

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001944-MR

PARK HILLS CENTER, LLC

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY BUNNELL, JUDGE
ACTION NO. 14-CI-01400

PIMLICO PARKWAY, LLC, a Kentucky Limited Liability Company; MCDONALD'S REAL ESTATE COMPANY, a Delaware Corporation; MCDONALD'S USA, LLC, a Delaware Limited Liability Company; and LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION and Its Members in Their Official Capacities Only: MICHAEL OWENS, CHAIR; K. MIKE CRAVENS; PATRICK BREWER; WILLIAM H. WILSON; CARLA BLANTON; FRANK PENN; WILL BERKLEY; KAREN MUNDY; CAROLYN PLUMLEE; DAVID DRAKE; and JOSEPH SMITH

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KRAMER AND STUMBO, JUDGES.

STUMBO, JUDGE: Park Hills Center, LLC appeals from an Opinion and Order of the Fayette Circuit Court affirming the Lexington-Fayette Urban County Planning Commission's decision approving an amended final development plan. That decision approved the planned construction and operation of a McDonald's restaurant on one of four lots located within a shopping center. Park Hills Center, LLC ("Park Hills") owns the remaining three lots. Park Hills now argues that the Fayette Circuit Court erred in sustaining the Planning Commission's decision. We find no error, and AFFIRM the Opinion and Order on appeal.

The facts are not in controversy. Appellant Park Hills owns three of the four commercial lots which comprise the Park Hills Shopping Center, which is located on the corner of Pimlico Parkway and Man O' War Boulevard in Lexington, Kentucky. Appellee Pimlico Parkway, LLC ("Pimlico") owns the remaining lot ("Lot 1"), where it sought to demolish a bank building and construct a McDonald's restaurant.

On February 13, 2014, Pimlico submitted a development plan to the Planning Commission for approval, which sought approval for the construction of the McDonald's restaurant. Two hearings subsequently were conducted during which Park Hills maintained that the addition of a McDonald's restaurant to the shopping center would negatively impact the welfare of existing businesses, endanger pedestrians and contribute to the area's traffic problems. Park Hills produced the testimony of a traffic engineer, Dr. Tom Creasey, in support of its position, and the owner of an adjacent Arby's restaurant also testified against the

plan. At both meetings, Pimlico argued that the proposed development plan fell squarely within the accepted uses for the sought B-6P zoning. Various other parties also testified as to the effect the plan would have on traffic patterns, pedestrian safety and other matters.

Thereafter, the Commission voted 7-1 to approve the plan. Park Hills then appealed from that ruling to the Fayette Circuit Court, where it argued that the ruling was arbitrary, capricious, and unreasonable, and that it violated certain articles of the Lexington-Fayette Urban County Zoning Ordinances. After oral arguments on the matter were conducted, the Fayette Circuit Court rendered an Opinion and Order on November 4, 2014, affirming the decision. As a basis for the Opinion, the court found in relevant part that Pimlico presented sufficient evidence at the Planning Commission meeting to convince a reasonable person that the plan should be approved; therefore, the decision was not arbitrary, capricious or unreasonable. The court also determined that the zoning ordinance provisions cited by Park Hills did not justify the reversal of the Planning Commission's decision. This appeal followed.

Park Hills now argues that the Fayette Circuit Court erred in sustaining the Planning Commission's approval of the development plan. The focus of its claim of error is its contention that the trial court improperly failed to conclude that the Planning Commission's action was arbitrary and unreasonable. Specifically, Park Hills maintains that the Commission failed to comply with Zoning Ordinance Article 12-1 and Article 21 because no substantial evidence

supported its decision. These Articles set out the general intent of B-6P (shopping center) zoning, including the assurance of traffic safety, the provision of adequate off-street parking and the protection of adjacent residential neighborhoods from depreciating property values resulting from overzoning. Article 21-7, to which Park Hills directs our attention, further provides that amendments to development plans can be made only by official Planning Commission action in a public hearing.

The substance of Park Hills' argument on this issue is its contention that the plan's proponents failed to offer substantial evidence to support the Planning Commission's decision. Citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972), Park Hills characterizes the question before us as whether the evidence offered by McDonald's and the Planning staff engineer is of such a nature that "in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." It further maintains that we must take into account anything in the record that fairly detracts from the weight of that evidence. Park Hills argues that the sweeping generalizations offered by McDonald's with no factual support, in conjunction with the "ludicrous/illogical" testimony of Planning Commission engineer Casey Kaucher cannot induce conviction in the minds of reasonable men that the plan comports with the Zoning Ordinances. It seeks an Opinion reversing the decision of the Fayette Circuit Court and declaring the Planning Commission's decision void and without effect.

Administrative agencies are vested with a great deal of discretion in carrying out the matters before them, and their decisions will be reversed only upon a finding that a decision is "arbitrary, capricious, or unreasonable." *Oldham Farms Development, LLC v. Oldham County Planning and Zoning Commission*, 233 S.W.3d 195, 196 (Ky. App. 2007). An agency's decision will not be deemed unreasonable if it is supported by substantial evidence, which is "evidence having sufficient probative value to convince a reasonable person." *Id.* The Kentucky Supreme Court has consistently held that a reviewing court may not substitute its judgment for the agency's judgment. *Id.* As such, a court's determination that an agency could have properly reached a different decision is not - by itself - sufficient to reverse the agency's decision. *Id.*

The dispositive question before us is whether the Fayette Circuit Court properly determined that Pimlico adequately rebutted Park Hills' claim that traffic flow, parking, pedestrian safety and other concerns required a rejection of the development plan. We must answer that question in the affirmative. While it is true that Pimlico did not retain a traffic engineer like Park Hills chose to do, the Fayette Circuit Court properly found that the testimony of the Commission's traffic engineer, Ms. Kaucher, was sufficiently persuasive that a reasonable person might accept her opinion over that of Park Hills' expert. Additionally, Pimlico rebutted Nick Nicholson's general data from the McDonald's corporate website with the testimony of Roderick Saylor. Mr. Saylor was the engineer and developer assigned by McDonald's to this specific development.

The Fayette Circuit Court determined that the Commission's decision was not an easy one, and this conclusion is supported by the video record.

However, nothing in the Zoning Ordinance provisions cited by Park Hills justify the reversal of the Planning Commission's decision. While it is true that the record may have also supported a decision in opposition to the one ultimately reached by the Commission, that determination is not sufficient to support the reversal of that decision. *Oldham Farms Development, supra*. In sum, and based on the totality of the record, we cannot conclude that the Commission's decision was arbitrary, capricious or unreasonable, and the Fayette Circuit Court properly so found.

For the foregoing reasons, we AFFIRM the Opinion and Order of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

T. Bruce Simpson, Jr.
Lexington, Kentucky

BRIEF FOR APPELLEES PIMLICO
PARKWAY, LLC, MCDONALD'S
REAL ESTATE COMPANY, AND
MCDONALD'S USA, LLC:

Stephen G. Amato
Christine N. Westover
Jacob C. Walbourn
Lexington, Kentucky

BRIEF FOR APPELLEES
LEXINGTON-FAYETTE URBAN
COUNTY PLANNING
COMMISSION:

Tracy W. Jones
Lexington, Kentucky