

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002079-MR

ELM STREET/MCCRACKEN PIKE
PRESERVATION ALLIANCE, INC.

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT JOHNSON, JUDGE
ACTION NO. 04-CI-00164

MAYOR FRED SIEGELMAN, IN HIS OFFICIAL
CAPACITY AS MAYOR; VERSAILLES CITY
COUNCIL AND ITS MEMBERS IN THEIR
OFFICIAL CAPACITY ONLY, TO WIT: NICKIE
SHYROCK, OWEN ROBERTS, GEOFFREY REID,
MARY ELLEN BRADLEY, LUTHER BLAND
AND ROY BENSON; AND JOSEPHINE
BARROWS, PROPERTY OWNER/APPLICANT

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND HOWARD, JUDGES; KNOPF,¹ SENIOR JUDGE.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

DIXON, JUDGE: Appellant, Elm Street/McCracken Pike Preservation Alliance, Inc., (“the Alliance”) appeals from an opinion and order of the Woodford Circuit Court which upheld the decision of the Versailles City Council (“Council”) to approve Appellee, Josephine Barrows', requested zone change.

The property at issue is approximately 47 acres owned by Barrows and located on Elm Street in Versailles, Kentucky. Since 1977, the property has been included in Woodford County's comprehensive plan for future residential development. In 1999, the City of Versailles annexed the property into the city limits with Barrows' consent and made a specific finding in the annexation ordinance that the property was “suitable for a residential subdivision or urban purposes without unreasonable delay.” City of Versailles Ordinance No. 99-29.

In 2001, Barrows filed an application for a zone map amendment for the 47 acres to R-4.² On March 8, 2001, the Versailles-Midway-Woodford Joint Planning Commission (“Commission”) held a public hearing on the zoning application. During the hearing, Barrows presented substantial evidence concerning the affects the proposed residential development would have on traffic flow in the area as well as water flowage and drainage issues. The Alliance presented the testimony from various individuals living around the property at issue who voiced concerns about the development. In May 2001, the Commission met and by a vote of 6 to 3 recommended approval of the zoning

² Previously, the property had 1.651 acres zoned R-1A; 4.96 acres zoned R-1B; and 40.585 acres zoned A-1.

change to the Versailles City Council. The Commission's recommendation contained detailed and thorough findings of fact and conclusions.

On July 17, 2001, the Council met to consider the recommendation by the Commission. The Council voted not to conduct a public hearing or hear arguments from either party regarding the zoning change, but rather to adopt the record compiled by the Commission. The Council then, however, unanimously adopted its own findings of fact and denied the zoning change.

Barrows thereafter appealed to the Woodford Circuit Court on the grounds that the Council's decision was arbitrary and violative of due process. In April 2002, the circuit court issued an opinion and order concluding, "It is hard to imagine a more arbitrary decision than that issued by the city council in this case." Specifically, the Court noted,

[T]his Court has reviewed the depositions of all members of the city council and the findings of fact adopted by the city council. No council person in any deposition articulated any reason for denying this zone change that came from evidence in the record before the planning and zoning commission. . . . The reason for their failure to cite such evidence was that there was nothing in the record before this planning commission that would justify turning down this project for any of these reasons.

. . . .

In accordance with the ruling in *Bryan v. Salmon Corp.*, [554 S.W.2d 912 (1977)], the Court finds that the decision of the Versailles City Council was arbitrary since there was not significant evidence to support any of its findings, some of its findings were beyond its authority, and some were irrelevant. However, the Court does find that

there was sufficient evidence to support the findings of the planning commission and, therefore, adopts those findings as its own. Since the Court specifically finds that the zoning change was in compliance with the comprehensive plan and was supported by substantial evidence, the record requires that the zoning request be granted. Therefore, this Court will order the city council to amend the zoning map and adopt the proposal as requested by the Versailles-Midway-Woodford County Planning and Zoning Commission.

The Alliance thereafter appealed to this Court, which reversed the circuit court on a procedural issue, finding that Barrows had improperly named the City and not the individual members of the Council. *Elm Street/McCracken Pike Preservation Alliance, Inc. v. Barrows, et al.*, 2002-CA-001927 (October 17, 2003). Notably, the opinion did not address the merits of the appeal. The Supreme Court thereafter denied discretionary review of this Court's decision.

In the interim, Barrows filed another zoning change application with the Commission. The new application was essentially identical to the prior designation recommended by the Commission. The Commission conducted another hearing wherein it received all of the evidence and comments presented during the first zoning hearing. At the conclusion of the hearing, the Commission again made findings of fact recommending to the Council that the zoning change be approved.

During an April 2004 Council meeting, the members decided not to conduct a public hearing on the matter but rather to rely on the entire record that was developed by the Commission. However, the Council did permit each side to make a fifteen minute presentation. Following the presentations, the Council members voted 5 to

1 to adopt findings of fact approving the zoning change. After two subsequent public readings, Ordinance No. 2004-20 rezoning the subject property was approved.

The Alliance again appealed to the Woodford Circuit Court alleging improper influence on the Council by Mayor Siegelman and improper consideration of the matter outside of the April 2004 Council meeting. By opinion and order entered September 8, 2005, the circuit court affirmed the decision of the Council. This appeal ensued.

On appeal, the Council's decision is not subject to *de novo* review. In *American Beauty Homes Corporation. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964), our highest Court explained that since zoning determinations are purely the responsibility and function of the legislative branch of government, such determinations are not subject to review by the judiciary except for the limited purpose of considering whether such determinations are arbitrary. *Id.* at 456. Arbitrariness review is limited to the consideration of three basic questions: (1) whether an action was taken in excess of granted powers, (2) whether affected parties were afforded procedural due process, and (3) whether determinations are supported by substantial evidentiary support. *Id.* See also *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464 (Ky. 2005); *Hougham v. Lexington-Fayette Urban County Government*, 29 S.W.3d 370 (Ky.App. 1999).

The Alliance presents the same arguments to this Court that it did in the lower court, namely that the Council's decision was arbitrary and violated the substantive

and procedural due process rights of the Alliance and members of the community, and that its decision is not supported by substantial evidence. Further, the Alliance contends that the Council violated the Open Meetings Law and considered evidence outside of the record; the Mayor engaged in improper ex-parte communications with Council members; and that the Ordinance is based on invalid PUD regulations. Because we agree entirely with the reasoning and conclusions of the circuit court's opinion, we incorporate and adopt it herein as the opinion of this Court, as follows:

Given the extensive record from the hearing at both the Commission and at the City Council, this Court, having reviewed all of the evidence in the record, is convinced that there was substantial evidence to support the City Council's decision. While there's substantial evidence in the record to support the City Council's findings, this Court must defer to that finding even if there is evidence to the contrary in the record. *Kentucky Commission on Human Rights v. Fraser*, Ky., 625 S.W.2d 852 (1981). The general rule is that if there is *any* substantial evidence to support the action of the agency, the action of the agency cannot be found to be arbitrary as a matter of law. *Taylor v. Coblin*, Ky., 461 S.W.2d 78 (1970).

The decision issued by the Commission in April 2004, considered all relevant issues concerning the rezoning of the proposed property. In the final decision by the City Council, the record demonstrates that the City Council was aware of the evidence in both hearings before the Commission, and did, in fact, review not only the record, but had discussions concerning the legal issues as they affected the current application.

While Plaintiff/Appellant, Elm Street/McCracken Pike Preservation Alliance, Inc., raises various issues as it relates to the final decision of the Versailles City Council, this Court is not the finder of fact in this matter. This court cannot and will not substitute its own judgment for that of the City

Council as it relates to the inferences to be drawn from the evidence of record. *Railroad Commission v. Chesapeake & Ohio Ry. Co.*, Ky. 490 S.W.2d 763 (1973).

The Appellant next contends that prior to council meetings, Council members were told that they had no choice but to approve the Commission's recommendation. This is premised upon the Appellant's argument that the City Council believed that it had to rezone the property based upon the prior Woodford Circuit Court opinion, an opinion that had been reversed in the Court of Appeals on jurisdictional grounds. Appellant is correct that the circuit court opinion did not control the decision of the City Council. The decision of the circuit court was advisory only, not binding upon the City Council. However, as an advisory opinion, a second legal opinion if you will, it is relevant to the City Council's decision, and one which the City Council would be remiss if they did not consider in making a final decision. The Woodford Circuit Court went into great depth to discuss the previous decision of the City Council, and specifically pointed out that if the City Council sought to reverse the Commission, the City Council would have to set forth its own findings of facts with substantial evidence to support such a final decision.

Where Appellant is incorrect, however, is its contention that the City Council felt bound by the previous circuit court opinion. The record simply does not support that contention. While the City Council may have relied upon the opinion, nothing in the record demonstrates that the City Council felt they could vote only one way based upon that court opinion. In fact, there was a dissenting vote at the first meeting concerning the ratification of the Commission's report.

The record shows that the City Council did not feel constrained to rule in a certain way, but rather they were aware of the need to support any deviation from the recommendations made by the Commission by substantial evidence in the record. This would indicate that the City Council was well aware of the need to support any changes based upon evidence, and not merely rely upon a prior

decision of the Woodford Circuit Court which had been overturned on procedural/jurisdictional grounds, not substantive grounds.

The next issue raised by the Appellant is its contention that the Mayor had improper ex-parte communications with various Council members. This is based upon a rather spurious argument by the Appellant that the Mayor, who is not a member of the legislative body, and only votes in the case of a tie, was friends with and had a business relationship with one of the zoning applicants.

As stated by the Appellant, these contacts occurred when the Mayor was present during, or participated in, discussions with various Council members concerning the City Council's decision on the issue of whether or not to approve the zoning request prior to the actual meeting. The record shows that the Council members, being fully aware of their role and duty in the proceedings, sought the Mayor's counsel on the matter, given his previous experience. Appellant has suggested that because it was the Mayor, and that by allowing the Council members to use his office for these discussions, the Mayor has somehow "inadvertently elevated the importance of his opinion in the eyes of the Council members when they decided how they were going to vote."

In looking at the actions of the Mayor in this instance, the Court looks to whether or not the decision of the City Council was tainted so as to make it unfair either to the Appellant or to the public interest. [*Louisville Gas & Electric Co. v. ex. rel. Cowan*, Ky.App., 862 S.W.2d 897 (1993)].

The record is devoid of any statement, suggestion, or remark by any Council member that by virtue of the Mayor's discussions with Council members, or by allowing the Council members to use his office, the Mayor unduly influenced their vote. To find that the Mayor's comments unduly influenced the Council members, this Court would have to find that the discussions between the Mayor and various Council members tainted the decision of the City Council; that the Mayor benefited in some manner from the

decision of the City Council; that he deliberately chose not to disclose the discussion; and finally that the discussions were so egregious that the only remedy to correct the problem is to void out the actions by the City Council. [*Id.*]

Simply put, there are no such facts to support this contention. If that were the case, then a mayor, who is an elected official, would be precluded from having friendships, business partners, or conversations with citizens concerning any matter which might be before the City Council. This hardly rises to the level of an impropriety. Thus, the standard set forth in *Louisville Gas, supra*, was not violated.

The second issue which this Court must address concerns whether the City Council acted within the scope of its authority. In reviewing the record, including all briefs of the parties to this matter, the Court finds no evidence or facts which would suggest that the City Council acted without legal authority in enacting the ordinance, nor does this Court find that the City Council exceeded its authority.

The only issue raised by the parties concerns whether or not the City Council held a “meeting” in violation of the Open Meetings Law as enacted by the legislature and codified in KRS 61.810. KRS 61.810(2) states:

Any series of less than quorum meetings, where the members attending one (1) or more of the meetings collectively constitute at least a quorum of the members of the public agency and *where the meetings are held for the purpose of avoiding the requirements of subsection (1) of this section*, shall be subject to the requirements of subsection (1) of this section. *Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues.* (Emphasis added.)

The statute outlines the parameters of open meetings, and by its very terms permits members to engage in discussions with each other “where the purpose of the discussions is to educate the members on specific issues.” In this case, it is clear that the individual Council members had

concerns, specifically legal concerns, as to what options they had available to them in dealing with the recommendations of the Planning and Zoning Commission. In fact, Appellants, in their brief, note that the City Attorney was present at these smaller meetings prior to the full City Council. It is just this kind of meeting that the law specifically permits. A meeting where the purpose of the discussion is to educate members on a specific issue pending before the City Council. The record supports the fact that the members were trying to educate themselves as to what options, if any, they could take as it regards the second application which was pending before them. That is a legitimate reason for the meetings under the statute, and does not violate the law.

The exception to meetings of less than a quorum, however, is also set forth in the statute. Where the motive of the meetings is to avoid complying with the requirements of the Open Meetings Law they violate the law. Nothing in the record supports Appellant's contention that the intent or motive of the Council members was to frustrate the law concerning Open Meetings. Therefore, this Court finds that the City Council complied with the Open Meetings Law, and thus acted within its authority as codified in KRS 100.211.

The final issue for review by this Court, pursuant to *American Beauty Homes, supra*, concerns whether or not the Appellant received procedural due process. Under the law, procedural due process rights involve adequate notice and the opportunity to be heard. *Conrad v. Lexington-Fayette Urban Council Government*, 659 S.W.2d 190 (Ky. 1983).

The Appellant suggests that the City Council violated their procedural due process rights when they only gave counsel for each side 15 minutes to argue the matter. This argument appears to be a non-issue. The decision of the City Council to limit discussion or arguments is well within their discretion. Keep in mind that the City Council had, in fact, reviewed all of the evidence of record previously, and were allowing each side additional time in which to discuss any changes or additional issues to be considered.

Further, in situations where the City Council approves a recommendation of the Commission, the City Council could make the decision with no hearing at all. *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky.App. 1971) A trial type of hearing is only required where there is a dispute as to the adjudicative facts. Where the only issue is legislative facts, a determination may be made without a hearing. Furthermore, the courts have held that even where a hearing is required in certain instances, it may permissibly be in the form of “argument type,” rather than “trial type.” *See McDonald, supra*.

Therefore, based upon the standard set forth in *American Beauty Homes, supra*, this Court finds that the decision of the City Council complies with the requirements therein, the decision of the City Council was supported by substantial evidence, was within the constraints of its statutory powers, and that it complied with the requirement of procedural due process due the Appellants.

The Appellant also argues to this Court that the second application of the Appellees, Barrows and Bluegrass, is barred under the doctrine of res judicata. The standard for applying res judicata in zoning matters is left to the discretion of the Court. The basis for this Court to apply res judicata in this matter is to prevent repeated and harassing applications for rezoning of the same property. *Fiscal Court of Jefferson County v. Ogden*, Ky. 556 S.W.2d 899 (1977), [overruled on other grounds in *Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1982)]. In this matter, the Court does not find that the reapplication was intended or served the purpose of harassment. In fact, based upon the final order of the Court of Appeals, Appellees would never have received a ruling on the merits of this application unless they re-applied. The Appellees did not receive their day in court on the first application as it relates to the substantive issues. When the Appellees were dismissed on a procedural/jurisdictional issue, they chose to re-file the application in order to allow it be addressed on the merits. This appears to be an intended and correct use of the judicial system, not a misuse bordering on harassment.

The final issue raised by Appellants concerns the legality of the PUD regulations. Since City Council's Ordinance No. 2004-20 addressed only the rezoning of the property in question, the legality of the PUD regulations are not properly before this Court. As noted by the Appellees, the only issue before this Court is the land use designation.

NOW, THEREFORE, the decision of the City of Versailles in the re-zoning matter is upheld and this appeal is dismissed with prejudice.

A close review of the record in this case clearly shows that the decision of the Versailles City Council was not arbitrary and that all three of the factors set forth in *American Beauty Homes, supra*, were fully complied with. Thus, we agree with the circuit court that the decision of the Versailles City Council rezoning the subject property should be upheld.

Therefore, the opinion and order of the Woodford Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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