RENDERED: DECEMBER 5, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001168-MR

BARDSTOWN JUNCTION BAPTIST CHURCH, INC.; KENNETH EZELL; JIMMY TERRELL; JAMES FRANS; BARBARA HUDSPETH; PAT BAUERMEISTER; JAMES PHILLIPS; JANET PHILLIPS; DONALD ROBERTSON, SR.; JOHN FOWLER and GAIL COLLARD — APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 12-CI-00331

SHEPHERDSVILLE CITY COUNCIL, and its Members in Their Official Capacities only, to wit: BERNARD BROWN, DON CUNDIFF, CORKY MILLER, LARRY HATFIELD, FAITH PORTMAN, and ROB FLAHERTY; CITY OF SHEPHERDSVILLE, KENTUCKY; SCOTT ELLIS, MAYOR OF THE CITY OF SHEPHERDSVILLE, KENTUCKY; ZONETON DEVELOPERS, INC.; DEBRA ANN SHAW; and KAREN SULLIVAN, EXECUTRIX FOR THE ESTATE OF OMA LEE SHAW — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: MAZE, KRAMER,[1] AND THOMPSON, JUDGES.

KRAMER, JUDGE: The above-captioned appellants have filed this appeal to contest a judgment of the Bullitt Circuit Court affirming a decision of the Shepherdsville City Council to rezone various properties. Upon review, we reverse.

FACTUAL AND PROCEDURAL HISTORY

Three separate zoning map amendment applications, respectively docketed by the Bullitt County Joint Planning Commission as "2012Z-02," "2012Z-03," and "2012Z-04," are the focus of this matter. The first of these applications was filed by appellee Zoneton Developers, Inc.; the second was filed by appellee Debra Ann Shaw; and the third by Karen Sullivan, Executrix for the Estate of Oma Lee Shaw (collectively, the "applicant appellees"). By way of background, each application regarded property situated in a specific area of Bullitt County that had been annexed by the City of Shepherdsville and had been designated by the Bullitt County Comprehensive Plan as "Low Density Suburban Residential/Agricultural" and zoned "agricultural" ("AG").[2] Each application

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

[2] These respective parcels either adjoined or were located in close proximity to one another. The exact locations of these respective parcels were specified in the Shepherdsville City Council's ordinances that ultimately adopted the Planning Commission's recommendations. According to those ordinances, Zoneton's property consisted of "48 acres, more or less. The property is a tract of land located on the west side of S. Preston Highway (just south of Beech Grove Road) in the City of Shepherdsville." Shaw's property was "1.48 acres, more or less. The property is located

requested a change from "AG" to a limited form of "General Industrial" ("I-G").[3] Each application was considered in a January 12, 2012 hearing before the Bullitt County Joint Planning Commission. Each application was then recommended by the Planning Commission for the Shepherdsville City Council's approval; in support, the Planning Commission cited identical findings of fact and the same statutory authority. And, following an argument-only hearing of February 23, 2012, the Shepherdsville City Council ultimately decided to adopt the Planning Commission's findings of fact, accept the Planning Commission's recommendations, and approve each application.

The chief appellant[4] in this matter is Bardstown Junction Baptist Church, Inc., a Kentucky non-profit corporation whose property borders the property sought to be rezoned. Following the City Council's decision, it appealed by filing an original action in Bullitt Circuit Court. In sum, the Church argued that

---

at 5241 S. Preston Highway (just south of Beech Grove Road) in the City of Shepherdsville." The Estate's property consisted of "89 acres, more or less. The property is a tract of land located on the west side of S. Preston Highway (just south of Beech Grove Road) in the City of Shepherdsville."

[3] Although a change to "I-G" would have permitted a wide variety of uses for the subject property, each applicant agreed to restrict the use of their respective properties to those listed in Section 5.802(1), (9), (12), and (45) of the Bullitt County Zoning Regulations. This set of limitations, as one of the commissioners at the January 12, 2012 Planning Commission hearing explained, would have restricted these properties to "Any use that's in light industrial, automotive, tractor-trailer, farm implements, assembly or manufacture, lower shop, machine shops, structure, steel fabricating shop, and wire rod, drawing nuts, screws, and bolt manufacturing. So basically, it's a manufacturing and anything in light industrial."

[4] The additional appellants captioned in this appeal claim an interest in this controversy solely by virtue of being members of Bardstown Junction Baptist Church. We will not address whether they have or should have standing as parties in this appeal because that issue has not been raised, and this court is not authorized to raise the issue of standing *sua sponte*. *See Harrison v. Leach*, 323 S.W.3d 702, 706 (Ky. 2010).

the City Council's decision to rezone warranted reversal because (1) during the January 12, 2012 hearing before the Planning Commission, the Planning Commission had denied it an opportunity to cross-examine witnesses and rebut evidence offered by Zoneton, Shaw, and the Estate; and (2) the City Council had failed to support its ultimate decisions to grant Zoneton's, Shaw's, and the Estate's applications with adequate findings of fact and substantial evidence. These arguments were rejected by the Bullitt Circuit Court and are now the focus of this appeal. We will discuss additional details relating to the Church's claims as they become relevant over the course of our analysis.

STANDARD OF REVIEW

This appeal concerns the administrative action of an agency. Judicial review of administrative action is concerned with whether the agency action was arbitrary. *Bd. of Comm'rs v. Davis*, 238 S.W.3d 132, 135 (Ky. App. 2007). State agencies may not exercise arbitrary power over the lives, liberty and property of citizens of the Commonwealth. Kentucky Constitution Section 2. Arbitrariness may arise when an agency: (1) takes an action in excess of granted powers, (2) fails to afford a party procedural due process, or (3) makes a determination not supported by substantial evidence. *Hilltop Basic Res., Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005). A reviewing court defers to an agency's factual findings that are supported by substantial evidence, and assesses whether the agency correctly applied the law under a *de novo* standard of review. *Davis*, 238 S.W.3d at 135.

ANALYSIS

We begin by addressing two procedural issues. First, both sets of appellees (*i.e.*, the Shepherdsville City Council and the applicants) assert that this appeal should be dismissed because, as they argue, the Church failed to join an indispensible party (*i.e.*, the Planning Commission). This argument is without merit, however. The Planning Commission merely functioned as a recommending body at the administrative level, whereas the Shepherdsville City Council was the legislative entity that took the final action that is the subject of this appeal. As such, the Shepherdsville City Council was the only administrative entity required by statute to be joined as a party-appellee in the Church's action before the circuit court or in any subsequent appeal. *See* Kentucky Revised Statutes (KRS) 100.347(2) and (3); *see also Board of Com'rs of City of Danville v. Davis*, 238 S.W.3d 132, 138 (Ky. App. 2007).

Second, both sets of appellees have tendered briefs that omit any citation in support of their various arguments to evidence introduced or proceedings that occurred before the Planning Commission.[5] Because the evidence introduced, considered, and relied upon by the City Council in this matter could only have been introduced before the Planning Commission,[6] and because the City

[5] To the extent that the City Council's brief attempts to do so in support of any particular argument, it chiefly cites an unverified spreadsheet, written by persons unknown and dated "01/24/2012" (thus, twelve days *after* the Planning Commission's January 12, 2012 hearing), purporting to detail "Utility Infrastructure Improvements since 1997" in the area of the applied-for zoning change.

[6] Because the City Council elected to hold an arguments-only hearing after the Planning Commission's hearing, rather than a trial-type hearing, it was not authorized to consider any evidence not introduced before the Planning Commission. *See Resource Dev. Corp. v. Campbell*

Council adopted the Planning Commission's recommendations without further comment, citation to the Planning Commission's record—and particularly to any substantial evidence in the Planning Commisson's record supporting the City Council's decision—was of critical import. In light of this violation of Kentucky Rules of Civil Procedure (CR) 76.12(4)(d)(iv),[7] the Church has pointed out that this Court is authorized to impose sanctions which could include striking the appellees' briefs and reversing the circuit court without considering the merits of this case. *See* CR 76.12(8). While we do not condone or encourage such lax attention to CR 76.12, we have elected to ignore these violations; as discussed below, a cursory review of the record amply supports reversing the circuit court on the merits.

With that said, the starting point of our substantive analysis is the Planning Commission's written recommendations for the City Council to approve Zoneton's, Shaw's, and the Estate's applications. As noted, the City Council adopted these recommendations verbatim and, therefore, the City Council's final action must rise or fall with them. These recommendations differed, inasmuch as the property descriptions and the identification of owners were concerned, but each recited the following:

County Fiscal Court, 543 S.W.2d 225, 228 (Ky. 1976).

[7] CR 76.12(4)(d)(iv) requires an appellee brief to put forth "An 'ARGUMENT' conforming to the appellee's Statement of Points and Authorities and to the requirements of paragraph (4)(c)(v) of [CR 76.12] with reference to record-references and citations of authority." In turn, CR 76.12(4)(c)(v) requires, in relevant part, "An 'ARGUMENT' conforming to the statement of Points and Authorities, *with ample supportive references to the record* . . . ." (Emphasis added.)

The Bullitt County Planning Commission pursuant to the provisions of KRS 100.211(1) held a public hearing concerning said application on **January 12, 2012**.

Based upon the testimony of the Applicant(s) and/or Proponents, the Bullitt County Planning Commission finds:

___ The existing zoning classification given to this property is inappropriate and the requested zoning classification is more appropriate because of the following:

_**X**_ There have been major economic, physical, and/or social changes within the area of the requested zoning changes which were not anticipated in the adopted comprehensive plan which have substantially altered the basic character of the area around this requested zoning change. **The property is in close proximity to Interstate 65, it could be serviced by rail, there are other properties within a one mile radius have [sic] been rezoned to I-L Light Industrial and B-1 Commercial, and there are utilities such as a 16" water line, sewers, gas and electric which are now available to the site and the expansion of the 245 corridor. Also referenced under Goals and Objectives of Commercial and Industrial Land Use was XIV(F) of the Comprehensive Plan.**

___ The requested zoning change is in agreement with the adopted Comprehensive Plan.

_**X**_ The opponents objected to the proposed zoning change on the following basis: **Added traffic to the area, potential flooding of surrounding properties and they did not feel there had been a significant change in the area to warrant a zoning change**.

Because of the testimony received at the public hearing as summarized herein, the Bullitt County Planning Commission recommends this requested zoning change be: **Approved with the following restrictions: a 15' dedicated easement to the Kentucky State Highway**

Department along the applicants property on S. Preston Highway and Beech Grove Road for future road expansion. The applicants also agreed that they would restrict the uses of the property to those listed in Section 5.802(1)(9)(12) and (45) of the Bullitt County Zoning Regulations.

The Planning Commission's recommendations were apparently written on a document template; the Planning Commission delineated what it added to the template through use of boldface and underlines. Also apparent is that the template used by the Planning Commission was designed to address the requirements of KRS 100.211(1) and KRS 100.213. The former required the Planning Commission to

> hold at least one (1) public hearing after notice as required by this chapter and make findings of fact and a recommendation of approval or disapproval of the proposed map amendment to the various legislative bodies or fiscal courts involved. The findings of fact and recommendation shall include a summary of the evidence and testimony presented by the proponents and opponents of the proposed amendment. . . .

The latter statute, KRS 100.213, required the Planning Commission's findings of fact to concentrate on the following points:

> (1) 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 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. . . .

In any event, the Planning Commission related the extent of its findings and legal reasoning through these recommendations. *See Dance v. Board of Education of City of Middlesboro*, 296 Ky. 67, 176 S.W.2d 90, 91 (1943) ("There can be no doubt as to the correctness of the rule that a municipal corporation can speak only through its records."). And, these recommendations clearly indicate the Planning Commission's findings were as follows: (1) Zoneton's, Shaw's, and the Estate's requested zoning change was not in agreement with the adopted Comprehensive Plan; (2) the existing zoning classification given to the property was not inappropriate; but (3) 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 the area. Accordingly, the only statutory justification cited by the Planning Commission in support of amending the zoning map was KRS 100.213(1)(b).

Next, we review the "summary of the evidence and testimony presented by the proponents and opponents of the proposed amendment," which these recommendations were required to provide per KRS 100.211(1).

As it relates to what the "opponents" (*e.g.*, the Church) presented, the Planning Commission's recommendations acknowledge arguments were made concerning "Added traffic to the area, potential flooding of surrounding properties," and lack of "a significant change in the area to warrant a zoning change." We would also add that the specifics of the Church's arguments relating to traffic and drainage were as follows: (1) added traffic in the region, due to the proposed development of the properties, would be more than twice the level projected by Zoneton, Shaw, and the Estate, and would, among other things, necessitate a condemnation of a substantial portion of the Church's property to allow for widening of roads; and (2) rezoning would result in greater instances of flooding, particularly in the area of the Church, because the properties were situated in a floodplain and the proposed development that was the subject of the rezoning planned to cover much of the properties with impermeable surface area.

To be clear, Kentucky precedent required the Planning Commission to consider traffic and drainage issues before it could properly recommend approval of a zoning map amendment to a legislative body (*e.g.*, the Shepherdsville City Council). *See 21st Century Development Co., LLC v. Watts*, 958 S.W.2d 25, 27-28 (Ky. App. 1997); *Davis*, 238 S.W.3d at 138. However, the Planning Commission's recommendations state nothing beyond an acknowledgment that arguments regarding traffic and drainage issues were made. Indeed, the record stands contrary to the notions that the Planning Commission properly considered any

evidence with respect to these issues, or that it believed addressing these issues was necessary for the purpose of its recommendations. For example:

- A 2011 proposal booklet from Red Rock Developments was presumably introduced before the Planning Commission. Red Rock was the prospective buyer of the properties at issue in this matter if the zoning amendment was approved. On page 8, the proposal states:

> **Red Rock has submitted all of the information required for a Zoning Map Amendment Application (which is the only action being sought at the present). Detailed site plans, storm drainage calculations, traffic calculations, identification of the ultimate tenant, etc. are not relevant to the rezoning process and should not be a factor in determining the appropriateness of the proposed zoning as the Bullitt County Attorney stated several times.**

- The transcript of the Planning Commission's hearing reflects that the attorney representing Zoneton's, Shaw's, and the Estate's attorney, as well as witnesses introduced by these appellees, represented to the Planning Commission throughout the January 12, 2012 hearing that traffic and drainage issues were not necessary considerations in zoning map amendment determinations;[8] and

[8] By way of illustration, on pages 136-137, one of Zoneton's, Shaw's, and the Estate's witnesses (identified only as "Mr. Barker," and introduced by these appellees in response to the Church's arguments before the Planning Commission relating to traffic and drainage) stated: "As we started this process six months ago, there were two major concerns. It was water and there's traffic. And as we all know, when we rezone a piece of property, whether it's here or really anywhere for that matter, traffic and water and site plan review is [sic] not technically part of the zoning. You get to zone it, and then you do that later."

- During the January 12, 2012 hearing, an assistant Bullitt County attorney was charged with advising the Planning Commission of the applicable law and procedure. While the transcript reflects that the assistant county attorney advised the Planning Commission on various points of law and procedure throughout the hearing, it also reflects that the assistant county attorney said nothing in response to the appellees' assertions that traffic and drainage issues had no bearing upon zoning map amendment determinations.

Other errors occurred during the administrative proceedings that were conducted in this matter.[9] For the sake of brevity, however, we will only focus the

[9] For example, from a review of the transcript of the January 12, 2012 hearing, it appears that the format the Planning Commission chose for its hearing limited both sides to an arbitrary 30-minute time limit irrespective of the issues presented; it prohibited both sides from cross-examining witnesses; it required all questions asked of any witness to be asked through the Planning Commission; and, it prohibited the introduction of rebuttal evidence.

To be clear, the Kentucky Supreme Court has explained that parties in these types of administrative hearings have a right to a "trial-type" hearing; that is, they have the right to demonstrate the incompleteness, untruth, partiality or any other weakness or defect in the testimony of a witness through full rebuttal and the opportunity to impeach witnesses through cross examination. *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591-92 (Ky. 1982). A hearing which precludes these rights, and merely affords parties with an "opportunity to present their side of the question," *id*. at 591, violates due process. Moreover, to paraphrase *Yates v. Commonwealth*, 430 S.W.3d 883, 901 (Ky. 2014), judges and other tribunals only have discretion to regulate cross-examination by setting appropriate boundaries that allow parties to develop a reasonably complete picture of a witness's veracity, bias and motivation.

Here, the Planning Commission denied the parties a right of cross-examination and full rebuttal, contrary to Kentucky law. The Planning Commission's imposition of arbitrary time limitations on cross-examination, irrespective of the complexity of the issue presented, was not an appropriate limitation. Furthermore, in the words of another tribunal faced with the same issue, "(a) requirement of the [zoning] board that attorneys desiring to cross-examine witnesses should ask questions through it would place an unjustified restriction on their rights." *Wadell v. Board of Zoning Appeals of City of New Haven*, 136 Conn. 1, 68 A.2d 152, 156 (1949). For a non-exhaustive list of limitations on the right of cross-examination that have been deemed appropriate in the context of zoning hearings, albeit in a persuasive opinion from one of our sister states, *see, e.g., People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 235-36 (Ill. 2002).

remainder of our opinion upon the error that ultimately requires reversing the circuit court's decision and finding the City Council's decision void. After reviewing the record introduced before the Planning Commission, and even after reviewing the numerous other records the applicant and City Council appellees improperly introduced before the circuit court,[10] we have located no evidence, per KRS 100.213.(1)(b), demonstrating "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 the area."[11]

Specifically, the record indicates that the Bullitt County Comprehensive Plan had been readopted in March, 2010. And, between that date and the January 12, 2012 hearing: (1) nothing indicates that the properties at issue became any closer in proximity to Interstate 65; (2) nothing indicates that the possibility of these properties being serviced by rail differed to any extent; (3)

[10] At the circuit court level, the City Council and applicant appellees added roughly eight hundred pages of documents into the record without any explanation of whether the Planning Commission considered them in making its recommendations. However, much of this information was either irrelevant, would have been impossible for the Planning Commission to have considered, or, according to the transcript of the January 12, 2012 hearing, was specifically ignored by the Planning Commission. For example, among these records are extensive traffic and drainage studies dated *January 23, 2012*; correspondence regarding settlement negotiations between the Church and the developer and applicants; and a booklet of exhibits that the Church attempted to tender as evidence during the Planning Commission's hearing, which the Planning Commission specifically refused to admit as evidence.

[11] At the circuit court level, the Church argued extensively that no evidence had been introduced supporting that, per KRS 100.213(1)(b), substantial changes had taken place on or near the properties at issue since the re-adoption of the Bullitt County Comprehensive Plan in March, 2010. While this particular argument does not appear in the Church's appellate brief, our standard for reviewing the City Council's zoning decision nevertheless requires a determination that substantial evidence supports it.

nothing indicates when other properties within a one-mile radius had "been rezoned to I-L Light Industrial and B-1 Commercial"; and (4) no evidence properly of record indicates that the "utilities such as a 16" water line, sewers, gas and electric which are now available to the site" were not also in existence in March, 2010, or that the Planning Commission was unaware of plans for the "expansion of the 245 corridor" at that time.

Indeed, the following discussion between the planning commissioners during the January 12, 2012 hearing, which occurred shortly before the Planning Commission voted to recommend approving the applied-for zoning map amendments, undermines the proposition that any such evidence does exist:

> COMMISSIONER #1: Mr. Chairman, I'd like to make a motion on Docket 2012Z-02 that we approve of this zone, because when the comprehensive plan was initially written [in 1997], these assets were not available. Interstate access, sewer access, a 16-inch water line access. And it wasn't anticipated.
>
> COMMISSIONER #2: Can I stop him before he goes any farther?
>
> COMMISSIONER #3: No.
>
> COMMISSIONER #2: We just re-adopted that—
>
> COMMISSIONER #3: Now, he, he, he, he, he has the floor to make his motion.
> COMMISSONER #2: Okay.
>
> COMMISSIONER #3: And we'll accommodate that.
>
> COMMISSIONER #1: And CSX railroad access availability to this property. There's been substantial changes in the area since the comprehensive plan was

> written [in 1997]. The proximity to the interstate, the fact that there is industrial and B-1 and B-2 business directly across the street from the property, the fact that we are aware and we've seen the plans of the expansion of the 245 corridor. All of these are things that call for change as we move forward. And that would be my motion . . .
>
> . . .
>
> COMMISSONER #3: Is there a second to the motion?
>
> COMMISSIONER #4: Second.
>
> COMMISSONER #1: We have a second. Now, is there any discussion on the motion?
>
> COMMISSONER #2: Yes, sir. Well, when we re-adopted the comprehensive plan [in March, 2010], all of those things were available there, and none of those things were changed. It's quite obvious those properties would have been rezoned, and nothing has happened there. So that's bogus. Now, Mr. Stranage was sitting here, I think he's gone. If he was sitting here, he'd still say it. We sat here and hashed off and on for two years to bring the corridor all the way down. Some of the same people are sitting there to make 245 a goldmine and a precious piece of property. . . .

In short, our review of the record has uncovered no substantial evidence in support of the City Council's decision to rezone the properties at issue in this matter under the authority of KRS 100.213(1)(b); the appellees have cited no such evidence; and the City Council's decision must therefore be declared arbitrary and void.

CONCLUSION

In light of the foregoing, we REVERSE.

THOMPSON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the reasoning and the result of the majority opinion, but I write separately to emphasize several additional points. First, the majority aptly sets out most of the deficiencies in the findings supporting the rezoning in this case. I would add that the findings of fact made by the Planning Commission and adopted by the City Council consist of little more than a mere parroting of the words of KRS 100.213. Findings which consist of nothing other than a repetition of the legal requirements as set out by a statute fail to meet the requirements of due process, in that such finding does not contain sufficient adjudicative facts to permit a court to conduct a meaningful review of the proceeding. *Caller v. Ison*, 508 S.W.2d 776, 776-77 (Ky. 1974).

Second, I fully agree with the majority's discussion about the insufficiency of the evidence supporting the rezoning. In particular, the majority correctly focuses on the lack of any evidence that the Planning Commission considered the traffic and drainage issues associated with the proposed rezoning. It is well-settled that zoning must follow from planning. *Warren Co. Citizens for Managed Growth, Inc. v. Bd. of Comm'rs of City of Bowling Green*, 207 S.W.3d 7, 15 (Ky. App. 2006), citing *City of Erlanger v. Hoff*, 535 S.W.2d 86, 88 (Ky. 1976); *City of Louisville v. McDonald*, 470 S.W.2d 173, 176 (Ky. 1971); and *Fritts v. City of Ashland*, 348 S.W.2d 712, 714 (Ky. 1961). But in this case, the applicants and even the Planning Commission seem to have taken the position that planning to

address the traffic and drainage issues must follow from the rezoning. In my view, this represents a fundamental misconception of the purpose of zoning.

Third, I am deeply concerned about the state of the record in this case. As noted in the majority opinion, the zoning applicants apparently introduced additional documents into the record while the matter was pending before the City Council and even before the circuit court. In rezoning matters, the local legislative body "is acting in an adjudicatory fashion to determine whether a particular individual by reason of particular facts peculiar to his property is entitled to some form of relief" *City of Louisville v. McDonald*, 470 S.W.2d at 178. When a City Council conducts an argument-type hearing on a recommendation forwarded by the Planning Commission, the Council's review is limited to the evidence presented to the Commission. *McKinstry v. Wells*, 548 S.W.2d 169, 173 (Ky. App. 1977), citing *McDonald*, 470 S.W.2d at 178-79. The circuit court's review of zoning matter is likewise limited to matters of record. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964). In either venue, it is simply inappropriate for a party to introduce additional documents or evidence which were not part of the record before the Planning Commission.

But finally, I believe that the most significant issue in this case concerns the Planning Commission's denial of the parties' right to cross-examine witnesses. In *Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1982), the

Kentucky Supreme Court held, unequivocally, that the right to cross-examination in a trial-type zoning hearing is an essential element of due process. *Id.* at 592.

> The purpose of a "trial-type hearing," as was stated in *McDonald*, *supra*, is to permit the development of all relevant evidence that will assist the administrative body in reaching its decision. In such a hearing, as we view it, the parties must have the opportunity to subject all evidence to close scrutiny so as to determine its trustworthiness. A trial-type hearing implies the opportunity for full rebuttal, and the opportunity to impeach witnesses. Cross-examination is a time-tested and unique method of assisting in the quest for truth. Under the rules of the Commission, there is no opportunity to demonstrate the incompleteness, the untruth, the partiality or any other weakness or defect in the testimony of a witness. Without such opportunity, the search for truth may very well be impeded and restricted. In a hearing to terminate welfare benefits, the United States Supreme Court declared that the recipient must have an effective opportunity to defend by confronting any adverse witnesses which includes the right to "cross-examine the witnesses relied on by the defendant." (who sought to terminate benefits). *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). The principle enunciated there applies with equal force to the situation in the present case.
>
> When viewed in the light of the purposes of a trial-type hearing, and the mandate in *Goldberg*, *supra*, the arguments of respondents against the right of cross-examination are little short of frivolous.

Id. at 591-92.

In my view, the holding of *Kaelin* is controlling to the result of this appeal. While I agree with the circuit court that the Planning Commission could impose reasonable restrictions on the time and scope of cross-examination, the Planning Commission's procedures went far beyond this. At the February 23,

2012 hearing, the Planning Commission arbitrarily limited each side to thirty minutes to make their presentations. Opposing parties were not allowed to cross-examine witnesses directly. Any questions for cross-examination were to be submitted to the commissioners, who could ask them at their discretion.

Contrary to the circuit court's conclusion, a hearing which substantially limits the right to cross-examination in this manner violates the due process rights clearly set out in *Kaelin*. For this reason, as well as the others, I agree with the majority that the circuit court's decision must be set aside. Therefore, I would reverse the circuit court and remand with instructions to enter a judgment setting aside the Ordinance granting the rezoning. Since the Planning Commission is not a party to this appeal, it would be up to the City Council whether to conduct its own trial-type hearing which comports with due process, or to direct the Planning Commission to do so.

BRIEF FOR APPELLANTS:

T. Bruce Simpson, Jr.
Lexington, Kentucky

BRIEF FOR APPELLEES, ZONETON DEVELOPERS, INC.; DEBRA ANN SHAW; AND KAREN SULLIVAN, EXECUTRIX FOR THE ESTATE OF OMA LEE SHAW:

John W. Wooldridge
Shepherdsville, Kentucky

BRIEF FOR APPELLEES, SHEPHERDSVILLE CITY COUNCIL AND ITS MEMBERS IN THEIR OFFICIAL CAPACITIES:

Joseph J. Wantland
Shepherdsville, Kentucky