

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001831-MR

E. DAVID MEENA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 07-CI-002950

LOUISVILLE METRO COUNCIL;
CITY COUNCIL OF GRAYMOOR/DEVONDALE;
HILDEBRAND 1, LLC; BROWENTON LIMITED
PARTNERSHIP; FENLEY REAL ESTATE

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

WINE, JUDGE: E. David Meena appeals from an order of the Jefferson Circuit Court upholding zoning ordinances enacted by the Louisville Metro Council (Metro Council) and the Graymoor/Devondale City Council. He argues that the Planning Commission's findings, as adopted by the Councils, were unsupported

by substantial evidence, and that the map amendment was clearly inappropriate given the existing traffic problems in the area surrounding the development. We find that the Planning Commission's findings were supported by substantial evidence sufficient to justify the rezoning under Kentucky Revised Statutes (KRS) Chapter 100. Hence, we affirm.

Hildebrand 1, LLC, and Browenton Limited Partnership (Hildebrand/Browenton) are the owners of a 37.97 acre tract of land located at 4906 Brownsboro Road and 2000 Warrington Way (the subject property). The subject property lies primarily within Louisville Metro, but a portion of the property is located within the City of Graymoor/Devondale. Both cities are located in Jefferson County, Kentucky. The subject property is bordered on the west by Interstate 264 (I-264), on the north by Brownsboro Road, on the east by Warrington Way, and on the south by Carlimar Lane. At the time of the application, the subject property was zoned R-4 (single-family residential) and OR-2 (office-residential).

On March 23, 2006, Fenley Real Estate (Fenley) filed an application on behalf of Hildebrand/Browenton requesting to rezone the subject property to PD (planned development). Fenley proposed to build a mixed-use development consisting of commercial and office space, a six-story hotel, residential duplexes and multi-family housing. The development is to be known as the Midlands Project.

Prior to filing the application for a map amendment, Fenley held five “charette” workshops and two formal neighborhood meetings to receive input on the effect of the development on the surrounding area. After the application was filed, the Planning Commission referred the matter to its Land Development & Transportation (LD&T) Committee, which conducted several hearings. The application and development plan was also reviewed by other agencies, including the Louisville Metro Public Works Department, the Metropolitan Sewer District, the Air Pollution Control District, the Louisville Metro Planning and Design Department, and the Kentucky Transportation Cabinet. These assessments addressed noise impacts, economic impacts and traffic impacts.

The most significant issue to arise involved the effect of the Midlands Project on traffic around the Brownsboro Road/US 42 corridor, including the interchange with I-264. There are significant traffic congestion problems in that area and the corridor currently fails state transportation guidelines during peak afternoon periods. Given the substantial increase in traffic that the Midlands Project would likely generate, the LD&T Committee recommended traffic impact studies prior to any public hearing on the proposal.

Three traffic analyses were conducted prior to the July 2006 LD&T meeting - October 2005, March 2006, and July 2006. Following the meetings,

a supplemental traffic analysis (the CORSIM analysis) was conducted. After receipt of these analyses, the Planning Commission staff recommended a continuance of further public hearings for further evaluation of the traffic impacts of the Midlands Project on the surrounding road system.

Following this additional review, the Planning Commission held formal public hearings on the application on October 12, 2006, October 26, 2006, and November 30, 2006. At these meetings, the Planning Commission heard testimony from proponents and opponents of the development. The Planning Commission staff also submitted their recommendation that the rezoning be approved subject to various binding elements to address the traffic issues. Specifically, the staff recommended that Fenley be required to: (1) install a \$1.2 million roundabout at the entrance to the development; (2) post a bond to be used by Public Works for additional roundabout improvements; (3) post a \$10,000 bond to be used by Graymoor/Devondale at its discretion for an eight-year term to accommodate the cost of traffic-calming devices; (4) provide an additional \$120,000 for the Transportation Cabinet's Midlands Project to improve ramp access on the US 42/I- 264 interchange; and (5) dedicate land for a slip ramp from I-264 through the project onto Brownsboro Road.

Additional binding elements were developed for phased approval of building permits to ensure that traffic from the Midlands Project would not

come “online” before road improvements were underway, including a planned new interchange at I- 264 and Westport Road. Pursuant to this scheme, Binding Element 26 provides that:

A detailed district development plan, for the first phase of this project, may be issued building permits no sooner than the awarding of the construction contract for the Westport Rd./I- 264 interchange. This plan shall:

- (a) Be in accordance with the approved concept (general) plan.
- (b) Represent not more than 60 percent (60%) of the development as based on the total average PM peak hour trips (gross generated trips as shown on p. 2 of the Traffic Impact Study dated July 7, 2006 prepared by URS Corp.).
- (c) Be accompanied by a traffic analysis based on the actual uses shown on the plan in comparison to the projected traffic generation presented in the July 2006 traffic study presented by the applicant.

Similarly, Binding Element 27 provides:

- (A) A detailed district development plan, for any subsequent phase(s) of this project shall:
 - (a) Be in accordance with the approved concept (general) plan.
 - (b) Be accompanied by traffic and air quality analyses, completed per
Transportation Plan Review (DPDS)
[Director of Planning & Design Services]
and APCD[Air Pollution Control District]
requirements, and based upon the

actual uses and projected trip generations.

On November 1, 2006, the Planning Commission voted 9-0 (with one abstention) to approve the map amendment subject to binding elements previously developed. The Planning Commission forwarded its findings and recommendation to the Metro Council and the Graymoor/Devondale City Council. After review by the Land Use Committee and two readings of the proposed ordinance, the Metro Council adopted the Planning Commission's recommendation on February 22, 2007, with two amendments. Most significantly, the Metro Council added the following section to Binding Element 27:

The scope of review for detailed district development plans under this section (A) shall be as provided for in the Land Development Code Sec. 2.8.6.A.3 and Sec. 11.4.7.F.2.

(B) Building permits for subsequent phases shall not be issued until the earlier of (i) the completion of the Westport Road/I- 264 interchange, or (ii) January 1, 2009.

Likewise, after holding two public readings of the proposed ordinance, the Graymoor/Devondale City Council adopted the Planning Commission's recommendation on February 27, 2007.

On March 23, 2007, Meena, a nearby resident and opponent of the development, filed an appeal pursuant to KRS 100.347(3). He argued that the

Planning Commission's findings were not supported by substantial evidence and disregarded important elements of the Comprehensive Plan relating to the traffic impacts of the Midlands Project. After reviewing the record, the circuit court concluded that there was substantial evidence to support the Planning Commission's findings that the binding elements would adequately address traffic problems and that the project would comply with the provisions of the Comprehensive Plan. Consequently, the court determined that the Councils did not act unreasonably or arbitrarily by adopting the Planning Commission's recommendation to approve the map amendment. Meena now appeals to this Court.

Judicial review of a zoning decision is concerned with the question of arbitrariness, and neither the trial court nor this Court is authorized to conduct a *de novo* review of the decision. *City of Louisville v. McDonald*, 470 S.W.2d 173, 178 (Ky. 1971). Arbitrariness review is limited to the consideration of three basic questions: (1) whether the agency acted in excess of its statutory powers; (2) whether the agency's proceedings were in accord with the parties' due process rights; and (3) whether the action taken by the legislative body was supported by substantial evidence. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). Meena does not raise any due

process issues. Rather, he contends that Fenley's application does not meet the requirements for granting a map amendment as set out in KRS 100.213(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.

KRS 100.193 requires that the Planning Commission prepare a "comprehensive" plan which serves as a guide for public and private development in the most appropriate manner. *Fritz v. Lexington-Fayette Urban County Government*, 986 S.W.2d 456, 459 (Ky. App. 1998). This master plan for an area is comprehensive in that numerous and extensive elements or studies are to be considered in formulating and adopting the plan. KRS 100.187. Zoning changes are allowed if they are in accordance with the comprehensive plan, or if the plan is out of touch with reality (KRS 100.213(1)(a) and (b); *Wells v. Fiscal Court of Jefferson County*, 457 S.W.2d 498

(Ky. 1970)), and there is a compelling need for the proposed change (*McDonald, supra*; KRS 100.213).

Meena argues that the Planning Commission lacked substantial evidence to find that the map amendment complied with Cornerstone 2020, the Comprehensive Plan adopted by Louisville Metro. He challenges the Planning Commission's findings that the site plan is compatible for the surrounding area, and that it meets the Comprehensive Plan's requirements for form district and town center development. But Meena particularly takes issue with several aspects of the Planning Commission's findings that the Midlands Project would meet the requirements of the mobility/transportation guidelines set out in the Comprehensive Plan.

First, he argues that the traffic studies presented by Fenley do not support the Commission's conclusion that the binding elements will adequately address the traffic issues. Second, given these concerns, he argues that the Planning Commission should have required additional traffic studies prior to the commencement of any construction. And third, Meena notes that the phased approval process set out in the binding elements does not require the completion of infrastructure improvements to the US 42/Brownsboro Road corridor or to the Westport Road/I- 264 interchange. Based on these issues, Meena asserts that there was no substantial evidence to support the Planning Commission's finding that the map amendment complied with the

Comprehensive Plan, and as a result, the Councils' decisions to grant the map amendment were in excess of their statutory authority.

But as the trial court noted, the Planning Commission made extensive findings on all of these issues. The Planning Commission found that the subject property is not appropriately located within the Neighborhood Form District due to its proximity to I-264; that the Midlands Project is compatible with the Town Center Form District; that the Midlands Project is compatible with existing land building and land uses on contiguous properties; and that the binding elements and phased approval process will mitigate the traffic impacts of the development.

In its role as a finder of fact, the Planning Commission is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 309 (Ky. 1972). Such determinations must be upheld on appeal unless they are not supported by substantial evidence. *Danville-Boyle County Planning and Zoning Commission v. Prall*, 840 S.W.2d 205, 208 (Ky. 1992). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

The Planning Commission found that the proposed zone change conforms to the requirements of KRS 100.213 because it is in agreement with Cornerstone 2020. We agree with the circuit court that there was substantial evidence to support the Planning Commission's findings that the Midlands Project is compatible with the Town Center Form District. Likewise, there was substantial evidence to support the Planning Commission's conclusions that the Midlands Project is compatible with the existing building and land uses on contiguous properties.

The closer issue concerns the Planning Commission's findings that the binding elements will adequately address the traffic impacts of the development. As Meena correctly points out, Binding Elements 26 and 27 allow the development to proceed before completion of the Westport Road/I-264 interchange. And while Binding Elements 29 and 30 require Fenley to contribute toward improvements of the US 42/I-264 interchange, neither of these elements tie approval of building permits to any work on the improvements to the US 42/Brownsboro Road corridor. Given the undisputed evidence that the US 42/Brownsboro Road corridor is inadequate for existing traffic patterns, Meena argues that it was unreasonable for the Planning Commission to allow the Midlands Project to proceed before necessary infrastructure improvements are completed.

In response, Fenley correctly notes that a planning commission is not bound to follow every detail of a land use plan. *Warren County Citizens for Managed Growth, Inc. v. Board of Commissioners of City of Bowling Green*, 207 S.W.3d 7, 17 (Ky. App. 2006), citing *Ward v. Knippenberg*, 416 S.W.2d 746, 748 (Ky. 1967). We also agree with Fenley that a developer can only be asked to bear the burden of public improvements that bear a reasonable relationship to the actual impacts of the proposed development. *Lexington-Fayette Urban County Government v. Schneider*, 849 S.W.2d 557, 560 (Ky. App. 1992). Nevertheless, it must always be remembered that the essential element of all zoning is planning. *Fritts v. City of Ashland*, 348 S.W.2d 712, 715 (Ky. 1961).

Moreover, the applicable section of KRS 100.213 required the Planning Commission to find that the proposed re-zoning is in agreement with the elements of the Comprehensive Plan. While strict adherence to every detail of the Comprehensive Plan is not necessary, a failure to ensure some minimal compliance with the mobility/transportation guidelines would lead to

chaotic and arbitrary development.¹ It is within this context that we must evaluate the sufficiency of the Planning Commission's findings.

When viewed in isolation, the individual traffic components do not seem to address the mobility/transportation guidelines set out in Cornerstone 2020. But when viewed in their entirety, we conclude that the Planning Commission's findings and binding elements sufficiently address the applicable mobility/transportation guidelines. For example, Fenley focuses heavily on the roundabout which will be built at the Ky. 22 entrance to the Midlands Project. Obviously, the roundabout will only facilitate access to and from the development, and not the impact of the additional traffic upon the surrounding streets and roads. Rather, it is merely one component in the overall transportation scheme.

Similarly, the planned improvements to Westport Road and the construction of an interchange at I-264 and Westport Road cannot be viewed

¹ Cornerstone 2020 sets out the intents of its mobility/transportation guidelines, in pertinent part, as follows:

- 1.To provide for safe and proper functioning of the street network with a coordinated hierarchy of arterial, collector and local roads.
- 2.To ensure that new developments do not exceed the carrying capacity of streets.
- 3.To ensure that internal and external circulation of all new development provides safe and efficient travel movement by all types of transportation.

Consistent with these intents, the mobility/transportation guidelines set out policies which, among other elements, require that the Planning Commission evaluate developments for their impact on the roadway system and upon surrounding land uses, and require street and transit improvements to mitigate the impacts of the development.

in isolation. By tying approval of the Midlands Project to progress on the Westport Road improvements, the Planning Commission implicitly found that these improvements will take some of the additional traffic away from the US 42/Brownsboro Road corridor. The Metro Council's amendment allows construction to proceed before work on the Westport Road interchange is begun. This change somewhat undermines the intent behind the binding element, but not fatally so.

Finally, the Planning Commission's findings do address the impact of the Midlands Project on the US 42/Brownsboro Road corridor. The Planning Commission proposed signal timing changes to improve traffic flow. The Planning Commission required Fenley to contribute to a future traffic study to address the impact of the additional traffic which the Midlands Project will generate. And most significantly, the Planning Commission required Fenley to dedicate land for and provide funds toward future improvements to the I-264/US 42 interchange.

We agree with Meena that the efficacy of these required elements is debatable. Nevertheless, the Planning Commission made extensive and detailed findings that the map amendment, as subject to the binding elements, meets the mobility/transportation guidelines as set out in Cornerstone 2020. While there clearly was evidence to support a contrary conclusion, we cannot say that the Planning Commission's findings were

unsupported by substantial evidence. In light of the conflicting evidence, the decision to grant the map amendment is a matter within the discretion of the Metro Council and the Graymoor/Devondale Council. Under the circumstances, we cannot find that the Councils' decisions to grant the map amendment were arbitrary or in excess of their statutory authority.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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