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02-CV-2016-900246.00

Judge: BEN H. BROOKS

To: PETER F. BURNS MR.
PFBurns@BCMLawyers.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

SUZANNE SCHWARTZ ET AL VS CITY OF MOBILE ET AL
02-CV-2016-900246.00

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JOJO SCHWARZAUER
CIRCUIT COURT CLERK
MOBILE COUNTY, ALABAMA
CIRCUIT CIVIL DIVISION
205 GOVERNMENT STREET
MOBILE, AL, 36644

251-574-8420
charles.lewis@alacourt.gov

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

SCHWARTZ SUZANNE, DAVIS CAROL ADAMS, WAGNER HERB, Plaintiffs, V. CITY OF MOBILE, MOBILE CITY PLANNING COMMISSION, COOPER MARINE & TIMBERLANDS CORP., MOBILE CITY COUNCIL, Defendants.	)	**Case No.:** CV-2016-900246.00

Plaintiffs' Proposed Order

This complaint alleges that the coal handling facility Cooper is operating in the City of Mobile is illegal for three separate reasons:

1. The Planning Commission's approval of Cooper's permit was an illegal delegation of legislative authority;
2. The decision to grant Cooper a coal handling permit was arbitrary and capricious; and,
3. The plaintiffs were denied due process of law as a result of a post hoc enlargement of the capacity of coal that could be stored at the facility

The Plaintiffs filed a partial motion for summary judgment in which they argue that the Planning Commission exceeded its authority. The defendants' countered with a motion for summary judgment as to all counts based upon the Plaintiffs' alleged lack of standing and as to count one on the merits. If the Plaintiffs survive the standing issue, the parties agree that the legality of the planning approval process under which Cooper's coal handling permit was approved is a question of law that is ripe for summary judgment. The other two issues are fact driven, if the Plaintiffs have standing to raise them.

The Court has before it the affidavit of Richard Olsen, Deputy Director of Planning for the City of Mobile, dated March 16, 2016, along with supporting documents and the affidavits and the amended affidavits with attachments filed by the Plaintiffs. Based upon the material presented, the Court makes the following findings of fact and conclusion of law.

Findings of Fact

1. On September 25, 2015, a citizen's complaint alerted the Planning Commission that Cooper was operating a coal handling facility within the City of Mobile.
2. Coal is a hazardous material as defined by the City of Mobile Zoning Ordinance. Cooper had approval to operate a wood chipping facility but not a coal handling facility.
3. Cooper is located in an I-2 district which is designated for heavy industry. Neither coal handling nor coal storage are permitted uses in I-2 districts. Mobile City Code § 64-12 (Chart of Permitted Uses)
4. On October 5, 2015, the City of Mobile issued a notice of violation to Cooper for operating a coal handling facility without planning approval.
5. On October 16, 2015, Cooper applied for "planning approval for the handling of coal and similar dry bulk cargo." In support of that application, Cooper attached a document entitled "Dust Control Measures" which details Cooper's efforts to control its fugitive coal dust emissions as required by its ADEM air permit. Those efforts include, among others, discontinuation of coal transfer when weather conditions cause fugitive coal dust to increase. When dust is observed blowing from the piles, wet suppression is to be applied and tarps are to be used if weather conditions warrant. (Exhibit A1 to Cooper's December 12, 2017 Opposition to Plaintiffs' Motion for Partial Summary Judgment)
6. With regard to coal dust control, the Planning Commission Staff Report noted that Cooper "does not appear to have nor propose to have the same level of dust control devices and mitigation measures as the proposed 2013 coal facility to the South." (Exhibit A2 to Cooper's December 12, 2017 Opposition to Plaintiffs' Motion for Partial Summary Judgment)

7. In paragraph # 1 of its Statement of Facts, Cooper acknowledges

   "The only reference to coal in the zoning ordinance Chart of Permitted Uses is "coal mining," and CMT [Cooper] does not mine coal." (Id.)
   See also Mobile City Code § 64-12 (Chart of Permitted Uses). Nonetheless, when the City issued a Notice of Violation and required CMT to apply for approval to handle coal, CMT complied.

8. On November 19, 2015, the Planning Commission granted Cooper's application, and by letter dated November 24, 2015, the Planning Commission notified Cooper that that the Planning Commission had approved Cooper's expansion of an existing wood chipping facility to include the handling of coal.

9. On December 1, 2015, three of the Plaintiffs, among others, appealed the Planning Commission approval to the City Council. Themes common to the appeals included the accumulation of fugitive coal dust and the absence of science based analysis of the harms the coal dust was causing the community. Plaintiff Schwartz was one of the appellants. In her notice of appeal she addressed the prolific "air borne particulates from the piles of coal stored openly at this location." She chronicled the efforts homeowners and business must take to remove the regular accumulation of coal dust on their property. In Vascular Specialist Ralph B. Pfeiffer, JR., M.D.'s appeal, he opined that coal dust was damaging the lungs of those exposed. In the appeal filed by Plaintiff Herb Wagner, in behalf of the Mobile Environmental Justice Action Coalition, he complained that the Planning Commission failed to address the scientific studies by the American Lung Association and the American Medical Association detailing health consequences of living and/or working near coal storage facilities. Also among the appellants to complain of fugitive coal dust and the lack of an independent technical review of the application were downtown historic residential neighborhoods Church Street East and De Tonti Square.

10. On January 5, 2016, the City Council heard the appeal. Speakers were limited to five minutes apiece. Nine residents spoke in favor of the appeal. Cooper's attorney was the sole speaker in opposition to the appeal. Following the presentations, which took approximately 50 minutes in total, the City Council in a vote of 4-2 denied the appeal.

11. Cooper contended at oral argument that it was entitled to handle coal as a matter of right because of its stevedoring operation. However, the transcript of the January 7, 2016 Planning Commission meeting clearly establishes that the only limit on the quantity of coal that Cooper can store is the height of the piles it can maintain with its current footprint. At that hearing, a question was raised about the capacity of coal the Planning Commission had authorized Cooper to handle. Mr. Harvey, the attorney who represented Cooper before the Planning Commission and City Council, gave the Planning Commission "an explanation on what your approval was—the intent behind your approval." (Cooper Exhibit A-6 page 3). Mr. Anderson, the City Attorney, explained his understanding was that the Planning Commission had approved

> "Whatever footprint they have had, they can still use that footprint, whether it's three feet high or 30 feet high. It doesn't matter; it's just the footprint of where they've been storing it, which to me is the historical capacity."

Mr. Anderson's understanding became that of the Planning Commission which was openly acknowledged as a win for Cooper, whose attorney was told "Hey, you just won. You better leave. You just won. Thank you, Steve." Cooper Exhibit A-6 page 4)

1) Standing

1. Motion to Strike Amended Affidavits as Conclusory

The Defendants contend that the Plaintiffs lack standing to bring any of the claims in their complaint. The Plaintiffs respond that they have standing both in the narrow sense applicable to traditional zoning cases and under the broader standing provisions applicable to cases in which the environment in general is at risk.

The Plaintiffs filed affidavits and amended affidavits which the defendants moved to strike as conclusory and as lacking expert foundation. Conclusory affidavits are those that recite conclusions of law without including facts which tend to prove or disprove the assertion. *McGee v. McGee*, 91 So. 3d 659, 669 (Ala. 2012) Cooper's reliance upon *Reid v. Jefferson Cty*., 672 So. 2d 1285, 1290 (Ala. 1995) is misplaced. In *Reid*, the Plaintiff provided no factual support for the proposition that the pedestrian bridge at issue hampers ingress to and egress from his property.

Here the Plaintiffs have provided a factual basis for their opinions that the Planning Commission's decision "could have" an adverse effect upon them. Plaintiffs' amended affidavits

establish that they are residents of the city of Mobile, and that they live within close proximity to Cooper's coal handling facility. Plaintiff Bohnenstiehl lives the closest at 0.76 miles from the coal handling facility and Wagner lives the furthest away 4.45 miles from the facility. The affidavits also establish that in 2014, the last full year tonnage was available, Cooper moved 176,898 tons of coal from one ship or barge to another, and an additional 1,002,419 tons of coal onto or off of its dock.

It is undisputed that fugitive coal dust is problematic for those in affected areas. The problem is so well recognized that Cooper, and other coal handling facilities, are required by law to take certain steps to mitigate fugitive coal dust regardless of the facilities' proximity to residential areas. Plaintiff Davis testified by affidavit that she has seen coal dust plumes rising from Cooper's facility when the wind is high or equipment is moving the coal. Plaintiffs Schwartz, Davis and Wagner own residences within less than five miles of Cooper's facility. Plaintiff Bohnenstiehl, who has rented her home for 10 years, "frequently scrubs coal dust from the door, windows and patio furniture of her home." The other plaintiffs have similar problems with what they believe to be coal dust on their property.

The amended affidavits set out facts in support of the Plaintiffs aggrieved status and consequently are not conclusory.

2. Motion to Strike Amended Affidavits as Lacking Expert Foundation

The second prong of the Defendants' motion to strike is hereby granted in part and denied in part. None of the Plaintiffs has established the qualifications necessary to testify to the health effects of exposure to coal dust in general or to any health issues they have experienced as a result of exposure to coal dust. Those portions of the affidavits that relate to medical consequences of exposure to coal dust are inadmissible and will not be considered by the Court.

The Court further finds, however, that the Plaintiffs are qualified to testify that granting Cooper's permit adversely affects the use and enjoyment of the Plaintiffs' property and consequently the Plaintiffs have standing to bring this suit. It has long been the law of Alabama that expert testimony is not required to establish the value of land. Laypeople who have had an opportunity to form an opinion are qualified and owners are presumed, without more, to be qualified to testify concerning the value of their land. *State v. Steele*, 374 So. 2d 325, 329 (Ala. 1979)

> It is well-settled that any person, including a layman, is competent to testify to his opinion concerning the value of land if he has had an opportunity for forming a correct opinion and testifies in substance that he has done so. *State v. Woodham*, 292 Ala. 363, 294 So.2d 170 (1974). The owner of land, by virtue of his ownership, is considered prima facie qualified to testify to its value without any further showing. *Shelby County v. Baker*, 269 Ala. 111, 110 So.2d 896 (1959).

Lay opinions as to matters affecting the value of land, even from a knowledgeable lessee, are admissible with the weight of that testimony being for the jury to ascertain. *Evans v. Newsome*, 56 Ala. App. 651, 652, 324 So. 2d 791, 793 (Civ. App. 1975)

The owners' opinions that granting the permit "could have" an adverse effect on their property was sufficient to establish aggrieved party status in *Ex parte Steadham*, 629 So. 2d 647, 648 (Ala. 1993). In *Steadham*, the Alabama Supreme Court reversed the Court of Appeals and expressly held that even disputed evidence of a diminished property value affords the plaintiff aggrieved party status.

> Having reviewed the record in this case in light of the principles discussed above, we conclude that the petitioners presented enough evidence to show that the board's decision "could have" an adverse effect upon them. There was testimony, albeit disputed, that the petitioners would suffer diminished property values as a proximate result of the zoning variance. This satisfies the petitioners' burden of showing that each of them was a "party aggrieved" by the board's decision, within the meaning of § 11–52–81.

This Court finds that the opinions expressed in the Plaintiffs' affidavits that granting Cooper's permit has had an adverse effect on the Plaintiffs' use, enjoyment and the value of their land are admissible and establish that the Plaintiffs are aggrieved parties as defined in Code of Alabama Section 11-52-81. Having met that narrow definition of aggrieved party, the plaintiffs *perforce* meet the broader definition applicable when matters of environmental protection are at issue as enunciated in *Ex parte Fowl River Protective Ass'n, Inc*., 572 So. 2d 446, 456 (Ala. 1990) and *Black Warrior Riverkeeper, Inc. v. E. Walker County Sewer Auth*., 979 So. 2d 69, 75-76 (Ala. Civ. App. 2007).

2) Questions of Fact

Having found that the Plaintiffs have standing, the Court further finds that issues of fact preclude the Court from addressing whether granting the permit was arbitrary and capricious and whether it constituted a denial of due process of law. The remaining issue, whether granting the permit was an illegal exercise of legislative authority by an administrative body is one of law which is appropriate for summary Judgment.

3) Illegal Delegation of Legislative Authority

Plaintiffs contend that the Planning Commission illegally exercised legislative authority when it granted Cooper's application to operate a coal handling facility in a district where coal handling is not a permitted use. Plaintiffs argue that the Planning Commission effectively amended the Chart of Permitted Uses *sub silentio* when it authorized a coal handling facility because coal mining is a permitted use in that district. The Court agrees.

The legislature, in Alabama Code Section 11-52-70, delegated zoning authority to the City

Council – not to the City Planning Commission. That section provides:

> Each municipal corporation in the State of Alabama may divide the territory within its corporate limits into business, industrial and residential zones or districts and may provide the kind, character and use of structures and improvements that may be erected or made within the several zones or districts established and may, from time to time, rearrange or alter the boundaries of such zones or districts and may also adopt such ordinances as necessary to carry into effect and make effective the provisions of this article.

The annotations to that code section clearly establish that, when it comes to changing zoning, the City Planning Commission is advisory only.

> Authority of planning commission.
>
> City, within the context of its zoning ordinance and within the limits imposed by the Code of Alabama, has the ultimate authority to rezone, and **the planning commission, in consideration of a rezoning amendment, is an advisory body only**. The planning commission can recommend to the city what it thinks should be done, but **it cannot pass finally on an application to rezone**. The city is not bound by a recommendation of the planning commission. *Mobile v. Karagan*, 476 So. 2d 60, 1985 Ala. LEXIS 4073 (Ala. 1985). (Emphasis added)

The Alabama Supreme Court has held that where a board derives its powers directly from the state legislature, such powers cannot be circumscribed, altered, or extended by the municipal governing body. *Swann* v. *Bd. Of Zoning Adjustment of Jefferson*, 459 So. 2d 896 (Ala. Civ. App. 1984); *Nelson* v. *Donaldson*, 255 Ala. 76, 50 So. 2d 244 (1951); *Water Works Board of the City of Birmingham* v. *Stephens*, 262 Ala. 203, 78 So. 2d 267 (1955)

The seminal case dealing with the power of a city planning commission, *City ofMobile v. Karagan*, 476 So. 2d 60, (Ala. 1985) clearly defines the role of the Mobile City Planning Commission. In *Karagan*, the Alabama Supreme Court upheld the Mobile City Council's action, because the City Planning Commission was advisory only. The Alabama Supreme Court stated:

> The Mobile Zoning Ordinance, which was enacted in accordance with the provisions of the Code, specifically provides that the Planning Commission shall make recommendations on proposed amendments and transmit its recommendations to the City for 'further action.' Section IX-B-6 of the zoning ordinance, which is entitled Legislative Disposition, specifies the 'further action' the City might take. Consequently, the City, within the context of the zoning ordinance and within the limits imposed by the Code, has the ultimate authority to rezone, and the Planning Commission, in consideration of a rezoning amendment, is an advisory body only. The Planning Commission can recommend to the City what it thinks should be done, but it cannot pass finally on an application to rezone. The City is not bound by a recommendation of the Planning Commission. (*Id*. at 62-63)

Karagan was followed by other decisions which together establish a consistent line of cases which confirm that City Planning Commissions are advisory only when a change in zoning is at issue.

For instance, in *Calhoun v. Mayo*, 553 So. 2d 51, 52 (Ala. 1989) the Supreme Court stated:

> The planning commission is an advisory body and as such can only make recommendations to the Council, and it does not have the power to pass finally on an application to rezone. Its recommendations are not binding on the Council. The recommendations of the planning commission are only factors to be considered by the Council. *City of Mobile v. Karagan*, 476 So.2d 60, 62, 63 (Ala. 1985). Whether to change the zoning classification is a matter left to the legislative discretion of the municipal authorities. See *Episcopal Foundation of Jefferson County v. Williams*, 281 Ala. 363, 202 So.2d 726 (1967).

By the year 2012 the rule was so firmly established that it was no longer a point of contention. The Court recognized in *Gibbons v. Town of Vincent*, 124 So. 3d 723, 732 (Ala. 2012) that the parties had appropriately agreed that the City Planning Commission was an advisory body only:

> Consistent with our precedent, the parties agree that a planning commission can act only as an advisory body. In *Peebles v. Mooresville Town Council*, 985 So. 2d 388 (Ala. 2007), this Court held that, pursuant to the zoning statutes, a planning commission is an advisory body and cannot be vested with the power to rezone property: "'Under § 11-52-76, Ala. Code 1975, the zoning power delegated to every municipality ultimately rests with the legislative body of that municipality, i.e., the city or town council -- not the zoning commission or the municipal planning commission. See § 11-52-76, Ala. Code 1975 ' … A municipality is required to organize neither a zoning commission nor a municipal planning commission before enacting a comprehensive zoning ordinance. Both such commissions are optional and, even if created, are strictly advisory. See, e.g., *Rose v. City of Andalusia*, 249 Ala. 333, 335, 31 So. 2d 66, 66 (1947) ('It is not mandatory that a zoning commission be appointed, although such a commission may be designated ....'); and *City of Mobile v. Karagan*, 476 So. 2d 60, 62-63 (Ala. 1985) ('[T]he City [of Mobile], within the context of the zoning ordinance and within the limits imposed by the Code, has the ultimate authority to rezone, and the Planning Commission, in consideration of a rezoning amendment, is an advisory body only. The Planning Commission can recommend to the City what it thinks should be done, but it cannot pass finally on an application to rezone. The City is not bound by a recommendation of the Planning Commission.')."*Peebles*, 985 So. 2d at 397.

In the case at bar, the Planning Commission approved a land use that is not permitted in the district where the facility is located. Formulating the Chart of Permitted Uses is a legislative function. Once the permitted uses have been established, it is permissible to delegate the administrative determination of whether the conditions exist which warrant issuing the permit for the legislatively approved use. Here, operating a coal handling facility is not a permitted use in district I-2. Consequently, there was no administrative duty to exercise.

In a case similar to the one at bar, a municipal zoning authority granted a special exception to a church to permit construction of a parking lot on a lot zoned for residential purposes. The Alabama Supreme Court held that because a parking lot was not a permitted use, the City of Fairhope's Board of Adjustment and Appeals exceeded its authority in granting the church a special exception. *Ex parte*

Fairhope Bd. of Adjustment & Appeals, 567 So. 2d 1353 (Ala. 1990) Similarly, the Court of Civil Appeals held that the board of zoning adjustment did not have the authority to grant a special exception for a concession stand in a district where the regulations do not expressly allow for that use. *Harris v. Jefferson Cty. Bd. of Zoning Adjustment*, 773 So. 2d 496, 499 (Ala. Civ. App. 2000)

Here, as in *Fairhope* and *Harris* the administrative board exercised legislative authority that is reserved for the elected City Council. The Planning Commission cannot expand its powers by calling a coal handling facility a coal mine. Even Cooper agrees it is not engaged in coal mining. The Planning Commission was not authorized to approve Cooper's application for a use that was not permitted for that district.

Conclusions of Law

1. The Plaintiffs have standing to bring this action.
2. The undisputed facts establish that operation of a coal handling facility is not a permitted use in district I-2. The permit authorizing Cooper to store unlimited quantities of coal at its facility was authorization for a coal handling facility, not a stevedoring operation or a coal mine.
3. The permit was issued by the Planning Commission, not the City Council.
4. This Court finds as a matter of law that the Planning Commission unconstitutionally usurped legislative authority when it authorized Cooper's coal handling permit in violation of the Chart of Permitted Uses.
5. Cooper is operating a coal handling facility without a valid permit and in violation of law.
6. Cooper is hereby enjoined from further operating the coal handling facility at issue until and unless Cooper obtains a valid permit to do so.

DONE this[To be filled by the Judge].

/s/[To be filled by the Judge]

CIRCUIT JUDGE