

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001695-MR

JIM BURKE, ELLEN BURKE, VINCENT
J. EIDEN, JAMES TODD SHELL, KIRSTEN
SHELL, JOHN SUTTON, JEAN SUTTON, AND
STAN WICLIFFE

APPELLANTS

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 01-CI-00434

OLDHAM COUNTY BOARD OF ADJUSTMENT
AND APPEALS; LITERS, INC.; ROCK
SPRINGS FARMS, III, INC.; AND
MARY A. HAUNZ

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Appellant homeowners (the appellants) appeal from an opinion and order of the Oldham Circuit Court dismissing their appeal from a decision of the Oldham County Board of Adjustments and Appeals (the Board). The Board granted a

Conditional Use Permit (CUP or permit) to appellee Liter's Inc.,¹ allowing underground quarrying of limestone. We affirm.

Liter's operates a rock quarry located in Oldham County. On April 25, 2001, Liter's filed an application with the Board for a CUP to allow underground quarrying of limestone on property owned by appellees, Rock Springs Farms III, Inc. and Mary A. Haunz, and adjacent to appellants' homes. The permit would allow for expansion of Liter's mining and blasting operations to an area north of Interstate 71.

The Board held public hearings for three days in May and June of 2001. Both parties were represented by counsel during the hearings. Counsel presented opening statements, called witnesses and cross-examined adverse witnesses. Counsel also made closing statements, after which the Board continued to question witnesses. Further, at the request of one of the Board members, Liter's conducted blasting demonstrations on the quarry property. The Board granted the Conditional Use Permit, with 19 specific conditions attached. Appellants filed their appeal in July of 2001, and in January 2002, appellants filed for Summary Judgment before the Oldham Circuit Court. After briefing, the circuit court entered an opinion and order dismissing the homeowners' appeal. This appeal followed.

¹ Liter's, Inc. is the spelling in court documents, including the opinion of the circuit court. However, in the Notice of Appeal to this Court, Appellee is referred to as Liters. For purposes of consistency, throughout this opinion we have adopted the first spelling.

The appellant homeowners raise three issues for our consideration: First, whether the Oldham County Zoning Ordinance unconstitutionally delegates legislative authority to the Board of Adjustments; whether a conditional use permit allowing a quarry operation complies with the Oldham County Comprehensive Plan; and finally whether the homeowners were denied their constitutional rights to procedural due process.

The circuit court's scope of review in the case *sub judice* was to determine whether the Board acted in excess of powers delegated to it by the legislature, whether the parties affected by the Board's decision were provided procedural due process, and whether the action taken by the Board was supported by substantial evidence. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n, Ky., 379 S.W.2d 450, 456 (1971). Our review is to determine whether or not the circuit court's factual findings are clearly erroneous. Jones v. Cabinet for Human Resources, Ky. App., 710 S.W.2d 862, 866 (1966). Kentucky Rules of Civil Procedure (CR) 52.01. Furthermore, this Court is not bound by the trial court's decision on questions of law. Our review of the application of the law to the facts is de novo. Carroll v. Meredith, Ky. App., 59 S.W.3d 484, 489 (2001).

Appellants argue that Section 211 of the Oldham County Zoning Ordinance unconstitutionally delegates zoning power from

the Fiscal Court to the Board. Section 211 states in pertinent part:

In the interest of the public convenience, safety, morals and welfare and to encourage the best use of land, certain land uses, due to their extent, nature of operation, limited application, or relationship to certain natural resources, must be considered as singular cases. The uses listed in this section may be allowed by the Board of Adjustments in certain districts, after public hearing, by Conditional Use Permit, provided the Board of Adjustments finds such uses to be essential or desirable [sic] and not in conflict with the elements and objectives of the Comprehensive Plan.

Subpart A of Section 211 then lists 23 different conditional uses, including extraction of minerals. It also allows "uses similar" to those specifically listed.

The appellants' constitutional argument is based on the proposition that allowing conditional uses is "no less than a delegation of the zoning power reserved by the legislature" to the Fiscal Court, and is therefore unconstitutional and that further the Board is being given unlimited discretion to make these decisions thereby resulting in an unconstitutional delegation of the zoning power.

The circuit court concluded that Section 211 is valid as a zoning ordinance enacted under the Commonwealth's enabling statutes found in Kentucky Revised Statutes (KRS) Chapter 100

and that the ordinance "comports to the objectives and goals of the enabling statutes."

KRS 100.237 grants the Board "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[.]" It should be noted that the appellants are not challenging the constitutionality of KRS 100.237, but only the Oldham County ordinance. The Fiscal Court exercised its zoning power in determining what specific conditional uses were permissible. The zoning ordinance specifically names the conditional uses as required by KRS 100.237. The Board may not issue a conditional use permit for uses not specifically listed or uses which are not "similar" to the specifically listed uses. Contrary to the appellants' contention, this is not a grant of zoning power to the Board, in that the Fiscal Court, not the Board, makes the determination as to what conditional uses are permissible.

The Board's discretion is limited by Section 211 of the ordinance in granting conditional use permits. As stated, the Board may only issue conditional use permits for the uses, or similar uses, listed in the ordinance. Contrary to the appellants' argument, a list of 23 uses is not unlimited. The

Board must also make a factual determination that the use is "essential or desireable [sic] and not in conflict with the elements and objectives of the Comprehensive Plan." In addition, the Board is required to subject each use to specifically stated conditions. The conditions required for "Extraction, Rock Quarries, Mineral and Earth Products" are as follows:

1) Establishment by the responsible authority or approved engineer of the final ground elevations to be attained for the operations.

2) Filing of a performance bond equal to \$5,000.00 per acre with the County or City to insure proper finishing of the area into a usable condition.

3) Plan of use of the area following completion of the operation.²

The Board is then required to consider any other conditions it "feels necessary to further the purposes of this regulation and further the public's best interest." Here, the Board attached 19 conditions, in addition to the ones required by the ordinance. Given the above requirements and standards, we do not believe what the ordinance has done can be interpreted as an unconstitutional delegation of legislative authority to the Board.

² Zoning ordinance, section 211, § F.

Appellants ask us to hold that an application for an industrial use, such as quarrying, does not qualify as a conditional use. They cite Carlton v. Taylor, Ky. App., 569 S.W.2d 679, 681 (1978), in which we held that an application for a retail liquor store did not qualify as a conditional use in a residential neighborhood. Carlton is easily distinguishable from the case sub judice. In Carlton, a retail liquor store was not a specifically listed conditional use, and yet the Board issued the permit. Further, in Carlton, this court could not conclude that a liquor store promoted the public health, safety or welfare. Id. at 681. Here, the Fiscal Court, in exercising its legislative power, determined that the extraction of minerals is a conditional use. By definition, it thereby determined that the extraction of minerals is "essential to or would promote the public health, safety, or welfare." As we stated in McCollum v. City of Berea, Ky. App., 53 S.W.3d 106, 110 (2000), "[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." (citing Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954)). We cannot say that access to natural resources, and the economic benefit to the community derived thereby, do not promote the public welfare.

Appellants contend that the use of the terms "desirable and essential," render the regulation unconstitutionally vague. They complain that the ordinance does not state to whom the use must be desirable or essential. KRS 100.111 requires that conditional uses promote the "public health, safety and welfare." (Emphasis ours.)

As an extension of the exercise of the police power, the interference or regulation by public authority of the use of a citizen's property must be for the superior interest and rights of the public, and the power must be exercised in a reasonable and fair manner for the promotion of the common good of a community as a whole, more particularly, it must bear a substantial relation to the public health, safety, morals or welfare." Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Com'n, Ky., 287 S.W.2d 434, 436 (1956).

Clearly, the use must be essential or desirable to the community or public as a whole.

Appellants next claim that the issuance of the conditional use permit did not comply with the Oldham County Comprehensive Plan. The circuit court acknowledged that, "by its definition, a CUP introduces a use into an area which may impair the integrity and character of the zone in which it is located or in adjoining zones." The circuit court determined, however, that the CUP "does not introduce a use which impairs the geographic area as a whole because the geographic area

includes other commercial and industrial uses." The court relied on the specific findings of the Board that the CUP complied with the Oldham County Comprehensive Plan as follows:

In keeping with the Oldham County Comprehensive Plan, Chapter 1, Page 5, "Business and Industry, the goal is to expand commercial and industrial development which will provide for increased tax revenues, and a larger employment base to satisfy the need of a growing county labor force."

(A) Objective A: Assist existing businesses in expansion.

The court further noted that,

Comprehensive zoning plans are to be used as guidelines for the development of both private and public property. KRS 100.183 and KRS 100.187. Liter's is an existing business which has been located in Oldham County, in the same geographic area since 1954.

The circuit court then concluded that the Board's finding that the CUP complies with the Oldham County Comprehensive Plan was supported by substantial evidence.

To support their argument appellants rely on the following portion of the text of the Comprehensive Plan that the CUP does not comply with the plan:

Haunz Lane has developed into an industrial area over the past years. The development of additional industrial uses along Haunz Lane should be discouraged in order to limit any negative impacts on surrounding residential land uses.

This text does specifically pertain to the area where Liter's proposes to expand its mining operation. However, appellants fail to cite the entire provision as it relates to industrial development of Haunz Lane. The text that follows appellants' citation is as follows:

When existing industrial land uses expand or redevelop on Haunz Lane, measures to reduce the negative impacts of heavy truck traffic, noise, and buffering should be enacted.
[Emphasis ours.]

The Comprehensive Plan anticipated expansion of industrial uses in this particular area and provided for such expansion or redevelopment. The conditions imposed on Liter's were specifically to address the negative impact of such expansion or redevelopment in compliance with this provision. Therefore, the circuit court did not err in finding that the Board's determination that the CUP complied with the Oldham County Comprehensive Plan was based upon substantial evidence.

Finally, appellants argue that their procedural due process and equal protection rights were violated. Appellants argue that the Board allowed Liter's to present testimony that was neither subjected to cross-examination nor rebuttal. For the first two days of the three day hearings, the parties made opening statements, presented their witnesses, cross-examined their adverse witnesses and made closing statements. After the witnesses testified, the Board conducted its own question and

answer session with the witnesses. The circuit court in its findings stated that this procedure complied with KRS 100.345, which states in pertinent part:

Whenever a public hearing is required by this chapter, the presiding body may prescribe the procedures to be followed. No information offered at the hearing shall be excluded for failure to follow judicial rules of evidence. The presiding body may adopt its own rules to determine the kind of information that will be received. Members of the presiding body may visit a site pertinent to a hearing prior to the final decision of the presiding body. All information allowed to be received shall constitute evidence upon which action may be based.

The circuit court found that the procedural due process requirements were maintained during the course of the public hearing, that a trial-type hearing was held, and that counsel was not denied the right to cross-examine adverse witnesses during the testimony phase of the hearing. The court found that, because KRS 100.354 allowed the Board the discretion to establish its own procedures, that conducting its own question and answer sessions of witnesses did not violate due process. After careful review of the record, we hold the procedure the Board followed did not violate appellants procedural due process. Questions directed at the witnesses in the question and answer session were related to what conditions would be imposed upon approval by the Board. Appellants make

much of the fact that almost all of the questions were directed at Liter's. It is apparent that the Board was very concerned with what conditions would be imposed in order to assure that the negative impact to the residents would be minimized. There is no argument that Liter's was permitted to present additional witnesses not subject to cross-examination. While appellants were not questioned to the extent that the Board questioned Liter's, appellants were not excluded from this question and answer session. While administrative due process does require that cross-examination be guaranteed, Kaelin v. City of Louisville, Ky., 643 S.W.2d 590 (1982), appellants cite no authority that supports their argument that the Board must allow unlimited cross-examination or rebuttal. We do not believe this procedure violated appellants' due process rights.

Appellants next argue that because the blasting demonstrations were not conducted under conditions substantially similar to those involved in the proceedings, the evidence was inadmissible for the Board to consider. They argue that the demonstration blasts were misleading as to what the residents would actually experience. In reviewing the record, the circuit court found that the Board asked extensive questions regarding the blasting demonstrations and that they discussed the limitations of the demonstrations. The circuit court correctly noted that KRS 100.345 allows for a site visit by the Board.

The court concluded that the Board had the discretion to determine the weight it gave to such demonstrations. There is no allegation that Liter's attempted to deceive the Board in conducting the demonstrations. The record verifies that Liter's explained the limitations of the testing and that the Board was given specific information as to the distances from the blast and the level of blasting. Therefore, the trial court's finding in this regard is not clearly erroneous.

Appellants claim that the Board's knowledge of an offer of a million dollars to the Fiscal Court by Liter's tainted the hearing and thereby violated their rights to a fair hearing. A thorough review of the record established the following facts concerning this offer. Prior to the hearing, Liter's offered the City of Orchard Grass Hills \$240,000.00, representing a payment of \$.02 per ton of limestone mined at the new location, if the City would adopt a resolution endorsing and recommending the proposal to the Board. The City rejected the offer. In the letter to the city, Liter's stated that it would,

[O]ffer the Oldham County Fiscal Court the sum of \$100,000 payable yearly for the 10 years for the total payment of \$1,000,000 to be earmarked, if the court wishes, for improvements to Haunz Lane and its' [sic] intersection with Kentucky Highway #22 from which the citizens of Orchard Grass Hills would obviously benefit. This offer will be made even though the new location, if approved, will not result in any increased traffic on those roads, since for Liter's

this amounts to an extension, not an expansion of its'[sic] operations.

In a letter to the Fiscal Court dated April 27, 2001, Liter's stated,

Liter's has committed to pay the Oldham Fiscal Court the sum of \$100,000.00 per year for ten years, to be earmarked for improvements to Haunz Lane or otherwise in the Court's discretion. Liter's will pay the total sum of \$1,000,000.00 directly to the Court in annual installments beginning in the calendar year in which mining begins under the new permit and continuing until paid, subject only to the new mining operation's being halted by Court order or operation of law. No payment will be made in any year or part thereof in which mining is prohibited. To our knowledge, no action is required of the Court in this matter. We simply wish to confirm our commitment to the Court in the event we are permitted to continue our operations in Oldham County.

Appellants argue that the offer of the money was intended to influence a favorable decision from the Board and placed the residents at a distinct advantage. The circuit court found that the financial offer to Fiscal Court did not taint the public hearing for the following reasons:

Liter's is accustomed to making financial contributions for road maintenance and improvements as a condition of previous permits. The record indicates that Liter's counsel addressed the issue of the financial contribution in his opening statement. Liter's indicated that the contribution was to be designated for improvements to Haunz Lane and that it had already paid for the engineering study and design for these improvements. Liter's counsel also

addressed this issue of the financial incentive offered to the City of Orchard Grass Hills during his opening statement.

Public policy mandates that private and corporate citizens contribute to the costs of improving and maintaining public facilities when their developments or businesses place burdens on those facilities. See Lampton v. Pinaire, Ky. App., 610 S.W.2d 915 (1980) and Lexington-Fayette Urban County Government v. Schneider, Ky. App., 849 S.W.2d 557 (1992). The Board would have likely placed financial contribution conditions on the CUP if Liter's had not made the offer. The offer is not excessive. The one million dollars is to be disbursed at a rate of one hundred thousand dollars per year.

While appellants framed their argument in such a way as to convince the court that Liter's offered one million dollars to the Fiscal Court in exchange for the CUP - in essence a bribe - the evidence is to the contrary. The offer to the Fiscal Court, from the beginning, was tied to improvements on Haunz Lane. The Board minutes of June 20, 2001, specifically state as follows:

- there is a completed preliminary plan for the upgrading of Haunz Lane and Hwy. 22 intersection, as well as the entire length of Haunz Lane
- this plan calls for a right hand turn out of Haunz Lane, a left hand turn out of Haunz Lane and a single lane going into Haunz Lane
- there would be turning lanes and storage lanes on Hwy. 22 in both directions
- there will be certain corrective improvements to Haunz Lane for site

distance, drainage and shoulder improvements

- the complete cost estimate for these improvements, which is included in the traffic study, would be approximately \$1.1 million

Because the offer was tied to the costs of the use, specifically road improvements, we do not believe it was different than Liter's offer to reduce its hours of operation, to pay for pre-mining surveys to owners of nearby homes, or to agree to blast at levels significantly below state permitted limits. While we are concerned that in documents to the Board and the Fiscal Court the offer is referred to as a "financial incentive," under the circumstances we do not believe the offer was improper. Therefore, the finding of the circuit court in this regard was not clearly erroneous.

We are limited in our review of the actions of the Board. We may not substitute our judgment as to whether this use is essential or desirable or would promote the public welfare. Minton v. Fiscal Court of Jefferson County, Ky. App., 850 S.W.2d 52, 56-57 (1992). The Board did not act in excess of powers delegated to it by the legislature, appellants were provided procedural due process and the actions taken by the Board were supported by substantial evidence.

For the foregoing reasons, we affirm the judgment of the Oldham Circuit Court.

ALL CONCUR.

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