGISTRATE, DISTRICT 8;
JENNIFER OLDHAM, HARDIN COUNTY ATTORNEY;
AND HARDIN COUNTY PLANNING AND
DEVELOPMENT COMMISSION,

COMPRISED OF:
RICK BAUMGARDNER, CHAIRMAN;
BRENT GOODIN, VICE CHAIRMAN;
ROD GRUSY, SECRETARY;
WILLIAM BALL, MEMBER;
AND TEDDI J. EMBRY, MEMBER

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, KRAMER,¹ AND LAMBERT, JUDGES.

CAPERTON, JUDGE: William and Judy Hudson appeal the Hardin Circuit Court's findings of fact, conclusions of law, declaratory judgment, and order affirming the Hardin County Fiscal Court's approval of the Hardin County Planning and Zoning Commission's decision to impose an overlay zone on an area including the Hudson property, placing certain limitations on the use of that property. After a review of the parties' arguments, the record, and the applicable law, we reverse and remand for further proceedings.

This matter was presented for judicial review to the Hardin Circuit Court. The court entered its findings of fact, conclusions of law, declaratory judgment, and order on June 22, 2012, affirming the decision of the Hardin County Fiscal Court's approval of the Hardin County Planning and Zoning Commission's decision to impose an overlay zone as a part of the comprehensive plan generally.

¹ Judge Joy A. Kramer, formerly Judge Joy A. Moore.

In so doing, the court undertook a review of the procedural history of the case, which we shall briefly summarize.

The current comprehensive plan was adopted in 2008. Thereafter, an overlay zone was contemplated for development at interchanges along Interstate 65 which runs through Hardin County. The interchange area near the Glendale Industrial site appeared to be the first use of the overlay zone, although the zone may be applied to other interchange locations in Hardin County.

Before the public meeting was held on adoption of the overlay zone, an informal open house was provided to the public to provide information on the plans for the overlay zone. At the public hearing on September 21, 2010, testimony was taken under oath. At the Commission meeting on October 5, 2010, the overlay zone was passed by a unanimous vote of the commissioners present and findings of fact were approved.

Another public hearing was conducted before the fiscal court. Evidence was received and questions answered. On December 14, 2010, the fiscal court voted 3-1 to approve the action of the commission. At this December meeting the fiscal court also began the process for text amendments in response to some concerns about the setback lines of the overlay zone as originally enacted.

The commission held another public hearing on February 1, 2011. The amendments were explained with questions answered. At the public hearing on the amendments on February 22, 2011, the amendments were passed by a vote of 6-2 and the fiscal court approved the changes on March 8, 2011. The Hudsons

opposed the amendments and sought judicial review as their property was impacted by the amendments which placed certain limitations on the use of their property. In reviewing this matter, the court concluded that the Hudsons' had received procedural due process given the multiple public hearings on the matter and that their position had been clearly heard and considered. The court concluded that the overlay zone was not arbitrary, was reasonable, and was not enacted outside of the fiscal court's legislative powers. The court undertook an assessment of the facts contained in the commission's record and concluded that substantial evidence existed to support the commission and the fiscal court's finding that the overlay zone was consistent with the comprehensive plan as required by statute. It is from this that the Hudsons now appeal.

At the outset we note that Kentucky courts are clear that "judicial review of administrative action is concerned with the question of arbitrariness." *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). The specific grounds for judicial review are: 1) whether the action was in excess of granted powers; 2) whether procedural due process was afforded; and 3) whether the action was based on substantial evidentiary support. *Id.*

On appeal the Hudsons argue: (1) that no factual findings support this overlay zone; specifically, that the Commission failed to include adjudicative facts in its decision; (2) that their due process rights were violated; and (3) that their equal protection rights were violated.

In response, the Appellees argue: (1) the fiscal court's approval and establishment of the overlay zone that applied to the Hudson property was properly based upon adjudicative facts; (2) the Hudsons' due process claims must fail; and (3) the Hudsons' equal protection claim is factually inaccurate and meritless. With these arguments in mind we turn to the dispositive issue, whether there were sufficient adjudicative facts to support the decision to adopt the overlay zone.

Kentucky Revised Statutes (KRS) 100.213(1) requires:

Before any map amendment is granted, the planning commission or the legislative body or fiscal court must find that the map amendment is in agreement with the adopted comprehensive plan, or, in the absence of such a finding, that one (1) or more of the following apply and such finding shall be recorded in the minutes and records of the planning commission or the legislative body or fiscal court: (a) That the existing zoning classification given to the property is inappropriate and that the proposed zoning classification is appropriate; (b) That there have been major changes of an economic, physical, or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area.

Sub judice the commission properly found that the overlay zone complied with the comprehensive plan, as required by KRS 100.213(1). However, this ultimate finding had to be supported by adequate findings of adjudicative facts:

When a city legislative body makes a zoning change, it must make a finding of adjudicative facts necessary to support the change. These findings must be made from (and supported by) the evidence heard by the Planning Commission or from evidence heard by the city

legislative body if it elects to hold a separate trial-type hearing....The finding that the change sought is in conformance with the original zoning master plan is the finding of an ultimate fact. We held such a finding inadequate in *Caller v. Ison*, Ky., 508 S.W.2d 776 (1974).

Manley v. City of Maysville, 528 S.W.2d 726, 728 (Ky. 1975).

The difference between adjudicative and legislative facts was made clear by this Court:

“Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the question of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kinds of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.” 1 K. Davis Administrative Law Treatise, s 7.02, p. 413 (1958).

The enactment of a comprehensive plan is based upon a finding of legislative facts. A comprehensive plan has general application throughout the community and the facts to be considered do not relate as such to a particular individual or the status of his property. However, when determining whether to grant a zone map amendment, the legislative body must decide whether an individual because of his own particular factual situation is or is not entitled to some form of relief. In such cases, there must be a finding of adjudicative facts. *See City of Louisville v. McDonald, supra*, at 177-78. A legislative body is not governed by judicial standards in making findings of legislative facts. Therefore, findings of legislative facts cannot be a substitute for findings of adjudicative facts which due process requires be made in deciding a request for zone map amendment. *cf. Young v. Neale*, Ky., 457 S.W.2d 358 (1969).

McKinstry v. Wells, 548 S.W.2d 169, 173-74 (Ky. App. 1977).

Sub judice, the commission found that the overlay zone agreed with the comprehensive plan previously adopted in its October 5, 2010, resolution. This resolution then disjointedly lists goals and objectives but fails to explain how they are related or accomplished by the overlay zone. We believe that the resolution contains many legislative findings but little to no adjudicative findings as required by due process.² Accordingly, we must reverse and remand this matter to the circuit court for further proceedings. As such, we decline to address the remainder of the Appellants' arguments.

In light of the aforementioned, we reverse and remand this matter for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Dwight Preston
Elizabethtown, KY

BRIEF FOR APPELLEES:

R. Keith Bond
Elizabethtown, Kentucky

² The parties have not directed this Court to where in the record such findings were contained elsewhere in the record.