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Administrative Law--Zoning--Appeal From Zoning Board Decisions

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if he saw it. The guilty party is the acting tenant, who is fully cognizant of his acts and their consequences, and should be held to account for them accordingly.

Roger M. Oliver

ADMINISTRATIVE LAW—ZONING—APPEAL FROM ZONING BOARD DECISIONS.
—Petition to the Louisville and Jefferson County Planning and Zoning Commission asking a zone change from residential to business for a shopping center denied as contra the master zoning plan. At the hearing evidence was introduced to show: other commercial developments in the area, no objection from residents of the area, no detriment would accrue to the surrounding area, and a community advantage would result.

Applicant appealed to Jefferson Circuit Court pursuant to KRS 100.057(2), which provides: "... Hearings in the Circuit Court shall be de novo. ..." The circuit court upheld the commission and found that the decision was neither arbitrary nor unreasonable and, in hearing the evidence, that there was no tenable basis for re-classifying the property.

Applicant appealed, contending that the circuit court erred in placing the burden of proof on him. Held: Affirmed. The trial court merely set the order of introduction of proof as authorized by CR 43.02(3), and did not place the burden on applicant. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450 (Ky. 1964). This holding has little significance, but the court did not stop there. The court went on to consider the constitutionality of KRS 100.057(2) and purported to hold the statute unconstitutional because of the provision for a de novo hearing in circuit court. The court found that the section violated the Kentucky Constitution, Sec. 27.1 The court stated:2

In order that the independence of the three distinct departments of government be preserved, it is a fundamental principle that the legislature cannot invade the province of the judiciary ... nor may it impose on the judiciary nonjudiciary duties.

The court reasoned that the legislature, in providing for a de novo hearing, attempted to confer upon the judiciary the identical duties

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1 "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

2 379 S.W.2d 450 at 453.
and powers of the commission and thus turn the judiciary into a legislative policy making organ. This function, said the court, calls for policy decisions by a body which specialized training and experience in this field.

It is questionable whether this case can be said to hold precisely what the Court of Appeals purports to hold because at best it is a multi-leg decision, and a simple affirmance of the circuit court decision does not require a decision on the constitutional question. If the court is only affirming that part of the circuit court action which was an appeal from the board’s action on constitutional grounds, then the Court of Appeals may be denying applicant due process. If he relied on the statute in bringing his case to circuit court, then he probably proceeded mainly on the basis of a de novo hearing of the evidence with less emphasis on the constitutional grounds for appeal than would otherwise be the case. Had the Court of Appeals so intended they would likely have reversed the circuit court’s action in hearing the case de novo and remand it for hearing on appeal as to the constitutional issues. However, there is little doubt that in a future proper case the Court of Appeals will follow what it purports to hold in this case.

The question then arises as to what grounds are left for appeal from an adverse zoning commission ruling. In the principal case the court gives what it conceives to be the valid grounds for judicial review: “Basically, judicial review of administrative action is concerned with the question of arbitrariness.”

Defining arbitrariness the court refers to three grounds:

(1) Action in excess of granted powers.
(2) Lack of procedural due process.
(3) Lack of substantial evidentiary support.

To define these grounds we will analyze the cases cited by the court in illustration of each proposition.

Action in Excess of Granted Powers

In Henry v. Parrish the Jefferson County Board of Health attempted to collect permit fees from restaurant owners to defray the cost of health inspections. The reasonableness of the fee was not in issue. The board contended that the power to regulate health matters carries with it the incidental power to make charges to defray the

\[\text{3 Ky. Rev. Stat. } \S 100.057(2) \text{ [hereinafter cited as KRS].}\]
\[\text{4 379 S.W.2d 450 at 456.}\]
\[\text{5 Ibid.}\]
\[\text{6 307 Ky. 559, 211 S.W.2d 418 (Ky. 1948).}\]
cost. In affirming the issuance of an injunction against collection the court made the following points:

1. The board differs from a city government which may impose fees as an inherent adjunct to its police power. The board is created by the legislature to exercise a particular power of the legislature and the limit of the board's power is the particular power as delegated. Any doubt is strictly construed against the board.

2. Since the statute creating the Board of Health\(^7\) provides for financing the board's operations from a county and city tax fund\(^8\) it shows a legislative intent that the board not do its own fund raising.

Thus we may conclude that the courts will not by judicial construction of a statute enhance the power of an administrative agency to do things incidental to the performance of its function. Agencies have no inherent powers and must therefore apply to the legislature for any powers needed.

**Lack of Procedural Due Process**

In *Kentucky Alcoholic Beverage Control Board v. Jacobs*\(^9\) the board cited defendant for permitting a fugitive from the law to enter his premises. After a hearing, the board revoked defendant's liquor license and ordered that the premises be padlocked until the following June pursuant to a statute\(^10\) which provided that the board shall have the power "... to close, lock, and bar ... any premises in violation of KRS Chapter 241." The court held the statute\(^11\) unconstitutional because there was no requirement in the statute that the board make a finding that a nuisance exists before ordering the premises padlocked. Since the premises would be closed not only for alcoholic beverage purposes but for all purposes it would amount to a taking of property without due process.

The statute in question did not deny a hearing and the court presumed that in most cases a fair hearing would be given. The only objection which rendered the statute unconstitutional was that it did not require a hearing to determine the nuisance issue. We may therefore conclude that statutes conferring authority on administrative agencies to deny the use of private property must explicitly provide for hearings and determinations of fact so as to assure procedural due process.

\(^7\)KRS ch. 212.
\(^8\)KRS 212.470.
\(^9\)269 S.W.2d 189 (Ky. 1954).
\(^10\)KRS 241.060(6).
\(^11\)Ibid.
Lack of Substantial Evidentiary Support

In *Thurman v. Meridian Mutual Insurance Co.*, the plaintiff insurance company filed a petition with the Insurance Commissioner asking that it be permitted to set fire insurance rates lower than those set by the Kentucky Rating Bureau. The Commissioner has authority to allow such downward rate deviations if he finds the resulting premiums would not be "excessive, inadequate, or unfairly discriminatory." The applicant previously had a profitable auto insurance business for many years but was relatively new in the fire insurance line. In other states similar deviations were allowed to the company. The Kentucky Commissioner had also allowed deviations for the years 1955-1957. Operating profit on fire insurance in Kentucky for the company had dropped during the years in question. It was contended that the reduced profits would not continue once the fire insurance business was fully established because its lower rates would attract a larger number of applicants, permitting it to select its risks and thus achieve a lower loss factor.

The Commissioner denied the application, finding that the company's solvency would be jeopardized by the rate reduction and that the company's nationwide experience with the reduced rates did not justify granting the deviation. On appeal the circuit court set aside the Commissioner's ruling and ordered the reduction. The Court of Appeals reversed and reinstated the Commissioner's ruling, holding that the Commissioner's findings are conclusive if founded on "substantial evidence." In defining "substantial evidence" the court said:

> Returning now to the permissible scope of judicial review, bear in mind that the scope of discretionary power by the Commissioner, though resting ultimately on opinion as distinguished from pure fact, represents a factual finding and is not to be disturbed unless it is arbitrary or unreasonable. By 'arbitrary' we mean clearly erroneous, and by 'clearly erroneous' we mean unsupported by substantial evidence. By 'unreasonable' is meant that under the evidence presented there is no room for difference of opinion among reasonable minds.

What the court appears to be saying is that in a field requiring expert knowledge the court will treat the opinion of an administrative agency as a finding of fact and not reviewable if (1) substantial evidence has been heard, and (2) reasonable men could differ. By equating "clearly erroneous" with "unsupported by substantial

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12 345 S.W.2d 635 (Ky. 1961).
13 KRS 304.606.
14 345 S.W.2d 635 at 639.
"evidence" the court leaves a possibility, however, for review of the agency's opinion.

In conclusion, there will probably not be any more cases in which the circuit court judge makes a trip to the property to determine if it would be a good place to have a shopping center. Permissible scope of judicial review will be on the basis of:

1. Action in excess of granted powers with a presumption of a lack of any power not explicitly enumerated by the legislature.
2. Lack of procedural due process with a requirement that the statute itself enumerate a procedure which meets the standards of due process quite apart from whether due process was in fact achieved in the case.
3. Lack of substantial evidentiary support, i.e., whether evidence was heard and whether there is any evidence to support the finding, or whether a reasonable man could reach the same conclusion.

It is submitted that this will make zoning board rulings extremely difficult, if not impossible, to overturn. This is regrettable since it grants power to effectively take the most profitable uses of private property without the judicial restraint which the legislature intended when it enacted the KRS 100.057 de novo provision. Hopefully, when the proper case arises, the court will construe review on the "clearly erroneous" question to permit some latitude of judgment as to the weight of the evidence presented to the board.

Courtney F. Ellis

TORTS—INTERVENING CAUSE—FORESEEABILITY.—The plaintiff sustained injuries when she fell through a trap door left open by a tenant in the unlighted hallway of a building. The plaintiff claimed that the negligence of the defendant, the owner of the building, in failing to light the passageway, was a concurring proximate cause of her injuries. Held: Judgment for the plaintiff was reversed with directions that the defendant be given a judgment n. o. v. "Granted that appellant may have been negligent in failing to keep the passageway lighted, the independent act of negligence by the tenant, without which the accident could not have occurred, was an act the appellant

15 Louisville and Jefferson County Planning and Zoning Comm'n v. Cope, 318 S.W.2d 842 (Ky. 1958).