

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

2010 APR 19 A 8:28

James Baggett, *et al.*,
Plaintiffs,

v.

The Board of County Commissioners
Of Douglas County, Kansas,
Defendant,

and

Mastercraft Corporation,
A Kansas Corporation,

and

City of Lawrence, Kansas,
Intervenor-Defendants.

Case No. 2008CV371

Div. No. 1

BY 

Pursuant to K.S.A. Chapter 60

MEMORANDUM OF DECISION

This matter comes before the court on plaintiff's petition. All parties have submitted memoranda in support of their respective positions.

Nature of the Case

The plaintiffs appeal the decision of the Board of County Commissioners of Douglas County, Kansas (hereinafter referred to as the *County*) approving the annexation of approximately 155 acres of land by the City of Lawrence. The plaintiffs ask the court to declare the County Commission's actions to be null and void and to set them aside.

Standard of Review

When considering a request from a city that a board of county commissioners determine that an annexation of property will not hinder or prevent the proper growth and development of the area or that of any other incorporated city located within the county, the board acts in a quasi judicial capacity. *Cedar Creek Properties v. Board of Johnson County Commissioners*, 249 Kan. 149, 815 P.2d 492 (1991). When reviewing the Board's actions the district court is limited to considering whether, as a matter of law, (1) the Board acted fraudulently, arbitrarily, or capriciously, (2) the Board's order is supported by substantial evidence, and (3) the Board's action was within the scope of its authority. *City of Topeka v. Shawnee County Board of County Commissioners*, 252 Kan. 432, 845 P.2d 663 (1993).

The court cannot substitute its judgment for that of the members of the Board "who act as elected representatives and are able to observe and hear those who testify." *Id.*, 252 Kan. at 439. A reviewing court must accept as true the evidence and inferences supporting the Board's findings and disregard conflicting evidence and inferences. *Friends of Bethany Place, Inc. v. City of Topeka*, Court of Appeals Docket # 100,997, 222 P.3d 535, 549 (2010).

Findings of Fact

1. Mastercraft Corporation (hereinafter referred to as *Mastercraft*) is the developer of 155 acres of land near the intersection of Douglas County

Roads 1800 N and 900 E. At the times relevant to this case, there were 14 actual owners of the property.

2. The individual plaintiffs are owners of property adjacent to or located within ½ mile of the land owned by Mastercraft.
3. In 2003 the owners of the property submitted a request to the Board of County Commissioners (hereinafter referred to as the *Board*) to change the zoning of the property from agricultural to industrial. The Board denied the request. The members of the Board were the same in 2003 and 2004 as they were in 2008.
4. On January 30, 2008 Mastercraft petitioned the City of Lawrence to annex the 155 acres mentioned above.
5. On April 15, 2008 the City of Lawrence adopted a resolution asking the Board of County Commissioners to determine that the annexation of the Mastercraft property "will not hinder or prevent the proper growth and development of the area or that of any other incorporated city located within Douglas County, all as provided by K.S.A. 12-520c."
6. The Board first considered the City's request at its meeting on May 14, 2008. After hearing presentations by interested parties, the commission took a straw vote on the issues and then voted to refer the matter to the county staff to prepare findings to support the position that the annexation should be permitted. The commissioners decided to vote on those findings at the May 21st commission meeting. The

specific facts regarding the action taken at this meeting will be set forth in detail as necessary.

7. On May 21, 2008, at its regular meeting, the Board adopted Resolution Number 08-18 setting forth the County Commission's finding, among other things, that: "[T]he annexation of the Property by the City will not hinder or prevent the proper growth and development of the area, or that of any other incorporated city located within the County, all as provided by K.S.A. 12-520c."
8. On June 17, 2008, the plaintiffs filed their notice of appeal of the Board's finding that the annexation of the land by the City would not hinder or prevent the proper growth and development of the area.
9. On September 8, 2008, the City of Lawrence (hereinafter referred to as the *City*) published notice that it had adopted Ordinance No. 8285, annexing the Mastercraft land into the City of Lawrence. Hereinafter the Mastercraft tract of land shall be referred to as the *Property or the Annexed Land*.
10. On September 2, 2008, the City adopted Ordinance No. 8293 and notice of the adoption was published on September 9, 2008. This ordinance changed the zoning of the Annexed Land from agricultural to general industrial.
11. The City later adopted Ordinance No. 8350 which repealed Ordinance No. 8293 and reenacted the identical provisions with a new effective date.

12. This action is the plaintiffs' appeal of the Board's decision.

Issues

- I. Is the Board's Decision Supported by Substantial Competent Evidence or is it Unreasonable, Arbitrary or Capricious?
- II. Was the Board Required to Give Notice of Hearing to Interested Parties?
- III. Did the Board Lose Jurisdiction to Make a Decision?
- IV. Was the Legal Description Defective?
- V. Did the Applicant Fail to Disclose the Proposed Use and Development of the Property?
- VI. Did the Board Violate Plaintiff's Right to Due Process Because It's Members Were Biased, Prejudged the Issue, and Participated in Improper Ex parte Communications?

Conclusions of Law

- I. *Is the Board's Decision Supported by Substantial Competent Evidence or is it Unreasonable, Arbitrary or Capricious?*

Plaintiff first argues that the Board acted unreasonably, arbitrarily and capriciously when it found that that the annexation of the land by the City would not hinder or prevent the proper growth and development of the area because the finding is not supported by substantial competent evidence. In their memoranda the parties exhaustively itemize all of the evidence received by the Board concerning the annexation. As noted above, the court must determine whether the evidence presented in support of the Board's decision is competent

and substantial. The court does not re-weigh all of the evidence and substitute its judgment for the judgment of the Board.

The Board held a hearing on May 14, 2008. At the hearing, several of the plaintiffs spoke in opposition to the annexation. The Board also received and considered several letters from plaintiffs and other persons opposed to the annexation. Many persons, including officers and executives from the chamber of commerce, bankers, and realtors, spoke in favor of the annexation. The court is not going to itemize all of the evidence that is so capably itemized by the parties. Rather, the court will address specifically some of the alleged deficiencies mentioned by plaintiffs in their memorandum.

The plaintiffs devote a large portion of their memorandum to a discussion of the staff report. The staff report recommends that the applicant's request be deferred until further planning is complete. The property is outside the urban growth area shown in the comprehensive plan, *Horizon 2020*. However, the sector plan was under revision at the time the hearing was conducted and the draft changes to the plan recommended the inclusion of this property in the urban growth area.

The staff report was first considered by the planning commission. The planning commissioners had an extensive discussion of the staff's position that planning should precede annexation versus the applicant's position that planning should follow annexation. A good many of the staff's objections had to do with the fact that the property being outside the city does not have city services available and no plans exist for the extension of the services. The commissioners

were concerned that Lawrence had recently lost an opportunity for a major employer because no property was available at the time. The planning staff appeared to concede that in the future it was very likely that the proposed use for the property would be appropriate. After hearing all of the arguments pro and con the planning commission recommended annexation by a vote of six to two. Plaintiffs state that the vote of the planning commission is not in the record; however, the minutes of the planning commission meeting are included in the record as Document Number 4.

The staff report and the planning commission recommendation were both considered by the Lawrence City Commission and the Board of County Commissioners in determining that the property was appropriate for annexation. While the staff report recommended deferral of the request for annexation, it did not state that the ultimate annexation and proposed use were inappropriate. The real issue that the City Commission and the Board of County Commissioners dealt with was the need to move quickly to create more industrial sites for use by businesses wishing to move into the county versus the need for long range planning to proceed in an orderly manner. Ultimately, the governing bodies concluded that the need for quick action was more important than the need to plan first.

The plaintiffs contend that the Board should have considered each of the fourteen factors set forth in K.S.A. 12-521(c). As the Board's attorneys point out, K.S.A. 12-521 applies to involuntary annexations and the factors set forth in the section are intended to protect landowners from being unreasonably annexed

without their consent. The case at hand involves a voluntary annexation and the same protections are not needed for this type of annexation and are not included in the procedure established in K.S.A. 12-529c. The Board was not required to consider the 12-521c factors.

Having reviewed the evidence set forth in detail in the record and the memoranda of all the parties, the court finds that the Board's decision is supported by substantial competent evidence. Because substantial competent evidence was presented to support the Board's decision the Board did not act arbitrarily and capriciously.

II. Was the Board Required to Give Notice of Hearing to Interested Parties?

Plaintiff next contends that neither the Board nor the City of Lawrence published notice of the hearing or directly notified the plaintiffs or any city located in Douglas County. K.S.A. 12-520c does not contain any notice requirements. The plaintiffs emphasize the fact that the Board did not notify the City of Lecompton of the hearing date. The developer/applicant contends that even though there is no notice requirement its representatives personally notified representatives of the City of Lecompton and they had no objection to the annexation by the City of Lawrence.

Plaintiffs do not argue in their memorandum that the failure to notify interested parties violates the Constitution. However, the Board does address possible constitutional arguments in its memorandum. The arguments presented by the Board are convincing and the court finds that there is no constitutional requirement that the Board give notice to any other party. The court can find no

justification based on statute or constitution for requiring the Board to give notice to the City of Lecompton or anyone other than the landowner.

III. *Did the Board Lose Jurisdiction to Make a Decision?*

The plaintiffs next contend that the Board did not have jurisdiction to adopt Resolution No. 08-18 because the resolution was not adopted within the 30-day period set out in K.S.A. 12-520c. They further contend that as result the resolution is void.

K.S.A. 12-520c(c) provides, among other things, that:

The city clerk shall file a certified copy of such resolution with the board of county commissioners who shall, within thirty (30) days following the receipt thereof, make findings and notify the governing body of the city thereof.

The plaintiffs argue that, within the context of this statute, "shall" is mandatory and the failure of the Board to adopt the resolution and notify the City Commission within 30 days deprives the Board of jurisdiction to adopt the resolution. The Kansas Supreme Court has determined that:: "'Shall' is frequently read to mean 'may' where the context requires." *Paul v. City of Manhattan*, 212 Kan. 381, 385, 511 P.2d 244 (1973). The Supreme Court attempted to provide some guidance in *Sunflower Racing, Inc. v. Board of County Commissioners of Wyandotte County*, 256 Kan. 426, 435, 885 p.2d 1233 (1994), when it stated:

"In determining whether provisions of a statute are mandatory or directory, it is a general rule that where strict compliance with a provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system, and dispatch of the public business, the provision is directory."

The thirty-day provision contained in K.S.A. 12-520c appears to be designed to benefit the applicant and the city that asked the Board for its approval of the annexation. It is the type of provision that "fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system, and dispatch of the public business." The time period seems to provide an avenue for the applicant or city to secure a timely response to its request for findings from a recalcitrant Board. It is not a provision that "is essential to the preservation of the rights of parties affected or to the validity of the proceeding."

For this reason the court finds that the thirty-day time period set forth in K.S.A. 12-520c is directory. The court further finds that the failure of the Board to strictly comply with the time period does not invalidate its resolution.

IV. Was the Legal Description Defective?

The plaintiffs next argue that the Board's resolution (No. 08-18) is defective because the legal description in the resolution is not the same as that contained in the City's ordinance (No. 6764). Both descriptions describe the property as being the Southeast Quarter of Section 18, Township 12, Range 19 East. The main difference between the descriptions is that the description in the resolution does not contain the wording included in the ordinance, "containing 159.9 acres, more or less and subject to restrictions, easements, and reservations of record."

The plaintiffs rely on the decision in *City of Lenexa v. City of Olathe*, 233 Kan. 159, 660 P.2d 1368 (1983) to support their contention that the resolution is

defective. In that case the description set out in the notice of the adoption of the ordinance mistakenly contained the incorrect township. The court held that the notice was defective because persons reading the notice might have thought that the property annexed was an entirely different tract than that which was actually intended to be annexed. In this case there can be no doubt that the Annexed Property is the southeast quarter section of Section 18, Township 12, Range 19 East. The only issue is exactly how much property is contained within that quarter section, a matter that can be determined by survey. The court can take judicial notice of the fact that the curvature of the earth and other factors cause some minor variations in the exact number of acres contained in sections described in the original United States Survey of Kansas. The controlling description is complete and accurate in both the ordinance and the resolution. The plaintiffs' argument is without merit.

V. Did the Applicant Fail to Disclose the Proposed Use and Development of the Property?

Plaintiffs next argue that the applicant incorrectly or incompletely disclosed its intentions regarding the proposed use of the property. Although the applicant stated that it wanted to develop the property for use as a warehouse distribution center or industrial park, it also stated that it could not tell the Board the "specific use; only that it would be within the industrial zoning classification."

The plaintiffs contend that the applicant's failure to be more specific violates the requirement of the Kansas Supreme Court that the Board consider the proposed use or the reason for the requested annexation in determining

whether the annexation will affect the future growth of the area. *Cedar Creek Properties, Inc., v. Bd. Of County Commissioners of Johnson County*, 249 Kan. 149, 158, 815 P.2d 492 (1991). Plaintiffs state that the applicant presented two "competing and inconsistent renditions regarding the use of the property."

Plaintiffs argue that the applicant's statement that it would like to use the property for an industrial park or warehouse distribution center is totally inconsistent with the applicant's statement that it did not know for certain the exact use, but the use would be included within any permitted use within the industrial zoning classification of the City of Lawrence. They contend that because of this inconsistency the Board could not properly carry out its duty to determine whether the annexation would affect the future growth of the area.

The Board contends that the applicant's statement of the proposed use is not made up of two competing and inconsistent proposals. Rather, counsel for the Board says that the applicant's position was that it was a developer and all of the uses were not known. The applicant stated that the property would have multiple uses, most likely beginning with an industrial park, but ultimately the uses could include any use contained in the "industrial zoning" classification of the City of Lawrence. Thus, the Board was asked to consider the possibility that the property could be used for the most intense use contained in the industrial zoning classification.

In its memorandum the Board analyzes and compares the facts in *Cedar Creek* with the facts in the case at hand. In *Cedar Creek* the proposed use was known. The applicant intended to use the property as a quarry. The problem in

that case was that the board of county commissioners refused to consider the proposed use during its deliberations because it considered the proposed use to be irrelevant in determining whether the annexation would hinder the development of the area. The Court held that the proposed use is a factor that affects the Board's determination of whether to grant permission for annexation and must be considered by the Board.

The Board in this case specifically found that an industrial park can involve multiple uses and the developer could not reasonably identify the exact uses to which individual purchasers or lessors might want to put their portion of the property. The Board went on to find that the potential future uses of the property may include any use permitted within the industrial zoning classifications and development code of the City of Lawrence. Thus, in making its determination the Board considered that the property might be used for the most onerous purpose set out in the industrial zoning classifications. The Board fulfilled the obligation imposed by the *Cedar Creek* Court.

VI. Did the Board Violate Plaintiffs' Right to Due Process Because It's Members Were Biased, Prejudged the Issue, and Participated in Improper Ex parte Communications?

Finally, the plaintiffs argue that the board denied them due process because the commissioners were biased, prejudged the issues presented, and participated in improper ex parte communications outside the hearing. In 2003 or 2004 the owners of the Property asked the Board to change the zoning classification on the Property from agricultural to industrial. The Board was

comprised of the same individuals as were members on the date of the hearing in question. Two of the commissioners, Bob Johnson and Jere McElhaney, voted in favor of the zoning change. Plaintiffs contend that since Commissioners Johnson and McElhaney voted in favor of the zoning change in 2004 they should not have been a part of the 2008 annexation decision because they had previously formed a judgment as to the merits of the issue and did not consider the plaintiffs' arguments.

The only Kansas case which discusses prejudgment is *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, 40 P. 3d 522 (2002). The *McPherson* case involved a request for a conditional use permit. While this is not exactly the same situation as is present in the case at hand, the case is instructive for the issues facing this court. The *McPherson* Court discusses several cases from other jurisdictions reviewing quasi-judicial proceedings. Ultimately, the court does not make a precise statement of the test to be applied in such cases. When one looks at the manner in which the Court decided the case the Court was concerned with whether the decisionmaker maintained an open mind and listened to all of the evidence presented at the hearing before deciding the issue. This conclusion is supported by the Court of Appeals' decision in *Tri-County Concerned Citizens, Inc. v. Bd. Of county Comm'rs of Harper County*, 32 Kan. App. 2d 1168, 95 P.3d 1012 (2004).

In the case at hand, the comments made by the commissioners on the record and the answers to interrogatories filed by Commissioners Johnson and McElhaney support the conclusion that they listened to all of the evidence

presented before making a final decision on the issues before the Board. The burden is on the plaintiffs to show that the Board members did not maintain an open mind and listen to all of the evidence presented at the hearing before deciding the issue of whether to approve the annexation. The plaintiffs have not met that burden.

The plaintiffs then contend that the Board denied them due process because the members of the Board participated in ex parte communications outside of the hearing. In support of their argument the plaintiffs state that the following contacts occurred:

- Bob Johnson had a private meeting with the applicant's attorneys, Jane Eldredge and Matthew Gough. The meeting concerned the pending annexation.
- Jere McElhaney had a phone conversation with Steven Schwada, a representative of the applicant and a phone conversation with Jane Eldredge, applicant's attorney. These phone conversations took place between the date the planning staff submitted its report and May 14, 2008 and the subject matter of the conversations was the proposed annexation.
- Jere McElhaney participated in phone conversations with Keith Browning, the county's director of public works, and with Rich Barr, a representative of Lawrence-Douglas County Fire and Medical, regarding the proposed annexation.

- Jane Eldredge sent an e-mail to Jere McElhaney on or about May 6, 2008. The subject of the e-mail was the *Cedar Creek Properties* case.

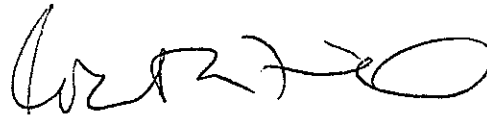
The commissioners involved did not reveal these contacts at the public hearing on May 14, 2008 or at any other time. In their responses to discovery, Commissioners Johnson and McElhaney stated that these contacts and communications did not provide them with information that differed from the information they received at the May 14, 2008 hearing. The Supreme Court's ruling in *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, 40 P.3d 522 (2002) makes it clear that not all ex parte contacts deprive a party to the proceeding of due process. In that case, it appears that all information disclosed in the ex parte communications was also disclosed at the hearing. In *Davenport Pastures v. Board of Morris County Comm'rs*, 40 Kan. App. 2d 648 (2008) the Court of Appeals held that: "Under the facts of this case, where it examined evidence that merely duplicated what was submitted, the Commission's examination of evidence outside the hearing did not violate Davenport's due process rights." 40 Kan. App. 2d at 656-657. The court looked at the record to determine whether the Commission members' consideration of extra-record evidence prejudiced the proceedings in a meaningful way.

The Board also cites *Shephard v. City of Lawrence*, Docket # 96,735 (2007), an unpublished Court of Appeals case in which the court held that communication between a city commissioner and a person who opposed the applicant's request for re-zoning did not deprive the plaintiff of due process.

In the case at hand, the court permitted the plaintiffs to propound discovery to the Board. The Board responded to that discovery. The discovery responses indicate that the members of the Board received no information that was not disclosed at the hearing. The plaintiffs offer no evidence to the contrary. The plaintiffs fail to show that they were prejudiced by the contacts made outside of the record.

For all of the reasons set forth above, the court finds that judgment should be entered in favor of the defendants. Costs are assessed to the plaintiffs.

This memorandum of decision constitutes a journal entry and judgment is entered in accordance with the findings hereinabove made. This memorandum is dated and effective this 19th day of April, 2010.



Robert W. Fairchild
District Judge

cc: Ronald Schneider
Barber Emerson, LC
Evan Ice
Kaup & Schultz, LC
Toni Ramirez Wheeler