RENDERED: SEPTEMBER 16, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000480-MR

APPLE VALLEY SUBDIVISION
PROPERTY OWNERS ASSOCIATION, INC.;
JONATHAN ERIC BINGHAM;
DAVID STEFF; SONJA DENISE MINCH;
RUTH ANNE LARIMORE;
DAVID L. SHIPP; JUDY LEE;
RANDALL GENE THOMAS;
JAMIE SPAULDING; JOSEPH A. KIRSCHBAUM;
ALLEN J. SCHULER;
BARBARA HOSSE-YOCUM;
FRANCIS GARY BRADSHAW;
PHILLIP ROSS ALLEN; AND JOYCE HARRISON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 13-CI-000079

OVERLOOK DEVELOPMENT, LLC;
LOUISVILLE/JEFFERSON COUNTY
METRO PLANNING COMMISSION;
PHILLIP C. BILLS; RONALD BENDERSON,
RANDALL BENDERSON AND
DAVID H. BALDAUF AS
TRUSTEES UNDER A TRUST AGREEMENT
DATED OCTOBER 14, 1985,
KNOWN AS THE BENDERSON
85-1 TRUST; RONALD BENDERSON;

RANDALL BENDERSON; DAVID H. BALDAUF;
RB-3 ASSOCIATES; RB-3
ASSOCIATES & BENDER; MARK CHAIT;
ROBERT BENDERSON;
LDG MULTIFAMILY, LLC;
MICHAEL GROSS FAMILY LLC;
AND MICHAEL GROSS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL AND TAYLOR, JUDGES.

ACREE, JUDGE: Appellee Louisville/Jefferson County Metro Planning Commission approved a development plan to construct an apartment complex on land abutting Outer Loop Road in Louisville, Kentucky. Appellant Apple Valley Subdivision Property Owners Association, Inc., is a homeowners' association of residents across Outer Loop from the subject property. The remaining Appellants are residents and office-holders of various cities and subdivisions adjacent to or nearby the subject property. Appellants collectively oppose the project, and appeal a Jefferson Circuit Court opinion and order finding the Commission did not act arbitrarily in approving the proposed development plan. We affirm.

I. Facts and Procedure

On June 18, 2012, Appellee Michael Gross filed an application on behalf of Appellee LDG Multifamily, LLC, with the Louisville Metro Division of Planning & Design Services, a staff department of the Commission, seeking a ministerial review and approval of a Category 3 Development Plan (Plan). The

Plan called for the construction of an apartment community known as Frontgate Apartments, located at 7411 Outer Loop, Louisville, Kentucky. The land subject to the Plan was, at the time, jointly owned by: (1) Appellee RB-3 Associates; and (2) Appellees Ronald Benderson, Randall Benderson, and David H. Baldauf, Trustees under a Trust Agreement dated October 14, 1985, known as the Benderson 85-1 Trust.

Neighbors within the area objected to the Plan.

Staff initially determined that the Plan required certain waivers prior to being approved. Seeking to avoid the waivers process, the applicant requested that Planning & Design Services' Director Phillip Bills interpret selected sections of the Louisville Metro Land Development Code (Code) and ascertain their applicability to the Plan. Director Bills issued a Director's Interpretation finding the Plan complied with the Code, eliminating the need for waivers.[1]

Appellants appealed the Director's Interpretation to the Louisville Metro Board of Zoning Adjustment. The Board held a public hearing on October 1, 2012. Appellants were permitted to appear, speak, cross-examine, rebut, and answer questions. The Board denied the appeal, effectively upholding the Director's Interpretation. Appellants sought reconsideration of the Board's

[1] Had the Plan not complied with the Code, the applicant would have needed to request "waivers" authorizing them to proceed with the Plan despite its incompatibility. According to the parties, this would have triggered a "discretionary review" by the Commission, which would have allowed the Commission to take outside factors, such as the neighbors' opposition, into consideration. If waivers were not needed, the Plan would be presented to the Commission for "ministerial approval," meaning if the Plan satisfied the requirements of the Code, the Commission was obligated to approve it.

decision. The Board held a second public hearing on October 15, 2012. Appellants were again permitted to speak. The Board denied reconsideration.

The Plan was then submitted to the Commission for ministerial approval. The Commission held a public hearing on October 18, 2012. Appellants appeared and voiced their concerns. Notably, Appellants claimed that Commission approval was impossible because the original application did not include the land owners' proper signatures or names, and the Plan violated at least three sections of the Code. The Commission heard testimony in favor of and against the Plan, discussed the Appellants' concerns at length, asked questions, and openly deliberated. The Commission found the Plan satisfied the Code and approved it.[2]

On November 2, 2012, Gross filed with the Commission a second and substitute application, the Revised Development Plan, concerning the same property and sought its approval, this time on behalf of Appellee Overlook Development, LLC. The application identified the property owners as "RB-3 Associates & Bender." The relevant deed to the property was attached to the application. Appellee Mark Chait signed the application as the authorized agent of "RB-3 Associates & Ben."

The Revised Plan is almost identical to the original one, except it reduced the number of "lots" and phases from three to two, and eliminated a retail complex originally included in the Plan. The Revised Plan, like the original, was

[2] Appellants appealed the Commission's decision to the Jefferson Circuit Court. However, that appeal was later dismissed as moot upon approval by the Commission of a revised development plan concerning the same project and property.

submitted to the Commission for ministerial approval. A public hearing was held on December 6, 2012. Appellants were again permitted to appear, speak, cross-examine, rebut, and answer questions. They objected to the Revised Plan based upon their belief that the new application suffered from the same deficiencies as the original application, and that the Revised Plan still failed to comply with at least three sections of the Code. The Commission ultimately approved the Revised Plan "for construction of a multi-family development on two lots[.]"

Displeased, Appellants appealed to the Jefferson Circuit Court. The circuit court affirmed the Commission's approval by opinion and order entered February 18, 2014. This appeal followed.

II. Review Standard

Upon reviewing an administrative decision, this Court's appraisal is limited to whether the administrative decision was arbitrary. *Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). A decision is arbitrary if: (1) the agency exceeded its statutory authority; (2) the affected parties were denied procedural due process; or (3) it is not supported by substantial evidence. *Id.*; *Hilltop Basic Res., Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005); *Keogh v. Woodford County Bd. of Adjustments*, 243 S.W.3d 369, 372 (Ky. App. 2007).

III. Analysis

Appellants make three arguments: (1) the original and revised applications were both non-compliant with the Code and should never have been

considered; (2) the Commission's approval is arbitrary and capricious because the Plan does not comply with multiple sections of the Code; and (3) Appellants were denied due process by the Board and the Commission.

A. Application Signature

Appellants argue both applications – the original filed on June 18, 2012, and the second filed on November 2, 2012 – were deficient because they failed to include the land owners' proper names and signatures, as required by Section 11.6.4.B.1 of the Code, and therefore should never have been accepted, processed, or considered by the Commission. We disagree.

Before proceeding, we pause to clarify that, while Appellants take issue with both applications, our focus is on the second application and the Revised Plan submitted November 2, 2012. The original application was part and parcel of Appellants' first appeal.[3] The subject of this appeal is the second application and the Commission's approval of the Revised Plan.

Code Section 11.6.4.B.1 directs that "[a]pplications for [Category 3] development plan approval shall be submitted on forms supplied by the department. Applications shall be signed by the property owner or his/her agent . . . [and] shall be accompanied by supporting material determined appropriate[.]" *Id.* The relevant form states that "Owner Information & Signature(s)" are required for all applications and an "[a]pplication **will not** be accepted without it." (Emphasis in original).

[3] See footnote 2.

At the time of the second application, RB-3 Associates and the trustees of the Benderson trust owned the property. The owners' names on the application were stated as "RB-3 Associates and Bender." "Bender," Appellants note, is not the owner's proper name.

We agree with the circuit court's observation that nothing in the Code explicitly prohibits the abbreviation of a property owner's name. The deed to the land was also attached to the application, as permitted by the Code. Code Section 11.6.4.B.1 (an application "shall be accompanied by supporting material determined appropriate"). The deed makes it perfectly clear that the land is owned by the trustees of the Benderson trust. To the extent Appellants claim that the Code requires proper identification so that the Commission and the general public can ascertain the property's actual owners, the attached deed served this function and eliminated any ambiguity.

The application was also signed by the authorized agent of RB-3 Associates and the Benderson Trust. This was perfectly acceptable under the Code and the application's instructions. Code Section 11.6.4.B.1 ("Applications shall be signed by the property owner or his/her agent[.]"). Appellants have not challenged the agent's authority to sign on behalf of both owners. We see no issue here.

Furthermore, Appellees assert that "there is no dispute that the" second application "was in fact signed by both of the Property owners prior to the Planning Commission hearing on December 6, 2012." While we are unable to locate a revised application in the record, Appellants do not contradict Appellees'

assertion, and the Commission's December 6, 2012 meeting minutes reflect that Appellees' attorney gave Appellants' attorney a copy of a revised application at the public hearing.

Like the circuit court, we find no impropriety regarding the identification of the property owners relative to the November 2, 2012 application. We affirm on this issue.

B. Substantive compliance with the Louisville Metro Land Development Code

Appellants next argue the Commission's approval is arbitrary and capricious because the Revised Plan fails to comply with at least three sections of the Code. Without defining it as such, Appellants are making, in substance, "substantial evidence" arguments. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 307 (Ky. 1972). Substantial evidence is "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Id.* at 308.

The circuit court found, and we agree, that much of this argument turns on the interpretation of certain words contained in the Code. There are three Code sections at issue: Section 6.1.3; Section 7.8.60.B.1; and Section 5.4.1.G.1.b.

Code Section 6.1.3 directs that "[d]evelopments with an aggregate of 200 or more dwellings[4] (single family or multi-family) shall have at least two separate access roadways connecting directly to existing roadways." Appellants

[4] The Revised Plan proposes 212 dwellings.

argue the Revised Plan does not include two access roadways connecting directly to existing roadways because the second access point leads to an adjoining parking lot, not a roadway, and therefore fails to comply with this Code section.

The Revised Plan identifies two access points. The first is the front entrance to the complex, which is a right in/right out entry that connects directly to Outer Loop. The second entrance (*i.e.*, the second access point) connects from the apartment complex to the back of a commercial park lot, which then connects to Outer Loop at a signal. Residents and visitors would turn out of the complex and travel a short distance through the parking lot before connecting to Outer Loop. Appellants maintain this "indirect" access through a "parking aisle" is incompatible with the Code.

The Commission discussed at length the various definitions of "parking aisle," "roadway," and "street." While the Code does not define the term "roadway," it does define "street" as "[a]ny public way or legally created private way for vehicular traffic used as a means of access to lots abutting thereon[.]" Code Section 1.2.2. (Street). In contrast, a parking aisle is "[a]n area within a parking facility intended to provide ingress and egress to parking spaces." Code Section 1.2.2. (Parking Aisle).

Appellees' counsel explained to the Commission that a legally created cross-access agreement existed with the adjoining parking lot. In light of this, the parking lot passway or driving aisle is more akin to and can be interpreted as a private street or private roadway. The Commission agreed with the Appellees'

interpretation. That is, it was satisfied that the cross-access easement created a private roadway providing adequate access to the development and the private roadway directly connected the development to Outer Loop, an existing roadway. This fulfills the Code's policy that a sizeable development, such as this one, contains two access points to facilitate traffic flow and emergency services.

We are mindful that "an administrative agency's interpretation of its own regulations is entitled to substantial deference." *Commonwealth, Cabinet for Health Servs. v. Family Home Health Care, Inc.*, 98 S.W.3d 524, 527 (Ky. App. 2003). "We are not to 'reinterpret or to reconsider the merits of the claim, nor to substitute [our] judgment for that of the agency[.]'" *Curd v. Kentucky State Bd. of Licensure for Professional Engineers and Land Surveyors*, 433 S.W.3d 291, 303 (Ky. 2014) (footnote omitted). And, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *S. Bluegrass Racing, LLC v. Kentucky Horse Racing Auth.*, 136 S.W.3d 49, 53 (Ky. Ct. App. 2004) (quoting *Fuller*, 481 S.W.2d at 307). Appellants have not convinced this Court that the Commission's interpretation of the Code, or its application of the Code to this factual scenario, is indeed erroneous or arbitrary. In light of the Commission's interpretation and the evidence presented, we cannot say its decision was unsupported by substantial evidence.

This brings us to the remaining Code sections: 7.8.60.B.1 and 5.4.1.G.1.b. Code Section 7.8.60.B.1 requires that each ***lot*** "have access to and

abut a public or private street for at least twenty-five feet." And, Code Section 5.4.1.G.1.b states that "[m]ulti-family units that do not maintain the four areas of the traditional neighborhood site design pattern may use alternative site designs that meet the following: . . . (b) Parking is in the rear of the ***lot***, takes access from the alley if there is an alley, and is screened from the street by a building or street wall[.]" (Emphasis added).

As we have alluded, the problem here is nomenclature. In formulating their plan, the Appellees designated a single parcel of land as the subject of the development,[5] but they referred to the land as being comprised of first three, then two, "lots" to indicate, ultimately, that the single parcel of land would be developed in two phases. The record shows the separate phases were established for purposes of financing as is common in the industry. The Commission, though, adopted Appellees' misnomer when it approved a "plan for construction of a multi-family development on ***two lots***[.]" (Emphasis added). It would have been clearer and more accurate to have identified a multi-family development in two phases.

Appellants' argument attempts to exploit this discrepancy in terminology. They argue that even if "Lot 1" complies with these Code sections, "Lot 2" does not. We reject that argument for the same reasons the circuit court

[5] The appendix to that deed includes metes and bounds descriptions of two tracts. The first includes all the property to be developed plus a small area outside the development boundary that is to be dedicated to the neighboring shopping center per a minor plat. The second tract describes the boundary for the adjoining property to the east. The second tract is of no consequence to this appeal. Our focus is on the first tract.

rejected it. Additionally, Appellants' argument here is inconsistent with their earlier argument regarding the Code requirement of two separate access roadways. For purposes of that Code requirement, the Appellants aggregated Lot1/Phase 1 (only 32 units) with Lot 2/Phase 2 (180 units) to exceed the 200 unit limit, thereby requiring two access roadways. Appellants' argument that Appellees do not comply with Code Sections 7.8.60.B.1 and 5.4.1.G.1.b. reverses that approach and asks that we consider the development not in the aggregate, but rather to consider the two phases as separate development proposals, each of which would have to comply with the Code. If the Commission had taken that approach, neither phase would have to comply with the two access roadway requirement because neither phase alone exceeds 200 units. The development project cannot be both aggregated and separate.

We are also persuaded by Appellees' argument to the circuit court when it upheld the Commission's decision. That argument is repeated here that, "[a]s yet, no second lot, but rather only possible phases, has been created." We agree. Although the project was occasionally called a "subdivision," it was not yet, and according to plan will not be, subdivided as the statute defines the term. Kentucky Revised Statutes 100.111(22) (" 'Subdivision' means the division of a parcel of land . . . in an urban-county government or consolidated local government . . . means the division of a parcel of land into two (2) or more lots or parcels; for the purpose, whether immediate or future, of sale, lease, or building development . . . ."). While the whole tract was segmented, there was no

conveyance of the land out of a source deed into two separate deeds for the two phases, nor was that part of the plan. Furthermore, the segmenting occurred only to facilitate a financing strategy to improve the entire parcel of land, phase-by-phase, and not "for the purpose . . . of sale, lease, or building development[.]" The building development plan was to improve the entire unified parcel of land; phasing simply allowed development to proceed in a way that lessened the financial risk to the property owners, the developer, and the lender.

It is clear that the Commission approved the proposal to develop this property in the aggregate – that is, by reviewing the development plan as a whole. There is substantial evidence to support the conclusion that it complies with the Code, including Sections 7.8.60.B.1 and 5.4.1.G.1.b.[6]

C. Due Process

Finally, Appellants claim they were denied due process by the various participants at the Board and at the Commission. They allege, however, no deprivation of either a hearing or notice. Instead, Appellants contend they were not allowed to make their full case and their arguments were never taken seriously and some arguments not even considered.

"[A] party to be affected by an administrative order is entitled to procedural due process." *Am. Beauty Homes Corp*., 379 S.W.2d at 456. Procedural due process demands notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Hilltop Basic Resources*, 180

[6] The subdivision has access to and abuts Outer Loop, and parking is in the rear of the development and appears to be screened by the clubhouse.

S.W.3d at 469 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976)). In the context of administrative planning decisions, the process must provide sufficient notice to affected landowners and an opportunity to be heard in opposition. *See id.*; *Am. Beauty Homes Corp*., 379 S.W.2d at 456. ("Administrative proceedings affecting a party's rights which did not afford an opportunity to be heard could likewise be classified as arbitrary."). "The concept of constitutional due process in administrative hearings is flexible." *Danville-Boyle County Planning and Zoning Comm'n v. Prall*, 840 S.W.2d 205, 207 (1992) .

In this case, the record reflects that Appellants were given the opportunity to be heard and to oppose the proposed development plan on numerous occasions. They challenged the Plan and Revised Plan in four public hearings, two before the Board and two before the Planning Commission. We have carefully reviewed the minutes from all four meetings and perceive no lack of opportunity or meaningful presentation or discussion of the Appellants' concerns. The public hearings before the Board and the Planning Commission provided sufficient opportunity for the Appellants to be heard on the matter.

We, like the circuit court, also find the case of *Prall*, *supra*, instructive. In that case, the Kentucky Supreme Court cited by way of example a factual scenario in which it found no lack of due process when:

> The Planning Commission conducted several public hearings. The opposing parties were represented by counsel who made comprehensive statements and

> furnished exhibits to the Commission. The Commission members asked questions, cross-examined speakers and received answers. Although the witnesses who spoke were not sworn, many stated reasons why they felt it was improper to grant the proposal. All were given a full opportunity to express themselves and to refute and contradict those who expressed contrary views.

Prall, 840 S.W.2d at 207-08 (quoting *Bellemeade Co. v. Priddle*, 503 S.W.2d 734, 740 (Ky. 1973)). The Appellants in this case received no less process. They had numerous opportunities to voice their concerns, to submit evidence, to cross-examine, to respond to questions, and to rebut unfavorable evidence. They specifically objected to the second (and original) application as deficient for failing to properly identify the property owners and contain their signatures, and objected to the Revised Plan (and the original Plan) as non-compliant with Code Sections 6.1.3, 5.4.1.G.1.b, and 7.8.60.b.a. The Planning Commission discussed Appellants' objections at length during both hearings, including the access issue as it related to Code Sections 6.1.3 and 7.8.60.b.a, and the Board's prior determination pertaining to Code Section 5.4.1.G.1.b.

The Commission may not have given Appellants the process they desired, but it did give them the process they were due. Appellants received adequate notice and had ample opportunity to be heard in a meaningful manner. They have failed to demonstrate any deprivation of procedural due process.

IV. Conclusion

We affirm the Jefferson Circuit Court's February 18, 2014 Opinion and Order affirming the Commission's December 6, 2012 resolution approving the Revised Plan.

NICKELL, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND DOES NOT FILE SEPARATE OPINION.

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