RENDERED: OCTOBER 12, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000300-MR

GLENN M. SALYER and
RED RIVER RANCH, L.L.C. — APPELLANTS

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, SPECIAL JUDGE
ACTION NOS. 03-CI-00122 & 04-CI-00128

CITY OF STANTON, KENTUCKY, AND STANTON PLANNING COMMISSION; VIRGINIA WILLS, SOLELY IN HER CAPACITY AS MAYOR OF STANTON, KENTUCKY AND AS A MEMBER OF THE STANTON CITY COUNCIL; JAMES MARTIN, SOLELY IN HIS CAPACITY AS A MEMBER OF THE STANTON CITY COUNCIL; DANNY MCCORMICK, SOLELY IN HIS CAPACITY AS A MEMBER OF THE STANTON CITY COUNCIL; MIKE LOCKARD, SOLELY IN HIS CAPACITY AS A MEMBER OF THE STANTON CITY COUNCIL; MARIAM SMALLWOOD, SOLELY IN HER CAPACITY AS A MEMBER OF THE STANTON CITY COUNCIL; PAM TIPTON, SOLELY IN HER CAPACITY AS A MEMBER OF THE STANTON CITY COUNCIL; BILLY RAY ESTES, SOLELY IN HIS CAPACITY AS A MEMBER OF THE STANTON CITY COUNCIL; VICKIE SLEMP, SOLELY IN HER CAPACITY AS CITY CLERK FOR THE CITY OF STANTON, KENTUCKY; AND ED HASH, SOLELY IN HIS CAPACITY AS ZONING ENFORCEMENT OFFICER FOR THE CITY OF STANTON, KENTUCKY; and BOARD OF ADJUSTMENT OF THE CITY OF STANTON, LOUISE ASHLEY, CHAIRPERSON, KEVIN MORTON, BOBBY CUNNINGHAM, JAMES KIRKPATRICK AND ED HASH, MEMBERS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JUDGE. KNOPF AND ROSENBLUM,[1] SENIOR JUDGES.

DIXON JUDGE: Glenn M. Salyer and Red River Ranch (hereinafter collectively referred to as "Salyer") appeal from an order of judgment of the Powell Circuit Court finding that Salyer's mulch operation violated the City of Stanton's zoning and nuisance ordinances and issuing an injunction prohibiting any further operation of the facility. Finding no error, we affirm.

This zoning predicament occurred after Salyer purchased a tract of property immediately adjacent to a residential area in the City of Stanton in August of 2001 which was zoned "heavy industrial." Shortly after purchasing the property he began operating a mulch facility at this location. Soon, residents near the facility began to voice numerous complaints. Objections were made about the noise and smell emanating from the facility, as well as regarding water flow and airborne mulch particulates, among other concerns. Eventually, nearby residents sought relief from the City of Stanton and the Stanton Planning Commission to stop the mulch operation.

The Stanton Zoning Enforcement Officer ultimately determined that Salyer's use of the property violated both the city's zoning and nuisance ordinances and brought an action in the Powell Circuit Court to compel Salyer to halt his mulch

[1] Senior Judges William L. Knopf and Paul W. Rosenblum sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

operation. Initially, the circuit court referred the matter to the Stanton Board of Adjustment in order to determine whether Salyer's use of the property was compliant with "heavy industrial" use, or whether it met the standard for a conditional use permit. After a lengthy hearing, the Board of Adjustment unanimously decided that Salyer's use of the property was not a permitted use under the city's zoning ordinance. It further concluded that the mulch operation did not meet any of the conditional uses under the city's zoning ordinance and the continued use of the facility for mulch operations would be "detrimental to surrounding properties and possesses characteristics which would be a nuisance to the residents of [Stanton]." Salyer appealed this decision to the Powell Circuit Court.

Salyer's appeal of the Board's decision was consolidated with the City of Stanton's earlier lawsuit by the Powell Circuit Court. After extensive briefing, the Powell Circuit Court issued separate orders in the two companion cases in which it found Salyer's use of the property invalid under the City of Stanton's zoning ordinance, overruled Salyer's objections, and issued an injunction enjoining Salyer from bringing mulch onto the property. This appeal ensued.

Salyer makes essentially three arguments on appeal. First, he claims that the City of Stanton's zoning ordinance is not valid or enforceable because it was not properly enacted. Second, Salyer contends that he was denied due process because the Board of Adjustment's counsel acted improperly as investigator, prosecutor and advisor. Third, he argues his mulch facility is allowed under the city's zoning ordinance as a

"principal use," and if not a principal or permitted use, Salyer maintains that the Board of Adjustment improperly found that the proposed use was not a "conditional use." We will review each of these arguments separately.

VALIDITY OF CITY OF STANTON'S ZONING ORDINANCE

Salyer's first argument on appeal centers on what he claims is the invalidity of Stanton's zoning ordinance because it was improperly enacted. He points out that the City of Stanton operates as an independent planning unit under the provisions of KRS 100. Subsection 117 of KRS 100 requires a city to interrogate, in writing, all other cities and the county in which it is located to determine whether they wish to enter into a joint planning unit before proceeding with an independent unit. Under these provisions, only if the county and other cities in that county decline can a city establish its own planning unit.

During the course of discovery in this litigation Salyer sought evidence from the City of Stanton that it had, in fact, interrogated, in writing, all other governmental entities required by statute prior to enactment of its independent planning unit. Apparently, the City of Stanton was unable to produce any such records. Salyer maintains that this lack of proof that the City of Stanton followed the requisites of KRS 100.117 requires this Court to invalidate the zoning ordinance. We disagree.

Contrary to Salyer's argument, an absence of proof that an ordinance was lawfully enacted does not equate with a determination that it is, in fact, invalid. Rather, "the law raises a presumption in favor of the validity of the ordinance and the burden is

on the person attacking it to show its invalidity." *City of Louisville v. Puritan Apartment Hotel Co.,* 264 S.W.2d 888, 890 (Ky. 1954). Consequently, the burden is upon Salyer to prove that the City of Stanton failed to comply with the requisites of KRS 100.117 when it established its independent planning unit.

Salyer cites to several Kentucky decisions which have found various ordinances void for failure to comply with procedural requirements. *See Bellefonte Land, Inc. v. Bellefonte, Kentucky,* 864 S.W.2d 315, 316-317 (Ky.App. 1993) (failure of city to comply with statute requiring it to join planning commission before adopting zoning ordinance rendered amended ordinance and subdivision regulations void); *Helm v. Citizens to Protect the Prospect Area, Inc. (COPPA),* 864 S.W.2d 312, 314 (Ky.App. 1993) (substantial compliance with statute's procedural requirements is insufficient and therefore, zoning ordinance was void); *Bates v. City of Jenkins,* 322 S.W.2d 475, 476 (Ky. 1959) (while city council had intended to enact an ordinance, where it had not actually been enacted the ordinance was void). However, a crucial fact in all of these cases is that the procedural requirements had not, in fact, been followed. This is quite different than the case here. In this case, there is no proof that the correct procedures were not followed, just that there is no evidence that they were. And, as has previously been established, the burden is upon Salyer to prove this fact, not the City of Stanton. Salyer has put forward no proof that the City of Stanton's ordinance is not valid.

Salyer argues that because there is no record that the City of Stanton wrote to the county government and all other cities within Powell County,[2] pursuant to KRS

[2]Clay City is apparently the only other city within Powell County.

100.117, any zoning ordinance is thereby void ab initio. He maintains that because a municipal corporation can speak only through its formal records, a silent record is tantamount to a determination that proper procedures were not followed.

While Salyer's argument may have merit when procedural steps are required to be recorded as in *Bates, supra.,* such is not the case here. There is nothing in KRS 100.117 which requires any city or county to maintain any records of any written interrogation of other entities under this section.

Salyer's other arguments concerning the City of Stanton's statutory noncompliance, likewise have no merit. There is no proof in the record that the city has failed to update its Comprehensive Plan as required by KRS 100.197(2). Additionally, counsel for the City has adequately addressed the staggered terms of Board of Adjustment members and it is apparent that the City is in compliance with KRS 100.217(4).

VIOLATION OF DUE PROCESS

Salyer next claims he was denied due process because of the multiple roles played by the attorney for the Board of Adjustment. He asserts that the Board's attorney improperly acted as investigator, prosecutor and advisor during the Board of Adjustment proceeding. We also find this argument without merit.

Board of Adjustment hearings are administrative in nature. Consequently, there is no requirement that such hearings must comply with strict judicial procedures. Our Supreme Court has stated that although the process of making zoning determinations

might be considered “quasi judicial” or “quasi adjudicatory,” it does not follow that the legislative bodies making such determinations are performing judicial functions, and thus, are subject to the same rules of conduct or procedure as judicial officers. *Hilltop Basic Resources, Inc. v. County of Boone,* 180 S.W.3d 464, 468 (Ky. 2005) Further, another panel of this Court has recognized as an administrative agency, a city planning commission's merger of investigative and adjudicative roles with respect to zoning did not create an unacceptable appearance of bias. *Warren County Citizens for Managed Growth, Inc. v. Board of Com'rs of City of Bowling Green,* 207 S.W.3d 7, 18 (Ky.App. 2006). If a city planning commission can act as investigator and adjudicator, it follows that its attorney may permissibly act as investigator, prosecutor and advisor.

Additionally, as noted by the circuit court in the proceedings below, all statutory requirements were met. Under the provisions of KRS 100.261, in an appeal to the Board of Adjustment, a public hearing is required which affords any interested person the opportunity to appear and be heard. There is no allegation that any interested person was either not permitted to attend or not permitted to testify. As such, all procedural due process requirements have been met.

PERMITTED USE OR CONDITIONAL USE

Finally, Salyer argues that the Planning Unit, the Board of Adjustment and the circuit court erred by finding that his mulch facility was not a “principal” or “permitted” use in the heavy industrial zone, and therefore an allowed use. Alternatively,

he contends the finding that his mulch operation did not constitute a "conditional use" under the city's zoning ordinance was also error.

Initially, we would note that the scope of our review on appeal is limited. In planning and zoning cases, judicial review is limited to whether the administrative decision was arbitrary, in that it was clearly erroneous and unsupported by substantial evidence. *Fritz v. Lexington-Fayette Urban County Government,* 986 S.W.2d 456, 458-459 (Ky.App. 1998). Great deference must be given to the planning commission's decisions. *Evangelical Lutheran Good Samaritan Soc., Inc. v. Albert Oil Co., Inc.,* 969 S.W.2d 691, 694 (Ky. 1998). An appellate court is not empowered to undertake a de novo review of a planning commission's actions, but may only 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. *See Warren County Citizens for Managed Growth, supra.,* at 13; and, *Minton v. Fiscal Court of Jefferson County,* 850 S.W.2d 52, 54 (Ky.App. 1992). Moreover, parties appealing a zoning decision bear the burden of demonstrating that the decision was purely arbitrary. *Hilltop Basic Resources, supra.* at 646. As stated by another panel of our Court in *McManus v. Kentucky Retirement Systems,* 124 S.W.3d 454, 458 (Ky.App. 2003),

> [d]etermination of the burden of proof also impacts the standard of review on appeal of an agency decision. When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence

> when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people. Where the fact-finder's decision is to deny relief to the party with the burden of proof or persuasion, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses . . . (Citations and internal quotations omitted.)

With the aforementioned principles in mind, we now turn to Salyer's claims. First, he maintains that his mulch facility is a "principal" or "permitted" use in the heavy industrial zone. Salyer claims his operation fits within the definition of heavy industry. That definition states: "[t]hose industries whose processing of products result in the emission of any atmospheric pollutant, light flashes or glare, odor, noise or vibration which may be heard and/or felt off the premises and those industries which constitute a fire or explosion hazard." However, Stanton's zoning ordinance specifically sets forth all permitted uses. They include:

> Wholesale, storage; warehouse; anima [sic] hospital; bakery; bottling works; building material yard; cabinet making; carpenter's shop; clothing manufacture; dairy; dyeing and dry-cleaning works; fruit canning or packing; ice plants; laundry; milk distribution station; optical goods; paper boxes; pencils; printing; publication or engraving; and trucking terminal.
>
> Other industrial uses not listed above shall be considered conditional uses and will require written approval of the Board of Adjustment.

Contrary to Salyer's position, Stanton's zoning ordinance clearly sets forth all uses which are permitted uses, and, as Salyer concedes, a mulch operation is not among them. We

cannot agree with Salyer that the allowable uses of “storage, wholesale sales, building material yards, and trucking terminals,” adequately reflect the scope of his business. The evidence of the disruption to the nearby residents, the odor, insect, rodent, noise, and airborne mulch problems created by this operation clearly are not anticipated in the enunciated uses. We believe that there was substantial evidence to support the Board's determination that Salyer's mulch facility was not included within the purview of the ordinance and that he has not met his burden by showing that the evidence in his favor was so compelling that no reasonable person could have failed to have been persuaded by it.

Second, Salyer argues that even if his mulch facility is not a permitted use, the Board erred by finding that his operation was not a “conditional use.” Under KRS 100.111(6) a conditional use is defined as:

> a use which is essential to or would promote the public health, safety or welfare in one (1) or more zones, but which would impair the integrity and character of the zone in which it is located, or in adjoining zones, unless restrictions on location, size, extent, and character of performance are imposed in addition to those imposed in the zoning regulation.

Salyer contends that the Board of Adjustment erred by determining that his mulch operation “is both detrimental to surrounding properties and possesses characteristics which would be a nuisance to the residents of the City [of Stanton].” He maintains that there is no substantial evidence to support these findings. Again, we disagree.

The Board of Adjustment held an extensive hearing on the matter of the proposed use of Salyer's mulch operation. The Board heard from numerous witnesses,

interested parties and concerned citizens over the course of a two-day hearing. Numerous complaints were lodged against Salyer regarding the stench coming from his facility, the pollution of nearby streams, the proliferation of mosquitoes, rats and flies near the mulch piles, and the noise emanating from the operation. Even the circuit judge presiding in this case viewed the property and noted the strong odor, the noise caused by the grinding of the mulch, and the view of the mulch facility from the surrounding properties, and found the operation to be "obnoxious to the general public." Consequently, this Court cannot say the Board's decision was unsupported by substantial evidence or that it was arbitrary and capricious.

For the foregoing reasons the judgment of the Powell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John S. Talbott
Richard V. Murphy
Lexington, Kentucky

BRIEF FOR APPELLEE:

B. Scott Graham
Stanton, Kentucky