

Introduction to Planning & Zoning

Presentation to Kentucky Housing Task Force

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Speaker Background

David A. Pike is the managing owner of Pike Legal Group, PLLC, a regional law firm with six attorneys, with offices in Shepherdsville, Kentucky. F. Keith Brown is the Senior Associate Attorney for the firm. We have had incredible adventures practicing land use law for over 30 years representing private clients and local governments. We appreciate the opportunity to share our experience with the Task Force.

The multi-state practice of the Pike Legal Group, PLLC is concentrated in land use, zoning, permitting & related litigation as well as in real estate, administrative law, and telecommunications. One or more Pike Legal Group, PLLC, attorneys are admitted to practice in Alaska, Arkansas, Georgia, Indiana, Kentucky, Ohio, Tennessee, & West Virginia.



Overview

- Public Policy for Housing in the Commonwealth involves many issues which are intertwined with Planning and Zoning including:
 - Economic Incentives;
 - Taxation,
 - Regulation of Building Structures,
 - Transportation planning (Road improvements are usually subsequent to development),
 - Utility Capacity and Access,
 - School considerations,
 - Density,
 - Balance between Multi-Family and Single-Family Development
 - Availability of Recreational Opportunities; and
 - Application of the federal Fair Housing Act

Kentucky is a Zoning Enabling State

- Kentucky's appellate courts have held that the power to regulate land use is derived from the General Assembly, not inherent local "Home Rule" authority.
- KRS Chapter 100 is our guide. It is the "alpha and omega" of Zoning in KY.
- Allows localities to choose to adopt or not adopt Planning and Zoning at their discretion. Many rural areas do not have Planning and Zoning.
- Allows localities a great deal of freedom to adopt Comprehensive Plan and Zoning Ordinance provisions addressing residential development and regulation – Degree of regulation varies widely across the Commonwealth.
- Planning Commission and Board of Adjustment Members are appointed by Mayor or County Judge/Executive with Legislative Body approval.



Zone Classifications

- Per KRS Chapter 100, a planning unit will normally establish a number of Zone Classifications – often including Agricultural, Commercial, Industrial, and Residential, perhaps with several different specific types of Residential Zone Classifications:
 - Estate (Example: 1 acre+ in upscale development)
 - Traditional Single Family (Relatively large lot size & setbacks)
 - Duplex and/or Dense Single Family
 - Patio Homes
 - Condominiums
 - Townhouses
 - Apartments (Single Story / Multi-Story / Fourplex, etc.)
- The Zoning Map for the jurisdiction will identify which Zone Classification is in effect for each parcel. (“Euclidean Zoning”)

Comprehensive Plan / Rezoning

- The Comprehensive Plan will identify Current and anticipated Future Land Uses for broad areas in the community by Map. Comprehensive Plan is to be updated every 5 years per statute.
- Goals and Objectives of Comprehensive Plan are a key element, which must be approved by the Legislative Body.
- KRS 100.213 provides the grounds for a re-zoning to a new classification (finding of compliance with Comprehensive Plan, original Zone Classification inappropriate or that changes in social, economic factors in vicinity were not anticipated by Comprehensive Plan).
- Planning Commission makes a recommendation on a re-zoning (i.e. zoning map amendment) after Public Hearing and City Legislative Body or Fiscal Court makes final decision. Note distinction between “plan certain” (Lou./Lex.) and other jurisdictions in imposing binding elements. Smaller jurisdictions must obtain applicant’s agreement to binding elements.

What is a Subdivision?

- Defined by KRS 100.111(22) – key because this triggers the right to regulate
- "Subdivision" means "the division of a parcel of land into three (3) or more lots or parcels except in a county containing a city with a population equal to or greater than eight thousand (8,000) based upon the most recent federal decennial census or in an urban-county government or consolidated local government where a subdivision means the division of a parcel of land into two (2) or more lots or parcels; for the purpose, whether immediate or future, of sale, lease, or building development, or if a new street is involved, any division of a parcel of land; provided that a division of land for agricultural use and not involving a new street shall not be deemed a subdivision. The term includes resubdivision and when appropriate to the context, shall relate to the process of subdivision or to the land subdivided; any division or resubdivision of land into parcels of less than one (1) acre occurring within twelve months following a division of the same land shall be deemed a subdivision within the meaning of this section." (Emphasis added). KRS 100.111(22)

Subdivision Regulations

- A Planning Commission may adopt regulations for the SUBDIVISION of land within its boundaries once it has completed a comprehensive plan (KRS 100.273(1))
- The Agricultural Exemption may thwart subdivision regulation of certain 5 or more acre lots used for certain “agricultural” purposes. *Grannis v. Schroder*, 978 S.W.2d 328 (Ky. Ct. App. 1997). See also KRS 100.111(2) (Agricultural Use Definition), and KRS 100.203(4) (Agricultural Supremacy Clause/Limited Regulation). KRS 413.072 (Right to Farm Law).
- Subdivision regulations must be based on the Comprehensive Plan (KRS 100.281)

What are Subdivision Regulations?

- Subdivision regulations provide uniform guidelines for physical improvements that will be installed on developed property, such as streets, utilities and sewers
- Subdivision regulations are technical in nature
- Regulations containing a general list of matters to be considered are not sufficient. There must be rules and regulations constituting *specific* standards to be applied – Essentially a Checklist
- Planning Commission is DECISION-MAKER on subdivision plats (No Legislative Body review)

Standards for Decision

- Ministerial – Subdivision Plat – Key is Statutory/Regulatory compliance. Very limited discretion of Planning Commission to deny compliant Plat Application
- Arbitrariness/Substantial Evidence Review – Applied in Quasi Judicial Proceedings such as Re-Zoning (a/k/a Map Amendment). The local government decision will likely be upheld if due process was provided, it complies with KRS Chapter 100 and local enactments, is not arbitrary, and is based on substantial evidence of record. The Legislative Body may or may not conduct its own Public Hearing on a re-zoning. The arbitrariness/substantial evidence standard is also applied to review of Conditional Use Permits and Variances.
- Legislative – Adoption of original Zoning Ordinance or subsequent Text Amendment (Greatest degree of judicial deference. Enactment is not to be arbitrary and is to have a rational basis.)

Practicalities of the Decision Process

- There is wide variation in funding and staff resources of local Planning Offices and in documentation of decisions with formal findings, etc.
- Local Comprehensive Plans and Zoning Ordinances vary widely in detail and level of regulation of residential land use
- Recommendation of Zoning Administrator to Planning Commission, Board of Adjustment or Legislative Body is often critical
- Opposition of Neighbors to Proposed Development (“NIMBY”) is a “wild card” creating GREAT UNCERTAINTY of outcome for applicants
- NIMBY Neighbors often want to see a Subdivision Plat denied even though it is a ministerial decision

Judicial Review

- KRS 100.347 provides for appeal of re-zoning, subdivision plat, conditional use, variance, and other land use decisions to Circuit Court within 30 days.
- Numerous such cases are filed each year across the Commonwealth.
- “On the Record” review. No bench or jury trial before court.
- Judicial review is generally deferential and based on arbitrariness considerations, but some local government decisions do get overturned or remanded for new decision. Courts like to see that due process was provided, no decision-maker had a conflict of interest, the Comprehensive Plan and Zoning Ordinance (or Subdivision Regs.) were properly applied, and that the deciding body made specific findings of acts based on “substantial evidence” of record.

Judicial Review Continued

- It can take years for KRS 100.347 appeal cases to work their way to finality in courts particularly considering Circuit Court decisions are often appealed to the Court of Appeals followed by Motions for Discretionary Review to the Supreme Court after a Court of Appeals decision.
- Filing of a KRS 100.347 appeal, as a practical matter, often puts the development on hold because of developer concern over “building at risk.”
- KRS 100.3471 (2017 Zoning Appeal Bond Statute) was designed to discourage appeals where litigants lost at Circuit Court in order to prevent development projects from being substantially delayed by the appellate process. LAST WEEK, the Supreme Court declared the statute UNCONSTITUTIONAL in a lengthy 4 to 3 Opinion. The majority found the statute to encumber the constitutional right to at least one appeal and to invade the rule-making power of the Supreme Court.

Conclusion

- Challenge for the Legislature is how to effect policy goals for Housing within the highly localized Planning Units. Food for Thought:
 - Should Planning Units be required by statute to follow the Comprehensive Plan when presented with housing-related applications? (Current standard is “*Comp. Plan is a guide, not a straitjacket.*”)
 - Should localities be required to be more permissive for more dense “affordable housing” (whether rental or owner-occupied)? Current KRS Chapter 100 gives localities great discretion on residential zoning standards.
 - Should Public Hearings on residential subdivision plats be discouraged? (Technical/Ministerial plat issues not well-suited for Public Hearing / Potential Delegation to Zoning Administrator to avoid public hearings)
 - Are there other means outside of Planning and Zoning to encourage affordable housing?



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Thank You!

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