IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS



**Scenic Riverway Community Association, *et al.*,**

Plaintiffs,



**Case No.** 2008CV622
**Div. No.** 1

v.

**City of Lawrence, Kansas,**

Defendant,

Pursuant to K.S.A. Chapter 60

## MEMORANDUM OF DECISION

This matter comes before the court on plaintiffs' petition. Both parties have submitted memoranda and made arguments in support of their respective positions.

### Nature of the Case

This case is the second of two cases involving the annexation and rezoning of a 155 acre tract located at the intersection of North 1800 Road and East 900 Road, which is close to the Lecompton exit on I-70. This location is essentially the intersection of Highway K-10 and the county road known informally as "Farmer's Turnpike." In the first case many of the same plaintiffs challenged the action of the Douglas County Board of County Commissioners approving the annexation of the land by the City of Lawrence, Kansas. The court ruled in favor of the county commission. In this case the plaintiffs challenge the actions of the City of Lawrence annexing and rezoning the 155 acre tract from agricultural use to general industrial use.

**Standard of Review**

The standard of review for government zoning actions is set out in *Combined Investment Co. v. Board of Butler County Comm'rs*, 227 Kan. 17, 605 P.2d 533 (1980) as follows:

> "(1) The local zoning authority, and not the court, has the right to prescribe, change or refuse to change, zoning.
>
> (2) The district court's power is limited to determining
>
> (a) the lawfulness of the action taken, and
>
> (b) the reasonableness of such action.
>
> (3) There is a presumption that the zoning authority acted reasonably.
>
> (4) The landowner has the burden of proving unreasonableness by a preponderance of the evidence.
>
> (5) A court may not substitute its judgment for that of the administrative body, and should not declare the action unreasonable unless clearly compelled to do so by the evidence.
>
> (6) Action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate.
>
> (7) Whether action is reasonable or not is a question of law, to be determined upon the basis of the facts which were presented to the zoning authority.
>
> (8) An appellate court must make the same review of the zoning authority's action as did the district court." 227 Kan. at 28. *See also, Zimmerman v. Board of County Com'rs*, 289 Kan. 926, 218 P.3d 400 (2009) and *Manly v. City of Shawnee*, 287 Kan. 63, 194 P.3d 1 (2008).

## Findings of Fact

1. Steve Schwada (hereinafter referred to as "Schwada") is an agent for the owners of 155 acres of land near the intersection of Douglas County Roads 1800 N and 900 E (hereinafter described as "The Property." 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 Property.
3. On January 30, 2008 Schwada petitioned the City of Lawrence to annex the Property.
4. On April 15, 2008 the City of Lawrence adopted a resolution asking the Board of County Commissioners to determine that the annexation of the 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."
5. On April 17, 2008, Schwada applied for a change of the zoning classification of the Property.
6. 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."

7. On May 30, 2008, the City mailed notice of the proposed rezoning to the owners of all property located within 1000 feet of the Property. Notice of the planning commission to be held on June 25, 2008 was published in a timely manner.
8. On June 25, 2008 the Lawrence-Douglas County Planning Commission held a public hearing concerning the proposed zoning change and approved by a four to one vote the rezoning application subject to certain conditions.
9. On August 19, 2008 the Lawrence City Commission approved the first reading of Rezoning Ordinance 8293.
10. On September 2, 2008, the city commission approved the second reading of Rezoning Ordinance 8293 and notice of the approved ordinance was published on September 9, 2008. This ordinance changed the zoning of the Property from agricultural to general industrial.
11. 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 Property into the City of Lawrence.
12. On October 6, 2008, the plaintiffs filed a petition appealing the annexation and rezoning of the Property.
13. On November 11, 2008, the City repealed Rezoning Ordinance 8293 and approved the first reading of Ordinance 8350 which contained provisions identical to those contained in Ordinance 8293.

14. On November 18, 2008, the City Commission approved the second reading of Ordinance 8350.

15. On November 21, 2008, City Ordinance 8350 was published.

**Issues**

I. Did the city commission have authority or jurisdiction to rezone the Property?

II. Was the city commission's action approving the rezoning arbitrary, unreasonable and capricious?

III. Was the rezoning subject to improper and illegal conditions?

IV. Did the City give proper notice?

V. Did the commissioners participate in improper ex parte communications?

**Conclusions of Law**

*I. Authority and Jurisdiction.* Plaintiff's first argument is that the City lacked the authority and the jurisdiction to enact the ordinance changing the zoning classification of the property. It is undisputed that the Property was not located in the city limits of Lawrence when the application for rezoning was filed, when the hearing before the planning commission took place, or when the City Commission had its first and second readings of the ordinance rezoning the property. The City published the ordinance annexing the property on September 8, 2008 and published the ordinance rezoning the property on September 9, 2008.

K.S.A. 12-754 provides that:

> "The zoning regulations for a city shall define the zoning jurisdiction as including the area within the city limits and may also include land located outside the city which is not currently subject to county zoning regulations and is within three miles of the city limits, but in no case shall it include land which is located more than ½ the distance to another city."

Section 20-103 of the City's Land Development Code provides that:

> "The provisions of this Development Code apply to all Development Activity, public and private, within the corporate limits of the City of Lawrence, to the extent permitted by law."

The plaintiffs contend that these two provisions prevent the initiation of the zoning process prior to annexation. The plaintiffs point out that Section 20-108(e) of the City's Development Code provides that:

> "Within two (2) months of the annexation of any territory not classified in a zoning category established pursuant to this Development Code, the City Commission shall initiate consideration of a rezoning of the same annexed territory to a specific zoning category pursuant to this Development Code or to the UR, Urban Reserve, Zoning District."

The plaintiffs contend that this provision requires that the city wait 2 months after annexation to commence rezoning procedures.

The City responds that the rezoning was not effective until the publication of Ordinance 8293, which occurred after the Property was annexed by the City. The City contends that nothing in the statute or Development Code Section 20-103 prohibits the initiation of the rezoning process prior to the annexation of the property in question. The City further contends that Section 20-108(e) does not require that the City refrain from zoning a property until 2 months has elapsed from the date of annexation, rather, it mandates that if the annexed property is not subject to a zoning classification it *must* be rezoned within 2 months. Both parties cite the decision in *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 69 P.3d 601 (2003), as authority for their positions. While the case is not directly on point, the Court states that:

> "Moreover, our holding does not deprive the City of anything. 'It retains its sovereign right to rezone the property at any time after annexation, or to delineate the proposed use through affirmative zoning action at the time of annexation.' 7 Kan. App. 2d at 665. De Soto's own zoning regulations provide additional flexibility, *i.e.*, the planning commission's public hearing regarding a proposed zoning change may even be held prior to annexation." 275 Kan. at 879.

The court finds that the City's position is the most logical. So long as the City follows its own zoning procedures, the fact that a rezoning is initiated prior to the effective date of the annexation of the property does not harm anyone. All parties are given the same right to present their positions to the planning commission and the city commission. There are many reasons why a city may wish to pursue an expedited process and, so long as the statutory process is followed, no one is harmed. The worst risk that is run by this procedure is that the City goes through the rezoning process and the annexation is not completed, rendering the rezoning steps unnecessary.

The court finds that the City had jurisdiction and authority to enact the rezoning ordinance.

*II. Reasonableness of the Rezoning Ordinance.* The plaintiffs next contend that the city's action in rezoning the Property was unreasonable, arbitrary and capricious. The plaintiffs analyze the evidence considered by the City in making its decision to rezone in light of the factors set out in *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978), and conclude that the City acted unreasonably. As the City points out, the factors set forth in *Golden* are also incorporated in the City's Development Code Section 20-1303(g). In its memorandum the City also analyzes the evidence considered by the City

Commission in light of the *Golden* factors and concludes that the applicants presented substantial evidence to support the City's action approving the rezoning application.

There is no question that the city commission considered each of the *Golden* factors. The plaintiffs appear to contend that the commission is required to look at each factor and keep a running score. They apparently contend that only if a majority of the factors favor rezoning should the commission approve the request. In *McPherson Landfill, Inc. v. Board of County Commissioners of Shawnee County*, 274 Kan. 303, 40 P.3d 522 (2002), the Supreme Court stated:

> "As a suggestion to zoning authorities, the *Golden* court enumerated eight factors which address the question of whether a final decision is reasonable. 224 Kan. at 598. The *Golden* factors have become standard considerations throughout Kansas by those charged with the responsibility of voting on zoning changes. However, the following *Golden* factors are suggestions and other factors may be equally or more important factors depending on the circumstances of the particular case. . . ." 274 Kan. at 306.

This court's review of the zoning authority's actions is guided by the considerations from *Combined Investment* set out above. The court's role is to determine whether the conclusions reached by the city commission are supported by substantial evidence. The court has reviewed the evidence presented at the hearing and summarized by the parties and finds that the commission's findings are supported by substantial evidence. Thus, the Court finds that the City Commission's finding that the Property should be rezoned is not arbitrary and capricious.

*III. The Conditions Imposed by the City.* The City granted the application to rezone the Property subject to the following conditions:

1. The owners could not use the property as a truck stop, explosive storage facility; salvage yard or a slaughter house.

2. No building permits can be issued for Section Two of the Property unless the City determines that the use or uses do not require City water or sanitary sewer service, because rural water service and on-site waste management will meet the requirements of the proposed use or uses.

3. The City of Lawrence, rather than the planning commission, must approve any site plan for the Property.

Plaintiffs contend that imposing conditions for rezoning is prohibited by the Kansas statutes. Specifically, plaintiffs argue that K.S.A. 12-755 sets for the City's zoning authority. Plaintiffs contend that the specific powers enumerated in the statute compose an exclusive list. The right to impose conditions on an approval of a rezoning application is not among the enumerated powers and the plaintiffs contend it is thus prohibited.

Defendants argue that the provisions of K.S.A. 12-755 are merely examples of powers and are not exclusive. The language of the statute states in part: "(a) The governing body may adopt zoning regulations which may include, but not be limited to, provisions which. . . ." This language clearly indicates that the enumerated powers are not exclusive. In fact, the enumerated powers are extremely limited and do not specifically state that the governing body can establish zone classifications that restrict the use of the property located within

each classification, a power that is basic to a municipality's ability to enact zoning regulations.

The court finds that the City has the authority to rezone the property subject to the enumerated restrictions.

*IV. Notice.* The plaintiffs next argue that the City did not give written notice of the proposed rezoning hearing to the Board of County Commissioners or to the affected Township Boards when required to do so. Plaintiffs rely on K.S.A. 12-743. Defendants argue that 12-743 applies to global enactments not site specific re-zoning. The statute provides:

> "(a) Before any city adopts a comprehensive plan or part thereof, subdivision regulations, zoning regulations or building or setback lines affecting property located outside the corporate limits of such city, written notice of such proposed action shall be given to the board of county commissioners of the county in which such property is located. Such notice shall also be given to the township board of the township in which such property is located if the township is located in a county not operating under the county unit road system."

The court finds that the statute applies to a city's initial enactment of or subsequent modification of the zoning regulations in general, not to the city's application of the zoning regulations to a specific tract of land. Thus, the City was not required to give notice to the county commission or the townships.

*V. Ex Parte Communications.* The plaintiffs next contend that three of the city commissioners engaged in improper ex parte communications with the applicant for rezoning. The City's answers to interrogatories indicate that Commissioner Mike Amyx met with Steve and Duane Schwada to discuss the rezoning application in January and July 2008; that Commissioner Rob Chestnut

met with Steve Schwada and Jane Eldridge to discuss the rezoning application and other issues on April 15, 2008; and that Commissioner Mike Dever met with Jane Eldridge and Steve Schwada at Eldridge's office to discuss the rezoning application and related issues on one or two occasions. Plaintiffs complain that these contacts were disclosed only at end of the public hearing rather than at the beginning of the public hearing as was the case with the plaintiffs' ex parte contacts. Plaintiffs concede in their memorandum that they confirmed prior to the public hearing that the applicants had engaged in ex parte communication with city commissioners. To counteract this, plaintiffs, themselves, met with some of the city commissioners ex parte.

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 plaintiff's have failed to demonstrate that the City Commission's ex parte communications with the applicant render the final decision of the City Commission unlawful or that they deprived the plaintiffs of due process of law.

**Summary**

For the reasons stated herein the court finds that judgments should be entered in favor of the defendant. Costs are assessed to plaintiff. 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 30th day of August, 2010.

Robert W. Fairchild
District Judge

cc: Ronald Schneider
Kaup & Schultz, LC
Toni Ramirez Wheeler