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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002041-MR

MASONIC HOMES OF KENTUCKY, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 11-CI-000009

LOUISVILLE METRO PLANNING COMMISSION;
PEGASUS TOWER COMPANY, LLC; AND
VILLAGE MANOR PARTNERS, LTD

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: The Louisville Metro Planning Commission (“the

Commission”) approved the application of Pegasus Tower Company, Ltd.

(“Pegasus Ltd.”), to construct a cellular communications tower on a tract of land

adjacent to property owned by Appellant, Masonic Homes of Kentucky, Inc.

(“Masonic”). Masonic sought judicial review in Jefferson Circuit Court, and the court affirmed the Commission's decision and dismissed the appeal. Masonic now appeals the order of the Jefferson Circuit Court. Finding no error, we affirm.

In August 2010, Pegasus Ltd. (the predecessor in interest to Appellee Pegasus Tower Company, LLC (“Pegasus LLC”)) initiated the application process with the Commission for approval to construct a 152.5-foot monopole cellular tower at 105 Fenley Avenue in Louisville, Kentucky. Pegasus Ltd. planned to build the tower on a tract of land leased from Appellee, Village Manor Partners, Ltd. The Masonic property is located on the eastern border of the tract.

Kentucky Revised Statutes (KRS) 100.987 vests the Commission with the authority to plan for and regulate the placement of cellular antenna towers within the geographic boundaries of the Louisville Metro government. The statute provides, in relevant part:

(2) Every utility or a company that is engaged in the business of providing the required infrastructure to a utility that proposes to construct an antenna tower for cellular telecommunications services or personal communications services within the jurisdiction of a planning unit that has adopted planning and zoning regulations in accordance with this chapter shall:

(a) Submit a copy of the applicant's completed uniform application to the planning commission of the affected planning unit to construct an antenna tower for cellular or personal telecommunications services. The uniform application shall include a grid map that shows the location of all existing cellular antenna towers and that indicates the general position of proposed construction sites for

new cellular antenna towers within an area that includes:

1. All of the planning unit's jurisdiction; and
2. A one-half (1/2) mile area outside of the boundaries of the planning unit's jurisdiction, if that area contains either existing or proposed construction sites for cellular antenna towers;

(b) Include in any contract with an owner of property upon which a cellular antenna tower is to be constructed, a provision that specifies, in the case of abandonment, a method that the utility will follow in dismantling and removing a cellular antenna tower, including a timetable for removal; and

(c) Comply with any local ordinances concerning land use

. . . .

(4) After an applicant's submission of the uniform application to construct a cellular antenna tower, the planning commission shall:

(a) Review the uniform application in light of its agreement with the comprehensive plan and locally adopted zoning regulations;

(b) Make its final decision to approve or disapprove the uniform application; and

(c) Advise the applicant in writing of its final decision within sixty (60) days

Pegasus Ltd.'s application came before the Commission for a public hearing on December 2, 2010. Pegasus Ltd. presented expert testimony and written evidence to support its position that its proposal was in conformity with the

comprehensive plan and locally adopted zoning regulations. The Commission also heard testimony from concerned citizens, including Masonic, opposing the tower's location. At the conclusion of the hearing, the Commission approved Pegasus Ltd.'s application.

Masonic appealed to the circuit court, alleging that the Commission acted outside of its statutory authority by granting the application and that the decision was not supported by substantial evidence. In March 2011, the court granted a motion by Pegasus Ltd. to substitute its successor corporation and real party in interest, Pegasus LLC, as the named Appellee.

Masonic argued that Pegasus Ltd. did not have standing to apply for a construction permit because it was not "in the business of" constructing cell phone towers; consequently, the Commission exceeded its statutory authority by approving the application. Masonic challenged Pegasus Ltd.'s standing for the first time in the circuit court, asserting that Pegasus Ltd. had ceased its business operations on August 20, 2010, when it transferred its assets to a new business entity, Pegasus LLC; thereafter, Pegasus Ltd. also withdrew its registration as a foreign corporation with the Kentucky Secretary of State.¹ Masonic alternatively contended that the evidence failed to establish that the location was the best available site for the tower and that the Commission failed to require Pegasus Ltd. to reach an agreement with the historic preservation office. In October 2011, the court rendered an opinion and order affirming the Commission's decision and

¹ We note the record includes a detailed recitation of the corporate restructuring of Pegasus Ltd., and its ultimate conversion to Pegasus LLC, a Virginia corporation.

dismissing Masonic's appeal. The court relied on *Harrison v. Leach*, 323 S.W.3d 702 (Ky. 2010), to conclude that Masonic had waived any challenge to Pegasus Ltd.'s standing by failing to raise it at the administrative level. The court also found that the Commission's decision was supported by substantial evidence. This appeal followed.

Judicial review of an administrative decision is concerned with whether the action of the agency was arbitrary. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). Three grounds exist for finding that an agency's decision was arbitrary: (1) the agency acted in excess of its statutory powers, (2) the agency did not afford procedural due process, and (3) the agency's decision was not supported by substantial evidence. *Id.*

Masonic argues here, as it did below, that the Commission exceeded its statutory authority and that the decision was not supported by substantial evidence. First, Masonic asserts that Pegasus Ltd. did not have standing to pursue the tower application and that the trial court erred by concluding Masonic's objection to standing was untimely and therefore waived. Masonic contends *Harrison, supra*, is distinguishable because the facts of this case involve the limited jurisdiction of an administrative agency.

In *Harrison, supra*, the Kentucky Supreme Court concluded "that lack of standing is a defense which must be timely raised or else will be deemed waived." *Harrison*, 323 S.W.3d at 708. The Court explained that, while subject-matter

jurisdiction cannot be waived, standing is a separate and distinct concept. *Id.* at 705-06. The Court pointed out that “[t]he key difference is that subject-matter jurisdiction involves a court's ability to hear a type of case while standing involves a party's ability to bring a specific case.” *Id.* at 705. Recently, in *Daugherty v. Telek*, 366 S.W.3d 463, 467 (Ky. 2012), the Court reiterated the principles of *Harrison*:

Once filed, a court has subject matter jurisdiction of the case so long as the pleadings reveal that it is the kind of case assigned to that court by a statute or constitutional provision. A court, once vested with subject matter jurisdiction over a case, does not suddenly lose subject matter jurisdiction by misconstruing or erroneously overlooking a statute or rule governing the litigation.

We acknowledge Masonic’s concern that an agency’s jurisdiction is limited to the authority delegated to it by the legislature. *Custard Ins. Adjusters, Inc. v. Aldridge*, 57 S.W.3d 284, 287 (Ky. 2001). However, we are not persuaded that an agency’s limited jurisdiction renders the principles of *Harrison* inapplicable to administrative procedure. KRS 100.987 specifically vests the Commission with subject-matter jurisdiction to regulate the placement of cellular towers within the boundaries of metropolitan Louisville; consequently, we conclude *Harrison* applies to the Commission’s exercise of its statutory jurisdiction. The question of standing, as opposed to subject-matter jurisdiction, “focuses more narrowly on whether a particular party has the legally cognizable ability to bring a particular suit.” *Harrison*, 323 S.W.3d at 706. Whether Pegasus, Ltd. was able to bring its

application before the Commission constituted a question of standing. It is undisputed that Masonic failed to object to Pegasus Ltd.'s standing at the administrative level. As noted in *Harrison, supra*, "an opposing party may waive any question regarding another party's inability to bring a particular action under particular facts." *Id.* at 707. After careful review, we agree with the trial court that Masonic waived the issue of standing by failing to raise the issue at the administrative level.

Furthermore, assuming *arguendo* that Pegasus Ltd.'s application was defective, we find no merit in Masonic's alternative argument that the Commission lost subject-matter jurisdiction over the *kind* of case that KRS 100.987 empowers it to adjudicate. See *Daugherty*, 366 S.W.3d at 467. "[O]ne party's inability to seek a judicial determination of a particular matter (*i.e.*, a lack of standing) does not mean that a court itself lacks subject-matter jurisdiction." *Harrison*, 323 S.W.3d at 706. We find this reasoning persuasive and applicable in the realm of administrative procedure. The alleged defect cited by Masonic did not divest the Commission of its statutorily authorized subject-matter jurisdiction to regulate cellular tower placement. Quite simply, the Commission attempted to follow the statutory procedures and guarantee due process, even if the applicant was not the real party in interest due to corporate reorganization. *Cf. Com. ex rel. Meredith v. Frost*, 172 S.W.2d 905, 909 (Ky. 1943) (matter of agency discretion to determine whether a claimant meets statutory requirements). In sum, there were no jurisdictional defects; accordingly, we are satisfied the Commission's action

substantially complied with the statutory requirements. *See City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990) (substantial compliance can remedy non-jurisdictional defects).

Masonic also contends the Commission's decision was not supported by substantial evidence. Masonic specifically asserts that the evidence failed to establish that the location was the best available site for the tower and that the Commission failed to require Pegasus Ltd. to reach an agreement with the historic preservation office.

When an agency's decision is supported by substantial evidence, it is not arbitrary and cannot be disturbed on judicial review. *Starks v. Kentucky Health Facilities*, 684 S.W.2d 5, 6-7 (Ky. App. 1984). Substantial evidence has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). A reviewing court is not entitled to substitute its judgment for that of the agency on issues of witness credibility and evidentiary weight. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 309 (Ky. 1972).

We agree with the findings of the trial court regarding the sufficiency of the evidence; accordingly, we recite the lower court's well-reasoned opinion as follows:

[Masonic]'s arguments as to the tower's location fall flat in light of the substantial evidence that the tower's visual impact on surrounding properties would be

minimal in the proposed location. The proposed site is adjacent to a commercial complex and is surrounded by above ground utilities, raised railroad tracks and billboards. Relocating the tower would serve only to inconvenience an alternative group of individuals. The expert testimony, including a radio frequency engineer and real estate appraiser, as well as the related exhibits provided the Commission with significant evidence upon which to determine that the proposed location was a suitable site in regard to both visual impact and usefulness. No other, more preferable sites have been shown to be available to minimize the tower's impact, yet maintain its necessary functionality. The Commission recognized that moving the tower further back on the property raised the likelihood of requiring multiple smaller towers, which the Commission viewed as a much more detrimental alternative. Against significant expert testimony, [Masonic] offered only the lay opinions of local residents and other interested individuals. The opinions largely attack the tower's lack of visual appeal. Such evidence is insufficient to rebut the plethora of detailed evidence presented by Pegasus, LTD. See, e.g., *Cellco Partnership v. Franklin County, Ky.*, 553 F.Supp.2d 838, 852 (E. D. Ky. 2008). In basing its decision on substantial evidence, the Commission was not required to follow the recommendations iterated in the Staff Report, or even to consider all of the issues raised.

Finally, [Masonic] has not cited to any authority that empowers the Commission to require or impose as a condition, an applicant enter into an agreement with an uninvolved third party, such as the State Historic Preservation Office. The Commission must simply approve or disapprove the application; it may not subject approval to such conditions. KRS § 100.987(4)(a)-(c). The Commission may only make suggestions or require a tower to be co-located. KRS § 100.987(5), (6). Pegasus, LTD. submitted substantial evidence that no other suitable locations for the tower existed, including no available utilities within which to co-locate the tower and no high rise buildings on which to place the tower. [Masonic]'s contentions as to the tower's affect on the

surrounding historic properties are therefore to no avail. While [Masonic] may believe that the tower should be located in an alternative location, mere opinion is insufficient to rebut the substantial evidence in the record. The Commission ensured that Pegasus, LTD. would construct the tower in a location that it would be best obscured by the surrounding trees, wires and billboards. It additionally established that additional landscaping and a visually appealing fence would be installed to further obscure the ground level appearance.

After reviewing the record, it is clear the Commission's decision was supported by substantial evidence. Although Masonic presented evidence opposing the tower, Pegasus Ltd. presented a variety of evidence to show that its application was in agreement with the objectives of the comprehensive plan and local zoning regulations. KRS 100.987(4)(a). Given the amount of evidence supporting the Commission's action, we can find no error with the circuit court's decision to affirm.

For the reasons stated herein, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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