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TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-002607-MR

JAMES P. UPCHURCH and
BETTY G. UPCHURCH — APPELLANTS

v. — APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 00-CI-00024

CUMBERLAND COUNTY FISCAL COURT;
DONNA THURMAN-KNIGHT, County Judge;
EARL BRANHAM, MAGISTRATE; LESTER
LONG, Magistrate; FRANKIE SELLS,
Magistrate; THOMAS J. BROWN,
Magistrate; SIERRA CLUB and THE
KENTUCKY RESOURCES COUNCIL, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; MILLER[1] AND SCHRODER, JUDGES.

EMBERTON, CHIEF JUDGE: The Upchurches purchased real property in Cumberland County for the purpose of constructing and operating a confined poultry production facility. Subsequent to their purchase of the property, the Cumberland County Fiscal Court

[1] Judge Miller concurred in this opinion prior to his retirement effective January 1, 2003.

enacted Ordinance No. 199899-03 setting forth restrictions on the construction and operation of poultry facilities which, if the Upchurches were to construct and operate their facility as planned, would be violated. The ordinance was enacted pursuant to the police powers granted to counties under KRS[2] 67.083. The Upchurches filed this action challenging the validity of the ordinance, arguing, in essence that such regulation can be carried out only by a properly enacted Planning and Zoning Ordinance. We disagree and therefore affirm.

The ordinance requires that a permit be acquired to construct and operate a poultry facility and restricts the location of the facility and the litter storage areas to a distance greater than 2,500 feet from a dwelling, public school, active church, public park, or incorporated city limits. It also contains distance restrictions from any lake, river, blue line stream, spring, sink hole, or roadway. The facility must be located in an agricultural zone on a tract of at least fifteen acres. It also placed limitations upon the number of barns and the number of chickens in each barn.

As with many counties whose citizens fear encroachment on the freedom to use their land as they please, Cumberland County has never adopted a comprehensive planning and zoning

[2] Kentucky Revised Statutes.

scheme nor has it met any of the requirements set forth in KRS Chapter 100 for the lawful enactment of land use regulations. Thus, if the ordinance is an attempt to enact a planning and zoning regulation it is conceded by Cumberland County that its enactment is invalid. However, Cumberland County contends that the ordinance is not a planning and zoning ordinance but a permissible exercise of the powers enumerated under KRS 67.083(3), a Home Rule Statute by which county governments are vested with the power to perform the critical function of protecting the health and welfare of its citizens.

> The prime function of these units of government is to promote the safety, convenience, comfort, and the common welfare of their citizens by establishing and maintaining those things which tend to do so and by regulating or prohibiting those things which are hurtful. The conservation of public health should be of as much solicitude as the security of life. It is an imperative obligation of the state, and its fulfillment is through inherent powers. The health of a community is the special concern of the local units of government, and to meet local demands there can be no question that the Legislature may invest them with ample authority.[3]

Poultry facilities have long been a source of litigation. The odors, noises, dust, insects, and waste disposal have caused those who live in the vicinity of such operations to seek judicial intervention. The courts, however,

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[3] Nourse v. City of Russellville, 257 Ky. 525, 530-31, 78 S.W.2d 761, 764 (1935).

have not been inclined to find such facilities to be a nuisance, per se. As stated in Valley Poultry Farms, Inc. v. Preece:[4]

> The keeping of poultry has been a source of much litigation in other jurisdictions and it has frequently been recognized that the keeping of chickens is not a nuisance per se but may become a nuisance because of the circumstances or manner in which the business is operated. Nuisance - Keeping Poultry (1965) 2 A.L.R.3d 966-978. (Emphasis added).

Because of the potential of a confinement facility to become a nuisance, the court in Shaeffler v. City of Park Hills, Kentucky,[5] upheld an ordinance that prohibited the keeping, or harboring, of livestock, fowls, and animals within the corporate limits. In so doing, it relied upon the city=s broad discretion in the enactment of laws to preserve and promote the health and general welfare of its citizens and concluded that:

> A city has a broad discretion in the enactment of laws to preserve and promote the health, morals, security and general welfare of its citizens. Sufficient grounds exist for the enactment of an ordinance of this nature if it has substantial relation to a legitimate object in the suppression of the conditions which the city authorities deem detrimental to the public good. Nourse v. City of Russellville, 257 Ky. 525, 78 S.W.2d 761. The keeping of poultry is a proper subject of regulation to protect the public health and welfare. 2 Am.Jur., Animals, Section 30.[6] (Emphasis added).

[4] Ky., 406 S.W.2d 413, 416 (1966).

[5] Ky., 279 S.W.2d 21 (1955).

[6] Id. at 22.

Through the County Home Rule Statute the legislature has likewise given counties broad discretion to perform the function of protecting the general health and welfare of its citizens, including but not limited to the control of animals, abatement of public nuisances, public sanitation, conservation of natural resources and the regulation of commerce.[7] Without proper management and reasonable care for the surrounding environment, the noises, odors, insects and disposal of waste are potentially harmful to the surrounding properties and waterways, and ultimately become an intolerable nuisance to the surrounding community.

However, central to appellants= argument is that if regulation is to be imposed it must be accomplished by way of a planning and zoning scheme enacted under KRS Chapter 100, and that by appellees= failure to properly enact an ordinance in compliance with KRS Chapter 100 the county is rendered unable to regulate such an operation. We disagree.

Quite simply, planning and zoning has nothing to do with the ordinance. It stands on its own through police powers granted to the county by KRS 67.083(3). The so-called County Home Rule Statute has, among other purposes, the grant of power to the fiscal court in order that it may:

[7] KRS 67.083(3).

(a) Control of animals, and abatement of public nuisances;

. . . .

(c) Public sanitation and vector control;

. . . .

(h) Conservation, preservation and enhancement of natural resources including soils, water, air, vegetation, and wildlife; and

. . . .

(m) Regulation of commerce for the protection and convenience of the public[.]

Zoning, on the other hand, has as its very essence:
[T]he territorial division of the land into use districts according to the character of the land and buildings, the suitability of land and buildings for particular uses, and uniformity of use. Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems are employed.[8]

Although the purposes and objectives of the powers granted by the Home Rule Statute and of the Planning and Zoning Statute are obviously different, we recognize that the demarcation line between the two may sometimes appear faint. For example, in certain instances regulations mandated by a

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[8] 83 Am.Jur.2d, Zoning & Planning, э2, p. 36.

Planning and Zoning Ordinance may also meet the objective of the Aprotection and convenience of the public≅ clause, or the Acontrol of animals and abatement of nuisances≅ clause of the Home Rule Statute, (or vice versa). It may well be that had Cumberland County had a Planning and Zoning Ordinance in place it could have accomplished its objectives by that means. That question is not before us.

As to the ordinance that is before us, we conclude that it is a valid ordinance properly enacted pursuant to KRS 67.083(3). The purpose of the ordinance is the regulation of poultry facilities which are recognized to pose certain health and environmental risks when operated improperly and without regard to surrounding property owners. The ordinance does not designate any specific area for the use or non-use of a chicken facility.[9] It simply provides that if a poultry confinement facility is operated within the county the owner must comply with the specified conditions in the ordinance.

While we hold that governmental bodies clearly have the power to protect the health and welfare of their citizens by

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[9] Although the ordinance refers to agricultural zones, since there is no planning or zoning in Cumberland County, the term agricultural zone must be interpreted to refer to the facility=s location in general traditional farming areas.

such an ordinance, the right is not unfettered. As explained in Tolliver v. Blizzard:[10]

> The rule is that, in order to sustain legislative interference with the business of the citizen, by virtue of the police power, the act or ordinance must have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends in some degree towards the prevention of offenses, or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the only one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of the police regulation, is an invasion of the property rights of the citizen, it is the duty of the court to declare it void.

The Cumberland County ordinance does not prohibit poultry confinement facilities. Given the nature of such facilities and their potential to detrimentally affect the surrounding areas and natural resources, the requirements imposed by the ordinance are reasonably related to the specified powers in KRS 67.083(3) and its purposes.

The order is affirmed.

MILLER, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS BY SEPARATE OPINION.

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[10] 143 Ky. 773, 137 S.W. 509, 510-11 (1911).

SCHRODER, JUDGE, DISSENTING. Fiscal Court enacted an ordinance (No. 199899-03) controlling the construction and location of poultry facilities in Cumberland County. The ordinance regulates the location and layout of poultry production facilities involving 500 or more chickens. The ordinance requires a minimum of 15 acres in an agricultural Azone≅ (Cumberland County has no planning and zoning). The ordinance restricts the number of barns per farm to two with a maximum of 23,000 chickens per barn (regardless of farm acreage). Spacing is at least 2,500 feet from another poultry barn - whether or not they are located on the same farm. Setbacks are included: 2,500 feet minimum from another=s dwelling; 2,500 feet from a public school, church or park; and 2,500 feet from any city limits; 500 feet from a lake, river, blue line stream, spring or sink hole; 150 feet from the property line; 500 feet from a primary road; and 300 feet from a secondary road. The ordinance also controls outbuildings, storage, and a development plan with proof of compliance with the Agriculture Water Quality Act (Senate Bill 241, 1994, codified as KRS 224.71-110, et seq.). This is land use planning. This is zoning. Counties are authorized by KRS 100.203 to enact comprehensive plans and zoning ordinances. However, before any planning operations may begin, the county must establish a planning unit or commission (KRS 100.113) and

follow the statutory scheme set forth in Chapter 100 of the Kentucky Revised Statutes. See Bellefonte Land, Inc. v. Bellefonte, Ky. App., 864 S.W.2d 315 (1993).

Under the present statutory scheme, zoning is not the answer. The AAgricultural Supremacy Clause≅ of KRS 100.203(4) exempts farming (five or more acres) operations (except for setback lines and two other exceptions) from planning and zoning ordinances. Grannis v. Schroder, Ky. App., 978 S.W.2d 328 (1997). Additionally, in 1980, the General Assembly enacted House Bill, commonly referred to as ARight To Farm Act,≅ codified as KRS 413.072, which prohibits any city or county from adopting, and voids, any ordinance which would regulate farming through zoning or other regulations. See KRS 413.072(2). Farming operations include agricultural and silvicultural operations as well as facilities for the production of livestock and poultry. KRS 413.072(3).

The Right To Farm Act, KRS 413.072(2), also prohibits cities and counties from declaring any agricultural operation a nuisance per se, even though KRS 381.770(4) allows cities and counties to adopt nuisance codes. KRS 413.072(2). KRS 413.072(6) & (7) and KRS 381.770(1) & (2) allow for the abatement of common law and actual nuisances on agricultural lands. See KRS 411.500 to KRS 411.570 for codification of the common law of nuisance in the Commonwealth.

In spite of the above prohibitions, the nuisance doctrine is not the only check on animal feeding operations (AFO - defined as a facility where animals are held for 45 days or more per year and where crops, vegetation or postharvest residue are not sustained over any portion of the lot. 401 KAR 5:002 э 1(11)). The Clean Water Act, or Federal Water Pollution Control Act (33 U.S.C. э 1251, et seq.) recently celebrated thirty years of existence. In 1994, the General Assembly enacted the Agriculture Water Quality Act (Senate Bill 241, 1994), KRS 224.71-110, et seq., which requires the reporting and mapping out by any landowner with ten or more acres of agricultural or silviculture uses of his plans to protect surface waters and ground waters from pollution stemming from agricultural activities. Water quality controls are to be adopted later. 401 KAR 5:050 authorizes the Natural Resources and Environmental Protection Cabinet (NREPC) to issue, revoke, modify, etc., permits to discharge into the waters of the Commonwealth according to the guidelines of the Clean Water Act or Federal Water Pollution Control Act (33 U.S.C. э 1251, et seq.).

The NREPC has developed the Kentucky Pollution Discharge Elimination System (KPDES) which follows the National Pollution Discharge Elimination System (NPDES), which requires permits for the discharge of certain levels of pollutants (and

their treatments) into waters of the Commonwealth from point sources. See 401 KAR 5:055 э 1. Examples of point sources include concentrated animal feeding operations (CAFO) (beef, pork, and poultry) as well as concentrated aquatic animal (fish) production facilities, and others. 401 KAR 5:055 э 1(1).

The KPDES contains guidelines or effluent limitations for point sources. 401 KAR 5:002 э 1(58) provides that a CAFO (concentrated animal feeding operation) is an AFO where:

> (a) More than the following numbers of indicated animals are confined:
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> 1. 1,000 slaughter and feeder cattle;
> 2. 700 mature dairy cattle, whether milked or dry cows;
> 3. 2,500 swine each weighing over twenty-five (25) kilograms (approximately fifty-five (55) pounds);
> 4. 500 horses;
> 5. 10,000 sheep or lambs;
> 6. 55,000 turkeys;
> 7. 100,000 laying hens or broilers if the facility has continuous overflow watering;
> 8. 30,000 laying hens or broilers if the facility has a liquid manure system;
> 9. 5,000 ducks; or
> 10. 1,000 animal units; or
>
> (b)1. More than the following number and types of animals are confined:
>
> a. 300 slaughter or feeder cattle;
> b. 200 mature dairy cattle, whether milked or dry cows;
> c. 750 swine each weighing over twenty-five (25) kilograms (approximately fifty-five (55) pounds;
> d. 150 horses;
> e. 3,000 sheep or lambs;

f. 16,500 turkeys;
g. 30,000 laying hens or broilers if the facility has continuous overflow watering;
h. 9,000 laying hens or broilers if the facility has a liquid manure system;
i. 1,500 ducks; or
j. 300 animal units; and

2. Either pollutants are discharged into navigable waters through a manmade ditch, flushing system or other similar manmade device; or pollutants are discharged directly into waters of the Commonwealth which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

The Aanimal unit≅ standard is a comparison of waste produced by different animal species. See 401 KAR 5:002 ϶ 1(12) wherein a slaughter or feeder cow equals one animal unit; a mature dairy cow equals 1.4 animal units; a pig or hog over 55 pounds equals .4 animal unit; a sheep equals .1 animal unit; and a horse equals 2 animal units. Under 401 KAR 5:002 ϶ 1(58)(a), it takes 55 turkeys to equal one animal unit, 100 laying hens or broilers if the facility has continuous overflow watering, but only 30 laying hens or broilers if the facility has a liquid manure system. In farms like the appellants=, where the poultry is confined, an AFO becomes a CAFO, and therefore requires a KPDES permit, where the facility involves 100,000 or more laying hens or broilers if the facility has continuous overflow watering, and 30,000 or more laying hens or broilers if the facility has a

liquid manure system, or, depending on the type of discharge, the numbers may be less. 401 KAR 5:002 э 1(58)(a)&(b).

We can all agree that 23 chickens in a coop would be a traditional agricultural or farm use. Likewise, 23,000 chickens in a barn is more of a chicken factory or AFO. An AFO is not subject to city or county regulations because of the Right to Farm Act. An AFO is not subject to state regulation unless it becomes a CAFO. At some point a traditional farm becomes an AFO or chicken factory that should be subject to local regulation. Where is that point? I do not know; that is a decision for the General Assembly. However, I am unwilling to say a county should have no powers in this case. Under KRS 67.083 3(h), the conservation and preservation of natural resources, including soil, water, and air, are county functions. Regulations based on standards, but not mere blanket prohibitions, should be constitutional when it comes to farming operations. Five hundred chickens on 15 acres <u>may</u> <u>be</u> a legitimate health standard to preserve our soils, waters, and air. Under uniform standards though, a farmer with 15 acres should not have the same limitation on the number of animal units as a farmer with 2,000 acres.

The Clean Water Act has standards but only regulates water, not air and soil. The state KPDES permit system goes no further than the federal system and covers only CAFOs. I

believe the county should have jurisdiction to adopt regulations that begin after the number of animal units exceeds the traditional farm numbers contemplated in the Right To Farm Act. The county should be able to regulate AFOs such as the chicken factories in question. Unfortunately, the regulations adopted by the county presently contravene the Agricultural Supremacy Clause and the Right to Farm Act, hence, the ordinance must fail.

I would reverse and hope that the General Assembly would revise the definition in KRS 413.072(3) of farming operations to limit its application to traditional concepts of farming and allow regulation by the county of AFOs. If so amended, KRS 67.083(6) would allow the county to regulate not the traditional farms covered by the Right To Farm Act, but the AFOs or factories.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

John R. Tarter
Henderson, Kentucky

BRIEF FOR APPELLEES CUMBERLAND COUNTY FISCAL COURT:

Charles E. English, Jr.
Ryan C. Reed
Bowling Green, Kentucky

ORAL ARGUMENT FOR APPELLEES:

AMICUS CURIAE BRIEF FOR APPELLEES SIERRA CLUB and KENTUCKY RESOURCES COUNCIL, INC.:

W. Henry Graddy, IV
Midway, Kentucky