

RENDERED: MAY 9, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court Of Appeals**

NO. 2002-CA-000947-MR

ALICE SOUTH HUME and
PIN OAK STUD, LLC

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NO. 01-CI-01223

FRANKLIN COUNTY FISCAL COURT;
THERESA A. BARTON, County Judge-Executive;
JILL E. ROBINSON, Magistrate;
PHILLIP W. KRING, Magistrate;
HOWARD R. DAWSON, Magistrate;
IRA W. FANNIN, Magistrate;
HUSTON WELLS, Magistrate;
J.W. LUTTRELL, Magistrate;
LEWIS BIZZACK; GARY BIZZACK; and
JOHN W. BIZZACK, Executor of the Estate
of JOHN BIZZACK

APPELLEES

OPINION

REVERSING

** ** * * * * *

BEFORE: EMBERTON, Chief Judge; BAKER and HUDDLESTON, Judges.

HUDDLESTON, Judge: Alice Hume and Pin Oak Stud are neighboring landowners of a property owned by the Bizzacks, who appeal a Franklin Circuit Court final order which upheld a change in the zoning of the property from Professional Office (PO) to Highway Commercial (CH). The case has had a long and complicated procedural history, and has previously been before this Court.

In the Spring of 1997, the Bizzacks proposed a change in the zoning of property they owned in Franklin County, Kentucky, situated in the southwest quadrant of the intersection of Interstate Highway 64 and U.S. Highway 60, the specific tract being 10.31 acres bordered by U.S. 60 (Versailles Road) and Millville-Duncan Road. Following two hearings, the Frankfort-Franklin County Planning Commission adopted findings recommending to the Franklin County Fiscal Court that the proposed zone change be adopted.

The fiscal court gave two readings at two different meetings, following which it approved the zone amendment and adopted in full the findings of the planning commission. On appeal, Franklin Circuit Court found that although there had been a good faith attempt by the Planning Commission to analyze changes which had taken place in the area, both it and the fiscal court failed to analyze those facts in light of defined standards set out in Kentucky Revised Statutes (KRS) 100.213.

It remanded the case to Franklin Fiscal Court for reconsideration.

However, the fiscal court failed to appropriately reconsider the zone change as mandated by the circuit court. Instead, it conducted an ex parte meeting with the Bizzacks' counsel in order to prepare findings which would satisfy the circuit court upon review. The fiscal court held two meetings in March 1998 at which it gave first and second readings to the proposed zone map amendment without allowing debate or considering other findings. The fiscal court considered only the set of findings specifically intended to result in approval of the zone map amendment.

This second adoption of the zone map amendment was appealed to Franklin Circuit Court, which vacated the decision on the basis of the fundamental unfairness of the procedures before the fiscal court. It found that although ex parte contact does not invalidate a decision per se, the result here was so egregious that it resulted in an impermissible denial of Due Process to affected landowners challenging the proposed change. In response to a motion by the landowners to alter, amend or vacate its judgment, the circuit court expressly declined to again remand the matter to the fiscal court. In so doing, it stated that the aura of such an arbitrary action could not be erased by a second remand.

The Bizzacks appealed to this Court in John Bizzack and Lewis Bizzack v. Alice South Hume and Crit Blackburn Luallen, No. 1999-CA-001356-MR. We dismissed the appeal without reaching the merits because of the Bizzacks' failure to name the Franklin Fiscal Court as a party to the appeal.¹

On January 19, 2001, the Bizzacks again applied to the Frankfort-Franklin County Planning Commission for a change in the zoning of the subject property from Professional Office to Highway Commercial. Included in the application was a development plan which included a large restaurant, a fast food restaurant, a bank, a dry cleaning establishment and a hardware store intended to be placed on the property.

The planning commission voted 5-4 to approve the request following a hearing at which each side was limited to 45 minutes of presentation and testimony. The planning commission made the following findings:

1. The Future Land Use Map of the Comprehensive Plan designates the property for Regional Retail land use.²

¹ In support of our decision, we cited Boyd & Usher Transport v. Southern Tank Lines, Inc., Ky., 320 S.W.2d 120 (1959).

² According to the Comprehensive Plan, Regional Retail land uses may include Professional Office, Highway Commercial or other listed zoning classifications.

2. The subject property is located at the southwest quadrant of US 60 and I-64.
3. The PO zone district would generate 1800 average daily trips, as compared to 8800 trips,^[3] roughly five times the current zoning.
4. The Comprehensive Plan indicates that Regional Retail uses should occur along major highway corridors near the interstate to accommodate the large amount of traffic generated by such uses.
5. A letter from Jeff Hackbart stated there were unsolved sanitary sewer problems in the area.
6. The purpose of the highway commercial zone district is to provide for services for the traveling public.
7. The Highway Commercial zone district permits uses that will accommodate the traveling public.
8. Testimony was given that the addition of retail towards the west would affect level of service in a negative way.

³ While the finding does not explain the cause of the increase in daily traffic, we infer that the 8800 trips refer to the traffic which would be generated by the new Highway Commercial zone.

9. In the Comprehensive Plan, under Town and County, Goal 2, Policy 6 said to support infill development skipped over in urban areas.
10. Goal 2, Town and Country, Policy 7 states to support redevelopment of brownfield sites.
11. Goal 3 states provide sanitary sewer utility extension [sic] only in accordance with a Comprehensive Plan.
12. Goal 5 states approve new development only when the facilities to serve it will be concurrently available.
13. Goal 8 states to promote a safe and efficient transportation system, through access management, required roadway interconnections, traffic systems management and development impact analysis[.]

Following the recitation of the above findings, the planning commission recommended approval of the zone map amendment "based on findings of fact 1, 3, 2, 6 and 7."

On July 19, 2001, the Franklin County Fiscal Court voted not to hold a new hearing but to place an ordinance on its agenda. The fiscal court added a finding of its own to those of the planning commission, which was that "the Franklin County

Fiscal Court finds that the subject map amendment is in agreement with the adopted Comprehensive Plan, as amended[.]” The fiscal court gave second reading and voted to grant the requested zone change on August 9, 2001.⁴

Following the decision by the fiscal court, Hume and Pin Oak Stud appealed to Franklin Circuit Court arguing that the fiscal court acted arbitrarily in granting the zoning amendment. Their arguments were that the fiscal court did not make appropriate findings when it rendered its decision, that what findings it did make were not supported by substantial evidence, and that the entire procedure denied them procedural due process.

The circuit court⁵ upheld the fiscal court on multiple grounds. Its first stated reason for affirmance was that under Evangelical Lutheran Good Samaritan Society v. Albert Oil,⁶ the zoning amendment became effective by operation of law following the failure of the fiscal court to act within ninety days after this Court dismissed the Bizzacks’ appeal. In the alternative,

⁴ Hume and Pin Oak Stud allege that the fiscal court’s decision was made without the benefit of the record from the planning commission. The fiscal court responds to this allegation by arguing there is no evidence to support it.

⁵ The case this time was heard by a division of Franklin Circuit Court other than the one which entered the two prior decisions regarding the subject property.

⁶ Ky., 969 S.W.2d 691 (1998).

the circuit court found that the fiscal court made sufficient findings which were supported by substantial evidence. Finally, the circuit court concluded that the hearing before the planning commission did not violate procedural due process in that it limited both sides to an equal amount of time, and that no prejudice could be demonstrated resulting from the time limit. Hume and Pin Oak Stud appeal.

We will begin by addressing the circuit court's interpretation of Evangelical Lutheran Good Samaritan Society.⁷ In that case, the Supreme Court held that KRS 100.211(7) requires that after a planning commission recommends a zone change, the fiscal court or local legislative body must act on the recommendation within ninety days.⁸ Strict compliance with the statute is necessary to prevent delaying tactics by the legislative body, and "the consequence of the failure of the local legislative body to override the planning commission recommendation is that the planning commission's recommendation becomes effective as a matter of law."⁹

Evangelical Lutheran has no application to the present case. Following this Court's dismissal of the Bizzacks' appeal, the circuit court's judgment became final. That court vacated

⁷ Id.

⁸ Id. at 694.

⁹ Id.

the actions of the fiscal court and planning commission, and specifically declined to remand the matter for further consideration. The fiscal court cannot be said to have failed to act on the matter when it was expressly prohibited from doing so by order of the circuit court. Therefore, we reverse the circuit court's decision that the planning commission's prior recommendation regarding the zone change became effective by operation of law prior to the Bizzacks' 2001 application.

We must now look to the fiscal court's adoption of the zone amendment. Under KRS 100.347 and American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission,¹⁰ judicial review in zoning cases is limited to the question of whether the administrative decision was arbitrary.¹¹ "As a general rule the yardstick of fairness is sufficiently broad to measure the validity of administrative action."¹² Those issues properly brought before us are "confined to questions of law which are encompassed in the question: Was the administrative decision arbitrary?"¹³

¹⁰ Ky., 379 S.W.2d 450 (1964).

¹¹ Fritz v. Lexington-Fayette Urban County Gov't, Ky. App., 986 S.W.2d 456, 458-59 (1999).

¹² American Beauty Homes, supra, n. 9, at 457, citing Commonwealth ex rel. Meredith v. Frost, 295 Ky. 137, 172 S.W.2d 905 (1943).

¹³ Id. (internal quotation omitted.)

As part of the ordinance adopting the planning commission's recommendation, the fiscal court found that the proposed amendment was in agreement with the comprehensive plan. Such a finding is one of the alternatives required by KRS 100.213(1) before a zone map amendment may be granted.¹⁴ However,

[a] finding which consists of nothing other than a repetition of the legal requirements as set out by a statute fails to meet the requirements of due process, in that such finding does not contain sufficient adjudicative facts to permit a court to conduct a meaningful review of the proceeding for the purpose of determining the question of whether the action of the [c]ommission has or has not been arbitrary.¹⁵

¹⁴ The Bizzacks' previous application was passed by the planning commission and fiscal court under the theory that there had been "major changes of an economic, physical, or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area," as outlined in Ky. Rev. Stat. (KRS) 100.213(1)(b). There have been no significant changes to the property or the comprehensive plan in the time between the Bizzacks' first and second petitions.

¹⁵ Caller v. Ison, Ky., 508 S.W.2d 776, 776-77 (1974). See also City of Beechwood Village v. Council of and City of St. Matthews, Ky. App., 574 S.W.2d 322 (1978).

We must therefore determine whether there were sufficient adjudicative facts developed at the fiscal court level in order to determine whether its decision was arbitrary.

Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the question of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kinds of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.¹⁶

When a legislative body such as a fiscal court determines legislative facts, it may do so without a hearing "unless a hearing is required by legislation which is applicable to the body concerned."¹⁷ With respect to adjudicative facts,

the legislative body [here, the fiscal court] has three alternatives if the planning and zoning commission conducts a trial-type due process hearing

¹⁶ McKinstry v. Wells, Ky. App., 548 S.W.2d 169, 173 (1977), quoting 1 K. Davis Administrative Law Treatise, § 702, p. 413 (1958).

¹⁷ City of Louisville v. McDonald, Ky., 470 S.W.2d 173, 177 (1971).

and makes factual findings in support of its recommendation. First, the legislative body may follow the commission's recommendation without a hearing or only an argument-type hearing. Second, the legislative body may review the record made before the commission and determine from that evidence adjudicative facts which differ from those found by the commission. Third, the legislative body may hold its own trial-type hearing and, based upon the evidence presented at that hearing, find different adjudicative facts than [sic] those found by the commission.¹⁸

In this case, the fiscal court's finding that the proposed zone map amendment is in agreement with the adopted comprehensive plan was clearly a determination of an adjudicative fact. Given that the fiscal court did not conduct its own trial-type hearing but instead relied on that conducted by the planning commission, it was required by McKinstry and McDonald to make any decision regarding an adjudicative fact on the basis of the record developed by the planning commission.

As mentioned earlier, Hume and Pin Oak Stud argue that the fiscal court failed to make its finding on the basis of the

¹⁸ McKinstry, supra, n. 16, at 173. See also McDonald, id. at 179.

record. In fact, they allege that the fiscal court was never presented with the transcript of the proceedings before the planning commission. While the fiscal court argues there is no evidence to support this allegation, our review of the record shows otherwise. The transcript of the hearing before the planning commission was not prepared until November 8, 2001, after proceedings had begun in Franklin Circuit Court to review the fiscal court's action. Because the transcript of the evidentiary hearing was not prepared until after the fiscal court made its decision, the fiscal court could not have relied upon it.

In cases such as this, a transcript of the factfinding hearing is necessary to avoid the problem of having to show by collateral proof what evidence was heard by the administrative body.¹⁹ In this instance, we know what evidence was heard by the planning commission through a review of the record of its hearing. We also know that that evidence was not available to the fiscal court.

Accordingly, the fiscal court acted arbitrarily when it found that the proposed map amendment is in compliance with the comprehensive plan in that the finding was not based on the

¹⁹ Gentry v. Pressnier, Ky., 437 S.W.2d 756, 758 (1969).

evidence presented to the planning commission. We therefore vacate that finding.

Having stricken the fiscal court's adjudicative finding as arbitrarily reached, we must now look to see if its decision could be supported without that finding. If the adjudicative facts found by the planning commission support the fiscal court's decision on their own, the fiscal court's decision is nevertheless valid.²⁰

As previously stated, the planning commission recommended approval based on findings that the property was designated by the comprehensive plan for regional retail land use, that it is located at the southwest quadrant of US 60 and I-64, that the proposed zone change would result in roughly five times the traffic,²¹ that the purpose of the highway commercial zone district is to provide for services for the traveling public, and that the highway commercial zone permits uses that will accommodate the needs of the traveling public. Of those findings, only two refer to adjudicative facts: the finding regarding the future land use map and the finding regarding increased traffic. Therefore, we must determine whether those two findings are sufficient to support the change in zoning.

²⁰ See McKinstry, supra, n. 16, at 173.

²¹ This is our inference from the literal words of the third finding.

It can be inferred from the statement that the property is designated for regional retail land use that the proposed amendment is in conformity with the future land use map, although the planning commission did not expressly so find.²² However, "the land use plan element is not the only portion of the comprehensive plan which need be consulted."²³ In making a decision regarding the appropriateness of a proposed amendment, the planning commission must consider the entire comprehensive plan.²⁴

In this case, unlike Watts, the planning commission did not exclude evidence on subjects other than the proposal's compliance with the future land use map. In fact, much of the testimony at the hearing was devoted to issues like traffic, sewer disposal and urban sprawl. Therefore, we cannot say the planning commission failed to consider these issues.

However, to the extent other elements of the comprehensive plan were considered, the planning commission made no findings. What are labeled as "findings" are essentially

²² The current zoning of professional is also in conformity with regional retail land use designation. However, that would only be relevant if the amendment were predicated on a finding of inappropriateness of the existing zoning as described in KRS 100.213(1)(a), which is not the case.

²³ McKinstry, supra, n. 16, at 172.

²⁴ See 21st Century Development Co., LLC v. Watts, Ky. App., 958 S.W.2d 25 (1997).

descriptive statements with no adjudicative aspect. For instance, those purported findings which start with "there was testimony that . . ." or "a letter said . . ." are in no way adjudicative. Those statements merely summarize the testimony presented, but fail to draw a conclusion from, or assign any weight to, the referenced testimony. Likewise, the last five "findings" merely restate goals and policies from the comprehensive plan. To make an adjudicative finding, the planning commission would have had to state what impact this zone change would have on those goals, how it would or would not further them, or some other similar conclusion.

Furthermore, to the extent adjudicative conclusions can be drawn from the statements of the planning commission, they weigh against the zone change. For example, the commission presented evidence that there were unsolved sewer problems in the area and that significant traffic problems would be created by the new zoning. In that there was no conflicting evidence presented in the purported "finding," the only conclusion which may be inferred is that the identified negative results will occur as a result of the zone change.

Likewise, the goals presented by the planning commission in its findings regarding urban infill development and existing brownfields weigh against the granting of this amendment. As noted in the comprehensive plan, the traditional

boundary between retail commercial establishments and heavy industry and agricultural interests is I-64; retail establishments have traditionally been to the north of the interstate on U.S. 60, while property to the south has been devoted to industrial and agricultural uses. The natural conclusion from the proposal at hand is that it will lead to urban sprawl because it breaks down the traditional division. Additionally, there is a significant area of retail-zoned land north of the interstate which is currently undeveloped.

The planning commission may, of course, alter historical land uses. However, in a case such as this where the planning commission's decision to approve an amendment facially conflicts with its own goals and policies, the commission must at a minimum explain via sufficient adjudicative findings its reasons for approval.²⁵ We are not presented with any findings regarding how this amendment complies or conflicts with the comprehensive plan's stated goals and policies regarding traffic and sewer management, preservation of the traditional distinctions in land use on opposite sides of I-64, and prevention of urban sprawl and encouragement of infill redevelopment, just to name a few. Finally, the comprehensive

²⁵ "A local legislative body to enact a valid ordinance must observe all legal requirements, including those they impose upon themselves." Helm v. Citizens to Protect the Prospect Area, Inc., Ky. App., 864 S.W.2d 312, 314 (1993).

plan points to a projected demand for 163.4 acres of professional office space in Franklin County, but no available land which may be used for offices in the City of Frankfort and only 57 acres available in Franklin County. The planning commission and fiscal court failed to explain, or even address, how a reduction in the amount of available office land in Franklin County by roughly 18% despite a noted shortage would not conflict with the comprehensive plan.

In the absence of adjudicative findings regarding recognized conflicts between the proposed amendment and the goals and policies stated in the county's comprehensive plan, we conclude that the fiscal court and planning commission acted arbitrarily in approving the proposed zone map amendment. Accordingly, we reverse the Franklin Circuit Court order and vacate the adoption by the fiscal court of the planning commission's proposed amendment. Because we have vacated the decision on this basis, we need not reach the question of whether the 45 minute time limit imposed at the hearing before the planning commission was a violation of procedural due process.

Finally, like Franklin Circuit Court in 1998, we decline to remand the matter to Franklin County Fiscal Court for reconsideration. The arbitrariness of its action, having thrice

been found constitutionally impermissible, cannot be erased by yet another remand.

ALL CONCUR.

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