Updates from the Capitol: Part II
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Energy and Environmental Law Issues In The 2022 General Assembly

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HB 1 The Executive Branch Budget for 2023-2024 included:

- Funding for 7-8 new staff positions at the Public Service Commission
- Authorization for use of federal funds for brownfields, orphan oil and gas wells, and gulf hypoxia mitigation
- Language from previous budget preventing filling of mine safety positions was not included.

HB 8 (Petrie and others) makes numerous changes in tax laws, including possible reduction of the individual income tax rate, removing certain tax exemptions and imposing new service taxes, including car-sharing, historical site admissions.

The bill will impose excise and use taxes on electric and hybrid vehicles, including: an initial and subsequent annual registration fee of $120 per year for electric vehicles, which are defined to include plug-in hybrids; an initial and subsequent annual registration fee of $60 per year for hybrid vehicles, which are defined as having a combined internal combustion engine and electric motor, but no plug-in capability; and an additional tax of three cents ($0.03) per kilowatt hour (kWh) on any publicly accessible electric vehicle charging station that supplies power to electric vehicles. The fees on EVs and hybrids would have gone into effect immediately, but on the last day, House Bill 659 deferred the new fees for EVs and hybrids to January 1, 2024, in order to allow further consideration in the 2023 General Assembly session, of whether the proposed fees and the allocation of only half of those fees to the road fund, is appropriate.

The bill also eliminates sales tax exemptions for utility bills for residences unless the renter or homeowner "declares" that it is their "domicile." It is unclear how individuals will be made aware of the need or means to do so in order to avoid paying taxes on utility bills over and above their already high utility bills.

HB 45 (Bowling) revises several definitions in KRS Chapter 224 to address the chemical processing of waste plastics in order to recycle chemicals and monomers in the plastics, sometimes referred to as "advanced" or "chemical" recycling. The concept of recycling plastics by decomplexing of polymers has attracted criticism and the economics of such processing through pyrolysis, gasification, depolymerization, and other processes has not been demonstrated on a commercial scale. With only some 20% of post-consumer plastics being recovered through physical recycling (with the remainder being landfilled, incinerated, or dumped into the environment) it can be argued that the legal framework for regulating waste management and use of recycled feedstock should remain open to increasing the diversion of post-consumer plastics to new uses with the resulting decrease in virgin plastic production that such use would allow.

The final bill included language sought by Energy and Environment Cabinet and KRC to assure that those facilities engaged in the processing of waste plastics remain as regulated "solid waste sites and facilities," that conversion of plastics for fuel as advanced recycling, and that any facility processing and using the feedstock is subject to Cabinet regulation.

HB 77 (Bratcher) repealed and reenacted with amendments of Kentucky's Radon Safety program, including revisions in board membership, and increase in cap on fines to $1,000 per occurrence.

HB 195 (Johnson) creates a notification requirement in KRC Chapter 100 for communities with planning and zoning regarding developments within 660 feet of natural gas transmission pipelines; requires a notified pipeline operator to provide pipeline location information to the developer; and requires the

developer to include language on the final plat filed with the planning commission stating that the developer has utilized reasonable means to notify the pipeline operator and verify the pipeline location.

The language largely tracks the recommendations of the consensus stakeholder group Pipelines and Informed Planning Alliance (PIPA) that advises the U.S. DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA). https://primis.phmsa.dot.gov/comm/pipa/pipa_consultation_planning.htm

A model ordinance for land use and construction near transmission pipelines is included in Appendix B of the PIPA Report *Partnering to Further Enhance Pipeline Safety In Communities Through Risk-Informed land Use Planning,* November 2010 https://primis.phmsa.dot.gov/comm/publications/PIPA/AppB%20-%20ModelOrdinance.pdf The full Report is at https://primis.phmsa.dot.gov/comm/publications/PIPA/PIPA-Report-Final-20101117.pdf#pagemode=bookmarks

The bill was amended in the House to include "hazardous liquids pipelines" as well, which includes anhydrous ammonia, oil, and natural gas liquids pipelines.

HB 222 (Kulkarni, Nemes) is intended to protect freedom of expression against strategic lawsuits against public participation (SLAPP suits) by establishing procedures for dismissing legal actions filed in response to a party's exercise of free speech, right to petition, or right to association; allowing for an immediate appeal as a matter of right; allowing for costs to be awarded to the moving party if dismissal is granted; and allowing for costs to be awarded to responding party if the motion was found to be frivolous or filed with the intent to delay. Kentucky becomes one of over 30 states that have adopted such laws.

In *Seiller Waterman, LLC v. Bardstown Capital Corporation,* 643 S.W.3d 68 (Ky. 2022) the Supreme Court of Kentucky endorsed the extension of the *Noerr-Pennington* doctrine to zoning cases. The *Noerr-Pennington* doctrine is derived from two United States Supreme Court cases: *Eastern R.R. Presidents Conference*

v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), and immunizes (with exceptions) the First Amendment right to petition government and to influence governmental action.

The *Seiller* decision traces the origins and exceptions to the *Noerr-Pennington* doctrine under federal law and in Kentucky, and also for extending the protections of the doctrine to zoning matters. The Court discussed the development of anti-SLAPP legislation such as that adopted in HB 222, and specifically noted the bill in the opinion:

> In 2021, Washington adopted the Uniform Public Expression Protection Act (UPEPA), designed to prevent SLAPP litigation that intends to silence and intimidate defendants from engaging in constitutionally-protected activities. Five states, including Kentucky, have introduced UPEPA legislation, although Washington is the only state that has enacted the UPEPA as of March 1, 2022. The Kentucky legislation was introduced as House Bill 222 on January 5, 2022, passed in the House unanimously on February 18, 2022, and is currently pending in the Senate. House Bill 222 would create new KRS sections that establish procedures for dismissing legal actions filed in response to a party's exercise of free speech, right to petition, or right to association. The proposed legislation would also allow a party to appeal, as a matter of right, any order granting or denying a motion to dismiss filed in conjunction with this statute.

Seiller Waterman, LLC v. Bardstown Capital Corp., 643 S.W.3d 68 (Ky. 2022).

HB 594 (Pratt) will require agencies proposing regulation changes under KRS Chapter 13A to consider costs to regulated entities and to identify any regulation with over a certain dollar impact to be a "major economic impact." Current law already requires costs **and** benefits be considered in a regulatory impact analysis, so the bill adds nothing to regulatory analysis of costs.

HB 669 (Gooch) and **SB 315** (Mills) broaden the definition of "orphan wells" in KRS Chapter 353 in order to allow for receipt and expenditure of federal Infrastructure Act funds for plugging of abandoned and orphan oil and gas wells. The bill includes language requiring that requests for proposals on plugging and reclamation be structured in order to allow smaller Kentucky based companies to bid.

HB 758 (Gooch) establishes a water management assistance fund to provide assistance for both capital and non-capital expenses of governmental entities that provide public drinking water and wastewater services to the public. The intent is to provide "soft cost" technical, managerial, and financial assistance to assist local governmental entities to provide public water and wastewater services.

SB 205 (Mills) seeks to force disinvestment from financial companies engaged in energy company boycotts, requiring state agencies to divest from the listed financial company if it does not cease its energy company boycott after warning from the state. The bill requires the State Treasurer to publish, maintain, and update a list of financial companies engaged in energy company boycotts and to file the list with the Legislative Research Commission and the Attorney General; require state governmental entities to notify the Treasurer of the listed financial companies in which the state governmental entity owns direct or indirect holdings; require state governmental entities to inform and warn listed financial companies that they may become subject to divestment by the state governmental agency unless they clarify their actions or cease their energy company boycott, The bill also requires state governmental entities to divest from the listed financial company if it does not cease its energy company boycott in the timeframes established by the section; and provides for delays in the divestment schedule if it will result in a loss of value or a benchmark deviation.

Since the bill it exempts financial institution decisions made for ordinary business purpose, there is a question of whether the bill will have much effect since the decision of financial companies to invest, or to disinvest, from fossil fuels, is a

logical business reaction to the risk associated with investment in carbon-heavy industries. Some recent articles exploring energy boycott bills are these:
Wall Street firms face W.Va. boycott over alleged fossil fuel bias
https://www.politico.com/news/2022/06/14/banks-letter-west-virginia-boycott-fossil-fuels-00039246
Climate investing 'boycott bills' flood state capitals
https://www.politico.com/news/2022/02/15/climate-investing-boycott-bills-flood-state-capitals-00008641

SB 217 (Webb) Amends statutes governing the independent status of the Department of Fish and Wildlife Resources in relation to the Tourism Cabinet, and with respect to procurements by the Department. Testimony in House Committee expressing legitimate concerns of rank-and-file fish and wildlife groups, who are the "users" whose purchases of stamps and licenses fund much of the department's activities, with respect to the changes in management and accountability of the F&W Commission under the proposed bill.

Bills Of Interest That Did Not Pass

I. The issue of **utility rate proceedings** and **affordability** was the focus of several bills and resolutions filed in the House and Senate:

- **SB 28** (Girdler, Hornback, Adams, Meredith, Parrett) Would have allowed a utility to grant free or reduced rate service to any commercial food production operation that produces food items intended for human consumption, subject to the Public Service Commission approval of the tariff. Allowing an exemption or preferential rate for one subclass of customers will shift those costs to other ratepayers, since the costs will have to be paid by ratepayers within the system.
- **SB 329** (Wheeler) Would require the Public Service Commission to examine the use of the fuel adjustment clause by electric and natural gas utilities and report to the Legislative Research Commission by December 1 each year beginning on December 1, 2022.

- **SR 316** (Wheeler) a simple resolution urging the Public Service Commission to examine strategies to address utility costs to ratepayers, was adopted.
- **HB 341** (Gooch) which was withdrawn, would have allowed PSC-regulated utilities to file "streamlined" procedures for rate cases if a full rate case had been filed within the preceding 5 years. The bill would have (1) eliminated evidentiary hearings unless requested by the utility (which would seldom happen), (2) imposed limits on intervention timing, as well as on discovery by parties directed to the utility, and (3) allowed a number of utility capital investments to be done by "rider" rather than in a rate case or through a certificate of public convenience and necessity, thus allowing for less scrutiny of such proposed investments.
- **HB 755** (Gooch, Fugate) would have required the Public Service Commission to open an administrative case to initiate an investigation to reduce the volatility of fuel adjustment clause charges on electric utility bills within 90 days of the effective date of the Act and to promulgate administrative regulations to implement any changes it has prescribed to reduce the volatility of fuel adjustment clause charges on electric utility bills within 60 days of issuing an order in the administrative case. House Committee Substitute replaced text of bill with a legislative task force to study three issues: the Fuel Adjustment Clause; the use of securitization of debt in order to lower utility rates by obtaining more economical debt financing for retiring utility debt; and the impacts of early retirement of coal-fired power plants.
- **HCR 138** (Miles and Gooch) would have directed the Legislative Research Commission to examine and evaluate the feasibility of implementing an alternative rate mechanism (ARM) for public utilities regulated by the Public Service Commission.

II. What would a legislative session be without a bill proposing changes in the **administrative regulation process** to address regulations found by an interim legislative committee to be "deficient?" **HB 337** (Hale) would have granted an administrative body 10 days to appeal a legislative committee's deficiency finding to the Attorney General; allow the Attorney General 20 days after receipt of the

appeal to uphold or overrule the deficiency finding; and would deem a regulation withdrawn or nullified automatically if the appeal is not filed or the deficiency finding is upheld by the Attorney General; authorize the Governor to act on the regulation if the deficiency finding is overruled; prohibit an administrative body from promulgating an identical or substantially similar regulation for at least one year after a deficiency finding was upheld.

The House tacked HB 337 on to Senate Bill 65, which the Senate refused to accept the amendment. The House then receded and withdrew the amendment and passed the bill without the House amendment.

III. Competing bills to amend the merchant power plant construction certificate law to address **utility-scale solar facilities** were considered and fail to achieve consensus. **HB 392** found support in the House, while **SB 69** was favored by the Senate. Issues included the setting of decommissioning bonds, extent of local government input and control over siting decisions, and whether transfers of ownership and control would be subject to Siting Board review and approval.

IV. What do **dam safety** and **hog manure smells** have in common? Nothing. Yet **HB 597** (Gooch), an Energy and Environment Cabinet bill, would have updated state laws concerning water resources and require high hazard dams to develop and maintain emergency action plans. The bill was amended without notice in a Senate committee hearing to eliminate state permitting of no-discharge industrial hog barns, lagoons, and waste application on farmlands. In the end, the bill failed and the Cabinet's authority over industrial-scale hog waste management is intact.

VI. SB 118 (Smith) would have required the Energy and Environment Cabinet to update and study the state assumption of the Section 404 permitting program under the Clean Water Act. Several provisions of the bill would also have affected permit issuance under the KPDES pollutant discharge permit program.

Update On Issues From Past Sessions

HB 246 Jefferson County Solid Waste Management (2017)

A June 17, 2021 decision by the Kentucky Supreme Court in *Louisville/Jefferson County Metro Government Waste Management District et al. v. Jefferson County League of Cities et al.* 2019-SC-0520-DG found that the statute, which allowed the cities within Jefferson County to opt out of the county solid waste plan, violated the mandate of Kentucky Constitution Section 156a that "[a]ll legislation relating to cities of a certain classification shall apply equally to all cities within the same classification." Because the revisions to KRS Chapter 109 treated the home rule cities in Jefferson County differently than those elsewhere in the Commonwealth.

HB 72 Chapter 100 Zoning Appeal Bonds (2017)

There are four pending Court of Appeals cases challenging whether KRS 100.3471 is constitutional: *Bischoff v. Byrd,* 2019-CA-1311-MR; *Raz, Inc. v. Mercer County Fiscal Court,* 2020-CA-0543-MR; *Blue Grass Trust For Historic Preservation v. Lexington Fayette Urban County Government Planning Commission,* 2020-CA-0726-MR; and *Commonwealth v. Boone Dev., LLC,* 2021-CA-0411-MR.

Additionally, on May 9, 2022, the Scott Circuit Court issued a final Order in the case of *Richardson v. Georgetown-Scott County Planning Commission, et al.,* 16-CI-00146, concluding that KRS 100.3471 is unconstitutional for violating Sections 3, 27, 28, and 115 of the Kentucky Constitution.

HB 328 Billboards (2021)

HB 328 was intended to address an issue regarding the on-site and off-site distinctions in state regulation of outdoor advertising devices that resulted in a judicial decision appearing to declare void the entire Kentucky Billboard Act. A Sixth Circuit Court of Appeals decision reviewing and upholding the lower court ruling that the content-based distinction between regulation of on-premise and off-premise outdoor advertising devices was subject to strict scrutiny because the content of the sign was required to be read in order to determine whether the

sign was exempt or regulated, limited the scope of the District Court decision to the single billboard at issue before the District Court. During that interim, numerous outdoor advertising devices which do not meet the setback and spacing requirements for such devices were erected in Kentucky.

A question unanswered in the adoption of HB 328 is whether those devices erected during the period following the District Court decision and prior to the Sixth Circuit decision were "grandfathered" even if they fail to meet the size, spacing, and distance requirements of state law.

The underpinning of the District Court and Sixth Circuit decisions in *L.D. Mgmt. Co. v. Gray*, 988 F.3d 836 (6th Cir. 2021) holding that Kentucky law that differentiated between billboards advertising off-site activities and those advertising on-site activities was content-based and subject to strict scrutiny), was rejected by the U.S. Supreme Court in the case of *City of Austin, Texas v. Reagan National Advertising of Austin, LLC,* 142 S.Ct. 1464, 212 L. Ed. 2d 418 (2022). The *City of Austin* Court held that a city's outdoor advertising ordinance, which distinguished between on-premises and off-premises signs and specially regulated the latter, was facially content-neutral and was not subject to strict scrutiny under the First Amendment absent a content-based purpose or justification. The ordinance's provisions did not single out any topic or subject matter for differential treatment, and the message on the sign mattered only to the extent that it informed the sign's relative location.

In the aftermath of the *City of Austin* decision, the future of those signs erected without complying with the spacing and setback requirements due to the District Court decision voiding the Kentucky Billboard Act on the basis of the on-premise / off-premise content distinction, is all the more questionable.

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COMMONWEALTH OF KENTUCKY
SCOTT CIRCUIT COURT
DIVISION I
CASE NO. 16-CI-00146

WILLIAM RICHARDSON, et al. **PLAINTIFFS/APPELLANTS**

v.

GEORGETOWN-SCOTT COUNTY PLANNING COMMISSION, et al. **DEFENDANTS/APPELLEES**

ORDER

This matter came before the Court upon a December 7, 2021, hearing on an October 29, 2021, Motion for Appeal Bond, pursuant to KRS 100.3471, filed by Skyway Towers, LLC, Cellco Partnership, D/B/A Verizon Wireless, and Gene L. Burcher, Jr., ("Private Party Appellees"); the November 1, 2021, Motion filed by the Georgetown-Scott County Planning Commission, Mark Sulski, Jeff Caldwell, Byron Moran, John Shirley, Rob Jones, Frank Wiseman, Regina Mizell, and Janet Holland (collectively "GSCPC Appellees" unless otherwise noted); the Responses filed by William Richardson, Candance Richardson, Shawn Turner, Kerri Turner, James Clough, Chester Kiehl, Susan Jackson, Ward Simmons, Catherine Snow, and Wilson Simmons ("Appellants") on November 3, 2021; and the December 3, 2021, Brief in Support of the Constitutionality of Kentucky Revised Statute ("KRS") 100.3471 filed by the Attorney General. Having considered the Motions, Memorandums, Briefs, Responses, and Replies thereto, the record as a whole, and being otherwise sufficiently advised, the Court finds as follows:

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FINDINGS OF FACTS

This case came before the Court on an Administrative appeal for a cellular tower application. On December 29, 2020, the Court affirmed the action of the GSCPC, finding that the GSCPC Appellees did not act arbitrarily in granting the application. On January 8, 2021, Appellants filed a Motion to Alter, Amend, or Vacate pursuant to Kentucky Rule of Civil Procedure ("CR") 59.05; the Court denied Appellants' Motion on September 3, 2021. On October 1, 2021, Appellants filed a Notice of Appeal pursuant to CR 73.03.

On October 29, 2021, Private Party Appellees filed a Notice, Motion, Order, moving the Court to set an Appeal Bond pursuant to KRS 100.3471 and requesting a hearing on the matter. On November 1, 2021, GSCPC Appellees filed a separate Motion for an appeal bond under KRS 100.3471. On November 3, 2021, Appellants filed Responses both Motions. On November 4, 2021, these Motions and Responses came before the Court. Noting that the Attorney General was not present—as is required when challenging the constitutionality of a statute pursuant to KRS 418.075—the Court instructed Appellants to serve notice on the Attorney General and to schedule a conference call the following week, during which a date for the evidentiary hearing could be set.

Thereafter, the Office of the Attorney General was served, and the parties appeared for a scheduling hearing on November 12, 2021. On November 23, 2021, the Court entered a Scheduling Order. On December 3, 2021, Private Party Appellees filed a Pre-Hearing Brief; GSPC filed a Brief and Response; the Attorney General filed a Brief in Support of the Constitutionality of KRS 100.3471; and Appellants filed a Pre-Hearing Memorandum.

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I. THE EVIDENTIARY HEARING

On December 7, 2021, the Court held an evidentiary hearing pursuant to KRS 100.3471(3). During the hearing, Private Party Appellees called Scott M. Behuniak, president and C.O.O. of Skyway Towers, LLC, to testify.[1] Appellants called Dr. William Richardson as a witness. Additionally, several parties filed Affidavits.[2] In addition to testimony, the Court also heard oral arguments from Appellants and the Attorney General.

Dr. Richardson testified that he planned on constructing a private heliport on his property, which is adjacent to the proposed site of the cellular tower.[3] Additionally, Dr. Richardson explained that he opposes the cellular tower application because he is concerned that the tower will interfere with his ability to construct a heliport on his adjoining property and hinder his ability to operate, take off, and land his helicopter.[4]

During his testimony, Mr. Behuniak testified as to the expected damages to the Private Party Appellees resulting from the appeal. Based on Mr. Behuniak's long experience in the wireless industry, he testified that he expected Skyway Towers, LLC, would incur a substantial loss of rent due to the absence of tower revenue from Cellco Partnership d/b/a Verizon Wireless, as well as potentially a second wireless carrier over a one-year and two-year period in which the appeal may remain pending.

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[1] Mr. Behuniak has over twenty years of experience in the telecommunications field. As president and C.O.O. of Skyway Towers, LLC, Mr. Behuniak manages and oversees property management and tower development.
[2] On December 8, 2021, GSCPC filed an Affidavit of Counsel, Thomas R. Nienaber. Private Party Appellees filed an Affidavit of Counsel, F. Keith Brown on December 14, 2021.
[3] Dr. Richardson testified that he submitted an application to the Federal Aviation Administration ("FAA") to build a private heliport on his property in 2016; that application was approved by the FAA in 2017. (Appellants' Exhibit 1, Notice of Airspace Analysis Determination Establish a Private Use Airport, Conditional No Objection, ASN Number 2016-ASO-1141-NRA for the R.M. Johnson Field.).
[4] Regarding his concerns, Dr. Richardson points to a November 2, 2021, bulletin issued by the FAA. Dr. Richardson testified that, according to this bulletin, 5G-C wireless communication potentially affects a radio altimeter utilized by the helicopter and may result in loss of instrument effectiveness. (Appellants' Exhibit 2, FAA Aviation Safety: "Risk of Potential Adverse Effects On Radio Altimeters.").

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The Court found both witnesses to be credible and their testimony sincere. Upon the hearing's conclusion, the Court found that Appellants' appeal was not presumptively frivolous under KRS 100.3471(c). Furthermore, pending its decision on the constitutionality of KRS 100.3471, the Court determined that, pursuant to KRS 100.3471(3)(d), the appeal bond would be set at $100,000.00 in the interim. Lastly, the Court permitted the parties to tender Proposed Findings of Fact and Conclusions of Law by December 17, 2021; all parties did so.

On April 1, 2022, the Attorney General filed a Notice of Supplemental Authority as well as an accompanying Exhibit. On April 7, 2022, the Court held a Status Conference. Finally, on April 14, 2022, Appellants filed a Response to the Attorney General's Notice of Supplemental Authority.

ANALYSIS

In 2017, the Kentucky General Assembly enacted KRS 100.3471. Explaining the statute's purpose, the General Assembly stated that "it is desirable to curb unnecessary appeals of land use cases, which appeals burden the courts, cause loss of jobs and loss of tax revenue, and many times render time-sensitive projects such as multifamily affordable housing projects undevelopable…."[5] 2017 Ky. Acts ch. 181 § 2.

In particular, the statute requires that any party that appeals the Circuit Court's final decision made in accordance with any legal challenge under KRS Chapter 100, upon motion of an appellee, be required to file an appeal bond. KRS 100.3417(1). If the appellee files a motion for the Circuit Court to set an appeal bond, the judge must conduct a hearing to determine and set the amount of the bond. KRS 100.3417(3)(a). In making this determination, if the Circuit Court finds—as the Court has here—that the appeal is not presumptively frivolous, the Court must

[5] As the Attorney General points out, "The fact that this case is almost six years old lends some credence to the concerns expressed by the General Assembly when it enacted 2017 Ky. Acts. Ch. 181." (The Attorney General's Proposed Findings of Fact, Conclusions of Law, and Order, at 1, n.1.)

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consider all costs that the appellee may incur during the pendency of the appeal, including but not limited to attorney fees and court costs, plus interest payable on land acquisition or development loans, up to a maximum bond amount of one hundred thousand dollars ($100,000.00). KRS 100.3417(3)(d). Nevertheless, "the appellee has the burden to present sufficient evidence establishing the appellee's cost and damages. KRS 100.3471(3)(e). Once the Circuit Court sets the bond amount, the appellant must post it within fifteen (15) days, or else its appeal will be dismissed. KRS 100.3471(3)(f). Once the appeal becomes final and unappealable, either party can move the Circuit Court to conduct a hearing on the actual costs and damages to be paid to the appellee. KRS 100.3417(4)(a).

Appellants argue that KRS 100.3471 is unconstitutional. Currently, there are four cases pending before the Court of Appeals asking the Court to determine whether KRS 100.3471 is constitutional.[6] "Constitutional challenges to statutes generally fall within one of two categories: a facial challenge or an as-applied challenge." *Commonwealth v. Bredhold*, 599 S.W.3d 409, 415 (Ky. 2020). Here, Appellants argue that KRS 100.3471 is unconstitutional on its face, specifically arguing the following: (1) the statute violates the doctrine of separation of powers established by Sections 27 and 28 of the Kentucky Constitution; (2) it denies their right to an appeal guaranteed under Section 115 of the Kentucky Constitution; and (3) it violates their right to equal protection guaranteed by Section 3 of the Kentucky Constitution.

"It is a well-established principle that '[a] facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *Harris v. Commonwealth*, 338

[6] Currently, four cases pending before the Court of Appeals ask the Court to determine whether KRS 100.3471 is constitutional: (1) *Bischoff v. Byrd*, No. 2019-CA-1131-MR, on appeal from Nelson Circuit Court; (2) *Raz, Inc. v. Mercer Cnty. Fiscal Court*, No. 2020-CA-0543-MR, on appeal from Mercer Circuit Court; (3) *Blue Grass Tr. For Historic Preservation v. Lexington Fayette Urb. Cnty. Gov't Planning Comm'n*, No. 2020-CA-0726-MR, on appeal from Fayette Circuit Court; and (4) *Commonwealth v. Boone Dev., LLC*, No. 2021-CA-0411-MR, on appeal from Jessamine Circuit Court.

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S.W.3d 222, 229 (Ky. 2011) (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). This is a steep hurdle; if the statute could be constitutional under even one set of facts, the facial challenge fails. *See Harris v. Commonwealth*, 338 S.W.3d 222, 229 (Ky. 2011).

I. SEPARATION OF POWERS UNDER SECTIONS 27 AND 28 OF THE KENTUCKY CONSTITUTION

Appellants argue that KRS 100.347 is unconstitutional because it violates separation of powers in Sections 27, 28, and 116 of the Kentucky Constitution. Specifically, Appellants contend that KRS 100.3471 unconstitutionally intrudes on the Supreme Court's authority to prescribe rules of practice and procedure for the Court of Justice, and, as those rules apply to its appellate jurisdiction.

Citing various cases, Appellees argue that KRS 100.3471 constitutes a special statutory proceeding from an administrative agency, and that because administrative appeals are a matter of legislative grace, the legislature has the authority to impose rules controlling those appeals.[7] Indeed, the Supreme Court has acknowledged that, in "special statutory proceedings," the statutory procedures may differ from those procedures used in typical civil actions. CR 1(2). Whenever, that occurs, the statutory procedures control over conflicting Rules of Civil Procedure. *Id.*

Except for matter of right appeals under Section 110(2)(b), Section 116 of the Kentucky Constitution provides that "The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction...." Ky. Const. Sec. 116 (1976).

Section 27 of the Kentucky Constitution provides as follows:

> 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.

[7] *See Anthony v. McLaughlin*, 566 S.W.3d 581, 584–85 (Ky. App. 2018) (holding seven-day time for eviction appeals prevails over inconsistent Civil Rules); *see also Miller v. Jones*, 658 S.W.2d 888, 889–90 (Ky. App. 1983) (holding ten-day time for small claims appeals prevails over inconsistent Civil Rules).

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Lastly, Section 28 of the Kentucky Constitution provides as follows: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

To be clear, the issue before the Court deals with appeals *from the Circuit Court to the Court of Appeals*. As stated in *Board of Adjustments v. Flood*, 581 S.W.2d 1 (Ky. 1978), the civil rules do not apply to administrative agency actions until after the appeal has been perfected to circuit court. However, once the appeal has been perfected, the rules applicable to that appeal fall squarely within the judicial branch.

In *Elk Horn*, the Supreme Court stated that, "[e]xcept for matter of right appeals, which are expressly provided for [in Section 115], the Kentucky Constitution undeniably delegates exclusively to this Court the authority to adopt rules of practice and procedure for the Court of Justice and rules governing our appellate jurisdiction." *Elk Horn Coal Corp. v. Cheyenne Res., Inc.,* 163 S.W.3d 408 (Ky. 2005). In *Elk Horn*, the Supreme Court found that the legislature acted outside of its authority when it attempted to impose a penalty upon unsuccessful appellants pursuant to KRS 23A.300. Here, the provision of KRS 100.3471 requiring an appellant to post a bond as a condition of an appeal from Circuit Court to the Court of Appeals is similarly unconstitutional.

The Kentucky Rules of Civil Procedure prescribe the only available methods to stay judgments.[8] The purpose of those rules is to impose certain duties on appellants for the privilege of staying, or superseding, a court order. KRS 100.3471 invades the province of judicial branch by requiring an appellant to post an "appeal bond" which supersedes nothing. Appellees are not entitled to the protection of a bond under KRS 100.3471 because there is nothing preventing

[8] For example, CR 62.02 provides "When an appeal is taken from any judgment granting or denying an injunctive relief, the judgment may be stayed as provided in Rule 65.08." Moreover, Cr 62.03 provides "When an appeal is taken the appellant may stay the enforcement of judgment by giving a supersedeas bond as provided in Rule 73.04."

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them from enforcing the Circuit Court judgment. Appellees can proceed with the project, but they do so at their own risk. Therefore, unlike supersedeas bonds (which stay execution on money judgments) and injunction bonds (which protect parties from wrongfully issued restraining orders and injunctions), there is no reason for a bond in a typical Chapter 100 appeal.

Accordingly, because Section 116 of the Kentucky Constitution gives the Supreme Court the sole authority to prescribe rules governing its appellate jurisdiction, and because appeals of Chapter 100 cases from Circuit Court to the Court of Appeals fall within that jurisdiction, KRS 100.3471 is unconstitutional as it violates the doctrine of separation of powers established by Sections 27 and 28 of the Kentucky Constitution.

II. RIGHT TO AN APPEAL GUARANTEED BY SECTION 115 OF THE KENTUCKY CONSTITUTION

In 1976, Section 115 of the Kentucky Constitution became effective. Appellants argue that the KRS 100.3471 bond requirement interferes with a matter of right appeal in violation of Section 115 of the Kentucky Constitution, which provides as follows:

> In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court, except that the Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law, and the General Assembly may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage. Procedural rules shall provide for expeditious and inexpensive appeals. Appeals shall be upon the record and not by trial de novo.

Ky. Const. Sec. 115 (1976).

Specifically, Appellants contend that KRS 100.3471 "imposes an unconstitutional financial barrier and penalty on the exercise of the right of appeal guaranteed by § 115 of the Constitution." (Resp. at 7, Nov. 3, 2021).

In support of their argument, Appellants cite *Fickey v. Cross Creek Apartments, Ltd.*, 700 S.W.2d 807 (Ky. Ct. App. 1985), wherein the Kentucky Court of Appeals considered an *as-*

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applied challenge to the constitutionality of KRS 383.255. Specifically, the Court of Appeals granted limited review to the issue of "whether [that statute was] constitutional insofar as it would require an indigent person to deposit with the circuit court clerk the amount of rent due from the onset of the forcible detainer action as a condition precedent to maintaining an appeal to the circuit court." *Fickey*, 700 S.W.2d at 807–08. Ultimately, the Court of Appeals held that "*when applied to an indigent person* without sufficient funds to make the required payment into the court, the statute creates a financial barrier between him and the circuit court which forecloses his avenue of appeal. *Fickey*, 700 S.W.2d at 808 (emphasis added).

Admittedly, this case is distinguishable from the one before the Court. As previously discussed, constitutional challenges to statutes typically fall into one of two categories: a facial challenge or an as-applied challenge. For example, the *Fickey* case involved an *as-applied challenge* to the constitutionality of a different statute. Here, Appellants are making *a facial challenge* to the constitutionality of KRS 100.3471. Moreover, unlike the *Fickey* appellant, Appellants in this case have neither argued nor shown that they are indigent or otherwise incapable of satisfying the bond requirement.[9] Furthermore, Appellants cannot make an *as-applied challenge* based on the rights of unidentified, hypothetical, indigent third parties. *See Commonwealth v. Bredhold*, 599 S.W.3d 409, 416 (Ky. 2020) ("[I]n order to declare a statute unconstitutional as applied, a court must find the law unconstitutional as applied to the *challenger's particular circumstances*.") (emphasis added) (citing *United States v. Salerno*, 481 U.S. 739, 745 n.3 (1987))).

Accordingly, the question before the Court is whether KRS 100.3471, *in all circumstances*, constitutes an unreasonable condition on the right to appeal. In enacting KRS 100.3471, the General Assembly recognized that appeals of land use cases can "burden the

[9] For example, one of the Appellants, Dr. Richardson, testified that he was opposed to the cellular tower application because he had concerns regarding potential adverse effects on a private heliport he was planning to construct.

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courts, cause loss of jobs and loss of tax revenue, and many times render time-sensitive projects such as multifamily affordable housing projects undevelopable…."[10] 2017 Ky. Acts ch. 181 § 2. The Court acknowledges that, due to the complexity of KRS Chapter 100 cases, litigation can (and often does) go on for many years, and therefore can be extremely costly.

In cases such as this, the Circuit Court acts like an appellate court, but it is still the court of original jurisdiction. A petition for review under KRS 100.347 of the GSCPC's decision to the Circuit Court is not an "appeal to another court" provided for under Section 115 because the Planning Commission, which was created or empowered under KRS Chapter 100, does not constitute a "court" within the meaning of the constitutional provision. KRS 100.3471 requires the Court to impose a bond to cover all costs that Appellees may suffer or incur during the pendency of, or that will be caused by the appeal. Regardless of an appellants' financial condition, the requirement of a bond between $100,000.00 and $250,000.00 under KRS 100.3471 is a violation of the right to an appeal guaranteed by Section 115, especially because the statute authorizes the assessment and payment of damages to an appellee even if the appellant is successful on appeal.

III. RIGHT TO EQUAL PROTECTION GUARANTEED BY SECTION 3 OF THE KENTUCKY CONSTITUTION

Lastly, because KRS 100.3471 exempts government agencies (and persons challenging the creation or expansion of a landfill) from having to post an appeal bond, Appellants argue that it violates the right to equal protection as guaranteed under Section 2 of the Kentucky Constitution.

Section 3 of the Kentucky Constitution provides as follows:

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[10] As the Attorney General points out, "The fact that this case is almost six years old lends some credence to the concerns expressed by the General Assembly when it enacted 2017 Ky. Acts. Ch. 181." (The Attorney General's Proposed Findings of Fact, Conclusions of Law, and Order, at 1, n.1.)

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> All men, when they form a social compact, are equal; and no grand or exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

A constitutional challenge to a statute on equal protection grounds is facial and, as such is "the most difficult challenge to mount successfully." *Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006). Therefore, Appellants "must establish that no set of circumstances exists under which the [law] would be valid." *Id.* The presumption of the law's validity requires a challenger to show a constitutional violation is "clear, complete and unmistakable." *Ky. Indus. Util. Customers, Inc. v. Ky. Util. Co.*, 983 S.W.2d 493 (Ky. 1998).

As the Attorney General notes, even before the enactment of KRS 100.3471, government agencies were not required to file an appeal bond in a case where a private appellant was.[11] Therefore, the Attorney General asserts that KRS 100.3471(5) largely codifies the rule already found in CR 81A. Moreover, Appellants concede that the guarantee of equal protection *does not* prohibit all differential treatment among citizens, particularly in cases where the differential treatment results from a classification pertaining to economic matters rather than a suspect economic classification. When differential treatment among citizens results from a classification based on economic policy, courts evaluate it under rational basis review. *Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018). Under the rational basis test, courts must simply ask "whether there is any conceivable state of facts that could provide a rational basis for the classification." *Id.* at 596.

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[11] *See* CR 81A ("Whenever a bond is or may be required by these rules in order to take any proceeding, to indemnify any party, or to stay proceedings under the enforcement of a judgment, such requirement shall not apply to the United States, the Commonwealth, or any of its municipal corporations or political subdivisions, or any of their agencies or officers acting for or on their behalf."); *see also* KRS 454.190 ("Unless otherwise expressly provided by law, no bond, obligation or security shall be required of the Commonwealth or any of its agencies or officers acting for or in behalf of the Commonwealth in order to prosecute any remedy in the courts of this state.").

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KRS 100.3471 applies equally to all appellants in appeals of land uses cases from the Circuit Court to the Court of Appeals *except for* governmental entities *or* persons challenging the creation or expansion of a landfill. The exception to governmental entities is rational where the government has the resources to pay judgments or damages from wrongfully issued injunctions, making a bond unnecessary. In addition, the exception to persons challenging landfills is also rational where the creation or expansion of landfills is potentially so damaging to the challengers, and at the same time potentially costly for the applicant that there is a rational basis for treating it differently than other land use cases. Therefore, this Court finds no denial of equal protection to parties described within KRS 100.3471. However, appellate courts have also examined similar statutes to determine whether they deny appellants equal protection for other reasons.

Appellants cite *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005), wherein the Kentucky Supreme Court reviewed the constitutionality of KRS 26A.300—which imposed a ten percent penalty of the original judgment on unsuccessful second appeals of superseded judgments—and noted that, "Appellant is entitled to equal protection of the law under the 14th Amendment to the United States Constitution and under Sections 1, 2, and 3 of the Kentucky Constitution. Equal protection of the law essentially means that all persons similarly situated should be treated alike." *Id.* at 411. Ultimately, the Court held that KRS 26A.300 *denied equal protection* because it only assessed a penalty against unsuccessful appellants in second appeals from superseded money judgment, and not any other unsuccessful appellants in second appeals. *Id.* at 413. Therefore, the Court found that the statute was discriminatory because it failed to treat all unsuccessful appellants in second appeals the same. *Id.*

KRS 100.3471 only applies to appellants in land use cases, regardless of whether the appeal is frivolous, and it subjects appellants to such significant damages that it not only

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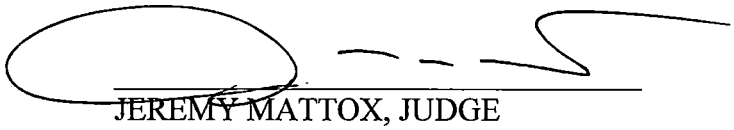
discourages legitimate appeals but may preclude them altogether. Considering the holding in *Elk Horn*, the Court finds that KRS 100.3471 violates Appellants' rights to equal protection under the law guaranteed by Section 3 of the Kentucky Constitution.

CONCLUSION

For the reasons set forth herein, the Court finds that KRS 100.3471 is unconstitutional, as it violates Sections 3, 27, 28, and 115 of the Kentucky Constitution. Appellants shall not be required to post a bond to perfect their appeal.

This order is final and appealable, there being no just cause for delay.

Entered this 9th day of May, 2022.



JEREMY MATTOX, JUDGE
SCOTT CIRCUIT COURT
DIVISION I

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