

NO. 15CI001026

JEFFERSON CIRCUIT COURT
DIVISION SIX (6)
JUDGE OLU A. STEVENS

OPEN LOUISVILLE, ET AL.

PLAINTIFFS

v.

OPINION AND ORDER

WAL-MART REAL ESTATE
BUSINESS TRUST, ET AL.

DEFENDANTS

This matter is before the Court for consideration of Defendant Wal-Mart Real Estate Business Trust's ("Wal-Mart") Motion for Summary Judgment and Defendant Newbridge Development LLC's ("Newbridge") Motion for Summary Judgment and Defendants Louisville/Jefferson County Metro Government and Louisville Metro Planning Commission's (collectively referred to as "Metro Defendants") Motion for Summary Judgment. After careful review of the record, including the memoranda filed by the parties, the motions will be granted.

FACTS

Plaintiffs bring this action challenging the Metro Defendants decision to approve a district development plan and waivers for a Wal-Mart Supercenter at 18th and Broadway Streets in Louisville, Kentucky. Plaintiffs assert that the action of the Metro Defendants, in particular, the Planning Commission, were arbitrary. Plaintiffs also claim the composition of the Planning Commission violates statutory requirements and that such violations operated to deny Plaintiff's due process of law.

OPINION

The well-settled law in Kentucky regarding motions for summary judgment begins with the principle that “the record must be viewed in the light most favorable to the party opposing the motion, and all doubts are to be resolved in that party’s favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky.1991). With that foundation set, summary judgment “is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* Even if a trial court believes the party opposing the motion for summary judgment may not succeed at trial, “it should not render a summary judgment if there is any issue of material fact.” *Id.* This is because it is the trial judge’s duty to examine the evidence, “not to decide any issue of fact, but to discover if a real issue exists.” *Id.*

The standard of review for any action of an administrative agency is whether the agency’s action was “arbitrary”. *Wolf Pen Preservation Ass’n, Inc. v. Louisville Jefferson County Planning Commission*, 942 S.W.2d 310 (Ky. App 1997). Arbitrary is defined as “unsupported by substantial evidence”. *Danville-Boyle County Planning and Zoning Commission v. Prall*, 840 S.W.2d 205, 207 (Ky. 1992). The position of the Circuit Court in such matters is one of review, not reinterpretation. *Department of Education v. Commonwealth of Kentucky*, 798 S.W.2d 464 (Ky. App. 1990). Here, the Planning Commission held a number of public hearings in which it received various presentations in support of the project and concerned individuals, including the Plaintiffs herein, were permitted to attend, raise issues and pose questions. There is an abundance of evidence in support of the Commission’s action and this Court sees no reason to disturb it.

Plaintiff’s also claim they were denied due process of law because of defects in the composition of the Planning Commission members. There are various substantive and

procedural problems with the Plaintiff's claims in this regard; but even if those problems were rectified, the de facto officer doctrine operates to defeat the Plaintiffs' claims. Whenever an individual discharges "the general duties of an office, claiming right thereto under a commission or appointment, he is an officer de facto; and generally, if not universally, his acts are good as to third parties, however irregular his appointment or qualification." *Moorman v. Commonwealth*, 325 S.W.3d 325 (Ky. 2010). Plaintiff's reliance upon *Ryder v. United States*, 515 U.S. 177 (1995) is simply misplaced.

The Plaintiffs have asserted that this juncture is not the proper time to address the sufficiency of their allegations and in large part declined to provide a substantive response to any of the issues raised by the various motions for summary judgment. The party opposing a properly supported motion for summary judgment has an obligation to do something more than rely upon the allegations of his pleading. *Continental Casualty Company, Inc. v. Belknap Hardware & Manufacturing Co.*, 281 S.W.2d 914, (Ky. 1995). The time for Plaintiffs to contest the motions for summary judgment has come and gone.

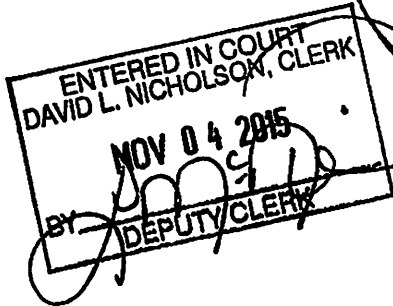
The Plaintiffs freely admit "each individual Commissioner has not violated any law" and "the individual members of the Commission have not been sued because, individually, they have done nothing wrong." The Court concurs. There is no evidence that the Planning Commission acted in an arbitrary manner or that its decision in this matter was a result of bias. There are no genuine issues of genuine material fact and Defendants are entitled to judgment as a matter of law. The Metro Defendants' Motions for Summary Judgment will be granted.

ORDER

IT IS HEREBY ORDERED that the Metro Defendants' Motions for Summary Judgment are **GRANTED**. The Plaintiffs' Complaint against Wal-Mart Real Estate Business

Trust, Newbridge Development LLC, and Louisville/Jefferson County Metro Government and Louisville Metro Planning Commission is **DISMISSED with prejudice.**

This is a final and appealable Order and there is no just cause for delay.



JUDGE OLU A. STEVENS

DATE: 11/21/15

Distribution to:

Stephen T. Porter
Attorney for Plaintiff

Clifford H. Ashburner
Attorney for Wal-Mart Real Estate Business Trust

Jonathan Baker
Attorney for Metro Defendants

Christy Ames
Attorney for Newbridge Development, LLC

Anne E. Gorham
Attorney for Newbridge Development, LLC

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001846-MR

OPEN LOUISVILLE, INC., ET AL

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 15-CI-001026

WAL-MART REAL ESTATE BUSINESS
TRUST, ET AL

APPELLEE

NOTICE
APPELLANT'S BRIEF OVERDUE
** ** ** ** **

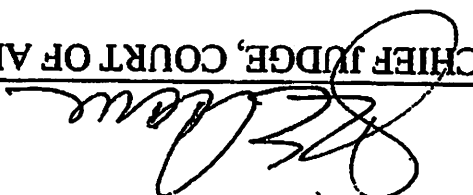
The records of the Clerk of the Court indicate that the time for filing the Appellant's Brief has expired. Pursuant to Court of Appeals administrative order 2007-7, the attorney for appellant is hereby Notified that:

If the parties have agreed to settle the case or the appellant has abandoned the appeal, a motion to dismiss shall be filed within ten (10) days of the date of this Notice.

If the appellant has inadvertently missed the deadline, the attorney shall file a motion for additional time pursuant to CR 6.02(b), within ten (10) days of the date of this Notice. The motion may be accompanied by an affidavit and shall specify in detail why the deadline was missed and how this constitutes excusable neglect. The brief for appellant shall be tendered with the motion.

Failure to act within ten (10) days shall result in an order dismissing the appeal and the attorney(s) may be reported to the Kentucky Bar Association or other sanctions may be imposed against the attorney(s) and/or appellant.

ENTERED: JUN 09 2016


CHIEF JUDGE, COURT OF APPEALS

By: C.P.
Deputy Clerk
Kentucky Court of Appeals

Step #	Date	Description	Memo
1	11/04/2015	CIRCUIT COURT JUDGMENT	
2	12/02/2015	NOTICE OF APPEAL - REGULAR CIVIL	\$160.00 FILING FEE PAID.
3	01/06/2016	LATE LETTER - RETURN OF PLEADING ON COURT'S OWN MOTION	RETURNED APPELLANTS' PREHEARING STATEMENT AS LATE. DUE: 12-22-15. MAILED BY US REGULAR MAIL ON 12-22-15 AND RECEIVED ON 12-23-15. RETURNED TO STEPHEN T. PORTER.
4	01/06/2016	TENDERED DOCUMENT	TENDERED APPELLEE'S SUPPLEMENTAL PREHEARING STATEMENT ON BEHALF OF NEWBRIDGE DEVELOPMENT LLC. APPELLANTS' PREHEARING STATEMENT HAS NOT BEEN FILED YET. RECEIVED ON 1-5-16.
5	01/06/2016	TENDERED DOCUMENT	TENDERED APPELLEE'S SUPPLEMENTAL PREHEARING STATEMENT ON BEHALF OF WAL-MART REAL ESTATE BUSINESS TRUST. APPELLANTS' PREHEARING STATEMENT HAS NOT BEEN FILED YET. RECEIVED ON 1-5-16.
6	01/14/2016	PROCEDURAL MOTION	APPELLANT'S MOTION FOR ADDITIONAL TIME TO FILE A PREHEARING STATEMENT. (ATTACHED AFFIDAVIT (TENDERED PREHEARING STATEMENT) ### D/26 FILED BY STEPHEN PORTER
7	01/26/2016	MOTIONS SCHEDULED FOR FOLLOWING STEPS.	
8	02/24/2016	ORDER GRANTING PROCEDURAL MOTION	
9	02/24/2016	PREHEARING STATEMENT	
10	02/24/2016	SUPPLEMENTAL PRE-HEARING STATEMENT	SUPPLEMENTAL PRHEARING STATEMENT FILED BY NEWBRIDGE DEVELOPMENT LLC
11	02/24/2016	SUPPLEMENTAL PRE-HEARING STATEMENT	SUPPLEMENTAL PREHEARING STATEMENT FILE BY WAL-MART REAL ESTATE BUSINESS TRUST ET AL.
12	03/08/2016	READY - PREHEARING	

13	03/08/2016	ASSIGNMENT - PRE-HEARING	
14	03/09/2016	PRE-HEARING DENIED	
15	03/09/2016	ORDER ENTERED TO START	
16	04/07/2016	NOTIF. OF CERTIFICATION - REGULAR CIVIL	
17	06/09/2016	NOTICE APPELLANT'S BRIEF OVERDUE	ATTORNEY**APPELLANT'S BRIEF OVERDUE. MOTION MUST BE FILED WITHIN TEN (10) DAYS. FAILURE RESULTS IN DISMISSAL. SANCTIONS LANGUAGE. ###D/21/W-WALLET
18	06/23/2016	PROCEDURAL MOTION	APPELLANT'S MOTION FOR ADDITIONAL TIME TO FILE A BRIEF. ### D/7 FILED BY STEPHEN PORTER
19	07/06/2016	RESPONSE TO MOTION	APPELLEE NEW BRIDGE DEVELOPMENT RESPONSE TO APPELLANT'S MOTION FOR ADDITIONAL TIME TO FILE A BRIEF. ### FILED BY BETHANY BREETZ ### TIMELY MAILED UPS 7/5/16.
20	07/06/2016	RESPONSE TO MOTION	APPELLEE GREG FISHER RESPONSE TO APPELLANT'S MOTION FOR ADDITIONAL TIME TO FILE A BRIEF. ### FILED BY JONATHAN BAKER ### TIMELY MAILED FED EX 7/5/16
21	07/06/2016	RESPONSE TO MOTION	APPELLEE WAL-MART REAL ESTATE BUSINESS RESPONSE TO APPELLANT'S MOTION FOR ADDITIONAL TIME TO FILE A BRIEF. ### FILED BY LISA DEJACO ### TIMELY MAILED FED EX 7/5/16
22	07/11/2016	UNAUTHORIZED PLEADING LETTER RETURNING SUCH PLEADING	RECEIVED APPELLANT'S RESPONSE TO APPELLEE'S RESPONSES FOR APPELLANT'S MOTION FOR ADDITIONAL TIME TO FILE A BRIEF. *MUST FILE A MOTION OF LEAVE OF THE COURT TO FILE THIS RESPONSE.*
23	07/19/2016	PROCEDURAL MOTION	APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR A PREHEARING CONFERENCE. (TENDERED

			APPELLANT'S MOTION PREHEARING CONFERENCE) ### D/2
24	07/19/2016	PROCEDURAL MOTION	APPELLANT'S MOTION FOR LEAVE TO FILE A REPLY TO OPPOSITION STATEMENTS BY ALL COUNSEL FOR THE VARIOUS APPELLEE'S (TENDERED APPELLANT'S REPLY) ### D/2 FILED BY STEPHEN PORTER
25	06/29/2016	RESPONSE TO MOTION	APPELLEE'S RESPONSE TO APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR A PREHEARING CONFERENCE. ### FILED BY JONATHAN BAKER
26	07/29/2016	RESPONSE TO MOTION	APPELLEE NEW BRIDGE DEVELOPMENT RESPONSE TO APPELLANT'S MOTION FOR LEAVE TO FILE A REPLY TO OPPOSITION STATEMENTS BY ALL COUNSEL FOR THE VARIOUS APPELLEE'S ### FILED BY BETHANY BREETZ
27	08/02/2016	MOTIONS SCHEDULED FOR FOLLOWING STEPS.	
28	08/02/2016	MOTIONS SCHEDULED FOR FOLLOWING STEPS.	
29	08/02/2016	MOTIONS SCHEDULED FOR FOLLOWING STEPS.	

Litigant Information	Case Information	StepSheet	Attorneys	Circuit	Appeals
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Description	Primary(Y/N)	Name	Seq #
Appellant	Y	OPEN LOUISVILLE, INC.	1
Appellant	N	CASSIAHERRON	7
Appellant	N	CHANELLEHELM	9
Appellant	N	CONCERNED ASSOCIATION OF RUSSELL RESIDENTS	4
Appellant	N	HAVENHARRINGTON	5
Appellant	N	HOWARDBEDFORD	6
Appellant	N	JOHNCARTER	12
Appellant	N	JOHNOWEN	10
Appellant	N	MARTINAKUNNECKE	3

Appellant	N	NEIGHBORHOOD PLANNING AND PRESERVATION	2
Appellant	N	WEST LOUISVILLE TALKS	11
Appellant	N	WOMEN IN TRANSITION, INC.	8
Appellee	Y	WAL-MART REAL ESTATE BUSINESS TRUST	13
Appellee	N	GREGFISCHER MAYOR	18
Appellee	N	LINDA J. BROWN	16
Appellee	N	LOUISVILLE AND METRO PLANNING COMMISSION	20
Appellee	N	LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	17
Appellee	N	NEWBRIDGE DEVELOPMENT LLC	14
Appellee	N	THE LEGISLATIVE COUNCIL OF LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	19
Appellee	N	WILLIE DENNIS BROWN	15

Attorney Information	Case Information	StepSheet	Litigants	Circuit	Appeals
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Attorney(s)	Attorney's Address	Party Name	Party Type
JOHN G CARROLL	ASSISTANT JEFFERSON COUNTY ATTORNEY, 531 COURT PLACE, SUITE 900, LOUISVILLE, KY 40202	LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	Appellee
JOHN G CARROLL	ASSISTANT JEFFERSON COUNTY ATTORNEY, 531 COURT PLACE, SUITE 900, LOUISVILLE, KY 40202	GREGFISCHER MAYOR	Appellee
JOHN G CARROLL	ASSISTANT JEFFERSON COUNTY ATTORNEY, 531	THE LEGISLATIVE COUNCIL OF LOUISVILLE/JEFFERSON COUNTY METRO	Appellee

	COURT PLACE, GOVERNMENT SUITE 900, LOUISVILLE, KY 40202		
JOHN G CARROLL	ASSISTANT JEFFERSON COUNTY ATTORNEY, 531 COURT PLACE, SUITE 900, LOUISVILLE, KY 40202	LOUISVILLE AND METRO PLANNING COMMISSION	Appellee
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	OPEN LOUISVILLE, INC.	Appellant
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	NEIGHBORHOOD PLANNING AND PRESERVATION	Appellant
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	MARTINAKUNNECKE	Appellant
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	CONCERNED ASSOCIATION OF RUSSELL RESIDENTS	Appellant
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	HAVENHARRINGTON	Appellant
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	HOWARDBEDFORD	Appellant
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	CASSIAHERRON	Appellant
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	WOMEN IN TRANSITION, INC.	Appellant
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	CHANELLEHELM	Appellant
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	JOHNOWEN	Appellant
STEPHEN T PORTER	2406 TUCKER	WEST LOUISVILLE	Appellant

	STATION ROAD, TALKS LOUISVILLE, KY 40299		
STEPHEN T PORTER	2406 TUCKER STATION ROAD, LOUISVILLE, KY 40299	JOHNCARTER	Appellant
ANNÉ E GORHAM	STITES & HARBISON, 2300 LEXINGTON FINANCIAL CENTER, 250 WEST MAIN STREET, LEXINGTON, KY 40507	NEWBRIDGE DEVELOPMENT LLC	Appellee
BETHANY A BREETZ		NEWBRIDGE DEVELOPMENT LLC	Appellee
CHRISTY A. AMES	STITES & HARBISON, 400 WEST MARKET STREET, SUITE 1800, LOUISVILLE, KY 40202	NEWBRIDGE DEVELOPMENT LLC	Appellee
LISA CATHERINE DEJACO	WYATT TARRANT & COMBS LLP, 500 W. JEFFERSON ST., SUITE 2800, LOUISVILLE, KY 40202	WAL-MART REAL ESTATE BUSINESS TRUST	Appellee
JONATHAN LEE BAKER	ASSISTANT JEFFERSON COUNTY ATTORNEY, 531 COURT PLACE, 9TH FLOOR, FISCAL COURT BUILDING, LOUISVILLE, KY 40202	GREGFISCHER MAYOR	Appellee
JONATHAN LEE BAKER	ASSISTANT JEFFERSON COUNTY ATTORNEY, 531 COURT PLACE, 9TH FLOOR, FISCAL COURT BUILDING, LOUISVILLE, KY 40202	LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	Appellee
JONATHAN LEE BAKER	ASSISTANT JEFFERSON	LOUISVILLE AND METRO PLANNING	Appellee

	COUNTY ATTORNEY, 531 COURT PLACE, 9TH FLOOR, FISCAL COURT BUILDING, LOUISVILLE, KY 40202	COMMISSION	
JONATHAN LEE BAKER	ASSISTANT JEFFERSON COUNTY ATTORNEY, 531 COURT PLACE, 9TH FLOOR, FISCAL COURT BUILDING, LOUISVILLE, KY 40202	THE LEGISLATIVE COUNCIL OF LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	Appellee
EKUNDAYOSETON	500 WEST JEFFERSON STREET, SUITE 2800, LOUISVILLE, KY 40202	WAL-MART REAL ESTATE BUSINESS TRUST	Appellee
ZACHARYVANVACTOR	STITES & HARBISON PLLC, 400 W MARKET ST, STE 1800, LOUISVILLE, KY 40202	NEWBRIDGE DEVELOPMENT LLC	Appellee
WILLIE DENNIS BROWN	4213 NORBOURNE BLVD., APT. 4, LOUISVILLE, KY 40207	WILLIE DENNIS BROWN	Appellee
LINDA J. BROWN	4213 NORBOURNE BLVD., APT. 4, LOUISVILLE, KY 40207	LINDA J. BROWN	Appellee

Circuit Information	<u>Case Information</u>	<u>StepSheet</u>	<u>Litigants</u>	<u>Attorneys</u>	<u>Appeals</u>
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County	Case #	Judgement Date	Judge Name
JEFFERSON(056)	(Case #: 15-CI-001026) (Court:1) (Division:Circuit Court)	11/04/2015	STEVENS, OLU

Associated Appeals	Case	Stepsheet	Litigants	Attorneys	Circuit
Information					
None					