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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001659-MR

MCB ENTERPRISES, LLC. AND M. CRAIG BALLARD — APPELLANTS

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 03-CI-00017

JESSAMINE COUNTY/CITY OF WILMORE JOINT PLANNING COMMISSION; PETER BEATY; KEN HOUP; JEFF BAIER; JOSEPH L. POAGE; CHARLES FULLER; JANE BALL; JAMES MCKINNEY; DOUG LINDLE AND DWIGHT WINTER; AND J. DAVID WHITEHOUSE, SUSAN WHITEHOUSE AND TAYLOR MADE FARMS, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT AND MOORE, JUDGES.

ACREE, JUDGE: MCB Enterprises, LLC, and Craig Ballard appeal from a judgment of the Jessamine Circuit Court upholding the decision of the Jessamine County-City of Wilmore Joint Planning Commission denying their application for permission to develop a parcel of property. The subject property, 91.26 acres formerly known as the

Dillingham Farm, is located on East Hickman Road in Nicholasville. MCB has filed five applications to develop the property and currently wishes to build a subdivision on the site. Under its prior ownership, portions of the property had been used as an illegal dump. Due primarily to ongoing environmental concerns, the Commission denied MCB's request for permission to develop. MCB argues the decision was arbitrary and capricious, based solely on the objections of neighboring landowners and that the findings supporting the decision were barred by *res judicata*. We disagree and affirm the circuit court.

MCB filed its first application for a cluster development containing nineteen lots on January 9, 2001. The Commission denied the request, and MCB subsequently dismissed its appeal to the circuit court before receiving a decision. During the pendency of the appeal, MCB filed and withdrew two applications, one for another nineteen-lot development and the second for a development containing four large lots. A fourth application, again for nineteen lots, was denied as barred by *res judicata* in September 2002.

On October 22, 2002, MCB filed an application for a cluster development containing thirteen lots. The Commission conducted a hearing on December 10, 2002, and denied the application. MCB appealed the denial to Jessamine Circuit Court which issued its own findings of fact, conclusions of law, and a judgment upholding the Commission's decision with one exception. The circuit court found insufficient evidence to sustain the Commission's finding regarding traffic impact. This appeal followed.

On appeal, MCB raises five issues. The first is whether *res judicata* barred the Commission from making additional findings of fact on matters not determined during the hearings of MCB's prior application. In second and third arguments, MCB also argues that its development application fully complied with the Commission's criteria and that, consequently, denial of its request was arbitrary and capricious. We have also considered the two remaining arguments, that the Commission's decision was based solely on the objection of the neighboring landowners and that the Commission failed to properly consider the compelling need for such a development, and determined them to be without merit.

The standard of review of administrative zoning decisions is well known. As stated in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission,* 379 S.W.2d 450, 456 (Ky. 1964), judicial review of such a decision is limited to a determination whether the decision was arbitrary. In this context, arbitrary means whether the agency acted in the proper exercise of its statutory powers, whether an affected party was afforded procedural due process, and whether the action taken by the agency was supported by substantial evidence. *Id.* at 456.

Presenting its first argument, MCB asserts that the Commission denied the first application solely because of environmental concerns. MCB further asserts that because there were no findings regarding sewage disposal and soil conditions, those issues must have been resolved in favor of granting the application. Citing *Fiscal Court of Jefferson County v. Ogden*, 556 S.W.2d 899 (Ky.App. 1977), MCB argues that the

Commission was bound by its previous findings, or lack thereof, when it denied the first application in January 2001. Insisting that principles of *res judicata* were violated, MCB claims the Commission erroneously reconsidered the sewage disposal and soil conditions issues and resolved them against approval of the application. We do not agree.

While this Court did state in *Ogden* that the doctrine of *res judicata* "has a place in the law of zoning[,]" we also said "discussion of res judicata is not required" in that case. *Fiscal Court of Jefferson County v. Ogden,* 556 S.W.2d 899, 902 (Ky.App. 1977). Much more recently we said

> Administrative *res judicata* is at best a poor fit when applied to zoning cases, and our courts have struggled with such applications. *See, e. g., Johnson v. Lagrew,* 447 S.W.2d 98, 102 (Ky. 1969) and *Fiscal Court of Jefferson County v. Ogden*, 556 S.W.2d 899, 902 (Ky.App. 1977). While we understand the sentiment expressed in *Ogden* that repeated zone change applications can be vexing, it is also true that communities change, sometimes very rapidly, and that the entities charged with regulating the changes must be free to reexamine their prior decisions.

Danville-Boyle County Planning Commission v. Centre Estates, 190 S.W.3d 354, 360 (Ky.App. 2006). We agree with the circuit court that "the Commission was correct when it concluded that there had been a substantial change in circumstances and that the doctrine [of *res judicata*] is inapplicable in this case."

We also agree with the circuit court that MCB's argument is more appropriately described as an argument for collateral estoppel. We would go further by adding that MCB was attempting the use of offensive collateral estoppel. Offensive

collateral estoppel is used "to prevent a defendant from relitigating issues resolved in the earlier proceeding." *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 326 (1979).

The following elements must be present for the offensive use of collateral estoppel: (1) a final decision on the merits; (2) identity of issues; (3) issues actually litigated and determined; (4) a necessary issue; (5) a litigant who had lost in a previous proceeding; and (6) a full and fair opportunity to litigate. *May v. Oldfield,* 698 F.Supp. 124, 126 (E.D.Ky 1988). The general rule is that a judgment in a previous action operates as an estoppel only as to matters which were necessarily involved and determined in that former action. It is not conclusive as to matters which were immaterial or non-essential to the determination of the action or which were not necessary to uphold the judgment. *Sedley v. City of West Beuchel*, 461 S.W.2d 556, 558 (Ky. 1970).

The issues MCB seeks to preclude from reconsideration do not satisfy the elements of offensive collateral estoppel. In order to prohibit the Commission from considering sewage disposal and soil conditions in its review of this application, MCB would have to establish not only that these issues were actually litigated and determined in MCB's favor in the prior proceeding, but that such determination was necessary to the final decision. Clearly, neither of these elements can be satisfied. In fact, resolution of these issues was not the focus of, and arguably were not necessary to, the denial of the development application before us. Therefore, MCB's first argument fails.

In separate arguments, MCB contends that its application fully complied with the regulatory criteria and the Commission's failure to approve the development plan was clearly arbitrary and capricious. "[J]udicial review of administrative action is concerned with the question of *arbitrariness*." *American Beauty Homes*, 379 S.W.2d at 456 (emphasis in original). In order to decide whether a particular action was arbitrary, a reviewing court must "determine whether the commission acted in excess of its statutorily-granted powers, whether procedural due process was afforded, and whether there was substantial evidence in the record to support the commission's findings and recommendations." *Minton v. Fiscal Court of Jefferson County*, 850 S.W.2d 52, 55 (Ky.App. 1992). All three elements must be present in order to avoid a determination of arbitrariness.

MCB does not base its challenge upon the Commission's lack of authority. Nor does MCB claim it was not afforded procedural due process. Therefore, the basis of MCB's claim of arbitrariness is that the decision is not supported by substantial evidence.

Substantial evidence has been defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)(citation and internal quotations omitted). Even if MCB shows that the evidence presented would also support the approval of the application, this is not sufficient to carry its burden on appeal. MCB must establish that "under the evidence . . . there is no room for difference of opinion among reasonable minds" that approval was the exclusive

conclusion to be drawn from the evidence. *Danville-Boyle County Planning and Zoning Commission v. Prall*, 840 S.W.2d 205, 208 (Ky. 1992)(citation omitted).

Our review of the evidence and of the circuit court's summary of that evidence reveals a substantial concern with the environmental issues plaguing this property. The first five and last two findings of fact made by the Commission detail its concerns.

> 1. The proposed cluster development is located on a former landfill site which was poorly regulated and which has concentrations of lead and arsenic at levels posing a health hazard to future occupants of these premises. The site may also have asbestos, but no test was ever conducted for this substance, notwithstanding the fact that this was a landfill which had been cited numerous times by the Commonwealth for failing to comply with the law.
>
> 2. It appears from the testimony that a substantial portion of [MCB's] property was used as an illegal dump site. There is no accurate information in the Commonwealth of Kentucky's records or elsewhere as to the precise location or the boundaries of these sites. The area depicted as the site of the former landfill on [MCB's] map is based on supposition.
>
> 3. There is evidence in the records of the Commonwealth of Kentucky that a barn containing a substantial number of tires burned down on the subject property several years ago, thereby contaminating the soil. There is no specific information as to where this barn was located or the boundaries of the contamination associated with the burning tires. Likewise, the records from the Commonwealth of Kentucky reflect that there was a pond site used for dumping purposes that was filled; however, the boundaries are unknown and [MCB] did not adequately address this in [its] presentation.
>
> 4. [MCB] has failed to present substantial evidence that the cluster development can be adequately served by the septic

> system. The soil characteristics, as substantiated by [MCB's] own evidence, indicate that 94% of the soil is rated as severe for septic system use.
>
> 5. [MCB] has failed to provide the required comprehensive soil examinations for the cluster by the County Health Officer. Accordingly, and in view of [MCB's] own evidence as to soil characteristics, there is a lack of substantial evidence to establish that the subject property can be appropriately served by the septic system.
>
> 8. [MCB] has failed to demonstrate that the subject property has been properly cleared of harmful substances which pose a threat to human health and habitation.
>
> 9. The subject property was disapproved for residential development in January 2001 based on environmental concerns, and [MCB] has not demonstrated that there has been a substantial change in environmental circumstances.

MCB's own expert witness admitted that the concentration of lead in some soil samples from the property exceeded the maximum acceptable level set by the Kentucky Department for Environmental Protection. Furthermore, in a letter dated January 9, 2001, the Department strongly recommended that the landfill cap placed on the property in the 1990s remain undisturbed. The letter stated that

> if the cap is disturbed, the site would again be considered under management, and would therefore resume being a "waste site or facility" as defined by [Kentucky Revised Statute] 224.01-010(27). Unless all waste is removed, the operator may be required to obtain a less-than-one-acre CCD landfill permit under existing regulations, subjecting the fill area to the siting restrictions of 401 [Kentucky Administrative Regulation] 48:050 Section 1, as well as the deed notice requirement notice. If the operator chooses to remove the waste (i.e., to "clean close"), the site would not need a solid waste permit but may be subject to air monitoring, soil

> sampling and waste characterization during the removal operation.

The Commission also noted, in findings 4 and 5, evidence that the property was not suitable for use of a septic system. Taken as a whole, this is precisely the character of evidence that a reviewing court expects to see in order to justify upholding the Commission's decision. We are therefore unable to agree with MCB that the Commission's decision was not supported by substantial evidence. Denial of the development application was not arbitrary or capricious.

MCB's final arguments are that the decision was based solely on the objection of the neighboring landowners, and that the Commission failed to properly consider the compelling need for such a development. Our finding that the Commission's decision was not arbitrary is incompatible with a finding in MCB's favor on either of these charges. However, we will remind MCB of what was said more than forty years ago in *American Beauty Homes, supra,* and reinforced as recently as the Supreme Court's decision in *Hilltop Basic Resources, Inc. v. County of Boone,* 180 S.W.3d 464 (Ky. 2005). Land-use planning

> is a delegation of legislative power to an administrative agency (whether characterized as a part of the legislative or executive branch of the government) to be exercised in conformity with a legislative policy and in a discretionary manner in the light of prevailing local conditions. It calls for policy decisions by a body with specialized training and experience in this field. In no sense does the Commission perform a judicial function.

American Beauty Homes, 379 S.W.2d at 455; see also, *Hilltop*, 180 S.W.3d at 468 (With regard to zoning determinations, "the concept of impartiality is, by necessity and by function, more relaxed and informal."). MCB's concern with biases "such as these are best ferreted out in the legislative arena, i.e., through expression of the will of the voters in the electoral process." *Hilltop* at 470.

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

ALL CONCUR.

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