

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000019-MR

ROBERT L. CLARK AND
BETTY J. CLARK

APPELLANTS

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 04-CI-00373

DREW KIRKLAND; NICK CAMBRON;
DAVE APPLEBY; MARK BOTHWELL;
VIVIAN BOWLES; JUDY DIXON; JIMMY
GILLES; MARTIN HAYDEN; SCOTT
JAGOE; IRVIN ROGERS; OWENSBORO
METROPOLITAN PLANNING COMMISSION;
AND B.C.E. PROPERTIES, LLC

APPELLEES

OPINION
REVERSING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.¹

GUIDUGLI, JUDGE: Robert and Betty Clark appeal from an order of the Daviess Circuit Court affirming a decision of the Owensboro Metropolitan Planning Commission ("OMPC"). The OMPC permitted an amendment to a development plan providing for an additional

¹ Judge David C. Buckingham concurred in this opinion prior to his retirement effective May 1, 2006.

access point to a shopping center. The Clarks maintained that the OMPC's action was invalid because it altered a zoning map and zoning regulation in violation of Kentucky statutory law and local ordinance. For the reasons stated below, we reverse the order on appeal.

In 1998, the OMPC conducted a hearing and took proof on a request to change the zoning classification on an 11.83 acre parcel of real property situated in Daviess County, Kentucky. The OMPC rendered a finding recommending approving the change of zoning from A-U Urban Agricultural and B-4 General Business to B-4 General Business. The zoning change cleared the way for landowner IBOK, LLC and its successors to commercially develop the parcel. The Clarks, as adjacent residential property owners, opposed the change.

On December 23, 1998, and acting in reliance on the OMPC's recommendation, the Daviess County Fiscal Court enacted an ordinance formalizing the zoning change. The change was made subject to the submission of a final development plan, and it provided that "[A]ccess to Fairview Drive shall be limited to a single access point located a minimum of 413 feet from KY 54."

On June 23, 2003, IBOK, LLC transferred title to B.C.E. Properties, LLC of a 0.610 acre tract adjacent to Fairview Drive. This parcel was part of the larger tract that was the subject matter of the December 23, 1998, ordinance. The

OMPC acted on February 12, 2004, to consider approval of an amended final development plan on this 0.610 acre parcel, which included an additional access point on Fairview Drive. The final development plan was approved, and it was from this approval that the Clarks appealed to Daviess Circuit Court. The Clarks argued in relevant part that the ordinance, which allowed for a single access point on Fairview Drive, preempted the OMPC from subsequently permitting the addition of a second access point.

On December 1, 2004, the circuit court entered the order that forms the basis for the instant appeal. The court ruled that the ordinance did not preempt OMPC from exercising its authority to approve major changes in the property development plan. It found that the amendment to the development plan was fully considered by the OMPC and was supported by the record. The court affirmed the action of the OMPC, and this appeal followed.

The Clarks now argue the circuit court erred in affirming the OMPC's action accepting the final development plan. Specifically, they argue that the OMPC's action is invalid and contrary to the law because it disregards the ordinance's language limiting access to Fairview Drive to one location. They also maintain that they were improperly denied notice of the OMPC's action on the matter, that the placement of

the second access point violates local law, and that the decision resulted in an unconstitutional and unlawful taking of their driveway without due process of law or just compensation. In sum, they seek an order reversing the circuit court's action and declaring as invalid the OMPC's action approving the final development plan.

The corpus of the Clarks's claim of error is that the OMPC does not have the authority to disregard the condition contained in the December 23, 1998, ordinance limiting Fairview Drive access to a single point. The resolution of this issue turns on whether the condition is properly characterized as an irrevocable component of the zoning ordinance not subject to amendment by the OMPC, or rather is a discretionary matter properly subject to the OMPC's authority to approve final development plans.

Our review of KRS Chapter 100 and the associated case law has uncovered nothing that addresses the question of how a local legislative or quasi-legislative body undertakes the process of amending or otherwise deviating from a "condition" attached to a zoning ordinance. On one hand, amending a condition does not change the underlying zoning classification. This supports the argument that OMPC's action does not require Fiscal Court's approval. That is to say, the zoning of the parcel at issue remains "B-4 General Business" irrespective of

whether it has one or two access points on Fairview Drive. On the other hand, the Owensboro Fiscal Court chose clear, unambiguous and mandatory language of limitation ("shall be limited to a single access point"), and one would be hard-pressed to argue that Fiscal Court meant something other than what it said or that this limiting language should be afforded less weight than other elements of the ordinance.

The issue may be resolved by reference to KRS 100.211(2). It states that,

A proposal to amend the text of any zoning regulation which must be voted upon by the legislative body or fiscal court may originate with the planning commission of the unit or with any fiscal court or legislative body which is a member of the unit. Regardless of the origin of the proposed amendment, it shall be referred to the planning commission before adoption. The planning commission shall hold at least one (1) public hearing after notice as required by KRS Chapter 424 and make a recommendation as to the text of the amendment and whether the amendment shall be approved or disapproved and shall state the reasons for its recommendation. In the case of a proposed amendment originating with a legislative body or fiscal court, the planning commission shall make its recommendation within sixty (60) days of the date of its receipt of the proposed amendment. It shall take an affirmative vote of a majority of the fiscal court or legislative body to adopt the proposed amendment. (Emphasis added).

The submission of the amended development plan containing the proposal to add a second access point on Fairview

Drive in contravention to the zoning ordinance constitutes, in the language of KRS 100.211(2), a "proposal to amend the text of . . . [the] zoning regulation" While B.C.E. Properties did not characterize its action as such, it was an attempt to avoid compliance with the ordinance's limiting language without placing the matter before the Fiscal Court. The OMPC is availed of the authority to approve a development plan that comports with the zoning ordinance; however, an action that seeks to deviate from the text of the ordinance requires an affirmative vote by the majority of the Fiscal Court² and commensurate due process requirements including notice to all affected parties. Any action to add a second access point on Fairview Drive requires the Fiscal Court's approval, and the circuit court erred in failing to so rule.³

For the foregoing reasons, we reverse the order of the Daviess Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Jennifer E. Spreng
Owensboro, Kentucky

BRIEF FOR APPELLEE, B.C.E.
PROPERTIES, LLC:

Mark R. Hutchinson
William L. Wilson, Jr.
Owensboro, Kentucky

² KRS 100.211(2).

³ The Clarks's eminent domain and Takings Clause argument is moot.