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# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-001512-MR

CHEROKEE TRIANGLE ASSOCIATION, INC. APPELLANTS
KEITH AUERBACH, M.D.
JOHN DOWNARD,
RHONDA PETR

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NOS. 13-CI-004484 AND 15-CI-001809

LOUISVILLE METRO PLANNING & ZONING COMMISSION, APPELLEES
LOUISVILLE METRO COUNCIL AND,
LOUISVILLE METRO GOVERNMENT,
WILLOW GRANDE, LLC

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: This is a land use appeal involving a high-rise condominium project. The Louisville Metro Council ("City Council") approved a zoning map amendment in favor of developer Willow Grande, LLC ("Willow

Grande"). The Cherokee Triangle Association ("CTA"), which opposed both the project and the zone change, challenged the City Council's approval in the Jefferson Circuit Court. Eventually, the circuit court entered a judgment upholding the zone change and the City Council's acceptance of the final development plan. After review, we find no error and affirm.

## I. BACKGROUND

Willow Grande sought to build a condominium tower in the Cherokee Triangle neighborhood of Louisville. The project's proposed location is a 0.88-acre property (the "subject parcel") occupied by the Bordeaux Apartments. Willow Grande proposed to demolish the Bordeaux Apartments and construct a 17-story building in their place. Willow Grande applied for a certificate of appropriateness with the Cherokee Triangle Architectural Review Committee ("ARC") to begin demolition. The ARC approved the application, but conditioned the approval on obtaining permission from the Louisville Metro Council to change the zoning designation of the subject parcel.[1]

As a result, Willow Grande applied for a zoning map amendment with the Louisville Metro Planning Commission ("Planning Commission"). Willow Grande also opted to have the Planning Commission decide whether certain

[1] The CTA appealed this decision, and another panel of this Court affirmed in *Cherokee Triangle Ass'n., Inc. v. Willow Grande, LLC*, 2017 WL 541082 (2014-CA-000685-MR).

deviations from Louisville Metro's land use regulations were appropriate. The Planning Commission held a public hearing on the proposed zone change and on the associated applications for variances[2] and waivers.[3] The hearing lasted several hours, and multiple neighbors expressed opposition to the project.

Following the hearing, the Planning Commission recommended denying the proposed map amendment without deciding whether the variances and waivers were appropriate. The recommendation prompted Willow Grande to petition the City Council for approval. Once again, a hearing was held. 21 council members heard both sides' positions regarding the development. Two council members recused themselves from the proceedings. One allegedly recused because a close relative lives in the Cherokee Triangle neighborhood, and the other cited a pre-existing business relationship with an officer of Willow Grande.

Despite the Planning Commission's recommendation, the Louisville Metro Council ultimately approved the zoning map amendment by a vote of 14-7. The City Council adopted an ordinance to that effect, which included its factual

[2] Kentucky authorizes dimensional variances through KRS 100.241. The findings necessary to grant a variance are provided in KRS 100.243.

[3] Under Section 11.8.1 of the Land Development Code ("LDC"), "[t]he Planning Commission may modify, reduce or waive those standards and minimum requirements established by this [LDC] which cannot be modified through a dimensional variance." The Section explicitly states that a waiver shall not be used to modify "[u]se, conditional use, density [or] [Floor Area Ratio] standards. The findings necessary to grant a waiver are outlined in Section 11.8.5 of the LDC.

findings supporting the decision, but remanded for the Planning Commission to make a recommendation as to the variances and waivers.

On remand, the Planning Commission recommended approving five variances and seven waivers. Willow Grande also revised its proposed site plan to reduce the building's height by two stories. The City Council later accepted this revision and approved a final plan.

After final approval, the CTA appealed to the circuit court.[4] In addition to challenging a protective order entered in favor of the recused council members, the CTA charged both the City Council and the Planning Commission with error. First, the CTA claimed the City Council improperly granted the zoning map amendment because the entire Willow Grande project was treated as an "infill" development, as defined in the Land Development Code ("LDC"), rather than a "non-infill" project. According to the neighbors, the building would not have been eligible to stand taller than 35 feet if the project been properly characterized as "non-infill" from the outset. Second, the CTA claimed the City Council improperly approved the final development plan because it remanded the case for the Planning Commission to provide a recommendation as to the proposed variances and waivers. This was a fatal procedural error, from the CTA's

[4] The actions were initially assigned to multiple circuit court divisions. They were eventually consolidated in Division 11.

perspective, even though the Planning Commission did not originally address them. Finally, the CTA relied on *Louisville and Jefferson County Planning Commission v. Schmidt*, 83 S.W.3d 449 (Ky. 2001), to attack the Planning Commission's general authority to grant waivers.

Once it had considered the CTA's arguments and Willow Grande's responses, the circuit court ultimately granted summary judgment in favor of Willow Grande. The circuit court held that the CTA failed to preserve any argument regarding a distinction between infill and non-infill development by not raising the issue during the administrative process. The circuit court also found that the CTA was afforded due process, and that the Planning Commission acted lawfully in granting the waivers. This appeal followed.

## II. STANDARD OF REVIEW

Appeals from local planning and zoning decisions are reviewed under the familiar arbitrariness standard explicated in *Am. Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). Under that standard, the decisions will not be upheld if the agency exceeded its lawful authority, denied the parties due process, or failed to adequately justify its legal conclusions or factual findings. *Id.*

## III. DISCUSSION

On appeal, the CTA once again alleges separate errors by the Planning Commission, the City Council, and the circuit court. The CTA begins by renewing its position that the Planning Commission failed to follow its own regulations regarding "infill development" and thereby exceeded the authority of its governing legislation. The CTA follows this argument with a claim that the City Council acted arbitrarily merely because its decision was different from the Planning Commission's. The final attack on the circuit court consists of two parts. The first part accuses the circuit court of failing to adequately consider the case, and the second part asserts the circuit court abused its discretion by granting the protective order. We will address these issues in the order presented.

## 1. THE CTA FAILED TO PRESERVE THE ARGUMENT THAT THE WILLOW GRANDE PROJECT WAS A NON-INFILL DEVELOPMENT.

The CTA's primary argument before this Court is that the Planning Commission erroneously treated the proposed development as an "infill development" project when it was a non-infill project. In support of this argument, CTA cites to the LDC and asserts under its definition for "infill development," that the subject parcel is not "vacant or underutilized land in an area within which a majority of the land is developed or in use." The CTA also stresses that the Planning Commission never classified the subject parcel as either vacant or

underutilized. On this point, the CTA assures this Court that had the Planning Commission done so, there is no possible way the project would have been an "infill development."

In response, Willow Grande counters that the CTA did not properly present this issue to the Planning Commission. Willow Grande also defends that even if the Planning Commission had designated the project as "non-infill," the condominium's final height was allowable under the LDC. For the following reasons, the circuit court correctly found the issue was not preserved.

The failure to raise an issue during the administrative process precludes it from later being considered by the judiciary on review. *Wilson v. Kentucky Unemployment Ins. Com'n*, 270 S.W.3d 915, 917 (Ky. App. 2008).

Here, the circuit court examined the record and found that counsel for the CTA mentioned "infill development" three times during the proceedings. The first took place before the Planning Commission when counsel for the CTA "specifically asked the [Planning] Commission to disregard the term 'infill.'" The second also took place before the Planning Commission, and although the CTA's counsel did state that the project was not "infill development" on that occasion, the circuit court found that counsel did not ask the Planning Commission to designate the project as "non-infill." In fact, the circuit court found the only time CTA questioned whether the project was "infill development" or not was in response to

Willow Grande's motion[5] to alter, amend or vacate the summary judgment order. This was the third time the issue appeared in the record, and it did not occur during the administrative process. Based on these findings, we agree that the CTA waived this argument by failing to preserve it.

### 2. UNDER KRS[6] 100.203, THE PLANNING COMMISSION IS AUTHORIZED TO GRANT LAND USE CONTROLS OTHER THAN THOSE SPECIFICALLY ENUMERATED IN THE STATUTE

In its appeal to the circuit court, the CTA repeatedly disputed whether the Planning Commission had general authority to grant "waivers" under the LDC. The CTA cited *Louisville and Jefferson Cty. Planning Comm'n v. Schmidt*, 83 S.W.3d 449 (Ky. 2001), in support of this argument, and Willow Grande contested by relying on the statutory language of KRS 100.203. Accordingly, the issue preserved for this Court's consideration is whether KRS 100.203 confers the general power to grant "waivers." That statute, in pertinent part, gives local planning bodies the power to enact zoning regulations through

> [a] text, which shall list the types of zones which may be used, and the regulations which may be imposed in each zone, which must be uniform throughout the zone. In addition, the text shall make provisions for the granting of variances, conditional use permits, and for nonconforming use of land and structures, **and any other**

[5] Evidently, this motion—filed by Willow Grande—was only intended to ascertain the scope of the summary judgment rather than question its substance.
[6] Kentucky Revised Statutes

> **provisions which are necessary to implement the zoning regulation.**

KRS 100.203 (emphasis added).

Administrative bodies derive their authority from the legislature. *Allen v. Woodford Cty. Bd. of Adjustments*, 228 S.W.3d 573, 576 (Ky. App. 2007). In Kentucky, the enabling legislation for planning and zoning bodies is KRS Chapter 100. *See id.* Through that Chapter, the General Assembly has expressly recognized that each planning unit faces its own unique land use challenges. *See, e.g.*, KRS 100.183-100.197 (requiring adoption of a thoroughly designed comprehensive plan as a means of fostering appropriate development).

Noting this affinity toward local expertise over zoning matters, Kentucky courts have routinely construed KRS Chapter 100 as giving wide latitude to the planning body. *See Bellemeade Co. v. Priddle*, 503 S.W.2d 734, 738 (Ky. 1973) (construing statutory language to authorize floating zones); *see also Ward v. Knippenberg*, 416 S.W.2d 746, 748 (Ky. 1967) (zoning body not bound to follow every detail of land use plan). They also defer to the local zoning body's reasonable interpretation of a statute it is charged with implementing in the event the statutory text is ambiguous. *Ky. Occupational Safety and Health Review Comm'n v. Estill Cty. Fiscal Court*, 503 S.W.3d 924, 927-28 (Ky. 2016) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778 (1984)).

Here, when read in line with Kentucky's preference for administrative flexibility in the context of comprehensive plan design, the plain text of KRS 100.203 broadly authorized the Planning Commission to grant "waivers" as part of the LDC. Local planning bodies are not required to shoehorn every proposed deviation from the zoning ordinance into a specifically enumerated land use control, and the statutory text of KRS 100.203 reflects that reality by leaving room for "other provisions which are necessary to implement the zoning regulation." And although it is not entirely clear what constitutes such necessary "other provisions," we must defer to the Planning Commission's reasonable interpretation that "waivers" fall into this category.[7]

### 3. THE CITY COUNCIL DULY APPROVED THE ZONE MAP AMENDMENT AND THE FINAL DEVELOPMENT PLAN.

The CTA asserts that the city council improperly approved the zone map amendment and the final development plan for two reasons. First, the CTA

[7] It is important to note that the CTA only attacked the Planning Commission's general authority to grant waivers. It did not attack the propriety of the specific "waivers" granted. In other words, although the CTA cited *Schmidt*, *supra*, it did not assert that the "waivers" in this case were merely dimensional variances granted under a more relaxed standard than the one provided in KRS 100.243. *Schmidt* forbade this practice, and as a corollary, held that "waivers" cannot relax the standards for other land use controls enumerated in KRS 100.203, *i.e.*, conditional use permits and permits for non-conforming uses of land or structures. In the same vein, "waivers" certainly cannot be granted to "permit a use of any land, building, or structure which is not permitted by the zoning regulation in the zone in question, or to alter density requirements in the zone in question." *See* KRS 100.247 (prohibiting use variances).

claims it was error for the city council to adopt findings that were inconsistent with the Planning Commission's recommendation. Second, the CTA claims it was error for the City Council to remand the case back to the Planning Commission so that the Planning Commission could make a recommendation regarding the proposed variances and waivers. From the CTA's perspective, the proper course of action would have been for the Planning Commission to address Willow Grande's application for variances and waivers when it voted to deny the zoning map amendment. Only then, the CTA maintains, could the City Council have had a proper record to confirm the overall development plan. For the following reasons, we disagree.

Under KRS 100.211, the planning commission must hold at least one public hearing and make a recommendation, supported by substantial evidence, to the legislative body regarding any application for rezoning. *City of Louisville v. McDonald*, 470 S.W.2d 173, 177 (Ky. 1971). The ultimate decision whether to rezone, however, must be made by the legislative body. *Id.* at 179. In making that final decision, the legislative body is not bound by the planning commission's recommendation. Instead, it has several options. For example, it may review the commission's record, assuming it was made in a trial-type due process hearing, and reach a different decision; it may hold its own due process hearing and reach a different decision; or it may, of course, follow the commission's recommendation.

*Id.* A properly supported finding by the legislative body that a proposed map amendment agrees with the comprehensive plan is a sufficient basis for approving the zone change. KRS 100.213.

Here, the City Council rejected the Planning Commission's recommendation and adopted its own findings of fact. Among other findings from the record, the City Council specifically determined that the development is compatible with the Louisville Metro's Cornerstone 2020 comprehensive plan because it meets the objectives of a Traditional Neighborhood Form District.[8] Accordingly, the zone map amendment was properly granted.

The City Council's approval of the final development plan was also appropriate. Although we agree that the zoning board of adjustment normally hears and decides applications for variances, *see* KRS 100.241, this is not always the case when the underlying development involves an application for rezoning. In such circumstances, the local zoning ordinance may have empowered the applicant to have the planning body consider the variance application alongside the rezoning application. *See* KRS 100.203(5). And if the applicant elects this tandem consideration, the procedures of the local zoning ordinance must be followed—

[8] *See* "Zone Change Justification Statement," Codes and Regs. PDS Louisville Metro, Case 09-17822-12, Vol. 2 of 2, Page 445 of 1009 (2013-11-14) (explaining why project supports the character of surrounding neighborhood while facilitating access to parks and commercial areas alike).

additionally pursuant to KRS 100.347(2), any appeal from the planning body's final action granting or denying a variance must be brought in the circuit court within 30 days following the legislative body's final action to grant or deny the map amendment.

Here, when the Planning Commission recommended denying the proposed map amendment, it did so without making a final recommendation as to the proposed variances and waivers. On the contrary, the Planning Commission did not finally resolve the issue of the proposed variances and waivers until after the City Council approved the zone change and remanded the case. Ultimately, the Planning Commission approved several variances and waivers as required under Section 11.4.5 of the LDC. These modifications were included in the overall development plan, which was later submitted and approved by the City Council. Accordingly, there was no error relating to the final development plan.

**4. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION EITHER IN ISSUING THE PROTECTIVE ORDER OR IN CORRECTING A CLERICAL ERROR.**

Although the CTA claims it was error for the circuit court to enter the protective order preventing the two recusing council members from participating in discovery, we find no such error. "A trial court has broad discretion over disputes

involving the discovery process." *Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. App. 2001). Moreover,

> [m]ere familiarity with the facts of a case gained by an agency [or other nonjudicial body] in the performance of its statutory role does not, however, disqualify a decisionmaker . . . . Nor is a decisionmaker disqualified simply because he has taken a position, even in public on a policy issue related to the dispute, in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances . . . .

*Hilltop Basic Res., Inc. v. Cty. of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976)).

Here, since the council members entirely abstained from voting, the circuit court had a reasonable basis to enter the protective order. Furthermore, counsel for the CTA's position that Judge Edwards "just guessed at what Judge Stevens meant to do" and only entered summary judgment after "trying to read Judge Stevens' mind" is both groundless and unacceptable. Courts only speak through written orders, *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010), and there is nothing in the circuit court's judgment remotely supporting counsel for the CTA's claim that either of the judges who presided over this case failed to "read the briefs, [consider] the record, [hear] oral arguments, and . . . [understand] the law and facts of the case."

## CONCLUSION

For the foregoing reasons, the Jefferson Circuit Court's judgment is affirmed.

ALL CONCUR.

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