

RENDERED: JANUARY 11, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-001868-MR

MARLENE WHITE AND  
RIKKI JAMALIA

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE ERNESTO M. SCORSONE, JUDGE  
ACTION NO. 07-CI-01468

PETER BROWN, LEXINGTON-FAYETTE URBAN  
COUNTY BOARD OF ADJUSTMENTS MEMBER;  
JOANNE BELL, LEXINGTON-FAYETTE URBAN  
COUNTY BOARD OF ADJUSTMENTS MEMBER;  
CAROLYN EDWARDS, LEXINGTON-FAYETTE URBAN  
COUNTY BOARD OF ADJUSTMENTS MEMBER;  
JAMES GRIGGS, LEXINGTON-FAYETTE URBAN  
COUNTY BOARD OF ADJUSTMENTS MEMBER;  
MIKE OWENS, LEXINGTON-FAYETTE URBAN  
COUNTY BOARD OF ADJUSTMENTS MEMBER;  
LEWIS STOUT, LEXINGTON-FAYETTE URBAN  
COUNTY BOARD OF ADJUSTMENTS MEMBER; AND  
BARRY STUMBO, LEXINGTON-FAYETTE  
URBAN COUNTY BOARD OF  
ADJUSTMENTS MEMBER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DIXON, JONES, AND K. THOMPSON, JUDGES.

JONES, JUDGE: Appellants, Marlene White and Rikki Jamalia, appeal from an order of the Fayette Circuit Court upholding a final decision of the Lexington-Fayette Urban County Board of Adjustments (the “Board”) denying White a conditional use permit to operate a bed-and-breakfast on her property.<sup>1</sup> Following review of the record and applicable law, we AFFIRM.

**I. BACKGROUND**

The early facts of this case have been summarized in a related appeal, *White v. Harper*, No. 2017-CA-001783-MR, 2018 WL 4189553 (Ky. App. Aug. 31, 2018), and we adopt them herein as follows:

White purchased property at 119 South Ashland Avenue in Lexington in January 2006. She intended to convert the premises to a bed-and-breakfast. At the time of the purchase, the neighborhood’s R-3 “planned neighborhood residential” zoning designation allowed property to be put to such a use if other conditional use permit application requirements were met. White applied for a conditional use permit from the [Board].

Her efforts were vigorously opposed by the Ashland Park Neighborhood Association. Ultimately,

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<sup>1</sup> Jamalia is not named on the deed of the property at issue and is not named on the application for a conditional use permit. She was a managing member of the LLC intended to operate the bed-and-breakfast and resided on the property during the pendency of this litigation.

the neighborhood association sought a zone change affecting properties in the Ashland Park area—including the subject property—in a manner that would disallow White’s proposed use of the premises altogether. In response to this proposal, the urban county council placed a moratorium on decisions relating to conditional use permits in the area while it conducted hearings on the proposed zone change decision.

On August 17, 2006, White appeared before the urban county council and asked that her property be removed from the zone change proposal that was under consideration. The council rejected her petition and passed a resolution affecting properties on South Ashland Avenue that called for a zone change from R-3 to R-2, or “two-family residential.”

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This decision would have effectively eliminated the possibility of using the property at 119 (a/k/a 121) South Ashland Avenue as a bed-and-breakfast, but the urban county council decided that White “may go forward to have her application [for a conditional use permit] considered on the merits as submitted with the full rights of an R-3 property.” This decision by the urban county council turned on its recognition that White “bought the property when it was zoned R-3 and submitted an application before the moratorium was imposed . . . in reasonable reliance on the zoning regulations in effect when she filed her application.” The urban county council observed that the [Board] had exclusive jurisdiction to conduct a hearing and to issue a decision with respect to White’s application for a conditional use permit.

On February 23, 2007, White appeared before the [Board] and reiterated her request for a conditional use permit that would allow her to open and operate a bed-and-breakfast on her property as though it still had an R-

3 designation. This effort was again opposed by the neighborhood association. The [Board] ultimately denied White's application for a conditional use permit because the property did not meet the requirements for such a permit.

*Id.* at \*1-2.

Specifically, the Board disapproved White's application for the following reason:

A bed and breakfast is permitted as a conditional use only where it is clearly incidental and secondary to the use as a residence. That requirement is clarified and strengthened by requiring that the B & B be carried out by an owner with a controlling interest. Applicant has testified that the property is held by deed to Marlene White; however, an LLC has been or will be running the B & B. That indicates that the operation of a business in the majority of the structure, owned by a separate entity other than the owner of the real property, and comprising the primary use as being operation of a B & B, not as a dwelling. As the applicant stated in her own words, a separate 1,000 square feet "will be used as the primary residence." This is more comparable to providing a suite for use in managing this business.

R. 300.

On March 23, 2007, Appellants appealed the Board's denial of White's application for a conditional use permit to the Fayette Circuit Court. They contended the Board's decision was arbitrary and capricious, in that it: (1) failed to make required findings; (2) exceeded its scope of review; (3) was the product of unfair prejudice and discrimination; (4) denied Appellants due process; and (5)

lacked substantial evidentiary support. Additionally, Appellants alleged that the Board had subjected them to disparate and discriminatory treatment and denied them due process and equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution, 42 U.S.C.<sup>2</sup> § 1983, and §§ 1, 2, and 3 of the Kentucky Constitution. The Board filed an answer on April 13, 2007, in which it acknowledged that it had denied White's application for a conditional use permit, but otherwise denied the allegations.

On June 11, 2015, Appellants moved for summary judgment. In the memorandum supporting their motion, Appellants contended that the Board's granting the neighborhood association's motion to postpone the hearing on White's application for a conditional use permit had been in clear violation of the Board's bylaws and had violated Appellants' procedural due process rights. Additionally, Appellants argued that they had clearly met each of the eleven required conditions necessary to obtain a conditional use permit to operate a bed-and-breakfast under Lexington-Fayette Urban County Zoning Ordinance (the "Zoning Ordinance") Article 1-11, which demonstrated that the Board's decision to deny their application was arbitrary. Appellants acknowledged that the Board's findings indicated that they had not met all the required conditions; however, Appellants

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<sup>2</sup> United States Code.

contended that this finding was contrary to the evidence presented at the hearing. Finally, Appellants argued that the Board should have given them the opportunity to cure any technical defects before denying White's application.

On July 13, 2015, the Board filed a response to Appellants' motion for summary judgment and a cross-motion for summary judgment. The Board disputed Appellants' contention that it had violated their due process rights by granting the neighborhood association's motion to postpone the hearing on White's application. The Board noted that all due process requires is that a person be provided with notice and an opportunity to be heard, both of which had been given to Appellants. The Board contended that Appellants had failed to meet their burden to prove that the Board had acted arbitrarily in denying the conditional use permit. The Board noted that testimony given at the hearing demonstrated that Jamalia—who is not listed as a deed owner of the property—was the primary resident of the property. Additionally, testimony from Appellants had indicated that an LLC had been set up to operate the bed-and-breakfast, but that the LLC did not own the property. The Board contended that this testimony demonstrated that Appellants did not meet the requirements for the grant of a conditional use permit. Finally, the Board noted that Appellants had not argued or addressed their claims of equal protection and § 1983 violations in their motion for summary judgment.

Accordingly, the Board requested that the court deem those claims waived and dismiss them.

In Appellants' reply to the Board's response, they contended that the fact that the Board had granted a non-applicant citizen's motion to postpone the hearing on White's application in and of itself constituted a due process violation. Appellants contended that, but for the postponement, they would have been alerted of any defects in their permit application in a timely manner and would have been able to reapply while still under the R-3 zone. Appellants maintained their argument that because the Board's decision had been based on technical deficiencies, rather than substantive concerns, they should have been given the opportunity to cure those defects before the Board denied White's application. Appellants further noted that the Board's decision with respect to White's application was inconsistent with the Board's decisions with respect to other bed-and-breakfasts operating in the Lexington area. Finally, Appellants clarified that they had not intended to waive or abandon any claims not addressed in their motion for summary judgment, but had intended to move for summary judgment only on their claims that the Board's decision had been erroneous.

On September 25, 2015, Appellants moved for summary judgment on their constitutional claims. In that motion, Appellants contended that the Board had violated their procedural due process rights by illegally postponing the hearing

on White's application for a conditional use permit then arbitrarily denying that application. Appellants argued that the sole purpose of delaying the hearing on White's application, the moratorium imposed by the Urban County Council, and the eventual downzoning of White's property was to prevent them from opening and operating a bed-and-breakfast. Appellants argued that this contention was supported by the fact that White's application was the only one pending at the time that the Urban County Council imposed the moratorium. Thus, Appellants contended that they had been singled out and treated differently than other citizens who apply for conditional use permits before the Board. Appellants additionally argued that the Board had violated their substantive due process rights. Appellants contended that they had been deprived of their fundamental right to the use and enjoyment of White's property when the Board arbitrarily denied White's application for a conditional use permit. They argued that the denial was not tailored to serve a compelling state interest, but merely to deny Appellants their right to use the property as they had originally intended. Finally, Appellants argued that the Board had denied them equal protection of the law when it arbitrarily postponed the hearing on White's application for a conditional use permit in violation of the Board's own bylaws. Because Jamalia is a "person of color," Appellants argued that a strict scrutiny standard should apply to their claim;



however, they contended that the Board's arbitrary postponement of the hearing on White's application could not pass even rational basis review.

The Board replied to Appellants' second motion for summary judgment and filed another cross-motion for summary judgment on October 26, 2015. The Board argued that it had acted within its discretion in granting the neighborhood association a thirty-day extension of the hearing on White's permit application. The Board noted that the circuit court, in a separate case, had already determined that the moratorium imposed by the Urban County Council did not violate Appellants' due process rights. Further, the Board contended that—contrary to Appellants' assertion—Appellants did not have a constitutionally protected right to operate a bed-and-breakfast on White's property. Accordingly, the Board argued that Appellants' procedural and substantive due process claim should be dismissed. As to Appellants' equal protection claim, the Board contended that even if Appellants had a fundamental vested property right their claim must fail. The Board argued that Appellants' claim that they had been singled out because Jamalia is a person of color was unmeritorious, as Jamalia had never been an owner of the property at issue and had not presented any evidence that her race played a part in the Board's decision to deny the conditional use permit. Additionally, the Board contended that there was no evidence that

Appellants had been treated differently than any other citizen who had applied for a conditional use permit.

Following oral arguments, the circuit court entered an order denying Appellants' motions for summary judgment and granting the Board's motions for summary judgment on August 4, 2016. The circuit court first addressed Appellants' contention that the Board had acted arbitrarily in denying White's application for a conditional use permit. The circuit court concluded that the minutes of the February 23, 2007, hearing established that a full hearing had been held on White's application, at which all interested parties were permitted to be heard. Accordingly, the circuit court concluded that the Board had not denied Appellants due process. While the circuit court acknowledged the possibility that different conclusions could be reached as to whether Appellants met all conditions necessary for a bed-and-breakfast conditional use permit, it concluded that the Board's decision was supported by substantial evidence. Additionally, while the circuit court found that the Board could have granted Appellants additional time to cure any deficiencies in White's application, it concluded that the Board was under no requirement to do so.

The circuit court next considered Appellants' constitutional arguments. The circuit court concluded that Appellants simply did not have any vested property right to run a bed-and-breakfast at the time White purchased the

property at issue. Further, the circuit court found that Appellants had presented no evidence showing a nexus between the Board's decision to deny White's application and Jamalia's race, and that Appellants had failed to demonstrate that the Board's action failed a rational basis standard. Absent any vested property right, the circuit court concluded that Appellants' claims that the Board violated their constitutional rights must fail.

This appeal followed.

## **II. ANALYSIS**

Appellants challenge the circuit court's conclusion that the Board's denial of White's application for a conditional use permit was not arbitrary and its conclusion that the Board had not violated their constitutional rights.

### **A. The Board's Decision Was Not Arbitrary**

KRS<sup>3</sup> 100.237 bestows the Board with "the power to hear and decide applications for conditional use permits to allow the proper integration into the community of uses which are specifically named in the zoning regulations which may be suitable only in specific locations in the zone only if certain conditions are met[.]" The Board has the discretion to "approve, modify, or deny any application for a conditional use permit." KRS 100.237(1). Because "zoning determinations are purely the responsibility and function of the legislative branch of government,

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<sup>3</sup> Kentucky Revised Statutes.

such determinations are not subject to review by the judiciary except for the limited purpose of considering whether such determinations are arbitrary.” *Hilltop Basic Res., Inc. v. Cty. of Boone*, 180 S.W.3d 464, 467 (Ky. 2005) (citing *American Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning & Zoning Comm’n*, 379 S.W.2d 450, 456 (Ky. 1964)). Arbitrariness is determined by answering “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.” *Ibid.*

Appellants first contend that the Board denied them procedural due process. “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 Res.*, 180 S.W.3d at 469 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976)). In an administrative setting, procedural due process has 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).

Appellants acknowledge that they were provided with notice and were given the opportunity to present evidence and be heard at a public hearing. They contend, however, that the Board acted in contravention of its own bylaws by postponing the hearing on White's application at the request of the neighborhood association. Appellants contend that this violation constitutes a *per se* due process violation. They direct our attention to Article X.A.2 of the Board's bylaws, which states as follows:

After the required public notices have been given, postponement of a public hearing on an appeal can be granted only by official action of the Board at the scheduled meeting. **If such postponement is desired, the applicant and/or his attorney or representative shall appear before the Board and give the reasons to be entered upon the minutes of the hearing.**

The Chairman shall ask if anyone present objects to the postponement, and the Board shall then decide whether or not to grant such postponement to another, definite date. If the applicant or his representative is not present for the public hearing as scheduled, to present the case or request postponement, the Board shall decide whether to proceed with the hearing as scheduled on the agenda or to postpone it to another definite date.

(Emphasis added.)

Appellants interpret the bylaw as dictating that the *only* time a hearing can be postponed is when the applicant and/or his attorney or representative requests a postponement. This interpretation is tenuous. While Article X.A.2 sets forth the way in which an applicant can request to postpone a hearing, it does not

indicate that the only time a hearing can be postponed is on motion of the applicant. We need not, however, interpret Article X.A.2 at length as we have uncovered no authority indicating that a Board's violation of its bylaws in and of itself constitutes a procedural due process violation.

Appellants additionally argue that the effect of the alleged bylaw violation denied them due process. Because Appellants were not heard on White's application until more than a year after the original hearing date, Appellants contend that they were denied the right to be "heard at a meaningful time and in a meaningful manner." While the lengthy delay was no doubt frustrating to Appellants, we cannot conclude that it amounts to a procedural due process violation by the Board. The length of the delay was entirely out of the Board's hands—the vast majority of the delay was caused by the Urban County Council issuing a moratorium, which precluded the Board from considering White's application for a conditional use permit. Once the moratorium had been lifted, the Board promptly heard White's application, during which Appellants were given the opportunity to be fully heard. There was no procedural due process violation.

Next, Appellants contend that the Board's decision was not based on substantial evidence. If an administrative agency's decision is not supported by substantial evidence, it is arbitrary and, therefore, erroneous. *Fritz v. Lexington-Fayette Urban Cty. Gov't*, 986 S.W.2d 456, 458 (Ky. App. 1998). Substantial

evidence has been defined as “evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men.” *Smyzer v. B.F. Goodrich Chem. Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

“[A] zoning ordinance must contain standards to be used in determining whether to permit or deny a conditional use, so as not to vest absolute and arbitrary power in the administrative agency.” *Keogh v. Woodford Cty. Bd. of Adjustments*, 243 S.W.3d 369, 372 (Ky. App. 2007) (citing *Hardin Cty. v. Jost*, 897 S.W.2d 592, 596 (Ky. App. 1995)). The Zoning Ordinance sets out the following standards that must be met to be granted a conditional use permit for a bed-and-breakfast:

- (1) The use shall be clearly incidental and secondary to the use for dwelling purposes;
- (2) The use shall be carried on only by owners with at least a fifty-one percent (51%) ownership interest, and who reside on the premises;
- (3) The use shall not require external alteration of the dwelling except as may be required to meet fire and building codes;
- (4) Each room to be rented shall be designed and intended to accommodate no more than two persons;
- (5) Each room shall be rented for no longer than seven (7) consecutive days. Any facility which rents rooms for more than seven days shall be regulated as a boarding house;

- (6) The use shall not adversely affect the uses permitted in the notification area and in the immediate neighborhood by excessive traffic generation, noise and the like;
- (7) The owner-operator shall maintain a guest log and other records, which shall be subject to annual review and inspection;
- (8) The use shall not be conducted within any accessory building in a residential zone;
- (9) The conditional use permit shall become null and void upon the sale or transfer of the property;
- (10) All off-street parking areas shall be completely screened with landscaping;
- (11) The use shall be in compliance with all applicable state and local laws, including Health Department Rules and Regulations.

Zoning Ordinance Article 1-11.

Minutes from the hearing on February 23, 2007, indicate that there was significant discussion about whether Appellants met standards 1 and 2. Jamalia testified that she had been living, and intended to continue living, in a studio space in the back portion of the property. White and Jamalia intended to rent out all four bedrooms in the house to guests. There was no intention that White would reside on the property. Jamalia additionally testified that she is not a record owner of the property, but that the bed-and-breakfast would be operated by an LLC in which she has a 51% interest. This was substantial evidence on which



the Board could rely to conclude that Appellants had not met standards 1 and 2 under Article 1-11 to be granted a conditional use permit to operate a bed-and-breakfast. Accordingly, we cannot find that the decision of the Board was arbitrary.

Appellants additionally argue that the circuit court erred in concluding that the Board was not required to grant them an opportunity to cure any defects in White's application for a conditional use permit before denying the application. We disagree. There is no requirement that applicants for conditional use permits be granted the opportunity to cure deficiencies in their applications before an application is denied.

### **B. The Board did not Violate Appellants' Constitutional Rights**

Next, Appellants argue that the circuit court erred in granting the Board summary judgment on their constitutional claims. The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR<sup>4</sup> 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will

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<sup>4</sup> Kentucky Rules of Civil Procedure.

review the issue *de novo*.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Appellants contend that the Board violated their due process and equal protection rights under 42 U.S.C. § 1983, the Fifth and Fourteenth Amendments to the United States Constitution, and the First, Second, Third, and Thirteenth Sections of the Kentucky Bill of Rights. To succeed on a substantive due process claim, Appellants must demonstrate that the Board arbitrarily and capriciously deprived them a constitutionally protected property interest. *Warren v. City of Athens, Ohio*, 411 F.3d 697, 707 (6th Cir. 2005).

Appellants contend that they had a vested right in the zoning designation of the property at the time it was purchased, R-3, which included the right to operate a bed-and-breakfast as a conditional use. We disagree. “A right, in order to be vested (in the constitutional sense) must be more than a mere expectation of future benefits or an interest founded upon an anticipated continuance of existing general laws.” *Louisville Shopping Ctr., Inc. v. City of St. Matthews*, 635 S.W.2d 307, 310 (Ky. 1982) (citing 16A AM. JUR. 2D *Constitutional Law* § 669). Owners of properties zoned R-3 do not have the right to operate a bed-and-breakfast; they have the right to *apply* for a conditional use permit to do so, but there is no guarantee that the application will be granted. This is not a situation where Appellants were already operating a bed-and-breakfast on the

property and then were informed that they could not longer do so because of a zone change. Because Appellants' had no constitutionally protected interest in White's property being zoned R-3, we cannot find that the Board violated their substantive due process rights.

Appellants additionally argue that the Board denied them equal protection of the law. Appellants contend that a strict scrutiny standard must apply to this claim because Jamalia is a person of color. We note, however, that Jamalia is not the owner of the property at issue and was not listed on the application for a conditional use permit. The Board denied White's application. Accordingly, Appellants' equal protection claim is subject to a rational basis review. "Under this standard of review '[l]egislative distinctions between persons . . . must bear a rational relationship to a legitimate state end.'" *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003) (quoting *Chapman v. Gorman*, 839 S.W.2d 232, 239 (Ky. 1992)).

Appellants contend that the Board treated them differently than similarly situated citizens when it postponed the hearing on White's application for a conditional use permit and then denying the application. As noted, the Board only postponed the hearing when concerned citizens requested that the hearing be postponed. It was not an arbitrary action. The fact that White had the only pending application for a conditional use permit at the time the *Urban County Council* imposed a moratorium does not indicate that the *Board* singled Appellants

out and treated them differently. Further, as discussed above, the Board had legitimate reasons for denying White's application. Accordingly, Appellants' equal protection claim must fail.

### **III. CONCLUSION**

Based on the foregoing, we **AFFIRM** the order of the Fayette Circuit Court.

**DIXON, JUDGE, CONCURS.**

**THOMPSON, JUDGE, CONCURS IN RESULT ONLY.**

**BRIEFS FOR APPELLANTS:**

W. Henry Graddy, IV  
Dorothy T. Rush  
Versailles, Kentucky

**BRIEF FOR APPELLEES:**

Tracy W. Jones  
Lexington, Kentucky