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CHEROKEE TRIANGLE ASSOCIATION, INC., ET AL. v.
WILLOW GRANDE, LLC, ET AL.

ORDER OF THE KENTUCKY SUPREME COURT DENYING DISCRETIONARY REVIEW (JUNE 8, 2022)

SUPREME COURT OF KENTUCKY

WILLOW GRANDE, LLC,

Movant,

v.

CHEROKEE TRIANGLE ASSOCIATION, INC., ET AL.,

Respondents.

2020-SC-0458-D (2019-CA-0208)

Jefferson Circuit Court No. 16-CI-005124

Before: John D. MINTON JR., Chief Justice.

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

/s/ John D. Minton Jr.
Chief Justice

Entered: June 8, 2022

OPINION OF THE
KENTUCKY COURT OF APPEALS
(AUGUST 21, 2020)

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

WILLOW GRANDE, LLC,

Appellant,

v.

CHEROKEE TRIANGLE ASSOCIATION, INC.; TIM HOLZ; RHONDA PETR; RUTH LERNER; NICK MORRIS; ANNE LINDAUER; DAVID DOWDELL; PEGGY ELGIN; JOHN ELGIN; KEITH AUERBACH; JOHN FENDIG; BILL SEILLER; AND JOHN DOWNARD,

Appellees.

No. 2019-CA-000208-MR

Appeal from Jefferson Circuit Court,
Honorable A.C. Mckay Chauvin, Judge,
Action No. 16-CI-005124

Before: CLAYTON, Chief Judge,
DIXON and MAZE, Judges.

OPINION AFFIRMING

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MAZE, Judge:

Willow Grande, LLC (Willow Grande) appeals from an order of the Jefferson Circuit Court dismissing its claims for abuse of process and interference with a prospective contractual relationship against the Cherokee Triangle Association, Inc. (the CTA), individual members of the CTA, and the CTA's counsel, Bill Seiller (Seiller). The trial court concluded that the CTA, and other defendants were immune from liability arising from their pursuit of appeals challenging the re-zoning of Willow Grande's property. Willow Grande argues that there were factual issues whether those appeals were objectively baseless. Consequently, Willow Grande contends that the trial court could not find the defendants immune on a motion to dismiss.

We conclude that the trial court correctly applied the *Noerr-Pennington* doctrine to analyze the issue of immunity. Since the CTA and individual defendants were statutorily authorized to pursue the zoning appeals for the purpose of petitioning the courts for redress of grievances, they are entitled to constitutional immunity for any claims arising out of those appeals. Therefore, the trial court properly found that Willow Grande's claims were barred and dismissed the action. Hence, we affirm.

I. Facts and Procedural History

The current case is an outgrowth of an extended factual and procedural history. However, those underlying facts are not significantly in dispute. Willow Grande is the owner of .88 acres located at 1418 and 1426

Willow Avenue in the Cherokee Triangle area of Louisville, Kentucky. Beginning in 2008, Willow Grande and its developer began planning to replace the existing Bordeaux Apartment complex with a new condominium tower. One side of the street is predominantly single-family dwellings of fewer than four stories. The other side features a mix of structures, including three high-rise multi-family residential buildings—the eight-story Willow Terrace built in 1924, the eleven-story Dartmouth built in 1928, and the twenty-story 1400 Willow built around 1980.

In 2012, Willow Grande began the approval process by submitting a proposal. In the first phase of the project, Willow Grande applied for a certificate of appropriateness with the Cherokee Triangle Architectural Review Committee (CTARC). The certificate of appropriateness was a prerequisite to obtain a demolition permit for the existing structure and a construction permit for the new condominium tower. To set the approval process in motion, the developer provided CTARC mailing labels of all "abutting" landowners to whom written notice was sent by first class mail stating the date, time, and location of a public meeting at which the project would be discussed.

That meeting occurred January 25, 2012, beginning with a nearly hour-long presentation by the developer's attorney and the architect of the new Willow Grande Tower. When the meeting was opened for public comment, a statement from the CTA's President was read urging denial of the application for various reasons. Seiller, an attorney and resident of the Dartmouth, also spoke against the project, although he stated that the CTA was not taking an official position at that time.

CTARC held a second public meeting a month later. But since the public record was closed at the end of the first meeting, no new testimony was heard. Subsequently, CTARC approved the application, but conditioned upon approvals of a zoning map amendment and a construction permit.

The CTA, now represented by Seiller, appealed to the Louisville Metro Landmarks Commission (the Commission). The CTA alleged that Willow Grande failed to provide proper notice to all abutting landowners as required by Metro ordinance. The CTA further argued that its members were not afforded an opportunity to present all relevant evidence against the project. And finally, the CTA asserted that the certificate was granted without substantial evidence. Following review, the Commission affirmed the certificate of appropriateness granted by CTARC, concluding that it was not based upon any clearly erroneous finding as to a material fact.

As permitted by Metro Ordinance § 32.263, the CTA appealed the Commission's decision to the Jefferson Circuit Court. *Cherokee Triangle Ass'n, Inc. v. Louisville Metro Landmarks Commission*, No. 12-CI-003990 (Jeff. Cir. Ct.). The complaint also listed Keith Auerbach and Chenault McClure Conway as plaintiffs. Auerbach and Conway live across the street from the proposed development but were not parties to the appeal before the Commission. The trial court concluded that Auerbach and Conway were not proper parties because they failed to appeal CTARC's issuance of the certificate to the Commission. The trial court further found that the notice requirements had been substantially followed, all parties had received sufficient due process, and the Commission's issuance of the certificate was supported

by substantial evidence. This Court affirmed the trial court's order on appeal. *Cherokee Triangle Ass'n, Inc. v. Willow Grande, LLC*, No. 2014-CA-000685-MR, 2017 WL 541082 (Ky. App. Feb. 10, 2017).

While these matters were pending, Willow Grande applied to the Louisville Metro Planning Commission (the Planning Commission) for a map amendment, in accord with the conditions imposed by CTARC. Willow Grande also applied for a number of variances and waivers from Louisville Metro's land-use regulations. The Planning Commission held a public hearing on the proposed zone change and on the associated applications for variances and waivers. The hearing lasted several hours, and multiple neighbors expressed opposition to the project. Following the hearing, the Planning Commission recommended denying the proposed map amendment without deciding whether the variances and waivers were appropriate.

The recommendation prompted Willow Grande to petition the Metro Council for approval. Following a hearing, the Metro Council voted to adopt factual findings approving the map amendment. The Council remanded the matter to the Planning Commission to address Willow Grande's applications for the variances and waivers.

On remand, the Planning Commission recommended approving five variances and seven waivers. Willow Grande also revised its proposed site plan to reduce the building's height by two stories. The Metro Council later adopted this recommendation and approved a final plan.

In the first action, filed on September 6, 2013, the CTA, joined by Auerbach, John Downard, and Rhonda

Petr, appealed the Metro Council's approval of the zoning map amendment. *Cherokee Triangle Ass'n, Inc. v. Willow Grande, LLC*, No. 13-CI-004484 (Jeff. Cir. Ct.). In the second action, filed on April 16, 2015, the CTA, joined by Auerbach and Petr, appealed from the Planning Commission's order granting the variances and waivers. *Cherokee Triangle Ass'n, Inc. v. Willow Grande, LLC*, No. 15-CI-001809 (Jeff. Cir. Ct.).[1] After filing of the second action, the matters were consolidated before a single division of the Jefferson Circuit Court.

In its first order, entered November 20, 2015 (as modified by a later order entered August 26, 2016), the trial court upheld the Metro Council's adoption of an ordinance granting the zoning map amendment. The court found no evidence that the Metro Council acted arbitrarily or in excess of its authority. In its second order, entered on August 26, 2016, the trial court likewise upheld the Planning Commission's grant of the variances and waivers to Willow Grande.[2] This

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[1] In its brief, Willow Grande states that the CTA filed four lawsuits challenging the re-zoning and administrative approvals of the project. Willow Grande appears to be referring to an "Amended and Supplemental Complaint" filed by the CTA on June 23, 2015, in Action No. 13-CI-004484. The amended complaint reflected the Metro Council's adoption of the final development plan. The trial court determined that the claims raised in the amended complaint were repetitive of those brought in Action No. 15-CI-001809 and consolidated the matters brought in those two complaints. The amended complaint did not constitute a separate lawsuit, only the attempted amendment of an existing one.

[2] Although the matters were consolidated, the first order was heard and issued by Division Six of the Jefferson Circuit Court. Thereafter, the matter was reassigned to Division Eleven by Order of Reciprocal Reallotment. The order correcting the November 20, 2015 order in Action No. 13-CI-004484 and the order

Court affirmed those judgments on appeal. *Cherokee Triangle Ass'n, Inc. v. Louisville Metro Planning & Zoning Comm'n*, No. 2016-CA-001512-MR, 2017 WL 5953521 (Ky. App. Dec. 1, 2017). Thereafter, the Kentucky Supreme Court denied CTA's motion for discretionary review.

Willow Grande filed its first complaint in this action on October 14, 2016, against the CTA and eleven individual association members, asserting claims for abuse of process, wrongful use of civil proceedings, and interference with a prospective economic advantage. By amended complaint filed on February 12, 2018, Willow Grande joined Seiller, who had been the CTA's lead counsel, and John Elgin as defendants. After all parties were before the court, the CTA and individual defendants filed a motion to dismiss, arguing that KRS[3] 100.347 afforded them an unfettered right to appeal zoning decisions. Consequently, they asserted that their statutory appeals could not be considered as "sham" litigation under the *Noerr-Pennington* doctrine. The trial court agreed, concluding that the defendants were shielded from liability from Willow Grande's claims relating to their actions in appealing the zoning decisions. By amended order entered on January 8, 2019, the trial court entered a corrected order dismissing the claims relating to Seiller. Willow Grande now appeals from these orders. Additional facts will be set forth below as necessary.

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granting summary judgment in Action No. 15-CI-001809 were entered by the presiding judge in Division Eleven.

[3] Kentucky Revised Statutes.

II. Standard of Review

CR[4] 12.02 sets out defenses which may be asserted without filing a responsive pleading, including, "(f) failure to state a claim upon which relief can be granted[.]" A motion to dismiss for failure to state a claim upon which relief may be granted "admits as true the material facts of the complaint." *Upchurch v. Clinton County*, 330 S.W.2d 428, 429-30 (Ky. 1959). A trial court should not grant such a motion "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . ." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Whether a court should dismiss an action pursuant to CR 12.02 is a question of law. *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002). Consequently, we conduct a *de novo* review of the trial court's order dismissing the action. *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599, 601 (Ky. 2011), *overruled on other grounds by Maggard v. Kinney*, 576 S.W.3d 559 (Ky. 2019).

III. Application of the *Noerr-Pennington* Doctrine

The parties agree the viability of Willow Grande's claims turns on the application of the *Noerr-Pennington* doctrine, which stems from two United States Supreme Court cases, *Eastern Railroad 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). The *Noerr* case involved a dispute between the trucking industry and the railroad

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[4] Kentucky Rules of Civil Procedure.

industry and their respective interests in, and competition for, the long-distance transportation of heavy freight. The trial court determined that the Eastern Railroad Presidents Conference, an association of the presidents of 24 railroads, had violated the Sherman Anti-Trust Act in its publicity campaign directed at law-making and law enforcement authorities, and against truckers as competitors. The Supreme Court held, however, that no violation of the Act could be "predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135, 81 S. Ct. at 528. The Court explained that:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

Id., 365 U.S. at 139, 81 S. Ct. at 530.

The Court further explained that:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such

> injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Id., 365 U.S. at 143-44, 81 S. Ct. at 533.

Nevertheless, the Court acknowledged that there could be situations where the efforts toward influencing governmental action were merely a sham "to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor[.]" *Id.*, 365 U.S. at 144, 81 S. Ct. at 533.

In the *Pennington* case four years later, the Supreme Court recognized its prior decision in the *Noerr* case and held that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." 381 U.S. at 670, 85 S. Ct. at 1593.

Thereafter, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972), the Supreme Court extended its views in the *Noerr* and *Pennington* cases to efforts by citizens or groups of citizens to influence administrative agencies and courts. 404 U.S. at 510-11, 92 S. Ct. at 611-12. The Court stated that "the right to petition extends to all departments of the Government." *Id.*, 404 U.S. at 510, 92 S. Ct. at 612. But the Court also reiterated that the *Noerr-Pennington* doctrine does not provide absolute immunity where the challenged action is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor[.]" *Id.*, 404 U.S. at 511, 92 S. Ct. at 612 (quoting *Noerr*, 365 U.S. at 144, 81 S. Ct. at 533).

The *Noerr-Pennington* doctrine is grounded in the First Amendment rights of association and petition. *Id.*, 404 U.S. at 510-11, 92 S. Ct. at 611-12. However, Kentucky courts were hesitant to apply the doctrine to state law claims such as abuse of process and intentional interference with contractual relations. In *Eastern Kentucky Resources v. Arnett*, 892 S.W.2d 617 (Ky. App. 1995), a panel of this Court noted that other federal and state courts have applied the *Noerr-Pennington* doctrine to petitioning activities such as zoning questions and other activities outside the antitrust field. *Id.* at 618. But the Court declined to formally adopt the doctrine. Similarly, the Kentucky Supreme Court mentioned the *Noerr–Pennington* doctrine in *Simpson v. Laytart*, 962 S.W.2d 392 (Ky. 1998), but also declined to formally adopt the doctrine in that case, as other issues were dispositive of the matter. *Id.* at 396.

Eventually, this Court addressed the application of the *Noerr-Pennington* doctrine in *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411 (Ky. App. 2004), as it affected state law claims for abuse of process and intentional interference with a contractual relation. In *Stepner*, as in the current case, a group of developers attempted to bring these claims against an adjoining property owner who had unsuccessfully challenged their re-zoning action. The circuit court dismissed the developers' complaint, concluding that the *Noerr-Pennington* doctrine shielded Stepner from liability. *Id.* at 413-14. On appeal, this Court agreed, and then went on to address the sham litigation exception to the doctrine.

> The Supreme Court in [*Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S. Ct. 1920, 123 L.Ed.2d 611 (1993)] set out a two-part

> definition of sham litigation. The Court stated that the first part of the definition was that "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 60, 113 S. Ct. 1920. The Court noted that courts could examine a litigant's subjective motivation only if the litigation was objectively meritless. *Id.* The Court held that if the first part of the definition of sham litigation is met, then courts should focus on whether the litigation conceals "an attempt to interfere directly with the business relationships of a competitor" through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* at 60-61, 113 S. Ct. 1920 *quoting Noerr*, 365 U.S. at 144, 81 S. Ct. 523 and *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L.Ed. 2d 382 (1991). (Emphasis in original.)

Id. at 415.

In the current case, Willow Grande urges that the sham exception is applicable because the zoning challenges brought by the CTA were objectively baseless. Willow Grande first points to language in this Court's prior opinions characterizing certain arguments made by the CTA as "without merit." We do not find this characterization to be controlling for purposes of determining whether the underlying litigation was objectively baseless. The prior panels made those comments in the context of the standard of review of appeals from zoning actions under KRS 100.347. *See Am. Beauty Homes Corp. v. Louisville & Jefferson Cty.*

Planning & Zoning Comm'n, 379 S.W.2d 450 (Ky. 1964). We also note that the discretionary nature of re-zoning determinations creates an additional limit on the scope of judicial review in those actions. *See Hilltop Basic Res., Inc. v. Cty. of Boone*, 180 S.W.3d 464, 468 (Ky. 2005). As a result, while the CTA's arguments were unavailing in the prior appeals, we cannot construe the language in those opinions as determinative of the outcome in this case.

The Court in *Stepner* noted that the underlying appeal by the property owner was brought pursuant to KRS 100.347(3), which permits an appeal of a zoning decision by "[a]ny person or entity claiming to be injured or aggrieved[.]" *Stepner*, 170 S.W.3d at 415-16. The Court also noted that the statute grants a neighboring or adjacent property owner broad standing to challenge the zoning change. *Id.* at 416. *See also Warren Cty. Citizens for Managed Growth, Inc. v. Bd. of Comm'rs of City of Bowling Green*, 207 S.W.3d 7, 12 (Ky. App. 2006). In light of this statutory right to bring the zoning challenge, the Court in *Stepner* indicated that the zoning appeal could not have been objectively baseless, regardless of the plaintiff's subjective motivation. *Stepner*, 170 S.W.3d at 416.

Willow Grande argues that the CTA's statutory authorization and standing to bring the zoning appeals cannot serve as the sole basis to determine whether the appeals were objectively baseless. Willow Grande points to *Bourbon County Joint Planning Comm'n v. Simpson*, 799 S.W.2d 42 (Ky. App. 1990), in which a panel of this Court held that a zoning applicant could pursue claims for abuse of process and interference with a prospective contractual relationship arising from adjoining property owners' appeal of a re-zoning

determination. *Id.* at 45-46. The Court held that there were genuine issues of material fact whether the zoning appellants had acted in good faith when challenging the zoning action. *Id.* at 46.

The decision in *Simpson* predates *Stepner*'s adoption of the *Noerr-Pennington* doctrine.[5] Since the First Amendment protects the right of citizens to petition for redress of grievances, the doctrine generally provides immunity from legal action to persons who bring a zoning appeal to induce the passage or enforcement of law or to solicit governmental action. Nevertheless, Willow Grande asserts that the CTA's action was so objectively baseless that it should not be entitled to the absolute immunity afforded by the *Noerr-Pennington* doctrine.

But under the objective prong of the sham exception, sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief. *Professional Real Estate Investors*, 508 U.S. at 62, 113 S. Ct. at 1929. If the court finds the litigation to be baseless, the court must then focus on whether the baseless lawsuit conceals an attempt to use the governmental process, as opposed to the outcome of that process, to cause injury to the plaintiff. *Id.*, 508 U.S. at 60-61, 113 S. Ct. at 1928. Essentially, a sham involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action in any form. *Video*

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[5] We also note that *Noerr-Pennington* immunity is generally regarded as an affirmative defense which must be timely raised or is deemed to have been waived. *See Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 860 (5th Cir. 2000). There is no indication that the issue was ever raised in *Simpson*.

International Production, Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1082 (5th Cir. 1988).

For purposes of the motion to dismiss, we must accept Willow Grande's assertion that the CTA sought to use the appeal process to delay the project and to obtain concessions on the size of the condominium development. But as noted in *Stepner*, if a party is genuinely aggrieved by the outcome of a zoning action, KRS 100.347 affords that party both the right and standing to challenge that action. Willow Grande does not allege that the parties to the zoning appeals lacked standing under KRS 100.347 or failed to comply with the procedural requirements to bring such an action. We agree that there were defects in each of these appeals which rendered success on the merits unlikely, most notably lack of preservation and the improper naming of parties. But on their face, each of these actions was brought for the express purpose of challenging the zoning decisions as they affected the substantial interests of the neighboring and adjoining property owners.

We may also consider a pattern of repetitive litigation to determine whether the zoning appeals were objectively baseless.[6] *See California Motor Transp*, 404

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[6] With respect to the claims against Seiller, Willow Grande points to another appeal in which Seiller represented neighboring property owners who were challenging re-zoning actions by the Planning Commission and the Metro Council. The circuit court rejected similar arguments to those presented in the appeals at issue in this case, and this Court affirmed that judgment on appeal. *Mauney v. Louisville Metro Council*, No. 2014-CA-000263-MR, 2016 WL 4255017 (Ky. App. Aug. 12, 2016). We find no basis to consider conduct occurring in a different appeal, involving

U.S. at 513, 92 S. Ct. at 613. Similarly, a pattern of asserting unsupported legal or factual arguments may demonstrate that the zoning appeals were objectively baseless. *See Pound Hill Corp., Inc. v. Perl*, 668 A.2d 1260, 1264 (R.I. 1996). But in this case, the CTA brought separate appeals from specific actions as they became appealable: the CTARC issuance of the certificate of appropriateness; the Metro Council's approval of the re-zoning; and the Planning Commission's approval of the variances and waivers. The appeals were brought as soon as the underlying matters became ripe for adjudication, and not merely for purposes of delay or vexation.

Furthermore, Willow Grande does not assert that the CTA abused the process, rather than the outcome of that process, as a means to procure a result other than favorable governmental action. Along similar lines, a claim for abuse of process is based on "the employment of legal process for some other purpose other than that which it was intended by the law to effect." *Raine v. Drasin*, 621 S.W.2d 895, 902 (Ky. 1981), *abrogated on other grounds by Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016). Willow Grande does not allege that the CTA had an anticompetitive purpose in bringing the zoning appeals, or any purpose other than to challenge the appropriateness of the proposed development to the Cherokee Triangle area. The mere fact that the appeals were ultimately unsuccessful is not sufficient to bring them within the scope of the sham exception.[7]

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different parties, a different parcel of property, and a different developer, as evidence of a repetitive pattern of conduct in this case.

[7] Willow Grande refers to the recently rendered decision by another panel of this Court in *Bardstown Capital Corp. v. Seiller*

Consequently, we must conclude that Willow Grande's complaint failed to state facts sufficient to fall within the sham exception to the *Noerr-Pennington* doctrine. The CTA's efforts to delay the project in order to influence governmental approval of the size and scope of the development cannot be considered to be objectively baseless as a matter of law.[8] Thus, the

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Waterman, LLC, No. 2018-CA-001886-MR, ___ S.W.3d ___, 2020 WL 3108238 (Ky. App. Jun. 12, 2020). In that case, the Court concluded that the sham exception to the *Noerr-Pennington* doctrine applied to preclude summary judgment. The Court found sufficient evidence to create genuine issues of material fact concerning both the "objectively baseless" and the "subjective motivation" prongs of the test. As an initial matter, we note that the *Bardstown Capital* opinion is not final as of this writing. Opinions that are not final shall not be cited as authority in any other case. CR 76.30(2); Rules of the Supreme Court (SCR) 1.030 (8)(a). *See also Kohler v. Com., Transp. Cabinet*, 944 S.W.2d 146, 147 (Ky. App. 1997). Second, the facts of *Bardstown Capital* are distinguishable from those in the current case. While the CTA was unsuccessful in its appeals from the zoning and administrative decisions, we have concluded that it had valid standing and interest to bring the appeals. And unlike in *Bardstown Capital*, there is no claim that the CTA or its individual members brought those appeals with an anti-competitive motive or to extract a personal pecuniary gain outside of the scope of a zoning appeal. Thus, we conclude that the result in *Bardstown Capital* would not control the outcome of this appeal.

[8] In 2017, the General Assembly enacted KRS 100.3471, which requires a party appealing a circuit court decision to post a bond which "shall consider the costs that the appellee may incur during the pendency of the appeal." KRS 100.3471(3)(d). The statute further sets out criteria under which the circuit court may find the appeal to be "presumptively frivolous," KRS 100.3471(3)(c), in which case the bond may also account for economic losses and damages which the appellee may incur during the pendency of the appeal. 2017 Ky. Laws ch. 181, § 1 (eff. Apr. 11, 2017). These provisions were not in effect at the time the CTA filed its appeals in the underlying actions and are not relevant to the issues

trial court properly found that the CTA and the individual defendants were immune from claims of abuse of process and interference with a prospective contractual relationship arising from their zoning appeals. Therefore, the trial court property granted their motion to dismiss the complaint.

IV. Conclusion

The *Noerr-Pennington* doctrine protects persons who associate and petition the government for redress of grievances. Since these interests implicate significant constitutional rights, a party seeking to assert claims arising from such conduct bears a high burden of showing that the causes of action will not have an impermissibly chilling effect on the exercise of those rights. The CTA and the adjoining property owners had a right to assert objections to the Willow Grande development as it affected their substantial interests. They also had a right to bring appeals from adverse zoning determinations to ensure that those decisions complied with applicable law. Finally, the CTA and adjoining property owners had a right to employ Seiller to pursue these legal matters.

Although the CTA and adjoining property owners were unsuccessful in their appeals, Willow Grande now bears the burden to establish that those actions were "objectively baseless." From the face of the pleadings and the opinions rendered by this Court and the trial court in the prior actions, we find no basis to conclude that the CTA brought those appeals for any

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presented in this case. Furthermore, we express no opinion whether this section is affected by the application of the *Noerr-Pennington* doctrine or any other constitutional rule.

reason other than to obtain a favorable outcome with respect to their interests in the proceedings. As a result, those appeals cannot be considered to have been sham litigation under the *Noerr-Pennington* doctrine. For this reason, the CTA, the adjoining property owners, and Seiller are immune from liability from Willow Grande's claims of abuse of process and interference with a prospective contractual relationship.

Accordingly, we affirm the order of the Jefferson Circuit Court dismissing Willow Grande's complaint.

ALL CONCUR.

AMENDED OPINION AND ORDER OF THE JEFFERSON CIRCUIT COURT, DIVISION EIGHT (JANUARY 7, 2019)

JEFFERSON CIRCUIT COURT
DIVISION EIGHT

WILLOW GRANDE, LLC,

Plaintiff,

v.

CHEROKEE TRIANGLE ASSOCIATION, INC., ET AL.,

Defendants.

No. 16-CI-005124

Before: A.C. McKay CHAUVIN, Judge.

OPINION AND ORDER (AMENDED)

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Procedural History

This matter comes before the Court on motions of Defendants Cherokee Triangle Association, Inc., et al ("CTA") (collectively, "Defendants") and Defendant Bill Seiller ("Mr. Seiller") to dismiss. The motions were

filed on July 19, 2018 and July 10, 2018, respectively. Plaintiff Willow Grande, LLC ("Willow Grande") responded on August 6, 2018 and August 20, 2018, to which the Defendants replied on August 30, 2018. Willow Grande filed a supplemental response on September 21, 2018, to which Mr. Seiller replied on September 24, 2018. A hearing on the motion was held on September 26, 2018.

The Defendants filed a motion for protective order on July 19, 2018. Willow Grande responded on August 14, 2018, to which the Defendants replied on August 24, 2018.

An AOC-280 having been tendered, the motions now stand submitted for a ruling.

Legal Standard

In considering a motion to dismiss pursuant to CR 12.02, relief should be granted only if it appears that the plaintiff would be unable to prevail under any set of facts which could be proven in support of the claim. *Kevin Tucker & Assocs. v. Scott & Ritter, Inc.,* 842 S.W.2d 873 (Ky.App. 1992); *Berthelsen v. Kane,* 759 S.W.2d 831 (Ky.App. 1988); *Broyde v. Gotham Tower, Inc.,* 13 F.3d 994 (6th Cir. 1994). In making that determination, the Court is obliged to view all pleadings in the light most favorable to the Plaintiff, and consider all allegations raised in the Complaint to be true. *Ewell v. Central City,* 340 S.W.2d 479 (Ky. 1960).

Summary of Relevant Undisputed/ Indisputable Facts

Willow Grande is a development project begun in 2011 to build a multi-story condominium building

("Development") on property located in the Cherokee Triangle neighborhood. CTA is an organization made up of Cherokee Triangle residents. CTA and its members, through Mr. Seiller (*i.e.* counsel) sought appellate review of three (3) decisions concerning the Development: (1) the decision of the Cherokee Triangle Architectural Review Committee to approve the Development; (2) the decision of the Louisville Planning and Zoning Commission to rezone Willow Grande's property; and (3) the decision of the Louisville Planning and Zoning Commission to grant multiple variances and waivers in order for the Development to comply with zoning laws. By September of 2018, the Defendants had appealed these decisions, without success, to every level of review available, thereby exhausting all of their administrative and judicial avenues for relief.

Willow Grande brought the above-styled Complaint against the CTA, Mr. Seiller, and the individuals who joined in the appeals alleging abuse of process, wrongful use of civil proceedings, tortious interference with a prospective economic advantage.

Conclusions of Law

Willow Grande's claims are based on the Defendants' rigorous efforts to challenge zoning decisions concerning the Development through the appeals process. Kentucky has adopted the *Noerr-Pennington* doctrine, which shields citizens or groups of citizens from liability for exercising their right to petition public officials and administrative agencies in activities such as zoning decisions regardless of intent of purpose. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers*

of Am. v. Pennington, 381 U.S. 657 (1965); *Grand Communities, Ltd. v. Stepner,* 170 S.W.3d 411, 415 (Ky.App. 2004). In so doing, the courts also recognized the "sham" exception to the doctrine. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49 (1993). Willow Grande contends that the allegations set out in its Complaint fall within the sham exception. The Court does not agree.

In order to determine whether the Defendants' appeals constitute "sham" litigation, the Court must apply a two-part test. First, the Court must find that the Defendants' appeals were objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Professional Real Estate Investors, Inc.* at 58. If so, then the Court next examines whether the litigation conceals an attempt to interfere directly with the business relationships of a competitor, through the *use* of the appellate process as opposed to the *outcome* of that process, as an anticompetitive weapon. *Id.* The Defendants' subjective motivations may not be considered unless their appeals are objectively baseless. *Id.*

In the instant case, the Defendants' right to appeal the zoning decisions is expressly conferred under to KRS 100.347. Accordingly, the Defendants' exercise of their due process right to appeal the adverse decisions was not, and arguably could not be, *objectively* baseless.[1] *See Grand Communities, Ltd. v. Stepner,* 170 S.W.3d

[1] The Court expressly rejects Willow Grande's repeated assertion that the appeals taken by the Defendants were found by the reviewing court(s) to be groundless, unacceptable, unreasonable, without merit, or baseless. This position is entirely unsupported by the record.

411, 415-16 (Ky.App.2004). As such, the Defendants' subjective motivation, whatever it may have been, is irrelevant and the sham exception to the *Noerr-Pennington* doctrine does not apply. *Id.* The Defendants are therefore shielded from liability from Willow Grande's claims relating to their actions in appealing the zoning decisions.

Wherefore, IT IS HEREBY ORDERED as follows:

1. The Defendants' motions are GRANTED and the above-styled Complaint is DISMISSED with respect Defendants CTA, Tim Holz, Rhonda Petr, Ruth Lerner, Nick Morris, Anne Lindauer, David Dowdell, John Downard, Peggy Elgin, John Elgin, Keith Auerbach, John Fendig and Mr. Seiller;

2. The Defendants' motion for protective order is respectfully DENIED as moot.

There being no just cause for delay, this Order is FINAL and APPEALABLE.

SO ORDERED this 7th day of January, 2019.

/s/ A.C. McKay Chauvin
Judge

ec: Hon. Donald L. Cox / Hon. Joe Hummel /
Hon. Matthew P. Cox
Hon. Jack S. Gatlin
Hon. William B. Orberson / Hon. James C. Wade
Hon. Valerie W. Herbert / Hon. Jennifer A. Peterson
Hon. Paul Hershberg
Hon. Donald I. Miller, II

ORDER OF THE JEFFERSON CIRCUIT COURT DIVISION EIGHT (JANUARY 7, 2019)

JEFFERSON CIRCUIT COURT
DIVISION EIGHT

WILLOW GRANDE, LLC,

Plaintiff,

v.

CHEROKEE TRIANGLE ASSOCIATION, INC., ET AL.,

Defendants.

No. 16-CI-005124

Before: A.C. McKay CHAUVIN, Judge.

This matter came before the Court on January 7, 2019, on motions of Defendant Bill Seiller ("Mr. Seiller") "to clarify December 19, 2018, Opinion and Order granting motion to dismiss", and Plaintiff Willow Grande, LLC ("Willow Grande") "to alter, amend, or vacate pursuant to CR 59.05 or to compel additional findings pursuant to CR 52.02. The parties were represented by counsel.

Following discussion of record, and the Court being otherwise sufficiently advised;

1. Insofar as the failure to include Mr. Seiller among the parties whose motions to dismiss Willow Grande's claims was inadvertent, his motion to clarify is GRANTED. Accordingly, the Court will enter an Amended Or der correcting the oversight.

2. For the reasons stated on the record, Willow Grande's motions are respectfully DENIED.

ORDERED this 7th day of January, 2019.

/s/ A.C. McKay Chauvin
Judge

ec: Hon. Donald L. Cox / Hon. Joe Hummel /
Hon. Jack S. Gatlin
Hon. Valerie W. Herbert / Hon. Denis M. Motta
Hon. William B. Orberson / Hon. James C. Wade
Hon. Theodore Walton
Hon. Paul Hershberg

OPINION AND ORDER OF THE JEFFERSON CIRCUIT COURT, DIVISION EIGHT (DECEMBER 18, 2018)

JEFFERSON CIRCUIT COURT
DIVISION EIGHT

WILLOW GRANDE, LLC,

Plaintiff,

v.

CHEROKEE TRIANGLE ASSOCIATION, INC., ET AL.,

Defendants.

No. 16-CI-005124

Before: A.C. McKay CHAUVIN, Judge.

OPINION AND ORDER

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Procedural History

This matter comes before the Court on motions of Defendants Cherokee Triangle Association, Inc., et al ("CTA") (collectively, "Defendants") and Defendant Bill Seiller ("Mr. Seiller") to dismiss. The motions

were filed on July 19, 2018 and July 10, 2018, respectively. Plaintiff Willow Grande, LLC ("Willow Grande") responded on August 6, 2018 and August 20, 2018, to which the Defendants replied on August 30, 2018. Willow Grande filed a supplemental response on September 21, 2018, to which Mr. Seiller replied on September 24, 2018. A hearing on the motion was held on September 26, 2018.

The Defendants filed a motion for protective order on July 19, 2018. Willow Grande responded on August 14, 2018, to which the Defendants replied on August 24, 2018.

An AOC-280 having been tendered, the motions now stand submitted for a ruling.

Legal Standard

In considering a motion to dismiss pursuant to CR 12.02, relief should be granted only if it appears that the plaintiff would be unable to prevail under any set of facts which could be proven in support of the claim. *Kevin Tucker & Assocs. v. Scott & Ritter, Inc.,* 842 S.W.2d 873 (Ky.App. 1992); *Berthelsen v. Kane,* 759 S.W.2d 831 (Ky.App. 1988); *Broyde v. Gotham Tower, Inc.,* 13 F.3d 994 (6th Cir. 1994). In making that determination, the Court is obliged to view all pleadings in the light most favorable to the Plaintiff, and consider all allegations raised in the Complaint to be true. *Ewell v. Central City,* 340 S.W.2d 479 (Ky.1960).

Summary of Relevant Undisputed/ Indisputable Facts

Willow Grande is a development project begun in 2011 to build a multi-story condominium building ("Development") on property located in the Cherokee Triangle neighborhood. CTA is an organization made up of Cherokee Triangle residents. CTA and its members, through Mr. Seiller (*i.e.* counsel) sought appellate review of three (3) decisions concerning the Development: (1) the decision of the Cherokee Triangle Architectural Review Committee to approve the Development; (2) the decision of the Louisville Planning and Zoning Commission to rezone Willow Grande's property; and (3) the decision of the Louisville Planning and Zoning Commission to grant multiple variances and waivers in order for the Development to comply with zoning laws. By September of 2018, the Defendants had appealed these decisions, without success, to every level of review available, thereby exhausting all of their administrative and judicial avenues for relief.

Willow Grande brought the above-styled Complaint against the CTA, Mr. Seiner, and the individuals who joined in the appeals alleging abuse of process, wrongful use of civil proceedings, tortious interference with a prospective economic advantage.

Conclusions of Law

Willow Grande's claims are based on the Defendants' rigorous efforts to challenge zoning decisions concerning the Development through the appeals process. Kentucky has adopted the *Noerr-Pennington* doctrine, which shields citizens or groups of citizens from liability for exercising their right to petition

public officials and administrative agencies in activities such as zoning decisions regardless of intent of purpose. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington,* 381 U.S. 657 (1965); *Grand Communities, Ltd. v. Stepner,* 170 S.W.3d 411, 415 (Ky.App. 2004). In so doing, the courts also recognized the "sham" exception to the doctrine. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49 (1993). Willow Grande contends that the allegations set out in its Complaint fall within the sham exception. The Court does not agree.

In order to determine whether the Defendants' appeals constitute "sham" litigation, the Court must apply a two-part test. First, the Court must find that the Defendants' appeals were objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Professional Real Estate Investors, Inc.* at 58. If so, then the Court next examines whether the litigation conceals an attempt to interfere directly with the business relationships of a competitor, through the *use* of the appellate process as opposed to the *outcome* of that process, as an anti-competitive weapon. *Id.* The Defendants' subjective motivations may not be considered unless their appeals are objectively baseless. *Id.*

In the instant case, the Defendants' right to appeal the zoning decisions is expressly conferred under to KRS 100.347. Accordingly, the Defendants' exercise of their due process right to appeal the adverse decisions was not, and arguably could not be, *objectively* baseless.[1]

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[1] The Court expressly rejects Willow Grande's repeated assertion that the appeals taken by the Defendants were found by the

See Grand Communities, Ltd. v. Stepner, 170 S.W.3d 411, 415-16 (Ky.App.2004). As such, the Defendants' subjective motivation, whatever it may have been, is irrelevant and the sham exception to the *Noerr-Pennington* doctrine does not apply. *Id.* The Defendants are therefore shielded from liability from Willow Grande's claims relating to their actions in appealing the zoning decisions.

Wherefore, IT IS HEREBY ORDERED as follows:

1. The Defendants' motions are GRANTED and the above-styled Complaint is DISMISSED with respect to Defendants CTA, Tim Holz, Rhonda Petr, Ruth Lerner, Nick Morris, Anne Lindauer, David Dowdell, John Downard, Peggy Elgin, John Elgin, Keith Auerbach and John Fendig;

2. The Defendants' motion for protective order is respectfully DENIED as moot.

There being no just cause for delay, this Order is FINAL and APPEALABLE.

SO ORDERED this 18th day of December, 2018.

/s/ A.C. McKay Chauvin
Judge

ec: Hon. Donald L. Cox / Hon. Joe Hummel / Hon. Matthew P. Cox

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reviewing court(s) to be groundless, unacceptable, unreasonable, without merit, or baseless. This position is entirely unsupported by the record. To suggest otherwise, and to do so repeatedly and fervently, does Willow Grande and counsel no credit.

Hon. Jack S. Gatlin
Hon. William B. Orberson / Hon. James C. Wade
Hon. Valerie W. Herbert / Hon. Jennifer A. Peterson
Hon. Paul Hershberg
Hon. Donald I. Miller, II

OPINION OF THE
KENTUCKY COURT OF APPEALS
(DECEMBER 1, 2017)

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

CHEROKEE TRIANGLE ASSOCIATION, INC. APPELLANTS KEITH AUERBACH, M.D. JOHN DOWNARD, RHONDA PETR,

Appellants,

v.

LOUISVILLE METRO PLANNING & ZONING COMMISSION, LOUISVILLE METRO COUNCIL AND, LOUISVILLE METRO GOVERNMENT, WILLOW GRANDE, LLC,

Appellees.

No. 2016-CA-001512-MR

Appeal from Jefferson Circuit Court,
Honorable C. Edwards, Judge,
Action No. 13-CI-004484 AND 15-CI-001809

Before: COMBS, JOHNSON and
D. LAMBERT, Judges.

OPINION AFFIRMING

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LAMBERT, D., Judge:

This is a land use appeal involving a high-rise condominium project. The Louisville Metro Council ("City Council") approved a zoning map amendment in favor of developer Willow Grande, LLC ("Willow Grande"). The Cherokee Triangle Association ("CTA"), which opposed both the project and the zone change, challenged the City Council's approval in the Jefferson Circuit Court. Eventually, the circuit court entered a judgment upholding the zone change and the City Council's acceptance of the final development plan. After review, we find no error and affirm.

I. Background

Willow Grande sought to build a condominium tower in the Cherokee Triangle neighborhood of Louisville. The project's proposed location is a 0.88 acre property (the "subject parcel") occupied by the Bordeaux Apartments. Willow Grande proposed to demolish the Bordeaux Apartments and construct a 17-story building in their place. Willow Grande applied for a certificate of appropriateness with the Cherokee Triangle Architectural Review Committee ("ARC") to begin demolition. The ARC approved the application, but conditioned the approval on obtaining permission from the Louisville Metro Council to change the zoning designation of the subject parcel.[1]

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[1] The CTA appealed this decision, and another panel of this Court affirmed in *Cherokee Triangle Ass'n., Inc. v. Willow Grande, LLC*, 2017 WL 541082 (2014-CA-000685-MR).

As a result, Willow Grande applied for a zoning map amendment with the Louisville Metro Planning Commission ("Planning Commission"). Willow Grande also opted to have the Planning Commission decide whether certain deviations from Louisville Metro's land use regulations were appropriate. The Planning Commission held a public hearing on the proposed zone change and on the associated applications for variances[2] and waivers.[3] The hearing lasted several hours, and multiple neighbors expressed opposition to the project.

Following the hearing, the Planning Commission recommended denying the proposed map amendment without deciding whether the variances and waivers were appropriate. The recommendation prompted Willow Grande to petition the City Council for approval. Once again, a hearing was held. 21 council members heard both sides' positions regarding the development. Two council members recused themselves from the proceedings. One allegedly recused because a close relative lives in the Cherokee Triangle neighborhood, and the other cited a pre-existing business relationship with an officer of Willow Grande.

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[2] Kentucky authorizes dimensional variances through KRS 100.241. The findings necessary to grant a variance are provided in KRS 100.243.

[3] Under Section 11.8.1 of the Land Development Code ("LDC"), "[t]he Planning Commission may modify, reduce or waive those standards and minimum requirements established by this [LDC] which cannot be modified through a dimensional variance." The Section explicitly states that a waiver shall not be used to modify "[u]se, conditional use, density [or] [Floor Area Ratio] standards. The findings necessary to grant a waiver are outlined in Section 11.8.5 of the LDC.

Despite the Planning Commission's recommendation, the Louisville Metro Council ultimately approved the zoning map amendment by a vote of 14-7. The City Council adopted an ordinance to that effect, which included its factual findings supporting the decision, but remanded for the Planning Commission to make a recommendation as to the variances and waivers.

On remand, the Planning Commission recommended approving five variances and seven waivers. Willow Grande also revised its proposed site plan to reduce the building's height by two stories. The City Council later accepted this revision and approved a final plan.

After final approval, the CTA appealed to the circuit court.[4] In addition to challenging a protective order entered in favor of the recused council members, the CTA charged both the City Council and the Planning Commission with error. First, the CTA claimed the City Council improperly granted the zoning map amendment because the entire Willow Grande project was treated as an "infill" development, as defined in the Land Development Code ("LDC"), rather than a "non-infill" project. According to the neighbors, the building would not have been eligible to stand taller than 35 feet if the project been properly characterized as "non-infill" from the outset. Second, the CTA claimed the City Council improperly approved the final development plan because it remanded the case for the Planning Commission to provide a recommendation as to the proposed variances and waivers. This was a fatal procedural error, from the CTA's perspective, even though

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[4] The actions were initially assigned to multiple circuit court divisions. They were eventually consolidated in Division 11.

the Planning Commission did not originally address them. Finally, the CTA relied on *Louisville and Jefferson County Planning Commission v. Schmidt*, 83 S.W.3d 449 (Ky. 2001), to attack the Planning Commission's general authority to grant waivers.

Once it had considered the CTA's arguments and Willow Grande's responses, the circuit court ultimately granted summary judgment in favor of Willow Grande. The circuit court held that the CTA failed to preserve any argument regarding a distinction between infill and non-infill development by not raising the issue during the administrative process. The circuit court also found that the CTA was afforded due process, and that the Planning Commission acted lawfully in granting the waivers. This appeal followed.

II. Standard of Review

Appeals from local planning and zoning decisions are reviewed under the familiar arbitrariness standard explicated in *Am. Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). Under that standard, the decisions will not be upheld if the agency exceeded its lawful authority, denied the parties due process, or failed to adequately justify its legal conclusions or factual findings. *Id.*

III. Discussion

On appeal, the CTA once again alleges separate errors by the Planning Commission, the City Council, and the circuit court. The CTA begins by renewing its position that the Planning Commission failed to follow its own regulations regarding "infill development" and

thereby exceeded the authority of its governing legislation. The CTA follows this argument with a claim that the City Council acted arbitrarily merely because its decision was different from the Planning Commission's. The final attack on the circuit court consists of two parts. The first part accuses the circuit court of failing to adequately consider the case, and the second part asserts the circuit court abused its discretion by granting the protective order. We will address these issues in the order presented.

1. The CTA Failed to Preserve the Argument That the Willow Grande Project Was a Non-Infill Development.

The CTA's primary argument before this Court is that the Planning Commission erroneously treated the proposed development as an "infill development" project when it was a non-infill project. In support of this argument, CTA cites to the LDC and asserts under its definition for "infill development," that the subject parcel is not "vacant or underutilized land in an area within which a majority of the land is developed or in use." The CTA also stresses that the Planning Commission never classified the subject parcel as either vacant or underutilized. On this point, the CTA assures this Court that had the Planning Commission done so, there is no possible way the project would have been an "infill development."

In response, Willow Grande counters that the CTA did not properly present this issue to the Planning Commission. Willow Grande also defends that even if the Planning Commission had designated the project as "non-infill," the condominium's final height was allowable under the LDC. For the following reasons,

the circuit court correctly found the issue was not preserved.

The failure to raise an issue during the administrative process precludes it from later being considered by the judiciary on review. *Wilson v. Kentucky Unemployment Ins. Com'n*, 270 S.W.3d 915, 917 (Ky. App. 2008).

Here, the circuit court examined the record and found that counsel for the CTA mentioned "infill development" three times during the proceedings. The first took place before the Planning Commission when counsel for the CTA "specifically asked the [Planning] Commission to disregard the term 'infill.'" The second also took place before the Planning Commission, and although the CTA's counsel did state that the project was not "infill development" on that occasion, the circuit court found that counsel did not ask the Planning Commission to designate the project as "non-infill." In fact, the circuit court found the only time CTA questioned whether the project was "infill development" or not was in response to Willow Grande's motion[5] to alter, amend or vacate the summary judgment order. This was the third time the issue appeared in the record, and it did not occur during the administrative process. Based on these findings, we agree that the CTA waived this argument by failing to preserve it.

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[5] Evidently, this motion—filed by Willow Grande—was only intended to ascertain the scope of the summary judgment rather than question its substance.

2. Under KRS[6] 100.203, the Planning Commission Is Authorized to Grant Land Use Controls Other than Those Specifically Enumerated in the Statute

In its appeal to the circuit court, the CTA repeatedly disputed whether the Planning Commission had general authority to grant "waivers" under the LDC. The CTA cited *Louisville and Jefferson Cty. Planning Comm'n v. Schmidt*, 83 S.W.3d 449 (Ky. 2001), in support of this argument, and Willow Grande contested by relying on the statutory language of KRS 100.203. Accordingly, the issue preserved for this Court's consideration is whether KRS 100.203 confers the general power to grant "waivers." That statute, in pertinent part, gives local planning bodies the power to enact zoning regulations through

> [a] text, which shall list the types of zones which may be used, and the regulations which may be imposed in each zone, which must be uniform throughout the zone. In addition, the text shall make provisions for the granting of variances, conditional use permits, and for nonconforming use of land and structures, and <u>any other provisions which are necessary to implement the zoning regulation</u>.

KRS 100.203 (emphasis added).

Administrative bodies derive their authority from the legislature. *Allen v. Woodford Cty. Bd. of Adjustments*, 228 S.W.3d 573, 576 (Ky. App. 2007). In Kentucky, the enabling legislation for planning and zoning bodies is KRS Chapter 100. *See id.* Through that

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6 Kentucky Revised Statutes

Chapter, the General Assembly has expressly recognized that each planning unit faces its own unique land use challenges. *See*, *e.g.*, KRS 100.183-100.197 (requiring adoption of a thoroughly designed comprehensive plan as a means of fostering appropriate development).

Noting this affinity toward local expertise over zoning matters, Kentucky courts have routinely construed KRS Chapter 100 as giving wide latitude to the planning body. *See Bellemeade Co. v. Priddle*, 503 S.W.2d 734, 738 (Ky. 1973) (construing statutory language to authorize floating zones); *see also Ward v. Knippenberg*, 416 S.W.2d 746, 748 (Ky. 1967) (zoning body not bound to follow every detail of land use plan). They also defer to the local zoning body's reasonable interpretation of a statute it is charged with implementing in the event the statutory text is ambiguous. *Ky. Occupational Safety and Health Review Comm'n v. Estill Cty. Fiscal Court*, 503 S.W.3d 924, 927-28 (Ky. 2016) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778 (1984)).

Here, when read in line with Kentucky's preference for administrative flexibility in the context of comprehensive plan design, the plain text of KRS 100.203 broadly authorized the Planning Commission to grant "waivers" as part of the LDC. Local planning bodies are not required to shoehorn every proposed deviation from the zoning ordinance into a specifically enumerated land use control, and the statutory text of KRS 100.203 reflects that reality by leaving room for "other provisions which are necessary to implement the zoning regulation." And although it is not entirely clear what constitutes such necessary "other provisions," we must

defer to the Planning Commission's reasonable interpretation that "waivers" fall into this category.[7]

3. The City Council Duly Approved the Zone Map Amendment and the Final Development Plan.

The CTA asserts that the city council improperly approved the zone map amendment and the final development plan for two reasons. First, the CTA claims it was error for the city council to adopt findings that were inconsistent with the Planning Commission's recommendation. Second, the CTA claims it was error for the City Council to remand the case back to the Planning Commission so that the Planning Commission could make a recommendation regarding the proposed variances and waivers. From the CTA's perspective, the proper course of action would have been for the Planning Commission to address Willow Grande's application for variances and waivers when it voted to deny the zoning map amendment. Only then, the CTA maintains, could the City Council have

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[7] It is important to note that the CTA only attacked the Planning Commission's general authority to grant waivers. It did not attack the propriety of the specific "waivers" granted. In other words, although the CTA cited *Schmidt*, *supra*, it did not assert that the "waivers" in this case were merely dimensional variances granted under a more relaxed standard than the one provided in KRS 100.243. *Schmidt* forbade this practice, and as a corollary, held that "waivers" cannot relax the standards for other land use controls enumerated in KRS 100.203, *i.e.*, conditional use permits and permits for non-conforming uses of land or structures. In the same vein, "waivers" certainly cannot be granted to "permit a use of any land, building, or structure which is not permitted by the zoning regulation in the zone in question, or to alter density requirements in the zone in question." *See* KRS 100.247 (prohibiting use variances).

had a proper record to confirm the overall development plan. For the following reasons, we disagree.

Under KRS 100.211, the planning commission must hold at least one public hearing and make a recommendation, supported by substantial evidence, to the legislative body regarding any application for rezoning. *City of Louisville v. McDonald*, 470 S.W.2d 173, 177 (Ky. 1971). The ultimate decision whether to rezone, however, must be made by the legislative body. *Id.* at 179. In making that final decision, the legislative body is not bound by the planning commission's recommendation. Instead, it has several options. For example, it may review the commission's record, assuming it was made in a trial-type due process hearing, and reach a different decision; it may hold its own due process hearing and reach a different decision; or it may, of course, follow the commission's recommendation. *Id.* A properly supported finding by the legislative body that a proposed map amendment agrees with the comprehensive plan is a sufficient basis for approving the zone change. KRS 100.213.

Here, the City Council rejected the Planning Commission's recommendation and adopted its own findings of fact. Among other findings from the record, the City Council specifically determined that the development is compatible with the Louisville Metro's Cornerstone 2020 comprehensive plan because it meets the objectives of a Traditional Neighborhood Form District.[8] Accordingly, the zone map amendment was properly granted.

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[8] *See* "Zone Change Justification Statement," Codes and Regs. PDS Louisville Metro, Case 09 17822-12, Vol. 2 of 2, Page 445 of 1009 (2013-11-14) (explaining why project supports the character

The City Council's approval of the final development plan was also appropriate. Although we agree that the zoning board of adjustment normally hears and decides applications for variances, *see* KRS 100.241, this is not always the case when the underlying development involves an application for rezoning. In such circumstances, the local zoning ordinance may have empowered the applicant to have the planning body consider the variance application alongside the rezoning application. *See* KRS 100.203(5). And if the applicant elects this tandem consideration, the procedures of the local zoning ordinance must be followed—additionally pursuant to KRS 100.347(2), any appeal from the planning body's final action granting or denying a variance must be brought in the circuit court within 30 days following the legislative body's final action to grant or deny the map amendment.

Here, when the Planning Commission recommended denying the proposed map amendment, it did so without making a final recommendation as to the proposed variances and waivers. On the contrary, the Planning Commission did not finally resolve the issue of the proposed variances and waivers until after the City Council approved the zone change and remanded the case. Ultimately, the Planning Commission approved several variances and waivers as required under Section 11.4.5 of the LDC. These modifications were included in the overall development plan, which was later submitted and approved by the City Council. Accordingly, there was no error relating to the final development plan.

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of surrounding neighborhood while facilitating access to parks and commercial areas alike).

4. The Circuit Court Did Not Abuse Its Discretion Either in Issuing the Protective Order or in Correcting a Clerical Error.

Although the CTA claims it was error for the circuit court to enter the protective order preventing the two recusing council members from participating in discovery, we find no such error. "A trial court has broad discretion over disputes involving the discovery process." *Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. App. 2001). Moreover,

> [m]ere familiarity with the facts of a case gained by an agency [or other nonjudicial body] in the performance of its statutory role does not, however, disqualify a decision-maker. . . . Nor is a decisionmaker disqualified simply because he has taken a position, even in public on a policy issue related to the dispute, in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances. . . .

Hilltop Basic Res., Inc. v. Cty. of Boone, 180 S.W.3d 464, 469 (Ky. 2005) (quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493, 96 S. Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976)).

Here, since the council members entirely abstained from voting, the circuit court had a reasonable basis to enter the protective order. Furthermore, counsel for the CTA's position that Judge Edwards "just guessed at what Judge Stevens meant to do" and only entered summary judgment after "trying to read Judge Stevens' mind" is both groundless and unacceptable. Courts only speak through written orders, *Kindred Nursing*

Centers Ltd. Partnership v. Sloan, 329 S.W.3d 347, 349 (Ky. App. 2010), and there is nothing in the circuit court's judgment remotely supporting counsel for the CTA's claim that either of the judges who presided over this case failed to "read the briefs, [consider] the record, [hear] oral arguments, and . . . [understand] the law and facts of the case."

CONCLUSION

For the foregoing reasons, the Jefferson Circuit Court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Bill V. Seiller
Louisville, Kentucky

Ed Jon Wolfe
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Bill V. Seiller
Louisville, Kentucky

BRIEF FOR LOUISVILLE METRO GOVERNMENT, LOUISVILLE METRO COUNCIL, LOUISVILLE METRO PLANNING COMMISSION:

John G. Carroll
Louisville, Kentucky

Jonathan Lee Baker
Louisville, Kentucky

ATTORNEY FOR WILLOW GRANDE, LLC:

Thomas Sturgeon, III

Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES:

Sheryl Snyder
Louisville, Kentucky

OPINION OF THE
KENTUCKY COURT OF APPEALS
(FEBRUARY 10, 2017)

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

CHEROKEE TRIANGLE ASSOCIATION, INC., KEITH AUERBACH, M.D., AND CHENAULT MCCLURE CONWAY,

Appellants,

v.

WILLOW GRANDE, LLC, LOUISVILLE METRO LANDMARKS COMMISSION,[1] AND CHEROKEE TRIANGLE ARCHITECTURAL REVIEW COMMITTEE,

Appellees.

No. 2014-CA-000685-MR

Appeal from Jefferson Circuit Court,
Honorable James M. Shake, Judge,
Action No. 12-CI-003990

Before: ACREE, NICKELL and TAYLOR, Judges.

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[1] The formal name of this administrative agency is Louisville/Jefferson County Metro Historic Landmarks and Preservation Districts Commission ("Landmarks"). Louisville/Jefferson County Metro Government–Administration, Metro Ordinance § 32.254. The style of the case is taken from the Notice of Appeal.

OPINION AFFIRMING

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NICKELL, Judge:

Cherokee Triangle Association, Inc. ("CTA");[2] Keith Auerbach, M.D.; and Chenault McClure Conway (collectively "appellants"),[3] challenge two Jefferson Circuit Court opinions and orders in furtherance of their opposition to issuance and approval of a Certificate of Appropriateness ("Certificate") by two administrative agencies—the Cherokee Triangle Architectural Review Committee ("CTARC") and Landmarks—for construction of Willow Grande, a seventeen-story residential tower containing twenty-four luxury condominiums and an underground garage, in a historic preservation district in Louisville, Kentucky. The first opinion and order, entered February 6, 2014, denied their request for summary judgment and affirmed grant of the Certificate.[4] The second, entered March 27, 2014, denied their motion to alter, amend or vacate the prior opinion and order. Appellants maintain the proposed tower is out of character with the surrounding buildings, and its height, mass and scale would destroy the district, not preserve it. Having considered the briefs, the record and the law, we affirm.

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[2] A neighborhood organization formed "to protect the integrity, character and nature of the Cherokee Triangle neighborhood."

[3] Auerbach and Conway own units inside The Dartmouth, an eleven-story building across the street from the proposed construction site. Both are members of the Dartmouth-Willow Terrace Condominium Association ("Association").

[4] No formal summary judgment motion was filed by any party in this case.

FACTS AND PROCEDURAL BACKGROUND

Jefferson Development Group began planning Willow Grande in 2008. Four years later, it began the approval process by submitting a proposal. Since the desired building site is part of a historic preservation district, a CTARC Certificate is required for construction to commence. Since the outdated Bordeaux Apartment complex currently occupies the proposed site, not only is a new construction permit required, but also a demolition permit, both of which constitute exterior alterations. Metro Ordinance § 32.256(C). No one opposes removal of the Bordeaux; many neighbors have expressed concern about its replacement.

The proposed construction site is .88 acres at 1418 and 1426 Willow Avenue. One side of the street is predominantly single-family dwellings of fewer than four stories. The other side features a mix of structures, including three high-rise multi-family residential buildings—the eight-story Willow Terrace built in 1924, the eleven-story Dartmouth built in 1928, and the twenty-story 1400 Willow built around 1980. If the plan comes to fruition, Willow Grande will be built across the street from 1416 Willow, the address of the Dartmouth and home of Auerbach and Conway.

To set the approval process in motion, the developer provided CTARC mailing labels of all "abutting" landowners to whom written notice was sent by first class mail stating the date, time and location of a public meeting at which the project would be discussed. Metro Ordinance § 32.257(G). That meeting occurred January 25, 2012, beginning with a nearly hour-long presentation by the developer's attorney and Merrill Moto, an architect with Joseph & Joseph Architects,

the firm that designed the Willow Terrace, the Dartmouth, and now Willow Grande. When the meeting was opened for public comment, a statement from CTA's President was read urging denial of the application for various reasons, including not enough consideration being given to the developer's request for upzoning from R-7 to R-8A.[5]

Hon. Bill V. Seiller, an attorney and resident of the Dartmouth, spoke on behalf of the Association which he said was not taking an official position because some residents favor the project, while others oppose it. As areas of united concern, he identified compatibility with the neighborhood, height, and size of the proposed building's footprint. Specifically addressing construction issues in the event of approval, he asked that inconvenience to residents be minimized and insisted the developer be required to post a performance bond[6] to ensure timely completion.

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[5] Property zoned R-7, Residential Multi-Family, in Jefferson County may have 34.8 dwelling units per acre. Property zoned as R-8A Multi-Family, as the Cherokee Triangle Preservation District was in 1974 after a devastating tornado, allows higher density apartments with 58.08 dwellings per acre and a bigger floor area ratio. When the neighborhood plan was adopted in 1989, the area was downzoned to R-7.

On August 8, 2013, the Louisville Metro Council made findings contrary to those made by the Planning & Zoning Commission regarding Willow Grande, and adopted the requested zoning change. That decision is currently being appealed separately to this Court. *Cherokee Triangle Ass'n, Inc. v. Louisville Metro Planning & Zoning Comm'n,* Case No. 2016-CA-001512.

[6] The performance bond was requested because of the neighborhood's previous experience with 1400 Willow. Amid construction, 1400 Willow's original developer declared bankruptcy, leaving an unsightly, incomplete five-story skeleton for two years. Completion

The public record was closed at the end of the meeting, but the evening concluded without resolution. A second CTARC meeting occurred about a month later—so more CTARC members could attend—but no additional testimony was heard because the public record had been closed at the January meeting. Ultimately, the proposal was approved and the Certificate was issued with two conditions—identified concerns must be corrected and the Bordeaux cannot be demolished until a new construction permit is issued.

On March 30, 2012, CTARC issued an eighteen-page, single-spaced report concluding Willow Grande's height would relate "nicely" to its other large neighbors, "but starkly contrasts with its other immediate neighbors." In referencing 1400 Willow, the building closest in size to Willow Grande, CTARC noted some residential design guidelines were inapplicable because "the 1400 is not defined as part of the district's historic significance," "the 1400 does not establish itself as part of the streetscape pattern of similarly designed facades," and, "while the height of the new building is comparable to the 1400 it is separated by an entire block and dropping topography."

CTA, alone and now represented by Seiller, appealed to Landmarks, the agency responsible for "establishment, regulation, and promotion of local landmarks and districts." Metro Ordinance § 32.254(F) and 32.257(K).[7] To overturn CTARC's decision, Landmarks would have to find "the staff or [CTARC] was

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occurred only after new developers stepped in and reached a compromise with residents.

[7] Kentucky Revised Statutes (KRS) 82.026 allows creation of local historic preservation commissions.

clearly erroneous as to a material finding of fact related to whether the proposed exterior alteration complied with the guidelines." Metro Ordinance § 32.257(K). Landmarks heard the appeal June 21, 2012.[8] After summarizing the arguments of counsel in a five-page report, a motion to find CTARC "was not clearly erroneous as to a material finding of fact" was unanimously approved and CTARC's issuance of the Certificate to Willow Grande was affirmed.

As permitted by Metro Ordinance § 32.263, the decision by Landmarks was appealed to Jefferson Circuit Court. A complaint and appeal was filed listing CTA, Auerbach, and Conway as "plaintiffs," asking that approval of the application be set aside, and that CTARC, Landmarks and Willow Grande (collectively "appellees") be permanently enjoined from taking further action on the proposed building. Appellants specifically alleged: Auerbach and Conway were entitled to—but did not receive—written notice of CTARC's public meeting, nor did they have personal notice of the proceeding; CTARC's issuance of the Certificate, and Landmarks' approval of it, were unlawful in that both exceeded their authority, ignored statutes and ordinances, misapplied rules and regulations, acted without substantial evidence, denied appellants due process, failed to give adequate notice of CTARC meetings, and wrongly excluded evidence and arguments. As a result, appellants claimed they were irreparably harmed.

Although we located no motion for summary judgment in the record, appellants filed a brief in support

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[8] A DVD of this hearing is included in the record, but is corrupted and cannot be viewed.

of such relief. In addition to arguing Auerbach and Conway had been denied due process, appellants argued issuance of the Certificate was arbitrary, capricious and based on less than substantial proof. Appellants contended the three existing high-rises are out of character with Cherokee Triangle and introducing a fourth high-rise based solely on the first three would destroy the district's historical character and violate the purpose of Landmarks—ensuring new construction is "compatible with the historic, visual and aesthetic character" of the district. Metro Ordinance § 32.250 (C)(5).

Willow Grande answered the complaint and appeal, arguing in particular that Auerbach and Conway, who live across the street, are not abutting landowners—all of whom received written notice, as did the Association to which Auerbach and Conway belong. Additionally, Seiller spoke at the CTARC meeting on behalf of the Association—including Auerbach and Conway; other Association members appeared and spoke so there was no material prejudice; no one objected to adequacy of notice during the hearing; Seiller argued lack of notice to Auerbach and Conway in the appeal to Landmarks, submitting statements from both in support thereof, but not indicating how their presence would have changed the outcome; neither Auerbach nor Conway asked to address Landmarks—an occurrence Willow Grande maintained waived any notice flaw—especially in light of Seiller's stipulation the appeal was ready for Landmarks to decide; and finally, Landmarks denied the appeal after finding notice to the Association constituted notice to its members. Furthermore, Willow Grande contended Auerbach and Conway did not exhaust their administrative

remedies because only CTA appealed CTARC's issuance of the Certificate. As a result, appellees argued Auerbach and Conway lacked standing to join the circuit court appeal and CTA lacked standing to make arguments on their behalf in a judicial proceeding. Ultimately, appellees argued the request for summary judgment by appellants should be denied and granted in favor of appellees because while appellants may disagree with issuance of the Certificate, they had not shown its issuance was unsupported by substantial evidence, nor had they shown it to be clear error for all existing buildings in the district to be considered, rather than only those structures appellants deemed to be conforming.

Appellants filed a reply citing no legal authority, but conceding Metro Ordinance § 32.257(G) did not require written notice be mailed to them. For the first time they argued they were entitled to *de facto* notice because developers and Landmarks' staff routinely send notice to "across-the-street property owners." Regarding failure to exhaust administrative remedies, appellants argued Auerbach and Conway appeared via the written statements they provided to Seiller.

After hearing argument on January 13, 2014,[9] the circuit court issued a twelve-page opinion and order on February 6, 2014, denying appellants' motion for summary judgment and affirming issuance of the Certificate to Willow Grande. The circuit court found notice of the CTARC meeting was mailed to more than 100 property owners, with only nineteen being returned. Fifteen residents appeared at a CTARC meeting on December 14, 2011, which was deferred

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[9] This hearing is not part of the appellate record.

until January 2012. Fourteen attended on January 25, 2012, leading the court to find substantial compliance with written notice as specified in Metro Ordinance § 32.257(G). The court went on to find Auerbach and Conway had received actual notice and were barred from appealing to circuit court because they had not appealed CTARC's issuance of the Certificate to Landmarks.

Having determined CTA to be the only proper plaintiff, the circuit court considered the procedural due process claim, noting residents had been given the opportunity to speak at the CTARC hearing where a written statement from the CTA President was read; and, CTA was represented by legal counsel who spoke, introducing news stories about the developer's financial stability. The court then found Willow Grande had given an "extensive" presentation including discussion of all residential design guidelines for new construction and each element of the site guideline checklist along with staff criticism and Willow Grande's curative measures. The circuit court was convinced CTARC had considered all factors mentioned in the ordinance and issued the Certificate on the basis of substantial evidence.

Appellants sought reconsideration in the circuit court, reiterating Auerbach and Conway had received neither written nor actual notice. They took issue with the proof on which CTARC and Landmarks had relied—claiming it fell far short of "substantial," and argued 1400 Willow—closest in height to the projected Willow Grande—could not be considered based on

Landmarks' own analysis,[10] leaving the only high-rises that could be considered the eleven-story Dartmouth and the eight-story Willow Terrace, neither of which could justify construction of a new seventeen-story tower. Finally, appellants again argued they were denied due process by non-consideration of the developer's financial ability to complete the project since CTARC had considered aspects of the design to make construction profitable. Appellants argued the developer should have been required to post a performance bond.

Appellees urged denial of the motion, arguing appellants had offered nothing new, just previously considered and rejected arguments and reconsideration is not a retelling of that which has already been told. They maintained Landmarks had approved issuance of the Certificate based on more than the height of the Dartmouth and Willow Terrace buildings, and did so only after considering forty-four relevant guidelines, including the mass and scale of all surrounding buildings. Appellees argued neither Auerbach nor Conway appealed CTARC's decision to Landmarks, a finding the circuit court said was fatal to judicial review which was not challenged in the motion for reconsideration. Finally, appellees argued there was no statutory authority for CTARC or Landmarks to

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[10] In the Certificate, the Architectural Review Committee (ARC) wrote, "[1400 Willow] exists today as a building on its unique site within the historic district but without real connection to the surrounding area aside from Cherokee Park. As such it may be considered a non-contributing structure in the district. It has many unique qualities but should not serve as a reference for design of new construction that is compatible with the character of the historic district."

require posting of a performance bond. According to appellees, reconsideration was inappropriate because appellants had not established a manifest factual or legal error.

After oral argument,[11] the circuit court entered a succinct opinion and order on March 27, 2014, denying appellant's motion to alter, amend or vacate denial of its request for summary judgment. The court again found Metro Ordinance § 32.257(G) had been substantially followed and proper notice had been mailed to all abutting landowners. The court found no ordinance required Landmarks to consider a developer's financial strength, but because CTARC had allowed appellants to offer such proof and argument, there had been no material prejudice and procedural due process had not been denied. Finally, citing *Bd. of Comm'rs v. City of Danville,* 238 S.W.3d 132, 135 (Ky. App. 2007), the circuit court concluded Landmarks had based its approval of CTARC's issuance of the Certificate on substantial evidence. It is against this backdrop that we now review the three arguments appellants have made and refined over the last several years.

ANALYSIS

When reviewing an administrative decision, our ultimate concern is whether it was arbitrary. In making that determination, our review is limited to three inquiries: did the agency exceed its authority, was procedural due process denied, and, was the decision based on substantial proof. *Am. Beauty Homes*

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[11] No recording of this hearing was certified as part of the appellate record.

Corp. v. Louisville and Jefferson Cty. Planning and Zoning Comm'n, 379 S.W.2d 450, 456-57 (Ky. 1964).

Before we receive an administrative appeal, a circuit court has already reviewed the agency's action. Without reinterpreting or reconsidering the merits of the claim or the proof, the circuit court determines:

> both "[i]f the findings of fact are supported by substantial evidence of probative value" and "whether or not the administrative agency has applied the correct rule of law to the facts so found." "The test of substantiality of evidence is whether . . . it has sufficient probative value to induce conviction in the minds of reasonable [persons]." Further, "'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" As long as there is substantial evidence in the record to support the agency's decision, the court must defer to the agency, even if there is conflicting evidence.

Rosen v. Commonwealth, Public Prot. Cabinet, Dept. of Fin. Insts., 451 S.W.3d 669, 673 (Ky. App. 2014), *quoting 500 Assocs., Inc. v. Nat. Res. and Envtl. Prot. Cabinet*, 204 S.W.3d 121, 131–32 (Ky.App.2006) (internal citations omitted).

This case is different. Rather than following the protocol quoted above, the Jefferson Circuit Court analyzed the Landmarks decision in the context of a motion for summary judgment, even though no such motion was filed by either party—a fact confirmed in a footnote in the Defendant's Brief filed in the circuit

court on November 22, 2013. Nevertheless, pleadings filed in the circuit court record mention requests for summary judgment. While we are confused by the seemingly extraneous discussion, the circuit court did find Landmarks' approval of CTARC's issuance of the Certificate was based on substantial evidence—one of two critical findings necessary for our review of an administrative decision. Because we may affirm the circuit court for any reason supported by the record, *Kentucky Farm Bureau Mut. Ins. Co. v. Gray,* 814 S.W.2d 928, 930 (Ky. App. 1991), we choose to ignore the references to summary judgment and apply the correct standard of review for an administrative appeal as stated in *Rosen.*

First, we consider whether Landmarks exceeded its authority. Landmarks is responsible for "the establishment, regulation, and promotion of local landmarks and districts" and is entrusted with "all necessary and implied powers to perform such duties." Metro Ordinance § 32.254(F). Landmarks has a wide-ranging nine-part purpose. Metro Ordinance § 32.250(C). It is charged with: preserving, protecting, perpetuating and using distinctive districts with "special historic, aesthetic, architectural, archaeological, or cultural interest or value[,]" promoting "the educational, cultural, economic, and general welfare of the people and safeguard[ing] the Metro Government's history and heritage as embodied and reflected in such landmarks, sites, and districts;" stabilizing and improving property within the districts with an eye toward increasing property value; fostering pride in past accomplishments; strengthening the local economy; protecting and enhancing area attractions that support and stimulate business and industry; enhancing the community's "visual and

aesthetic character, diversity, and interest[;]" maintaining "a secure and safe environment" in the districts; and, assuring "new construction and renovation or alterations to existing structures within historic districts, sites, areas, neighborhoods and places will be compatible with the historic, visual and aesthetic character of such historic district, site, area, neighborhood or place." *Id.* A separate ordinance identifies eleven Landmarks powers, the last of which is to "[u]ndertake such other activities or programs which further the purposes of this subchapter." Metro Ordinance § 32.261 (K).

Via ARCs,[12] Landmarks determines whether proposed exterior alterations are compatible with particular districts. Metro Ordinance § 32.251 and 32.257. If deemed compatible, a Certificate is issued.

Each ARC is composed of seven individuals, including the Director of the Department of Codes and Regulations or his or her designee. In a district ARC, at least two members must be owner-residents or tenants within the district, one member must be a real estate professional, one an architect, and one must own income-producing property within the district. "All members shall have a known interest in local landmarks districts preservation." Metro Ordinance § 32.253.

Landmarks itself has thirteen members including the Director of the Department of Codes and Regulations, the Planning Director of the Louisville and Jefferson County Department of Planning and Design Services, and one Metro Council member. Of the ten

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[12] Architectural Review Commitees.

members appointed by the Mayor, there shall be at least one architect, a second architect or landscape architect, one historian or architectural historian qualified in historic preservation, one registered professional archaeologist, one real estate broker or a MAI[13] designated real estate appraiser, one attorney, and one member of the Metro Area Chamber of Commerce (Greater Louisville, Inc.) with recognized expertise in business. All "members shall have a known interest in local landmarks and districts preservation." Metro Ordinance § 32.254. Clearly, those serving have specialized training in the topic.

When an applicant is denied a Certificate, or an entity otherwise disagrees with an ARC decision, it may appeal to Landmarks. Metro Ordinance § 32.257 (K). Upon receipt of a written appeal stating grounds and filed within thirty days of the decision, Landmarks schedules a meeting for consideration of the appeal, preceded by notice being mailed "to the applicant, the property owner, the appellant, and other parties of record." *Id.* Landmarks then reviews the application and the record of any ARC proceedings, and, at the chair's discretion may supplement the record with additional proof. *Id.* Landmarks then reviews the record and makes a written determination upholding or overturning the ARC decision. *Id.* An ARC decision "shall be overturned by [Landmarks] only upon the written finding that the staff or [CTARC] was clearly erroneous as to a material finding of fact related to whether the proposed exterior alteration complied with the guidelines." *Id.*

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[13] MAI designation indicates an individual affiliated with the Appraisal Institute.

CTA appealed to Landmarks. Auerbach and Conway did not, nor did they join CTA's appeal. As required, Landmarks scheduled and conducted the required hearing at which Seiller spoke on CTA's behalf expressing the same concerns raised throughout the approval process: history and character of Cherokee Triangle; the impact upzoning would have on the district; the need for the developer to post a performance bond to ensure completion of the building; and, possible denial of procedural due process, including lack of notice to some landowners and failure to consider the developer's financial soundness. After hearing a response from the developer's counsel, Landmarks voted unanimously to affirm CTARC's issuance of the Certificate. Relating the manner in which the application process unfolded to the ordinances dictating the process, we can draw but one conclusion. Landmarks did not overstep its authority.

Next we consider whether there was a denial of procedural due process. As briefed, this claim centers primarily upon whether Auerbach and Conway received notice of CTARC's public meeting, a question not properly before us. As stated above, a property owner believing he has been wronged by CTARC has the option of filing an appeal with Landmarks. Metro Ordinance § 32.257(K). CTA appealed; Auerbach and Conway did not. Their failure to appeal to Landmarks was fatal, as the circuit court found. *Taylor v. Duke,* 896 S.W.2d 618, 621 (Ky. App. 1995). Hence, Auerbach and Conway are not proper parties to this appeal.

While we consider none of the claims voiced by Auerbach and Conway, we must consider whether CTA was denied due process. Because any CTA member could have sued in his own right, had he done so

in a timely fashion and in the appropriate venue, CTA has associational standing to proceed. *Bailey v. Preserve Rural Roads of Madison Cty., Inc.* 394 S.W.3d 350, 355 (Ky. 2011).

Notice of ARC hearings must be sent to abutting landowners. Metro Ordinance § 32.257(G). The record indicates there was substantial compliance with the ordinance to ensure notice of the CTARC meeting was disseminated to all entitled to be notified. The record contains no proof any abutting landowner was deprived of notice. Auerbach and Conway live across the street from the proposed construction site, thus they are not abutting landowners. *Plunkett v. Weddington,* 318 S.W.2d 885, 888 (Ky. 1958).

Additionally, a written statement from CTA's President was read into the record during the ARC meeting, and Seiller—representing the Association at the CTARC meeting, but CTA during the Landmarks meeting—spoke in opposition to the application at both meetings and introduced media accounts of the developer's business practices. One cannot reasonably maintain notice was defective when CTA and its members were in the room and spoke. Because CTA had actual notice of the CTARC meeting and exercised its opportunity to be heard, it was not materially prejudiced and it was not denied procedural due process. *Hampson v. Boone Cty. Planning Comm'n,* 460 S.W.3d 912, 917 (Ky. App. 2014) (quoting *Storm v. Mullins*, 199 S.W.3d 156, 162 (Ky. 2006)). If CTA had more to say, when given the opportunity to speak during the CTARC meeting, it could have fully expressed itself.

Similarly, one cannot reasonably argue Landmarks was unaware of concerns voiced by some residents about the developer's financial soundness and the

desire that a performance bond be posted. Metro Ordinance § 32.257(K) gives the chair of Landmarks discretion to accept or reject additional proof. The public comment period had already closed. The choice to reject additional proof was an exercise in discretion, not error.

Furthermore, requiring a performance bond was not an option available to CTARC or Landmarks because it is not mentioned in the ordinances[14] establishing either agency and specifying their purpose and authority. Again, there was no denial of procedural due process.

Our third inquiry is whether the decision was based on substantial evidence. Both CTARC and Landmarks considered forty-four distinct new construction residential design guidelines, as well as twenty-four items on the design guideline checklist. CTARC's report consumed eighteen pages—double the length found to be adequate in *Minton v. Fiscal Court of Jefferson Cty.*, 850 S.W.2d 52, 56 (Ky. App. 1992). The report took into account all the surrounding structures and how the proposed construction would relate to them. In describing Willow Grande and the neighborhood during the presentation to CTARC, the architect acknowledged 1400 Willow exists and cannot be ignored—a point with which appellants disagree, their major contention being the high-rises, particularly 1400 Willow, should not be considered at all.

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[14] If residents believe a developer's financial fitness is a relevant consideration, or that ARC and/or Landmarks should be authorized to require posting of a performance bond, a move should be launched to revise local ordinances to adopt such an option.

As argued by appellees, some Cherokee Triangle residents dislike the Willow Grande proposal, but they have not shown Landmarks' approval of the proposal to be based on less than substantial evidence. Members of CTARC—and then Landmarks—all with specialized knowledge relevant to the task at hand, heard and considered proof from staff, the developer, and the public before issuing the Certificate and approving it. Because the record contains substantial evidence in support of the agency's decision, we must defer to Landmarks, even if appellants would reach a different result. *Rosen,* 451 S.W.3d at 673. We simply cannot strike down the decision as arbitrary. *Am. Beauty Homes Corp.*, 379 S.W.2d at 456.

For the reasons expressed, the opinions and orders entered by the Jefferson Circuit Court—affirming issuance of the Certificate by CTARC and approval of its issuance by Landmarks—are affirmed.

ACREE, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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