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(FILE NO. 2006-SC-0732-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000609-MR

SEBASTIAN-VOOR PROPERTIES, LLC;
SEBASTIAN PROPERTIES II, LLC; and
DON SEBASTIAN — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 02-CI-04119

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT; LEXINGTON-FAYETTE
URBAN COUNTY PLANNING COMMISSION;
DON ROBINSON, CHAIRPERSON; LYLE ATEN;
DR. THOMAS M. COOPER; NEILL DAY; LINDA
R. GODFREY; DALLAM B. HARPER, JR.; STEVE
KAY; KEITH E. MAYS; FRANK PENN, JR.;
RANDALL VAUGHN; and JOAN Z. WHITMAN, in
their official capacities as Members of
the LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution

VANMETER, JUDGE: As a general proposition, the doctrine of equitable estoppel may be invoked against a governmental entity only under exceptional circumstances. The question we must address is whether a pattern of the Lexington-Fayette County Planning Commission's (Commission)[2] permitting continuing development of a rural subdivision over a period of thirty years, constitutes such exceptional circumstances. Under the facts of this case we find that it does not, and we therefore affirm the decision of the Fayette Circuit Court.

In 1963, the Sebastian family began the development of what is now known as Spindletop Estates[3] in northern Fayette County. In February of that year, the Commission approved a preliminary development plan for 122 one-acre lots. This rural development was zoned A-1, which was an agricultural category later replaced by the current agricultural-rural (A-R) zone. In November 1963, the Commission approved final record plats for 40 lots. As noted by the parties, at that time existing

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and KRS 21.580.

[2] Prior to the 1974 merger of the City of Lexington and Fayette County governments, Lexington and Fayette County participated jointly in planning and zoning matters under the authority of KRS Chapter 100. The joint planning commission was known as the City-County Planning Commission. In the record, the Commission is sometimes referred to as the Lexington Fayette County Planning Commission. After merger, this body became the Lexington-Fayette County Urban County Planning Commission.

[3] Originally, the subdivision was known as Donewal Estates. The appellant, Don Sebastian, is the grandson of the original developer, W. H. Sebastian. The other appellants, Sebastian-Voor Properties, LLC and Sebastian Properties II, LLC are apparently family owned entities. The parties agree that the property has been in the Sebastian family since the original 1963 development. The appellants are jointly referred to as "Sebastian."

regulations required a developer to submit a "final subdivision plan" within 18 months. As none was submitted, the original preliminary plan expired.

In 1966, Sebastian applied for and received reapproval of the original preliminary plan for the remaining 82 lots. Appended to the plan were two new conditions requiring Board of Health approval of septic tanks on the individual lots and provisions for storm drainage. Later that year, the Commission approved the final record plat for 19 of the 82 lots.

In 1967, planning and zoning in Lexington and Fayette County underwent extensive overall revisions, with the result that the agricultural zone was redesignated A-R, and the minimum residential lot size was established at 10 acres. Nevertheless, over the next 29 years, the Commission approved final record plats in Spindletop Estates for 17 additional one-acre lots: 11 lots in 1977, 3 lots in 1989, and 3 lots in 1996.[4] The parties agree that these later approvals involved only the approval of "final subdivision plans" and "final subdivision plats" for the 17 lots, and that the Commission has not reapproved a "preliminary subdivision plan" for the remaining 59 acres since 1966.

[4] The approval of these last three lots was first approved in 1992, and reapproved in both 1995 and in 1996.

In 2002, Sebastian applied for a preliminary subdivision plan for the remaining 59 acres. Following a hearing, the Commission voted to follow its staff's recommendation and deny approval. The staff had recommended disapproval because the original preliminary plan, reapproved in 1966, had long since expired and was "not eligible for reapproval or an extension of its past approval[;]" the plan did not meet the minimum lot size requirement of forty acres for the A-R zone; the lots did not meet minimum setback requirements for the A-R zone; and the lots did not meet the minimum ten-acre size requirement for lots with septic tanks.

Following this denial, Sebastian filed an action before the Fayette Circuit Court, which upheld the Commission's decision.[5] This appeal followed.

The issue addressed by the trial court and before us on appeal is whether the Commission's action in approving the further development of Spindletop Estates over a thirty year period, notwithstanding noncompliance with local planning and zoning regulations, equitably estops the Commission from

[5] The trial court's denial of Sebastian's motion for partial summary judgment did not include the finality language generally required by CR 54.02. Sebastian argues, and LFUGC does not contest, that the trial court nevertheless resolved all substantive issues against Sebastian with the result that the order was final and appealable. We agree. *See Security Fed. Sav. & Loan Ass'n v. Nesler*, 697 S.W.2d 136, 138 (Ky. 1985) (a final order is one which adjudicates "all of the claims of all of the parties before the court at the time the order was entered).

prohibiting completion of the remaining 59 acres of the subdivision.

The doctrine of equitable estoppel has been frequently addressed in the context of the actions of a governmental agency or body. As Kentucky's highest court has stated:

> The essential elements of equitable estoppel are "(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice."[6]

The reported decisions, however, uniformly caution that the doctrine of equitable estoppel may be invoked against a governmental agency only under exceptional circumstances.[7] In

[6] *Electric & Water Plant Bd. v. Suburban Acres Dev., Inc.*, 513 S.W.2d 489, 491 (Ky. 1974)(quoting 28 Am.Jur.2d *Estoppel and Waiver* § 35 and *Smith v. Howard*, 407 S.W.2d 139 (Ky. 1966)); *see also Laughead v. Commonwealth, Dep't of Transp.*, 657 S.W.2d 228, 230 (Ky. 1983).

[7] *See Urban Renewal and Cmty. Dev. Agency v. International Harvester Co.*, 455 S.W.2d 69 (Ky. 1970); *Maryland Cas. Co. v. Magoffin County Bd. of Educ.*, 358 S.W.2d 353, 359 (Ky. 1961); *Taylor v. City of La Grange*, 262 Ky. 383, 387-88, 90 S.W.2d 357, 358 (1936); *Sizemore v. Madison County Fiscal Court*, 58 S.W.3d

addition, a public officer's failure "to correctly administer the law does not prevent a more diligent and efficient" officer's proper administration of the law, as "[a]n erroneous interpretation of the law will not be perpetuated."[8] And, as recently held by this court, "[e]xceptional circumstances do not include erroneous interpretations of the law."[9]

In the instant case, on several occasions after 1969, the Commission approved the final plats and development for a total of 17 additional lots, notwithstanding that the preliminary plan had lapsed, septic tanks were no longer permitted on one-acre lots, and the minimum lot size in the A-R zone had been increased to 10 (and subsequently 40) acres. Despite Sebastian's argument to the contrary, the elements of estoppel have not been met. Regardless of any changes in the law or mistakes by local officials in approving these lots, nothing in the record indicates that the Commission engaged in any conduct which either amounted "to a false representation or concealment of material facts" or was intended to "convey the

887, 891 (Ky.App. 2000); *American Life and Accident Ins. Co. v. Department of Ins.*, 1 S.W.3d 478, 482 (Ky.App. 1998); *J. Branham Erecting & Steel Serv. Co. v. Kentucky Unemployment Ins. Comm'n*, 880 S.W.2d 896, 897 (Ky.App. 1994); *Natural Res. and Envtl. Prot. Cabinet v. Kentucky Harlan Coal Co.*, 870 S.W.2d 421, 427 (Ky.App. 1993); *Cross v. Commonwealth, ex rel. Cowan*, 795 S.W.2d 65 (Ky.App. 1990); *City of Shelbyville, ex rel. Shelbyville Mun. Water and Sewer Comm'n v. Commonwealth, Natural Res. and Envtl. Prot. Cabinet*, 706 S.W.2d 426, 430 (Ky.App. 1986).

[8] *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet*, 689 S.W.2d 14, 20 (Ky. 1985).

[9] *Sizemore*, 58 S.W.3d at 891.

impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert[.]"[10] At most, there was lax enforcement of regulations, and permission was granted to allow the development of lots which would be served by the existing infrastructure in Spindletop Estates. However, any failure to correctly administer the regulations prior to 2002 did not prevent a more accurate interpretation at a later date.[11]

Furthermore, and beyond the elements of equitable estoppel, we do not believe that exceptional circumstances exist in this case. According to the record, the money expended by Sebastian over time related directly to the lots which previously were developed and sold. However, no infrastructure appears to exist already on the undeveloped 59 acres. In this particular case, we do not find the "circumstances 'so exceptional' as to work a 'gross inequity' between the parties."[12]

No doubt, Sebastian intended to develop the entire property since street stubs were incorporated into the existing development to facilitate that purpose. If this panel of the

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[10] *Electric & Water Plant Bd.,* 513 S.W.2d at 491. *See also Hunts Branch Coal Co. v. Canada,* 599 S.W.2d 154 (Ky. 1980).

[11] *See Delta Air Lines*, 689 S.W.2d at 20.

[12] *J. Branham Erecting*, 880 S.W.2d at 897 (quoting *City of Shelbyville*, 706 S.W.2d at 430).

court were acting as the Commission, we might very well find that permitting completion of the development would be appropriate, especially since the property abuts I-75 on the west. However, we are not the Commission, and making such a finding is not our role. As has been frequently stated, judicial review of an agency decision is limited to a determination of whether the decision was arbitrary, i.e., whether an action was taken in excess of granted powers, whether affected parties were afforded procedural due process, and whether decisions were supported by substantial evidence.[13] In this instance Sebastian urges us to find that the Commission, by following the local regulations, acted arbitrarily. To the contrary, however, we would be required to find the Commission acted arbitrarily if it did not follow the regulations. We agree with the trial court that a developer is charged with having knowledge of applicable laws and regulations,[14] and with understanding that conditions change over time. It follows, therefore, that the trial court did not err in concluding that the Commission was not estopped from enforcing the regulations as written.

[13] *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). See also *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464 (Ky. 2005).

[14] *See Sizemore*, 58 S.W.3d at 891 (equitable estoppel not found, in part due to Sizemore's experience, his "access to the statutes and regulations at issue," and his being charged "with notice of the proper procedure").

The other issues raised on appeal, as to whether Sebastian had a "vested right" to complete the development, and whether the Commission arbitrarily "changed the rules," are without merit. *Darlington v. Board of Councilmen of Frankfort*,[15] cited by Sebastian in support of its "vested rights" argument, does not mandate a different result since, as previously noted, the record supports findings that no improvements exist on the undeveloped 59 acres, and that no preliminary plan for the undeveloped 59 acres has been approved since the lapse of the original 1963 plan, as reapproved in 1966. Even though Sebastian filed an amended preliminary plan in 2002, that plan was never approved. Finally, we find it difficult, if not impossible, to reconcile Sebastian's final argument, that the Commission acted arbitrarily, with the Commission's action in enforcing the written regulations as to which Sebastian had notice.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEES:
T. Bruce Simpson, Jr. Lexington, Kentucky	Andrea L. Weddle Lexington, Kentucky

[15] 282 Ky. 778, 140 S.W.2d 392 (1940).