RENDERED: FEBRUARY 8, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-00522-MR

WAYNE RILEY; LOUISE DUCKETT;
AND OTHER AGGRIEVED PERSONS — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 06-CI-00410

HAROLD BRANTLEY AND HIS WIFE,
DIANE BRANTLEY; CITY OF BOWLING
GREEN, KENTUCKY; AND CITY-COUNTY
PLANNING COMMISSION OF WARREN
COUNTY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES, ROSENBLUM, SENIOR JUDGE[1].

NICKELL, JUDGE: Wayne Riley, Louise Puckett, and other aggrieved parties (hereinafter collectively referred to as "Riley") have appealed from the February 15,

[1] Senior Judge Paul Rosenblum 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.

2007, order of the Warren Circuit Court affirming the decision of the City of Bowling Green Board of Commissioners ("Board") granting the application of Harold Brantley and his wife, Diane Brantley (hereinafter collectively referred to as "Brantley"), to rezone a tract of property owned by them from residential to commercial use. For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In 1988, Brantley bought a 1.35 acre lot located at 1832 U.S. Highway 31-W, near the intersections of University Boulevard, Chestnut Street, and Loving Way, in Bowling Green, Kentucky. The lot contains a single-family house which Brantley has rented or leased for a number of years. Since Brantley's purchase, the property has been zoned "R-1" (residential).

In October of 1992 Brantley applied to the City-County Planning Commission of Warren County ("Planning Commission")[2] for a zoning change to "B-2" (business), expressing a desire to use the property for retail commercial purposes such as a "quality restaurant." Brantley proposed constructing a 10,000 square foot facility, having a maximum of two stories, and one common access point along U.S. Highway 31-W. After a public hearing in January 1993, the Planning Commission voted not to recommend the proposed change. The Board agreed and the City of Bowling Green subsequently enacted an ordinance denying the request. No appeal was taken from the

[2] The Planning Commission is a joint planning unit created pursuant to Kentucky Revised Statutes (KRS) 100.121 by the Warren County Fiscal Court and the legislative bodies of the cities of Bowling Green, Oakland, Plum Springs, Smiths Grove, and Woodburn, Kentucky, and consists of twelve appointed members.

decision or enactment of the ordinance. Subsequently, the current Warren County Zoning Ordinance ("Zoning Ordinance") was adopted.[3]

On May 12, 2003, Brantley again applied for a zone change for his property. He was joined in this application by a neighboring property owner, Deanna Williams Lanier. Together they sought to rezone a 1.78 acre combined tract from "RS-1A" (single-family residential) to "GB" (general business) for purposes of retail development with drive-through access. Their proposal indicated an intention to construct two separate structures having a maximum total space of 12,000 square feet. A traffic impact study was conducted in accordance with the requirements of the Zoning Ordinance, and a staff report on the application was prepared for use at a later public hearing. The hearing was conducted on June 19, 2003, following which the Planning Commission voted not to recommend the joint application for a zoning amendment. The application was then withdrawn, therefore no ordinance complying with the Commission's decision was enacted by the City of Bowling Green.

In early January 2006 Brantley filed a third application seeking to rezone his property for business usage. This application sought the change to construct a facility not to exceed 8,000 square feet to be designed for use as a bank or professional office building. Brantley's third application was not joined by Ms. Lanier or any other adjoining

[3] Among other things, the current Zoning Ordinance changed the alphanumeric designations of the different zoning classifications.

landowner.[4] The application included several binding elements[5] which listed restrictions on access points, lighting, signage, landscaping, screening, business hours and construction materials. A traffic impact study was not required in connection with this application. Again, however, a staff report was prepared for use at the public hearing. The staff report indicated eighteen policies of the Warren County Comprehensive Plan ("Comprehensive Plan")[6] affected the zoning change request.

On January 16, 2006, the Planning Commission held a public hearing on Brantley's third application. At the hearing, Andy Gillies ("Gillies"), the Executive Director of the Planning Commission, presented the staff report and other testimony regarding the application. He was questioned extensively by counsel for both proponents and opponents of the proposed zoning amendment. Gillies holds a master's degree in urban planning and a certificate from the American Institute of Certified Planners. He was treated as an expert witness for purposes of the public hearing. Gillies testified regarding the eighteen elements of the Comprehensive Plan that were triggered by Brantley's application. He opined the rezoning proposal, when read in conjunction with the binding elements, was in agreement with the Comprehensive Plan.

---

[4] The record reflects Lanier had obtained a zoning change on her property to "OP-R" (office/professional) sometime in the summer of 2005. Further, three other properties in the area had been rezoned for public institutional use between 2003 and 2005.

[5] Pursuant to KRS 100.403(4), "binding element" is defined as a "binding requirement, provision, restriction, or condition imposed by a planning commission or its designee, or a promise or agreement made by an applicant in writing in connection with the approval of a land use development plan or subdivision plan."

[6] KRS 100.183 requires each planning commission to prepare a comprehensive plan "as a guide for public and private actions and decisions to assure the development of public and private property in the most appropriate relationships." Pursuant to KRS 422.015, we are required to take judicial notice of any comprehensive plans and regulations adopted under KRS Chapter 100.

Gillies testified at length about possible traffic issues and his decision not to require a new traffic impact study. He stated the proposed development would not generate an average traffic flow in excess of 500 trips per day, and therefore, the study was not required under Policy LU-5 of the Comprehensive Plan.[7] He further testified discussion had been completed with the Kentucky Department of Transportation and elected officials regarding traffic flow issues and how best to resolve them. In accordance with a recommendation made by the Transportation Cabinet, Brantley's proposal included a deceleration lane to be constructed upon the property to alleviate northbound traffic flow problems. He further testified the 2003 proposal which had precipitated the earlier study was for a substantially larger banking facility with drive-through capabilities. On motion to the Planning Commission, the 2003 traffic impact study was introduced and made a part of the record. Finally, Gillies testified Brantley had satisfactorily addressed all eighteen of the Comprehensive Plan policies triggered by the zone change request. In accordance with the staff report, he recommended to the Planning Commission that the application be granted.

---

[7] Policy LU-5(A), in pertinent part, states as follows:

> 3. Commercial uses which are high traffic generators shall require a traffic impact study to be performed prior to requesting a zoning map amendment. The following uses are considered high traffic generators by default unless the developer provides evidence in the form of a detailed traffic impact study which proves otherwise:
>
> a. Free standing retail stores larger than 30,000 square feet gross area of building.
>
> b. Commercial uses which generate at least 500 average daily trips per day (ADT) and/or 100 vehicles per hour during the peak hour.
>
> c. Other non-residential uses which may be determined by interpretation of the Planning Commission to be high traffic generators.

Following Gillies' testimony, the Planning Commission heard testimony from Brantley regarding his proposal. Brantley provided a conceptual drawing, photographs of the subject property and examples of some existing banking facilities. He also presented a petition signed by thirty-eight neighbors who were in favor of the proposed zoning amendment. The Planning Commission accepted the petition as hearsay, and specifically stated it would be given due weight based upon that limitation. Brantley further addressed possible lighting and drainage issues associated with the site. Finally, he answered a series of questions propounded by counsel for opponents of the zoning amendment.

Brantley called four additional witnesses to testify in support of the proposed amendment. These witnesses included property neighbors and a real estate appraiser. All were subjected to cross-examination by Riley and the other opponents.

Riley was then allowed to call witnesses to testify in opposition to the proposal. Riley, a resident of Loving Way near the subject property, testified first and voiced strong concern regarding traffic issues. Dr. Robert Wyatt ("Wyatt"), also a resident of Loving Way, testified he was opposed to the proposal because he was not in favor of mixing residential and commercial areas. He further voiced concerns regarding drainage issues which could occur following development of the site. Casey Hixson ("Hixson"), another close neighbor, testified he was also concerned about drainage from the site. Following Hixson's testimony, a show of hands was requested from those opposed to the zoning amendment and seven hands were raised. No further testimony was presented to the Planning Commission.

Riley's counsel moved to have the 2006 application dismissed on the basis that it was substantially similar to Brantley's 2003 application for a zoning amendment which had been denied, the zoning ordinance was basically the same as it had been in 2003, and there had been no major social or economic changes since that time. Further, he argued the failure to procure a new traffic impact study was fatal to the application.

Hon. Hamp Moore ("Moore"), attorney for the Planning Commission, explained to the commissioners that the zoning ordinance prohibited the re-filing of an application for a zoning amendment for a period of one year following final action on an application. He further advised that this application was substantially different from, and was made more than one year after the denial of, the 2003 application. The Planning Commission decided to proceed with consideration of the application.

Following closing arguments from Brantley and those in opposition, a motion was made and seconded to approve the zoning amendment. The motion was made based on the findings of fact as presented in the staff report as well as the testimony presented at the public hearing that the proposed amendment complied with the Comprehensive Plan. The Planning Commission then unanimously voted to recommend approval of the proposed amendment.

The Board addressed the Planning Commission's recommendation by first and second reading in February 2006. At the readings, parties from each side were present, represented by counsel, and were allowed to present argument. The Board unanimously passed an ordinance adopting the Planning Commission's recommendation. That ordinance became effective on February 20, 2006.

Riley thereafter appealed the ordinance to the Warren Circuit Court pursuant to KRS 100.347. Riley alleged the zone amendment was invalid because: (1) the Planning Commission had failed to require a traffic impact study as mandated by the Comprehensive Plan; (2) the Planning Commission's recommendation violated the principle of administrative finality; (3) the Planning Commission had failed to make findings of fact supportive of its recommendation; and (4) the decision to grant the amendment was arbitrary and capricious. Both sides of the dispute submitted extensive briefs setting forth their positions. By order entered February 15, 2007, the circuit court affirmed the Board's decision finding a traffic impact study was unnecessary in light of Gillies' testimony and the performance of the 2003 study; the new application was properly filed outside the one-year waiting period required by the zoning ordinance for subsequent applications; the Planning Commission's decision was based on substantial evidence and was thus not arbitrary; and the minutes of the public hearing properly stated the reasoning and findings of the Board. This appeal followed.

II. STANDARD OF REVIEW

An appeal from a zoning decision of a Planning Commission is not entitled to review *de novo*. Rather, judicial review is limited to a determination of whether the Planning Commission acted arbitrarily, that is whether it acted within its statutorily granted powers, whether due process was afforded to all parties involved, and whether the decision is supported by substantial evidence. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964); *See also Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464 (Ky. 2005); *Hougham v. Lexington-Fayette County Urban Government*, 29 S.W.3d 370

(Ky.App. 1999); *Minton v. Fiscal Court of Jefferson County*, 850 S.W.2d 52 (Ky.App. 1992). If the requirements of due process are followed by the agency, the record on appeal is limited to that made before the Planning Commission. *City of Louisville v. McDonald*, 470 S.W.2d 173, 179 (Ky. 1971). We review any subsequent legislative action based on a Planning Commission's recommendation for arbitrariness or clear error, and if a legislative body acts in accordance with the recommendation of a Planning Commission made following a trial-type hearing and such legislative action is supported by substantial evidence in the record, it will not be deemed to be arbitrary. *Id.* Intrinsically, the decision regarding rezoning of a parcel of real property is not a judicial function, and our review is thus limited to whether the Planning Commission and any legislative body acted in an arbitrary manner in reaching a zoning decision.

A. STATUTORY SCHEME

In KRS 100.211, the General Assembly set forth the procedure to be followed in order to rezone a parcel of real property. Under that section, when an application is filed for a zoning amendment, a planning commission is required to give notice and hold at least one public hearing on the application. The planning commission must then make findings of fact and recommend approval or disapproval to the applicable legislative body. The findings must include a summary of the evidence presented in favor and in opposition to the proposed amendment. Only a majority of the legislative body may override a planning commission's recommendation. If the legislative body approves the recommendation, the zoning amendment is deemed to have passed by operation of law.

Our review of the record indicates the Planning Commission in the case *sub judice* followed all of the requirements set forth in KRS 100.211. Proper notice of the public hearing was given to neighboring landowners and the public in general via postings on the property, advertisements in the local media, and certified letters. The public hearing was held at the advertised time and location and ample opportunity was had by all in attendance to be heard on the matter. Further, the Planning Commission found, in accordance with KRS 100.213, that the proposed zoning amendment was in agreement with the Comprehensive Plan. Therefore, we conclude the Planning Commission acted well within its statutorily granted authority when making its decision on this zoning amendment.

B. DUE PROCESS

There is no argument before us that the parties were not afforded procedural due process. The record clearly reveals all parties, whether proponent or opponent of the proposed zoning amendment, were given ample opportunity at a trial-type hearing to present evidence, question witnesses, and make legal and factual arguments. In fact, the parties were given no less than three opportunities to do so before the Planning Commission and the Board. Therefore, for purposes of this appeal, we conclude the parties were afforded all the process due insofar as a trial-type hearing was conducted, and this issue requires no further discussion. However, we later shall briefly address Riley's contention that he was denied due process by the Planning Commission's failure to make findings of basic evidentiary fact.

C. SUBSTANTIAL EVIDENCE

On appellate review of an administrative agency's decision, we are bound by the factual findings of the agency if they are supported by substantial evidence. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky.App. 1995). If any substantial evidence supports the agency's decision, it cannot be held arbitrary and will be sustained. *Id.* at 409. Substantial evidence has been defined as evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Id*. In determining whether evidence is substantial, we must take into account anything in the record that fairly detracts from its weight. *Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 643. We afford great deference to the trier of fact in its evaluation of the evidence presented and the credibility of the witnesses appearing before it. *Bowling, supra* at 409-410.

Here, the Planning Commission's decision was based upon the pre-prepared staff report, the testimony of numerous live witnesses, and the capable arguments of counsel. A careful review of the record indicates the Planning Commission had before it sufficient evidence upon which to base its findings of fact. As the findings are clearly supported by substantial evidence, they shall be binding and conclusive for purposes of this appeal.

III. ANALYSIS

Riley advances four arguments in support of his contention that the Planning Commission's decision should be reversed. First, he argues the rezoning is invalid because the Planning Commission failed to properly determine whether the proposed new use of the subject property would constitute a “high traffic generator” thus

requiring a traffic impact study. Second, he argues the decision violates the principle of administrative finality. Third, he contends the Planning Commission erred in failing to make basic findings of evidentiary fact. Finally, he argues the Planning Commission's decision was arbitrary and unsupported by substantial evidence. We shall address each of these arguments in the order presented by the parties.

A. NECESSITY OF A TRAFFIC IMPACT STUDY

Riley first contends the Planning Commission failed to properly determine whether Brantley's proposed use of the subject property would constitute a "high traffic generator" so as to require Brantley to have a traffic impact study performed. Riley contends this failure runs counter to the plain language of the Comprehensive Plan and requires the Planning Commission's decision to be overturned. We disagree.

Gillies testified in an expert capacity that he did not believe the Comprehensive Plan required a traffic impact study as the proposed use of the property would not generate more than 500 ADT. No mention was made as to whether the proposed use of the subject property would generate more than 100 trips per hour during the peak hour. It is this failure to which Riley takes exception.

The Planning Commission had the 2003 traffic impact study before it when making its determination. The 2003 study had been conducted to determine the impact of two facilities having a significantly larger total square footage than the structure proposed in 2006. Further, the 2003 application had included provision for drive-through banking services. It is clear from the record that the 2006 proposal would generate less traffic

flow than the 2003 proposal. The only proposed use from 2003 which would generate more than 500 ADT and/or 100 trips during the peak hour was a drive-through banking facility. The 2006 application specifically omitted plans for such a facility. However, Brantley had made all necessary plans to comply with the recommendations stemming from the 2003 study, including a deceleration/turning lane and two access points to the property. Gillies testified he believed, in his expert capacity, these concessions would alleviate any traffic concerns arising from the smaller structure. In light of the evidence before the Planning Commission, we are unwilling to say the decision not to require a traffic impact study was arbitrary. The Planning Commission relied upon substantial evidence, and therefore the decision is conclusive. *Bowling, supra*.

We do not agree with Brantley that Riley's failure to question Gillies regarding whether the proposed use would generate more than 100 trips during the peak hour constitutes a waiver on appeal. The burden of proof rests solely upon the applicant in zoning change requests. *Murphy v. Key West Crossing, LLC*, 152 S.W.3d 876 (Ky.App. 2004); *Fritz v. Lexington-Fayette Urban County Government*, 986 S.W.2d 456 (Ky.App. 1999). However, as previously stated, we believe Brantley carried his burden of proof as to the traffic impact study, including uncontradicted expert testimony that such study was not required. Therefore, there was no error.

B. ADMINISTRATIVE FINALITY

Riley next contends the decision of the Planning Commission violated the principle of administrative finality. He contends the 2006 zoning amendment request was merely duplicative of Brantley's 2003 request and therefore barred by *res judicata*, the underlying legal principle of administrative finality. While we agree that the doctrine of

res judicata, and thus administrative finality, has some place in the context of applications for zoning amendments, we disagree that these principles should have been applied in the case *sub judice*.

No binding, published decision on the issue of administrative finality exists in Kentucky. Applying *res judicata* in zoning matters is simply left to the discretion of the Court and the basis for applying discretion is to prevent repeated and harassing applications to rezone the same real property. *Fiscal Court of Jefferson County v. Ogden*, 556 S.W.2d 899 (Ky. 1977) (*overruled on other grounds by Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1982)). We are unable to conclude from the record that the 2006 application was intended or served to harass or was merely duplicative of the 2003 application. The earlier application had included two tracts of property, as well as significantly different proposed usage. More than two years had elapsed between the filing of these applications and at least four tracts in the immediate area had been rezoned in the intervening time period, thus indicating a substantial change in the neighborhood's land usage. There is no indication in the record as to any complaint that the 2006 application was intended to harass or annoy. We will not infer any such complaint from a silent record and will assume the judgment of the trier of fact to be correct. *See Commonwealth, Department of Highways v. Richardson*, 424 S.W.2d 601 (Ky. 1967).

Further, KRS 100.213(2) specifically allows a planning commission, fiscal court, or other legislative body to "adopt provisions which prohibit for a period of two (2) years, the denial of a proposed map amendment or the consideration of a map amendment identical to a denied map amendment." In accordance with that statute, Section 3.1.9 of the Zoning Ordinance contains a prohibition on reconsideration for a period of twelve

months following final adjudication on a proposed zoning amendment. The General Assembly's inclusion of this discretionary language clearly indicates its desire to allow zoning decisions to be reconsidered. Thus, the Planning Commission and the Board were within their statutorily granted authority to reconsider Brantley's application filed more than one year after the running of the prohibition period.

C. FAILURE TO MAKE FINDINGS OF FACT

Riley next contends the Planning Commission erred in failing to properly make basic findings of evidentiary fact sufficient to support its decision. He argues the pre-prepared motion made to approve the zoning amendment merely parroted the legal requirements of a zoning amendment but made no actual findings unique to this case, thus depriving the opponents of the proposed change due process. We disagree.

The pre-prepared motion was based upon two earlier meetings between Brantley and the Planning Commission staff. Further, the motion included language that the proposal complied with the Comprehensive Plan, and that the findings of fact and recommendation should include a summary of the evidence and testimony presented at the hearing. Prior to being forwarded to the Board, these findings and documents were compiled and included with the recommendation.

The Planning Commission is not a court and is not held to the same standards with regard to its findings of fact. Essentially, the findings of the Planning Commission must be sufficient to allow for meaningful appellate review, and minutes of a planning meeting are adequate for such purpose when, as here, the record is "replete with findings and explanations showing compliance with the Planning Commission's guidelines." *Minton, supra*, 850 S.W.2d at 56. Our review of the record clearly indicates

the summary of the evidence and arguments presented at the public hearing sufficiently set forth the findings of the Planning Commission and allowed for adequate appellate review of the process. There was no error.

D. ARBITRARINESS

Riley's final contention is that the Planning Commission's decision was not supported by substantial evidence and was therefore arbitrary. We again disagree.

A careful review of the record clearly reveals the Planning Commission's decision was based on substantial evidence. The Planning Commission had before it Gillies' uncontradicted expert testimony, the 2003 traffic impact study, the staff report, Brantley's proposed binding elements, the testimony of several live witnesses, and the arguments of counsel for both proponents and opponents. There is no doubt from the ten-page, single-spaced minutes prepared after the public meeting that the Planning Commission had a significant amount of evidence before it. Certainly, the record contains substantial evidence and findings supportive of the Planning Commission's determination to grant the proposed zoning amendment. *City of Lancaster v. Trumbo*, 660 S.W.2d 954 (Ky.App. 1983). Therefore, as previously stated, the decision is not arbitrary and will not be disturbed on appeal. *Bowling, supra*.

For the foregoing reasons, the order of the Warren Circuit Court affirming the decision of the Board to grant the zoning amendment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Charles E. English
David W. Anderson
English, Lucas, Priest & Owsley, LLP
Bowling Green, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Charles E. English
English, Lucas, Priest & Owsley, LLP
Bowling Green, Kentucky

BRIEF FOR APPELLEES CITY OF BOWLING GREEN, KENTUCKY, AND CITY-COUNTY PLANNING COMMISSION OF WARREN COUNTY:

Frank Hampton Moore, Jr.
Matthew P. Cook
Cole & Moore, P.S.C.
Bowling Green, Kentucky

ORAL ARGUMENT FOR APPELLEES CITY OF BOWLING GREEN, KENTUCKY, AND CITY-COUNTY PLANNING COMMISSION OF WARREN COUNTY:

Matthew P. Cook
Cole & Moore, P.S.C.
Bowling Green, Kentucky

BRIEF FOR APPELLEES HAROLD BRANTLEY AND HIS WIFE, DIANE BRANTLEY:

Darell R. Pierce
Bowling Green, Kentucky

ORAL ARGUMENT FOR APPELLEES HAROLD BRANTLEY AND HIS WIFE, DIANE BRANTLEY:

Alan Simpson
Bowling Green, Kentucky