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OPINION OF JUNE 20, 2008, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000697-MR
AND
NO. 2007-CA-000713-MR

KENTUCKY PUBLIC SERVICE COMMISSION
AND BLUEGRASS WIRELESS, LLC APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-01213

L. GLENN SHADOAN AND
SUE SHADOAN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND MOORE, JUDGES.

COMBS, CHIEF JUDGE: The Kentucky Public Service Commission and Bluegrass Wireless, LLC, appeal from an opinion and order of the Franklin Circuit

Court vacating an order of the PSC entered on June 27, 2006. L. Glenn Shadoan and Sue Shadoan had asked the Franklin Circuit Court to vacate or set aside the order of the PSC. Both the PSC and Bluegrass Wireless now argue that the circuit court erred by granting that relief and by failing to dismiss the Shadoans' lawsuit. In the alternative, the PSC and Bluegrass Wireless contend that the circuit court erred by concluding that the Shadoans' local planning commission lacked jurisdiction to consider the proposed construction of a cellular tower on land adjacent to the Shadoans' property in Laurel County. We disagree with both contentions. Consequently, we affirm the opinion and order of the Franklin Circuit Court in its entirety.

In September 2005, Bluegrass Wireless filed an application with the PSC to secure a certificate of public convenience and necessity with respect to proposed construction of a cellular tower on property located in London, Kentucky. As adjacent property owners, the Shadoans sought to intervene in the application process, and in October 2005, the PSC granted their request.

After the Shadoans intervened, Bluegrass Wireless requested by letter that the PSC dismiss the application proceedings for lack of jurisdiction. The PSC examined the issue and determined that it did indeed lack jurisdiction to consider the proposed construction and that pursuant to the provisions of Kentucky Revised Statute(s) (KRS) 100.987(1), the London-Laurel County Joint Planning Commission was obligated to consider the proposed construction of the tower. The Shadoans' local planning commission had *not adopted any planning or zoning*

regulations relating to the location of cellular towers. Nonetheless, the PSC entered its order dismissing the application proceedings on June 27, 2006, and it denied the Shadoans' motion for rehearing on August 8, 2006.

On September 1, 2006, the Shadoans filed a complaint and petition for review in the Franklin Circuit Court naming the PSC and Bluegrass Wireless as respondents. Although the action was timely filed, the Shadoans did not file a separate and specific designation of record as contemplated by the provisions of KRS 278.420. Accordingly, the PSC and Bluegrass Wireless promptly filed motions to dismiss the Shadoans' petition for failure to designate the record properly.

The circuit court denied the motions to dismiss and entered an opinion and order granting summary judgment to the Shadoans. It concluded that the provisions of KRS 278.650 required the PSC to exercise jurisdiction where the local planning body had formally declined to do so because it had not adopted regulations dealing specifically with construction of cell towers. This appeal followed.

Bluegrass Wireless and the PSC argue first that the circuit court erred by failing to dismiss the Shadoans' action against them since the Shadoans did not file a separate and specific designation of record as required by the provisions of KRS 278.420. They contend that the Shadoans' failure to comply with that statutory provision in the administrative process resulted in a failure of jurisdiction of the Franklin Circuit Court.

KRS 278.410 provides that any party to a PSC proceeding or any utility affected by an order of the Commission may – within 30 days of the order – bring an action in Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. KRS 278.420 provides, in part, as follows:

> (1) In any action filed against the commission because of its order in a proceeding before it, the commission shall file a certified copy of the designated record and evidence with the court in which the action is pending.
>
> (2) Unless an agreed statement of the record is filed with the court, *the filing party shall designate, within ten (10) days after an action is filed, the portions of the record necessary to determine the issues raised in the action.* Within ten (10) days after the service of the designation or within ten (10) days after the court enters an order permitting any other party to intervene in the action, whichever occurs last, any other party to the action may designate additional portions for filing. The court may enlarge the ten (10) day period where cause is shown. Additionally, the court may require or permit subsequent corrections or additions to the record.

(Emphasis added).

There was no evidentiary record compiled by the agency in this case. Instead, the jurisdictional issue raised by Bluegrass Wireless was resolved in short order and as a matter of law. The Shadoans attached as an appendix to their complaint and petition a copy of the PSC's order of August 8, 2006, denying a rehearing. The circuit court readily accepted this filing and determined that a copy of the order of August 8, 2006, was the *only* document necessary to resolve the issues raised in the complaint. While the Shadoans may not have formally

identified this action as a "designation of record," we cannot say that the circuit court erred in concluding that the statutory requirements under the circumstances of this case were satisfied. The only issue before the PSC was whether it had jurisdiction to consider the utility's proposed construction of a cellular tower. The PSC had decided that issue, which then became subject to the plenary review of the circuit court.

We next consider whether the circuit court erred in concluding that the Shadoans' local planning commission lacked jurisdiction to decide the substantive issue regarding the proposed construction of a cellular tower because it had not adopted specific zoning regulations pursuant to the provisions of KRS 100.987. In its opinion and order, the circuit court observed that the statutory scheme governing the regulation of cellular towers contemplates circumstances under which a local commission may regulate construction of cellular towers. The statute provides separately for circumstances under which the PSC is to regulate the proposed construction of cellular towers. After examining the statutory scheme, the circuit court determined that pursuant to the provisions of KRS 100.987(1), a local planning commission has the absolute discretion to regulate the construction of cellular towers. However, in order to exercise this authority, the commission must first have adopted local planning and zoning regulations dealing specifically with the construction of cellular towers. Adoption of the regulations is, in effect, a condition precedent to its jurisdiction. The circuit court concluded that if a local planning commission has not adopted specific regulations concerning

the construction of cellular towers, there is essentially a void of jurisdiction at the local level. Pursuant to KRS 278.650, the PSC must then exercise its jurisdiction and authority to consider the utility's proposal.

On appeal, Bluegrass Wireless and the PSC contend that the Franklin Circuit Court misconstrued the statutory scheme by misinterpreting the provisions of both KRS 278.650 and KRS 100.987. KRS 278.650 provides, in pertinent part, as follows:

> If an applicant proposes construction of an antenna tower for cellular telecommunications services or personal communications services which is to be located *in an area outside the jurisdiction of a planning commission*, the applicant shall apply to the Public Service Commission for a certificate of public convenience and necessity pursuant to KRS 278.020(1), 278.665, and this section.

(Emphasis added).

Bluegrass Wireless and the PSC contend that the phrase "in an area outside the jurisdiction of a planning commission" refers solely to the geographical jurisdiction of a local planning unit or commission. According to Bluegrass Wireless and the PSC, a utility that seeks to build a cellular tower must apply for a certificate of public convenience and necessity with the PSC only if the applicant seeks to construct a tower outside the *geographical* jurisdiction of a local planning commission. However, where a utility seeks to build a tower *within* the geographical boundaries of a local planning unit, it must file an application with the local planning commission. Bluegrass Wireless and the PSC contend that the local planning commission has exclusive jurisdiction on this issue even if it has

declined, neglected, or omitted to adopt any planning or zoning regulations dealing specifically with the construction of cellular towers.

Bluegrass Wireless and the PSC argue that their interpretation of the provisions of KRS 278.650 is bolstered by operation of the provisions of KRS 100.987. That statute provides that local governments may plan for and regulate the construction of cellular towers. It also outlines the duties and powers of a planning commission where a utility's application has been submitted for approval. By virtue of these provisions, Bluegrass Wireless and the PSC contend that all local planning units established under KRS Chapter 100 have sole jurisdiction over applications concerning the proposed construction of a cellular tower within their political boundaries and that local planning commissions are required to consider a utility's proposal to construct a cellular tower within those physical boundaries.

In construing statutes, we must consider their literal language without adding or subtracting from their provisions. Nor may we attribute to them a meaning not reasonably or readily deducible from the precise language used. *Estes v. Commonwealth*, 952 S.W.2d 701 (Ky. 1997). KRS 100.987(1) provides as follows:

> A planning unit as defined in KRS 100.111 and legislative body or fiscal court that has adopted planning and zoning regulations may plan for and regulate the siting of cellular antenna towers in accordance with locally adopted planning or zoning regulations in this chapter.

Like the circuit court, we are persuaded that this provision affords a planning unit discretionary authority to regulate cellular tower construction within its political boundaries and that this authority is triggered by the local adoption of regulations specific to the construction of cellular towers. This interpretation of the plainly permissive language of KRS 100.987(1) also harmonizes with the language of KRS 278.650 that envisions the possibility that under some circumstances, an application for a proposed cellular tower may fall outside the regulatory authority (*i.e.*, "jurisdiction") of a local planning commission.

In this case, the legislative body of the London-Laurel County Joint Planning Commission has adopted a planning and zoning ordinance that does not include specific regulations concerning the proposed construction of cellular towers. As a consequence, the local planning commission essentially declined to exercise its jurisdiction to consider Bluegrass Wireless's proposal to construct a cell tower in Laurel County. The circuit court correctly concluded that the proposed construction of Bluegrass Wireless's cellular tower in Laurel County was "outside the jurisdiction" of the local planning commission since there was a void of jurisdiction on the subject. Therefore, KRS 278.650 served as the only statutory means to fill the jurisdictional vacuum. The Franklin Circuit Court correctly determined that this matter devolved by statute to the PSC to exercise jurisdiction in light of the default of the local planning commission to address the issue.

We affirm the opinion and order of the Franklin Circuit Court.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

MOORE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I agree with the well-reasoned opinion of the majority, and write separately only to express my opinion on the meaning of "may" in KRS 100.987(1).

Historically, "may" is permissive in meaning but conceivably may also have a mandatory meaning. To determine the true meaning of "may" in KRS 100.987(1), a review of that statute is necessary. In reviewing the statute we need only to read the first two lines to see that it immediately refers to planning and zoning regulations as adopted by a legislative body, fiscal court or planning unit. Thus, a review of Chapter 100 is in order as it applies to a legislative body, fiscal court, or planning unit's plan to regulate a particular geographic area.

I seek to avoid an in-depth discussion of the chapter and, for our purposes, focus on KRS 100.183 and KRS 100.187. KRS 100.183 states that the plan shall be a comprehensive plan. KRS 100.187 gives us the recipe for a comprehensive plan. Throughout KRS 100.187 the terms "may" and "shall" are used by the legislature in giving guidance as to the contents of a comprehensive plan. In short, "shall" is used to dictate that the comprehensive plan consider various broad categories, for example, uses for the public and private land, the channels, routes and terminals for transportation, the general location, character, and extent of public and semipublic buildings, land and facilities. In contrast,

"may" is used to allow flexibility to the planning commission in formulating the comprehensive plan within each of those categories; allowing it to consider what it would like to encompass within its planning and zoning and what it would like to disregard. Thus, "may" has a permissive character and, thereby, meaning is given to "may" and "shall" as used in Chapter 100.

A review of KRS 100.987(1) reveals that "shall" is conspicuously absent; "may" is the controlling term. When the statute is read, it appears apparent that "may", permissive in usage, allows a planning unit to extend its authority to regulate the citing of cellular antenna towers. This extension of authority is permissive and not mandatory. First and foremost, to construe such as mandatory would be to read "may" as "shall", which is, I believe, diametrically opposed to the meaning of the terms as established by the legislature in KRS 100.187. Secondly, to do so would be to either forcibly dictate that planning commissions established prior to 1998[1] regulate the citing of cellular antenna towers when it was not their intention to do so or, alternatively, to create two types of planning commissions, one that doesn't regulate the citing of towers[2] and others that do so regulate.[3] This would lead to inconsistency among our planning commissions and, I believe, an absurd result.

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[1] Planning commissions established prior to 1998 would have adopted regulations pursuant to KRS 100.183 and KRS 100.187, both enacted in 1966, and before the enactment of KRS 100.987 in 1998.

[2] Planning commissions established before the enactment of KRS 100.987.

[3] Planning commissions established after the enactment of KRS 100.987.

Therefore, I join in affirming the Franklin Circuit Court decision.

MOORE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Regarding Appellants' argument as to the designation of record pursuant to KRS 278.420(2), *Forest Hills Developers, Inc. v. Public Service Commission*, 936 S.W.2d 94 (Ky. App. 1996) and *Board of Adjustments of the City of Richmond v. Flood,* 581 S.W.2d 1, 2 (Ky. 1978), I agree with them that an appeal from an administrative agency is not a matter of right but is a matter of legislative grace, requiring strict compliance. However, in the case at hand, no injustice is done to this standard given the fact that the only document for review was the submitted August 8, 2006 order.

The purpose of a designation of record is to put the opposing party on notice of the evidence upon which the petitioner or appellant plans to rely for an appeal. In the case at hand, this requirement was met. *See Forest Hills*, 936 S.W.2d at 96.

Turning to the crux of this appeal: the interpretation of KRS 278.650 and KRS 100.987, I respectfully dissent from the majority's opinion.

Kentucky Revised Statute 100.987(1) provides:

> A planning unit as defined in KRS 100.111 and legislative body or fiscal court that has adopted planning and zoning regulations may plan for and regulate the siting of cellular antenna towers in accordance with locally adopted planning or zoning regulations in this chapter.

The circuit court and the majority opinion determined that this section of KRS 100.987 grants discretion in a local planning commission whether or not to regulate the siting of cell towers. Reading the entire statute as a whole, respectfully I am compelled to disagree.

Looking to the sections of KRS 100.987, section two provides that all utilities interested in constructing a cell tower *shall* file a completed uniform application with the local planning commission "of the affected planning unit[.]" Furthermore, section four of the statute provides that the local planning commission *shall* review the utility's uniform application in light of the comprehensive plan and local zoning regulations that have been adopted by the commission's legislative body. This section also states that the local commission *shall* make a final decision, in writing, either approving or disapproving the utility's application. If the commission disapproves, section five provides that it *shall* give the reasons for disapproval. According to KRS 446.010(30), "shall" is mandatory. *See also Hardin County Fiscal Court v. Hardin County Bd. of Health,* 899 S.W.2d 859, 861(Ky. App. 1995). Clearly, sections two and four are mandatory. Statutory construction rules require construing all sections of a statute to ascertain a statute's meaning. *See Combs v. Hubb Coal Corp.,* 934 S.W.2d 250, 252 (Ky. 1996) (Courts must try to harmonize and give effect to all sections and must try to construe the statute in such a manner that no part is rendered meaningless and ineffectual.).

Consequently, when KRS 100.987(1) is viewed in light of the entire statute, it becomes apparent that no conflict exists between section one and the remaining sections and no ambiguity exists within the statute. All parties involved in this case agree that the General Assembly has decentralized the regulation of cell tower placement over the years. Given this intent, it only makes sense that the legislature would require local planning units to regulate the siting of cell towers because the planning commission for such a unit would be most familiar with the local comprehensive plan, adopted by the unit, which controls the physical, economic and social growth of the unit's community. In fact, Chapter 100, commencing with KRS 100.113, discusses the types of planning units, of which the London-Laurel County Joint Planning Commission is one; KRS 100.193 states that such a commission shall prepare a comprehensive plan; KRS 100.187 states the plan shall contain a "land use plan element"; KRS 100.987(2) states that "[e]very utility or a company . . . that proposes to construct an antenna tower for cellular telecommunications services . . . within the jurisdiction of a planning unit that has adopted planning and zoning regulations in accordance with this chapter[4] shall: (a) Submit a copy of the applicant's completed uniform application to the planning commission . . .", and lastly KRS 100.987(4)(a) states that local planning commissions shall regulate cell towers in accordance with its local comprehensive plan.

[4] It should be noted that this subsection does not state with this "section" but specifically refers to this "chapter."

Given this, I conclude that the legislature intended to make local planning units primarily responsible for approving or disapproving placement of cell towers within their geographic boundaries. Kentucky Revised Statute 100.987(1) means that, while a local planning unit must approve or disapprove the siting of cell towers within its geographical boundaries, it has the option of adopting its own regulations or of using the regulations set forth in KRS Chapter 100, specifically KRS 100.985 to 100.987, to plan for and regulate the siting of cell towers. Moreover, finding no ambiguity within KRS 100.987, it must be applied as written. *See McCracken County Fiscal Court v. Graves,* 885 S.W.2d 307, 309 (Ky. 1994).

This notion that local planning units are first and foremost responsible for the siting of cell towers is reinforced when KRS 100.987 is considered in light of KRS 100.985, which sets forth definitions for KRS 100.985 to 100.987; KRS 100.986, which sets forth mandatory prohibitions on planning commissions in regulating the placement of cell towers; and KRS 100.9865, which sets forth the contents of uniform application to be filed with local planning commissions. When KRS 100.987 is placed in context with these other statutes, it becomes obvious that the General Assembly passed a comprehensive statutory scheme for local planning commissions to regulate the siting of cellular antenna towers, and the only discretion granted to local planning units is set forth in KRS 100.987(1) regarding whether the local planning commission elects to adopt its own regulations concerning the siting of towers or to merely use the statutory scheme

provided by the legislature. Therefore, I would hold that the circuit court's interpretation of KRS 100.987 was erroneous and the proper entity to consider Bluegrass's application is the London-Laurel County Joint Planning Commission.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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