

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002133-MR

KENTUCKY RSA #4 CELLULAR GENERAL
PARTNERSHIP; BRANDENBURG CELLULAR
CORPORATION; SOUTH CENTRAL RURAL
TELEPHONE COOPERATIVE CORPORATION, INC.;
AND BLUEGRASS CELLULAR, INC.

APPELLANTS

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 09-CI-00698

ALICE MOORE BOBLITT; THE JOINT
CITY-COUNTY PLANNING COMMISSION
OF NELSON COUNTY; AND WILLIAM
JOSEPH MONTGOMERY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Nelson Circuit Court's decision
vacating and setting aside the Joint City-County Planning Commission of Nelson

County's approval of RSA #4's application for construction of a cellular antenna tower. Based upon the following, we reverse the decision of the trial court.

BACKGROUND INFORMATION

The Appellant, the Commission, is the planning commission for Nelson County. The property upon which the cellular tower at issue was built is located within the Commission's area. The Appellees, Alice Moore Boblitt, et al., are property owners in Bardstown, Kentucky which is within Nelson County.

In May of 2009, Kentucky RSA #4 Cellular General Partnership d/b/a Bluegrass Cellular (RSA #4), applied to the Commission for approval to build a cellular antenna tower at 6656 Boston Road in Bardstown. Boblitt's property is located at 6540 Boston Road. The Appellee objected to the construction and attended two public hearings, however, when Boblitt asked for a copy of the complete Application, she was denied access. The Commission denied access based on Kentucky Revised Statute (KRS) 100.987(3). After the Commission allowed construction of the tower, the Appellees brought an action in Nelson Circuit Court. After a hearing, the trial court held that "[t]he provision of KRS 100.987(3) concealing the cellular antenna tower application is a clear unconstitutional violation of the procedural requirements of the United States and Kentucky Constitutions and related case law." The Appellants then brought this appeal.

STANDARD OF REVIEW

We review issues of law *de novo*. “[Z]oning determinations are purely the responsibility and function of the legislative branch of government, such determination are not subject to review by the judiciary except for the limited purpose of considering whether such determinations are arbitrary.” *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005).

“Arbitrariness review is limited to the consideration of three basic questions: (1) whether an action was taken in excess of granted powers, (2) whether affected parties were afforded procedural due process, and (3) whether determinations are supported by substantial evidentiary support.” *Id.* With these standards in mind, we review the decision of the trial court and the applicable law.

DISCUSSION

KRS 100.987 is a statute which outlines procedures for regulating cellular towers to local governments. Section three of that statute, which is at issue herein, provides as follows:

All information contained in the application and any updates, except for any map or other information that specifically identifies the proposed location of the cellular antenna tower then being reviewed, shall be deemed confidential and proprietary within the meaning of KRS 61.878. The local planning commission shall deny any public request for the inspection of this information, whether submitted under Kentucky’s Open Records Act or otherwise, **except when ordered to release the information by a court of competent jurisdiction**. Any person violating this subsection shall be guilty of official misconduct in the second degree as provided under KRS 522.030. (Emphasis supplied.)

During the hearing, Bobbitt asked for a copy of the completed Application, but the Planning Commission Director denied it, citing the above.

A second public hearing was held on July 14, 2009. After the second hearing, the Planning Commission approved the Application on July 28, 2009. Construction of the tower was completed on October 30, 2009 and was placed in active service on November 20, 2009. Boblitt then appealed the decision of the Planning Commission to the Nelson Circuit Court. She argued that the confidentiality provision in KRS 100.987(3) violates her right to due process and is, therefore, unconstitutional. The Nelson Circuit Court agreed with Boblitt and the court set aside the Planning Commission's approval of the application to construct the tower. RSA #4 then brought this appeal.

As set forth above, KRS 100.987(3) specifically allows Boblitt and/or the other Appellees to seek a court order to gain access to the Application. They did not do this, however, and we find that their failure to do so waived their rights. *Merson v. Muir*, 284 S.W.2d 811, 812 (Ky. 1955). Thus, we reverse the decision of the trial court holding the statute to have violated the Appellants' due process rights.

J. LAMBERT, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I disagree that Boblitt waived her right to request disclosure of the information "deemed confidential and proprietary within the meaning of KRS 61.878" by failing to seek

disclosure under the Open Records Act and instead appealing the approval of the cellular antenna tower application on the basis that she was denied due process. I would remand for the circuit court to hold a hearing to determine what information can properly be withheld and for the Commission to hold a new hearing.

Generally, the Open Records Act, KRS 61.870-61.884, provides “[a]ny person shall have the right to inspect public records” subject to narrow exceptions.

KRS 61.872. As a matter of public policy, any exceptions to Kentucky’s Open Records Act are to be strictly construed:

The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.

KRS 61.871. “The [Open Records Act] demonstrates a general bias favoring disclosure.” *Hardin Cnty. Sch. v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001).

The Open Records Act’s enumerated exceptions include excluding from public inspection except upon order of a court those “records confidentially disclosed to an agency which are generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records[.]” KRS 61.878(1)(c)1. A person who believes a record is wrongfully being withheld can request the Attorney General’s review under KRS 61.880(2) and then appeal a denial (5), or directly file suit under KRS 61.882.

KRS 100.987, which allows planning units to plan for and regulate the placement of cellular antenna towers, upends the narrow “confidential or proprietary” exception by providing as follows:

(3) All information contained in the application and any updates, except for any map or other information that specifically identifies the proposed location of the cellular antenna tower then being reviewed, shall be deemed confidential and proprietary within the meaning of KRS 61.878. The local planning commission shall deny any public request for the inspection of this information, whether submitted under Kentucky's Open Records Act or otherwise, except when ordered to release the information by a court of competent jurisdiction. Any person violating this subsection shall be guilty of official misconduct in the second degree as provided under KRS 522.030.

While a citizen could seek disclosure of cell phone tower application records through the Open Records Act or through a court order pursuant to KRS 61.882, such a request could properly be denied based upon the statutorily required interpretation that all such information be deemed confidential and proprietary under KRS 100.987.

KRS 100.987 does not require that Boblitt seek a court order under the auspices of the Open Records Act. Therefore, I disagree with the majority opinion that Boblitt waived her right to gain access to these records by filing an appeal of the approval of the application for construction of a cellular antenna tower on the basis that withholding this information violated her due process right. I believe Boblitt acted properly in appealing the application approval because her right to

this information stems not from an Open Records right that all members of the public have, but from a due process as applied right.

“In the interest of fairness, a party to be affected by an administrative order is entitled to procedural due process.” *Am. Beauty Homes Corp. v. Louisville & Jefferson Cnty. Planning & Zoning Comm’n*, 379 S.W.2d 450, 456 (Ky. 1964).

“Under due process, [an opponent to the action] [was] entitled to know what evidence is being considered and [is] entitled to an opportunity to test, explain and/or refute that evidence.” *Kentucky Am. Water Co. v. Com. ex rel. Cowan*, 847 S.W.2d 737, 741 (Ky. 1993). An action taken where procedural due process is not satisfied, is arbitrary. *Id.*

Due process cannot be satisfied where a public meeting is held without the relevant evidence about the placement of a cellular phone tower. While due process does not require cell phone providers to disclose whatever limited application information that is actually confidential and proprietary, due process also does not allow the wholesale withholding of all relevant information because it is automatically deemed confidential and proprietary under KRS 100.987. A hearing held under such circumstances may have the trappings of proper process, but is devoid of meaningful process. While Boblitt presented her own experts and evidence regarding other feasible locations for the tower, Boblitt had no way to directly challenge the twenty-five items submitted in support of the tower application where she was denied access to the application items. Boblitt had no feasible way to discover the direct sources of this material and, therefore, could not

test the relevant evidence, the feasibility of alternative sites and what support there was for the applicant's assertion that Boblitt's property values would not be negatively affected by the tower's location.

The circuit court properly recognized the unfairness of allowing the application for construction of a cellular antenna tower to be approved under these circumstances. However, by vacating the Commission's approval alone, the circuit court failed to address what the process should be going forward and failed to directly order the disclosure of the relevant information. Therefore, I would remand for the circuit court to hold hearings regarding what information from the cellular antenna tower application is in fact properly withheld as confidential and proprietary, and which information should be disclosed to this interested party. The circuit court can then properly order redaction of the confidential information or the signing of confidentiality agreement prior to release before remanding for the Commission to hold another application hearing.

Accordingly, I dissent.

BRIEF FOR APPELLANTS:

John E. Selent
Michael P. Abate
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stephen T. Porter
Louisville, Kentucky