

RENDERED: December 11, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001482-MR

JAMES L. ROSE; VIRGINIA J.
ROSE; MARTHANNE ROSE BOARDMAN;
GINGER ROSE MARTIN; JANE ROSE
COOK; and MILDRED LOUISE MILLER

APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
CIVIL ACTION NO. 97-CI-000018

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT; LEXINGTON-
FAYETTE URBAN COUNTY PLANNING
COMMISSION; and 50 ADDITIONAL
APPELLEES NAMED IN NOTICE OF
APPEAL

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, KNOPF and MILLER, Judges.

HUDDLESTON, Judge. This is an appeal from a Fayette Circuit Court summary judgment that upheld the refusal of the Lexington-Fayette Urban County Council to rezone two small tracts of land located at the intersection of Winchester Road (U.S. Highway 60) and Interstate Highway 75. One of the tracts is owned by various members of the family of Dr. Jim Rose and the other is owned by Mildred Louise

Miller. Rose/Miller assert that the Council and the Lexington-Fayette Urban County Planning Commission violated their substantive and procedural due process rights.

In 1996, the Council and Commission, proceeding in accordance with Ky. Rev. Stat. (KRS) 100.211, considered a comprehensive rezoning application relating to a proposed Expansion Area¹ for inclusion in the Urban Service Area.² The Council, in 1995, had engaged a professional planning and legal consultant services firm for devising an Expansion Area Master Plan (EAMP) to govern orderly development in the Expansion Area. The EAMP was adopted on July 18, 1996, as an element of the Comprehensive Plan (Plan), which was being updated at that time, pursuant to KRS 100.197, which requires such Plan to be reviewed by the planning commission at least once every five years. A review and updating of the Plan had been initiated by the Home Builders Association of Lexington (HBAL) in a suit against the Commission, since updating the Plan had taken longer than statutorily allowed due to a divisive debate in the community on growth and development. HBAL and the Commission entered into an agreed judgment pursuant to which the Commission agreed to complete the review and update of

¹The Expansion Area encompasses approximately 5,700 acres of land containing parcels owned by approximately 324 separate owners.

²Land within this boundary is available for development after zone changes are completed and development plans have been approved; land outside this boundary is in the Rural Service Area and is characterized primarily by agricultural zoning permitting residential uses on lots greater than ten acres and almost no other non-agricultural uses.

the Plan by July 31, 1996. All other elements of the Plan were adopted on July 29, 1996. However, HBAL and the Commission entered into a modified agreed judgment delaying the effective date of the EAMP until November 30, 1996, to allow time for the adoption of new zoning ordinance and subdivision regulation amendments by the Council. The judgment also provided that the Commission would initiate a comprehensive rezoning of the Expansion Area, based upon the recommendations set forth in the EAMP, as soon as the implementing ordinances were adopted, or by October 7, 1996, whichever first occurred. The Commission also agreed to hold its public hearing on such rezoning by November 11, 1996.

At the Commission's public hearing held on November 11, 1996, it was explained that the Commission would: only consider the proposed zone changes for the Expansion Area initiated by itself; only downgrade an area recommended for intense use to a less intense use, not upgrade such an area to a more intense use; and, would recommend approval or disapproval to the Council. It was also stated that if the land were zoned through this process, property owners would still have the right to file for another zone change category on their property. The Commission Chairman explained that because of the large number of people signed up to speak, he would impose a five-minute time limit on each presentation. The Commission had proposed a zone change for the Rose/Miller properties from R-1A (allowing one dwelling unit per acre) to EAR-1 (allowing three dwelling units per acre), based upon the EAMP recommendations. The EAMP also indicated a proposed

boulevard cutting through some of the Rose/Miller property. Rose/Miller's attorney argued for the worthlessness of the subject property zoned as EAR-1 and attempted to argue for a zone change from R-1A to ED (Economic Development), rather than EAR-1, the classification proposed by the Commission. The Commission's Chairman requested that Rose/Miller's attorney reserve his presentation to another hearing, to which he acceded. At the end of the hearing, the Commission recommended approval of all the properties in the Expansion Area for the zoning categories recommended in the EAMP. This recommendation was forwarded to the Council, which scheduled a public hearing on the comprehensive rezoning for December 19, 1996. However, contrary to the Commission's recommendation, the Council did not approve the comprehensive zone change based upon the Commission's record of its meeting. Instead, the Council adopted findings of fact in support of its decision to deny the zone change.

Prior to the Council's December 19, 1996, meeting, Rose/Miller attempted to file an application with the Commission to rezone their properties to ED. Rose/Miller's application was refused due to the Commission's policy of not accepting zone change applications for property on which a zone change is pending or in litigation to prevent the possibility of inconsistent zoning designations on the same property.³

³See Opinions of the Attorney General (OAG) 72-24 in which the Attorney General of Kentucky advised that a planning commission could not hold a hearing on a zone change application until
(continued...)

Rose/Miller then filed suit in Fayette Circuit Court seeking to overturn the Council's and Commission's decisions to not rezone their properties to ED. Rose/Miller alleged that uses proposed by the Commission and R-1A uses for the subject properties make them substantially valueless, amounting to a taking of the properties, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Sections 1, 2 and 26 of the Kentucky Constitution. Rose/Miller also argued that their procedural due process rights were violated when: (1) the Commission, at its November 11, 1996, meeting, refused to allow them offer proof of the need to rezone the subject properties to ED, rather than EAR-1; (2) the Commission refused Rose/Miller's submission of an application to rezone the subject properties prior to the Council's December 19, 1996, meeting; and, (3) the Council elected to not rezone the subject properties to ED. Rose/Miller requested that the circuit court declare the properties rezoned to ED,⁴ and award them attorney fees and costs from the Commission and Council pursuant to 42 United States Code (USC) § 1988, since their actions were undertaken under color of state law and violated 42 USC § 1983.

(...continued)
litigation on a previous zone change application for the same property is final.

⁴Rose/Miller also requested, in the alternative, that the circuit court declare the properties not subject to the zoning ordinances of the Lexington-Fayette Urban County Government.

The circuit court ruled, in response to Rose/Miller's motion for summary judgment, that: (1) the Commission's refusal to accept Rose/Miller's rezoning application while another application was pending in regard to the same properties was not unreasonable; (2) the Commission did not violate Rose/Miller's procedural due process rights by its decision to restrict comments by each property owner at its hearing on the comprehensive rezoning of the Expansion Area, since such action was not focused on Rose/Miller's properties; (3) the Commission's actions in rezoning the Expansion Area, as an element of the update of the Comprehensive Plan was a legislative, rather than quasi-judicial, act. Thus, the Commission was not "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" and, therefore required to conduct a trial-type hearing. City of Louisville v. McDonald, Ky., 470 S.W.2d 173, 178 (1971); (4) the Council did not violate Rose/Miller's procedural due process rights since it based its actions upon the Commission's record; and, (5) Rose/Miller's substantive due process rights were not violated since the subject properties remain zoned R-1A.

Rose/Miller's complaint is not that the Council was wrong in refusing to grant the Commission's zone change request, but that the Council was wrong to not consider their request for a zone change from R-1A to ED. As the circuit court explained, neither the Commission nor the Council was required to consider such a rezoning request. The Council's business at hand during the

Commission's self-initiated zone change application was to determine the propriety only of the Commission's recommendation.

We agree with the circuit court's conclusion that once litigation concerning this matter is final, Rose/Miller may file a zone change application with the Commission; and, should they be dissatisfied with the proceedings relating to their request, they may, having exhausted their administrative remedies, appeal to the circuit court for relief.⁵ Only then will it be necessary for a reviewing court to determine whether or not the Commission and Council have afforded Rose/Miller constitutional due process. At this point, such an inquiry is unnecessary since Rose/Miller are complaining of actions that neither the Commission nor the Council was required to perform, that is, consider their zone change request.

The summary judgment dismissing Rose/Miller's complaint is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANTS:

Robert S. Miller
MILLER, GRIFFIN & MARKS
Lexington, Kentucky

BRIEF FOR APPELLANTS:

BRIEF AND ORAL ARGUMENT FOR
APPELLEES:

Chris Westover
LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT, DEPARTMENT OF LAW
Lexington, Kentucky

⁵A salient feature of Rose/Miller's brief is its denunciation of the treatment Rose/Miller allegedly received from the Commission and Council, and their contention that relief should be afforded them now since both governmental bodies can be expected to treat them as shabbily in the future.

Thomas W. Miller
Carroll M. Redford, III
MILLER, GRIFFIN & MARKS
Lexington, Kentucky