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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002191-MR

THOMAS R. YOCUM — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 10-CI-01419

THE LEGISLATIVE BODY OF THE CITY OF FORT THOMAS, A/K/A THE CITY COUNCIL OF THE CITY OF FORT THOMAS, A/K/A THE FORT THOMAS BOARD OF COUNCIL; PLANNING COMMISSION OF THE CITY OF FT. THOMAS; CITY OF FT. THOMAS; SANITATION DISTRICT NO. 1; JAMES A. DOEPKER, II; AND CANDACE DOEPKER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Campbell Circuit Court's order denying the Appellant, Thomas R. Yocum's, zoning appeal and the granting of partial summary judgment on the issue of the constitutionality of Kentucky Revised Statute ("KRS") 100.212 and Zoning Ordinance Section 17.2 ("Ordinance 17.2") of the City of Fort Thomas.

Based upon the following, we will affirm the decision of the circuit court.

DISCUSSION

This case began with James and Candace Doepker's action to have property they owned at 40 Walden Lane in Fort Thomas, Kentucky ("Lot 9") rezoned. Lot 9 was originally zoned Residential 1-AA, and they petitioned the Fort Thomas Planning Commission ("Commission") to rezone it to Residential 1-A, which would allow them to subdivide their property and build a second residence on it.

Fort Thomas City Attorney Jann Seidenfaden conducted an investigation of the ownership records of the property and, although Yocum's name was not included in the records of the Property Valuation Administrator to receive notice, Seidenfaden added Yocum to the list of persons who were entitled to receive notice about the action. In June of 2010, Yocum received notice that the Commission would hold a public hearing on the issue of the rezoning of Lot 9 on June 16, 2010.

Yocum's property was wooded and contained a pond that was used for fishing, and he was concerned that the building of a second residence on the Doepkers' property would have an adverse affect on his use of his property. Consequently, he objected both orally and through written communications to the rezoning of the property.

The Commission unanimously approved recommending the zoning change and the City Council of Fort Thomas ("City Council") took up the matter at their regular meeting in August of 2010. Yocum requested that he be allowed to attend the meeting; however, he was not permitted to present evidence.

KRS 100.212 allows for a fourteen- (14) day notice requirement prior to a hearing. Ordinance 17.2 provides the same. Yocum contends that it would have taken him two full months to prepare his case against the zoning change and that, consequently, he was not afforded due process in being allowed only thirteen- (13) days' notice. The circuit court granted the Appellees' partial summary judgment on Yocum's request for a declaratory judgment that Ordinance 17.2 and KRS 100.212 are unconstitutional. Yocum then brought this appeal on both issues.

STANDARD OF REVIEW

When reviewing a zoning change, a court's function is only to determine whether the action was arbitrary, since such actions are "the responsibility and function of the legislative branch of the government . . . ." *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005). *See also American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964). *Hilltop* also provided that, in determining whether an action was arbitrary, we must determine:

> 1) Whether the action was in excess of the granted powers;
>
> 2) Whether the affected parties were afforded due process; and
>
> 3) Whether the determinations made were supported by substantial evidence.

Yocum contends that he was not afforded due process due to the fourteen-(14) day notice he received and that the determinations made were not based on substantial evidence.

The constitutionality of a statute is a matter of law and, therefore, subject to *de novo* review. *God's Center Foundation, Inc. v. Lexington Fayette Urban County Government*, 125 S.W.3d 295, 300 (Ky. App. 2002).

DISCUSSION

KRS 100.213(1) provides that "[b]efore 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 . . . ." Ordinance 17.1(A) contains identical language. It also requires that "such findings shall be recorded in the minutes and records of the Planning Commission and the Board of Council." In his appeal, Yocum argues first that the circuit court erred in denying his zoning appeal. He contends that changing the zone to permit subdividing Lot 9 is not in agreement with the Comprehensive Plan because it does not follow established patterns.

Yocum points to the Findings of Facts and Resolution No. Z-01-10 from the June 16, 2010, hearing before the Commission which states that:

> The proposed map amendment is consistent with the Comprehensive Plan and specifically the Land Use Plan Element provision that recommends future growth take place in a manner similar to established patterns.
>
> The City Council made the following findings of fact:
>
> (1) That the proposed zone change is consistent with the 2005 Comprehensive Plan Land Use Element and specifically the provision on page 83 that recommends that "future growth should take place in a manner similar to the established patterns." Existing properties north and west of 40 Walden Lane are developed on smaller lots than proposed by the applicant and classified as low density residential in the Comprehensive Plan.
>
> (2) That the proposed zone change is consistent with the 2005 Comprehensive Plan Goals and Objectives regarding Quality of Life and Housing/Residential

> Development. These provisions encourage new housing to maintain and enhance the city as a desirable place to live and to maintain the historically high quality character of the community. This proposal meets these provisions since it will be subject to the protective covenants and restrictions of the Walden Estates Subdivision controlling design and minimum size of the home.
>
> (3) That the proposed zone change is consistent with the 2005 Comprehensive Plan Existing Conditions Element that recognizes that Ft. Thomas is a landlocked community with a need to expand its population base and to expect scattered infill development. The proposed zone change will allow an additional infill single family home to be constructed and therefore, is consistent with this language of the Comprehensive Plan.
>
> (4) That the proposed zone change is consistent with the 2005 Comprehensive Plan provisions providing guidance for hillside development. The Comprehensive Plan does not prohibit development in designated Hillside/Greenbelt areas but recommends that development be sensitive to the special requirements of such development. The proponents pointed to other development in the city on sensitive hillsides that were done successfully and in compliance with hillside development controls of the Zoning Ordinance. Geotechnical exploration has been completed for the original development of the subdivision and the conditions of the proposed site are similar to the surrounding area.

Regardless of these findings, Yocum contends that there is not substantial evidence that the Comprehensive Plan was complied with in making the zoning change. Specifically, Yocum contends that subdividing Lot 9 is not in agreement with low density requirements provided in the Comprehensive Plan. The "Slope and Density Analysis" within the plan provides:

> This technique provides for decreasing densities as slope increases. The zoning techniques for achieving this are relatively straightforward and include establishing minimum lot sizes for steep slopes, requiring a high percentage of the sloped lot to remain undeveloped and reducing the number of allowable dwellings units (reducing densities). . . . Slope and density analysis may well be the most effective hillside management technique for Fort Thomas.

Yocum contends that rezoning Lot 9 to permit it to be subdivided would not be within this specific provision of the Comprehensive Plan because the Plan contemplates decreasing densities as the slope increases and further subdivision of a lot on a 40-percent slope would not further this goal.

The Appellees, however, point to the 2005 Comprehensive Plan notes which state that: "The 'physically restricted' lands in the 1994 plan (land with slope percentage greater than 20%) were renamed 'Hillside/Greenbelt' lands in 1999 to eliminate the notion that these areas cannot be redeveloped. . . ."

It further provides:

> In Fort Thomas, a mature community where readily available land for development has been depleted, most recent residential development has been on steep slopes and otherwise constrained areas. This trend is expected to continue as home sites become increasingly fewer and the development of engineering solutions to hillside construction enters the marketplace. Rather than simply permitting or not permitting hillside development in areas with slopes greater than a specific amount, Fort Thomas should seek to balance the benefits and risks of hillside development. . . .

We agree with the Appellees that, under the Comprehensive Plan, hillside developments were permitted and that the Commission's decision to recommend such in the rezoning of Lot 9 was based upon substantial evidence. Thus, we affirm the decision of the circuit court upholding the rezoning decision.

Yocum also contends that the rezoning of Lot 9 should not be allowed since it would cause the lot to be smaller than the lots which surround it. The Appellees, however, point to the fact that one of the properties directly across the street is smaller than the Lot 9 size after the rezoning. Also, they point to evidence before the Commission that most of the other parcels of land in the area are either similar to or smaller than the size of Lot 9 after it is subdivided. Thus, Yocum's argument on this issue fails as well.

Yocum next contends that he was not afforded due process in appearing before the Planning Commission due to the fourteen- (14) day window set forth in KRS 100.212(2) and Ordinance 17.2. He contends that the statute and ordinance are unconstitutional since this time period does not afford due process.

KRS 100.212(2) provides, in relevant part, as follows:

> Notice of the hearing shall be given at least fourteen (14) days in advance of the hearing by first-class mail, with certification by the commission secretary or other officer of the planning commission that the notice was mailed to an owner of every parcel of property adjoining the property the classification of which is proposed to be changed. It shall be the duty of the person or persons

> proposing the map amendment to furnish to the planning commission the names and addresses of the owners of all adjoining property. Records maintained by the property valuation administrator may be relied upon conclusively to determine the identity and address of the owner.

In interpreting the constitutionality of a statute, we are "obligated to give it, if possible, an interpretation which upholds its constitutional validity." *American Trucking Ass'n, Inc. v. Commonwealth, Transp. Cab*. 676 S.W.2d 785, 789 (Ky. 1984). A statute is constitutional unless there is a "clear, complete, and unmistakable . . . ." reason to find the law unconstitutional. *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 499 (Ky. 1998).

Due process requires that one be afforded "the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976). "[D]ue process is always had when a party has sufficient notice and opportunity to make his defense." *Somsen v. Sanitation Dist. No. 1 of Jefferson County*, 303 Ky. 284, 197 S.W. 2d 410, 411 (1946).

In *City of Louisville v. McDonald*, 470 S.W.2d 173, 179 (Ky. 1971), the Kentucky Supreme Court held that "[i]f the zoning commission conducts a trial-type due process hearing and based thereon makes factual findings and a recommendation, the legislative body may follow the commission's recommendation without a hearing or only an argument-type hearing."

Yocum contends that he was not given a meaningful opportunity to be heard in that he was not given sufficient time to prepare for the Commission meeting

under KRS 100.212 and that the City Council refused to consider any evidence, legal arguments, or anything else of a substantive nature on the merits as to why the recommendation of the Commission should not be approved.

Appellees contend, however, that the fourteen- (14) day requirement is not for adjoining homeowners. Yocum did appear at the hearing before the Commission and presented evidence. He did not ask for additional time to prepare. While he was denied the opportunity to present additional evidence before the City Council, there is no requirement that he be allowed to do so. In fact, the City Council could have simply followed the Commission's recommendation without a hearing. *See Resource Development Corp. v. Campbell County Fiscal Court*, 543 S.W.2d 225, 227 (Ky. 1976).

The Appellees point to the fact that since Yocum was provided a meaningful opportunity to be heard before the Planning Commission, he cannot establish that the statute and ordinance are violative of his right to due process. We agree. As set forth above, Yocum was given a meaningful opportunity to be heard as due process would require even though he was an adjoining landowner.

We agree with the circuit court that the statute and ordinance are constitutional. Thus, we affirm the granting of partial summary judgment and the circuit court's decision to uphold the rezoning of Lot 9.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEES, CITY OF FORT THOMAS, THE FORT THOMAS BOARD OF COUNCIL, AND THE PLANNING COMMISSION OF FORT THOMAS:

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BRIEF AND ORAL ARGUMENT FOR APPELLEES, JAMES A. DOEPKER, II, AND CANDACE DOEPKER:

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