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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000690-MR

BUTCHERTOWN NEIGHBORHOOD ASSOCIATION, INC., and ANDREW S. CORNELIUS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 14-CI-002092

LOUISVILLE METRO BOARD OF ZONING ADJUSTMENT; JBS USA, LLC; and SWIFT PORK COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

LAMBERT, J., JUDGE: Butchertown Neighborhood Association, Inc. (and its president, Andrew S. Cornelius) appeal from the Jefferson Circuit Court judgment affirming the Louisville Metro Board of Zoning Adjustment's approval of a

Modified Conditional Use Permit to JBS USA, LLC (owner of Swift Pork Company located on Story Avenue in Louisville, Kentucky). We affirm.

JBS (Swift) operates a hog-slaughtering and meat packing facility in the Butchertown area of Louisville, Kentucky. The plant has been there for many years and employs a large number of people. The original conditional use permit (CUP) was obtained in 1969;[1] it was first modified in 1981 to allow expansion.

In 2009, JBS sought another modified conditional use permit (MCUP), requesting permission to make four improvements (with justifications) to the facility:

(1) An outdoor employee break area;

(2) A decorative fence (already approved by the Historic Landmarks and Preservation District Committee) to replace the current fence on the Story Avenue side of the plant;

(3) An addition totaling 162 square feet to increase the area of the second stunning line (and meet OSHA and FSIS regulations concerning same); and

(4) Enclosure of the hog unloading chutes (proposed in order to reduce noise and odor in the neighborhood).

The MCUP was challenged by the Butchertown Neighborhood Association. On August 31, 2009, the Louisville Metro Board of Zoning Adjustment granted the MCUP with three conditions, one of which was for JBS to expend $137,500.00 for

[1] The original CUP allowed "[t]he operation of industrial meat packing plants, including slaughtering of animals, the processing, packaging and storing of meats, the operation of feed lots, the storing of hair and hides, and the rendering and storage of offal."

landscaping. JBS successfully appealed the imposition of that condition, and the matter was remanded to the Board by the Jefferson Circuit Court.

By agreement of the parties, the matter was stayed for a period of three years in an effort to conduct settlement negotiations. No settlement was reached. In October 2013, the Neighborhood Association sought to enjoin any public hearings on the application; these efforts were denied by the Board in December of that year. Public hearings were held (pursuant to Kentucky Revised Statute (KRS) 100.237) on December 16, 2013; February 17, 2014; and March 17, 2014. On the latter date, the Board voted unanimously to approve the MCUP and imposed five conditions; the minutes of that meeting were approved on April 7, 2014.

The Neighborhood Association challenged two of the five conditions in its appeal to the Jefferson Circuit Court. KRS 100.347(2). Those two conditions are:

> 3. The maximum number of hogs slaughtered per day, on a 6-day rolling average, will be 10,500. The limitation shall not be changed without the prior authorization of the Board of Zoning Adjustment following a duly notified hearing. Upon reasonable notice not to exceed 24 hours, representatives of the Louisville Department of Codes and Regulations shall have on-site access to JBS, USA, LLC/Swift's records showing the number of hogs slaughtered. To preserve JBS's proprietary interest, the Department of Codes and Regulations shall not photocopy or otherwise record the number of hogs slaughtered unless Department

> representatives believe that a violation of Condition No. 1[2] has occurred.
>
> 5. JBS USA, LLC/Swift will appear before the Board of Zoning Adjustment regarding the status of any Notice of Violations from the Air Pollution Control District on September 22, 2014, and appear before the Board every 6 months starting from March 17, 2014, for two years.

The Jefferson Circuit Court affirmed the Board's approval on April 10, 2015. The Neighborhood Association appeals to this Court, raising four arguments.

We begin by stating the standard of review:

> Judicial review of an administrative decision is concerned with whether the action of the agency was arbitrary. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). Three grounds exist for finding that an agency's decision was arbitrary: (1) the agency acted in excess of its statutory powers, (2) the agency did not afford procedural due process, and (3) the agency's decision was not supported by substantial evidence. *Id.*

Baesler v. Lexington-Fayette Urban Cty. Gov't, 237 S.W.3d 209, 212 (Ky. App. 2007).

The Neighborhood Association first finds fault with the circuit court's analysis of the legal requirements for the Board's approval of the MCUP. In so arguing, the Association insists that the Board should have made "the same required factual determinations, supported by substantial evidence, that would justify the issuance of an original CUP." This is simply not correct. A request for

[2] Condition No. 1 states: "The site shall be developed in strict compliance with the approved development plan dated March 3, 2014 (including all notes thereon). No further development shall occur on the site without prior review and approval by the Board."

modification is not the time to reconsider the original CUP (especially one which has been in place for so many years). The procedure for MCUPs is separate.

The Land Development Code (LDC) for Louisville-Jefferson County, Kentucky provides:

> At the initiation of the Planning Director or owner of the property subject to the Conditional Use Permit, any Conditional Use may be reconsidered in accordance with this Part. The Board shall determine the need for a new public hearing. Upon consideration of the request to modify the Conditional Use Permit, the Board may apply additional conditions.

LDC § 11.5A.1(E), entitled "Request for Modification." As the circuit court noted, there is nothing in the Code that requires the Board to reconsider the original CUP. Rather, the circuit court concluded, and we agree, that the Board made findings sufficient for "meaningful review" and for the court to determine the issue of arbitrariness. *See Caller v. Ison*, 508 S.W.2d 776, 777 (Ky. 1974).

Moreover, the Board made the Code's required findings (which were several pages long) after three separate hearing dates and testimony from multiple witnesses for each party. The Jefferson Circuit Court did not err in its analysis.

The Neighborhood Association secondly argues that the circuit court "erred in affirming the Board's approval of a Modified Permit conditioned on the future justification of JBS/Swift's request." In this vein the Association argues that the Board's imposition of Condition No. 5 was improper for allowing JBS to postpone compliance until an undetermined time in the future. The Association

further contends that the Board was merely substituting imposition of the condition for its duty to make required findings.

Again we disagree. The Board was within its authority to impose this condition. KRS 100.247(1) specifically permits attaching "necessary conditions such as time limitations, requirements that one (1) or more things be done before the request can be initiated, or conditions of a continuing nature." KRS 100.247(4) authorizes the Board's annual review and inspection "in order to ascertain that the landowner is complying with all of the conditions which are listed on the conditional use permit." Here the Board imposed twice-annual inspections for two years in order to ascertain compliance by JBS. Additionally, the Board did in fact make findings pertaining to this issue. The circuit court did not err in its review of Condition No. 5.

The Association also argues that the Board's approval was not supported by substantial evidence. We hold to the contrary. The Board's findings were extensive and were based on the testimony and evidence presented over the course of the three hearing dates. This comports with the above mentioned statutory and administrative regulations as well as Kentucky case law. *American Beauty Homes Corp.*, *supra*. *See also McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003).

The Association's final argument is that Condition No. 3 is not supported by substantial evidence and incapable of enforcement. We agree with JBS that this was not a new condition; rather it was imposed in 2009 and was not

part of that appeal. Furthermore, there was not only substantial evidence in the record to support the Board's finding pertaining to this condition, but it was also capable of being enforced pursuant to KRS 100.247(4).

Based on the above-stated reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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