

RENDERED: AUGUST 4, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NOS. 2014-CA-001370-MR AND 2014-CA-1373-MR

CITY OF GRAYSON; GEORGE
STEELE AS MAYOR OF THE CITY
OF GRAYSON; PEARL CRUM, JACK
HARPER, JUANITA KENNEDY,
PAM NASH, TERRY STAMPER, AND
DUANE SUTTLES AS CITY COUNCIL
MEMBERS; AND JOHNSON & GOEBEL,
INC.

APPELLANTS

v. COMBINED APPEALS FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 12-CI-00168

4th LEAF, LLC; JOHNSON
& GOEBEL, INC.; RALPH'S FOODS, INC.;
CHARTER FOODS, INC.; J. D. TRUST,
INC.; LOVES TRAVEL STOPS AND
COUNTRY STORES, INC.; AND
OUR LADY OF BELLEFONTE, INC.

APPELLEES

4th LEAF, LLC; AND
RALPH’S FOODS, INC.

CROSS-APPELLANTS

v. CROSS-APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 12-CI-00168

CITY OF GRAYSON; AND THE INDIVIDUAL
MAYOR OF THE CITY OF GRAYSON, GEORGE STEELE;
PEARL CRUM, JACK HARPER, JUANITA
KENNEDY, PAM NASH, TERRY STAMPER
AND DUANE SUTTLES, AS CITY COUNCIL
MEMBERS; CHARTER FOODS, INC.; J.D. TRUST, INC.;
LOVES TRAVEL STOPS AND COUNTRY
STORES, INC.; AND OUR LADY OF BELLEFONTE,
INC.

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CLAYTON, AND J. LAMBERT; JUDGES.

LAMBERT, J., JUDGE: The City of Grayson (and its Mayor and Council
Members) and Johnson & Goebel, Inc., appeal from the Carter Circuit Court order
declaring Grayson City Ordinance No. 2-2012 invalid. 4th Leaf, LLC, and Ralph’s
Foods, Inc., cross-appeal from the order. We affirm.

The controversy began over whether a certain parcel of property in Grayson was properly regarded as public and thus acceptable as a city roadway. Although not specifically stated in the proposed ordinance, the apparent purpose of declaring the roadway public was to make possible the construction of a Wal-Mart store in Grayson. The development would require a traffic light on the property, and installation of the traffic light was only feasible if the city road system owned the roadway. A prior request to condemn the property, instigated in 2010, had been abandoned by the City; 4th Leaf (which owns and operates the Super 8 Motel located on the adjacent property) had recently paved the property (at a cost of \$130,000.00).

The City of Grayson, after public readings of the proposed ordinance, deemed that the roadway had been used publicly for the statutorily required number of years and adopted the ordinance. The Carter Circuit Court, on direct appeal filed by 4th Leaf (and after cross motions for summary judgment as well as a motion for judgment on the pleadings¹), struck the ordinance as invalid. In so doing, the Carter Circuit Court granted 4th Leaf's motion for judgment on the pleadings and denied the opposing parties' motions for summary judgment.

The Carter Circuit Court succinctly stated the disputes among the parties, and we repeat those introductory paragraphs here:

At issue herein is a "roadway" [referred to by some as "Super 8 Lane" but owned by 4th Leaf, LLC] which connects Carol Malone Boulevard to Rupert Lane in the city of Grayson. Such roadway stretches across and runs

¹ Kentucky Rules of Civil Procedure (CR) 56.03 and 12.03, respectively.

between various commercial properties on property described by the Plaintiff [4th Leaf, LLC] as a parking lot. Although the Plaintiff herein conveyed the property which originally encompassed the roadway, the roadway itself was reserved and not conveyed in that Deed recorded in Official Record Book 123, at Page 628. As such, the Plaintiff retained ownership of the roadway while granting certain rights for the use of the roadway to Womack Leasing, LLC (the grantee of such conveyance). The language of reservation specifically states as follows:

There is excepted from and not included within this conveyance that certain roadway constructed or to be constructed across the aforescribed premises, as more particularly described in Exhibits 1 and 2 attached hereto and incorporated by reference herein. Fourth Leaf, LLC, agrees to maintain said roadway until such time as the same may be dedicated to and/or accepted by the City of Grayson, Kentucky, as a city road. Womack Leasing and Farmers Hardware shall have the right to use said roadway for access to and across the subject property.

See Deed of Conveyance recorded in Official Record Book 123, at Page 629.

On March 22, 2012, and March 27, 2012, the City Council conducted a first and second reading, respectively, of Ordinance No. 2-2012 (hereinafter referred to as the Ordinance). Pursuant to [Kentucky Revised Statute] KRS 82.400(3), the Ordinance deemed the roadway in question to be dedicated to the public and accepted such roadway into the city road system. The Plaintiff objected to the action being taken by the City Council and thereafter instituted this action. At the heart of the Plaintiff's position is the City Council's finding that the "roadway has been open to the unrestricted use of the general public for in excess of five (5) consecutive years." Additional legal arguments were also raised by the Plaintiff.

KRS 82.400(3), pursuant to which the City's ordinance was passed,

states as follows:

When any property has been opened to the **unrestricted use of the general public for five (5) consecutive years**, it shall be conclusively presumed to have been dedicated to the city or consolidated local government as a public way or easement, subject to acceptance by the city or consolidated local government. The city or consolidated local government may, at any time after the expiration of five (5) years from the time the property is opened to the public, pass an ordinance declaring it so dedicated, and accepting the dedication, whereupon it shall be a public way or easement of the city or consolidated local government for all purposes. The lack of an actual dedication to the city or consolidated local government, or of a record title on the part of the city or consolidated local government, shall be no defense against the collection of any tax that may be levied against property abutting thereon for the payment of the cost of any improvement constructed thereon by order of the city or consolidated local government. Nothing herein shall be construed to require the expiration of five (5) years to raise a presumption of dedication in any case where, under any rule of law in force in this state, a dedication would be presumed in less than five (5) years. Provided, however, that property of a railroad company shall not be presumed to be dedicated as a public way or easement under this section or any other rule of law in force in this state unless the company consents to said dedication in writing.

(Emphasis added.)

The Carter Circuit Court, in reviewing the ordinance, premised its holding on the time factor enunciated in KRS 82.400(3). The court discussed 4th Leaf's testimony that periodic road blocks were put in place over the course of the

years to defeat any claim in this regard. The circuit court made this specific finding: “The total lack of detail regarding time alone prevents such testimony from forming the basis of the City Council’s conclusion that the use had been for five consecutive years.” Because the City was unable to prove this crucial threshold requirement, the Carter Circuit Court held the ordinance invalid.

Our standard of review is whether the circuit court erred in so ruling.

We hold that it did not.

“On factual issues[], a circuit court in reviewing the agency's decision is confined to the record of proceedings held before the administrative body and is bound by the administrative decision if it is supported by substantial evidence.” [*Com. Transp. Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. App. 1990), citing *American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm’n*, 379 S.W.2d 450, 456 (Ky. 1964)]. “If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained.” *Taylor v. Coblin*, 461 S.W.2d 78, 80 (Ky. 1970). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972), citing *Blankenship v. Lloyd Blankenship Coal Company, Inc.*, 463 S.W.2d 62 (Ky. 1970).

Bowling v. Nat. Res. & Env'tl. Prot. Cabinet, 891 S.W.2d 406, 409 (Ky. App. 1994).

It has been 4th Leaf’s consistent position, and the circuit court agreed, that the City failed in its burden of proving the “unrestricted use of the general public for five (5) consecutive years.” Although the proponents of the ordinance

offered substantial evidence of **public use**, they were utterly lacking in competent evidence to rebut 4th Leaf's testimony that the use was **not unrestricted** for five consecutive years. (Emphasis ours.)

Therefore, the circuit court, by focusing on the statutory time element and the lack of substantial evidence to prove that necessary requirement, properly deemed the ordinance invalid. The circuit court further noted that nothing prevents the City "from addressing the issue of dedication again in the future" provided that the City "develop the necessary facts required to make the evidentiary determinations required by KRS 82.400(3)."

Having held the circuit court's holding correct, we deem it unnecessary to address the remaining issues in the direct appeals and cross-appeal.

The order of the Carter Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS/
CROSS-APPELLEES CITY OF
GRAYSON, GEORGE STEELE AS
MAYOR OF THE CITY OF
GRAYSON; PEARL CRUM, JACK
HARPER, JUANITA KENNEDY,
PAM NASH, TERRY STAMPER,
AND DUANE SUTTLES AS CITY
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