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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000733-MR

CHARLES DAVID MORRIS AND JULIA G. MORRIS — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-01553

ROB CARTER; SUE CARTER; KELLY HELTON; JONATHON MAYS; ANN POLLOCK PATTERSON; JOHN PATTERSON; FRANKLIN COUNTY FISCAL COURT AND ITS MEMBERS OR THEIR SUCCESSORS, TERESA A. BARTON, JILL E. ROBINSON, PHILLIP W. KRING, HOWARD R. DAWSON, IRA W. FANNIN, HUSTON WELLS, AND LAMBERT MOORE; FRANKLIN COUNTY PLANNING & ZONING COMMISSION AND ITS MEMBERS OR THEIR SUCCESSORS, ANNIE METCALF, DAVID GARNETT, SHERRON JACKSON, MICHAEL DAVENPORT, ROBERT MASON, CHARLENE WILEY, JOE SANDERSON, LAURA HENDRICKS, LEE WATERFIELD, DAVID VAUGHN, MITCH BUCHANAN, AND FORREST BANTA — APPELLEES

AND: NO. 2006-CA-000790-MR

FRANKLIN COUNTY FISCAL COURT AND ITS MEMBERS; TERESA A. BARTON, COUNTY JUDGE EXECUTIVE, AND HER SUCCESSOR, ROBERT ROACH; JILL E. ROBINSON, MAGISTRATE; PHILLIP W. KRING, MAGISTRATE; HOWARD R. DAWSON, MAGISTRATE; IRA W. FANNIN, MAGISTRATE; HUSTON WELLS, MAGISTRATE; LAMBERT MOORE, MAGISTRATE; J. W. LUTTRELL, MAGISTRATE; OR THEIR SUCCESSORS — CROSS-APPELLANTS

v.

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-01553

CHARLES DAVID MORRIS; JULIA G. MORRIS; ROB CARTER; SUE CARTER; KELLY HELTON; JONATHAN MAYS; ANN POLLOCK PATTERSON; JOHN PATTERSON; FRANKFORT-FRANKLIN COUNTY PLANNING AND ZONING COMMISSION AND ITS MEMBERS OR THEIR SUCCESSORS, ANNIE METCALF, DAVID GARNETT, SHERRON JACKSON, MICHAEL DAVENPORT, ROBERT MASON, CHARLENE WILEY, JOE SANDERSON, LAURA HENDRICKS, LEE WATERFIELD, DAVID VAUGHN, MITCH BUCHANAN, AND FORREST BANTA — CROSS-APPELLEES

OPINION
REVERSING
AS TO THE APPEAL AND THE CROSS-APPEAL

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

WINE, JUDGE: Charles David Morris and Julia G. Morris ("the Morrises") appeal the Franklin Circuit Court's order which set aside a zoning ordinance enacted by the Franklin County Fiscal Court ("Fiscal Court") granting a map amendment for their property. The Fiscal Court cross-appeals from the trial court's order.

The Morrises own a 54.305-acre tract of undeveloped land at 1904 Louisville Road in Franklin County, Kentucky. Pursuant to the Franklin County Zoning Ordinance and the 2001 Comprehensive Plan, the property has been designated as "low density residential" and zoned Rural Residential ("RR"). Under the Franklin County Zoning Ordinance, RR-zoned property is limited to single-family residential lots which may not be smaller than 1.5 acres with sewers.

The Morrises' property adjoins the Kentucky Department of Fish and Wildlife's "Game Farm." In addition, the Morrises' property is located directly across U.S. 60 from the Julian Farm, a Kentucky State Nature Preserve. The Julian Farm is subject to a conservation easement. There are several other RR-zoned properties in the area including: Fox Run Estates, which consists of 36 single-family homes on at least 1.5-acre lots; a trailer park; and two subdivisions that existed prior to the Franklin County

Zoning Ordinance. Thus, these latter two properties were grandfathered in under the original and subsequent Comprehensive Plans.

In the summer of 2002, the Morrises submitted their first application (the 2002 application) to have their entire 54.305-acre tract of land rezoned. Specifically, the Morrises requested in their application that their property be zoned from the existing RR status to Rural Residential "B" ("RB") status. Pursuant to the Frankfort/Franklin County Zoning Ordinance, RB-zoned property could be developed for single-family residential use at a density of four lots per acre. On January 27, 2003, the Franklin County Planning Commission (Commission) held a public hearing where various witnesses spoke in support of and against the zoning change. The Commission heard testimony about the plans to widen U.S. 60, the inappropriateness of RR zoning, the infill development of the Morrises' property, and the availability of sewers. On March 13, 2003, the Commission adopted ten findings of fact before forwarding their recommendation of denial to the Fiscal Court. The Commission's findings included:

> 1) that the Julian Farm was mistakenly listed as RB; . . . 3) that US 60 is currently being expanded; 4) the Comprehensive Plan states there is already enough land zoned for residential purposes to accommodate more than 250 times the proposed residential growth in the county; 5) The Kentucky Department of Fish and Wildlife has asserted no objection; 6) the Comprehensive plan designates the area for RR; 7) RR only allows one unit per one and a half acres; 8) the property is located between the Game Farm and Broadview Manor, and Hart Mobile Home Park which is not zoned RR; 9) the Morrises' applications exceeds (sic) one unit per one and half acres[;] 10) the development of the property and extension of sewers

> to it by the private developer will enhance the availability of sewers for Broadview Manor and Fox Run subdivisions.

On June 6, 2003, the Fiscal Court concluded its second reading to Ordinance No. 3-2003, 2003 Series, and denied the 2002 amendment.

The Morrises submitted a new application for a zone map amendment (2003 application) to rezone a lesser portion of the same property on November 3, 2003. In the 2003 application, the Morrises requested to rezone 20.036 acres from RR to RB and 10.028 acres from RR to Highway Commercial ("CH"). The remaining 24.241 acres would remain zoned RR. On April 8, 2004, the Commission submitted a "Staff Report" with twelve findings of fact recommending denial to the Fiscal Court.

The Commission held a public hearing on July 8, 2004. Robert Kellerman, counsel for the Morrises, testified about changes in the property that had occurred since the 2002 application. He indicated those changes included the recently completed widening of U.S. 60 and the recent construction of sewers. In addition, Kellerman testified that the Morrises' property is a prime example of infill ground because the area around it was already developed as RB. Jack McDonald, a licensed real estate agent, testified that there is a shortage of available sewer single-family lots in Franklin County as there is only a two-year supply. Adjoining landowners, including the appellees, testified against any rezoning plans.

On August 12, 2004, the Commission recommended denial on both rezoning requests in the Morrises' 2003 application. The Fiscal Court did not conduct a

public hearing, but relied on the record before the Commission and adopted the Commission's adjudicative facts. On October 21, 2004, the Fiscal Court voted to deny the proposed amendment to change 10.028 acres from RR to CH. However, the Fiscal Court did approve the proposed amendment to change the Morrises' 20.036 acres from RR to RB. The Fiscal Court set out fourteen findings of fact in support of the zoning change. The Fiscal Court conducted a second reading of the ordinance approving the zoning change (No. 18-2004) on November 19, 2004.

The Morrises had appealed the Fiscal Court's denial of their 2002 application to the circuit court on July 7, 2003. Following the enactment of Ordinance No. 18-2004 on November 19, 2004, Rob and Sue Carter, Kelly Helton, Jonathan Mays, Ann Patterson and John Patterson ("Game Farm Petitioners") appealed the Fiscal Court's decision to grant the 2003 application to change 20.036 acres of the Morrises' property from RR to RB. The Fiscal Court's decision to deny the proposed change of the 10.028 acres from RR to CH was not appealed. The circuit court consolidated the two appeals on March 21, 2005. However, the Morrises did not brief the issues related to the denial of the 2002 application.

After briefing of the issues related to the 2003 application, the circuit court entered an opinion and order on March 7, 2006, setting aside Ordinance No. 18-2004. The court rejected the argument by the Game Farm Petitioners that the 2003 application was barred by *res judicata* and collateral estoppel based on the denial of the 2002 application. But the court found that the Fiscal Court's findings granting the map

amendment were not supported by substantial evidence. In particular, the court found no evidence that the map amendment agreed with the Comprehensive Plan, that there had been major changes in the area which were not anticipated by the Comprehensive Plan, or that the existing RR zoning was no longer appropriate. As a result, the trial court concluded that the requirements of KRS 100.213 were not met and the Fiscal Court acted arbitrarily in granting the map amendment. The Morrises and the Fiscal Court now appeal from that order.

As a preliminary matter, the circuit court held that the Morrises waived their appeal of the Fiscal Court's denial of the 2002 application as they never briefed any part of the denial of the 54.305 acres from RR to RB. Under *Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000), if a party fails to brief any part of a judgment appealed from, that part is considered waived and confessed and is thus affirmed. In their reply brief, the Morrises only discuss the issues raised with respect to the 2003 application and not the denial of the 2002 application. Hence, the circuit court properly dismissed the Morrises' appeal of the 2002 application.

The standard of review in zoning cases remains a question of arbitrariness. 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 whether (1) the agency acted in excess of its statutory powers; (2) the agency's proceedings were in accord with the parties' due process rights; and (3) the action taken by the legislative body was supported by substantial evidence. If any one of

these three elements is not met, then the Fiscal Court acted arbitrarily. *Minton v. Fiscal Court of Jefferson County,* 850 S.W.2d 52, 55 (Ky.App. 1992).

As to the first element, the Game Farm Petitioners initially argued that the Fiscal Court acted outside its statutory authority when it granted the Morrises' 2003 application based on the alleged *res judicata* effect of the Commission's denial of the 2002 application.

The circuit court held that the doctrines of collateral estoppel and *res judicata* do not apply to the 2003 application. The doctrine of *res judicata* prevents re-litigation of claims. *Fiscal Court of Jefferson Co. v. Ogden*, 556 S.W.2d 899, 902 (Ky.App. 1977). Similarly, the doctrine of collateral estoppel precludes relitigation of issues previously determined. *City of Louisville v. Louisville Professional Firefighters Association*, 813 S.W.2d 804, 807 (Ky. 1991). The reason behind these doctrines is to ensure resolution in litigation in zoning changes, and to protect the public from repeated and harassing rezoning applications. *Ogden*, 556 S.W.2d at 902.

In this case, the circuit court noted that the 2002 application and the 2003 application were similar but that there were fundamental differences, including the smaller acreage involved in the 2003 application, and the existence, not just the anticipation, of sewers in the 2003 application.

The Game Farm Petitioners did not appeal the circuit court's decision on this issue. But in its cross-appeal, the Fiscal Court asserts that while the circuit court denied that either doctrine applied to this case, the court then relied on the findings and

conclusions made by the Fiscal Court in its denial of the 2002 application as a basis to reverse the Fiscal Court's grant of the 2003 map amendment.

While it does appear quite clearly that the circuit court did rely, at least to some extent, on the 2002 application as a basis for its reversal of the Fiscal Court below, we agree with the circuit court that the doctrines of collateral estoppel and *res judicata* are not applicable in this case. As the circuit court correctly noted, there were substantial differences between the 2002 and 2003 applications. First, the 2003 application only sought 20.036 acres to be rezoned from RR to RB and another 10.028 to CH, leaving the remaining 24.241 acres as RR. Second, there was confirmation from the Franklin Sewer Department of the availability of sewers to accept flow from the proposed development on the Morrises' property if the map amendment were to pass. There was testimony that since the 2002 application, a new force main had been installed by the City of Frankfort that made the sewers not just anticipated, but operational. Based on either of these two factors alone, the circuit court correctly found that the doctrines of *res judicata* or collateral estoppel did not preclude the Morrises' 2003 application. We will address the circuit court's reliance on the reasons for the denial of the 2002 application later in this opinion.

As to the second element, the Game Farm Petitioners do not allege that they have not been afforded their due process rights. Thus, we are left with the final element of whether there was substantial evidence to support the Fiscal Court's decision to grant the map amendment in the 2003 application. An administrative agency's findings of fact,

if supported by substantial evidence, are binding on a reviewing court. A*llen v. Kentucky Horse Racing Authority,* 136 S.W.3d 54, 59 (Ky.App. 2004), *citing Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002). Thus, we must uphold the Fiscal Court's decision if it's found to be supported by substantial evidence. *Id*. at 578.

KRS 100.213 states:

> (1) 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.

The Morrises argue that the circuit court exceeded its limited authority to overturn the decision of the Fiscal Court when it substituted its own judgment. The Morrises further assert that the circuit court ignored the substantial evidence in support of the zoning change while choosing instead to focus on the evidence against the map

amendment. Such an approach, they contend, is inconsistent with *Danville-Boyle County Planning and Zoning Commission v. Prall,* 840 S.W.2d 205, 208 (Ky. 1992), in which the Court noted:

> In zoning cases the standard of judicial review is set forth in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, Ky., 379 S.W.2d 450 (1964). Basically, the judicial review of an administrative decision provides that those issues are confined to questions of law which are encompassed in the question: "Was the administrative decision arbitrary?" By arbitrary we mean clearly erroneous and by clearly erroneous we mean unsupported by substantial evidence. . . . *Crouch v. Police Merit Board*, Ky., 773 S.W.2d 461 (1989).

In its cross-appeal, the Fiscal Court first argues that the circuit court improperly considered the reasons for the denial of the 2002 application in determining whether the findings supporting the 2003 application were supported by substantial evidence. Because the doctrines of *res judicata* and collateral estoppel do not apply, the Fiscal Court contends that it is not required to explain the different findings and conclusions on two separate applications. We agree. Having determined that the 2002 and 2003 applications were substantially different, the Fiscal Court's earlier findings are not necessarily binding in the consideration of a subsequent application. Rather, the focus of the inquiry must be on the evidence supporting the required findings under KRS 100.213. As previously noted, the Fiscal Court made fourteen factual findings in support of its conclusion that the map amendment is consistent with the Comprehensive Plan. In rejecting this conclusion, the circuit court improperly looked to changes in circumstances since the denial of the 2002 application.

Furthermore, to the extent that the circuit court considered changes since the adoption of the Comprehensive Plan, it still viewed each finding in isolation rather than as a whole.

A local legislative body is not required to follow the Comprehensive Plan in every detail. The Comprehensive Plan serves as a scheme of general planning and zoning objectives in an area with what can be perceived as the best way to zone an area with the current and foreseeable development. But in no way is the Comprehensive Plan a final plan and it is continually subject to modification as developments continue to impact the land and change its foreseeable use. In fact, the Comprehensive Plan was intended to ". . . [serve] as a guide rather than a strait-jacket." *Ward v. Knippenberg*, 416 S.W.2d 746, 748 (Ky. 1967). Moreover, the Fiscal Court was entitled to review the evidentiary record made before the Commission and was at liberty to make adjudicative findings different from those found by the commission. *Hilltop Basic Resources, Inc. v. County of Boone*, 191 S.W.3d 642, 647 (Ky.App. 2006), *citing City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971).

When viewed as a whole, the evidence of record supports the Fiscal Court's findings. In its first finding, the Fiscal Court stated that "[o]ver 250 existing single family units exist within one half mile of the property, including Willowcrest Subdivision (150 units – zoned RB), Broadview Manor (89 units – zoned RB) and Fox Run Estates (36 units – zoned RR) and the Hart's Mobile Home Park." Since the Comprehensive Plan encourages development to be contiguous to existing development, the Fiscal Court found that the Morrises' property is not an appropriate "transition" zone to agricultural

property. The circuit court noted that these subdivisions were zoned RB prior to the adoption of the Comprehensive Plan. Therefore, the circuit court held that the extension of sewers alone was not substantial evidence to support the conclusion that the 2003 application was in agreement with the Comprehensive Plan.

But in his testimony at the July 8, 2004 public hearing held by the Commission in support of the map amendment, Robert Kellerman pointed to additional circumstances which had changed since the adoption of the Comprehensive Plan. The first major development was the expansion of U.S. 60 to a five-lane highway and the second was the extension of sewers to the property. The Fiscal Court specifically addressed these factors in its third, fourth and ninth findings.

Likewise, the Fiscal Court's tenth finding focuses on the Comprehensive Plan's stated objective that "growth should occur where infrastructure is available, and it is now available." Mr. Morris testified that he waited to file the 2003 application until the property had the sufficient infrastructure - gas, sewer, water, electric and highway so that the development of his property would be appropriate. In conjunction with the developments nearby on property also zoned RB, Kellerman argued that these factors would support a finding that the Morrises' property is not an appropriate "transition" zone to agricultural property.

The Fiscal Court's second finding stated that "[t]he property is bordered on the east by the Game Farm Subdivision, on the South in part by the Willowcrest Subdivision and on the west by the mobile home park. The development of the property

is an appropriate 'infill' development under the Comprehensive Plan (p. 26)." The circuit court agreed with the Morrises and the Fiscal Court that the Comprehensive Plan encourages infill development, but did not concur with their conclusions that the Morrises' property fit the description of "infill" development. Instead, the circuit court agreed with the Commission's staff report, which gave the following definition of infill development:

> Infill development refers to the planning, design and construction of homes, stores, workplaces and other facilities that make existing communities more livable. The term infill development is commonly used to describe the reuse of property and buildings in an urbanized (city) area. . . . The designation of the property as rural activities and low-density residential is appropriate given the property's location outside the urbanized area of Frankfort.

Staff Report 4/8/04 at 7.

The circuit court again noted that the surrounding subdivisions and mobile home development predated the adoption of the Comprehensive Plan. Thus, the circuit court again concluded that the circumstances had not gone beyond those anticipated by the Comprehensive Plan and that, therefore, the Fiscal Court's finding that the Morrises' property was appropriate for infill development was not supported by substantial evidence.

While the surrounding properties have not changed since the adoption of the Comprehensive Plan, other circumstances have changed, including the expansion of U.S. 60 to five lanes and the completion of sewers to the Morrises' property. In the context of

these additional circumstances, the Fiscal Court could reasonably find that the Morrises' property met the definition of infill development.

The circuit court conceded that these changes in the area occurred but determined that these changes were anticipated at the time the Comprehensive Plan was adopted. However, Kellerman testified that, while the Comprehensive Plan anticipated the extension of sewers to one of the neighboring subdivisions, the plan did not contemplate that sewers would be extended as far as the Game Farm. Similarly, while Kellerman testified that the Comprehensive Plan acknowledged the possible widening of U.S. 60, he added that the plan did not anticipate that the project would be completed in the time period of the Comprehensive Plan. Thus, contrary to the circuit court's findings, there was substantial evidence of major changes that were not anticipated by the Comprehensive Plan. *See Bryan v. Salmon Corp.*, 554 S.W.2d 912, 916-17 (Ky.App. 1977).

In its fourteenth finding, the Fiscal Court found that "[t]here are currently an insufficient number of residential lots that are available for sale in Franklin County to satisfy the demand at its present pace. Even though other property may be zoned or designated for residential zoning, an insufficient amount is in development." The circuit court first noted that this finding directly conflicts with the Fiscal Court's finding denying the 2002 application, which stated that "[t]here is sufficient land already zoned for the anticipated suburban residential land use growth projected within the Comprehensive Plan. The Comprehensive Plan provides for approximately 2,300 acres of new suburban

residential land use – 6 times the anticipated demand for the suburban residential land use growth." (Fiscal Court's Ordinance No 3-2003 FF # 9).

At first blush, we would agree with the circuit court that these two findings are clearly inconsistent. However, since neither *res judicata* nor collateral estoppel applies to the 2003 application, the Fiscal Court was not absolutely bound by its prior finding. Furthermore, there was new evidence presented in support of the 2003 application which called the prior finding into question. As previously noted, Jack McDonald testified at the public hearing on the 2003 application that there was a shortage in Franklin County of available single-family lots with sewer service. He concluded that the county had only a two-year supply of such lots remaining. Based on this new evidence, the Fiscal Court could reasonably conclude that its prior finding failed to adequately address the need for additional lots.

In conclusion, we agree with the circuit court that there was substantial evidence in this case which would have warranted a denial of the 2003 application. However, we cannot agree with the circuit court that there was no substantial evidence to support granting the map amendment. Since the 2002 application was based on substantially different facts, the Fiscal Court was not bound by its prior findings supporting the previous denial. Although there was conflicting evidence and conflicting interpretations of the evidence with regard to each of the findings in the 2004 ordinance, we agree with the Morrises and the Fiscal Court that the findings were supported by reasonable interpretations of the evidence of record. And while some of the findings

may appear questionable when viewed alone, the totality of the circumstances supports the Fiscal Court's decision. Therefore, we find the Fiscal Court relied on substantial evidence to find that the area has experienced changes sufficiently consistent with the guidelines of KRS 100.213 to justify the map amendment.

Accordingly, the judgment of the Franklin Circuit Court is reversed and the Fiscal Court's actions enacting Ordinance No. 18–2004 are valid.

ALL CONCUR.

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