

RENDERED: OCTOBER 4, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2018-CA-001309-MR

FRANK W. FREEMAN; JAMES M. FREEMAN; LAURA  
SCHOONOVER; C&L FARMS; AND BLACK GOLD  
OIL COMPANY D/B/A C&L EXPLORATION COMPANY      APPELLANTS

v.                                  APPEAL FROM WARREN CIRCUIT COURT  
   HONORABLE STEVE ALAN WILSON, JUDGE  
   ACTION NO. 17-CI-00172

CITY-COUNTY BOARD OF ADJUSTMENTS OF WARREN  
COUNTY, KENTUCKY; BLUEGRASS MATERIALS OF  
KENTUCKY, LLC; AND BLUEGRASS MATERIALS, INC.      APPELLEES

OPINION  
AFFIRMING

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BEFORE: KRAMER, MAZE AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Frank W. Freeman, *et al.*, (“Appellants”) appeal from an order of the Warren Circuit Court affirming a decision of the City-County Board of Adjustments of Warren County, Kentucky (“the Board”) which granted

to Bluegrass Materials Company, LLC (“Bluegrass Materials”) a conditional use permit to expand its existing rock quarry in Warren County, Kentucky. Appellants argue that the Board improperly granted the permit because the wrong entity applied for the permit; the Board did not follow its own planning and zoning guidelines; Appellants were not afforded due process; and, the Board’s decision was not supported by substantial evidence. We find no error and AFFIRM the order on appeal.

### **Facts and Procedural History**

Bluegrass Materials operates a rock quarry on Barren River Road in Warren County, Kentucky. The quarry has been in operation since 1953. In 2010, Bluegrass Materials purchased an adjoining tract of approximately 218 acres in order to expand the quarry. Appellants own the oil and gas rights to a 100-acre parcel of the 218-acre tract, and have operated oil wells on the 100-acre parcel since 1985.

After purchasing the 218-acre tract, Bluegrass Materials applied to the Board for a conditional use permit under Warren County Zoning Ordinance Section 5.2.6(D)(4)(b) in order to conduct quarry operations. A public hearing was conducted on the application, at which Freeman voiced opposition to the issuance of the permit on the basis that quarry operations would interfere with the oil and gas rights of Freeman and other interest holders. Testimony was also adduced

from Jeremy Goad on behalf of Bluegrass Materials, other homeowners and a representative of the City-County Planning Commission. At the conclusion of the hearing, the five-member Board voted unanimously to grant the permit.

Appellants appealed from the Board's ruling to the Warren Circuit Court. The court affirmed the issuance of the conditional use permit upon determining that the Board's action was not arbitrary. The court also noted that although Freeman argued that the issuance of the permit would interfere with his exercise of oil and gas rights, the sole question before the circuit court was whether the Board's decision was arbitrary under Kentucky law. It determined that the infringement of Freeman's oil and gas rights, if any, was not before the court and could be subject to separate litigation. This appeal followed.

### **Arguments and Analysis**

Appellants argue that the Warren Circuit Court committed reversible error in sustaining the Board's issuance of Bluegrass Material's conditional use permit. They first contend that the wrong legal entity applied for the conditional use permit, and that the Warren Circuit Court erred in failing to so rule. Specifically, Appellants assert that "Bluegrass Materials Company, LLC" acquired the surface rights to the real property that was the subject matter of the conditional

use application, but “Bluegrass Materials, Inc.” improperly applied for the permit.<sup>1</sup> Appellants argue that the Board did not follow its own guidelines in accepting an application on behalf of an entity that was not registered to do business in the Commonwealth and did not own the subject property. It therefore follows, they contend, that the Warren Circuit Court’s failure to address this error renders its decision arbitrary under the standard of *Danville-Boyle County Planning Commission v. Centre Estates*, 190 S.W.3d 354 (Ky. App. 2006).

Appellants acknowledge that this issue was not addressed below.

An appellate court “is without authority to review issues not raised in or decided by the trial court.” *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). On this basis alone we are precluded from finding error. *Id. Arguendo*, even if this matter were raised and ruled upon below, it would not be a basis for reversing the order on appeal. Appellees acknowledge that the name “Bluegrass Materials, Inc.” rather than “Bluegrass Materials Company, LLC” appears on the conditional use permit application, which they characterize as an inconsequential clerical error. There are a number of published opinions which stand for the proposition that a clerical error or other mistake in the filing of the petitioner’s name is not a basis for dismissing the action where no one could mistake the

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<sup>1</sup> The record employs the names “Bluegrass Materials Company, LLC” and “Bluegrass Materials of Kentucky, LLC” interchangeably.

purpose of the action and there was no prejudice to the defendant. In *Wathen v. Mackey*, 300 Ky. 115, 187 S.W.2d 1000 (1945), for example, a personal injury action was instituted in the name of an infant's guardian, rather than in the name of the infant by his guardian. The Court of Appeals held that because there was no prejudice and no one could mistake the purpose of the action, there was no basis for reversing with the judgment. As applied to the facts before us, there was no prejudice to the parties arising from the incorrect name appearing on the application, and the parties were fully aware at all times of the purposes of and parties to the application. Thus, even if this matter were raised and ruled upon below, we would find no error.

The focus of Appellants' claim of error is that the Warren Circuit Court improperly failed to conclude that the Board's decision was arbitrary and is therefore subject to reversal. As the parties are well aware, a court's review of an administrative ruling is centered on whether the ruling was arbitrary. *See generally American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). An administrative decision is found to be arbitrary when 1) the agency acts beyond the scope of its statutory powers, 2) the agency fails to afford procedural due process, or 3) it makes a determination unsupported by substantial evidence. *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005) (citing *American Beauty*

*Homes*, 379 S.W.2d at 456). Substantial evidence is defined as “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). “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).

The three questions for our consideration, then, are 1) whether the Board acted beyond its statutory authority, 2) whether the Board failed to afford procedural due process to Appellants, and 3) whether the Board’s decision is unsupported by substantial evidence. Having closely examined the record and the law, we must answer each of these questions in the negative. Appellants do not expressly argue that the Board exceeded the scope of its authority. Rather, they assert that the Board did not follow its own planning and zoning guidelines by failing to consider the permit’s impact on Appellants’ oil and gas lease dated November 20, 1985. We find no basis for concluding that the Board acted beyond the scope of its authority in issuing a conditional use permit. To the contrary, such authority is expressly authorized by statute. “The board shall have the power to hear and decide applications for conditional use permits . . . . The board may approve, modify, or deny any application for a conditional use permit.” Kentucky Revised Statute (“KRS”) 100.237. The Board’s action falls squarely within its

statutory authority, and we cannot conclude that the first element of *Hilltop Basic Resources* has been met.

The next question is whether the Board failed to afford procedural due process to Appellants. Appellants argue that they were not given procedural due process because they did not receive written notice in advance of the hearing as required by statute. When an application is made for a conditional use permit, KRS 100.237(6) requires the issuance of written notice at least 14 days in advance of a hearing to 1) the applicant, 2) administrative and governmental officials, 3) adjoining property owners, and 4) other persons designated by local ordinance. The statute does not require written notice to persons or entities like Appellants, who possess leasehold interests in the subject parcel; therefore, the second element of *Hilltop Basic Resources* has not been met.<sup>2</sup>

The third and final question on this issue is whether the Board's decision is supported by substantial evidence. In reaching its decision granting the conditional use permit, the Board found that 1) the use is not detrimental to the public health, safety or welfare of the zone in which it is proposed, and does not constitute a change from the present operation; 2) the use will not contribute to an overburdening of municipal services; 3) the use will not increase traffic

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<sup>2</sup> Though Freeman was not provided with written notice of the hearing, he had actual notice of the hearing, which he attended and at which he testified against the issuance of the conditional use permit.

congestion, parking problems or increase population density; and, 4) the use otherwise meets the requirements of the zoning ordinance. The Board heard the testimony of a number of witnesses on both sides of the issue, including representatives of the Board, of Bluegrass Materials and concerned citizens. It is noteworthy that the Board expressly limited the scope of its consideration to whether the conditional use permit would comport with the zoning ordinance, and found that the impact of the permit, if any, on Appellants' leasehold interests was outside the scope of permitting process. The Board's decision was supported by substantial evidence.

### **Conclusion**

We find no error in the Warren Circuit Court's determination that the City-County Board of Adjustments of Warren County, Kentucky acted within its statutory authority, that due process was afforded to those statutorily entitled, and that the Board's decision was supported by substantial evidence. Accordingly, we AFFIRM the Warren Circuit Court's order affirming the decision of City-County Board of Adjustments of Warren County.

ALL CONCUR.



**BRIEFS FOR APPELLANTS:**

Kenneth A. Meredith, II  
Bowling Green, Kentucky

**BRIEF FOR APPELLEE  
BLUEGRASS MATERIALS  
COMPANY, LLC:**

D. Gaines Penn  
Bowling Green, Kentucky

**BRIEF FOR APPELLEE CITY-  
COUNTY BOARD OF  
ADJUSTMENTS OF WARREN  
COUNTY, KENTUCKY:**

Hoy P. Hodges  
Bowling Green, Kentucky