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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001645-MR

SOUTHWEST CLARK NEIGHBORHOOD ASSOCIATION, INC.; MELANIE LEDFORD; MARK LEDFORD; REGENA CAMPBELL; ELIZABETH MERIDETH; STEPHEN GREEN; MICHAEL K. MAUFFREY; LEE ANN COTTRELL; THOMAS COTTRELL; DEBORAH GARRISON; GARY GARRISON; MARION SHEARER; DEBORAH JAE ALEXANDER; PAMELA ROUNDTREE; ADRIAN THOMAS; GENEVA FLANNERY; JOHN QUISENBERRY; CANDACE TOOLE; JOAN MAYER; BOB TABOR; JOHN M. FOX; ANGELA KELLY FOX; TOM LYKINS; M. CLARE SIPPLE; HARRY ENOCH; CRAIG STOTTS; MOLLY STOTTS; RUTHIE SKINNER; RANKIN SKINNER; BEN C. KAUFMANN; AND JANET ZUSMAN — APPELLANTS

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JUDGE
ACTION NO. 14-CI-00305

HENRY BRANHAM, JUDGE EXECUTIVE-CLARK COUNTY FISCAL COURT; RICK SMITH, COMMISSIONER, CLARK COUNTY FISCAL COURT; VANESSA OAKS ROGERS, COMMISSIONER, CLARK COUNTY FISCAL COURT; JOELLEN REED, COMMISSIONER, CLARK COUNTY FISCAL COURT; LARRY DISNEY, CHAIR, WINCHESTER-CLARK

COUNTY JOINT PLANNING COMMISSION;
GRAHAM JOHNS, VICE CHAIR, WINCHESTER-CLARK
COUNTY JOINT PLANNING COMMISSION;
STEVE BERRYMAN, MEMBER, WINCHESTER-CLARK
COUNTY JOINT PLANNING COMMISSION;
PAUL DEATON, MEMBER, WINCHESTER-CLARK
COUNTY JOINT PLANNING COMMISSION;
GLENN FARRIN, MEMBER, WINCHESTER-CLARK
COUNTY JOINT PLANNING COMMISSION;
BONNIE HUMMELL, MEMBER, WINCHESTER-CLARK
COUNTY JOINT PLANNING COMMISSION;
MARK POOLE, MEMBER, WINCHESTER-CLARK
COUNTY JOINT PLANNING COMMISSION;
A. DWAIN WHEELER; MEMBER, WINCHESTER-CLARK
COUNTY JOINT PLANNING COMMISSION;
THE ALLEN COMPANY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

JONES, JUDGE: Southwest Clark Neighborhood Association, Inc. ("Southwest") – along with 30 named individuals – appeals the Clark Circuit Court's September 23, 2015, order approving the adoption of the Clark County Fiscal Court's ordinance reclassifying zoning of approximately 165 acres of real property from A-1 (Agricultural) to I-2 (Heavy Industry). After a thorough review of the record, we affirm.

I. BACKGROUND

This zoning saga first began in July of 2013, when Appellee, The Allen Company, Inc. ("Allen"), applied for a zoning map amendment seeking to rezone approximately 103 acres of real property located at 7527 New Boonesboro Road, Clark County, from Agricultural to Heavy Industry in order to operate an *open-surface* aggregate mine on the land ("Application 103"). Following a due-process type hearing, the Clark County Kentucky Planning and Zoning Commission ("Planning Commission") recommended denying Application 103, as it found the application was not in agreement with the Clark County Comprehensive Plan ("Comprehensive Plan"). The Clark County Fiscal Court ("CCFC"), also an Appellee in this action, heard the matter on October 9, 2013, and officially denied Application 103.[1]

On November 5, 2013, the Planning Commission adopted the following bylaw:

> Any zoning map amendment that has been denied by the Planning Commission will not be reheard within 2 years from the time the Planning Commission has submitted, in writing, its recommendation to the legislative body unless:
> 1. There has been an update to the Comprehensive Plan, or
> 2. 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.

[1] The minutes from the Planning Commission's hearing regarding the July 2013 application, as well as the minutes from the CCFC October 9, 2013, meeting are not a part of the official record on appeal. However, as the July 2013 application is relevant to one of the issues raised on appeal, all parties have included information regarding it in their briefs.

("Article VIII") (emphasis added). This bylaw was enacted under the authorization of KRS[2] 100.213(2), which states: "The planning commission, legislative body, or fiscal court may adopt provisions which prohibit for a period of two (2) years, the reconsideration of a denied map amendment or the consideration of a map amendment identical to a denied map amendment."

Allen subsequently acquired six tracts of land adjacent to the 103-acre tract. In April of 2014, Allen filed a second application ("Application 165") with the Planning Commission. Application 165 included the 103-acre tract, along with the six newly acquired tracts (collectively, the "Property"), and again sought a zoning map amendment reclassifying the Property from A-1 to I-2. Along with Application 165, Allen submitted an affidavit, and later a substituted affidavit, signed by its secretary, Robert Beam, as well as a proposed development plan (the "Development Plan").[3] The affidavits stated that, if Application 165 was approved, Allen would only use the Property for an *underground quarrying operation* and other uses associated with underground quarrying. The affidavit further stated that the only surface use Allen would make of the Property would be in accordance with the Development Plan. Potential surface use included, but was not limited to, ventilation, parking, detention facilities, conveyor, utilities, and other safety facilities that the government may impose. In addition to delineating

[2] Kentucky Revised Statutes.

[3] The Winchester-Clark County Zoning Ordinance 8.63(a) requires that development plans accompany any zoning map amendment request.

the surface use of the Property, the Development Plan included a rendering of a conveyor belt over the Kentucky River, which Allen intended to use to transport mined limestone from the Property to its active quarry located in neighboring Madison County, Kentucky, for processing and shipment.

On May 6, 2014, the Planning Commission conducted a five-hour due-process type hearing on Application 165. Counsel for Allen and counsel for those in opposition to Application 165 were both present.[4] At the beginning of the hearing, Rhonda Cromer, Planning Director for the Planning Commission, submitted a Zoning Map Amendment Analysis. Cromer's Analysis noted the differences between Application 103 and Application 165 and found, in part, that: Application 165, with the conditions included in the affidavits, is in agreement with the Comprehensive Plan; the existing zoning classification for the Property is inappropriate; and that Application 165 should be approved.

During the hearing, any individual who requested to speak was allowed to do so, and all present were given the opportunity to "cross-examine" each individual who spoke. Allen called three witnesses – its Executive Vice President, who is a licensed blaster, and two mining engineers, also experienced with blasting. Five witnesses spoke against the zoning map amendment. These witnesses spoke out about concerns regarding declining property values, effects

[4] Southwest is a Kentucky non-profit corporation. It was organized on June 20, 2014, after the Planning Commission's hearing. However, its officers and directors are among those who opposed Application 165 at the hearing.

from the blasting, and the historical significance of the Property and surrounding area. Along with their testimony, the opponents of the amendment presented a PowerPoint presentation and written materials. After the close of the hearing, the Planning Commission voted five-one to recommend denial of the zoning map amendment on the grounds that the proposed amendment did not meet the criteria for approval in the Comprehensive Plan.

The record of the hearing, along with the Planning Commission's recommendation, was then referred to CCFC for final action on June 17, 2014. The following day, counsel for Allen sent a letter to CCFC Judge Executive, Henry Branham, outlining the applicable law and Allen's legal arguments in support of Application 165. Allen enclosed a proposed ordinance changing the zoning of the Property, an area plat, a copy of the proposed motion adopting the proposed ordinance, and additional copies of the record from the Planning Commission's hearing. In addition to the originals, Allen included 10 copies of the letter and all attached documents in his correspondence; however, Allen did not send a copy of the letter to counsel for those opposing the zone change amendment.

CCFC did not hold another public hearing, instead choosing to base its decision on the record forwarded to it by the Planning Commission. On June 25, 2014, CCFC gave first reading of an ordinance approving Application 165, entitled Ordinance 2014-11 (the "Ordinance"). At this time, Allen's counsel gave a presentation in support of the zoning amendment. Southwest's counsel was

absent from the reading.[5] In lieu of having counsel argue against the adoption of the ordinance, several members of Southwest spoke in opposition.[6] On July 9, 2014, CCFC conducted a second reading of the Ordinance and approved Application 165 with "the binding element that the property will be used as an underground quarry operation, that a conveyor be approved by appropriate governmental agencies and other underground uses associated therewith with the only surface uses as shown on the Development Plan . . . ." In the Ordinance, CCFC found both that the proposed zoning classification was in agreement with the Comprehensive Plan and that the current zoning of the Property was inappropriate and the proposed zoning classification was appropriate.

In support of its conclusion that the proposed amendment was in agreement with the Comprehensive Plan, CCFC made the following findings of fact:

> A. The industrial goals for the Plan . . . are in agreement with the proposed map amendment in that the proposed quarry will meet Goal LU-3 by accommodating a diversification of industrial development, which will assist in providing for a broad and stable economic base while retaining the area's character and meeting the objective of providing services for industrial development, encouraging the development of a diverse range of industries, and providing an industry and product that will meet the community's long-term needs for quarry products.

[5] The reason for counsel's absence is not clear from the record.

[6] Two members of Southwest have filed affidavits indicating that they requested, but never received, copies of Allen's letter to Judge Branham during the June 25 hearing.

> B. The proposed map amendment is in accord with the principles . . . for industrial development. Based upon an area or county-wide consideration the proposed quarry location is appropriate due to the advantageous characteristics of the property and its proximity to highway access and markets. Near the property are existing similar activities such as a waste water plant, quarry, and power substation. All necessary utilities are available to the site. The applicant is subject to significant regulation from State and Federal governments and has stated and agreed that it will comply with all state and federal requirements.
> C. Moreover, at page 47 the Plan specifically recognizes the significance of high quality limestone in the area where the property is located stating that it "is under laid by a thick quality seam of Limestone." Also at page 49 the Plan recognizes that the land near the Southwestern end of the county along the Kentucky River where the subject property is located has the "The McAfee-Salvisa-Ashwood Association of soils" and is "underlain by high-grade limestone" and that "Generally, the soils in this association are not good for cultivation because the soils are droughty." This is further buttressed by the fact that The Allen Company operated a quarry on the site for nearly 30 to 40 years until about 1959.
> D. The Plan does not mention a land use for a quarry anywhere in the text or map, but it does not preclude such use. Based upon the above language, the proposed use of the property is in agreement with the goals and land use specifications of the Plan and thus is in agreement with the Plan.

Additionally, CCFC made the following findings of fact in support of its conclusion that the existing zoning classification for the Property was inappropriate and that the proposed classification is appropriate:

> A. The present zoning classification for the property is agricultural. This would allow for agricultural activity as well as residential construction. Based upon present criteria requiring 250 feet of road frontage and at least one acre for the construction of one residence, the property could be divided into 26 lots each with a separate septic tank. Such division

would destroy the existing view shed and add potential surface water pollution. [Allen] has placed a binding element or agreement on its application that would restrict its surface activities in a manner that would avoid such surface development, thereby avoiding the destruction of the view shed as well at [sic] the potential water pollution issues.

B. The subject property has unique geological features which make it extremely suitable for limestone quarrying purposes. The subsurface of the property consists of limestone and dolomite stone from the "High Bridge Group." This stone has a high resistance to abrasion and weathering and maintains a high carbonite content with a low silica and alumina content.

C. . . . The High Bridge Group of stone . . . is approximately 570 feet thick. The High Bridge seam typically lies below the surface and is predominately mined underground; however, vertical displacement across the Kentucky River causes the High Bridge Group to be exposed along the valleys of the Kentucky River and its tributaries from only Boonesboro to Frankfort.

D. The proposed use of the property offers Clark County a large source of a needed natural resource, which is necessary for the active and continued development of the county infrastructure and building.

E. A quarry previously existed on the property for 30 to 40 years until about 1959, and the most of the proposed quarry property was leased by [Allen] previously for an active quarry. Quarry use is already an existing use on property across the river from the property.

F. The proposed quarry with its binding element to limit surface use would not cause additional traffic to 627 nor the noise and air pollution of an above ground processing facility as all quarry activities would occur underground (except for vents and utilities) and it is anticipated that production from this quarry would be transported by conveyor across the river to the [Allen] quarry in Madison County for processing, production, and distribution from the Madison County quarry.

> G. The proposed site is near other industrial type uses such as the new Winchester Municipal Utilities water sewer treatment plant adjacent to the site, [Allen]'s present quarry across the river from this site and the East Kentucky Power Ford power plant near the site.
>
> H. A quarry is operated by [Allen] in Madison County, Kentucky, adjacent to the proposed quarry site separated only by the Kentucky River. The connection of the two quarry sites together by a planned conveyor across the river enables the mining of the high quality rock with minimum disturbance of the surface. [Allen] has demonstrated in its present quarrying operation . . . that using modern mining methods it can provide adequate dust control and comply with all regulatory agencies including the Division of Air Quality and MSHA regarding blasting.

Southwest filed its KRS 100.347 appeal with the Clark Circuit Court on July 28, 2014. This was followed by significant motion practice concerning the record on appeal to the Circuit Court – namely Southwest's concern that the letter its attorney had written and discussed at the hearing before the Planning Commission, exhibits that had been attached to that letter, and the PowerPoint presentation that was shown at the Planning Commission hearing were missing from the record – and several procedural issues. On March 10, 2015, the Circuit Court entered an order establishing that the official record included the PowerPoint presentation and the letter from Southwest's counsel with all exhibits and setting a briefing schedule.

Following briefing and arguments, the circuit court entered an order on April 2, 2015, finding that Article VIII of the Planning Commission's bylaws

did not bar the Planning Commission from considering Application 165 within two years of considering Application 103. Southwest then filed a motion for summary judgment, as well as two motions to vacate CCFC's approval of the Ordinance – one on the grounds of lack of notice and due process, and one on the grounds that CFFC had not had the complete record before it when it approved the Ordinance. Both Allen and CCFC filed their own motions for summary judgment shortly thereafter. The circuit court overruled both of Southwest's motions to vacate and requested additional briefing by all parties on the issue of whether the Comprehensive Plan needed to be amended.

On September 10, 2015, the circuit court entered an order finding that the Planning Commission and CCFC were not required to amend the Comprehensive Plan prior to considering Allen's request for zoning map amendment and granting summary judgment to Allen and CCFC. On September 23, 2015, the circuit court entered an order affirming the CCFC's approval of the Ordinance on Allen's Application 165, and granting summary judgment to both CCFC and Allen. Southwest filed a motion to alter, amend, or vacate under CR[7] 59.05 on October 10, 2015. The motion was overruled by the circuit court on October 15, 2015. This appeal followed.

II. Standard of Review

[7] Kentucky Rules of Civil Procedure.

In zoning cases, our review is limited to the question of whether the legislative body acted arbitrarily in making its decision. *Am. Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning & Zoning Comm'n*, 379 S.W.2d 450, 465 (Ky. 1964). We determine arbitrariness by considering "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 Res., Inc. v. Cty. of Boone*, 180 S.W.3d 464, 467 (Ky. 2005). "The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). As to questions of law, we review those *de novo*; however, "we afford deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing." *Commonwealth, ex rel. Stumbo v. Ky. Pub. Serv. Comm'n*, 243 S.W.3d 374, 380 (Ky. App. 2007).

III. ANALYSIS

On appeal, Southwest alleges numerous assignments of error: (1) that CCFC lacked the statutory authority to approve a rezoning to allow quarrying activity, as neither the comprehensive plan nor the zoning regulations provide for such land use; (2) that the Ordinance fails to include adjudicative findings of fact sufficient to support the conclusion that the current zoning of the property was

inappropriate and that the proposed rezoning was appropriate; (3) that CCFC acted beyond its statutory powers by approving a rezoning conditioned on binding elements that it lacked the statutory authority to impose; (4) that CCFC acted arbitrarily and contrary to adopted regulations by considering Allen's proposed development plan prior to the plan's being reviewed by the Planning Committee; (5) that CCFC exceeded its statutory power and acted arbitrarily in considering Application 165 with respected to the portion of the Property located at 7527 Boonesboro Road as the submission of the application in relation to that parcel was contrary to Article VIII of the Planning Commission's bylaws; and (6) that CCFC denied Southwest due process rights.

A. CCFC's Authority to Allow Quarrying

CCFC, acting as a legislative body, derives its authority to act on matters of zoning from KRS Chapter 100. Under Chapter 100, planning commissions are required to develop a comprehensive plan to serve as a guide for property development, and "all zoning is mandated to follow the comprehensive plan." KRS 100.183; *Fritz v. Lexington-Fayette Urban Cty. Gov't*, 986 S.W.2d 456, 458 (Ky. App. 1998).

Before CCFC can grant a request for zoning map amendment, it is required to find that either the requested map amendment is in agreement with the Comprehensive Plan, *or*, that either: (1) "the existing zoning classification given to the property is inappropriate and the proposed zoning classification is appropriate;"

or (2) "[t]hat 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).

CCFC went beyond the mandate of KRS 100.213(1), stating that the proposed amendment was in agreement with the Comprehensive Plan *and* that the current zoning on the Property was inappropriate and the proposed amendment was appropriate. Southwest, however, contends that CCFC's statement that the proposed zoning classification is in accord with the Comprehensive Plan is clearly erroneous, as neither the Comprehensive Plan nor the Winchester-Clark County Zoning Ordinance ("Zoning Regulations") mentions quarrying. CCFC acknowledges this absence in the Ordinance itself, stating that the Comprehensive Plan "does not mention a land use for a quarry anywhere in the text or map, but it does not preclude such use."[8] R. 98.

We cannot agree with Southwest that the Comprehensive Plan must be amended to contain the word "quarry" in order for CCFC to amend the zoning map to include one. "[A] comprehensive plan is intended to be a guide for development, not a straight-jacket." *Warren Cty. Citizens for Managed Growth,*

[8] This is not an entirely accurate statement. In a discussion of existing land use in unincorporated Clark County, the Comprehensive Plan states: "Some agricultural and industrial uses are difficult to distinguish in a 'windshield survey' of the county. Farms may include timbering, sawmills, **quarries** and mines not observable from the road, as well as junkyards and illegal dumps. P. 43. Both parties are correct, however, that quarries are not specifically mentioned in the Future Land Use section of the Comprehensive Plan or in the Zoning Regulations.

Inc. v. Bd. of Comm'rs of City of Bowling Green, 207 S.W.3d 7, 16 (Ky. App. 2006); *see also* KRS 100.183. "A zoning agency is not bound to follow every detail of a land use plan," and likewise, a land use plan need not delineate specifics of every possible use that might be made of land. *Id*.; *see also Minton v. Fiscal Court of Jefferson Cty.*, 850 S.W.2d 52, 56 (Ky. App. 1992). So long as CCFC found that the amendment was in accord with the *principles* of the Comprehensive Plan, the absence of the word "quarry" is irrelevant. A review of the Ordinance shows that CCFC properly concluded that the proposed zoning classification was in agreement with the Comprehensive Plan. *See supra* p. 7.

Additionally, we do not agree with Southwest that rezoning the Property to heavy industry to allow quarrying violates the Zoning Regulations. The Zoning Regulations state that "[t]he intent of [the I-2 District] is to provide manufacturing, industrial and related uses which may potentially involve nuisance factors such as noise, air pollution, odor, vibration." The Zoning Regulations further state that one of the permitted uses in the I-2 district is: "[t]he manufacturer [sic] and/or sale of rock, sand or gravel when a principal use."

The word "manufacture" is not defined in either the Comprehensive Plan or the Zoning Regulations. Southwest argues that the mining of limestone cannot be considered manufacturing for purpose of the Zoning Regulations or Comprehensive Plan. In support of this argument, Southwest cites both general and common dictionary definitions, as well as different definitions that our

Supreme Court have given to the word. *See Commonwealth v. W.J. Sparks, Co.*, 1 S.W.2d 1050 (Ky. 1928) ("Often it has been said that the word 'manufacture' is not susceptible of accurate definition. . . . Clearly, manufacturing does not require the creation of something out of nothing . . . . If this were a case where the rock was merely blasted from the quarry and then broken into sizes for convenience, a different question would be presented."); *Shelby Cty. Bd. of Assessment Appeals v. Gro-Green Chem. Co., Inc.*, 602 S.W.2d 155 (Ky. 1980).

While we agree with Southwest that "quarrying" does not fit into the narrowest definitions of "manufacturing," CCFC was in no way bound to apply a narrow definition of the word. *See Hamner v. Best*, 656 S.W.2d 253, 255-56 (Ky. App. 1983) ("Appellants further argue that the Board's decision is too broad and contrary to the intent of the framers of the zoning ordinance. As the ordinance does not include a definition of 'family', the Board was not constrained to apply a narrow definition of single family dwelling.").

There was substantial evidence in the record that Allen intends for the quarrying of limestone on the Property to be the first step in a line of production by which it further transports, processes, and then sells the rock to be used for paving purposes. Based on this evidence, CCFC concluded that quarrying does fit into the definition of manufacturing when read in context with the entirety of the Zoning Regulations and the Comprehensive Plan. Applying deference, we cannot

conclude that CCFC's interpretation of the Zoning Regulation is unreasonable or unlawful. *Commonwealth, ex rel. Stumbo*, 243 S.W.3d at 380.

Thus, we agree with CCFC and the Clark Circuit Court that neither the Comprehensive Plan nor the Zoning Regulations needed to be amended in order for CCFC to find that Application 165 was in agreement with the Comprehensive Plan.

B. Sufficiency of CCFC's Findings of Fact

Southwest next argues that the findings of fact CCFC gives in the Ordinance are insufficient to support CCFC's ultimate conclusions that the proposed rezoning is appropriate. In addition to making the argument, *supra*, that any finding that the Ordinance is in agreement with the Comprehensive Plan is clearly erroneous without the specific mention of quarries in the Plan, Southwest points to the fact that the Ordinance only cites one goal, LU-3, and then makes generalized references to the Comprehensive Plan to support the finding that the Ordinance is in agreement with the Comprehensive Plan. Southwest notes that as the Comprehensive Plan itself states that, "[t]he question/evaluation of whether a given land use might be appropriate for a given area must be viewed in considering the comprehensive plan *in its entirety* . . .", and includes goals and objectives covering 11 areas of concentration,[9] the citation to one of the five land use goals

[9] The Areas of Concentration are: (1) Community Services; (2) Infrastructure – Sewer and Water; (3) Transportation; (4) Local Government; (5) Land Use; (6) Tourism; (7) Natural Resources; (8) Parks and Recreation; (9) Historic Preservation; (10) Housing; and (11) Crossroads Communities.

cannot support the conclusion that the amendment is consistent with the Comprehensive Plan.

While it is plain that the Ordinance only mentions goal LU-3 by name, a reading of the Ordinance shows that it references numerous elements of the Comprehensive Plan. The approving Ordinance's findings reference the Natural Resource Element, Transportation Element, Infrastructure Element, and Land Use Element. The findings referencing these elements are supported in the record. The fact that the Ordinance does not mention those elements by name does not mean that CCFC did not consider them. A fair reading of the Ordinance suggests that CCFC did consider them despite its failure to specifically delineate them by name. Having reviewed the Ordinance in conjunction with the Comprehensive Plan, we cannot conclude that the CCFC acted arbitrarily in finding that the proposed amendment was in accord with the Comprehensive Plan.

Southwest further argues that CCFC's finding that the Property's existing zoning is inappropriate and that the proposed zoning is appropriate is without sufficient evidence. Southwest points to the fact that CCFC's rationale for finding that the current agricultural zoning on the Property is inappropriate is based on an entirely hypothetical situation – that residential construction *could* occur on the Property, which *could* lead to destruction of the existing view shed and potential surface water pollution – that has never been proposed. Southwest also notes that when Allen's vice-president testified in support of Amendment 165, he

testified that Allen would continue to make agricultural use of the surface of the property in the future. We agree with Southwest that the hypothetical residential construction argument, having never been proposed to the Planning Commission, is without merit. *See Martin-Marietta Materials, Inc. v. Boone Cty. Fiscal Court*, 89 S.W.3d 428 (Ky. App. 2002) (finding that appellants' argument that existing agricultural zoning was inappropriate because of the possibility of the establishment of a large-scale hog farm, which would be much more offensive than a quarry, was without merit). However, this was not the sole basis on which CCFC found that the Property's existing zoning classification is inappropriate. *See supra* pp. 8-9.

At any rate, it is not required that CCFC find both that the proposed zoning classification conforms to the Comprehensive Plan *and* that the Property's current zoning classification is inappropriate and the proposed zoning classification is appropriate. KRS 100.213(1). Because we have concluded that that the CFCC acted appropriately in finding that the proposed zoning classification was in accordance with the Comprehensive Plan, any error with respect to its alternative finding that the Property's current zoning classification is inappropriate and the proposed zoning classification is appropriate was harmless.

C. Binding Elements

Southwest next contends that CCFC acted beyond its statutory powers in adopting the Ordinance with a binding element, and, as such, the Ordinance

should be set aside. Southwest's sole argument on this point is that the only reference to "binding elements" in KRS Chapter 100, which gives CCFC its authority to act on zoning amendments, is found in the Binding Elements Enforcement Act[10] ("BEEA"), which is inapplicable to Clark County. As such, Southwest reasons that CCFC has no authority to impose conditions on a map amendment approval.

Southwest is correct that BEEA is inapplicable to Clark County. BEEA only applies to counties containing a consolidated local government.[11] KRS 100.401. However, BEEA does not dictate which counties may *impose* binding elements; rather, it deals solely with the *enforcement* of binding elements. Looking solely to the fact that the BEEA exists when there are no other references to "binding elements" elsewhere in KRS Chapter 100, one can reason that binding elements may be imposed by planning commissions and the like without an express statutory provision. Further, this Court has continually upheld zoning amendments approved with conditions or "binding elements" so long as those conditions "bear a reasonable relationship to the benefits conferred on the subject development, to the overall benefit to the surrounding neighborhoods, and to the need for improvements necessitated by the development." *Lexington-Fayette*

[10] KRS 100.401 through KRS 100.419.

[11] At the time Southwest filed this suit, BEEA applied to cities of the first class as well as counties with consolidated local governments. It was amended, effective January 1, 2015, to remove the language: "a county containing a city of the first class." At any rate, Clark County neither contains a city of the first class nor has a consolidated local government. Thus BEEA was, and remains, inapplicable to Clark County.

Urban Cty. Gov't v. Schneider, 849 S.W.2d 557, 560 (Ky. App. 1992); *see generally Warren Cty. Citizens for Managed Growth, Inc.*, 207 S.W.3d 7 (affirming grant of zoning amendments subject to binding elements); *Cunningham v. City of Florence*, Nos. 2009-CA-001105-MR, 2009-CA-0011060-MR, 2009-CA-001161-MR, 2010 WL 2976935 (Ky. App. July 30, 2010) (affirming grant of zoning amendments subject to conditions); *Sansbury v. City Council of the City of Hillview*, No. 2013-CA-001660-MR, 2014 WL 6878925 (Ky. App. Dec. 5, 2014) (affirming grant of zoning amendment subject to 23 restrictions).[12] Based on the foregoing, we cannot conclude that CCFC lacked the authority to impose binding elements in the Ordinance.

D. Development Plan

Having determined that CCFC acted within its right in imposing binding elements on the zoning map change amendment, we now turn to Southwest's next argument: that the document from which the binding element was taken, the Development Plan, was improperly before CCFC, and, as such, CCFC acted outside its authority in considering it. Southwest directs our attention to Section 8.64 of the Zoning Regulations, which dictates development plan procedures as follows:

> (b) Review – The planning commission staff . . . shall review the development plan, and make recommendations to the commission's subdivision committee. The subdivision

[12] We do not cite these unpublished opinions as binding precedent. However, their factual similarity makes them appropriate for discussion and consideration. *See* CR 76.28(4)(c).

> committee will review all recommendations, and then forward their recommendations to the commission.
> (c) Commission Action – No development plan shall be considered for action by the commission until they have been reviewed by the subdivision committee . . .

The Planning Commission has not yet held a hearing or approved the Development Plan. Thus, Southwest argues, CCFC "usurped the function of review and approval or disapproval" by incorporating the Development Plan into the Ordinance by discussing the binding elements.

The section of the Ordinance to which Southwest refers reads, in pertinent part, as follows:

> Section 1. Based upon the above findings and conclusions the application for a zone map amendment made by the Allen Company, Inc. is hereby approved with the binding element that the property will be used as an underground quarry operation, that a conveyor be approved by appropriate governmental agencies and other underground uses associated therewith with the only surface use *as shown on the Development Plan* filed with the application for zone change . . . .

(Emphasis added).

We do not read this reference to the Development Plan in the Ordinance as incorporating and approving Allen's submitted Development Plan as a whole. It is merely a reference to a demonstrative of what surface uses Allen is permitted to make of the Property. There is no indication anywhere in the Ordinance that the Planning Commission no longer has the duty to consider and vote on approval of the Development Plan. The Planning Commission is still free to modify or reject the submitted Development Plan once this decision is final and

the Ordinance is enacted. CCFC was not acting outside its authority in referencing the Development Plan in the Ordinance.

E. Application of Article VIII to Application 165

Southwest next argues that pursuant to Article VIII of the Planning Commission's bylaws, cited in full *supra* p. 3, the Planning Commission was unable to consider Application 165 with respect to the portion of the Property located at 7527 Boonesboro Road. As discussed above, Allen first submitted Application 103 to rezone the Boonesboro Road property in July of 2013. Allen acknowledges that less than two years later, in April of 2014, Allen submitted Application 165, which included the Boonesboro Road property. Southwest contends that inasmuch as Application 165 included the Boonesboro Road property, it was the same as Application 103 and, as such, violated Article VIII and was improperly before the Planning Commission.

We read Article VII in light of KRS 100.213(2), *supra* p. 2, which gave the Planning Commission the authority to enact Article VIII. As an initial matter, we note that while Article VIII uses general language – "*any* zoning map amendment that has been denied . . ." – KRS 100.213(2) states that the planning commission may prohibit from reconsideration "a map amendment *identical* to a denied map amendment." Thus, reading the two together, we must determine if Application 103 and Application 165 are "identical."

The biggest difference between the two applications, of course, is that Application 103 sought to rezone 103 acres of real property, while Application 165 sought to rezone 165 acres. Even only considering the Boonesboro Road property, however, there are substantial differences between the two applications. Application 103 requested approval of surface mining, where the quarried limestone would be transported via the highway. Application 165 requested approval of subsurface mining, and proposed a method of transporting the limestone via a conveyor. Application 165 thus eliminated concerns raised with Application 103, such as loss of view shed and increased traffic. The requests in Application 165 disturb less surface area than what was proposed in Application 103, and further provides a "buffer zone" by adding the additional acreage to the application. The two applications have substantial differences, and therefore, we cannot conclude that they are identical. Thus, the Planning Commission's consideration of Application 165 was not barred by Article VIII.

F. Due Process

Southwest's final argument is it was denied due process in that: the record transmitted to CCFC did not include a letter that Southwest's counsel had written to the Planning Commission, Southwest's proposed findings of fact, or the PowerPoint presentation presented by Southwest member Deborah Garrison; CCFC gave no notice to Southwest that it was acting on an incomplete record; and CCFC based its decision, in part, on a letter from Allen's counsel, which

introduced new legal arguments and was neither submitted before the Planning Committee nor tendered to Southwest.

"Procedural due process in the administrative or legislative setting 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 . . . .'" *Hilltop Basic Res., Inc. v. Cty. of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (quoting *Morris v. City of Catlettsburg*, 437 S.W.2d 753, 755 (Ky. 1969)). "Although we have frequently referred to the process of making zoning determinations as being 'quasi-judicial' or 'quasi-adjudicatory,' it does not follow that the legislative bodies making such determinations are performing judicial functions (and thus subject to the same rules of conduct or procedure as judicial officers)." *Id*. (Internal citations omitted).

In this instance, Southwest was given the opportunity to be heard, to tender evidence, and to cross-examine witnesses for Allen. Southwest was afforded notice of the CCFC meetings on both June 25, 2014, and July 9, 2014, and its members attended and spoke in opposition of Application 165 at those meetings. As to the alleged specific denials of due process that Southwest cites, we find them to be unmeritorious. Judge Executive Branham testified in an affidavit that CCFC did, in fact, have both the proposed findings of fact and the letter from Southwest's counsel, with all attachments, before it when it considered Application 165. R. 408.

While CCFC was not in receipt of Garrison's PowerPoint, a review of the transcript from the Planning Commission hearing on May 6, 2014, reveals that neither Garrison nor her counsel attempted to tender a copy of the presentation as an exhibit. Garrison did, however, testify from her PowerPoint, which testimony is transcribed in the transcript of the May 6, 2014 hearing – a transcript that CCFC had before it when making its decision. As to the letter from Allen's counsel to Judge Executive Branham, a review has revealed that it did not present any legal arguments that had not been made before the Planning Commission. Further, this letter was available to the public 10 days prior to the meeting and at the meeting on June 25, 2014. As such, we hold that Southwest was afforded all the procedural process due to it under the law.

V. CONCLUSION

Based on the foregoing, we affirm the order of the Clark Circuit Court.

ALL CONCUR.

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