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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001660-MR

JOSEPH C. SANSBURY,
GROVER VORBRINK AND
DOYLE JACKSON APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 12-CI-01093

CITY COUNCIL OF THE CITY
OF HILLVIEW, KENTUCKY, AND THE
BULLITT COUNTY JOINT PLANNING
AND ZONING COMMISSION AND BOARD
OF ADJUSTMENT, AND ANNIE REEVES
TRUST, DAVID A. BATES III, SONIA BATES,
RONALD KITTLE, SR., MARY KITTLE,
BETTY LOU SIMPSON, AND THE ROGERS
GROUP, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND JONES, JUDGES.

DIXON, JUDGE: Appellants, Joseph C. Sansbury, Grover Vorbrink and Doyle Jackson, have filed a KRS 100.347 statutory appeal from an order of the Bullitt Circuit Court upholding the City of Hillview's zoning map amendment rezoning 301.41 acres to Earth Products Zone Classification. Finding no error, we affirm.

In May 2012, Appellee Rogers Group filed an application in the Bullitt County zoning office seeking to rezone approximately 301.41 acres of land on Pecan Lane in the City of Hillview from Agricultural and Stream Valley Reserve to Earth Products (EP). The planning commission held a public hearing on July 12, 2012, during which Rogers Group elected not to call any expert witnesses. The planning commission subsequently recommended denial of the application because there was no proof to sustain a change from agricultural and stream reserve to earth products. The recommendation was thereafter transferred to the city clerk.

On July 31, 2012, the Hillview City Council conducted a public hearing on the rezoning application, wherein Rogers Group presented significant expert and lay witness testimony and reports justifying the rezoning request. Further, each opponent who signed up to speak was given the opportunity to address the council and propound questions to the witnesses through the moderator of the meeting. After the presentation of all evidence the city council closed the meeting to consider the issues presented.

At the city council's next regular meeting on August 20, 2012, Ordinance 2012-06, rezoning the property in question to EP, was on the agenda.

The minutes of the meeting reflect that prior to a vote being taken on the ordinance, the city council approved 23 zoning restrictions with respect to use of the subject property that had been negotiated by the city of Hillview and Rogers Group. Immediately thereafter, Ordinance 2012-06 was read and approved by a vote of 4-2. No public comments were accepted during the meeting.

Appellants thereafter filed an appeal in the Bullitt Circuit Court pursuant to KRS 100.347 seeking judicial review of the ordinance. By order entered on August 26, 2013, the circuit court upheld the actions of the city council in adopting the ordinance. This appeal ensued.

Appellants first argue that the circuit court erred in upholding the ordinance because the city council failed to make sufficient findings of basic fact to satisfy the statutory requirements for rezoning pursuant to KRS 100.213. We must disagree.

An administrative body's decision is not subject to *de novo* review in this Court. Rather, judicial review of an administrative action is concerned with the question of arbitrariness. In *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964), our then-highest Court enunciated three factors to consider in determining arbitrariness: (1) did the administrative agency act within its statutory powers; (2) was due process afforded; and (3) was the decision reached supported by substantial evidence. *See also Minton v. Fiscal Court of Jefferson County*, 850 S.W.2d 52 (Ky. App. 1992). An administrative ruling is arbitrary, and therefore

clearly erroneous, if it is not supported by substantial evidence. *Fritz v. Lexington–Fayette Urban County Government*, 986 S.W.2d 456, 458–459 (Ky. App. 1998)(internal citation omitted). Reviewing courts may not disturb factual findings made by an administrative agency if those findings are supported by substantial evidence. In other words, "[a] reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious." *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003)(internal citation omitted). On determinations of fact "[t]he administrative agency's findings will be upheld even though there exists evidence to the contrary in the record." *Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky*, 91 S.W.3d 575, 578 (Ky. 2002) (internal citation omitted).

There is no allegation herein that the city council was not the statutory agency to make this decision, or that it exceeded its statutory powers. Further, we agree with the circuit court that due process was afforded at every level as Appellants were provided sufficient opportunity to present their case, cross-examine the proponents of the zoning ordinance, as well as rebut the proponents' arguments. Appellants do not argue that they were denied notice, a hearing, and sufficient opportunity to present their case. As such, the only question that remains is whether the city council's decision was supported by substantial evidence. We believe that it was.

KRS 100.213, which sets forth the findings necessary for a proposed zoning map amendment, provides in pertinent part:

> (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[1], 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.

The city council did not find that the proposed rezoning was in compliance with the existing comprehensive plan. Rather, the City stated in Ordinance 2012-06:

> Based upon all the above and the record, the City Council finds:
>
> 1. That the existing zoning classification given to the property is inappropriate and the proposed zoning classification is appropriate.
>
> 2. The comprehensive plan did not take into consideration the existing uses of the area where this real estate is located adjoining two (2) existing

[1] KRS Chapter 100 mandates that the planning commission prepare a "comprehensive" plan which serves as a guide for public and private development in the most appropriate manner. KRS 100.193. This master plan for an area is comprehensive in that numerous and extensive elements or studies are to be considered in formulating and adopting the plan. KRS 100.187.

> operating quarries and their expansions which are major changes of an economic and physical nature.

Appellants argue that the above findings are nothing more than a parroting of the statutory language of KRS 100.213, and that there is a complete lack of any basic factual findings to support the city council's conclusion that the existing zoning classification was inappropriate and the proposed zoning was appropriate. Accordingly, Appellants maintain that the city council's decision was arbitrary and the ordinance should be declared void. We disagree.

Appellants' efforts to characterize the city council's findings as simply a parroting of the statute completely ignore the earlier language in the ordinance referencing the multiple expert reports and other evidence presented during the July 31st public hearing. In addition to citing the testimony and reports of numerous experts recommending the zoning change that had been presented during the public hearing, the city council noted that Bullitt County Zoning Regulation § 5.301 permitted mineral extraction with a conditional use permit in both the agricultural and stream valley reserve zones. Further, the city council recognized that the comprehensive plan failed to take into consideration that the neighborhood in question was used as a mineral extraction area for more than thirty years prior to the adoption of the plan. As the trial court herein noted in its order:

> Ordinance 2012-06 contains approximately two pages of findings summarizing the voluminous testimony and expert reports tendered at the public hearing. The Ordinance specifically provided that the Council made their findings based on the public hearing, the record provided to them, and "the following adopted legislative

> findings of adjudicative facts." These two pages describing how the use of the land for a quarry were [sic] compatible with other uses in the area further incorporated into the final findings as the final findings were "based on all of the above and the record." The Council noted that the comprehensive zoning plan did not address the appropriate location for earth products zones despite the fact that neighboring properties had been used as a quarry for over thirty years prior to the comprehensive plan's adoption. These findings are specific enough to support the Council's conclusion that the existing zoning classification for the property was inappropriate and the proposed classification is appropriate. The Court finds that the City Council did make specific findings of fact.

Substantial evidence has been defined as "some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people." *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971); *Warren County Citizens for Managed Growth, Inc. v. Board of Com'rs of City of Bowling Green*, 207 S.W.3d 7, 16 (Ky. App. 2006). In its role as a finder of fact, the city council was afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 309 (Ky. 1972). Based upon the record herein, we conclude that the city council's findings were supported by substantial evidence and that its adoption of Ordinance 2012-6 was not arbitrary.

Appellants next argue that adoption of the ordinance was arbitrary and capricious because the zoning change was premised on restrictions that were negotiated outside of the record herein. Specifically, Appellants allege that the

City of Hillview and Rogers Group engaged in *ex parte* communications and that the approval of the zoning application may have been partially based on these improper communications. Appellants point out that at the July 31st public hearing, Rogers Group offered two land use restrictions in support of the zoning change – one which would limit the use of Castlerock Drive for transport of mined minerals, and a second which was a commitment to refrain from open pit mining within 300 feet of the property boundary. However, between the July 31st public hearing and the August 20th city council meeting when the ordinance was adopted, the City and Rogers Group agreed upon additional zoning restrictions in an attempt to address some of the concerns raised by the opponents. Ultimately, Rogers Group agreed to twenty-three separate restrictions which were read and voted on during the city council meeting prior to adoption of the ordinance. Appellant complains that these additional restrictions were the result of improper *ex parte* communications, were not made part of the record before the city council, were not subject to public review or comment, and were not subject to any examination by participants to the public hearing. Accordingly, Appellants conclude that such is a violation of their due process rights and of KRS Chapter 100.

While KRS 100.211 requires a public hearing before amending a zoning map or regulation, there is no such requirement for the adoption of land use restrictions pursuant to KRS 100.3681. As the trial court herein noted, land use restrictions are a form of a restrictive covenant and are thus independent of any zoning regulations. Further, we believe that submission of additional or revised

restrictions is analogous to revision of the application in that it changes the land use rights the applicant is seeking to obtain. As a panel of this Court in *Minton v. Fiscal Court of Jefferson County*, 850 S.W.2d 52 (Ky. App. 1992), held, "[t]here is no requirement that a new public hearing must be held any time there is a revision." Additionally, our Supreme Court has specifically stated that "[a]s rezoning is a legislative function, judicial concepts, like an impartial tribunal and prohibitions of *ex parte* contacts with the decisions makers, do not apply." *Hume v. Franklin County Fiscal Court*, 276 S.W.3d 748, 752 (Ky. 2008).

The record herein establishes that the city council heard significant testimony, evidence and arguments from both proponents and opponents of the zoning application at the public hearing. Further, the minutes of that meeting reflect discussion about possible restrictions and, in fact, Rogers Group tendered two restrictions into the record at that time. Appellants were certainly on notice that additional restrictions were a possibility. We agree with the trial court herein:

> As a practical matter, for Hillview to obtain the consent of applicants to restrictions in the context of a rezoning application, some communications over language may have been necessary. Kentucky law does not require such communications to occur in a public hearing. Consequently, Plaintiff's protests on grounds of *ex parte* communications and purported due process violations do not entitle them to relief on appeal. The fact that the Zoning Restrictions include the signature of the City Attorney as preparer further evidences their propriety. Kentucky's appellate courts have found that certain *ex parte* contacts with legislative body members do not invalidate the decisions of the legislative body. *Hougham v. Lexington-Fayette Urban County Government*, 29 S.W.3d 370 (Ky. App. 1999).

> Moreover, in upholding a zoning settlement agreement, the Kentucky Supreme Court recently emphasized that the settlement was adopted in a public meeting. *Cunningham v. Whalen, et al.*, 373 S.W.3d 438, 441 (Ky. 2012). Likewise, the Zoning Restrictions in the present case were adopted in a public meeting by majority vote of the City Council with Plaintiffs making no claim of inadequate notice of the public meeting.

We simply cannot conclude that Appellants' due process rights were violated as a result of any communications between the City and Rogers Group regarding additional restrictions, or that such communications render the adoption of the ordinance arbitrary. "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 v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (*Quoting National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503 (Ky. App. 1990)). Both the restrictions and ordinance were read and adopted at the city council's public meeting. No error occurred

Finally, Appellants argue that the city council's failure to swear in witnesses prior to their testimony during the public hearing was a violation of Appellants' due process rights. While Appellants concede that the current law in Kentucky does not require such procedure in zoning matters, they urge this Court to revisit the issue and find that the type of hearing contemplated in the *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971), requires that expert and lay evidence

presented in support of a rezoning application be presented under oath. We decline to do so.

The fundamental requirement of procedural due process is simply that all affected parties be given "the opportunity to be heard at a meaningful time and in a meaningful manner." *Hilltop Basic Resources, Inc.,*180 S.W.3d at 468 (Quotation omitted). Procedural due process in the administrative or legislative setting has widely been understood to encompass "a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a judicial review of the administrative action." *Morris v. City of Catlettsburg*, 437 S.W.2d 753, 755 (Ky. 1969) (Quotation omitted); *see also Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982); *Wyatt v. Transportation Cabinet*, 796 S.W.2d 872, 873–74 (Ky. App. 1990). However, our Supreme Court has held that due process, as defined in *City of Louisville v. McDonald*, Ky., 470 S.W.2d 173 (Ky. 1971), does not require, in the context of a Planning Commission hearing, the swearing of witnesses. As the Court noted in *Danville-Boyle County Planning and Zoning Commission v. Prall*, 840 S.W.2d 205, 207 (Ky. 1992), "Although it may be better practice to swear witnesses appearing before the Zoning Commission, such procedure is not mandated nor is a failure to swear a witness constitutionally inadequate. The concept of constitutional due process in administrative hearings is flexible."

KRS 100.345 authorizes a legislative or administrative body to adopt procedures for public hearings:

> Whenever a public hearing is required by this chapter, the presiding body may prescribe the procedures to be followed. No information offered at the hearing shall be excluded for failure to follow judicial rules of evidence. The presiding body may adopt its own rules to determine the kind of information that will be received. . . . All information allowed to be received shall constitute evidence upon which action may be based.

Herein, the city council adopted the following procedure for the public hearing: (1) any party wishing to speak could sign up to do so; (2) proponents and opponents of the zoning application were each given one hour to present their case; (3) The one hour designated to the opponents was equally divided between all individuals who signed up to speak; (4) all questions were addressed at the end of each presentation. All interested persons were given a full opportunity to express themselves and to refute and contradict those who expressed contrary views. We believe this procedure sufficiently constituted a trial-type hearing as required in *City of Louisville v. McDonald*, and the failure to swear in witnesses did not render the proceedings constitutionally inadequate.

For the reasons set forth herein, the order of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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