

HUSCH BLACKWELL

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MEMORANDUM

Date: March 17, 2015

To: Greg Hasty, Presiding Commissioner, Camden County, Missouri

From: Ryan Harding

Re: Rezoning Questions

Commissioner Hasty,

You asked for my opinion/explanation of certain questions pertaining to the rezoning application of Gary Prewitt. Your questions are indicated below, followed by my responses:

- 1. In consideration of the Court's injunction in the case of *Camden County Commission v. Glacier Park Investments, LLC*, Case No. 10CM-CC00363, is the County required, under Missouri law, to act upon Mr. Prewitt's rezoning application?**

Yes. The County is required to review and act upon Mr. Prewitt's rezoning application in accordance with Missouri law, including regulations enacted by the County.

Sections 64.510 through 64.690, RSMo. authorize the County to enact regulations pertaining to planning and zoning within the boundaries of the County. The County's regulations are contained, in part, within the Camden County Unified Land Use Codes ("the Code"). The Code, along with the Master Plan and applicable statutes, constitute the law of Camden County, and the County must follow the procedures mandated by the Code. *See 64.510 – 64.690*. Article 1400 of the Code governs requested changes in zoning. Section 1402 states:

1. Whenever a request to amend the Unified Land-Use Code or the Zoning Map is initiated by the County Commission, The Planning Commission, or the Board of Adjustment, the Planning Administrator, in consultation with legal counsel, shall draft the appropriate language and present it to the Planning Commission so that a

date for the public hearing may be established. The decision by the Planning Commission concerning such amendment to the Code or Zoning Map will then be sent to the County Commission in the form of a recommendation. The County Commission will address the issue and render a final decision

2. Any other person may also petition for an amendment to the Unified Land-Use Code or the Zoning Map. The petition shall be filed with the Planning Administrator and shall include at a minimum the following information:
 - a. A completed application using forms provided by the Planning Administrator.
 - b. A legal description of the land affected by the amendment if a change in the zoning district classification is proposed. The description must also include what the proposed map change is currently zoned.
 - c. A description or summary of the specific objective of any proposed change in the text of this regulation.
 - d. All required fees to enable the public notification by publication and/or to send a mailing notice to all owners of real property, as required by State Statutes.
3. Upon receipt of a petition as provided in Subsection (2) the Planning Administrator shall either:
 - a. Treat the proposed amendment as one initiated by the County and proceed in accordance with Subsection (1) if he believes the proposed amendment has significant merit and would benefit the general public, or
 - b. Forward the petition to the County Commission with or without comment for a determination of whether a Code amendment should be drafted and a public hearing process begun in accordance with Subsection (4).
4. Upon receipt of a petition for amendment as provided for in Subsection (2) the County Commission may remand the issue to the Planning Commission for a public hearing process in accordance with Subsection (1).

Thus, paragraph 2 of Section 1402 permits Mr. Prewitt to file a rezoning application. ("Any other person may also petition for an amendment to the Unified Land-Use Code or the Zoning Map."). After the submission of a rezoning application, paragraphs 3 and 4 of Section 1402 mandate that the application be acted upon by the County Planning Administrator. There is nothing in the Code which permits the County to refuse acting on the rezoning application in accordance with these requirements.

The Order and Judgment of the Circuit Court in case number 10CM-CC00363 likewise

does not permit the County to refuse to act upon the rezoning application. The Order simply states that commercial activities on the property at issue do not comply with the property's current R-1 zoning designation; thus the commercial use of the property does not comply with the Code and the Circuit Court enjoined future activity not consistent with R-1 zoning. But the Circuit Court's Order does not prohibit Mr. Prewitt from attempting to bring the property into compliance with the Code. In fact, as noted above, Mr. Prewitt has a right, under the law, to seek a change in zoning. He has executed that right through the filing of a rezoning application, and the County is required under the Code to proceed as mandated by Section 1402.

2. Why is the Order and Judgment in case number 10CM-CC00363 not currently enforceable?

The parties appeared before Judge Jaynes on the County's Motion for Summary Judgment. At that hearing, Judge Jaynes informed the parties that he did not want the Order enforced until the Missouri Court of Appeals had reviewed the case and issued an opinion either affirming or reversing his judgment. I therefore informed the County that it could not enforce the injunction prior to review by the Court of Appeals, in accordance with Judge Jaynes' directives.

3. Is the County authorized to limit discussions at public meetings to residents of the Camden County district?

A memorandum on this question was issued on February 10, 2015. A copy of the memorandum is attached hereto.

RRH:ss
Attachment

HUSCH BLACKWELL

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MEMORANDUM

CONFIDENTIAL: ATTORNEY WORK PRODUCT

Date: February 10, 2015

To: Camden County Commission

From: R. Ryan Harding
Emily M. Park

Re: Limitations of Discussions at Public Meetings

I. ISSUE

Is the Camden County Commission authorized to limit discussions at public meetings to residents of the Camden County district?

II. ANALYSIS

Section 64.005, RSMo. 2000, authorizes the county commission of counties bordering the Lake of the Ozarks, after a vote of the affected area, to create a district planning commission to prepare a district plan. For planning and zoning in such counties, the procedures outlined in §§ 64.510 to 64.695 for counties of the second and third classifications apply. *See* § 64.007.2. Accordingly, although Camden County is a first class county, §§ 64.510 to 64.695 apply because it borders on the Lake of the Ozarks and its district planning commission was created under § 64.005.

Section 64.640 addresses adoption of initial zoning regulations, restrictions and boundaries. Under this statute, the Planning and Zoning Commission (or Commission-appointed zoning commission) must make a preliminary report and proposed zoning order, and hold public hearings thereon. These public hearings “shall afford persons interested an opportunity to be heard.” After adoption of the zoning plan or regulations, changes to use of any parcel may only occur after a public hearing. § 64.645, RSMo. At least 15 days prior to such hearing, notice must be provided to “all owners of any real property located within one thousand feet of the

parcel of land for which the change is proposed.” Neither of these sections limit the hearing or notice only to individuals who are residents of the county.

Whether non-residents have standing to challenge zoning actions by a municipality was addressed in the case of *Allen v. Coffel*, 488 S.W.2d 671 (Mo. App. W.D. 1972). In that case, owners of land outside the corporate limits of the City of Peculiar brought an action seeking a declaration that zoning ordinances adopted by the City were unlawful. *Id.* at 673. The plaintiffs owned land adjacent and contiguous to a tract that the City re-zoned by ordinance for use as a mobile home park. *Id.* The court first addressed standing to challenge zoning in general. The court determined that anyone who could show that zoning would adversely affect his or her property interest would have standing. *Id.* at 674. Second, the need to prove “special damage” to a property interest was not required where the landowner had adjoining, confronting, or nearby property. *Id.* at 675.

The primary issue was whether this standing was lost because of “the adventitious circumstance of a city boundary between his land and the questioned zoning upon which his land abuts.” *Id.* Because this issue had not yet been addressed by Missouri courts, the court considered numerous cases from other jurisdictions. *Id.*

One such case was *Creskill Borough v. Dumont Borough*, 100 A.2d 182 (N.J. 1953). The court in *Allen* quoted dictum from the Chief Justice of the New Jersey Supreme Court, which had “been accorded authoritative recognition[.]” In this passage, the Chief Justice stated that the city “owe[d] a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights as they would to those of residents and taxpayers[.]” To do otherwise, according to the Chief Justice, would make “a mockery out of the principles of zoning.” This dictum was cited in Kansas and California Supreme Court cases, which were also discussed by the court in *Allen*. *Id.* at 675-76 (citing *Koppel v. City of Fairway*, 371 P.2d 113 (Kan. 1962) and *Scott v. City of Indian Wells*, 492 P.2d 1137 (Cal. 1972)). The *Allen* court cited the *Scott* case, in which the court addressed the due process requirements of the Fourteenth Amendment. *Id.* (citing *Scott*, 492 P.2d at 1144). In light of the due process requirements, the California court held that, not only did non-resident “affected” owners have standing to challenge the zoning, but they also had a right to receive notice of the zoning to the same extent that resident landowners received notice.

The *Allen* court also quoted an Illinois case, another case in which the requirements of the Fourteenth Amendment were considered. *Id.* at 677 (citing *Whittingham v. Woodridge*, 249 N.E.2d 332 (Ill. App. 1969)). In that case, the court held that “[t]o permit a thing (the corporate boundary line), so tenuous, to bar a party from objecting to a change in zoning, might in many instances permit the taking of property without due process of law.” *Id.* at 676 (citing *Whittingham*, 249 N.E.2d at 334).

After considering these cases, the *Allen* court considered several Missouri cases that had recognized that extra-territorial factors must be considered when zoning. Lastly, the court considered that zoning ordinances must be valid exercises of police power, meaning that such ordinances must promote the health, safety, morals, or general welfare of the community. In that regard, the court determined that “zoning shall be for the public welfare, not only to the residents of the enacting municipal community, but also to affected non-resident owners of property

contiguous to the municipal zoning.” *Id.* Ultimately, the court held that “as owners of property outside the limits of the City of Peculiar, but contiguous to property within the boundaries of the city—which property has been rezoned by ordinances—they have a legally protectable interest, and therefore, standing....” *Id.* at 674.

A very recent opinion from the Missouri Court of Appeals addressed limitation of topics and number of speakers at public meetings. *Campbell v. County Comm’n of Franklin Cty.*, 2014 WL 3582711 (Mo. App. E.D. 2014). This case has been transferred to the Missouri Supreme Court for consideration; therefore, it is not authoritative. However, both the majority and dissenting opinions cite to other cases that address these issues.

The *Campbell* case involved a challenge to amendments to the zoning regulations that allowed coal-ash landfills near power plants. *Id.* at 1. The amendment was specifically targeted to a proposal by Ameren, a utility company with a coal-fired power plant in the area, to operate such landfill. *Id.* at 1-2. By amending the zoning regulations to make coal-ash landfills a permitted use, Ameren would be permitted to operate the landfill without the need for permits or further public hearings. The plaintiffs alleged that the amendments were invalid because the Commission did not conduct valid public hearings. *Id.* Specifically, the Commission prohibited discussion of the coal-ash landfill proposed by Ameren, which was the impetus for the amendments. *Id.*

After first considering the definition of the term “hearing,” the court determined that the General Assembly intended that members of the public be able to present their side of the case. *Id.* at 5. Second, the court believed the rationale behind requiring fair notice of a hearing was equally applicable to the hearing itself because notice would be worthless to a person who is denied the opportunity to speak. *Id.* Case law regarding fair notice requires that the notice “fairly be given the meaning it would reflect upon the mind of the ordinary laymen, and not as it would be construed by one familiar with the technicalities solely applicable to the laws and rules of the zoning commission.” *Id.* (citing *State ex rel. Freeze v. City of Cape Girardeau*, 523 S.W.2d 123, 126 (Mo. App. E.D. 1975)). Thus, the court determined that “citizens at a public hearing should be able to speak on the subject of a zoning amendment as ‘it would reflect upon the mind of an ordinary laymen[.]’” *Id.* The question becomes whether “a fair-minded person in attendance...[could] say that everyone had been heard and that the legislative body...gave reasonable faith and credit to all matters presented[.]” *Id.* (quoting *Freeze*, 523 S.W.2d at 126). Using these guidelines, the court determined that the prohibition on discussions related to the Ameren proposal, which was the impetus for the zoning amendments, rendered the hearing invalid because it “prevented the citizens...from discussing the real subject of the amendment as ‘it would reflect upon the mind of an ordinary lay[person][.]’” *Id.*

The dissenting opinion also addressed the fair hearing issue. First, the opinion noted the difference between judicial hearings and legislative hearings, the latter of which are meant to “aid the governmental body in making an informed decision.” *Id.* at 24 (Gaertner, J., dissenting). Given this purpose, the hearing need only allow “a reasonable opportunity for presentation of opinions and evidence for and against the proposed zoning amendment...even if it means all parties are unable to share their individual views in the manner or to the extent that they desire.” *Id.* (citing *Miner v. City of Yonkers*, 189 N.Y.S.2d 762, 768 (N.Y. Sup. Ct. 1959) and *Greater Garden Ave. Area Ass’n v. City of Webster Groves*, 655 S.W.2d 760, 765 (Mo. App. E.D. 1983)).

In light of this case law, the dissent argued that that “reasonable limitations” on the presentation of evidence and opinions, so long as a particular viewpoint is not being restrained, should be permitted. *Id.* at 25. The dissent believed the goal of the legislative hearing is for the legislative body to be fully informed about each viewpoint as a whole, rather than to fully hear each individual. *Id.* Ultimately, given the facts of the case, the dissent believed the Commission’s limitation was reasonable. *Id.* at 27-29.

One case of particular interest cited by both the majority and dissenting opinion was *Greater Garden Ave. Area Ass’n v. City of Webster Groves*, 655 S.W.2d 760, 765 (Mo. App. E.D. 1983)). In that case, the plaintiffs appealed the issuance of a special use permit by Webster Groves, arguing that the city exceeded its authority and jurisdiction in issuing the permit because it considered evidence received after the public hearings and it did not allow plaintiffs to speak at an executive session regarding the permit. *Id.* at 763. The city had held three public hearings prior to the executive session, during which the plaintiffs spoke against the permit. The executive session was held to allow city officials to ask the applicant specific questions.

The court found that Webster Groves did not abuse its discretion in limiting the public’s participation at the executive session. *Id.* at 765. First, the records showed that no new facts were presented at the executive session which were not discussed at the earlier public hearings. *Id.* Additionally, at least one prior case in Missouri approved of administrative tribunals limiting the number of witnesses who have cumulative testimony on a particular issue. *Id.* (citing *Technical & Professional v. Board of Zoning*, 558 S.W.2d 798, 802-03 (Mo. App. W.D. 1977)). In that case, the court relied on prior case law, under which trial courts had the discretion to interfere and stop examinations that were cumulative in nature “when the introduction of a great number of witnesses tends mischievously and unnecessarily to protract the trial[.]” *Id.* (quoting *Technical*, 558 S.W.2d at 802-03). The *Technical* court found that this rationale was equally applicable to administrative tribunals. *Id.*

III. CONCLUSION

It is unlikely that the Camden County Commission is authorized to limit discussions at public meetings to residents of the Camden County district. First, there is nothing in §§ 64.510 to 64.695, the statutes governing planning and zoning in Camden County, that limits the hearing or notice only to those individuals who are residents of the county. Instead, § 64.640 requires that “persons interested” be given an opportunity to be heard. Additionally, prior to any amendment, “all owners” of property within 1,000 feet must be provided notice of the proposed change.

In addition, the *Allen* case determined that owners with property adjacent and contiguous to the zoned property had standing to challenge a re-zoning by a municipality, despite the fact that they were not residents of the municipality. 488 S.W.2d at 674. The court cited to cases that recognized that general zoning principles applied equally to individuals with nearby property, despite a tenuous corporate boundary line, and that failure to provide such individuals with notice and an opportunity to be heard could run afoul of the due process clause of the Fourteenth Amendment. *Id.* (citing *Creskill*, *Koppel*, *Scott*, and *Whittingham*).

Although the Commission is likely not authorized to limit public hearings to individuals who reside in the county, the Commission likely has the discretion limit the topics open for discussion and the number of individuals testifying on one particular subject. *See, e.g., Campbell*, 2014 WL 3582711; *Greater Garden*, 655 S.W.2d 760, 765 (Mo. App. E.D. 1983)). The majority in *Campbell* required that the county permit testimony on topics which would “reflect upon the mind of the ordinary laymen[.]” 2014 WL 3582711 at 1-2. Said differently, the question is whether a reasonable person would expect that a certain topic be open for discussion at the hearing. On the other hand, the dissenting opinion would have permitted “reasonable limitations,” so long as a particular viewpoint is not being restrained. *Id.* at 25. Both the majority and dissent cited to *Greater Garden*, which cited to another Missouri case that authorized administrative tribunals to limit the number of witnesses who have cumulative testimony on a particular issue when the introduction of a great number of witnesses “mischievously and unnecessarily protracts” the hearing. *Id.* (citing *Technical*, 558 S.W.2d at 802-03).

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