

IN THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSOURI
STATE OF MISSOURI

State of Missouri, ex rel. RUTH CAMPBELL,)
et al.,)
)
Relators-Plaintiffs,)
vs.)
)
COUNTY COMMISSION OF FRANKLIN)
COUNTY,) No. 11AB-CC00286
)
Respondent-Defendant,) Visiting Judge Division
)
and)
)
UNION ELECTRIC COMPANY, D/B/A)
AMEREN MISSOURI,)
)
Intervenor-Defendant.)

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
ORDER AND JUDGMENT
AS TO COUNT II OF PLAINTIFFS' PETITION,**

FINDINGS OF FACT

1. Plaintiffs have filed their Petition for Writ of Certiorari, in six counts, contesting the enactment of an ordinance by Franklin County, Missouri, Ordinance No. 11-307 (the "Zoning Amendment"). Count II remains for adjudication.

2. This matter has been submitted to the Court on the record established before defendant Franklin County Commission, as certified by said defendant on October 11, 2012, pursuant to this Court's Writ of Certiorari after various motions of the parties (the "Record").

3. Plaintiffs participated in the public hearings and other proceedings before the County Planning and Zoning Commission and the County Commission regarding the Zoning Amendment, and submitted evidence against the Zoning Amendment both to the Planning and Zoning Commission and the County Commission.

4. Lisa J.N. Bradley, a toxicology expert, testified to the Commission that:

(a) coal ash deposited in a facility meeting the County's Zoning Amendment would not create a risk to public health or drinking water sources, and there was no indication of any exposure of any toxic components of coal ash to the environment;

(b) there would be no exposure to the public of any toxic components of coal ash for a Utility Waste Landfill designed pursuant to Missouri Department of Natural Resources ("MDNR") regulations at the state level, and the Zoning Amendment;

(c) constituents of coal ash are naturally occurring and present in the water and soil throughout the country, in foods we eat, and even in daily supplements and vitamins, and this includes arsenic, cadmium, chromium, lead, mercury and selenium, which are not toxic in low concentrations;

(d) a house could be built on top of a coal ash landfill and if a child were exposed to the coal ash in the landfill every day by eating it, the exposure dose to arsenic is what you would get in your food every day.

5. The Court finds that the testimony of Ms. Bradley is credible and also that the County Commission may have reasonably and without arbitrariness chosen to believe this testimony.

6. The County Commission could reasonably and without arbitrariness have found further, and there was substantial and competent evidence in the Record to support findings, that:

(a) a Utility Waste Landfill, constructed in compliance with MDNR regulations and the Zoning Amendment, would not be unsafe or pose a risk to the public, and that it would function, in fact, in a much better way than the existing pond storage technology at the Labadie power plant;

(b) the existing Labadie power plant is running out of pond storage space for coal ash;

(c) the Zoning Amendment required a state-of-the-art design and construction for future coal ash storage which was an improvement over existing methods already permitted as of right on the Labadie power plant site;

(d) bottom ash, a form of the Labadie plant coal ash, is itself put to many beneficial uses directly in the environment, including by the County itself on its own roads;

(e) MDNR already comprehensively regulates the siting, location, design, operation and monitoring of Utility Waste Landfills;

(f) the Labadie power plant is already surrounded by floodplain, and state Utility Waste Landfill regulations expressly permit utility waste landfills in floodplains;

(g) based upon the professional opinion by Richard C. Ward, a land use expert with substantial experience, a Utility Waste Landfill use pursuant to the Zoning Amendment was, by definition, public, and promoted the public welfare of not only the region, but all residents of Franklin County, and among other things, it was irrefutably logical and promoting of the public welfare to keep the Labadie ash storage adjacent to the 40-year-old power plant;

(h) the Public Service Commission's original approval of the Labadie power plant in 1966 found that the power plant itself was in the public interest, and disposal of coal ash is inherent and essential to operation of a power plant;

(i) neither plaintiffs nor other witnesses submitted substantial and competent evidence of any legitimate zoning issues in opposition to the Zoning Amendment, including the issues of aesthetics, traffic, noise, pollution through fugitive air emissions, negative effect on property values, or inconsistency with the County's master plan; and

(j) a Utility Waste Landfill use designed and operating subject to the Zoning Amendment would promote the health, safety, morals, comfort and general welfare of Franklin County by conserving and protecting property and building values, securing the most economical use of the land, and facilitating adequate provision of public improvements in accordance with the master plan adopted by the County, and otherwise satisfied all statutory and ordinance requirements for a valid zoning amendment.

7. The Zoning Amendment requires that any Utility Waste Landfill be adjacent to an operating public utility power plant and that it be owned by a public utility, and therefore is a use which promotes the public welfare. In addition, based upon this provision of the Zoning Amendment and ample other evidence in the Record, the Zoning Amendment minimizes truck hauling traffic, most notably by allowing Labadie plant coal ash to be kept near the plant, and by prohibiting importation of coal ash from other Ameren power plants outside of Franklin County.

8. The County Commission specifically sent out a sample of the Labadie power plant coal ash for environmental testing, and the results indicated that the material was not hazardous.

9. The Zoning Amendment includes numerous notable measures protecting the public, groundwater and the environment, including County review and permitting.

CONCLUSIONS OF LAW

1. Franklin County is a first-class County which has adopted “alternative zoning” pursuant to Sections 64.800 *et seq.* of the Missouri Revised Statutes.

2. Defendant County Commission of Franklin County (the “County Commission”) is the duly constituted county commission of Franklin County, created and existing under the laws of the State of Missouri.

3. This Court has jurisdiction over this matter pursuant to Section 64.870.2 RSMo. and venue is proper in Franklin County.

4. The Zoning Amendment is a legislative action of the Franklin County Commission. *Gash v. Lafayette County*, 245 S.W.3d 229, 233 (Mo. 2008).

5. This Court may reverse the Zoning Amendment, a legislative decision, only if it is arbitrary and unreasonable, meaning that the decision by the County Commission is not fairly debatable, *Summit Ridge Co. v. City of Independence*, 821 S.W.2d 516, 519 (Mo. App. 1991), and this level of judicial deference to local legislative zoning decisions applies even in the rare cases, such as the present case, where the legislative decision is submitted for judicial review “on a legislative record.” See, *Kolb v. County Court of St. Charles County*, 683 S.W.2d 318, 321 (Mo. App. 1984), and *Gash v. Lafayette County*, 245 S.W.3d 229, 233 (Mo. 2008).

6. The Zoning Amendment is presumed to be valid. *Vatterott v. City of Florissant*, 462 S.W.2d 711, 713 (Mo. 1971), *Kolb*, supra.

7. Plaintiffs have the burden of proof that the County’s decision was arbitrary and unreasonable and not even fairly debatable. *Vatterott*, supra; *Rhein v. City of Frontenac*, 809 S.W. 2d 2107, 109-110 (Mo. App. 1991).

8. Plaintiffs have not met their burden of proof. The Record supports the legislative decision approving the Zoning Amendment, and the County Commission could have reasonably found that the plaintiffs and other opponents did not effectively rebut or refute the fundamental facts in support of the Zoning Amendment listed in this Court’s findings above and elsewhere in the Record.

9. This Court may not inquire into the interests or motives of the members of the Franklin County Zoning Commission when exercising legislative functions such as the Zoning Amendment. *Kolb*, supra, at 322.

10. Applying the foregoing standards of judicial review, the Court finds that the Zoning Amendment was fairly debatable, and not arbitrary or unreasonable.

11. Even if the Zoning Amendment were reviewed by this Court under a less deferential standard, such as whether it is supported "substantial and competent evidence upon the whole record," the Zoning Amendment is valid and legal, as it is amply supported by competent and substantial evidence in this voluminous Record.

ORDER, JUDGMENT AND DECREE

The Court therefore orders, adjudges and decrees that judgment be entered on Count II of plaintiffs' Petition for Writ of Certiorari in favor of defendants County Commission of Franklin County, Missouri and Union Electric Company, d/b/a Ameren Missouri, and against plaintiffs, and that costs be taxed against plaintiffs.

SO ORDERED:



Judge Robert D. Schollmeyer
Date: January 11, 2012

Certificate of True Copy
STATE OF MISSOURI
County of Franklin
I, Bill D. Miller, Clerk of the Circuit Court of Franklin County, hereby certify that the foregoing to be a true copy of the original as the same appears on file in my office.
IN WITNESS WHEREOF, I have hereunto set my hand affixed the seal of said Court at Union, Mo. this 11 day of January 2012
Seal By: 
Bill D. Miller
Clerk of the Circuit Court Franklin County