

Presented to the committee to be filed in records
Case # 17200NE 18 DEU Plan 1029

**Re: Oakland Hills Development with a request for
rezoning 200 acres 340 apt or condos into the
new Broad Run Parkway**

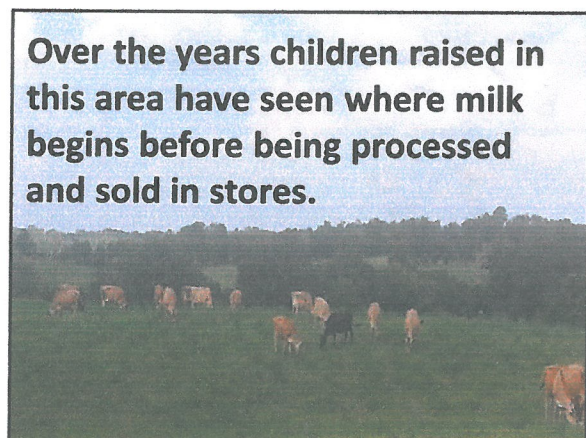
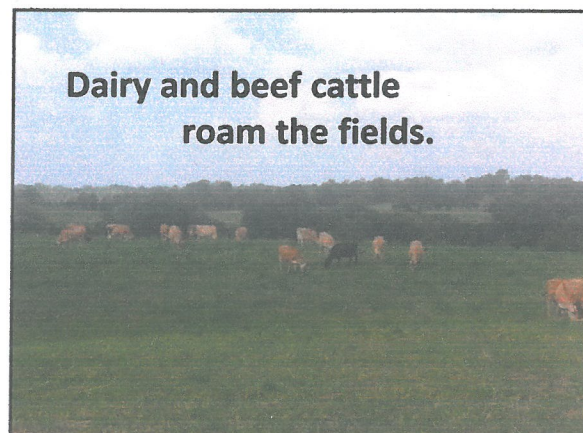
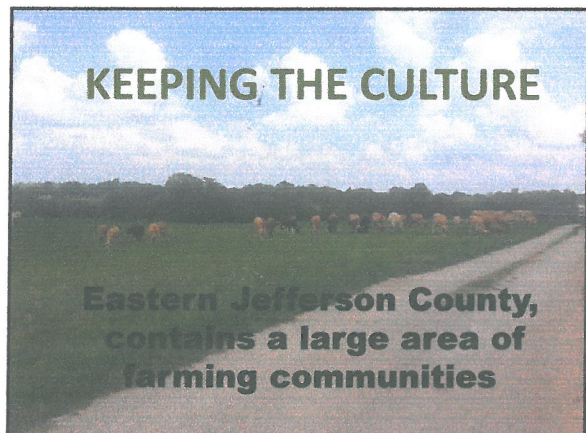
**This is a very large agricultural area NOT
compatible with apartment life.**

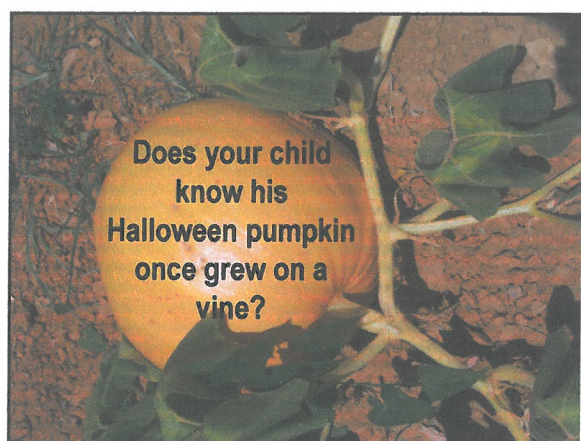
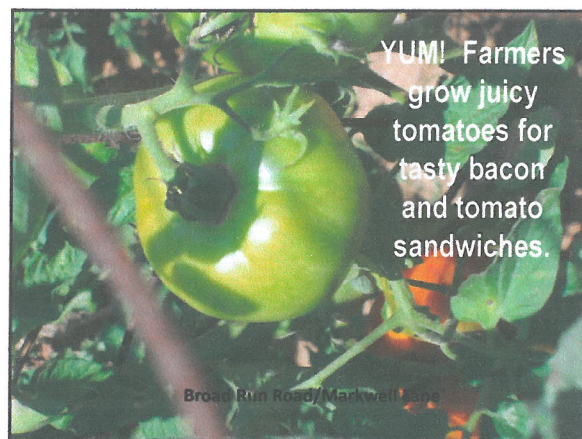
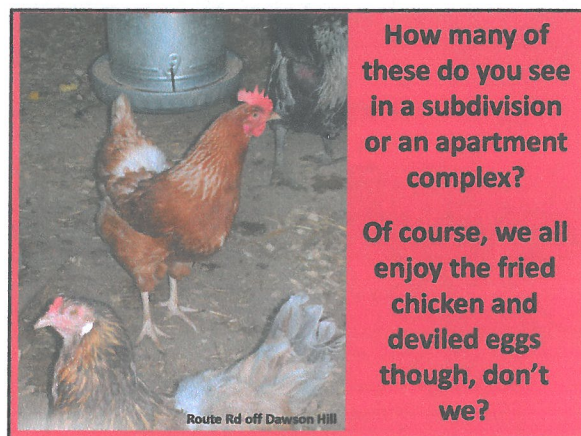
July 16/18

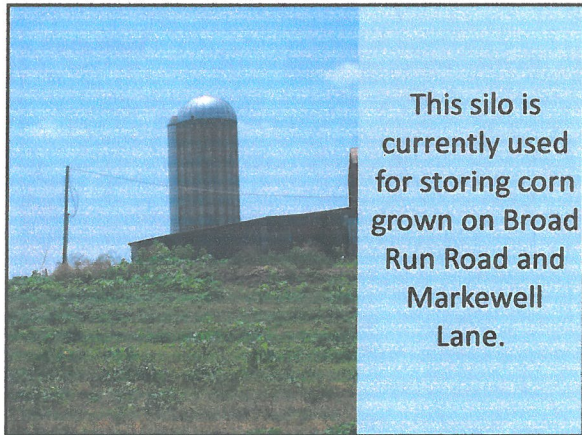
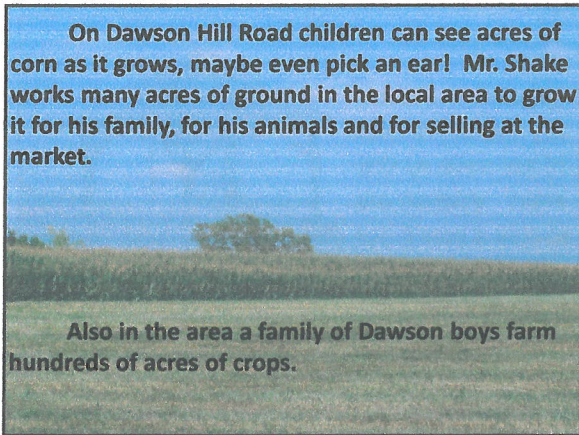
INVASION OF THE BUILDINGS

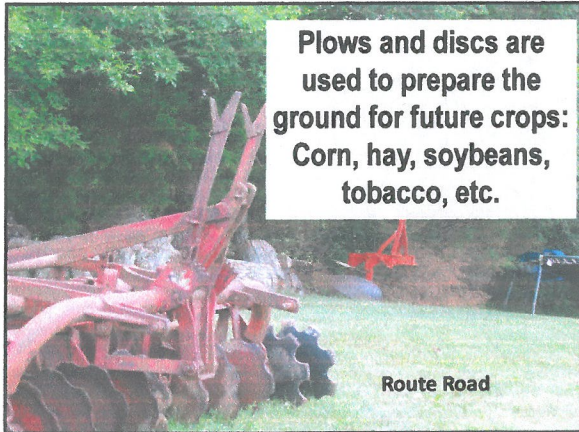
on
Agriculture Area

Received
@ PC
Public Hearings
7/16/18



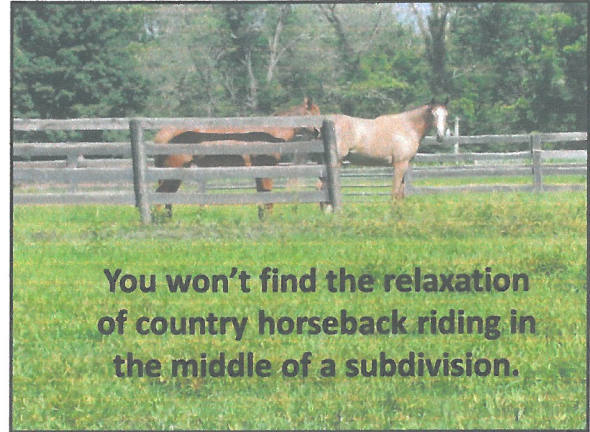




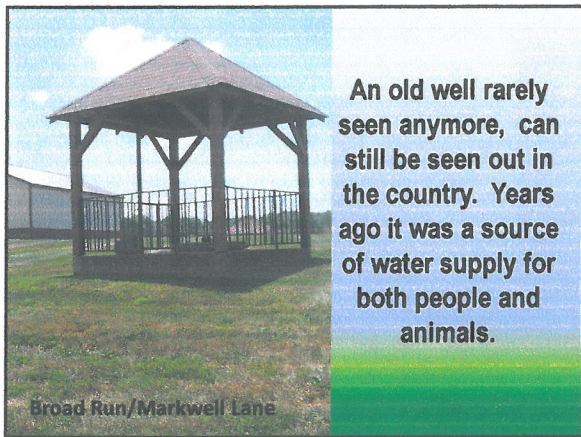


Plows and discs are used to prepare the ground for future crops: Corn, hay, soybeans, tobacco, etc.

Route Road



You won't find the relaxation of country horseback riding in the middle of a subdivision.



An old well rarely seen anymore, can still be seen out in the country. Years ago it was a source of water supply for both people and animals.

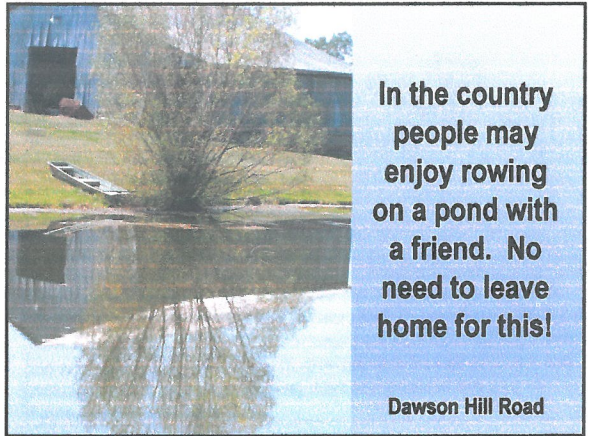
Broad Run/Markwell Lane



Route Road

Not from the country? This is a wood splitter used to prepare for heat in the homes and barns in the winter months.

Country folk enjoy rocking on the front porch after chores perhaps to just enjoy the song of a Whippoorwill or the scampering of a nearby bunny or squirrel. They relax as a cool breeze passes through the trees while they sit gazing with pride across their growing crops and grazing animals.



In the country people may enjoy rowing on a pond with a friend. No need to leave home for this!

Dawson Hill Road



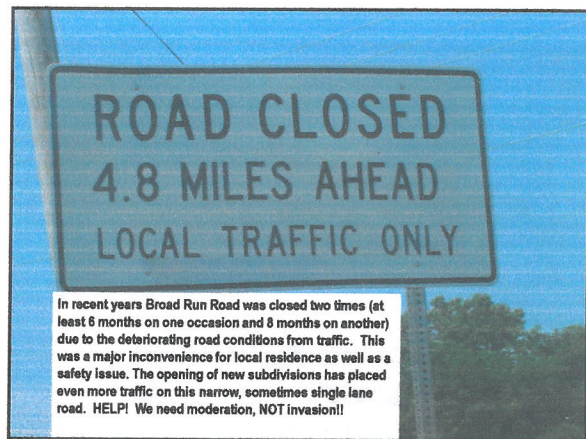
A peaceful shady road to wander down on Dobson Lane off Brentlinger



Some people enjoy staying home and fishing in their ponds to catch their dinner or just relax.



TARGET PRACTICE
On Dawson Hill Road this family gathers in the backyard and enjoys time with one another shooting targets with guns and bows.



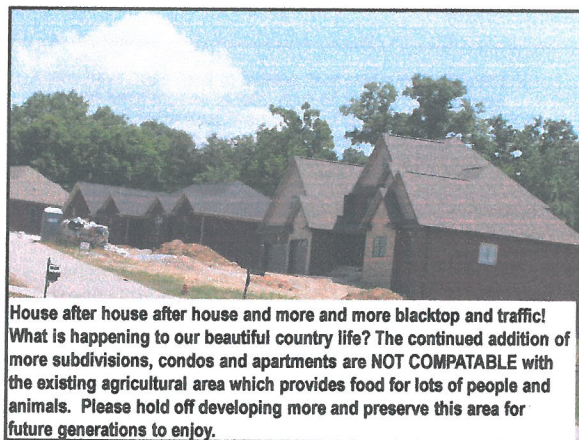
ROAD CLOSED
4.8 MILES AHEAD
LOCAL TRAFFIC ONLY

In recent years Broad Run Road was closed two times (at least 6 months on one occasion and 8 months on another) due to the deteriorating road conditions from traffic. This was a major inconvenience for local residence as well as a safety issue. The opening of new subdivisions has placed even more traffic on this narrow, sometimes single lane road. HELP! We need moderation, NOT invasion!!



Vehicles are dropping off the road as they make the turn off Broad Run on to Seatonville.

Wreckers have been required at times to pull the vehicles out. Help is needed with this problem.

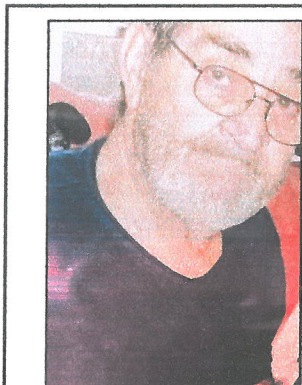


House after house after house and more and more blacktop and traffic! What is happening to our beautiful country life? The continued addition of more subdivisions, condos and apartments are NOT COMPATABLE with the existing agricultural area which provides food for lots of people and animals. Please hold off developing more and preserve this area for future generations to enjoy.



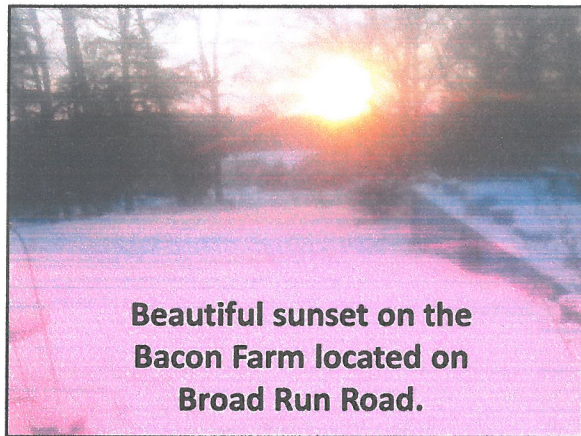
This is my husband with his daughter just a couple years ago. For 45 years he has enjoyed the peaceful scenery from our front yard shown above. Imagine a road being excavated between this table and the trees in the distance.

This is the easement just past the front yard outside our bedroom window where developers of Oakland Hills want a road where eventually traffic from over 900 homes will have access if ever opened

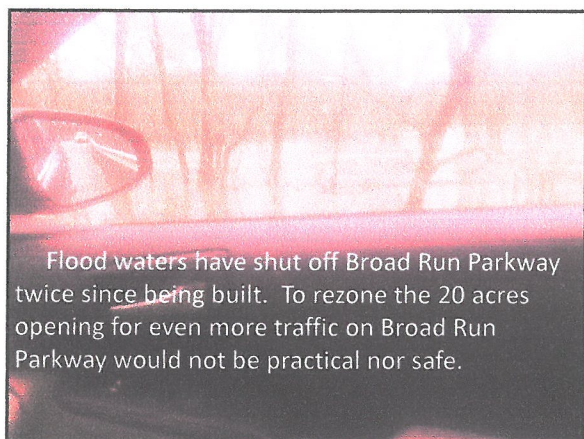


This is my husband just two years later after dealing with the stress brought on from the thought of his farm being back to back with possible apartments in addition to the roadway.

Just a few feet from his Bed.



Beautiful sunset on the Bacon Farm located on Broad Run Road.



Flood waters have shut off Broad Run Parkway twice since being built. To rezone the 20 acres opening for even more traffic on Broad Run Parkway would not be practical nor safe.

Many have been lead to believe that rezoning is needed in order to have money to take care of the park. This type propaganda technique is being used to convince people if if they do not support the rezoning they are not supporting the parks and our beautiful environment. This is just not true.

- The Courier Journal stated recently there is now 7 million dollars in the endowment fund for the park.
- There has been events held raising also money for the parklands.
- Foundations have been donating money towards the parklands.
- By rezoning not only would it allow for condos and apartment style housing the number of traffic would increase as well adding to the pollution and endangering the welfare of the wildlife in the area.

- Stop rezoning and leading to more traffic on these beautiful, narrow country roads. Condos and apartment complexes are out of character to the agricultural area.
- Subdivisions are not good for everyone. They do not have commonality with the agricultural area.

Our area contains a part of history and beauty that can not be replaced. Please help preserve the rural agricultural area we have for years to come by voting no to rezoning.

Thank you!

Dear Commissioners,

Please respect the commitment that you made to us.

My neighbors and I relied on the commitments made by the city. With this commitment we agreed to collectively invest over \$40 million in our conservation neighborhood. We have spent more and have protected nature longer than the Parklands in this section of the city. We recognize that Parklands wants the rent from the apartments to serve as a funding source for this private park. Our two requests are extremely rational and fair and would allow us to advocate for their plan. Lady justice is blindfolded, so it shouldn't matter that one of the private parties is led by the Jones family.

The endowment for the Parklands, has acquired the unfinished portion of our conservation neighborhood known as Oakland Hills. Their plan is to change it to a high-density neighborhood, including over 350 apartments. I bet you think my neighbors and I want to stop that. While we wish this wasn't the plan, we are prepared to sacrifice our vision for the greater good of the city. This selflessness has been commended by State Rep, Majority Whip Kevin Bratcher, who "considers us the most reasonable group of home owners he has ever encountered". Rep. Bratcher feels this way because he is aware of the promise made to us by the city and documented in all CAPS in every deed for every property in our neighborhood. They read: BINDING ELEMENT 3 STATES THE DENSITY OF THIS DEVELOPMENT SHALL AT NO TIME EXCEED 1.1 HOMES PER ACRE. This is not a binding element but rather a comment on our deeds referring to a binding element and therefore the planning board does not have the power change our deeds. It underscores this feature of our deed should stand forever for ENTIRE development and it is this promise that convinced my neighbors and I to move/build here.

Mr. Asburner sent a letter to the public describing the plan for Oakland Hills. In that letter and his testimony he states, "The plan also includes a total of approximately 416 preserved acres," which, if true, would be greater than the number of preserved acres of our original plan. Sadly, it is not true. He purposely used 125 acres that the Parklands bought from our community in his calculation, but his letter doesn't admit that. Given this misleading statement, Mr. Reverman recommended that they redo the public meeting and sent me an email indicating this. They did not. What is true is that they are trying to pack in 302 more dwellings in 125 fewer acres than the original plan.

As incredible as this sounds, our neighborhood is also home to the Kentucky Glade Cress, a plant listed as a threatened species and protected by the US Fish and Wildlife Department. The plants, which can only grow in this unique habitat, were located and mapped by Jeff Frank, a local conservationist. The Parklands claims they have done their own impartial study and has not found many of the plants that Frank found. Given the importance of this matter this approval should be withheld until the differences are reconciled accurately.

Despite the irony of a park endangering a threatened species and the attempt to betray the commitments made by the city to us, we are still trying to turn from adversaries to advocates of the new plan. We have just two requests. If they are granted, we will go from adversaries to advocates of their plan:

- 1) **Create a Glade Cress preservation plan** - approved by US Fish and Wildlife personnel
- 2) **Don't connect our road to the new section** - The new plan contains 3 access roads (only two are required), including the only existing road (Oakland Hills trail) that we use today. The park's

own traffic study demonstrates that our road has a less than average score for servicing the impending traffic. The other two roads each have traffic lights where they intersect with Bardstown Rd. giving them an above average score for servicing the impending traffic.

Thank you,

Robert Marino

Resident of Oakland Hills and Commissioner for Public Art, City of Louisville

Dock, Joel

From: Davis, Brian
Sent: Thursday, July 12, 2018 3:34 PM
To: Dock, Joel
Subject: FW: Contact Councilman Stuart Benson [#490]

From: Webster, Angela **On Behalf Of** Benson, Stuart
Sent: Thursday, July 12, 2018 3:06 PM
To: thenichs23@gmail.com
Cc: Davis, Brian
Subject: RE: Contact Councilman Stuart Benson [#490]

Brian,

Please place this in the case file for 17ZONE1018 so it can be considered by the commissioners in advance of the hearing on July 16th.



Angela Webster
Legislative Assistant to
Councilman Stuart Benson
District 20
Louisville Metro Council
City Hall – 2nd Floor
601 W. Jefferson St.
Louisville, KY 40202
Phone: (502) 574-3465

Click [HERE](#) to sign up for the District 20 E-News

From: Councilman Stuart Benson <no-reply@wufoo.com>
Sent: Thursday, July 12, 2018 2:47 PM
To: Benson, Stuart <Stuart.Benson@louisvilleky.gov>
Subject: Contact Councilman Stuart Benson [#490]

Name * Nancy Nicholas

Address
* 12408 Oakland Hills Trail
Louisville, Kentucky 40291
United States

Phone (502) 827-4018

Number

*

Email * thenichs23@gmail.com

Comments *

Councilman Benson,

I am contacting you regarding the rezoning proposal that will affect our subdivision -Oakland Hills. Our family recently built a home here. We saved our entire lives to build our retirement home in this subdivision based on what the developement requirments were at the time when we built. We are asking for your support to:

Not approve the new zoning request

Protect the Kentucky Glade Crest

Create a construction entrance that would not use Oakland Hills Trail for plots that were not in the original plans for our subdivision.

And most of all NOT TO CONNECT NEW PLOTS TO OUR SUBDIVISION. Please, please help us maintain and preserve our neighborhood and the endangered Kentucky Blade Crest.

Thank you for your time and support.

Nancy Nicholas

Dock, Joel

From: Reverman, Joe
Sent: Thursday, July 12, 2018 4:02 PM
To: Dock, Joel
Subject: FW: PLEASE VOTE NO case17zone1081 18devplan1099 Broad Run PKWY/Broad Run Rd-NO NEW HOUSING

From: Derouen, Andrea
Sent: Thursday, July 12, 2018 3:57 PM
To: Reverman, Joe
Subject: PLEASE VOTE NO case17zone1081 18devplan1099 Broad Run PKWY/Broad Run Rd-NO NEW HOUSING

Good Afternoon—

Would you please make sure that these comments get into the Case17Zone1081 File.

Thank you--

From: soccerdad4444@netzero.net [mailto:soccerdad4444@netzero.net]
Sent: Thursday, July 12, 2018 7:07 AM
To: Green, Jessica; Shanklin, Barbara; Woolridge, Mary; barbaraS.smith@louisvilleky.gov; cheriB.hamilton@louisvilleky.gov; davidjames.president@louisvilleky.gov; Leet, Angela; Coan, Brandon; Hollander, Bill H.; pat.malvihill@louisvilleky.gov; Kramer, Kevin; Blackwell, Rick; Yates, David; vickya.welch@louisvilleky.gov; cindy.fowler@louisvilleky.gov; Butler, Marianne; Reed, Scott; glen.stucker@louisvilleky.gov; Parker, Marilyn; julie.denton@louisvilleky.gov; Benson, Stuart; Lanshima, Vitalis; obin.engel@louisvilleky.gov; Peden, James; Flood, Madonna; Ackerson, Brent
Subject: PLEASE VOTE NO case17zone1081 18devplan1099 Broad Run PKWY/Broad Run Rd-NO NEW HOUSING

I would like to vote NO on the upcoming plans to rezone acreage case#17zone1081 18devplan1099 for new housing in the Broad Run Rd/Broad Run Pkwy/Bardstown Rd area, Additional traffic already a lot in area and notice increase with new park systems into the Back Run Rd/Dawson Hill Rd/Kings Church Rd/Route Rd areas. Roads are winding and people don't drive on the right side some of the time taking curves wide. Also there are times when people are using those roads for horseback riding, biking, local race/training for bikers, tractors/farm equipment and not to mention the abundance of wildlife that will be effected. Its already more difficult for residents trying to cross the road to get their mail. At times grass is not cut along roadways to see oncoming traffic to pull out on roadways or walk across. Additional traffic is going to be ridiculous and safety problem if additional housing is built.

VOTE IS NO!!!

Resident/Dawson Hill Rd/Turkey Run Park Area

Hougham vs. Lexington Fayette County

Protecting The Community & Re-zoning Information

Finally, a way to help communities in re-zoning cases!!! Elected and/or appointed officials (planning commissioners) can deny re-zonings when it has an "impact on the community" because of the Kentucky Supreme Court ruling in 2000. The case was Hougham vs. Lexington Fayette County. Additionally, "A planning commission does not have to re-zone solely because a request is in accordance with a comprehensive plan or its recommended land use element." Even if the "zone change request complies with the comprehensive plan or meets the criteria... does not mean the zone change must be granted." Why? "The Fiscal court still has discretion in reviewing and determining each zone change application. The governing body is given authority to decide each application on its own merits and its impact on the community." ... and "it can make its decision to grant or deny the zone change request. Making these decisions is the function of the appointed and/or elected officials. Their responsibilities include looking at the "big picture" and making the "tough decisions". "The governing body is given authority to decide each application on its own merits and its IMPACT ON THE COMMUNITY." So a Fiscal court can deny requested zone change - even though the zone change is in compliance with the comprehensive plan and even if the Planning Commission recommends approval and even if conditional binding elements address concerns impacting adjacent properties and even if economic growth is stressed. This legal case decided by our own Kentucky Supreme Court justices now affords a way to be effective and have a powerful voice.

Teena Halbig

Louisville 40299, 6505 Echo Trail, 267-6883, cell 777-5192

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Hearings
7/16/18

Form: All Guided Search Forms > **States Legal**
Terms: **hougham** (Edit Search)

Select for FOCUS™ or Delivery



*29 S.W.3d 370, *; 1999 Ky. App. LEXIS 169, ***

ROGER F. **HOUGHAM** AND VIRGINIA M. **HOUGHAM** APPELLANTS v. LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; LEXINGTON-FAYETTE URBAN COUNTY COUNCIL TERESA ANN ISAAC, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL CHARLES E. ELLINGER, D.D.S., MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; DAVID B. STEVENS, M.D., MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; GEORGE A. BROWN, JR., MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; ROBERT R. JEFFERSON, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; DICK DECAMP, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; ISABEL YATES, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; BILL FARMER, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; ALBERT S. MITCHELL, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; WILLY FOGLE, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; FRED V. BROWN, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JENNIFER MOSSOTTI, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; SANDY SHAFFR, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; RICHARD P. MOLONEY, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; GLORIA MARTIN, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; PAM MILLER, MAYOR OF LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; WALTER W. MAY, CHAIRMAN, LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; EUGENE BALLENTINE, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; DR. THOMAS M. COOPER, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; SARAH GREGG, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; DALLAM B. HARPER, JR., MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; ROBERT D. KELLY, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; GEORGE L. LOGAN, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; ROSE M. LUCAS, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; DWIGHT PRICE, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; DON ROBINSON, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; LESLIE PATTERSON VOSE, MEMBER OF LEXINGTON-FAYETTE URBAN COUNTY PLANNING COMMISSION; AND LEXINGTON FAYETTE URBAN COUNTY PLANNING COMMISSION, APPELLEES

2000-SC-000076-D, NO. 1998-CA-002213-MR

COURT OF APPEALS OF KENTUCKY

29 S.W.3d 370; 1999 Ky. App. LEXIS 169

December 23, 1999, Rendered

SUBSEQUENT HISTORY: **[**1]** As Modified January 14, 2000. Discretionary Review Denied by the Supreme Court of Kentucky, October 19, 2000. Opinion of the Court of Appeals Ordered to be Published. Released for Publication November 1, 2000.

PRIOR HISTORY: APPEAL FROM FAYETTE CIRCUIT COURT. HONORABLE REBECCA OVERSTREET, JUDGE. ACTION NO. 97-CI-01236.

DISPOSITION: AFFIRMED.

CASE SUMMARY


PROCEDURAL POSTURE: Appellants challenged an opinion and order entered by the Fayette Circuit Court (Kentucky) which sustained the decision of appellee county council to deny appellants' requested zone change.


OVERVIEW: Appellants wanted to rezone their 40 acres of agricultural urban land to light industrial. The requested zone change was in agreement with the adopted comprehensive plan. However, just because the zone change request complied with the comprehensive plan or met the criteria set forth in Ky. Rev. Stat. Ann. § 100.213(1)(a) or (b), did not mean the zone request had to be granted. The decision of appellee county council was not arbitrary and all three of the considerations the court was required to make in determining arbitrariness were fully complied with. The findings of fact rendered by appellee county council set forth seven specific reasons for denying the zone change. A review of the findings clearly showed that appellee county council's decision was based upon substantial evidence.


OUTCOME: Judgment affirmed. The court found that even though appellants' proposed zoning change complied with the comprehensive plan, appellee county council was given discretion to review the change based on its merits and its impact on the community, and was not required to approve the change.

CORE TERMS: zone change, planning commission, comprehensive plan, ex parte, legislative body, map, recommended, substantial evidence, tainted, elected, zoning classification, constituents, rezoned, zoning, fiscal, voted, farm, zone, ex parte contact, public interest, arbitrariness, neighborhood, notice, unfair, updates, staff, findings of fact, decision to deny, land use element, planning

LexisNexis (TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Real & Personal Property Law > Zoning & Land Use > Zoning Generally 
 HN1 ♦ See Ky. Rev. Stat. Ann. § 100.213(1).

Real & Personal Property Law > Zoning & Land Use > Zoning Generally 
 HN2 ♦ Just because a zone change request complies with the comprehensive plan or meets the criteria set forth in Ky. Rev. Stat. Ann. § 100.213(1)(a) or (b), does not mean the zone request must be granted. The fiscal court still has discretion in reviewing and determining each zone change application. The governing body is given authority to decide each application on its own merits and its impact on the community. There is no specific, magic formula which is applied to the determination of each zone change request. The administrative body must comply with all statutory requirements set forth in Ky. Rev. Stat. Ann. ch. 100 as to notice, hearing, findings of fact, etc. If it has followed all the statutory requirements, it can make its decision to grant or deny the zone change request. Making these decisions is the function of appointed and/or elected officials. Their responsibilities include looking at the "big picture" and making the "tough decisions." More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > Standards Generally 
 HN3 ♦ Judicial review of an administrative action is concerned with the question of arbitrariness. There are three areas to consider in determining arbitrariness: (1) did the administrative agency act within its statutory powers; (2) was due process afforded; and (3) was the decision reached supported by substantial evidence. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > Standards: Generally ^{ALL}

→ ^{INS} Ky. Rev. Stat. Ann. § 100.213 provides that before a zone change request is granted (map amendment), the planning commission or respective legislative body must find either that the proposal is in agreement with the comprehensive plan or that the existing classification is inappropriate and that the proposed zoning classification is appropriate; or that there have been major changes of an economic, physical, or social nature in the area which are not anticipated in their current comprehensive plan and which substantially alter the character of the area. Ky. Rev. Stat. Ann. § 100.197 requires continuing review and updates of the comprehensive plan. In the scheme of planning and zoning, society is constantly changing, which requires the continuing review and updates to comprehensive plans. A planning commission does not have to rezone solely because a request is in accordance with a comprehensive plan or its recommended land use element. [More Like This Headnote](#)

Governments > Local Governments > Employees & Officials ^{ALL}

^{INS} Members of a county council do not live in a vacuum nor are they required to. They are elected officials who represent the community and will be subjected from time to time to contact from constituents concerning issues, upon which they must ultimately decide. The mere fact that they are exposed to various information from competing groups does not make it impossible for them to serve and vote. Mere contact with neighborhood groups, letters from constituents, information gathered from staff, etc. does not, by itself, constitute "improper ex parte contact." If this were the case, seldom could an elected official make an informed decision without being accused of improper ex parte conduct. [More Like This Headnote](#)

COUNSEL: BRIEF AND ORAL ARGUMENT FOR APPELLANTS: Foster Ockerman, Lexington, KY.

BRIEF AND ORAL ARGUMENT FOR APPELLEES: Christine N. Westover, Lexington, KY.

JUDGES: BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES. EMBERTON, JUDGE, CONCURS. COMBS, JUDGE, CONCURS BY SEPARATE OPINION.

OPINIONBY: GUIDUGLI

OPINION: [*371] OPINION

AFFIRMING

GUIDUGLI, JUDGE. Appellants, Roger F. **Hougham** and Virginia M. **Hougham (the Houghams)**, appeal an opinion and order entered by the Fayette Circuit Court which sustained the decision of the Lexington-Fayette Urban County Council (LFUCC) to deny the appellants' requested zone change. LFUCC denied the request despite the fact that the requested zone change was in compliance with the comprehensive plan and recommended for approval by the Urban County Planning Commission (the Planning Commission). Appellants contend that the Council's action was both arbitrary and **[**2]** a denial of due process. Having thoroughly reviewed the facts, the record, the applicable statutory and case law, and the arguments of the parties, we affirm.

Appellants filed a zone change application in hopes of rezoning their approximately forty (40) acre farm located in Fayette County from the existing agricultural urban (AU) zone to a light industrial (I-1) zone. The property is located on Viley Road across from Calumet Farm and across New Circle Road from established and developing single family residential subdivisions. The farm also adjoins the Enterprise Individual Park which had been rezoned to

I-1 in 1985, and the "Little" property which was rezoned as I-1 in 1991. The Enterprise Industrial Park is still being developed but the "Little" property remains undeveloped and is still being used for agricultural purposes.

[*372] The first hearing on the zone change application occurred on October 24, 1996, before the Planning Commission. This hearing was continued until December 12, 1996, when the Commission voted 7-3 to recommend approval of the zone change request to LFUCC. The Planning Commission found the I-1 use requested to be in agreement with the land use element of the comprehensive **[**3]** plan. The Planning Commission also recommended several conditional zoning restrictions to address concerns relating to the impact the zoning change might have on surrounding properties. Specifically, the Planning Commission was concerned with traffic flow and run-off water problems.

At the LFUCC hearing on March 6, 1997, appellants called no witnesses nor did they cross-examine any of the opponents who testified. Instead, they relied upon the fact that the Planning Commission had recommended the zone change, that the zone change conformed to the comprehensive plan, that other land adjacent to the property had been rezoned I-1, that there is a need for more manufacturing jobs in Fayette County, and that economic growth would be beneficial to the County. Opponents to the zone change then presented their evidence and testimony. They argued that the land was still valuable for agricultural use, that there was already an excess of I-1 property, traffic concerns, water run-off problems, and that adjacent horse farms would be adversely affected. After testimony and arguments were presented by parties for and against the zone change, the Council voted 9-5 to override the Planning Commission's **[**4]** recommendation and deny the zone change request. The LFUCC denial was based upon findings of fact which the Council adopted.

Appellants appealed LFUCC's denial to the Fayette Circuit Court. There appellants argued the decision to deny the zone change was arbitrary in that it lacked substantive competent evidence and that it violated due process requirements based on alleged ex-parte communications by at least two (?) of the council members who voted against the change. The trial court upheld the Council's decision, and this appeal followed.

Kentucky Revised Statutes (KRS) Chapter 100 addresses issues of planning and zoning. ^{H73}
~~*~~Specifically, KRS 100.213(1) establishes what findings are necessary before a proposed map amendment may be reconsidered:

Before any map amendment is granted, the planning commission or the legislative body or fiscal court must find that the map amendment is in agreement with the adopted comprehensive plan, or, in the absence of such a finding, that one (1) or more of the following apply and such finding shall be recorded in the minutes and records of the planning commission or the legislative body or fiscal court.

(a) That the existing zoning classification **[**5]** given to the property is inappropriate and that the proposed zoning classification is appropriate;

(b) That there have been major changes of an economic, physical, or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area.

In the case before us, all parties agree that the requested zone change is in agreement with the adopted comprehensive plan. This was one of the main factors relied on by the Planning Commission in recommending the change.

^{H73} ~~*~~However, just because the zone change request complies with the comprehensive plan or meets the criteria set forth in KRS 100.213(1)(a) or (b), does not mean the zone request must be granted. The fiscal court still has discretion in reviewing and determining each zone

change application. The governing body is given authority to decide each application on its own merits and its impact on the community. There **[*373]** is no specific, magic formula which is applied to the determination of each zone change request. The administrative body must comply with all statutory requirements set forth in KRS Chapter 100 as to notice, hearing, **[**6]** findings of fact, etc. If it has followed all the statutory requirements, it can make its decision to grant or deny the zone change request. Making these decisions is the function of appointed and/or elected officials. Their responsibilities include looking at the "big picture" and making the "tough decisions."

On appeal, the decision is not subject to de novo review. ^{HN3} ↗ Rather, judicial review of an administrative action is concerned with the question of arbitrariness. *American Beauty Homes Corp. v. Louisville, etc., Ky.*, 379 S.W.2d 450 (1964), sets forth three (3) areas to consider in determining arbitrariness: (1) did the administrative agency act within its statutory powers; (2) was due process afforded; and (3) was the decision reached supported by substantial evidence. A close review of the record in this case clearly shows that the decision of the LFUCC was not arbitrary and that all three of the above-mentioned considerations were fully complied with. First, LFUCC is the statutory agency to make this decision, and no one contends it exceeded its statutory powers. Second, due process was afforded appellants at every level. Appellants do not argue that they **[**7]** were denied notice, a hearing, sufficient opportunity to present their case, cross-examine the opponents, and opportunity to rebut the opponents' arguments and findings of fact. Third, the decision was based upon substantial evidence.

Appellants' main contention is that LFUCC must approve the zone change since it comports to the comprehensive plan. However, this Court in *21 st Century Development Co., LLC v. Watts, Ky. App.*, 958 S.W.2d 25 (1997), specifically dealt with this issue when it stated:

^{HN4} ↗ KRS 100.213 provides that before a zone change request is granted (map amendment), the planning commission or respective legislative body must find either that the proposal is in agreement with the comprehensive plan or that the existing classification is inappropriate and that the proposed zoning classification is appropriate; or that there have been major changes of an economic, physical, or social nature in the area which were not anticipated in their current comprehensive plan and which substantially alter the character of the area. KRS 100.197 requires continuing review and updates of the comprehensive plan. In the scheme of planning and zoning, our society is constantly **[**8]** changing, which requires the continuing review and updates to our comprehensive plans. We agree with the circuit court that a planning commission does not have to rezone solely because a request is in accordance with a comprehensive plan or its recommended land use element.

Id. at 27 (emphasis added). In addition, the findings of fact rendered by LFUCC set forth seven (7) specific reasons for denying the zone change. A review of these findings clearly shows that the Council's decision was based upon substantial evidence.

Appellants also contend that two (2) council members engaged in ex parte conduct and therefore, they should not have participated in the hearing and/or voting process. Appellants claim these contacts "tainted" the entire proceedings and mandate that the two council members disqualify themselves. Basically, the conduct alleged involved council members attending neighborhood meetings at which the proposed zone change was discussed, requesting information from city staff concerning the site in question, and receiving letters from opponents of the zone change. The trial court found that there were no Kentucky cases dealing specifically with **[**9]** the issue of ex parte contacts by a legislative body acting in an adjudicatory capacity. Nor have appellants cited the Court to any such Kentucky case. The case argued **[*374]** by appellants talks in terms of "improper" ex parte contact where the decision reached is "so tainted as to make it unfair either to the innocent party or to the public interest" *Louisville Gas & Electric v. Commonwealth, Ky. App.*, 862 S.W.2d 897, 901 (1993). In addressing this issue, the trial court stated:

the members of the Council are elected officials and cannot isolate themselves from the people they represent. There is no evidence in the record that any Council members made improper statements or promises in their dealings with constituents. There is no indication that the contacts at issue tainted the decision making process so as to make it unfair to the parties or contrary to the public interest. The facts of this case clearly do not reach the level of *ex parte* contacts which would require the Council's decision be voided." ←

The court further found despite the alleged improper conduct, the appellants had been afforded all due process protections. ^{HNS} We agree with the **[**10]** trial court that members of council do not live in a vacuum nor are they required to. They are elected officials who represent the community and will be subjected from time to time to contact from constituents concerning issues, upon which they must ultimately decide. The mere fact that they are exposed to various information from competing groups does not make it impossible for them to serve and vote. Mere contact with neighborhood groups, letters from constituents, information gathered from staff, etc. does not, by itself, constitute "improper *ex parte* contact." If this were the case, seldom could an elected official make an informed decision without being accused of improper *ex parte* conduct. ←

For the foregoing reasons, we affirm the opinion and order of the Fayette Circuit Court which sustained LFUCG's decision to deny the requested zone change.

EMBERTON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS BY SEPARATE OPINION.

CONCURBY: COMBS

CONCUR: COMBS, JUDGE, CONCURRING: The fact that the LFUCG wholly disregarded the recommendation of the Planning Commission, coupled with the allegations of improper *ex parte* contacts with LFUCG council members, creates in my mind a perception of **[**11]** impropriety sufficient to question whether the due process requirement of *American Beauty*, *supra*, was met. Since Kentucky law is silent on what *ex parte* contacts are permissible as to a legislative body acting in a quasi-judicial capacity, we have no standard by which to evaluate the conduct alleged to have been improper in this case. Substantial evidence appears to have supported the final vote of the council. However, a question is forever raised and misgivings inevitably linger as to the propriety of the process in this case.






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