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OPINION OF OCTOBER 12, 2012, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002343-MR
AND
NO. 2009-CA-002394-MR

THOMAS NORTON; GEORGE NORTON; CARL NORTON; CLYDE WILCOXSON; GESS FAMILY PARTNERSHIP, LTD; TROY THOMPSON; LARRY WHITE AND BRENDA WHITE; PATSY A. BRATTON; MARY LOUIS BRATTON QUERTERMOUS; WAYNE QUERTERMOUS; AND IRENE GERDEMAN, AS TRUSTEE OF THE IRENE GERDEMAN LIVING TRUST — APPELLANTS/CROSS-APPELLEES

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 08-CI-06061

MARTY PERRY, NATIONAL REGISTER COORDINATOR FOR THE KENTUCKY HERITAGE COUNCIL AND THE STATE HISTORIC PRESERVATION OFFICE; VANESSA ZEOLI; CLARE SIPPLE; COMMONWEALTH OF KENTUCKY, COMMERCE CABINET, KENTUCKY HERITAGE COUNCIL AND THE STATE HISTORIC PRESERVATION OFFICE; MARK DENNE, ACTING EXECUTIVE DIRECTOR, KENTUCKY HERITAGE COUNCIL AND STATE HISTORIC PRESERVATION OFFICER;

CLARK COUNTY FISCAL COURT;
AND CLARK COUNTY-WINCHESTER
HERITAGE COMMISSION APPELLEES/CROSS-APPELLANTS

OPINION AND ORDER
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON, JUDGE; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Appellants appeal from the November 3, 2009, order entered by the Fayette Circuit Court whereby the court dismissed with prejudice the Appellants' action against all Appellees. Appellants also contest the trial court's denial of their motion to alter, amend, or vacate or, alternatively, to supplement the orders entered to make them consistent with the court's rulings, i.e., to enter an order that Appellees violated Appellants' due process rights in accordance with the trial court's oral statements at the September 9, 2009, hearing. After a thorough review of the parties' arguments, the record, and the applicable law, we agree with Appellants that the trial court erred in dismissing the action and accordingly, reverse and remand this matter for further proceedings.

This appeal stems from Appellees' nomination of Appellants' property to the National Register of Historic Places (hereinafter "National

[1] Senior Judge Joseph E. Lambert 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.

Register").[2] On July 23, 2008, Appellants, along with approximately 145 other landowners, were notified by the Kentucky Heritage Council through the Kentucky State Historic Preservation Office via letter that their property located in Clark and Fayette Counties, collectively known as the "Upper Reaches of Boone Creek"[3] (hereinafter "Upper Reaches"), would be considered by the Kentucky Historic Preservation Review Board for nomination to the National Register.

This letter indicated that Marty Perry, the National Register Coordinator for the Kentucky State Historic Preservation Office, would conduct a public informational meeting at the Boone's Creek Baptist Church in Lexington, Kentucky, on August 14, 2008. The letter further stated that if the property owner(s) wished to object, they were to do so in a written letter of objection, properly notarized, and submitted to the State Review Board by August 27, 2008. In addition, the notification letter stated that if the majority of owners object to the listing the district would not be listed.

Appellants contend that at the Boone's Creek Baptist Church meeting, Perry informed the landowners that unless greater than 50% of the landowners of the property designated objected, then the nomination would be submitted to the National Register as a historic district. Further, Perry indicated that the objections had to be written, notarized, and presented at the State Historic Review Board

[2] This is a separate and distinct listing from a National Historic Landmark.

[3] The Upper Reaches of Boone Creek encompasses approximately 10,000 acres in Clark and Fayette Counties, comprised of 157 separate parcels of property, with approximately 184 landowners.

meeting in Russellville, Kentucky, on August 27, 2008, a location three hours away from the land in question. Based on these assertions that an individual landowner would be "wasting his time" to object, Appellants assert that at least one landowner did not submit his written objection at that time.

At the August 27, 2008, State Review Board meeting in Russellville, several landowners attended and presented their written and notarized objection letters. Thereafter, counsel for Appellants sent a letter to Perry stating that they had objection letters from 129 landowners covering 95 parcels of property out of the 157 properties listed, and demanded that the action to submit the nomination be stopped.

In response, Mark Dennen, the Acting Executive Director of the Kentucky Heritage Council and State Historic Preservation Officer ("SHPO") sent counsel a letter dated October 28, 2008, wherein he stated that regardless of whether the majority of landowners object, the SHPO must still forward the nomination to the Keeper of National Register ("Keeper") for a determination of eligibility. The letter further stated that if the majority of the landowners objected prior to the State Review Board meeting, the Review Board would note that in their minutes but would still render a recommendation on eligibility for listing. The SHPO would likewise note the objections in his findings but would also render a finding as to the eligibility for listing for the Keeper.

After receiving this letter from the SHPO, the Appellants commenced an action in Fayette Circuit Court, alleging unconstitutional taking, due process

violations, trespass, conversion, defamation, and unjust enrichment. The Appellants sought injunctive and declaratory relief in addition to damages.

Appellants' trespass claim was based on their allegation that Vanessa Zeoli,[4] a graduate student at the University of Kentucky, worked for the Clark County-Winchester Heritage Commission for the purposes of obtaining information about Appellants' property for use in the nomination process to the National Register and trespassed on their property to create the application for the listing. Appellants' defamation claim alleged that Claire Sipple, an employee and agent of the Clark County-Winchester Heritage Commission, made defamatory allegations that the Appellants had "strong-armed" certain landowners into submitting objection letters at the August 27, 2008, State Review Board Meeting.

A hearing was held on December 5, 2008, and the court granted a temporary restraining order and injunction mandating that the Appellees cease their efforts and activities. In response, Appellees filed motions to dismiss for failure to state a claim, failure to exhaust administrative remedies, improper venue, sovereign immunity, and lack of personal and subject matter jurisdiction. The court held another hearing and thereafter deferred ruling on the motions to dismiss but ordered matters to proceed and answers to be filed. It also dissolved the temporary injunction against Appellees. When Appellants sought discovery by noticing the depositions of Perry, Sipple, and Zeoli, the court entered a protective order and prevented the depositions from being taken. Thus, the only proof in the

[4] At the time this action was instituted, Zeoli was a resident of New Jersey.

record concerning the Appellants' claims was the affidavits of the Appellants verifying the allegations contained in their complaint.

Thereafter, the State Review Board met on May 12, 2009, and decided to approve the district's nomination and to forward it to the Keeper for review and listing. The Appellants filed a motion with the court requesting that it prevent the Appellees from forwarding the nomination to the Keeper. The court did not grant this motion but instead requested that the Appellees have the nomination returned from the Keeper. The Appellees had the nomination returned, only to resubmit it on September 11, 2009.

On September 9, 2009, a hearing was held by the court. At that time Appellants maintained that they had at least 92 objection letters while the Appellees alleged that there were 184 landowners for the purposes of calculating whether the Appellants had met the 50% threshold. Appellees disallowed at least nine objection letters. Appellants informed the court that they had doubts and questions about the validity of how the number of property owners was calculated, the fluctuation of said number, and their concern that it may have been futile to try to stop the nomination process once it had begun, regardless of what measures were taken by the landowners. At that hearing, the Appellees discussed how the federal regulations required them to use either property records or property tax records and that, traditionally, they used tax records. The Appellees then went through the process used to tally the number of owners and the number of objections.

The Appellees informed the court that they counted 182 owners with 103 objections submitted; 9 objections were not recognized after conferring with National Park Service ("NPS"). The nine objections were not recognized by the Appellees for the following reasons: objection was submitted by someone who was no longer an owner; objections were made by LLCs and the Appellees were told by the NPS that trusts, LLCs, and LPs received only one vote even if they own multiple properties;[5] objections were submitted by someone with a remainder interest; and objections were withdrawn.

Thus, the Appellees informed the trial court that 91 objections were recognized by the SHPO at the State Review meeting out of 182 owners. Subsequently, on August 21 the Appellees recognized 184 owners, explaining that 2 owners were originally overlooked. The total objections recognized by the SHPO at that time were 84, based on the aforementioned criteria and withdrawals. At the hearing before the trial court Appellants presented an additional 4 objections which would have raised the total to 88 objections out of 184 landowners.[6]

The Appellants then argued to the trial court that the constantly changing of number of landowners and objections recognized for purposes of the hearing was inherently unfair. The Appellants claimed to have never been shown a

[5] This is in direct contrast to the situation where a husband and wife own a single property and receive two votes for that one property.

[6] At oral argument, counsel for the Appellants alluded to the tactics of at least one landowner that, during the time the number of landowners was to be counted, purchased additional tracts of land to increase the votes in favor of nominating the tracts for the national register of historic sites. Appellees offered this as but one example of chicanery and how the process was manipulated because no deadline was established in advance of the hearing held by the SHPO, upon which the number of parcels, as well as the names of the owners, would be determined.

piece of paper saying a property owner was in favor of registering his or her property on the historic register, even though the Appellees claimed that the majority of property owners were in favor of the listing. The Appellants argued to the court that their objections, which were offered by a majority of landowners, fell on deaf ears. The Appellants also took issue with the procedure for recognizing objections and pointed out that without a set point in time to count owners and objections, the entire count would continually fluctuate. As an example, Appellants pointed out that there was an issue concerning whether two of the objections should have been disallowed based on the fact that the property was held in a life estate. The Appellants additionally argued that the process violated their due process rights because there was never a citation to any federal regulation that limited trusts, estates, and LLCs to only one vote.

After hearing the parties, the court questioned whether it had jurisdiction to decide a federal regulation issue. The court than expressed its concern with the process and the implications of due process violations. The court concluded that the regulations were arbitrary and unclear if in order to implement the regulations Appellees had to call Washington, D.C., for clarification. The court also concluded that the process potentially deprived property owners of rights, specifically, the right to be left alone,[7] and to not have their property

[7] After a review of our jurisprudence we believe that the trial court's reference to the "right to be left alone" may be a reference to the right to privacy of an individual and not a property right *per se*. In *Commonwealth v. Wasson,* 842 S.W.2d 487, 496 (Ky. 1992), the Kentucky Supreme Court noted:

designated as historic when contrary to their wishes. Because the process was fundamentally flawed, the court concluded that the regulations violated due process.

Nevertheless, the court then entered an order dismissing the action against all Appellees on November 3, 2009. In said order, the court stated that there was "nothing further to be done and that there is a fundamental issue of jurisdiction" and, thus, dismissed the case with prejudice. The court further stated that it had a:

> Then in 1927, in *Brents v. Morgan, supra*, our Court defined this emerging right as "the right to be left alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned."
>
> > "The right of privacy is incident to the person and not to property.... It is considered as a natural and an absolute or pure right springing from the instincts of nature. It is of that class of rights which every human being has in his natural state and which he did not surrender by becoming a member of organized society. The fundamental rights of personal security and personal liberty, include the right of privacy, the right to be left alone.... The right to enjoy life [Ky.Const., § 1, first subpart] in the way most agreeable and pleasant, and the right of privacy is nothing more than a right to live in a particular way." *Id*. at 971, quoting 21 RCL parg. 3, p. 1197.
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> *See also Grigsby and Wife v. R.J. Breckinridge,* 65 Ky. (2 Bush) 480 (1867), and *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849)(1912), for further confirmation that the right of privacy has
>
> long been considered an inalienable right legally protected in this state.

Wasson at 496.

Given that the parties did not address this inalienable right to privacy in the appeal *sub judice* we decline to address this further. Moreover, on remand, the trial court will have the opportunity to clarify its concerns.

> [D]ue process concern with respect to the federal regulations as depriving landowners of property rights "to be left alone" and the "right not to have your property designated as something that you object to under the process." The court further states that the process is fundamentally flawed as being arbitrary and unclear in the manner in which it deals with objections to listing in a National Register Historic District and the counting of those objections. However, having found no error with the administration of the regulation by the Defendants and in light of jurisdictional issues, the Court hereby dismisses this action with respect to all Defendants.

Trial court order November 3, 2009.

Thereafter, the district was listed on the National Register by the Keeper on November 27, 2009. It is from the November 3, 2009, order dismissing the entire action against all Appellees that the Appellants now appeal.

When a trial court is presented with a Kentucky Rules of Civil Procedure (CR) 12.02 motion to dismiss, the court must take every well-pleaded allegation of the complaint as true and construe it in the light most favorable to the opposing party. *Gall v. Scroggy*, 725 S.W.2d 867 (Ky.App. 1987). As such, "[t]he court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari–Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL–CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977).

The Appellants present two arguments, namely: (1) the trial court erred in dismissing the complaint; and (2) that both the circuit court and this Court have subject matter jurisdiction. In support of this second argument, the

Appellants contend that: (1) the state court has concurrent jurisdiction over the federal claims in this case; (2) the Appellants' claims are not moot; (3) the doctrine of exhaustion of administrative remedies does not apply and, in any event, Appellants have already exhausted administrative remedies; and (4) the court has jurisdiction over Appellants' remaining claims.

In response, the Appellees present four arguments: (1) the applicable standard of review supports the circuit court's dismissal of this action; (2) Appellants' claims were properly dismissed against all Appellees as barred by the applicable sovereign, governmental, absolute, statutory, qualified and/or qualified official immunity; (3) although the circuit court correctly dismissed the action for lack of jurisdiction, in the alternative the court had jurisdiction to dismiss the Appellants' complaint for failure to state claims upon which relief could be granted since no procedural errors occurred in the nomination or listing of the Upper Reaches; this action did not involve an unconstitutional taking and the action did not involve deprivation of property rights; (4) the circuit court correctly dismissed this action because it lacked both subject matter and personal jurisdiction. In support of this fourth argument, the Appellees contend that: (1) the circuit court correctly held that it lacked jurisdiction; (2) Appellants failed to exhaust their administrative remedies; (3) Appellants' claims are moot; (4) the case raises federal issues requiring exclusive jurisdiction of federal courts; and (5) lack of personal jurisdiction over Appellees.

We believe that the numerous arguments presented by the parties may be condensed into four categories, namely: (1) jurisdictional issues including personal jurisdiction and subject matter jurisdiction, as well as the concurrent jurisdiction of state and federal courts to hear their claims; and whether the doctrines of mootness and failure to exhaust administrative remedies apply; (2) constitutional issues including unconstitutional taking and due process violations, both substantive and procedurally; (3) governmental immunity; and (4) common law claims including trespass and defamation. With this in mind we now turn to the first category presented, jurisdiction.

The parties enumerate multiple jurisdictional issues including personal jurisdiction and subject matter jurisdiction, concurrent jurisdiction, the doctrines of mootness and failure to exhaust administrative remedies. At the outset we note that the Appellees have a motion to dismiss this appeal for lack of jurisdiction pending before this Court. We have reviewed said motion in addition to the parties' arguments on appeal and have analyzed and concluded for the reasons set forth *infra,* that the trial court did have jurisdiction to consider the issues presented *sub judice*. As such, we deny Appellees' motion to dismiss this appeal for lack of jurisdiction.

We now address the jurisdictional issues beginning with the issues of subject matter jurisdiction and concurrent jurisdiction. First, we conclude that for our analysis, subject matter jurisdiction and concurrent jurisdiction are one and the same, for if our courts have either, then they can decide the controversy. Second,

we believe this matter is settled by *Commonwealth Health Corp. v. Croslin, infra.* Therein, the Kentucky Supreme Court addressed concurrent jurisdiction when it stated:

> [W]e are aware of the general principle that state courts have jurisdiction over cases arising under federal law "absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state court adjudication." *Gulf Offshore Co. v. Mobil Oil Corp*., 453 U.S. 473, 478, 101 S.Ct. 2870, 2875, 69 L.Ed.2d 784 (1981). It is well understood that "Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly." *Id*. at 479, 101 S.Ct. at 2876.

Commonwealth Health Corp. v. Croslin, 920 S.W.2d 46, 47 (Ky. 1996). *See also Blair v. Migliorini*, 744 F.Supp. 165, 168-69 (N.D. Ohio 1990)(citing *Hess v. Great Atlantic & Pacific Tea Co., Inc*., 520 F.Supp. 373, 375 (N.D.Ill.1981)(citing *Dowd Box v. Courtney*, 368 U.S. 502, 507–08, 82 S.Ct. 519, 522–23, 7 L.Ed.2d 483 (1962) (Stewart, J.); *Testa v. Katt*, 330 U.S. 386, 390–91, 67 S.Ct. 810, 813, 91 L.Ed. 967 (1947))(internal footnotes omitted) ("Second, Congressional and judicial policy, as well as notions of comity, teach that state courts are not only competent, but have concurrent jurisdiction to hear federal questions which are not within the exclusive jurisdiction of the federal courts.").[8]

[8] We find footnote 9 in *Blair* to be elucidating:

> Justice Stewart wrote:
>
> We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule. This Court's approach to the

Blair at 168. Appellees have not provided this court with an explicit provision by Congress confining jurisdiction to federal courts, nor have the Appellees provided an implicit recognition by Congress confining jurisdiction. That being the case, we must conclude that the trial court had concurrent jurisdiction.[9] We now address the issues of mootness and the failure to exhaust administrative remedies.

Appellees argue that the issues raised by Appellants are moot and, thus, were properly dismissed. Intertwined with this argument, Appellees contend that when Appellants filed their complaint with the circuit court there had been no determination made as to whether the Upper Reaches would be listed in the National Register. Thus, they argue that the issues were unripe and therefore not justiciable. Now, Appellees contend that any issue has been rendered moot by the inclusion of the Upper Reaches on the National Register because only the Secretary of the Interior may remove the property from the list, effectively rendering any judicial order from the Commonwealth to be ineffectual.

> question of whether Congress has ousted state courts of jurisdiction was enunciated by Mr. Justice Bradley in *Claflin v. Houseman*, 93 U.S. 130 [23 L.Ed. 833] [1877], and has remained unmodified through the years. "The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States has been elaborately discussed, both on the bench and in published treatises ... [and] the result of these discussions has, in our judgment, been ... to affirm the jurisdiction, where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case." 93 U.S. at 136.
>
> *Dowd Box v. Courtney*, 368 U.S. at 508, 82 S.Ct. at 522–23, 7 L.Ed. 483 (1962).

[9] We note that the trial court may have concluded otherwise, with its reference to jurisdictional issues. If so, such conclusion was in error.

We note that the Appellees are correct that an unripe claim is not justiciable. *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 275 (Ky.App. 2005). Our courts have long held that unless there is an "actual case involving a present, ongoing controversy, the issues surrounding it become moot." *Commonwealth, Dept. of Corrections v. Engle*, 302 S.W.3d 60, 63 (Ky. 2010) (citing *Commonwealth v. Hughes*, 873 S.W.2d 828 (Ky.1994); *Philpot v. Patton,* 837 S.W.2d 491 (Ky. 1992); *In Re Constitutionality of House Bill No. 222*, 262 Ky. 437, 90 S.W.2d 692 (1936)). However, we find it disingenuous for the Appellees to argue that the Appellants' claims concerning real property in this Commonwealth and their common law causes of action were unripe before inclusion on the National Register, and now argue that once included on the National Register, then Appellants' claims are rendered moot.

We agree with Appellants that the due process claims presented involving their real property located in this Commonwealth and their common law causes of action were ripe for adjudication by the circuit court. Simply said, we do not believe that justiciability of their claims is barred by the doctrine of mootness. However, if the justiciability of the claims were barred by mootness, then we believe that the exception to the mootness doctrine would apply because the nature of the claims is such that the dispute is capable of repetition, yet evading review. *Engle* at 63. As stated in *Engle*:

> Our courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy. The decision whether to apply the

> exception to the mootness doctrine basically involves two questions: whether (1) the 'challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again.' *In re Commerce Oil Co*., 847 F.2d 291, 293 (6th Cir.1988).
> *Philpot,* 837 S.W.2d at 493.

Engle at 63.

Appellees also argue that Appellants' failure to exhaust administrative remedies bars judicial review of the issue *sub judice*. Appellants argue that the doctrine of exhaustion of administrative remedies does not apply. If we assume *arguendo* that the doctrine does apply, Appellants argue that they have exhausted the administrative remedies and further action would be futile.

The Kentucky Supreme Court in *Kentucky Retirement Systems v. Lewis*, 163 S.W.3d 1, 3 (Ky. 2005), set forth a learned discussion on the doctrine of exhaustion of administrative remedies:

> Exhaustion of administrative remedies is a well-settled rule of judicial administration that has long been applied in this state. *See generally Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471–72 (Ky.2004). The exhaustion of remedies doctrine is easily explained: "proper judicial administration mandates judicial deference until after exhaustion of all viable remedies before the agency vested with primary jurisdiction over the matter." *Board of Regents of Murray State University v. Curris*, 620 S.W.2d 322, 323 (Ky.App.1981). The doctrine does not preclude judicial review, but rather delays it until after the expert administrative body has compiled a complete record and rendered a final decision. *Popplewell's*, 133 S.W.3d at 471. Exceptions to this principle do exist: a party is not required to exhaust all administrative

> remedies when the statute is alleged to be void on its face. *Goodwin v. City of Louisville*, 309 Ky. 11, 215 S.W.2d 557, 559 (1948). Exhaustion of remedies is likewise not required when continuation of an administrative process would amount to an exercise in futility. *Popplewell's,* 133 S.W.3d at 471.

Kentucky Retirement Systems v. Lewis, 163 S.W.3d 1, 3 (Ky. 2005).

If the Appellants are seeking to have their property removed from the National Register in the action *sub judice*, then Appellants must comply with 36 Code of Federal Register (C.F.R.) § 60.15 (Removing properties from the National Register).

36 C.F.R. § 60.15 states:

> (a) Grounds for removing properties from the National Register are as follows:
>
> > (1) The property has ceased to meet the criteria for listing in the National Register because the qualities which caused it to be originally listed have been lost or destroyed, or such qualities were lost subsequent to nomination and prior to listing;
> >
> > (2) Additional information shows that the property does not meet the National Register criteria for evaluation;
> >
> > (3) Error in professional judgment as to whether the property meets the criteria for evaluation; or
> >
> > (4) Prejudicial procedural error in the nomination or listing process. Properties removed from the National Register for procedural error shall be reconsidered for listing by the Keeper after correction of the error or errors by the State Historic Preservation Officer, Federal Preservation Officer, person or local government which originally nominated the property, or by the

Keeper, as appropriate. The procedures set forth for nominations shall be followed in such reconsiderations. Any property or district removed from the National Register for procedural deficiencies in the nomination and/or listing process shall automatically be considered eligible for inclusion in the National Register without further action and will be published as such in the Federal Register.

(b) Properties listed in the National Register prior to December 13, 1980, may only be removed from the National Register on the grounds established in paragraph (a) (1) of this section.

(c) Any person or organization may petition in writing for removal of a property from the National Register by setting forth the reasons the property should be removed on the grounds established in paragraph (a) of this section. With respect to nominations determined eligible for the National Register because the owners of private property object to listing, anyone may petition for reconsideration of whether or not the property meets the criteria for evaluation using these procedures. Petitions for removal are submitted to the Keeper by the State Historic Preservation Officer for State nominations, the Federal Preservation Officer for Federal nominations, and directly to the Keeper from persons or local governments where there is no approved State Historic Preservation Program.

(d) Petitions submitted by persons or local governments where there is no approved State Historic Preservation Program shall include a list of the owner(s). In such cases the Keeper shall notify the affected owner(s) and the chief elected local official and give them an opportunity to comment. For approved State programs, the State Historic Preservation Officer shall notify the affected owner(s) and chief elected local official and give them an opportunity to comment prior to submitting a petition for removal. The Federal Preservation Officer shall notify and obtain the comments of the appropriate State Historic Preservation Officer prior to forwarding an

appeal to NPS. All comments and opinions shall be submitted with the petition.

(e) The State Historic Preservation Officer or Federal Preservation Officer shall respond in writing within 45 days of receipt to petitions for removal of property from the National Register. The response shall advise the petitioner of the State Historic Preservation Officer's or Federal Preservation Officer's views on the petition.

(f) A petitioner desiring to pursue his removal request must notify the State Historic Preservation Officer or the Federal Preservation Officer in writing within 45 days of receipt of the written views on the petition.

(g) The State Historic Preservation Officer may elect to have a property considered for removal according to the State's nomination procedures unless the petition is on procedural grounds and shall schedule it for consideration by the State Review Board as quickly as all notification requirements can be completed following procedures outlined in § 60.6, or the State Historic Preservation Officer may elect to forward the petition for removal to the Keeper with his or her comments without State Review Board consideration.

(h) Within 15 days after receipt of the petitioner's notification of intent to pursue his removal request, the State Historic Preservation Officer shall notify the petitioner in writing either that the State Review Board will consider the petition on a specified date or that the petition will be forwarded to the Keeper after notification requirements have been completed. The State Historic Preservation Officer shall forward the petitions to the Keeper for review within 15 days after notification requirements or Review Board consideration, if applicable, have been completed.

(i) Within 15 days after receipt of the petitioner notification of intent to pursue his petition, the Federal Preservation Officer shall forward the petition with his or her comments and those of the State Historic Preservation Officer to the Keeper.

(j) The Keeper shall respond to a petition for removal within 45 days of receipt, except where the Keeper must notify the owners and the chief elected local official. In such cases the Keeper shall respond within 90 days of receipt. The Keeper shall notify the petitioner and the applicable State Historic Preservation Officer, Federal Preservation Officer, or person or local government where there is no approved State Historic Preservation Program, of his decision. The State Historic Preservation Officer or Federal Preservation Officer transmitting the petition shall notify the petitioner, the owner(s), and the chief elected local official in writing of the decision. The Keeper will provide such notice for petitions from persons or local governments where there is no approved State Historic Preservation Program. The general notice may be used for properties with more than 50 owners. If the general notice is used it shall be published in one or more newspapers with general circulation in the area of the nomination.

(k) The Keeper may remove a property from the National Register on his own motion on the grounds established in paragraph (a) of this section, except for those properties listed in the National Register prior to December 13, 1980, which may only be removed from the National Register on the grounds established in paragraph (a) (1) of this section. In such cases, the Keeper will notify the nominating authority, the affected owner(s) and the applicable chief elected local official and provide them an opportunity to comment. Upon removal, the Keeper will notify the nominating authority of the basis for the removal. The State Historic Preservation Officer, Federal Preservation Officer, or person or local government which nominated the property shall notify the owner(s) and the chief elected local official of the removal.

(l) No person shall be considered to have exhausted administrative remedies with respect to removal of a property from the National Register until the Keeper has denied a petition for removal pursuant to this section.

36 C.F.R. § 60.15(emphasis added).

The federal courts in *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 194 F.Supp. 2d 977, 992 (D.S.D. 2002), and *White v. Shull*, 520 F. Supp. 11, 14 (S.D.N.Y. 1981), determined that failure to exhaust administrative remedies warranted dismissal of action under a National Historic Preservation Act (NHPA) claim. Thus, we must agree with the Appellees that *if* the Appellants were seeking to have a court of this Commonwealth request the removal of the property from the National Register, then clearly 36 C.F.R. § 60.15 precludes such action until the Keeper has denied the petition for removal. 36 C.F.R. § 60.15(l).

However, if Appellants sought to have a court of this Commonwealth determine if procedural irregularities occurred in the nomination process in order to provide a ground for removal when petitioning the Keeper under 36 C.F.R. § 60.15(a)(4), then exhaustion of administrative remedies would not be required. *See Lewis* at 3. Thus, we agree with Appellants that Appellees' argument concerning exhaustion of administrative remedies does not warrant a dismissal of the matter *sub judice*.

We now turn to whether the trial court had personal jurisdiction over the Appellees. Appellees argue that the circuit court did not have personal jurisdiction over any Appellee;[10] specifically the Appellees argue that Zeoli was not a resident of Kentucky and that there was no attempt by Appellants to comply

[10] Appellees seem to confuse personal jurisdiction with venue. We decline to address these muddled arguments because "there are fundamental distinctions between the concepts of jurisdiction and venue…." *Dollar General Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007).

with Kentucky's Long-Arm Statue, KRS 454.210. Appellees state that Zeoli is a non-resident who worked for a period of time for Sipple and/or the Clark County-Winchester Heritage Commission for her efforts to create an application for the nomination of the Upper Reaches. Appellees contend that Zeoli is a life-long resident of New Jersey and that any claim against her involves a "single act" within the Commonwealth.

Appellants contend that Zeoli was a graduate student at the University of Kentucky and became involved in the matter *sub judice* when she trespassed on property within this Commonwealth as a part of her thesis and was then employed by the Clark County-Winchester Heritage Commission for the purpose of obtaining information about Appellants' property and completing an application for nomination. Moreover, Appellees contend exercising jurisdiction over Zeoli, a non-resident, would violate her due process rights.

Recently, the Kentucky Supreme Court clarified the appropriate analysis of long-arm jurisdiction over a non-resident defendant in *Hinners v. Robey,* 336 S.W.3d 891, 895 (Ky. 2011). "[R]eview first proceeds under KRS 454.210 and, if jurisdiction is permissible under the long-arm statute, only then is jurisdiction under federal due process examined." *Hinners* at 895, citing *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 57 (Ky. 2011). Accordingly, we first look to KRS 454.210.

At issue, Kentucky's Long-Arm Statute, KRS 454.210 establishes:

(1) As used in this section, “person” includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this Commonwealth.
(2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth;

2. Contracting to supply services or goods in this Commonwealth;

3. Causing tortious injury by an act or omission in this Commonwealth;

4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth;

5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this Commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth;

6. Having an interest in, using, or possessing real property in this Commonwealth, providing the

claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a nonresident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated;

7. Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting;

8. Committing sexual intercourse in this state which intercourse causes the birth of a child when:

a. The father or mother or both are domiciled in this state;

b. There is a repeated pattern of intercourse between the father and mother in this state; or

c. Said intercourse is a tort or a crime in this state; or

9. Making a telephone solicitation, as defined in KRS 367.46951, into the Commonwealth.

(b) When jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him.

(3) (a) When personal jurisdiction is authorized by this section, service of process may be made on such person, or any agent of such person, in any county in this Commonwealth, where he may be found, or on the Secretary of State who, for this purpose, shall be deemed to be the statutory agent of such person;

(b) The clerk of the court in which the action is brought shall issue a summons against the defendant named in the complaint. The clerk shall execute the summons by sending by certified mail two (2) true copies to the

Secretary of State and shall also mail with the summons two (2) attested copies of plaintiff's complaint. The Secretary of State shall, within seven (7) days of receipt thereof in his office, mail a copy of the summons and complaint to the defendant at the address given in the complaint. The letter shall be posted by certified mail, return receipt requested, and shall bear the return address of the Secretary of State. The clerk shall make the usual return to the court, and in addition the Secretary of State shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the Secretary of State and the action shall proceed as provided in the Rules of Civil Procedure; and

(c) The clerk mailing the summons to the Secretary of State shall mail to him, at the same time, a fee of ten dollars ($10), which shall be taxed as costs in the action.

(4) When the exercise of personal jurisdiction is authorized by this section, any action or suit may be brought in the county wherein the plaintiff resides or where the cause of action or any part thereof arose.

(5) A court of this Commonwealth may exercise jurisdiction on any other basis authorized in the Kentucky Revised Statutes or by the Rules of Civil Procedure, notwithstanding this section.

KRS 424.210

And finally, "where the defendant 'deliberately' has engaged in significant activities with a State, or has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable

to require him to submit to the burdens of litigation in the forum as well."

Hinners v. Robey, 336 S.W.3d 891, 898 (Ky. 2011)(internal citations omitted).

We believe that Zeoli's actions in the matter *sub judice*, i.e., her attendance at the University of Kentucky as a graduate student, the alleged trespass onto property within this Commonwealth as a part of her thesis, and being employed within this Commonwealth to complete the application for nomination to the National Register to be sufficient to establish personal jurisdiction. *See* KRS 454.210(2)(a)(1)-(3) and *Hinners* at 896 (there must be "a reasonable and direct nexus between the wrongful acts alleged in the complaint and the statutory predicate for long-arm-jurisdiction.").

We disagree with Appellees that such actions amounted to a "single act";[11] instead, such actions create a reasonable and direct nexus between the

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[11] Even if we were to conclude otherwise, we would still find that the requirements of federal due process have been satisfied. In *Hinners,* the Kentucky Supreme Court discussed when a single act is sufficient to provide personal jurisdiction:

> In *Southern Mach. Co. v. Mohasco Industries, Inc.,* 401 F.2d 374 (6th Cir.1968), the Sixth Circuit Court of Appeals devised a test for determining the outer limitations of *in personam* jurisdiction based upon a defendant's single act in relation to the forum state, such as we have here. This test is stated as follows:
>
> The first prong of the test asks whether the defendant purposefully availed himself of the privilege of acting within the forum state or causing a consequence in the forum state. The second prong considers whether the cause of action arises from the alleged instate activities [or consequence.] The final prong requires such connections to the state as to make jurisdiction reasonable.
>
> *Id*. at 381; *see also Wilson*, 85 S.W.3d at 593; *Tube Turns Div. of Chemetron Corp. v. Patterson Co., Inc.,* 562 S.W.2d 99, 100 (Ky.App.1978).

Hinners at 898(footnotes omitted).

wrongful acts alleged and the statutory predicate of long-arm jurisdiction. Having considered KRS 454.210, we proceed to a determination of whether this application of our statute offends the standards of federal due process. *Hinners* at 897.

The Kentucky Supreme Court recently undertook such an analysis:

> We begin with a review of some basic principles underlying federal due process as it relates to long-arm jurisdiction. "[D]ue process requires ... that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). As such, due process protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." *Id*. at 319, 66 S.Ct. 154. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit[.]" *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471–472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).
>
> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.,*

Zeoli purposefully availed herself of the privilege of acting within this state. As such, the trial court had personal jurisdiction over Zeoli.

> 465 U.S. 770, 774, 104 S.Ct. 1473, 79 L.Ed.2d 790, (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Burger King*, 471 U.S. at 472, 105 S.Ct. 2174.

Hinners at 897 (footnotes omitted).

We agree with Appellants that Zeoli's actions satisfy the federal due process requirements. Clearly, Zeoli had meaningful contact with this Commonwealth by attending the University of Kentucky, allegedly trespassing on property within this Commonwealth to complete her thesis project, and by being employed within the Commonwealth to complete an application for inclusion in the National Register involving real property within the Commonwealth. Zeoli certainly had "fair warning," given that her activities were purposefully directed at residents of this Commonwealth and the alleged injuries arose out of those activities. Moreover, "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there…." *Hinners* at 898, citing to *Burger King*, 471 U.S. at 473, 105 S.Ct. 2174. Thus, we must conclude that the trial court had personal jurisdiction over Zeoli and the claim for trespass.

Last, we note that the circuit court clearly had jurisdiction over Appellants' common law claim for defamation. Appellants alleged that Sipple made defamatory statements at the State Review Board meeting. There was no argument that the circuit court lacked personal jurisdiction over Sipple, and

jurisdiction to hear common law claims is within the jurisdiction of the circuit court. *See* Kentucky Constitution (Ky. Const.) § 112(5): "The Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court."

We do note that the Appellants correctly argue that the circuit court did not reference the claims of defamation or trespass in its order dismissing entered November 3, 2009; however, it did dismiss the action. Regardless, the circuit court clearly had subject matter jurisdiction to consider the claim of defamation. Therefore, we agree with the Appellants that the trial court erred in dismissing these common law claims.

We now turn to the second issue raised by the parties, the constitutional claims. The parties present multiple constitutional claim issues including unconstitutional taking and due process violations, both substantive and procedurally. We first address the unconstitutional taking claim.

At the outset, we note, "[a] party challenging governmental action as amounting to an unconstitutional taking bears a rather hefty burden." *Bobbie Preece Facility v. Commonwealth, Dept. of Charitable Gaming*, 71 S.W.3d 99, 102 (Ky.App. 2001). In order to prevail on a claim of unconstitutional taking, the one asserting such a claim must overcome the presumption of constitutionality, "i.e., the rule that an act should be held valid unless it clearly offends the limitations and prohibitions of the Constitution." *Bobbie Preece Facility* at 102, citing *Stephens v. State Farm Mutual Automobile Insurance Company*, 894 S.W.2d 624, 626 (Ky. 1995).

The Court in *Bobbie Preece Facility* set forth the following analysis concerning an unconstitutional taking claim:

> The "Takings Clause" of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." Section 13 of the Kentucky Constitution mirrors that provision: "[N]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." Preece correctly argues that the concept of "taking" has evolved over the years to include regulatory interference with one's use or enjoyment of his property in addition to the more traditional notion of a taking as a physical seizure of property.
>
> > [W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992)(emphasis in original).

Bobbie Preece Facility at 103. Thus, "in order to be entitled to compensation under the Takings Clause of the Fifth Amendment, the owner must be deprived of a portion of the "bundle of rights" in the property that existed when he obtained title to the property." *Bobbie Preece Facility* at 104 citing, *Lucas*, 505 U.S. at 1027, 112 S.Ct. 2886.

Appellees argue that the Appellants have failed to identify any constitutionally protected property interests which were taken by the National Register listing of their property. In response, Appellants direct this Court's

attention to the lack of discovery conducted on this matter. Both parties argue that *Historic Green Springs, Inc. v. Bergland*, 497 F.Supp. 839, 850 (E.D. Va. 1980), supports their respective positions.

While the court in *Historic Green Springs* ultimately found that a listing as a National Historic Landmark[12] did not constitute an unconstitutional taking under the Fifth Amendment based on the facts presented, the court did recognize that "[I]f, in the future, plaintiffs can demonstrate that the recognition of landmark status has more severely restricted development in the District than the record now shows, then a viable claim for relief under the Taking Clause may be presented." *Id.* Thus, *Historic Green Springs* did not foreclose the possibility of a successful unconstitutional takings claim and we believe that the Appellants were entitled to adequate discovery on this issue. Accordingly, the trial court erred in concluding otherwise.

We now address Appellants' due process violation claim. First, we note that due process has two meanings in our jurisprudence:

> (1) substantive due process, which is based on the idea that some rights are so fundamental that the government must have an exceedingly important reason to regulate them, if at all, such as the right to free speech or to vote; and (2) procedural due process, which requires the government to follow known and established procedures, and not to act arbitrarily or unfairly in regulating life, liberty or property.

Miller v. Johnson Controls, Inc., 296 S.W.3d 392, 397 (Ky. 2009).

[12] This is a different designation from the matter *sub judice*.

In *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government*, 265 S.W.3d 190, 195 (Ky. 2008), the Kentucky Supreme Court cited to *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988), wherein, the Ninth Circuit stated, "A substantive due process claim does not require proof that all use of the property has been denied, but rather that the interference with property rights was irrational or arbitrary." *Bateson* at 1303 (internal citation omitted).[13]

We agree with the trial court that the process used by Appellees to assess the number of property owners and the corresponding number of objections is fundamentally flawed. It is arbitrary and unclear because there is no fixed time at which the number and names of the landowners are determined at a reasonable time prior to the hearing, thus leading to a continual fluctuation in the number of landowners and required objections.

Additionally, Appellees have failed to provide any citation to any regulations that enumerate that trusts, estates, LLCs, and LPs are only entitled to a single vote while, in contrast, a husband and wife each have a vote regardless of how the title is held. We believe that without these written guidelines, the Appellees' discussion with the NPS as to how to treat the votes disallowed is fundamentally arbitrary and in violation of Appellants' due process rights because

[13] We note that in *Pritchett v. Marshall*, 375 S.W.2d 253 (Ky.1963), the highest court in Kentucky held that the state is enjoined against arbitrariness by Section 2 of the Kentucky Constitution and recognized that this is "a concept we consider broad enough to embrace both due process and equal protection of the laws, both fundamental fairness and impartiality." *Id*. at 258.

the statute, as written, does not provide a meaningful right to be heard. We are in agreement with the trial court that the Appellees did not misapply the administration of the regulations. We simply find said regulations to be inadequate by their failure to address the counting of votes concerning trusts, estates, LPs, and LLCs and the fixing of a definite time for designation of the number of parcels of land and the landowners entitled to participate. Thus, we reverse and remand this matter for further proceedings.

We now turn to the third issue for our review, Appellees' argument that the claims against them were properly dismissed because the claims were barred by sovereign, governmental, absolute, statutory, qualified, and/or qualified official immunity. We decline to address this argument since the trial court did not reach these claims because, as is apparent from the record, the trial court dismissed on other grounds.

We are a court of review and ordinarily will only review issues initially decided by the lower court. *See Fischer v. Fischer*, 197 S.W.3d 98 (Ky. 2006). Moreover, we disagree with Appellees' assertions that the trial court ruled on these issues by stating that there were "jurisdictional issues." It is apparent that the trial court found that it did not have jurisdiction to consider the issues raised, not that it was ruling on the merits of the Appellees' governmental immunity defense. Thus, we cannot agree with Appellees that the trial court ruled on the governmental immunity issue presented by the Appellees. Accordingly, we

decline to address these issues further. We now turn to the fourth issue presented by the parties, namely, the common law claims of the Appellants.

The fourth and last issue presented by the parties is whether the trial court erred in dismissing the common law claims of Appellants, including trespass and defamation. Appellants alleged that Sipple made defamatory statements at the State Review Board meeting, and that Zeoli and possibly others entered Appellants' property without permission in order to survey the property and take photographs while pursuing the nomination. The Appellants correctly state that the trial court's order of November 3, 2009, dismissing the action against all Appellees does not mention the Appellants' common law claims of defamation and trespass. Regardless, the effect of dismissing the case did, in fact, dismiss these common law claims and we agree with the Appellants that the trial court erred in dismissing them without full and complete discovery.

Wherefore, we reverse the circuit court's order of November 3, 2009, and remand for appropriate discovery and proceedings.

ALL CONCUR.

ENTERED: January 11, 2013

/s/ Michael O. Caperton
JUDGE, COURT OF APPEALS

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