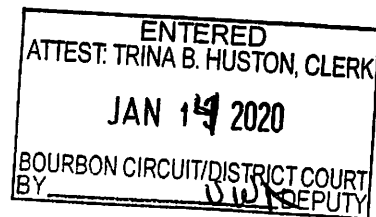


COMMONWEALTH OF KENTUCKY
BOURBON CIRCUIT COURT
DIVISION I
CASE NO. 04-CI-00146



**CITIZENS FOR PROGRESSIVE GROWTH
AND DEVELOPMENT, LLC, et. al.**

PLAINTIFFS

v.

**PARIS BOURBON COUNTY JOINT
PLANNING COMMISSION, et. al.**

DEFENDANTS

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on April 30, 2018, upon a motion by Citizens for Progressive Growth and Development, LLC ("Plaintiff") moving the Court to enter summary judgment in its favor. After reviewing the motion, the response thereto, the record as a whole, the arguments of counsel, and being otherwise sufficiently advised, the Court finds that Plaintiff is entitled to a judgment as a matter of law and **GRANTS** its Motion for Summary Judgment.

BACKGROUND

Plaintiff commenced this action in 2004, challenging Paris Bourbon County Joint Planning Commission's ("Defendant") final approval of the 2004 Comprehensive Plan ("2004 Plan"). In 2006, the Court entered an Opinion and Order ("2006 Order") holding that Plaintiff's appeal was valid under Kentucky Revised Statute ("KRS") 100.197.¹ It also held that the 2004 Plan substantially complied with the statutory research requirements of KRS 100.191, 100.187, and 100.182, except for the non-detrimental error of failure to include a map of the agricultural lands

¹ 2006 Order, p. 5 (Jun. 29, 2006).

of statewide importance.² The Court could not determine whether Defendant complied with its goals and objectives because it did not have sufficient information showing the amount of agricultural land changed to residential land use.³

In 2007, the Court entered an Order (“2007 Order”) acknowledging Defendant’s compliance with KRS 100.191(3) by submitting the map of the agricultural lands of statewide importance.⁴ Defendant’s Goal Three, Objective Two in the Statement of Goals and Objectives under General Growth and Redevelopment (“2004 Goal”) indicated a projected annual population growth rate of three percent. The Court found the 2004 Goal violated KRS 100.197(1) because the 2004 Plan’s land allocation for residential growth exceeded the projected growth rate in the 2004 Goal.⁵ The Court ordered Defendant to amend the 2004 Plan to comply with the statute.⁶

In 2013, Defendant created a Plan Task Force to propose revisions to the 2004 Plan.⁷ On February 16, 2017, Defendant approved a new Comprehensive Plan (“2017 Plan”), which stated the following goals, in relevant part:

Housing Resources

Goal 1 To provide adequate supply of safe and affordable housing based on the needs of the community.

Growth and Development...

Goal 3 To provide an adequate capacity of land to facilitate growth for all types of land uses.⁸

² 2006 Order, pp. 8-13.

³ *Id.* at 15.

⁴ 2007 Order, pp. 1-2 (Jan. 26, 2007).

⁵ *Id.* at 2.

⁶ *Id.* at 4.

⁷ Defendant’s Response to Plaintiff’s Motion for Order to Show Cause (May 18, 2015).

⁸ Record of Appeal (“ROA”), JPC 0000022.

On March 17, 2017, Plaintiff filed a Motion for Leave to Amend its Complaint.⁹ The Court granted Plaintiff leave on August 10, 2017.¹⁰ The amended complaint challenged the 2017 Plan's statutory compliance and it incorporated its 2004 complaint and appeal.¹¹ Plaintiff asserted that the 2017 Plan "did not reconcile the projected population growth with the land reserved for future development as residential."¹² On October 27, 2017, Defendant filed a Motion for Judgment on the Pleadings claiming Plaintiff failed to timely file an appeal and that Plaintiff's action was moot because the 2017 Plan remedied Plaintiff's concerns.¹³ On March 6, 2018, the Court denied Defendant's Motion.¹⁴

Now before the Court is Plaintiff's Motion for Summary Judgment. Plaintiff used the 2007 Order to show Defendant violated KRS 100.197(1) showing the residential land use exceeded the annual population growth rate.¹⁵ Plaintiff claimed that Defendant still has not complied with the 2007 Order since the 2017 Plan allocated residential land beyond the amount the Court found acceptable in 2007.¹⁶ Defendant responded that it substantially complied with the statutory requirement and its 2017 Plan was supported by substantial evidence.¹⁷ The Court heard oral arguments on the motion on June 5, 2018.

⁹ Plaintiff's Motion to File an Amended Complaint, p. 3 (Mar. 17, 2017).

¹⁰ Order Granting Leave to File an Amended Complaint (Aug. 10, 2017).

¹¹ Plaintiff's First Amended Complaint, p. 1 (Mar. 17, 2017).

¹² Plaintiff's Motion to File an Amended Complaint, p. 3 (Aug. 10, 2017).

¹³ Defendant's Motion for Judgment on the Pleadings (Oct. 27, 2017).

¹⁴ Order Denying Defendant's Motion for Judgment on the Pleadings ("2018 Order"), p. 5 (Mar. 6, 2018).

¹⁵ Plaintiff's Memorandum in Support of its Motion for Summary Judgment ("Plaintiff's Memo"), p. 2 (Apr. 30, 2018).

¹⁶ *Id.* at 3.

¹⁷ Defendant's Response to Plaintiff's Motion for Summary Judgment ("Defendant's Response"), pp. 2-7 (May 30, 2018).

STANDARD OF REVIEW

Under Kentucky law, summary judgment shall be granted if “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹⁸ While it has been recognized that summary judgment is designed to expedite the disposition of cases and avoid unnecessary trials when no genuine issues of material fact are raised, the Kentucky Supreme Court admonished liberal use of the rule.¹⁹

Summary judgment does not require the complete absence of factual disputes, but if the material, controlling facts are not in dispute, summary judgment is appropriate.²⁰ It must appear impossible for the non-moving party to produce evidence at trial warranting a judgment in his favor.²¹ Furthermore, “impossible” is apparent in a practical sense, not absolute.²²

The Court must view the record in a light most favorable to the non-movant.²³ The initial burden of showing no genuine issue of material fact exists lies with the movant.²⁴ Once the movant satisfies its burden, the burden shifts to the non-movant to present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.”²⁵

DISCUSSION

The issues before the Court is (1) whether the Court can evaluate the 2004 and 2017 Plans on the same rubric; (2) whether Defendant was compliant with KRS Chapter 100 and the 2006

¹⁸ Kentucky Rules of Civil Procedure (“CR”), Rule 56.03; *see Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

¹⁹ *Id.* at 483.

²⁰ *Rone ex. rel. Payne v. Davies Co. Bd of Ed.*, 655 S.W.2d 28, 29 (Ky. App. 1983).

²¹ *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001)

²² *Id.*

²³ *Steelvest*, 807 S.W.2d at 480.

²⁴ *Id.* at 481.

²⁵ *Id.*

Order because it omitted the three percent growth rate language; and (3) whether Defendant's 2017 Plan was supported by substantial evidence. The Court will address each issue in turn:

1. The Court can review the 2004 and 2017 Plans on the Same Rubric.

Defendant argued the 2017 Plan cannot be evaluated under the same rubric as the 2004 Plan.²⁶ Defendant stated that it amended the 2004 Goal to exclude the three percent growth rate thereby resolving the issue and complying with the 2006 Order.²⁷ The Court previously disposed of this issue when it found that the 2004 Plan and 2017 Plan were essentially the same.²⁸ Therefore, the Plans may be evaluated on the same rubric.

2. Defendant Was Not Compliant Because It Omitted Growth Rate Language.

Judicial review allows the Court to determine whether an agency's actions were arbitrary. The Court must give great deference to an agency's actions.²⁹ The appealing party has the burden to prove that the agency's decision was arbitrary.³⁰ When inquiring whether an action was arbitrary, the review is limited to 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 [were] supported by substantial evidentiary support."³¹ The only issue before the Court is the final prong questioning whether Defendant's actions were arbitrary because it was not supported by substantial evidence.

Defendant argued its compliance by amending the goals to reflect their desire to grow instead of a growth rate percentage.³² The Court's legal predecessor stated in the 2006 Order that

²⁶ Defendant's Response, p. 2.

²⁷ *Id.*

²⁸ 2018 Order, p. 4.

²⁹ *Evangelical Lutheran Good Samaritan Soc., Inc. v. Albert Oil Co., Inc.*, 969 S.W.2d 691, 694 (Ky. 1998).

³⁰ *Hilltop Basic Resources, Inc. v. Cty. of Boone*, 180 S.W.3d 464 (Ky. 2005).

³¹ *Am. Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964).

³² Defendant's Response, p. 2.

“[t]he only alternative is to amend the objective.”³³ In light of this sentence, Defendant ignored subsequent orders and amended the goal to omit the growth rate percentage.³⁴ The Court believes that Defendant’s reliance on the one sentence is improper, especially taking the paragraph as a whole:

Nowhere within the Comprehensive Plan does it state with specificity how much land previously set aside for agricultural use is being changed to proposed residential use. Without this information the Court cannot judge whether the Planning Commission is following this specific objective when it approved the Comprehensive Plan.

To clarify this point, in order for anyone to know if the Comprehensive Plan meets the objective of the 3% desirable annual population growth rate when the Planning Commission sets the acreage of land for future development, it would have to specifically list somewhere within the plan the specific population of the county and each incorporated area, the specific acreage of land currently set aside for residential growth within the county and each incorporated area, the acreage of the land proposed to be for residential use, and the projected people per acre (people per household and households per acre— depending upon projected density). By having all this information, then it can be determined if the Comprehensive Plan properly meets this objective. *The only alternative is to amend the objective.* This Court cannot determine if this Comprehensive Plan is fully supported by substantial evidence until this information is provided or otherwise addressed. However, in reviewing the other goals and objectives on pages 1-6 of the Comprehensive Plan, it appears that it is in keeping with them, with the exception as noted above.³⁵

This Court found the supporting evidence to be lacking and therefore enumerated what was needed so the Court could make a decision on whether Defendant complied with KRS Chapter 100.³⁶ The concern of this Court’s legal predecessor was beyond just the language; it was concerned with the discrepancy in the data when considering the growth rate and the future residential land use exceeding the projected population increase. The Court did not intend to solve all issues by excluding the projected growth rate language. The Court expected the goals to be

³³ 2006 Order, p. 15.

³⁴ Defendant’s Response, p. 2.

³⁵ 2006 Order, pp. 15-16.

³⁶ 2006 Order, p. 15.

supported by substantial research. The 2006 Order noted that it could not determine if the 2004 Goal was supported by substantial evidence until Defendant provided the requested information.³⁷

The sentence on which Defendant relied was superseded by the Court's 2007 Order. In it, the Court held that Defendant did not comply with statute because the amount of land allocated to residential land use exceeded the projected growth by 281 acres.³⁸ However, instead of following the 2007 Order, Defendant used the 2006 Order's sentence about amending the goal to modify its 2017 Goals and included language that expressed a desire to grow the community. The Court's legal predecessor stated in a previous order that "[i]t is clear from the record that neither party took this Court's Order dated January 26, 2007 very seriously."³⁹ In 2018, the Court observed that:

...Plaintiff argues that Defendant has not complied with this Court's 2007 Order for the Comprehensive Plan to come into compliance with KRS 100.197(1). The Court ordered the Defendant to address the issue regarding the desirable growth rate of the Comprehensive Plan and supply necessary information to calculate compliance with the statute, but that issue has not been resolved.⁴⁰

This issue persists to this day.

It is illogical for Defendant to reason that omitting the growth rate language would allow it to allocate an additional 1,049 acres more than the amount of land the 2007 Order found unacceptable. This was especially true when the 2017 Plan projected a decrease in population.⁴¹ Defendant was required to draft a statement of goals and objectives to guide implementing parts of a comprehensive plan.⁴² But Defendant must also support its findings with research.⁴³ By changing the 2017 goal to allow the agency to allocate land as it desires is arbitrary and

³⁷ *Id.*

³⁸ Plaintiff's Memo, p. 2.

³⁹ Order Denying Plaintiff's Motion to Show Cause, p. 1 (Mar. 27, 2017).

⁴⁰ 2018 Order, pp. 4-5.

⁴¹ Plaintiff's Memo, p. 3 (citing Exhibit 2, Affidavit of Mary Clay (Mar. 25, 2015)).

⁴² KRS 100.193.

⁴³ KRS 100.191.

contradictory to the statutory requirements. Therefore, the omission was insufficient to bring Defendant into compliance with the Court's Orders and KRS Chapter 100.

3. Defendant's Decision Was Not Supported by Substantial Evidence and so, the Decision Was Arbitrary.

Defendant argued that regardless of the Court's findings in the above issues, its decision was supported by substantial evidence and therefore, was not arbitrary.⁴⁴ Defendant amended the 2017 Goals to reflect its desire to grow.⁴⁵ To support its argument, Defendant stated that (1) job growth between 2012 and 2022 was projected to increase fourteen percent,⁴⁶ and (2) the request for building permits increased.⁴⁷ Defendant argued that these two factors combined with the desire to grow permitted it to allocate a larger amount of land and be in compliance with KRS Chapter 100.

Defendant's argument is not compelling. It conceded that the residential land allocation was more than required and beyond the research-supported findings. It justified the excess allocation by stating that designation of land does not guarantee that the land will be used for the allocated purpose.⁴⁸ Defendant stated that the land may not be used for the designated purpose because: (1) some private owners would not sell their land for residential use purposes;⁴⁹ (2) some of the allocated land could not be developed due to opposition;⁵⁰ and (3) that Defendant's policy is not to make distinctions about the status of the land, and whether it can be built upon.⁵¹

⁴⁴ Defendant's Response, p. 4.

⁴⁵ *Id.*

⁴⁶ *Id.* (citing 2017 Comprehensive Plan, p. 51).

⁴⁷ *Id.* at 5 (citing attached Exhibit 5, 2017 Annual Reflection, p. 2).

⁴⁸ *Id.* at 5.

⁴⁹ Defendant's Response, p. 5 (citing Exhibit 7) (Said that not all property owners want to use their land for development. Cite Wilma Hammons reflecting this sentiment)

⁵⁰ *Id.* at 6 (Some land, such as the North Middletown Road residential development, is being opposed, so although designated for decades as future residential use, they cannot build on that land yet).

⁵¹ *Id.* (No distinction of land that can and cannot be used. For example, the Millersburg land near the railroad track is suitable for industrial development, but some parts are within a flood plain. Defendant have a policy to not make such distinctions.)

When reviewing the elements of its plan, an agency must base its findings on research, analysis, and projections, not desires of the community.⁵² The 2017 Plan needed to reflect “characteristics of past and present population and a forecast of the extent and character of future population...”⁵³ Defendant may use “any other research analysis, and projections which, in the judgment of the planning commission, will further serve the purposes of the comprehensive plan.”⁵⁴

Nowhere in the statute does it allow Defendant to disregard the research element in favor of its desires. The goals of the 2017 Plan fail to satisfy KRS 100.191(1). Based on Defendant’s own research, the community does not require more residential land since the population was projected to decline. The 2017 Plan stated that, “the next 15 years projects a slight decline in the total population (219 people).” But Defendant projected that “the total number of households were projected to increase from 8,172 to 8,370; an increase of 198 households.”⁵⁵ The data that indicates an economic upturn does not justify the excess residential land. Since the research does not support the Defendant’s desire to grow or the over allocation of residential land, then Defendant’s actions were arbitrary.

Plaintiff satisfied its burden of showing no genuine issue of material fact exists. The Court concludes that the 2017 Plan, including its goals and the maps, were arbitrary as they do not meet the statutory requirement of support by substantial evidence.

⁵² KRS 100.191.

⁵³ *Id.* at (1).

⁵⁴ *Id.* at (4).

⁵⁵ ROA, JPC 0000012.

ORDER AND JUDGMENT

For the reasons set forth herein, genuine issues of material fact do not exist in this action. Plaintiff is entitled to judgment as a matter of law. **WHEREFORE**, Plaintiff's Motion for Summary Judgment is **GRANTED**. This is a final and appealable order with no just cause for delay.

Entered this 14th day of January, 2020.



JEREMY MATTOX, JUDGE
BOURBON CIRCUIT COURT
DIVISION I

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