

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000760-MR

BARREN RIVER AREA SAFE
SPACE, INC.; ROBERT C.
SIMPSON, JR.; H & L EDUCATIONAL
ENTERPRISES, LLC; AND
HOLLY FIELDS

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 12-CI-00998

CITY COMMISSION OF BOWLING
GREEN, KENTUCKY; CITY-COUNTY
PLANNING COMMISSION OF WARREN
COUNTY, KENTUCKY; WABUCK
DEVELOPMENT COMPANY, INC.; AND
FARMERS INVESTMENT COMPANY, INC.

APPELLEES

OPINION
VACATING AND REMANDING
WITH DIRECTIONS

** ** *

BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Barren River Area Safe Space, Inc., Robert C. Simpson, Jr., H & L Educational Enterprises, LLC; and Holly Fields (collectively referred to as appellants) bring this appeal from a March 29, 2013, order of the Warren Circuit Court affirming the decision of the City Commission of Bowling Green, Kentucky (City Commission) granting an application for zoning map amendment. We vacate and remand with directions.

This case involves a rezoning application in Warren County. Wabuck Development Company, Inc., held an option to purchase 6.09 acres of real property from Farmers Investment Company, Inc. The real property was located in Bowling Green and was zoned AG (agricultural) and HB (highway business). Wabuck sought to construct a men's residential substance recovery center (men's recovery center), which required rezoning of the property. Wabuck projected that about 40 percent of the residents at the men's recovery center would be either court referred or enrolled directly from a correctional facility. The men's recovery center would provide in-patient treatment to men suffering from substance abuse and alcohol dependency. Wabuck and Farmers filed an application for a zoning map amendment under the Comprehensive Plan to rezone the property from AG and HB to PUD (planned unit development).

The City-County Planning Commission of Warren County, Kentucky, (Planning Commission) conducted a hearing upon the proposed zoning change. During the hearing, the Planning Commission's attorney informed the commissioners that the residents at the men's recovery center were considered

“persons with disabilities” under Kentucky Revised Statutes (KRS) 100.982(1).

Thus, the attorney instructed the commissioners not to consider the identity or background information related to the individual residents to be housed at the recovery center. Also, during the hearing, many nearby property owners spoke in opposition to the zoning map amendment. In particular, Lee Alcott expressed her concerns; Alcott is the executive director of Barren River Area Safe Space (BRASS). She testified that BRASS runs a domestic violence shelter for women and children that was located approximately 1600 feet down the street from the planned development of the men’s recovery center. Alcott argued that the domestic violence shelter and the men’s recovery center should not be located so close together as their uses were inherently incompatible.

On April 19, 2012, the Planning Commission voted to grant the zoning map amendment and recommended rezoning the property to PUD. The matter was then heard by the City Commission upon the Planning Commission’s recommendation to rezone the property.

The City Commission considered Ordinance No. BG2012-16 to rezone the property to PUD at a meeting on June 5, 2012. During the meeting, the City Commission’s attorney “cautioned everyone to refrain from commenting about the particular use of the facility or the type of individuals that might use the facility to avoid any concerns with violating the rights of any protected classes.”¹ Thereafter, on June 19, 2012, the City Commission voted to approve the zoning map

¹ This quote was taken from the Minutes of Regular Meeting of the Board of Commissioners of the City of Bowling Green, Kentucky, held June 5, 2012.

amendment and passed the ordinance rezoning the property to PUD. Appellants then sought judicial review by filing an action in the Warren Circuit Court. KRS 100.347(3).

Before the circuit court, one contested issue involved whether the residents of the proposed men's recovery center were properly classified as persons with disabilities per KRS 100.982(1). Appellants argued that the City Commission committed an error of law by considering the residents as "persons with disabilities" under KRS 100.982(1). By so doing, appellants asserted that the commissioners erroneously believed they could not consider that the proposed men's recovery center would house men with substance abuse and/or alcohol dependency issues and who may have been previously incarcerated.

By order entered March 29, 2013, the circuit court interpreted KRS 100.982(1) as including the prospective residents of the men's recovery center as persons with disabilities. As the men's recovery center housed persons with disabilities, the circuit court concluded that the City Commission properly applied KRS 100.982(1) and KRS 100.984 and that substantial evidence supported the zoning map amendment. This appeal follows.

To begin, judicial review of an administrative action is limited and concerned with the question of arbitrariness. *Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964). We review the City Commission's decision for arbitrariness; relevant to this appeal is whether the City Commission properly interpreted and applied

KRS 100.982(1) as including the prospective residents of the men's recovery center as persons with disabilities under KRS 100.982(1). We observe that interpretation of a statute presents an issue of law, and our review proceeds *de novo*. *City of Worthington Hills v. Worthington Fire Protection Dist.*, 140 S.W.3d 584 (Ky. App. 2004).

KRS 100.982(1) reads:

“Person with a disability” means a person with a physical, emotional, or mental disability, including, but not limited to, an intellectual disability, cerebral palsy, epilepsy, autism, deafness or hard of hearing, sight impairments, and orthopedic impairments, but not including convicted felons or misdemeanants on probation or parole or receiving supervision or rehabilitation services as a result of their prior conviction, or mentally ill persons who have pled guilty but mentally ill to a crime or not guilty by reason of insanity to a crime. “Person with a disability” does not include persons with current, illegal use of or addiction to alcohol or any controlled substance as regulated under KRS Chapter 218A.

Of particular significance is the last sentence of KRS 100.982(1) which clearly provides that a person with disability does not include a person “with current, illegal use of or addiction to alcohol or any controlled substance.” In this sentence, the General Assembly's intent is clearly expressed. Individuals who have addictions to either alcohol or controlled substances are not to be considered persons with disabilities pursuant to KRS 100.982(1). Our review of the legislative history for this statute does not conflict with our interpretation of the legislature's intent on this issue.

In this case, the record plainly establishes that the residents at the men's recovery center would be at the center because of addictions to either alcohol or controlled substances. As the residents would necessarily have to suffer from such addictions, it is clear that the residents of the men's recovery center do not qualify as persons with disabilities under the plain language of KRS 100.982(1).

We recognize that the circuit court interpreted KRS 100.982(1) to include the residents as persons with disabilities. In so doing, the circuit court curiously utilized federal law in support thereof:

In accordance with the Kentucky Statute, the federal Equal Protection Statutes, and the Fair Housing Act, the City counsel's interpretation of the statute was not erroneous. The residents at the proposed facility do not have a "*current, illegal* use of or addiction to alcohol or any controlled substance;" rather, they are in recovery and, thus, considered under disability by law. KRS § 100.982. Under the Fair Housing Act and Federal Statutes, they are more clearly persons with a disability because they would be "participating in a supervised rehabilitation program." 42 U.S.C.A. § 12210.

We think the circuit court erred by utilizing federal law to interpret KRS 100.982(1) without either concluding that the statute was preempted by federal law or that the statute was unconstitutional under the United States Constitution. No such analysis or conclusions were made by the circuit court nor were they raised below. And, the circuit court's reasoning that the residents at the men's recovery center do not have a current "addiction" because they are in recovery is disingenuous. To qualify as a resident at the men's recovery center, the resident must necessarily have an addiction to either alcohol or controlled substances and

need inpatient treatment as a result thereof. Hence, we reject the circuit court's interpretation and application of KRS 100.982(1).

Therefore, we hold that the City Commission and the circuit court improperly considered the prospective residents of the men's recovery center as "persons with disabilities" under KRS 100.982(1) and, thus, failed to consider their situation in conjunction with the proposed rezoning. Accordingly, the City Commission misapplied KRS 100.984 when deciding the zoning map amendment. We view such error of law as arbitrary and as necessitating vacation of the City Commission's approval of the zoning map amendment through Ordinance No. BG2012-16. Upon remand, the City Commission shall reconsider the zoning map amendment in accordance with the Comprehensive Plan and shall not classify the residents of the recovery center as persons with disabilities under KRS 100.982(1). However, nothing in this Opinion should be interpreted or construed as approving or disapproving the merits of the proposed rezoning in accordance with the Comprehensive Plan.

We view any remaining allegations of error to be moot or without merit.

Accordingly, we vacate and remand to the circuit court with directions to remand this matter to the City Commission for reconsideration of the zoning map amendment as heretofore set forth.

For the foregoing reasons, the order of the Warren Circuit Court is vacated and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANTS:

Christopher T. Davenport
Bowling Green, Kentucky

JOINT BRIEF FOR CITY
COMMISSION OF BOWLING
GREEN, KENTUCKY:

H. Eugene Harmon
Bowling Green, Kentucky

JOINT BRIEF FOR CITY-COUNTY
PLANNING COMMISSION OF
WARREN COUNTY, KENTUCKY:

Frank Hampton Moore, Jr.
Matthew P. Cook
Bowling Green, Kentucky

ORAL ARGUMENT FOR CITY-
COUNTY PLANNING
COMMISSION OF WARREN
COUNTY, KENTUCKY:

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JOINT BRIEF AND ORAL
ARGUMENT FOR APPELLEE
WABUCK DEVELOPMENT
COMPANY, INC.:

David B. Vickery
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JOINT BRIEF FOR FARMERS
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Keith M. Carwell
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