

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000286-MR (DIRECT APPEAL)
AND
NO. 2002-CA-000315-MR (CROSS-APPEAL)

JESSAMINE COUNTY FISCAL COURT;
JESSAMINE COUNTY-CITY OF WILMORE
JOINT PLANNING COMMISSION; JOHN BUNTON;
LINDA BUNTON; CHARLES PAPP; KAREN PAPP;
MICHAEL STUTLAND; KATHRYN STUTLAND; TOM
BOWER; RHONDA BOWER; PATRICK GERSTEL;
KAREN GERSTEL; PATRICK PEPPER; SHARMAN
PEPPER; TIM STROHL; KAY STROHL; MRS. ALEX
BOWER; BOBBY DAY WILSON, in his official
Capacity as a member of the Jessamine
County Fiscal Court; STEVE GAYHEART, in
his official capacity as a member of the
Jessamine County Fiscal Court; TERRY
MECKSTROTH, in his official capacity as a
member of the Jessamine County Fiscal Court;
GEORGE DEAN, in his official capacity as a
member of the Jessamine County Fiscal Court;
JOHN NICKELL, in his official capacity as a
member of the Jessamine County Fiscal Court;
JIMMY WELLS, in his official capacity as a
member of the Jessamine County Fiscal Court;
WILLIAM NEAL CASSITY, in his official capacity
as Jessamine County Judge Executive; PETER BEATY,
in his official capacity as a member of the
Jessamine County-City of Wilmore Joint Planning
Commission; KEN HOUP, in his official capacity
as a member of the Jessamine County-City of
Wilmore Joint Planning Commission; CHARLES
FULLER, in his official capacity as a member of
the Jessamine County-City of Wilmore Joint
Planning Commission; WAYNE McCRAY, in his official
capacity as a member of the Jessamine County-City
of Wilmore Joint Planning Commission; CHARLES
KESTEL, Jr., in his official capacity as a
member of the Jessamine County-City of Wilmore
Joint Planning Commission; C. V. ELLIOTT, in his
Official capacity as a member of the Jessamine

County-City of Wilmore Joint Planning Commission; JOHN BLACKFORD, in his official capacity as a member of the Jessamine County-City of Wilmore Joint Planning Commission; JOSEPH L. POAGE, in his official capacity as a member of the Jessamine County-City of Wilmore Joint Planning Commission; RICHARD L. HARDIN, in his official capacity as a member of the Jessamine County-City of Wilmore Joint Planning Commission; and JOHN FITCH, Jr., in his official capacity as a member of the Jessamine County-City of Wilmore Joint Planning Commission

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 99-CI-00498

JOE STERNBERG; LESLIE STERNBERG;
SAM STERNBERG; CECILE STERNBERG;
JOHN HORNE and PORTIA HORNE

APPELLEES/CROSS-APPELLANTS

v.

DARREN TURNER AND KRISTEN TURNER

CROSS-APPELLEES

OPINION
AFFIRMING IN PART and
REVERSING IN PART

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER and HUDDLESTON,¹ JUDGES.

¹ Judge Huddleston concurred in this opinion prior to his retirement effective June 15, 2003.

EMBERTON, CHIEF JUDGE. The appellants/cross-appellees appeal from a decision of the Jessamine Circuit Court reversing a decision of the Jessamine County Fiscal Court denying a zone map amendment and remanding the case to the Jessamine County-City of Wilmore Joint Planning Commission for a de novo hearing. The appellees and cross-appellants, Joe Sternberg, Leslie Sternberg, Sam Sternberg, Cecile Sternberg, John Horne and Portia Horne, maintain that the trial court properly held that the decision of the Fiscal Court was arbitrary, but that the trial court should have approved the zone map amendment without remand for a de novo hearing.²

In late November 1998, the appellees applied for a zone change from A-1 to R-1 for approximately 80.63 acres of land owned by them on Brannon Road in Jessamine County, Kentucky. Brannon Road runs in an east-west direction and connects to U.S. Highway 68 that runs in a north-south direction. The appellees, after obtaining the zone change, intended to construct a fifty-six-lot residential neighborhood consisting of executive style, single-family dwellings located on one acre lots.

² For the purpose of clarity, the appellees/cross-appellants are referred to as simply the appellees throughout this opinion. The appellants/cross-appellees are referred to as the appellants.

In the same proximate area as the appellees' proposed development, there is a residential development known as Equestrian Estates consisting of residences similar to those appellees intended to develop. In order to construct Equestrian Estates, in November 1996, a zone change from A-1 to R-1 zoning was sought and obtained. At that time, the Joint Planning Commission found that since the adoption of the Comprehensive Plan, there had been substantial changes in the area, including the granting of a conditional use permit to the Southland Christian Church to significantly expand its facility. It further found that there was a shortage of the type of lots proposed by the Equestrian Estates development and that the zone change agreed with many of the principles in the Comprehensive Plan.

At the Commission hearing in the case before us the appellees relied heavily on changes that had occurred in the area, placing particular importance on the Equestrian Estates development. However, two weeks prior to the date the appellees applied for the zone change, the Commission adopted an amendment to the Comprehensive Plan that provides:

None of the improvements or any future improvements to U.S. 68, expansion plans for Southland Christian Church, the approval of Equestrian Estates (at U.S. 68 and Brannon Road), the approval of Roseglade (south of the U.S. 68 and KY 29 "Y" intersection), the approval of the zone change for the Ichthus property, or the development of the

Crosswoods Center at the Fayette County line shall be utilized to justify any zoning map amendment which is not in conformance with this Comprehensive Plan and this Plan Amendment.

The appellants objected to the requested zone change arguing that the amendment precluded reliance on the changes in the area resulting from the improvements listed in the amendment. In response, the appellees argued that the amendment precluding consideration of major improvements in the area of a requested zone change was inconsistent with Kentucky zoning laws.

Although without specific reference to the amendment of the Comprehensive Plan, the Commission found that the zone change did not agree with the Plan and there had not been changes in the character of the area since its adoption.

Without conducting a second public hearing, the Jessamine County Fiscal Court adopted the Commission's recommendation. The appellees appealed the denial, again arguing that the proposed zone change agreed with the Comprehensive Plan and cited the major changes in the area. In response, just as they did before the Commission, the appellants relied on the amendment claiming the appellees were precluded from citing the changes in support of their application. The appellees then addressed the legality of the amendment in their reply brief.

After holding oral argument and briefing the issue of the legality of the amendment, the circuit court found that the Commission had not complied with KRS³ 100.197 when adopting the amendment. Specifically, the court found that the Commission did not conduct a review of the elements of the Comprehensive Plan, did not conduct a review of the research basis for the Plan, did not make a finding that the research was still valid, and did not provide notice of the amendment as required by KRS 100.193(2) and KRS 100.197(3). The trial court reversed and remanded the case to the Commission for a de novo public hearing under the same ordinances, rules, and regulations existing at the initial hearing, except that the amendment was ordered stricken from the Comprehensive Plan. The appellees were precluded from introducing any factual matters that occurred since the initial hearing.

The appellants contend that the trial court was without authority to consider whether the amendment to the Comprehensive Plan was proper because the issue was not properly preserved. It argues that the appellees neither raised the issue before the Commission, Fiscal Court, in their complaint, nor initial brief to the court. Citing a long line of cases holding that issues not raised below cannot be heard and form

³ Kentucky Revised Statutes.

the basis for a decision by a reviewing court, the appellants contend the appellees waived this argument.⁴

In reviewing the record, it is apparent that the amendment to the Comprehensive Plan was a dominate issue throughout this case and when appellants relied on it in opposition to the change, appellees expressed their view that the amendment was improperly amended. As can be expected, since the Commission adopted the amendment just two weeks prior to the hearing, their objection was unsuccessful. Additionally, the argument was well-briefed and presented in the trial court. In summary, appellants' contention regarding judicial preservation has no merit.

Following oral arguments, the circuit court ordered the Commission to supplement the record with copies of minutes and other documents to determine whether the statutory steps were taken to amend the Comprehensive Plan. Judicial review of factual findings made by an administrative action is limited to whether the action was arbitrary.⁵ As to the issues concerning the factual basis for the Commission's actions, new or

⁴ See, e.g., Urella v. Kentucky Board of Medical Licensure, Ky., 939 S.W.2d 869 (1997); Clark v. Clark, Ky. App., 601 S.W.2d 614 (1980); Heucker v. Clifton, Ky., 500 S.W.2d 398 (1973).

⁵ American Beauty Homes v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964).

additional evidence is not admissible except to "establish the violation of some legal right with respect to a matter not in issue in proceedings before the commission."⁶ Despite the deference given an administrative agency in its findings and conclusions of facts, however, a court is authorized to review an issue of law on a de novo basis.⁷

The circuit court was well within its appellate authority to review the issue of the legality of the amendment and ordering the appellants to produce the record surrounding the adoption of the amendment. Its review of this legal issue was de novo.

Although appellants have spent substantial time arguing the procedural aspects of the circuit court's decision, they do not attempt to argue that the amendment complied with KRS 100.197. After review of the record and appellant's apparent concession, we find that the amendment was improperly adopted. For the appellants to now argue that there is no evidence that the Commission relied upon this improper amendment is specious. Not only was the amendment advanced by appellants as a basis to exclude consideration of evidence concerning the

⁶ Id. at 457-58.

⁷ Mill Street Church of Christ v. Hogan, Ky. App., 785 s.W.2d 263, 266 (1990).

proposed zone change, i.e., substantial changes in the area, but the Commission clearly relied upon the Comprehensive Plan, including the amendment, to deny the change.

The appellants contend that a remand to the Commission to conduct a de novo hearing was erroneous and that the proper remedy was remand to the Fiscal Court to reconsider the existing record without reference to the amendment. The appellees contend that a remand was not required at all but that the circuit court should have granted the zone change. When a zoning authority wrongfully denies a zone change, the court can either remand the matter for a rehearing or order the zone change requested.⁸ A remand is appropriate where, as here, the decision was based on an illegal amendment that precluded the fact finder from considering relevant evidence. Although the appellees are convinced that they still will not succeed, this is not a basis for this court to usurp the fact-finding functions delegated to another authority.

We accept appellants' contention that the remand should be to the Fiscal Court for a review of the record without consideration of the void amendment and not to the Commission for a de novo hearing as ordered by the trial court. The Commission serves as the initial fact-finding body. KRS 100.211

⁸ Louisville v. McDonald, Ky., 470 S.W.2d 173, 179 (1971).

requires a public hearing after notice following which the Commission makes a recommendation to the Fiscal Court. The Fiscal Court can accept those facts, conduct a new hearing, or make different findings. Whichever course it follows, the "ultimate decision must be made by the legislative body."⁹ As in Resource Development Corp. v. Campbell County Fiscal Court,¹⁰ the court can either consider the evidence produced at the Commission hearing or hold a due process, trial-type hearing of its own. Remand, however, is proper to the Fiscal Court.

The appellees' contention that they should be permitted to introduce new evidence of changes in the area since the Commission's hearing is rejected. A new hearing before the Commission with introduction of such evidence would require the filing of a new application for zone change. Appellees cannot piggyback this additional evidence to the present case.

The judgment of the Jessamine Circuit Court is affirmed except that the matter is remanded to the Jessamine Fiscal Court for consideration of the record without application of the amendment to the Comprehensive Plan.

⁹ Louisville v. McDonald, supra.

¹⁰ Ky., 543 S.W.2d 225 (1976).

ALL CONCUR.

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