

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-002592-MR
AND
NO. 2004-CA-002676-MR

LEWIS BIZZACK; GARY BIZZACK
JOHN BIZZACK; TERESA A.
BARTON, COUNTY JUDGE
EXECUTIVE; HOWARD R. DAWSON,
MAGISTRATE; IRA W. FANNIN,
MAGISTRATE; PHILLIP W. KRING,
MAGISTRATE; LAMBERT MOORE,
MAGISTRATE; JILL E. ROBINSON,
MAGISTRATE; HUSTON WELLS,
MAGISTRATE; FRANKLIN COUNTY
FISCAL COURT

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-00355

ALICE SOUTH HUME;
PIN OAK STUD, LLC

APPELLEES/CROSS-APPELLANTS

OPINION
REVERSING AND REMANDING WITH DIRECTIONS

** ** *

BEFORE: KNOPF AND MINTON, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Lewis Bizzack, Gary Bizzack, and John W.

Bizzack appeal from an order of the Franklin Circuit Court

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

overturning a zone change approved by the Franklin County Fiscal Court of property located in Franklin County, Kentucky. For the reasons stated below, we reverse and remand with directions.²

In order to provide context to this matter, we find it appropriate to review prior litigation surrounding the rezoning issue.

Alice Hume and Pin Oak Stud are neighboring landowners of property owned by the Bizzacks. The Bizzacks' tract consists of 10.31 acres bordered by U.S. 60 (Versailles Road) and Millville-Duncan Road. A 1981 plat of record in the Franklin County Clerk's office identifies the 10.31 acre-property as Lot 15 of the Englewood Office Park.

In the spring of 1997, the Bizzacks proposed a change in the zoning of their property from Professional Office to Highway Commercial. The Frankfort-Franklin County Planning Commission voted approval. After two readings the Fiscal Court approved the zone amendment adopting 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

² Alice South Hume and Pin Oak Stud, LLC, cross-appeal the circuit court's order. Because of our disposition of the appeal, we deem matters raised in the cross-appeal as moot and do not address same.

Statutes (KRS) 100.213.³ It remanded the case to the 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*

³ KRS 100.213(1) provides as follows:

Before any map amendment is granted, the planning commission or the legislative body or fiscal court must find that the map amendment is in agreement with the adopted comprehensive plan, or, in the absence of such a finding, that one (1) or more of the following apply and such finding shall be recorded in the minutes and records of the planning commission or the legislative body or fiscal court:

(a) That the existing zoning classification given to the property is inappropriate and that the proposed zoning classification is appropriate;

(b) That there have 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.

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 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, Case No. 1999-CA-001356-MR. This Court dismissed the appeal without reaching the merits because of the Bizzacks' failure to name the Franklin County Fiscal Court as a party to the appeal.

On January 19, 2001, the Bizzacks again applied to the 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. Following a hearing, the Planning Commission voted 5-4 to approve the request.

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[.]" On August 9, 2001, the Fiscal Court gave a second reading and voted to grant the requested zone change.

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 court upheld the Fiscal Court on multiple grounds.

Hume and Pin Oak Stud then appealed to this Court. On May 9, 2003, this Court rendered an opinion reversing the zone change on the basis that the Fiscal Court and Planning Commission acted arbitrarily in approving the proposed zone map amendment. Specifically, this Court held that the Fiscal Court had failed to make its findings based upon sufficient adjudicative facts contained in the record in that the Fiscal Court neither conducted its own evidentiary hearing nor reviewed the transcript of the Planning Commission's hearing, and that

the adjudicative facts found based upon evidence contained in the record were insufficient to support its decision. The Bizzacks subsequently petitioned the Supreme Court for discretionary review. The petition was not denied by the Supreme Court until June 9, 2004.

Meanwhile, on June 24, 2003, approximately two years and five months subsequent to the prior application; six weeks following this Court's reversal of the prior zone change; and over a year prior to the Supreme Court's ruling on the petition for discretionary review, the Bizzacks filed a new zone change request with the Planning Commission. Again, the subject property was Lot 15 in Englewood Office Park and the application again called for Highway Commercial zoning. The development plan described banking, fast food, restaurant, hardware, and dry-cleaning establishments.

Hume and Pin Oak Stud filed a motion in Franklin Circuit Court to stay Planning Commission action on the application. The court held that it lacked jurisdiction to entertain the motion, and declined to rule.

On September 18, 2003, the Planning Commission held a public hearing on the application. On November 20, 2003, the Planning Commission met to consider the zone change. The vote was deadlocked five to five. The application was forwarded to the Fiscal Court without a recommendation. On February 6, 2004,

the Fiscal Court considered the Bizzacks application for a zone change and granted the proposed rezoning of Lot 15. On the whole, the project was substantially identical to the project associated with the prior filing.

Hume and Pin Oak Stud again appealed the Fiscal Court's rezoning decision to the Franklin Circuit Court. On November 23, 2004, the circuit court entered an order reversing the rezoning on the basis that it was improper for the application for rezoning to have been filed while the prior rezoning decision was pending upon appeal. This appeal followed.

The Bizzacks contend that the Franklin Circuit Court erred in determining that it was improper for the Bizzacks to have filed a new rezoning application for Lot 15 while the prior rezoning application was pending upon appeal. In its order reversing the Fiscal Court, the circuit court expressed its opinion that res judicata barred the filing of the present rezoning application, but, ultimately, based its decision upon the "time-honored doctrine that the same case cannot be pending in two different tribunals at the same time."

We disagree with the circuit court's reliance upon the latter premise; however, we agree with the circuit court that central to our present review is the issue of res judicata in

the area of zoning. We thus begin our review with a discussion of the rules of res judicata in the area of zoning.

We first note that a petition for discretionary review was pending before the Supreme Court on the prior application at the time the present application was filed, and in that respect this Court's May 9, 2003, opinion denying the prior zone change was nonfinal. However, this does not mean that res judicata principles do not apply. We are of the opinion that a pending appeal of a judgment in a prior action does not deprive that judgment of res judicata effect. See Sidney Coal Co., Inc. v. Massanari, 221 F.Supp.2d 755, 772 (E.D. Ky. 2002) (citing *Restatement (Second) of Judgments* § 13, comment f (1982)).⁴

"The matter of res judicata in zoning matters is a serious and vexing problem. The textbook writers indicate that there is a division of authority in the application of res judicata to rezoning requests. Certainly, the people affected by repeated and harassing rezoning applications are entitled to protection. There should be some safety for the public at large. Certainly, the doctrine of res judicata is a valuable tool in litigation arising from zoning changes. It clearly has

⁴ We realize that there is a split of authority on this issue. Our Commonwealth, however, has never succinctly addressed the matter. We believe the majority rule follows the Restatement, and perforce adopt same in the context of zoning with which we are concerned. In this regard it is unfortunate that these proceedings were not abated pending the Supreme Court's ruling on the motion for discretionary review as requested by Hume and Pin Oak Stud.

a place in the law of zoning." Fiscal Court of Jefferson County v. Ogden, 556 S.W.2d 899, 902 (Ky.App. 1977). It seems to us, too, there is no valid reason for denying zoning litigants the settling effect of the doctrine of res judicata.

"Res judicata applies to administrative zoning decisions in order to promote finality of decisions unless it is shown that there has been a substantial change of circumstances since the earlier ruling." 83 Am Jur 2d *Zoning and Planning* § 741 (August 2005 Update) (footnotes omitted) (Emphasis added). See also *Judgment Denying Permit for use of Premises under Zoning Regulations as Bar to Subsequent Application*, 71 A.L.R.2d 1362 (the doctrine of res judicata in the area of zoning does not ordinarily apply where there are changed conditions and new facts which did not exist at the time of the prior judgment) and Johnson v. Lagrew, 447 S.W.2d 98 (Ky. 1969) (Recognizing legitimacy of successive zone change application when there have been changes since the prior application). Moreover, KRS 100.213(2) provides that "[t]he planning commission, legislative body, or fiscal court may adopt provisions which prohibit for a period of two (2) years, the reconsideration of a denied map amendment or the consideration of a map amendment identical to a denied map amendment." Hence, the statutory scheme for a zoning change specifically contemplates that an unsuccessful application may

at some point file an application identical to a previously denied application.

From the foregoing authorities, we infer the following rule with respect to res judicata in the area of zoning: The doctrine does apply, but is limited to the period in which there are no changes in facts since the denial of a prior application. Upon the occurrence of a change in facts such that the basis for the prior denial is no longer applicable, an application for a zoning change previously denied may be in order.

The Fiscal Court's final action on the prior application was on August 9, 2001. The present application was filed on June 24, 2003, less than two years following the Fiscal Court's action in the prior application. Franklin County Fiscal Court has not adopted the optional rule provided for in KRS 100.213(2) which provides for up to a two-year limitations period between the filing of a new application following action on a prior application; hence, the Bizzacks were not barred by this limitations period in filing a new application.

However, in order for the Bizzacks' new application to comply with res judicata in the area of zoning, it is necessary that there have been changes since the Fiscal Court's action in the prior case, which was ultimately denied, and the filing of its new application. In their brief, the Bizzacks argue that there have been changes since the prior application, primarily

in that substantial additional office space has become available in Franklin County. This, if true, may be sufficient to bring the present application into compliance with the res judicata rules governing zone changes. However, the Fiscal Court did not make a finding to this effect in its ordinance approving the zone change. There likewise may be other changes which would bring the Bizzacks' application within the requirement that there have been a change since the prior application.

An examination of the Fiscal Court's January 15, 2004, ordinance approving the zone change sought by the Bizzacks discloses that it does not make any findings regarding whether there have been changes since its action on the prior application.

Upon the whole we are of the opinion this matter should be remanded to the Franklin Fiscal Court for a determination of whether there have been changes since its action on the prior application in justification of a zone change. The Fiscal Court should specifically identify any such changes, and make appropriate findings of fact in support of its determination.

Because of our disposition herein, we need not consider other issues raised by the Bizzacks or issues raised by Hume and Pin Oak Stud in their cross-appeal.

For the foregoing reasons the judgment of the Franklin Circuit Court is reversed and this cause is remanded with directions to remand to the Frankfort Fiscal Court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-
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