

ENTERED 11/21/20
MARTHA M. MILLER
CLARK CIRCUIT/DISTRICT COURT
BY *[Signature]* D.C.

COMMONWEALTH OF KENTUCKY
CLARK CIRCUIT COURT
DIVISION I
CIVIL ACTION NO: 19-CI-00029

STUFF PROPERTIES, LLC

PLAINTIFF/APPELLANT

OPINION AND RULING

V.

WINCHESTER/CLARK COUNTY BOARD OF ADJUSTMENT

AND

TRESA BRIDGES

DEFENDANTS/APPELLEES

This matter is before the Court upon Plaintiff/Appellant Stuff Properties, LLC's petition for judicial review of a decision rendered by the Winchester/Clark County Board of Adjustment ("Board") on January 3, 2019, in which the Board found an unlawful expansion of a nonconforming use by Stuff Properties, LLC ("Stuff"). Upon review of the record and the parties' briefs, and after being sufficiently advised, this Court hereby **AFFIRMS** the Board's decision in accordance with this Opinion and Ruling.

BACKGROUND SUMMARY

On or about November 22, 2010, Stuff acquired approximately nine (9) acres located at 6169 Lexington Road, Winchester, Kentucky (hereinafter "the Property") upon which it currently operates a scrap and recycling business. At the time Stuff purchased the Property, scrap and recycling operations had existed for years, despite the zoning designation of B-4 General Business District that prohibited such operations. In 2012, Stuff filed an application with the Board seeking a zoning interpretation that the scrap and recycling operations are a permissible nonconforming use. During a special meeting held on February 13, 2012, the Board found the scrap and recycling business qualified as a "legal nonconforming use" in a B-4 zoning district. The Board also voted unanimously that the "recycling cannot be extended beyond the fronts of the buildings" then located at 6169 Winchester Road.

On March 21, 2013, Stuff purchased an adjoining lot consisting of approximately 1 acre located at 6233 Lexington Road, Winchester, Kentucky (hereinafter "the Lot") that is also situated in a B-4 zoning district. Prior to the acquisition, the Lot had not been utilized for scrap and recycling operations.

On May 5, 2016, the Interim Director of Planning and Community Development issued a Notice of Violation ("NOV") to Stuff for expanding the recycling operations beyond the front of the buildings. The NOV ordered the removal of all debris, vehicles, tractor trailers, trash, and recycling dumpsters that extended beyond the buildings. Except as stated later in this Opinion, the record does not indicate the Board took further action with respect to the NOV. Defendants/Appellees contend the NOV was "lost" during the transition of the Board's directors. Stuff claims it acknowledged the NOV and erected a privacy fence in response thereto; yet, it continued to park tractor trailers and store recycling materials and bins.

On September 27, 2018, the Board held a special meeting to determine whether the scope, area, and usage of the Property had changed since the 2012 Zoning Interpretation. The Board listened to comments and questions from various individuals, including Defendant Bridges and Stuff's counsel, although it did not render a decision concerning the expansion of the nonconforming use. Instead, the Board announced it would take up the matter at the next meeting allowing time to review the issues presented. On October 4, 2018, another public meeting was held during which the Board went into closed session to discuss whether Stuff was violating the Board's 2012 Zoning Interpretation. Upon returning to open session, the Board voted unanimously that Stuff had expanded its recycling operations beyond the front of the buildings and determined "the storage of recycling materials in containers or on the ground is found to be accessory to the recycling business and is prohibited." The Board's decision on October 4, 2018 was not appealed.

On November 8, 2018, Defendant Bridges filed a complaint alleging the Board's closed session meeting on October 4, 2018 violated the Kentucky Open Meetings Act under KRS 61.800-850. On November 18, 2018, the Board issued a Response to Bridges' Complaint, with a copy to Stuff's counsel, acknowledging the violation of the Act and scheduled another public meeting for the following reasons:

to remedy the violation of the Kentucky Open Meetings Act, to review the Board's action of October 4, 2018, and to consider a Notice of Violation from May 2016. At the close of the meeting on January 3, 2019, the Board reaffirmed the recycling operations cannot extend past the front of the buildings and stated, "storage of recycled materials in containers or on the ground is found as an accessory to the recycling business and prohibited, including materials, equipment, trash, recycling bins, tractor trailers, trucks, cranes and all other items associated with the recycling process cannot be stored in the front of the buildings."

On January 16, 2019, Stuff appealed the Board's decision pursuant to KRS 100.347(1) seeking equitable relief and a declaration of rights pursuant to KRS 418.040 and KRS 418.045.

This Court held an evidentiary hearing on October 14, 2019. The parties have filed post-hearing briefs pursuant to the Court's schedule and the matter now stands submitted.

STANDARD OF REVIEW

Judicial review of a zoning decision is focused exclusively on whether the agency's decision was arbitrary. In determining the existence of arbitrariness, judicial review is limited to three considerations: "(1) whether the agency exceeded its statutory authority; (2) whether the parties were afforded procedural due process; and (3) whether the agency decision was supported by substantial evidence." *Keogh v. Woodford County Bd. of Adjustments*, 243 S.W. 3d 369, 372 (Ky. App. 2007); *Hilltop Basic Res. Inc. v. County of Boone* 180 S.W. 3d at 464, 467 (Ky. 2005).

ANALYSIS

The threshold question is whether the action taken by the Board was arbitrary. The Court will now address the issues determinative of arbitrariness.

A. Did the Board exceed its statutory authority?

First, the statutory authority for the Board's actions concerning the expansion of a nonconforming use is found in KRS 100.253(2) which expressly states in relevant part, "The board of adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation

at the time the regulation which makes its use nonconforming was adopted. . .” Hence, the Board acted within its statutory authority under KRS 100.253(2).

Second, the Board acted within its statutory authority and obligations when it scheduled and conducted the meeting on January 3, 2019 to reconsider its actions taken on October 4, 2018 and to remedy the violation of the Kentucky Open Meeting Act. Pursuant to KRS 61.846(1), the Board was obligated to acknowledge the violation and to take remedial action. The Court finds the Board acted within its statutory authority and obligations in both instances.

B. Was Stuff afforded procedural due process?

“The hallmark of procedural due process is ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’” *Harrison Silvergrove Property, LLC v. Campbell County and Municipal Board of Adjustment*, 492 S.W.3d 908, 915 (Ky. App. 2016) (quoting *Hilltop Basic Res.*, 180 S.W.3d at 468). The record reflects that Stuff was provided clear and timely notice of the Board’s meetings and the intended purposes of same. The record further demonstrates that Stuff, by and through counsel, was afforded the opportunity to be heard at a meaningful time and in a meaningful manner. Therefore, the Court finds Stuff was afforded procedural due process.

C. Was the Board’s decision supported by substantial evidence?

The Court now turns to the issue of whether the Board’s decision was supported by substantial evidence. Substantial evidence is evidence which, when taken alone or in the light of all evidence, has sufficient probative value to induce conviction in the minds of reasonable persons. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). Stuff contends the Board acted erroneously when it found Stuff’s storage of recycle materials, trucks, trailers, and equipment constituted an impermissible expansion of a nonconforming use.

The function of this Court in reviewing the Board’s findings is to determine whether the action was arbitrary based upon the evidence the Board considered in making its decision. If the Board’s action was

not supported by substantial evidence, it was arbitrary. See *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky.1964).

It is undisputed that Stuff purchased the adjoining Lot after the Board determined the recycling operation on the Property was a legal nonconforming use. Notwithstanding the 2012 Zoning Interpretation restricting the area of the nonconforming use, Stuff argues that because the Lot is zoned as B-4, which permits uses such as truck terminals, freight yards, warehouses, and storage facilities, the Board erred in finding Stuff's use of the Lot constitutes an expansion of the nonconforming use. While the Court agrees Stuff may engage in business activities deemed permissible in a B-4 zone, the physical expansion of the scope and area of a nonconforming use onto the adjoining Lot is an impermissible expansion or enlargement of the nonconforming use.

KRS 100.253(2) and the Clark County Zoning Ordinance, Article 4.2, forbid the expansion of recycling operations from the original footprint located at 6169 Lexington Road to the adjoining Lot. As cited above, KRS 100.253(2) does not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted. Similarly, Article 4.2 states, "[A] nonconforming use shall not be extended beyond the scope and area of its operation at the time of the adoption of the regulation which makes such use nonconforming."

"As a matter of policy and consistent with the spirit of zoning laws, nonconforming uses are to be gradually eliminated and are to be held strictly within their bounds. An existing use cannot be enlarged nor extended and no substantially different use is permitted. *Legrand v. Ewbank*, 284 S.W.3d 142, 145 (Ky. App. 2008) (quoting *Attorney General v. Johnson*, 355 S.W.2d 305 (Ky. 1962)). Consistent with Kentucky jurisprudence, this Court finds the Board's decision was supported by substantial evidence and was not arbitrary.

RULING


The Court rules as follows:

1. The actions taken by the Board were not arbitrary.
2. Nothing in this Opinion shall be construed as prohibiting or restricting Stuff from engaging in other operations permitted in B-4 General Business District under Section 6.14 of the Winchester/Clark County Zoning Ordinances; provided, such operations do not expand or enlarge the nonconforming use of the scrap and recycling business.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Board's Order be **AFFIRMED**.

This is a final and appealable Order and there is no just cause for delay.

It is so ORDERED this 14th day of January 2020.


Hon. Brandy O. Brown
Clark Circuit Court, Div. I

CLERK'S CERTIFICATE

The undersigned Circuit Court Clerk certifies that a copy of this Order was mailed to counsel for the parties.

Witness my hand this the 21 day of Jan 2020.

Martha M. Miller
Clerk, Clark Circuit Court
by JM Taylor

- ✓ Hon. William Dykeman
- ✓ Hon. Michael Eaves
- ✓ Hon. Thomas FitzGerald
- ✓ W. Elkins