

**COMMONWEALTH OF KENTUCKY  
OLDHAM CIRCUIT COURT  
DIVISION ONE  
CASE NO 21-CI-00314**

**ROSE ISLAND ROAD COMMUNITY  
PRESERVATION ALLIANCE, LLC**

**PLAINTIFF/APPELLANTS**

**v.**

**OLDHAM COUNTY PLANNING  
AND ZONING COMMISSION, et al.**

**DEFENDANTS/APPELLEES**

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This matter comes before the Court as a Complaint and Petition for Declaration of Rights filed by the Plaintiff, Rose Island Road Community Preservation Alliance [Plaintiff] from a decision of the Oldham County Planning and Zoning Commission [the Commission]. The matter has been briefed and the Court heard oral arguments on the complaint. After a careful review of the record and the applicable law, the Court finds as follows:

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On or about April 28, 2021, Canfield Realty and Development, Land Design and Development, Inc., and Threesome Construction Co., Inc. [collectively, Defendants] filed a Major Subdivision Preliminary Plan with the office of the Commission. The application details a proposed subdivision [Rose Island Glen] for development along Rose Island Road in Oldham

County on 217.7 acres and includes a plan for 94 lots on lots of at least one acre.<sup>1</sup> As described on the drawing and notes attached to the application, a portion of the proposed development falls within the 100-year Floodplain. The application plan calls for the use of on-site sewage disposal systems- individual lot septic tanks and lateral fields. The application contains no requests for changes or variances to the proposed zoning of the area as the application describes a subdivision that falls within the parameters of the present zoning restrictions.

Prior to formally submitting the application, the Defendants conducted a neighborhood meeting on April 13, 2021 to introduce the development and to address the concerns of those living in close proximity to the proposed subdivision<sup>2</sup>. The meeting was conducted through the use of remote video conferencing technology, Webex, and 71 individuals logged into the meeting. The record on appeal contains a summary of the questions asked and discussed during the meeting.<sup>3</sup> During the meeting, the Defendants discussed and answered questions related to improvements to Rose Island Road, traffic impact the subdivision would have on Rose Island Road, flooding from the Ohio River and Huckleberry Creek in the area, development of a stormwater management system with water quality components, school capacity impact, the use of on-site septic systems instead of sanitary sewers, and other minor issues.

The Defendants met with the Technical Review Committee on or about April 21, 2021. All comments of the Technical Review Committee were met, except those enumerated in the Agency Comments<sup>4</sup>. A Summary of the Application was prepared by the office of the Commission in anticipation of the Planning and Zoning Hearing on May 25, 2021.<sup>5</sup> The Summary, in part,

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<sup>1</sup> Record on Appeal [ROA], pp. 8-9.

<sup>2</sup> Oldham County Subdivision Regulations, Article III, Sections 3.1, 3.2, & 3.3.

<sup>3</sup> ROA, pp. 10-11.

<sup>4</sup> ROA, p. 2.

<sup>5</sup> ROA, pp. 1-7.

includes statements that the proposed subdivision plan appears to be in conformance with all zoning and subdivision regulations; the traffic impact study and traffic assessment conducted by the Defendants revealed minimal impact on Rose Island Road and required no mitigation; the proposed lots would be served by on-site septic systems; a Stormwater Management Plan would need to be approved by the County Engineer; and several binding elements.

The Commission took up the application for Rose Island Glen, Docket PZ-21-10, on May 25, 2021. During the hearing the Commission reviewed exhibits and heard testimony from several witnesses, including the Defendants, area homeowners in support of the development, and area homeowners who opposed the development. The evidence and arguments presented to the Commission were summarized within the minutes adopted by the Commission. The Court reviewed the video recording of the May 25, 2021 hearing before the Commission, made a part of the official record herein, and finds the minutes accurately reflect the content of the hearing.<sup>6</sup>

During the hearing, Planning and Zoning Senior Planner, Tom McIntyre, presented the Summary of the application to the Commission, including aerial photos of the site, photos of Rose Island Road near the property site, and photos of State Highway 1793 near the property site. He informed the Commission of the procedural history of the case, the recommendations of the Technical Review Committee, and a representation that the application met the required regulations and ordinances for approval. Mr. McIntyre also relayed information about prior applications for the same area that failed to proceed past the neighborhood meeting in 2017.

County Engineer, Jim Sullivan, advised the Commission construction plans for the development would have to go through the engineering approval process. He advised that due to

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<sup>6</sup> Plaintiffs have argued the video recording of the hearing was unintelligible and thereby denied them due process upon appeal. While the recording is faint, proper adjustment of recording and speaker volume on a computer allowed the Court to hear the entire contents of the hearing.

the stormwater runoff concerns, he would be working with the developer on plans to remediate stormwater and construction site runoff. Because of the stormwater concerns, permits from the Kentucky Division of Water and Oldham County Stormwater Quality Management and Erosion Control must be obtained prior to the application receiving final approval. He noted that the presence of two blue line streams and the existence of a floodplain within the proposed development required coordination and permits with the Kentucky Army Corp of Engineers, the U.S. Army Corps of Engineers, Oldham County Floodplain Coordinator, and the Kentucky Division of Water. Mr. Sullivan concurred that roadway capacity improvements were not required according to the Traffic Assessment and Traffic Impact Study and the Kentucky Transportation Cabinet offered no comment on the prospect of future widening Rose Island Road. Finally, Mr. Sullivan requested that all permits be obtained prior to the approval of construction plans.

Michael Williams, Oldham County Schools Director of Pupil Personnel, informed the Commission that the development, if approved, would be served by the North Oldham Campus of the Oldham County School System. The capacity rating for the North Oldham Campus was 89.99% capacity and would rise to 91.04% capacity from existing subdivision developments. He indicated the North Oldham Campus would have sufficient capacity to absorb new students from this development.

Jim Urban, Director of the Office of Oldham County Planning and Zoning, recommended the Commission accept the plan with 18 binding elements as set forth in the minutes and adopted by the Commission upon their vote. Upon an inquiry by the Commission regarding accessing sewers, Director Urban responded that accessing sewers would be cost prohibitive to the project and septic systems were adequate for the soil in the area of the development. He advised the Health Department would have to approve all individual septic systems and advised that septic systems

were already in use by the homes and neighborhoods immediately adjacent to the development despite the concern of occasional flooding.

Attorney Paul Whitty presented the case on behalf of the Defendants to the Commission offering: the lots would be 1 to 2.4 acres in size; no variances or waivers were required for the project as it complied with the present county zoning ordinances; Rose Island Road had the capacity to handle the additional traffic; and binding elements had been offered to mitigate concerns of neighbors. He emphasized the conservative nature of the plan.

Kevin Young of Land Design and Development testified the developers considered the present state of Rose Island Road by making plans to increase the size of the shoulders near the property; to remove trees in the right of way to ensure visibility; to create two entrances into the development; and to improve Harmony Village Road. Mr. Young informed the Commission that the existing drainage issues would be addressed by the development and would not exacerbate the problem. Stormwater detention basins were a part of the proposal allowing runoff to be released slowly into the existing creeks. Responsibility for maintaining the basins and keeping them free of sediment and debris would fall to the developers and eventually to the Homeowners' Association. In response to questions from the Commission, Mr. Young acknowledged the nearest sewers were located in Rivers Landing. However, he stated, that due to the nature of the topography in the area, including the creeks and a lake within Rivers Landing, and the costs associated with the acquisition of easements, it would require a larger, more densely populated development to accommodate the cost of the sewers than the one currently being proposed. He indicated the Health Department had already reviewed the site for the possibility of on-site septic systems. When questioned by a Commissioner, Mr. Young maintained that the requirement of

“reasonably accessible” included more than just a consideration of the distance from an existing sanitary sewer line, but also the costs and feasibility of making the connection.

Eric Senn of Land Design and Development reiterated and restated much of Mr. Young’s statements in regard to the stormwater runoff and the use of the detention basins. Mr. Senn emphasized the development’s detention basins would drastically reduce the amount of stormwater runoff for the neighboring properties.

Diane Zimmerman, a licensed traffic analyst hired by the Defendants, testified consistent with her reports that were made apart of the record.<sup>7</sup> She noted that Rose Island Road is maintained by the state and has never been improved to modern roadway requirements. She estimated an increase of approximately 982 additional daily trips on Rose Island Road which is well within the capacity limits for the road. She confirmed additional improvements, including widening the shoulders at the proposed entrance and at Harmony Village Road, were suggestions from the state. Ms. Zimmerman also reasoned the proposed stormwater system at the bottom of Mayo Lane would prevent water from overtopping the road. Additionally, she indicated Harmony Village Road would be widened. She made no recommendation for widening Rose Island Road. She made no finding that the level of service (LOS) at the end of each development year or phase would be or would become unacceptable as defined by Part B of the Oldham County Subdivision Regulations Section 7.2.

Finally, the Commission heard from three homeowners in support of the proposed development. Each indicated the proposed development plan with only 94 homes was favorable in comparison to previous plans for development of the area.

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<sup>7</sup> ROA, pp. 13 - 50.

Following a brief recess, the Commission heard testimony and received exhibits in opposition to the development. Bill Schmitt, a neighbor of the proposed development and a member of Plaintiff's LLC, Amanda Schmitt, a neighbor and member of the Plaintiff's LLC, Leslie Wright, a neighbor, Goeff Schutz, a neighbor and owner of a business in the immediate area, Joe Kopacz, a neighbor in Rivers Landing, Richard van Kleeck, a neighbor, Richard Coomes, a neighbor, and Dan Weaver, a neighbor, testified before the Commission. They expressed the following concerns: 1) the adequacy of Rose Island Road to handle the increased in traffic from the development without significant improvement and modernization to the road; 2) the hazards that exist along Rose Island Road due to its narrow width, lack of shoulders, lack of outside lane markings, and the close proximity of trees and utility poles; 3) the use of Hwy. 1793 as a construction vehicle access when the roadway experiences flooding and falling rocks; 4) the sufficiency of the stormwater detention basins and their maintenance; 5) the location of many lots partially in the floodplain; 6) the failure of the application plan to address steep slopes on the property; 7) the failure of the plan to specifically address the plan for tree removal; and 8) the possible contamination of local freshwater wells from the use of septic systems in the development. Mr. Schmitt and Ms. Wright argued the failure to provide an Environmental Impact Study for the area in the floodplain and the proposed use of on-site septic systems violated the Oldham County Planning and Zoning Regulations. Christopher Wyatt requested an archeological study prior to any approval for the development due to a family cemetery being located near the development and the possibility of Native American burial grounds. Mr. Schmitt also submitted the signatures of 301 area residents opposed to the project along with 55 letters in opposition. Finally, Mr. Schmitt stated Section 7.4 of the Oldham County Planning and Zoning Regulations required the use of sanitary sewers in the area as an existing line was located less than ½ mile from the proposed

development. He believed flooding would damage septic systems and disable the detention systems.

Following the presentation by those in favor of the development and those opposed, questions from the Commission, cross-examination, rebuttal, and final statements, Director Urban summarized the application and proposed additional binding elements (18) to be considered by the Commission. Commissioner Greg King moved for the Commission to approve the Preliminary Subdivision Plan for Rose Island Glen with the 18 Binding Elements and a finding that the application was consistent with the subdivision regulations and the Oldham County Zoning Ordinances and in compliance with the Comprehensive Plan. The motion was seconded by Commissioner Wendy Hagan. After some discussion, a vote was held, and the motion passed by an 8-4 margin.

Following the approval of the Rose Island Preliminary Subdivision Plan, individuals, including Bill and Amanda Schmitt, formed Rose Island Road Community Preservation Alliance, LLC by documents filed on June 16, 2021 with the Kentucky Secretary of State. The registered agent's address is 212 N. 2<sup>nd</sup> Street, Suite 100, Richmond, Kentucky 40475. The Rose Island Community Preservation Alliance, LLC filed this Complaint and Declaratory judgment action herein as an appeal of the Commission's decision and seek Summary Judgment on its claims.

Additional facts will be included below as necessary.

## II. STANDARD FOR SUMMARY JUDGMENT

Pursuant to the standards set forth in CR 56 and Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), summary judgment is only proper if there is no genuine issue of material fact upon which reasonable jurors could differ, and the moving party is entitled to judgment as a matter of law. All pleadings must be construed in a light most favorable



to the non-moving party. **Id.** Furthermore, in **Paintsville Hospital Co. v. Rose**, Ky., 683 S.W.2d 255, 256 (1985), the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. However, it is not sufficient for a non-moving party simply to oppose summary judgment, they must present some affirmative evidence which shows there is an issue of material fact. **Steelvest**, *supra* at 482.

The Kentucky Supreme Court noted that “the movant has the initial burden of showing that no genuine issue of material fact exists” whereupon the burden shifts as “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” **Steelvest**, at 482. The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment. **Harker v. Federal Land Bank of Louisville**, Ky., 679 S.W.2d 226 (1984). However, where the conflict is between inferences to be drawn from undisputed facts, summary judgment may be granted when the only reasonable inference is in favor of the moving party. **Id.**, at 229.

### **III. STANDARD FOR REVIEW OF ADMINISTRATIVE AGENCY DECISIONS BY THE COURT**

“Judicial review of an agency decision is limited to the determination of whether the decision was arbitrary, i.e., whether the action was taken in excess of granted powers, whether affected parties were afforded procedural due process, and whether decisions were supported by substantial evidence.” **Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government**, Ky., 265 S.W.3d 190, 195 (2008)(citing **American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission**, Ky., 379 S.W.2d 450, 456 (1964)). “Judicial review of an administrative agency's action is concerned with the question of arbitrariness.” **Com. Transp. Cabinet v. Cornell**, Ky.App., 796 S.W.2d 591, 594 (1990), citing

**American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission**, Ky., 379 S.W.2d 450, 456 (1964). Section 2 of the Kentucky Constitution prohibits the exercise of arbitrary power by an administrative agency. **Id.**

In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary. **Com. Transp. Cabinet v. Cornell**, 796 S.W.2d at 594. The appellant has the burden of showing the board's decision is arbitrary on the basis of the evidence before the board. **Gentry v. Ressnier**, Ky., 437 S.W.2d 756 (1969).

#### **IV. SUMMARY OF THE PARTIES' POSITIONS ON THE MOTION FOR SUMMARY JUDGMENT**

In its Complaint, Plaintiff alleges the Commission failed to follow the applicable Oldham County Subdivision Regulations related to: 1) Section 7.7: Drainage and stormwater management requirements; 2) Section 5.9: "Environmentally-sensitive" areas and the Regulations' requirements that environmentally-sensitive areas be located on the preliminary plat; 3) Section 7.2: Roadway capacity standards; and 4) Sections 7.4 & 7.5: Sewage disposal standards and adequate wastewater treatment facilities. Plaintiff also alleges the Commission violated numerous goals and objectives of the Oldham County Comprehensive Plan, including Goal E-1, Objective E-2-2, Objective E-2-6, and Goal CF-3 relating to stormwater management; Goal T-1, Objective T-1-3, and Goal T-3 relating to traffic concerns and maintaining the appearance of scenic corridors;

and Objectives E-1-4 and CF-2-2 relating to sanitary sewer collection practices. Additionally, the Plaintiff alleges violations of Oldham County Ordinance Chapter 52 on Illicit Discharges and the Flood Damage Prevention Ordinance. Finally, in its motion for Summary Judgment, the Plaintiff adds claims for a violation of Section 7.1(C) of the subdivision regulations and Oldham County Ordinance Section 270-040 that require collector streets, like Rose Island Road, to have a minimum 22 feet of width; a violation of Ordinance Section 270-050 related to capacity at public schools; a violation of Ordinance Section 270-070 related to wastewater treatment; and violations of due process for the production of an inaccurate and incomplete record and minutes of the May 25, 2021 Planning and Zoning hearing.

Other allegations referred to in Plaintiff's Complaint have been addressed by the Court in an Order entered December 2, 2021.

In their response, the Defendants contend that the motion for Summary Judgment should be denied because the approval of a subdivision plan is a "ministerial act" limited to a determination of whether the plan complies with the Subdivision Regulations, Zoning Ordinances, Flood Damages Ordinance, and the Stormwater Ordinance. The Defendants further argue the Commission could not take the Comprehensive Plan into consideration and therefore could not fail to properly apply the Comprehensive Plan. The Defendants argue the Plaintiff lacks standing to prosecute the claims as the limited liability company was formed after the May 25, 2021 Preliminary Plan Approval and could not qualify as "any person or entity claiming to be injured or aggrieved by any final action of the planning commission" as allowed by KRS 100.347.

The Commission, likewise, opposes the motion for Summary Judgment. The Commission urges the Court to deny the motion for Summary Judgment because 1) the Plaintiff has failed to demonstrate that the Commission acted arbitrarily when it approved the application for Rose Island

Glen; 2) the record on appeal demonstrates substantial evidence to support the approval; and 3) the Commission did not act outside of its authority.

V. **ANALYSIS**

a. **STANDING TO APPEAL**

The Plaintiff is a limited liability company formed by the filing of Articles of Incorporation with the Kentucky Secretary of State on June 16, 2021. As evidenced by the date of its formation, it did not exist as an entity at the time of the May 25, 2021 Planning and Zoning hearing. According to Plaintiff's Reply to Appellee's Brief, at least two of the organizing members of Plaintiff's LLC are residents near the proposed development and testified during the May hearing.

KRS 100.347 allows any person or entity "claiming to be injured or aggrieved" by any final action of a planning commission, local legislative body, or board of adjustment to appeal from the action to the circuit court of the county in which the property, which is the subject of the action, lies.

To be "injured or aggrieved," a person must be something more than a property owner or taxpayer within an area with only a citizen's interest in the efficient administration of zoning laws. Kentucky courts have been reluctant to limit or narrow those qualified for standing. **21<sup>st</sup> Century Development, Co., LLC v. Watts**, Ky. App., 958 S.W. 2d 25, 28 (1997). However, the interest may not be remote and speculative, but must be present and substantial interest in the subject matter. **Warren County Citizens for Managed Growth Inc. v. Commissioners of City of Bowling Green**, Ky. App., 207 S.W.3d 7, 12-13 (2006), citing **City of Louisville v. Stock Yards Bank & Trust Co.**, Ky., 843 S.W.2d 327, 328-29 (1992).

Whether an LLC formed of members of the class of people who "claim to be injured or aggrieved" has standing to appeal a planning and zoning decision is a question Kentucky law, to

the best of this Court's knowledge, has yet to formally address.<sup>8</sup> However, other states have addressed this issue as highlighted by the article, "Standing of civic or property owners' association to challenge zoning board decision (as aggrieved party)", 8 A.L.R.4<sup>th</sup> 1087, Section 2a:

The courts have ruled, in general, that one of the requirements of the right to judicial review of administrative action is an interest in the action. The right to judicial review, termed "standing," is further circumscribed by the necessity of showing that the decision sought to be appealed has injuriously affected or prejudiced the interests of the party seeking to appeal. Zoning cases are covered by these rules; consequently, provisions of statutes and regulations detailing the standing requirements for judicial review of decisions of zoning boards often limit standing to "persons aggrieved" by the decision.

In a number of cases, a question has arisen as to the standing, as "aggrieved persons," of civic or property owners' associations seeking judicial review of zoning board decisions. In some jurisdictions, the courts have ruled, generally, that in a proper case, such associations have standing to appeal. They generally have rejected an interpretation of the "aggrieved person" requirement which limited the standing of civic or property owners' associations to the relatively rare situation in which the association itself owned property.

More frequently, the courts have considered the standing of particular civic or property owners' associations in connection with challenges to particular decisions of zoning boards or similar administrative bodies in various types of actions. Depending upon the circumstances presented, the courts have held or recognized that particular civic or property owners' associations had standing as "aggrieved parties" to challenge the grants of zoning variances, permits and exceptions, including cases of approval of platting and subdivisions, and rezoning decisions. Under other circumstances, opposite results have been reached.

Given that Kentucky Courts have been reluctant to limit or narrow those qualified for standing and that at least two of the neighbors who testified at the May 25, 2021 hearing in opposition to the subdivision plan are members of the Plaintiff's LLC, this Court finds the standing requirement has been met. Moreover, the burden is on the Defendants to show that the Plaintiff

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<sup>8</sup> **Woodrow v. Louisville and Jefferson County Planning and Zoning Com'n**, Ky., 346 S.W.2d 538 (1961), as cited by the Defendants is inapplicable. **Woodrow** was decided under a prior statute that has since been repealed and replaced with KRS 100.347. The language of the present statute contains no requirement for an entry of appearance at the hearing.

was not aggrieved by the decision of the Commission to approve the subdivision plan. **City of Beechwood Village v. Council of and City of St. Matthews**, Ky. App., 574 S.W.2d 322,324 (1978). Defendants failed in that burden.

**b. VIOLATION OF DUE PROCESS**

Plaintiff alleges that its due process rights were violated because the Commission's approved minutes from the May 25, 2021 hearing were "incomplete, inaccurate, and contain misrepresentation regarding testimony and evidence"<sup>9</sup> and because the Commission approved a deficient subdivision plan. This Court finds that the Plaintiffs have failed to present a viable claim for a violation of their due process rights.

KRS 100.167 states:

The planning commission shall adopt bylaws for the transaction of business, and ***shall keep minutes and records of all proceedings, including regulations, transactions, findings, and determinations, and the number of votes for and against each question***, and if any member is absent or disqualifies from voting, indicating the fact, all of which shall, immediately after adoption, be filed in the office of the commission or board, as applicable. If the commission has no office, such records shall be filed in the office of the county clerk. ***A transcript of the entire proceedings of a planning commission shall be provided if requested by a party, at the expense of the requesting party, and the transcript shall constitute the record.*** {Emphasis added}

The record on appeal includes a completed copy of the application for a Major Subdivision Preliminary Plan, two DVDs of the May 25, 2021 hearing, and hundreds of pages of slides, reports, pictures, documents, letters, copies of emails, pages of signatures on a petition in opposition to the development, and the minutes from the hearing. The record is not limited to the minutes of the

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<sup>9</sup> Plaintiffs' Motion for Summary Judgment, p. 24

hearing but includes all of the documents and the recordings that make up the transcript of the hearing.

In **Hocker v. Fisher**, Ky. App., 590 S.W.2d 342 (1979), the Court of Appeals found a due process violation and reversed a decision of a local planning commission where it had failed to make any recording of its proceedings. The Court found, “With no record to provide the proper elements for judicial review, the proceedings of the Paducah Planning Commission on March 20, 1978, must be deemed arbitrary and in conflict with due process and constitutional rights.” **Id.**, at 345. The opposite is true in the present case.

The Court has a complete record and a video-recorded copy of the entire hearing. Perhaps, the Plaintiff failed to request a copy of the transcript prior to filing this action. Perhaps, Plaintiff did not recognize that under the law the transcript of the entire proceeding, and not the minutes alone, constitutes the record. Nevertheless, this Court finds Plaintiff’s claim of a due process violation for an incomplete, inaccurate, or misrepresentative minutes is without merit and Summary Judgment is denied on this issue.

The Plaintiff also contends it was denied due process when the Defendants submitted an incomplete application for the subdivision plan.

The **Oldham County Subdivision Regulations[OCSR], Article III, Sections 3.1, 3.2, and 3.3** detail the subdivision consideration and application process. These Sections emphasize that the “application” process for a major subdivision application is more than just completion of a form on a piece of paper and the payment of fees. There are requirements for pre-application meetings with the Commission staff, neighbors, and a technical review committee. In addition, the Bylaws of Planning Commission requires the use of forms provided by the Commission office. **Planning and Zoning Bylaws Article 9: Application Procedures, 9.1. The Bylaws at Section**

9.2, state that the “[a]pplication forms presented to the Commission *may* be supplemented by other materials.” {Emphasis added}. There is no requirement for the application include any additional documents or information unless such is determined by the Commission Chairman or Administrator. **Bylaws**, 9.5. In addition, a major subdivision application requires review by the Technical Review Committee before it is docketed for a public hearing.

There is nothing in the record to suggest that the Defendants failed to comply in any way with the OCSR or Bylaws for a major subdivision application. Rather, the record reveals Defendants complied with all requirements and were properly before the Commissioner for a hearing on May 25, 2021. Plaintiff’s suggestion that it was denied due process by virtue of an incomplete application from the Defendants is without merit. Summary Judgment is denied on this element of the claim for a due process violation as well.

**c. ROADWAY CAPACITY STANDARDS**

As part of this appeal, Plaintiff has alleged violations of Sections 7.1 and 7.2 of the Regulations, the Goals and Objectives of the Comprehensive plan at T-1, T-1-3, and T-3, and Ordinance 270-040 as they relate to road capacity and width.

Without doubt, Rose Island Road is an old, narrow, winding, two-lane country road, lined by trees and utility poles. It is a State-maintained highway that does not meet the modern, state-minimum requirements for lane width, shoulders, or lane markings. There are no current state plans to improve or widen Rose Island Road<sup>10</sup>. The proposed subdivision site is on Rose Island Road at Harmony Village Drive. Rose Island Road would be classified as a collector road under the subdivision regulations.

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<sup>10</sup> ROA, p. 7.



i. **ROAD WIDTH**

As cited by Plaintiff, **Oldham County Comprehensive Zoning Ordinance Section [OCCZO], 270-040, Parts 4(4) & (3)**, sets forth the standards to be observed in the OCSR for *improvements* to existing roads. The ordinance does require the *improvements* to an existing “collector” road (like Rose Island Road, in the case of the present proposal) to meet a minimum width of 22 feet. However, Plaintiff has failed to consider **Part 3 of Section 270-040** which defines when *improvements* to a road may be required for the purposes of a subdivision development. “Traffic impact studies provide the commission the information necessary to properly understand the transportation infrastructure impacts of a proposed development on existing and planned road capacities. Further, traffic impact studies identify the need for any improvements to the transportation system to reduce congestion, maintain and improve safety, and provide site access and impact mitigation associated with the proposed development.”<sup>11</sup> Under the ordinance, it is a traffic impact study that guides the determination of whether an *improvement* to an existing road is necessary or recommended. There is nothing in the ordinance which requires the commission to insist upon an improvement to an existing road where the traffic study does not make such a recommendation.

**Section 7.2** of the **OCSR** is virtually identical to **Subdivision Ordinance 270-040, Parts 3 & 4** and states at **Section 7.2(C)(2)**, “Generally, a traffic study will provide operating-capacity and level-of-service analysis for critical roadway segments and/or intersections within an impacted study area. It then analyzes the impacts of the proposed development on the existing road network and proposes mitigation measures, if necessary, to improve any adverse conditions that may result from the proposed development.” The OCSR require the Commission to consider mitigating

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<sup>11</sup> OCCZO, Section 270.040 Part 3, Traffic Impact Study Requirements.

factors altering the overall impact of the proposed development on road capacity when those *improvements* have been identified by the traffic impact study when the LOS is “unacceptable” as defined by **Section 7.2(B)**.<sup>12</sup> See, **Section 7.2 (F)(1) & (2)**. Once again, nowhere do the OCSR require the Commission to deny an application for a failure to improve an existing collector road up to a minimum of 22 feet unless a traffic study makes such a recommendation because the road’s LOS is “unacceptable”.

Per the traffic impact study, Rose Island Road is rated as a LOS Level A. In the present case, the traffic safety study made no recommendations for improvements of Rose Island Road to accommodate the increased traffic on Rose Island Road due to this proposed development. Rather, the traffic impact study advises Rose Island Road “needs to be modernized”, but it does not recommend widening Rose Island Road to 22 feet. Instead, the report concurs with the Defendants’ expert and the Kentucky Transportation Cabinet on four proposed improvements including adding a 3-foot shoulder for 150 feet on Rose Island Road at the new entrance and at Harmony Village Road, correcting storm water system at Mayo Lane to prevent water from overtopping Rose Island Road, removing four trees in the Rose Island Road right of way as designated by the Kentucky Transportation cabinet, and widening Harmony Village Road.

Because there was no recommendation for widening Rose Island Road in the traffic study nor a finding that Rose Island Road’s LOS was “unacceptable” as defined by the OCSR, the Commission had no basis upon which to deny the subdivision application for failure to improve the collector road width to 22 feet. Accordingly, Plaintiff has failed to show the actions of the

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<sup>12</sup> OCSR Section 7.2(B) defines an “unacceptable” LOS as a LOS categorized as LOS level D and below. The categories of LOS are set forth in Section 7.2(G).

Commission were arbitrary or founded upon insufficient evidence. The request for Summary Judgment on this issue is denied.

ii. **ROAD CAPACITY**

**OCSR Section 7.2(D), Planning and Zoning Commission Approval Criteria**, sets for the standards to be used by the Commission when approving or denying an application for a subdivision after a traffic impact study. This section reads, in part:

1. The Planning and Zoning Commission may approve or deny a request for rezoning, subdivision, or development based on the findings of the Traffic Impact Study approved by the Commission's Traffic Engineer.
2. A proposed development may be denied if the Traffic Impact Study approved by the Commission's Traffic Engineer indicates that the LOS at the end of each development year or phase for the existing or proposed roads and intersections is unacceptable as defined in Part B of this section, unless the Traffic Impact Study and the proposed mitigation measures demonstrate that the proposed development will not increase the existing delay more than five (5) seconds.

A traffic impact study and a traffic assessment were completed for the proposed Rose Island Glen development by Diane Zimmerman. Her report was approved by the Commission's Engineer, Jim Sullivan. Neither the traffic impact study nor the traffic assessment indicated the LOS was or would become "unacceptable" on Rose Island Road as defined by the Regulations. Plaintiff has argued that the traffic impact study was flawed and incomplete due to findings it interprets as conflicting in the study comparing present LOS to levels the report documents from 2003.<sup>13</sup> However, Plaintiff presented no other competing traffic impact study and even if it had, it is the province of the Commission to weigh the credibility of the evidence presented during the hearing.<sup>14</sup>

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<sup>13</sup> Plaintiffs' Memorandum in Support of Summary Judgment, p. 10.

<sup>14</sup> Where the legislature has designated an administrative agency to carry out a legislative policy by the exercise of discretionary judgment in a specialized field, the courts do not have the authority to review the agency decisions

Plaintiff argues there was a violation of the Oldham County Comprehensive Plan at T-1, T-1-3, and T-3. This Court finds Plaintiff's argument on this issue is substantially the same as its arguments with regard to the subdivision regulations and ordinances on road capacity and width. Moreover, a comprehensive plan is only a plan and not a strict set of unbending rules for land management. This Court finds no violation of the comprehensive plan. Plaintiff has urged this Court to consider the holding in **21<sup>st</sup> Century Developers v. Watts**, Ky. App., 958 S.W.2d 25 (1997). However, Plaintiff's reliance upon this case as a foundation for its arguments about road width or road capacity is misplaced. In **21<sup>st</sup> Century Developers**, the Court of Appeals upheld the trial courts' remand of a Planning and Zoning Commission decision related to **zoning**, not the ministerial act of subdivision preliminary plan approval, because the Commission had failed to take into consideration all the evidence concerning present and potential future growth when it approved the zoning change. In this matter, no zoning changes have been requested and the Commission's approval of the preliminary subdivision plan is ministerial in nature, requiring no act of discretion prior to approval on the issue of road width and capacity.

This Court cannot substitute its judgment of the credibility of the evidence for that of the Commission. This Court is limited to a review as to whether the Commission followed its regulations, ordinances, and statutes, whether those opposed were granted the opportunity to be heard and present evidence, and whether the decision is based upon substantial evidence. Plaintiff

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de novo. **American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission**, 379 S.W.2d 450, 458 (1964). Judicial review of the administrative action is confined to a determination of whether the action taken was arbitrary. **City of Louisville v. McDonald**, Ky., 470 S.W.2d 173, 178 (1971). So long as the agency's decision is supported by substantial evidence of probative value, it is not arbitrary and must be accepted as binding by the appellate court. **Starks v. Kentucky Health Facilities**, Ky.App., 684 S.W.2d 5 (1984). Substantial evidence is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. **O'Nan v. Ecklar Moore Express, Inc.**, Ky., 339 S.W.2d 466 (1960). In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. **Kentucky State Racing Commission v. Fuller**, Ky., 481 S.W.2d 298, 309 (1972).

has failed in its burden of demonstrating to this Court a violation of any of these elements and, thereby, rendering the approval arbitrary. Summary judgment on the issue of road capacity is denied.

**d. ENVIRONMENTALLY SENSITIVE AREAS**

The Plaintiff charges the Commission should not have approved the Rose Island Glen subdivision preliminary plan as it failed to comply with Section 5.9 of the subdivision regulations. Specifically, Plaintiff contends the Defendants failed to file a statement that describes how the area in the floodplain would be protected during development. OCSR Section 5.9 requires developers to identify and locate environmentally sensitive areas on the plat filed with their application and to provide “the manner in which any such area is to be handled during development of the property, as well as any special design measures taken by the developer to attempt to minimize the development’s impact on the environmentally-sensitive areas.” Environmentally sensitive areas include 100-year floodplains.

A portion of the 217.7-acre site of the proposed development is within a 100-year floodplain. This section was clearly identified and located on the plat filed with the subdivision plan. Additionally, as required by the OCSR, the Defendants held a recorded neighborhood meeting on April 13, 2021. During the course of the neighborhood meeting, the Defendants addressed the flooding issue and the response is recorded in a summary that was made a part of the subdivision application.<sup>15</sup> The response included a general statement to work with “applicable local, state and federal agencies to engineer the site so as to not exacerbate any current flooding issues.” This statement ultimately resulted in a binding element requiring permits from U.S. Army

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<sup>15</sup> ROA, p. 10

Corps of Engineers, the Kentucky Division of Water, and related Oldham County agencies before construction could begin. Additionally, two blue line streams were observed on the property requiring coordination with the Kentucky Division of Water and the Kentucky Army Corps of Engineers. This is also what is required by the OCSR and **Oldham County Ordinance Chapter 151 on Flood Damage Control**.

Additionally, the OCSR do not require the production of a comprehensive and detailed environmental analysis study prepared by qualified professionals as demanded by Plaintiff. Rather, the OCSR uses the phrase “the Commission *may require*” {emphasis add}. This phrase makes the production of an environmental analysis (environmental impact study) permissive, and not mandatory, in the discretion of the Commission.

The Plaintiff’s allegation that the Commission acted to approve the subdivision preliminary plan without compliance with OCSR 5.9 is without merit. The record reveals substantial evidence to support the decision of the Commission. The decision to approve the preliminary plan cannot be considered arbitrary on this issue. Summary Judgment is denied.

e. **DRAINAGE AND STORMWATER MANAGEMENT**

Plaintiff argues the Commission committed an arbitrary approval of the subdivision plan for Rose Island Glen when a stormwater management plan as required by the Oldham County Stormwater Ordinance was not included. Specifically, Plaintiff alleges violations of **Ordinance Section 154.03(B) and OCSR 7.7(C)** by the approval of the subdivision plan.

**Ordinance 153.03(B)** reads, “Any development activity that involves land disturbance of one acre or more shall submit to the County Engineer, prior to development, a stormwater management plan showing location of post-construction best management practices (BMPs) prior to any construction activity. This would include but may not be limited to proposed major

subdivision and commercial development.” It is worthy to note that the Ordinance does not require the submission of a stormwater management plan to the Commission at the time of the application for preliminary subdivision plan approval, but a submission of a stormwater plan to the County Engineer prior to any construction activity. **OCSR 7.7(C)** merely requires every subdivision to provide for satisfactory drainage and accommodation of stormwater in conformity with the Stormwater Ordinance.

The subdivision preliminary plan application did include descriptions and diagrams for stormwater management, including detention basins. However, those plans were preliminary and require a KYR10 Permit from Kentucky Division of Water, an Oldham County Stormwater Quality Management permit, and an Oldham County Erosion Control permit. Additionally, the County Engineer requested a detailed plan from the Defendants for how all basins will function with regard to water surface elevation during rain events. All permits and plans must be submitted to the County Engineer’s Office in accordance with **Ordinance 153.040** for determination of its conformity with the **Stormwater Ordinance, Chapter 154**, as a whole. This plan to require permits and inspections from several agencies complies with **Oldham County Ordinance Chapter 52** on Illicit Discharges.

Plaintiff’s argument that the Commission’s approval of the subdivision plan was flawed by the failure of the Defendants to provide a stormwater management plan or by the production of a non-conforming stormwater management plan is without merit or foundation in the Ordinances or the OCSR. The Stormwater Ordinance gives the County Engineer’s Office the authority to determine conformity with its requirements, not the Commission. The act of the Commission to approve the Rose Island Glen preliminary subdivision plan despite the adequacy, or inadequacy,

of the stormwater management plan was not an arbitrary act. Plaintiff has failed to meet its burden and the motion for Summary Judgment on this issue is denied.

**f. School Capacity**

Plaintiff challenges the Commission's approval of the Rose Island Glen preliminary plan based upon an argument that the North Oldham School Campus cannot accommodate the number of new students potentially generated by families moving into the development. Specifically, the Plaintiff directs the Court's attention to statistics in a report from the Oldham County schools which suggests Harmony Elementary on the North Oldham Campus presently exceeds its capacity. Plaintiffs argue **OCSR 7.6** requires the denial of a subdivision plan where a development would cause a school to exceed its capacity.

Plaintiff's suggested interpretation of the OCSR is inaccurate. **OCSR 7.6(B)** requires the Commission to consider school capacity but does not oblige the Commission to deny a subdivision plan when a school may exceed capacity. **OCSR 7.6(B), School Capacity Consideration** articulates as follows, "..., available public school capacity *shall* be considered. Available school capacity inadequate to accommodate the number of students generated by a project or proposal *may* be considered grounds for denial of a subdivision plat as not being in compliance with the regulations." {Emphasis added}. While **Section 7.6(B)** makes the consideration of school capacity mandatory, it does not require a denial of a subdivision plat if capacity is not in compliance with the regulations.

The testimony at the May 25, 2021 hearing from the Oldham County Schools Director of Pupil Personnel, Michael Williams, evinced a school capacity on the North Oldham Campus, where students from the proposed development would attend, to be adequate to accommodate the number of students potentially generated by Rose Island Glen. While the Commission heard



testimony suggesting Harmony Elementary on the North Oldham Campus exceeded its capacity, the Commission, in its discretion, obviously found the testimony of Mr. Williams to be persuasive. There was no competent evidence presented that the available public school capacity was inadequate.

As the Commission considered the adequacy of the available public school capacity, the Plaintiff was afforded an opportunity to present evidence in opposition, and there being substantial evidence in the record to support the Commission's approval, the Plaintiff has failed to meet its burden of proof and the motion for Summary Judgment on this issue is denied.

**g. Sanitary Waste Disposal and On-site Septic Systems**

The final issue in the Plaintiff's Complaint and motion for Summary Judgment involves the Commission's approval of the Rose Island Glen preliminary subdivision plan despite its use of on-site sewage disposal systems (septic tanks) instead of sanitary sewers. It is Plaintiff's contention that the OCSR make the use of sanitary sewers mandatory in every subdivision located within one-half (1/2) mile of an existing sanitary sewer line. Because there exists a sanitary sewer line within 1/2 mile of the proposed development, Plaintiff argues the Defendants proposed use of individual septic systems and the Commission's approval of the subdivision plan including the use of individual septic systems violates the regulations and is, therefore, an arbitrary act.

**OCSR Section 7.4** requires every subdivision to be provided with a sewage disposal system approved by the Oldham County Health Department or the Kentucky Division of Water. The OCSR allow on-site sewage disposal systems within new subdivision developments where sanitary sewers are not reasonably accessible. **Section 7.4(A)** reads:

On-Site Disposal: On-site sewage disposal systems *may be permitted* in areas where public sanitary sewers are not *reasonably accessible*. {Emphasis added}

**Section 7.4(B)** states this same language a little differently:

Where a public sanitary sewer system, in the opinion of the Commission, is ***reasonably accessible***, sanitary sewers ***shall be installed*** to adequately serve all lots with connections to the public system. {Emphasis added}.

Both subsections use the phrase “reasonably accessible” and it is defined under Section 7.4 as follows:

***For purposes of this regulation, “reasonably accessible” shall mean that any portion of the property proposed for subdivision is located within one-half (1/2) mile of existing sanitary sewer line***, whether or not that line or treatment facility to which it leads has capacity sufficient to handle the extra demands the division would create.

Accordingly, under the OCSR, the phrase “reasonably accessible” has a specific meaning that is slightly different than its common usage. The OCSR place a distance element into the definition of “reasonably accessible” that does not exist in its common usage. The only reasonable interpretation of these sections is sanitary sewers must be installed where a sanitary sewer line exists within ½ mile of the proposed development. There are no exceptions or mitigation mentioned in the OCSR.<sup>16 17</sup>

At the May 25, 2021 hearing, the Defendants proposed a subdivision plan that included septic systems on each individual lot. Defendants, through the testimony of Kevin Young, advised the Commission that the Health Department had been to the site prior to the technical review and the Health Department agreed the layout of the lots and soil conditions were favorable for the use of septic systems. Under questioning from a Commissioner, Mr. Young insisted the term

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<sup>16</sup> The OCSR also require all subdivisions including those proposing to use on-site septic systems to include fifteen feet permanent sewer easements to facilitate future connections. OCSR 7.4(C)(1).

<sup>17</sup> The OCSR requires developers proposing a subdivision within ½ mile of a sanitary sewer system to meet with the appropriate sewer agency and complete a cost-effective analysis to determine feasibility of connection without exceeding capacity. There’s no indication in the record that such analysis took place.

reasonably accessible included more than just distance from the development to the nearest sanitary sewer line. As noted above in the Findings, Mr. Young included the nature of the topography in the area, including the creeks and a lake within Rivers Landing as matters affecting whether sanitary sewers were “reasonably accessible”. He argued a development with sanitary sewers would need to be much larger and more densely populated in order to be cost effective. Director Urban concurred with this assessment in his summation to the Commission by advising the Commission accessing sewers would be cost prohibitive to the project and septic systems were adequate for the soil in the area of the development. Director Urban advised the Health Department would have to approve all individual septic systems and that septic systems were already in use by the homes and neighborhoods immediately adjacent to the development despite the concern of occasional flooding.

At the May 25, 2021 hearing, Commissioner King, seconded by Commissioner Hagan, made a motion for the approval of the Rose Island Glen preliminary subdivision plan. The motion stated, “Based on testimony and evidence provided and presented, it is found that the application is consistent with the subdivision regulations and the Oldham County Zoning Ordinance and in compliance with the Comprehensive Plan.” The motion incorporated the 18 binding elements proposed and read into the record by Director Urban. Following the motion, the Commission had a period of open discussion. During the period of open discussion, a commissioner raised the issue of the potential of several lots within the development having septic systems within the floodplain. Director Urban explained the Health Department makes the determination of whether a site is appropriate for the issuance of a septic system permit and he noted that many of the homes in the immediate area of the development already have septic systems within the floodplain. At 1:56:30

of Disc 1,<sup>18</sup> another commissioner inquired about the use of sanitary sewers. Director Urban responded that sanitary sewers in prior development plans for the site made the economics of the proposals unfeasible. Director Urban stated he did not know the economics of this subdivision proposal with the possibility of sanitary sewers but assumed it would be just as cost prohibitive for the developer. Following the discussion, the Commission voted 8-4 to approve the subdivision preliminary plan. The Commission did not discuss whether the sanitary sewer line was within ½ mile of the proposed development. The Commission made no findings, other than the general findings of compliance with the subdivision regulation, ordinances, and comprehensive plan, of whether the subdivision plan met the definition of “reasonably accessible” as defined by the regulations.

This Court finds no violation of the **Oldham County Comprehensive Plan Goals and Objectives E-1-4 or CF-2-2**, as charged by the Plaintiff. It is clear from the record, the Commission considered the impact of the use of individual septic tanks within the flood plain and the Oldham County Health Department was part of the preparation of the site plan.

It is clear from the record, the Commission considered the prospect of sanitary sewers for the proposed development. The record reflects the Commission considered the economic expense and difficulty of the installation of sanitary sewers for the development. However, the plain language of the regulations requires the Commission to consider and find whether the proposed subdivision is within ½ mile of a sanitary sewer line- as “reasonably accessible” is defined by the **OCSR 7.4(A)**. Without a finding by the Commission that a sanitary sewer line is *not* within a ½ mile of the proposed development, then the sanitary sewers are required by default. **OCSR 7.4(B)**. Any finding substituting the expense to the developer or the relative difficulties of installation of

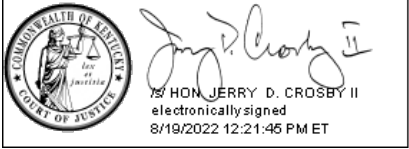
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<sup>18</sup> Misabeled as Disc 1.

sewer lines into “reasonably accessible” is clearly erroneous under **OCSR 7.4(A)**. Any approval of the subdivision preliminary plan with septic systems proposed without a finding that sanitary sewers were not “reasonably accessible”, as exclusively defined by **OCSR 7.4(A)**, amounts to an action contrary to the law and amounts to an arbitrary act.

As noted above, **OCSR 7.4** lays out specific requirements regarding the utilization of septic systems versus a public sanitary sewer system. If the Commission, in its opinion, finds that a public sanitary sewer system is reasonably accessible [is located within ½ mile of any portion of the property proposed for subdivision], as solely defined in **OCSR 7.4**, sanitary sewers *shall* be installed. If the Commission finds the public sanitary sewer system is not reasonably accessible [is not located within ½ mile of any portion of the property proposed for subdivision], with no consideration given to cost or hardship, then a septic system as proposed would be compliant with the requirements of the regulations. However, in this case, the Commission made no findings as whether a public sanitary sewer system was within ½ mile of the proposed subdivision and instead relied upon other considerations for the definition of reasonably accessible that are not supported in the OCSR. As the Plaintiff has established there is no issue of material fact, they are entitled to judgment under the law with regard to the sole issue of approval of the Rose Island Glen subdivision preliminary, including the proposal for individual septic systems, without findings by the Commission that the subdivision was not within ½ mile of a sanitary sewer line. The Oldham County Planning and Zoning approval of the preliminary subdivision plan, PZ-21-010, Rose Island Glen, is vacated and remanded to the Commission for further review consistent with this Order.

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



DATE: \_\_\_\_\_

JERRY D. CROSBY II, JUDGE  
OLDHAM CIRCUIT COURT