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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001780-MR

CREED AND SADIE WEBB; MICHAEL
AND LINDA TESTER; THOMAS AND GOLDIE NASH;
SHERRI ABNER; ROGER AND KIM WAGENLANDER;
JEFF AND SUSAN SAMS; AND JASON FLYNN APPELLANTS

APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 03-CI-00514

CITY OF NEWPORT APPELLEE

OPINION AFFIRMING

** **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Creed and Sadie Webb, Michael and Linda Tester, Jeff and Susan Sams, Thomas and Goldie Nash, Sherri Abner, Roger and Kim Wagonlander, and Jason Flynn (Appellants) appeal from an order of the Campbell Circuit Court granting summary judgment in favor of the City of Newport (Newport). Appellants had filed

state and federal claims against Newport, its mayor and members of the City Council in an attempt to prevent the Cote Brilliante neighborhood from being declared a blighted area which would allow Newport to exercise eminent domain and purchase Appellants' residences. We decline to consider Appellants Nash, Abner, Wagonlander and Flynn's challenge to the one-year statute of limitations which the trial court cited in dismissing their claims. These Appellants have all sold their properties to the city and, thus, their claims are moot. In addition, we will not review tort claims against the mayor and City Council members because they were not named as parties in the notice of appeal. Appellants' remaining issue is a claim that Newport failed to comply with the statutory requirements for declaring Cote Brilliante a blighted area and adopting a development plan. We disagree and affirm the circuit court.

Appellants filed a complaint in the federal district court in March 2002 challenging a city ordinance which declared Cote Brilliante a blighted area and authorized condemnation proceedings pursuant to Kentucky Revised Statutes (KRS) Chapter 99. Newport and several elected officials were named as defendants. The United States District Court granted summary judgment in favor of the defendants on the federal claims and dismissed the state law claims without prejudice. Appellants did not appeal from this decision, rather they filed an action

in the Campbell Circuit Court asserting both the state and federal law claims. Both sides requested summary judgment. The trial court issued an order granting summary judgment in favor of Newport, and this appeal followed.

Appellants now claim that Newport failed to provide evidence meeting all of the requirements for declaring an area blighted. KRS 99.340(2) defines "blighted" as follows:

- 2) "Blighted area" means an area (other than a slum area as defined in this section) where by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, submergency of lots by water or other unsanitary or unsafe conditions, deterioration of site improvements, diversity of ownership, tax delinquency, defective or unusual conditions of title, improper subdivision or obsolete platting, or any combination of such reasons, development of such blighted area (which may include some incidental buildings or improvements) into predominantly housing uses is being prevented[.]

Evidence used to prove blight included testimony from home owners in Cote Brilliante that their properties suffered from flooding, land slippage, broken sewer lines, cracked walls, and damage to structures and foundations. In addition there was evidence of *e. coli* bacteria in a creek within the area, obsolete platting, and vacant properties. Appellants claim that Newport failed to present evidence of all the factors of blight listed in the statute. This ignores the plain language of the

statute allowing a finding of blight to be based on "any combination of such reasons." The decision that an area is blighted is a legislative one and, as such, may not be overturned on review absent a finding that the City Council acted arbitrarily. Prestonia Area Neighborhood Ass'n. v. Abramson, 797 S.W.2d 708 (Ky. 1990). Appellants failed to meet their burden of demonstrating that Newport's decision was not supported by substantial evidence.

KRS 99.370 sets out the requirements allowing a city to adopt a development plan. Appellants contend that Newport failed to comply with the conditions set forth in subsections (3), (4), and (6) of the statute. Subsection (3) states as follows:

- (3) A public hearing held by the agency on the redevelopment project, whereat an opportunity shall be afforded to all persons interested to be heard, either in person or by counsel. Notice of such hearings shall be published pursuant to KRS Chapter 424. Notices of the hearing shall be mailed at least ten (10) days before the hearing, to the last known owner of each parcel of land in the development area at the last known address of such owner as shown by the records of the assessor and shall contain a description of the proposed development area by its location in relation to highways, streets, streams or otherwise. Such notices shall further state that maps, plats and particular description of the development plan, together with such zoning maps and ordinances as may relate thereto, are available for public inspection at a

place to be designated in such notice.
**The failure of any owner to receive a
copy of such notice shall not invalidate
the proceedings of the agency.**

(Emphasis added.) Appellants argue that they did not receive notice of the meeting or of the location where maps, plats, etc. would be available for public inspection. We first point out that the statute specifically states that the proceedings are not invalidated by lack of notice to any owner. Further, Appellants attended two meetings where the ordinance was read and both they and their counsel were in fact heard by members of the City Council prior to the final decision being made. Finally, all of the documents required to be made available to the public by KRS 99.370(3) were located at Newport's city offices where they were in fact inspected by Appellants.

KRS 99.370(4) requires a finding:

by the agency that there is a feasible method for the temporary or permanent relocation of families displaced from the development area, and that there are, or are being provided, in the development area or in other areas not less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families displaced from the development area decent, safe, and sanitary dwellings for such displaced families.

Newport's Zoning Administrator Greg Tully provide evidence of housing that would be available to the three remaining homeowners in Cote Brilliante, including real estate listings

for single family and multi-family residences and affordable housing through Brighton Center, Two Rivers II, Ann Street Project, Newport Housing Authority, and Section 8.

Finally, Appellants claim that Newport provided insufficient evidence to support a finding under KRS 99.370 which reads, in part, as follows:

- (6) A finding has been made by the council:
- (a) That the area is a slum area or that all the following conditions exist:
 - 1. That the area is a blighted area;
 - 2. That a shortage of housing of sound standards and design adequate for family life exists in the community;
 - 3. That the need for housing accommodations has been or will be increased as a result of the demolition of residential units in slum areas under development plans; and
 - 4. That the conditions of blight in the area and the shortage of decent, safe, and sanitary housing in the community cause or contribute to an increase in and spread of disease and crime and constitute a menace to the public health, safety, and welfare. . .

We have already dealt with the City Council's determination that Cote Brilliante was a blighted area. Appellants contest the City Council's finding that their neighborhood contains a shortage of sound housing. They argue that evidence of structural defects and "problematic" housing was too vague and not supported by testimony from a structural engineer. We conclude that the evidence offered by other homeowners in the area and the results of a study by a planning firm supported the City Council's decision regarding a shortage of sound housing in

the subdivision. Appellants complain that housing in Cote Brilliante will actually decrease from 98 homes to 52 residential units under Newport's development plan for the area. While it may be true that 98 homes existed in the area, at the time of this decision only three were occupied and, even before the area was declared blighted, there were vacant homes and empty lots occupied only by trash, debris, and junked cars.

Finally, Appellants argue the City Council's finding that blight in Cote Brilliante contributed to an increase in crime and disease was insufficiently supported by the evidence. There was testimony that sewer lines were broken, causing sewage to flow into a creek in the area and leading to the presence of *e. coli* bacteria in the water. Moreover, the evidence submitted to the City Council documented 154 calls to police within the past eighteen months. Appellants attempt to convince us that, since there was no study showing an increase in the crime rate in the Cote Brilliante neighborhood, the City Council could not make a finding under KRS 99.370(6)(a)(4). The language in subsection (4) requires a finding that the blighted area "[causes] or [contributes] to an increase in and spread of disease and crime and constitute a menace to the public health, safety, and welfare[.]" Clearly, a neighborhood where sewage runs into a creek and the police receive numerous complaints does contribute to the spread of disease and increased crime

within the City of Newport. While we may sympathize with Appellants' desire to remain in their neighborhood, they have not met the burden of showing that the City Council acted arbitrarily in seeking to condemn their properties and properly exercise its power of eminent domain.

For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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