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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000990-MR

ALLEN COMPANY, INC.,
A KENTUCKY CORPORATION APPELLANT

v.
APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 09-CI-00168

LINCOLN COUNTY FISCAL COURT;
DAVIS FAULKNER, JIM ADAMS,
JOHNNIE PADGET, TERRY WILCHER,
AS MEMBERS OF THE LINCOLN COUNTY
FISCAL COURT; R.W. GILBERT,
AS LINCOLN COUNTY JUDGE EXECUTIVE;
AND LINCOLN COUNTY/CEDAR CREEK
PLANNING AND ZONING COMMISSION APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

ACREE, CHIEF JUDGE: Appellant, Allen Company, Inc., appeals from the December 14, 2011 order of the Lincoln Circuit Court affirming the Lincoln County Fiscal Court's decision, contrary to the recommendations of the county planning and zoning commission, to deny a zone map amendment. Allen Company claims it was error for the circuit court to conclude the fiscal court did not act arbitrarily and that Allen Company was afforded adequate due process. Finding no error, we affirm.

I. Facts and Procedure

The real property at issue consists of 12.271 acres of land in the Waynesburg Community of Lincoln County. It is situated between U.S. Highway 27 and KY Highway 1247; access to the property occurs from U.S. 27. The property had been used in the past as a gas station and convenience store. Use of the property in this manner ceased and the property sat idle for some time.

In 2005, the fiscal court adopted a zoning ordinance for all of the unincorporated areas of Lincoln County along with a Future Land Use Map. Under that ordinance, the property was, and currently is, zoned A-1 (Agricultural). However, a building, underground fuel storage tanks, a canopy, and a parking area remain on the property.

Allen Company purchased the property in 2008. It intended to operate an asphalt manufacturing plant on the land. In October 2008, Allen Company filed an application with the Lincoln County/Cedar Creek Planning and

Zoning Commission seeking a zone map amendment from agricultural to light industrial.

The zoning commission conducted trial-type hearings on November 4, 2008, and January 6, 2009. Statutorily required notice of the hearings was given.[1] At the hearings, the following evidence was developed, as stated in the zoning commission's finding of fact:

> The evidence presented came from Alan Holt and Merle Clark. They expressed how the Allen Company has purchased said property and desire to use this property as a blacktopping plant that would create six-eight jobs. Mr. Clark explained how this property has been used for commercial purposes for the past several years as a gas station/store. He went on [to] explain how the size of the tract would not be logical to use for an agricultural purpose even though it is shown on the Future Land Use Map as agricultural.
>
> A plat showing the entire property owned by [Allen Company] was submitted. Also, submitted were a Development Plan, Traffic Impact Study, Phase 1 Environmental Site Study and Drainage Calculations. Mr. Clark went on to explain how the preexisting trees and additional screening would be used to offset the view from US HWY 27 and KY HWY 1247. Alan Bowman – County Engineer was present and approved the Development Plan and Drainage Plan.
> There were adjoining property owners or property owners in the vicinity present to voice concerns regarding this request. Concerns of possible increase in traffic, odors, increase in noise, possible groundwater contamination and concerns of lowered property values were discussed. The fact that there is a junkyard in the vicinity was also discussed.

[1] Kentucky Revised Statutes (KRS) 100.212 requires notice of a hearing scheduled on a proposal by a property owner to amend any zoning map be given at least fourteen days in advance of the hearing.

. . . .

> The property is adjacent to a large automobile salvage yard and automobile service garage on the east. The property contains no barns or farm buildings of any kind and has little, if any, crop or pasture land. On the north and south sides of the property there are significant groves of trees which offer substantial natural screening[.] The property has a commercial building on it with a canopy and gas tanks left from the former gas service station. The [Allen Company] submitted that the small acreage, with no farm improvements or significant crop land or pasture was unsuitable or unfeasible for economic viability for agricultural use. The [Allen Company] also submitted that there are existing businesses or commercial use in the area along the busy US 27 Highway, and that the proposed use is compatible with the character of the land use in the area, particularly the large salvage yard to the east. The facility will provide needed material for this portion of Lincoln County and the layout of the facility will be sufficiently screened by being located within the central part of the white pine trees screening the entire boundary along Kentucky Highway 1247. There will be no access to Kentucky Highway 1247 and only the existing entrances on US 27 will be used.

Based on this evidence and in accordance with Kentucky Revised Statutes (KRS) 100.213(1), the zoning commission found the existing A-1 agricultural zone classification was inappropriate or improper, and the proposed classification of light industrial was appropriate. To support its conclusion, the zoning commission pointed to the characteristics of the land, its location between two roads, and that it had been used previously for commercial uses. The zoning commission unanimously recommended the amendment be granted.

The zoning commission's recommendation, and the record of the proceedings before it, was forwarded to the fiscal court. The fiscal court also elected to have a trial-type public hearing, which was held on February 19, 2009. Statutorily required public notice of the hearing was given. The evidence submitted to the fiscal court appears to be substantially similar to that presented to the zoning commission. Notably, the circuit court found, and the parties do not dispute, what the fiscal court minutes of the February 19, 2009 meeting disclose, namely:

> Allan Holt (presumably an Allen Company employee) presented videos of the asphalt manufacturing process, what the paving projects would entail, and the necessity of community support. Counsel for the Allen Company also made a presentation involving the advantages to the Lincoln County community which would occur if the zone map amendment were to be approved. The fiscal court viewed photographs of the proposed site, artist renditions of the proposed asphalt manufacturing plant, and heard discussions regarding projected tax revenues. The fiscal court also heard from local citizens who were present to voice their concerns.

Thereafter, on March 13, 2009, the fiscal court voted to deny the first reading of the zone change submitted by Allen Company. The fiscal court issued no independent findings of adjudicative fact and took no further action on Allen Company's amendment application.

Displeased, Allen Company appealed to the Lincoln Circuit Court. The fiscal court responded in opposition. Relying on *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971), the circuit court found that the fiscal court acted

arbitrarily when it rejected the recommendation of the zoning commission making no adjudicative findings. The circuit court directed the fiscal court to take one of the following actions: (i) follow the recommendations of the zoning commission; (ii) review the record made before the zoning commission and make its own findings of adjudicative facts from that record; or (iii) hold its own trial-like hearing and make findings of adjudicative fact.

Upon remand, on April 24, 2010, the fiscal court rendered the following factual findings:

> 1. The area is primarily a residential and agricultural area, and there have been no changes to the primary use of the area since the adoption of the zoning ordinance.
>
> 2. That a change to industrial as requested could result in this area becoming more developed as an industrial area, as other applicants could use this change in seeking industrial zoning for other properties.
>
> 3. While the property does have a commercial building located on it, it has never been used as an industrial property, and while a change to commercial might be appropriate, there is no justification for a change to industrial.
> 4. That with a change to industrial and the proposed use of the property for an asphalt plant there will be chemicals introduced into the community that are hazardous or could be hazardous to persons living in a residential or agricultural community.
>
> 5. That there will be an adverse impact to traffic along the existing US 27 in that there will be a number of large trucks entering and exiting the highway during the operating hours of the proposed asphalt plant, and US 27 is already a congested highway and the introduction of more traffic, especially in the form of large trucks will

only result in more congestion and a negative impact on the flow of traffic along US 27.

Upon consideration of these facts, the fiscal court concluded: (i) the zone change requested by Allen Company does not comport with the adopted comprehensive plan or the Future Land Use Map; (ii) there has not been a sufficient change in the character of the area to justify the change; and (iii) while the existing zone classification (agricultural) may not be the most appropriate, the proposed zone change (light industrial) is less appropriate.

Allen Company took the matter back to the circuit court. By opinion and order entered December 14, 2011, the circuit court concluded the fiscal court's actions on remand were not arbitrary and satisfied due process.[2] Allen Company appeals from this order.

II. <u>Standard of Review</u>

Judicial review of a zoning decision focuses on arbitrariness. *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982). "Arbitrariness review is limited to the consideration of three basic questions: (1) whether an action was taken in excess of granted powers, (2) whether affected parties were afforded procedural due process, and (3) whether determinations are supported by substantial evidentiary support." *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005). Here, only the latter two are at issue.

[2] The tedium attendant to such administrative adjudications as this, unfortunately, has the propensity to lull lesser jurists into a somnambulistic analysis. Not so in this case. We commend the circuit court for its well-reasoned and thorough opinions.

III. Discussion

Allen Company adamantly takes issue with the manner in which the fiscal court reached its decision to deny the zone map amendment. It argues the fiscal court issued no adequate findings of adjudicative facts based upon substantial evidence from an identifiable record the fiscal court actually reviewed. Before turning to the specific arguments raised by Allen Company, we must discuss the controlling statutes and duties of the fiscal court.

All zoning must adhere to a comprehensive plan properly promulgated by the local planning and zoning commission. *Fritz v. Lexington-Fayette Urban County Gov't*, 986 S.W.2d 456, 458 (Ky. App. 1998). The comprehensive plan "serves as a guide for public and private development in the most appropriate manner." *Warren County Citizens for Managed Growth, Inc. v. Bd. of Com'rs of City of Bowling Green*, 207 S.W.3d 7, 14-15 (Ky. App. 2006). As its name implies, the comprehensive plan is designed to be all-encompassing, attending to not only current but future land uses. *See id*. at 15. Subsequent zoning amendments are limited. A property owner may only be granted a zone change if the amendment is "in accordance with the comprehensive plan" or, absent such a finding, the plan itself "is out of touch with reality, and there is a compelling need for the proposed change." *Fritz*, 986 S.W.2d at 458 (internal citations omitted). KRS 100.213 directs:

> (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 100.213(1)(a), (b).

"[A] hearing held for the purpose of granting and denying a zone change is of an adjudicatory nature." *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982); *McDonald*, 470 S.W.2d at 178 (in rezoning matters, the local legislative body "is acting in an adjudicatory fashion to determine whether a particular individual by reason of particular facts peculiar to his property is entitled to some form of relief"). Accordingly, "a property owner seeking a zone map amendment is entitled to procedural due process." *McKinstry v. Wells*, 548 S.W.2d 169, 173 (Ky. App. 1977). The right to due process is a fundamental constitutional notion jealously protected and preserved by the judiciary. In the realm of zoning, procedural due process "has widely been understood to encompass 'a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a judicial

review of the administrative action.'" *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (citation omitted).

McDonald, supra, is particularly instructive as to the scope of procedural due process afforded a property owner and the public in rezoning matters. 470 S.W.2d at 179. The *McDonald* court found that "procedural due process requires at least that the local legislative body in rezoning matters act on the basis of a record and on the basis of substantial evidence." *Id.* at 178. In keeping with that sentiment, the *McDonald* court held that the legislative body has three alternatives if the "zoning commission conducts a trial-type due process hearing and based thereon makes factual findings" to support its recommendation. *Id.* at 179.

> First, the legislative body may follow the commission's recommendation without a hearing or only an argument-type hearing. Second, the legislative body may review the record made before the commission and determine from that evidence adjudicative facts which differ from those found by the commission. Third, the legislative body may hold its own trial-type hearing and, based upon the evidence presented at that hearing, find different adjudicative facts than those found by the commission

McKinstry, 548 S.W.2d at 173 (citing *McDonald*, 470 S.W.2d at 179).

With these fundamental principles in mind, we turn to the specific claims of errors raised by Allen Company.

Allen Company first takes issue with the adequacy of the fiscal court's record. It contends there is no record upon which the fiscal court based its findings. Allen Company faults the fiscal court for failing to indicate from what

record it derived its adjudicative facts. This contention is easily disposed of. When the fiscal court elected to hold its own trial-type hearing, it was then confined to the evidence produced during that hearing. *See McKinstry*, 548 S.W.2d at 173. In our view, the fiscal court could also review the evidence produced and record fashioned at the due process trial-type hearing before the zoning commission, provided that evidence and the record created was presented to the fiscal court. Of course, if the legislative body chooses not to conduct a trial-type hearing, it is limited to the evidence produced at the hearing before the zoning commission. *Resource Dev. Corp. v. Campbell County Fiscal Court*, 543 S.W.2d 225, 228 (Ky. 1976). The inverse inference, however, does not hold sway. Because the evidence presented to the zoning commission has already been tested during the trial-type hearing, due process concerns are assuaged. We find it perfectly proper for the legislative body to rely, at its discretion and only after holding its own trial-type hearing, on the record and evidence produced both before the zoning commission and before the legislative body.

Turning back to Allen Company's concern regarding the record relied upon by the fiscal court, we need only point out that the sole record from which the fiscal court could derive its adjudicative facts include: (i) the evidence presented during the trial-type hearing before the zoning commission; and (ii) the evidence

presented during the trial-type hearing before the fiscal court.[3] We find Allen Company's argument that no identifiable record exists to be without merit.

Allen Company next contends the fiscal court's adjudicative facts were merely conclusory statements not supported by the record or substantive evidence. Therefore, Allen Company maintains, those factual findings were arbitrary and legally inadequate. We disagree.

Kentucky jurisprudence makes clear that the legislative body's "findings of fact must be supported by the record." *Hays v. City of Winchester*, 495 S.W.2d 768 (Ky. 1973). We unequivocally uphold and continue to adhere to that long-standing principle. However, in *McDonald*, this Commonwealth's then-highest court made the following significant comment: "[W]hen the legislative decision is simply a refusal to rezone, the problem becomes whether or not the evidence shows a compelling need for the rezoning sought or clearly demonstrates that the existing zoning classification is no longer appropriate." 470 S.W.2d at 173. Our review, then, is not whether substantial evidence supports the fiscal court's decision, but whether the record compels a finding in Allen Company's favor. *Bourbon County Bd. of Adjustment v. Currans*, 873 S.W.2d 836, 838 (Ky. App. 1994) ("[T]he failure to grant administrative relief to one carrying the burden

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[3] We are not wholly without concern for the fact that there is an apparent lack of audio/video recording or transcription of the trial-type hearings before the zoning commission and fiscal court. While our statutory scheme does not require such a recording be made, it would assuredly add a degree of certainty to the evidentiary showing made. *See Gentry v. Ressnier*, 437 S.W.2d 756, 758 (Ky. 1969) ("As to the decisions of the [legislative] body, considerations of certainty demand a formal record. As to a transcript of evidence there normally would be no problem of certainty.").

is arbitrary if the record compels a contrary decision in light of substantial evidence therein.”). Evidence is compelling if it is so overwhelming that no reasonable person could fail to reach the same conclusion. *Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 108 (Ky. App. 2007) (citation omitted).

Here, the evidence is not so overwhelming that no reasonable person could reach the same conclusion as reached by the fiscal court, *i.e.*, the property’s existing agricultural zoning classification is inappropriate and the proposed light industrial classification appropriate, or considerable changes have occurred which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area, or both. The Future Land Use Map adopted by the zoning commission preserves this property for agricultural use. An aerial view of the area reveals a small residential community and numerous fields, groves of trees, and open land. Likewise, the Phase 1 Environmental Site Assessment submitted by Allen Company describes the surrounding area as undeveloped with residential and agricultural properties. While some *commercial* uses[4] are present in the vicinity, Allen Company has not submitted, and the record reveals, no *industrial* uses.

Contrary to Allen Company’s position, the presence of a nonconforming, commercial use on the property does not bolster its claim that the existing agricultural classification is inappropriate. In fact, the 2005 comprehensive zoning ordinance adopted by the zoning commission directly states, “[i]t is the intent of

[4] Example of these commercial uses included a junkyard, a salvage yard, and an automobile service facility.

this ordinance to permit nonconforming lots, structures and/or uses to continue until they are removed, ***but not to encourage their survival***." Furthermore, during both trial-type hearings, several citizens expressed concerns that the zoning amendment would decrease property values, possibly allow groundwater contamination, and adversely affect traffic, odors, and noise.

The circuit court recognized, as do we, that the evidence presented by Allen Company in favor of the zone map amendment was "plentiful and robust." Nevertheless, this Court must cautiously refrain from submitting its judgment for that of the fiscal court. *McDonald*, 470 S.W.2d at 179 (declaring impermissible appellate *de novo* review of a zoning amendment request). Following careful review, we simply cannot say the record *compels* a decision contrary to that made by the fiscal court. The fiscal court's decision was not arbitrary, and the circuit court properly affirmed its decision.

Finally, Allen Company argues the fiscal court failed to take valid action within the requisite time period identified in KRS 100.211(7). As a result, Allen Company proffers, the zoning commission's recommendation to grant the zone map amendment became final by operation of law. Again, we disagree.

KRS 100.211(7) directs the legislative body to take "final action upon a proposed zoning map amendment within ninety (90) days of the date upon which the planning commission takes its final action upon such proposal." Final action occurs "on the calendar date when the vote is taken to approve or disapprove the matter pending before the body." KRS 100.347(5). The purpose of these statutes

is to prevent the legislative body from sitting idly by, possibly suspending in perpetuity a property owner's zone change request. *Evangelical Lutheran Good Samaritan Soc., Inc. v. Albert Oil Co., Inc.*, 969 S.W.2d 691, 694 (Ky. 1998) ("KRS 100.211(7) was designed to prevent unnecessary delaying tactics when it established the 90 day limit."). Indeed, "unless a majority of the legislative body votes to override the recommendation, such recommendation shall become final and effective." *Nicholasville Road Neighborhood Consortium, Inc. v. Lexington-Fayette Urban County Gov't*, 994 S.W.2d 521, 523 (Ky. App. 1999).

Here, the fiscal court's actions comport fully with KRS 100.211(7). The zoning commission's recommendation became final on January 6, 2009. Sixty-six days later, on March 13, 2009, the fiscal court voted to deny the first reading of the zone change submitted by Allen Company. While perhaps a procedural anomaly, the ultimate effect of the fiscal court's resolution was to reject Allen Company's zone map amendment request. *City of Lyndon v. Proud*, 898 S.W.2d 534, 536 (Ky. App. 1995) (the "denial of a recommendation" to amend a zone map need not "be in any particular form"). Accordingly, we find this constitutes sufficient final action within the meaning of KRS 100.211(7). The circuit court's subsequent pronouncement that the fiscal court's action failed to comport with established principles of due process did not render *nunc pro tunc* the fiscal court's action untimely. Furthermore, the circuit court directed the fiscal court to act, upon remand, within forty-five days following entry of the circuit

court's order of March 17, 2010.[5] The fiscal court took prompt action, adopting adjudicative facts and conclusions based thereon on April 27, 2010. At no point did the fiscal court run afoul of KRS 100.211(7).

IV. <u>Conclusion</u>

We affirm the Lincoln Circuit Court's December 14, 2011 order affirming the Lincoln Fiscal Court's decision to deny the requested zone map amendment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Merle C. Clark
Danville, Kentucky

BRIEF FOR APPELLEE,
LINCOLN COUNTY FISCAL
COURT:
Daryl K. Day
Stanford, Kentucky

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[5] It was perfectly proper for the circuit court to direct the fiscal court to act within a practical, defined time period to uphold and further the rationale of KRS 100.211(7). *See McKinstry*, 548 S.W.2d at 175 ("In order that the parties may receive a final resolution of this matter, the circuit court may impose a reasonable time limit within which the fiscal court must act.").