

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
February 19, 2009 Session

**COST ENTERPRISES, LLC v. CITY OF LEBANON, TENNESSEE**

**Appeal from the Chancery Court for Wilson County  
No. 06507 Jerry Scott, Judge**

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**No. M2008-00610-COA-R3-CV - Filed March 31, 2009**

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Developer sought approval for a planned unit development. The city planning commission approved the development, but the city council did not approve it due to water runoff issues. Developer appealed. The trial court reversed the city council's denial of the application, finding that the action was properly brought as a common law certiorari action and that the record contained no material evidence to support the city's decision. The city appealed. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Jennifer Orr Locklin, William Nelson Bates, and Phillip Andrew Wright, Nashville, Tennessee, for the appellant, City of Lebanon, Tennessee.

George Arthur Dean, Nashville, Tennessee, and Jere N. McCulloch, Lebanon, Tennessee, for the appellee, Cost Enterprises, LLC.

**OPINION**

Cost Enterprises, LLC ("Cost") desired to build a planned unit development ("PUD") known as Chestnut Ridge on 116 acres of land in Lebanon, Tennessee. Cost applied to the Lebanon Planning Commission, submitting all the documents required by city regulation. The commission held a hearing on February 28, 2006. After a presentation from a Cost representative, there were several questions about parking, sidewalks, and streets. Jim Dyer, a citizen who lived in the area beside the proposed development, expressed concerns about flooding. He stated that there were already water problems in the area since another subdivision had been built. The commission voted to recommend the PUD to the city council, with conditions,<sup>1</sup> for approval.

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<sup>1</sup>None of the conditions are relevant to this appeal.

Pursuant to city ordinance, the PUD master plan was submitted to the Lebanon City Council for approval. Ordinance 06-2876 contained the approval of the PUD. At the council meeting on March 21, 2006, Councilperson Kathy Warmath expressed concerns regarding storm water runoff from the development flowing into areas that already had flooding problems. The council deferred the first reading of the ordinance on her motion.

Ordinance 06-2876 was next considered by the city council on April 4, 2006. Councilperson Warmath indicated that Cost agreed to have an independent engineer assess Cost's storm water plans before beginning construction. She remained concerned, however, about the effect of several developments on storm water management in the area. She moved to defer the vote on Ordinance 06-2876 to allow time for a basin study to examine the storm water problem.<sup>2</sup> The motion was approved.

On May 16, 2006, the first reading of Ordinance 06-2876 was once again on the city council's agenda. The Regan Smith engineering firm had examined Cost's storm management plan and agreed with it. The firm also completed the basin study requested by the council at the April 4 meeting. Since the council members had not had an opportunity to examine the study, the ordinance was deferred to the July 18, 2006 city council meeting.

At the July 18, 2006 council meeting, an attorney for Cost withdrew the ordinance from the agenda on the belief that, due to the District Attorney's request that the council take no action, the matter would again be delayed.<sup>3</sup> Cost's attorney also noted the ordinance would be brought up at a later time and asked that it be reviewed on its merits.

In a letter dated November 15, 2006, a representative of Regan Smith wrote to Cost's engineer reiterating the conclusions from their May 2006 basin study that:

The correct engineering methods were used in performing this analysis.  
Good engineering judgment was used on the design assumptions in the report.  
If the detention ponds are constructed as designed, stormwater management for this project will exceed the requirements of the City of Lebanon.

The first reading of Ordinance 06-2876 was placed on the city council agenda for the November 21, 2006 meeting. Several citizens spoke about the development. Jim Dunn complained about flooding on his property on Blairmont Drive caused by the culvert under Cook Road being too small. He also complained of a buildup of silt and weeds in the creek by Blair Lane, "[t]hat's where

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<sup>2</sup>The vote on the ordinance was also delayed to obtain a pre-blast survey, to allow negotiations about the collector road and to examine the undermining of a road, but these issues are not involved in this appeal.

<sup>3</sup>The City's brief notes: "There was an underlying criminal investigation by the District Attorney's office surrounding the purchase of the land and its subsequent recommendation by the City's Planning Commission because a City employee also acted as Cost's real estate agent in the transaction for Cost's purchase of the subject property. That investigation has since been closed and no true bill was issued."

the water backs up.” Dunn felt like once something is built in this area of Blair Lane, “[t]hey’re going to back the water up again.” As to Cost’s development, he stated, “If they’re going to build a big project up there that’s going to bring more water down there on me, well, take care of me too and fix my situation and we’ll all be happy.” He added, “We just can’t go up there and build a couple of hundred houses and all of that mud and dirt and everything that’s going to be washed away while they’re building is going to be right in my yard and it’s going to be backed up in that culvert and we are going to get flooded, and that’s not right.”

Jim Dyer of Pocahontas Trail said that his backyard “looks like a river every time we have a hard rain.” He believed that the 36-inch culverts on the street were too small and that the area needed “a good comprehensive plan.” As to Cost’s development, he said, “And you know, if they put in a well run satisfactory development, they’ll have a good drainage plan with detention ponds and gate structures on them and so on. Otherwise, that water comes rolling off that hill.”

Darryl Bice of Blairwood Court maintained that, “Whatever they do in building, I’m not against that as long as it’s not going to hurt us downstream.” He also complained of debris and weeds in the creek that caused a backup.

Randall Henry of Cook Drive claimed that his flooding problems began when the Blairwood subdivision was built in 1998. He also argued that the railroad caused water backup and the flow of water under it needed to be increased. As to the development, he said: “think about what kind of roof top coverage you’ve got in streets and driveways. There’s going to be no place for water to go except it’s [sic] natural course and that’s downhill and everything below Bethlehem, you know, toward us is downhill. So that’s where it’s going to come.”

The next citizen to speak was Claude Maynard of Indian Hill Road. His home backed up on the development. He did not have the flooding troubles that others had experienced. His first concern was “whether or not anyone can engineer detention ponds to hold it to where the water can be released in a controlled environment.” Second, he noted that there was a marsh area behind his yard: “When they raised [sic] the elevation there to support a home then I hope they’re not thinking they’re going to turn the water over on me which is where it’s got to go. . . If any part of the runoff water in that area comes over on me then I would have a very, very, very serious problem.” He also complained that there was no buffer in the development’s plan so he did not have to look at the development.

Joe Maggart of Hiawatha was the last citizen to address the council. He was concerned that there were too many unknowns about what would happen as a result of the development.

Councilperson Warmath dominated the council’s discussion. She stated, “The water to me is the big number one concern.”<sup>4</sup> As the City notes in its brief, Warmath expressed doubts about the Regan Smith report since the firm relied on the information provided by Cost.<sup>5</sup> She complained that the city engineers had not seen the design for the water.<sup>6</sup> She also criticized the city standards: “Can we talk about in this plan it says we meet city standards? I hate to tell you the City standards are very minimum [sic], and they’re not really designed for these big hills.”

Councilperson Farmer confirmed that the property could be developed as a subdivision if not approved for a PUD. In a response to a question from Councilperson Barry, Public Works Director Baines said that, “in the current budget, we have already been planning to upgrade both Blair Lane and Cook Drive . . . So this should be bid sometime probably next year. . . I am concerned if I have enough money to do both of them.” He later added, “[t]hat does not address the railroad culvert.”

Director Baines summed up the situation as follows:

Where we have the problem is [or] may be a combination of downstream improvements about the culvert. I certainly believe the detention of a site like this helps the downstream people. If you hold water back upstream it helps people downstream. The question is getting everybody to get comfortable with that design criteria, et cetera. . . Engineering wise, it is like the guy says it is: a sound engineering design, but it’s not built yet. And everybody is uncomfortable with that project at this time.

The council then acted upon Councilperson Warmath’s “motion to deny it based on the facts we started out with from the very beginning until we can get comfortable with these guys that live here, the ones that are going to have to shovel out their garages and that would be my motion for this particular project.” Five members of the council voted to deny approval for the PUD, and one member abstained, so the ordinance was denied.

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<sup>4</sup> Although water was her “big number one concern,” Warmath also stated, “I even talked to people, key principles [sic] involved in this, and I said if you can come back and show us some density, address some density, we’ll talk about it. And today we’ve not done that. I’ve not been approached to do that.”

<sup>5</sup> The report to which Warmath and the City are referring is not clear. It is interesting to note that, as to Regan Smith’s examination of Cost’s water management plans, Regan Smith did exactly as the council minutes envisioned — the third party engineer “would review the plan for the water and either concur or not.” As for the basin study, the council minutes do not reflect how the study was to be done.

<sup>6</sup> The day before the council meeting, Warmath asked the city, “Did the original information submitted by the Chestnut developers have any water/drainage related information, designs or demonstrations?” A city representative responded by email: “The original (initial) submittal did not include drainage calculations, but the plan did show areas to be used for detention. The Engineering Department doesn’t require detailed drainage plans with a rezoning/PUD request. We require the detailed studies when the site plans or construction drawings are submitted.”

On December 18, 2006, Cost filed a Petition for Writ of Certiorari against the City of Lebanon alleging the City's decision to deny the PUD application was illegal, arbitrary and capricious. Oral arguments were heard on September 14, 2007 and an order issued on February 21, 2008. The trial court found that the action was properly brought as a common law certiorari action and that Cost's application was denied due to flooding and drainage issues. The trial court further found that the record contained no material evidence to support the City's decision and reversed the denial of the application.

The City of Lebanon appealed.

#### Standard of Review

This case was filed as a petition for a common law writ of certiorari, which is intended for review of administrative actions. Lebanon maintains that under its ordinances the decision whether to approve a PUD is a legislative decision, and therefore, the matter should be viewed as a declaratory judgment action. We must, therefore, examine the Lebanon documents and ordinances to determine whether the approval of a PUD is a legislative decision or an administrative decision.

The Planning Commission's Planned Unit Development Checklist expressly states: "The Planning Commission reviews the request and makes a recommendation to the City Council regarding the Master Development Plan. Approval of the Master Development Plan of Planned Unit Developments (PUD) is considered a rezoning and is therefore done by ordinance, approved by the City Council."

The Lebanon Municipal Code addresses PUDs in Chapter 8. Section 14-802 begins with the following language:

This chapter is intended to provide the means and guidelines through which tracts of land may be developed through an overall unified approach rather than the traditional lot-by-lot treatment. PUDs may be permitted in all zoning districts except the B-2 (Central Business) district.

The planning commission may consider, and the city council may adopt by ordinance, a PUD preliminary master plan satisfying the following criteria . . . .

The criteria include that (1) the PUD will not unduly injure the use, value or enjoyment of the surrounding property; (2) the PUD will have an approved water supply, wastewater disposal and storm water drainage; (3) the PUD will blend in with adjacent land uses; (4) the PUD will have screening; (5) the PUD will have landscaping; (6) any modifications of the zoning ordinance, sign ordinance and subdivision regulations are warranted and not inconsistent with the public interest; and (7) a homeowner association or other entity will be responsible for maintaining common areas.

Section 14-803(2) of the municipal code requires that:

An application shall be submitted to the planning commission, along with all documentation as required in these regulations. Any consideration of the preliminary master plan by city council shall be based upon a recommendation by the planning commission. Upon the planning commission making a recommendation, the city council will consider approval of the preliminary master plan by ordinance.

The remainder of Chapter 8 deals with permitted activities within the PUD, density, parking, building design, open space, landscaping, lighting and other details.

The City of Lebanon maintains that a declaratory judgment action is the only way to obtain judicial review of a municipal government's legislative decision not to amend a zoning ordinance. This is undoubtedly true for a typical rezoning matter. *See Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983). A PUD, however, is not a typical rezoning matter, as the Lebanon Municipal Code demonstrates. PUDs are permitted in all zoning districts except the B-2 (central business) district. Lebanon, Tenn. Mun. Code §14-802. In return for this flexibility and other benefits such as greater density, the developer of a residential PUD must comply with a panoply of standards and procedures not required of other projects. *See* Lebanon, Tenn. Mun. Code §§14-802 through 804. Thus, in Lebanon, the approval of a PUD involves the execution of an existing ordinance, not the making of new law. The exercise of such authority by the Lebanon City Council is properly characterized as administrative rather than legislative. *McCallen v. City of Memphis*, 786 S.W.2d 633,639 (Tenn. 1990) (quoting 8A Eugene McQuillin, *The Law of Municipal Corporations* § 25.217 (3d ed. 1986)). The council is just carrying out its own previously enacted legislative scheme.

Lebanon suggests that its previously enacted legislative scheme for PUD approval envisions continued legislative action. For example, the Planned Unit Development Checklist expressly states: "Approval of the Master Development Plan of Planned Unit Developments (PUD) is considered a rezoning and is therefore done by ordinance, approved by the City Council." What the city chooses to call the process is not determinative. It is the character of the action under review that is determinative. *Davis Group (MC), Inc. v. Metro. Gov't of Nashville & Davidson County*, 912 S.W.2d 178, 180 (Tenn. Ct. App. 1995).

The City further maintains that no section of the City's PUD ordinance states that the council must grant an application for a PUD so long as a list of conditions is met. In *McCallen*, however, the court stated that where a "zoning ordinance provides relief from zoning requirements designed for more conventional development only when a planned development meets the standards of the pre-existing ordinance," the criteria "are sufficient to require administrative adherence." *McCallen*, 786 S.W.2d at 639.

It is our opinion that the Lebanon City Council was acting in an administrative capacity when it denied Cost's application for a PUD. Consequently, the challenge to that action by writ of

certiorari is proper. Under the writ of certiorari, review of the action of the Lebanon City Council is limited to whether it exceeded its jurisdiction or acted illegally, arbitrarily or fraudulently. *Id.* at 638. This is not so different from the “fairly debatable, rational basis” standard applied to legislative acts. *Id.* at 641. Due to the similarity of standards of review, the Tennessee Supreme Court has held:

While this court recognizes the statutory, procedural distinction between common law certiorari and declaratory judgment, there is no sound logic to maintain different standards of substantive review. Whether the action by the local governmental body is legislative or administrative in nature, the court should refrain from substituting its judgment for the broad discretionary authority of the local governmental body. An invalidation of the action should take place only when the decision is clearly illegal, arbitrary, or capricious.

*Id.* at 641-42. Therefore, we must examine the Lebanon City Council’s decision to deny the application for the PUD to determine whether the decision is clearly illegal, arbitrary, or capricious.

#### Analysis

Under the Lebanon Municipal Code, “Any consideration of the preliminary master plan by [the] city council shall be based upon a recommendation by the planning commission.” Lebanon Mun. Code §14-803(2). The planning commission voted to recommend the PUD to the city council, with several conditions. The city admits that “none of the conditions dealt with the storm water concerns.”

An examination of the council’s discussion confirms the trial court’s determination that, “Clearly, the City Council denied the application based on the flooding and drainage issues.” The issue of drainage dominated the council’s discussion. Councilperson Warmath’s motion to deny the application was based on the drainage/flooding issue.

A decision is considered arbitrary when there is no evidence in the record to support it. *Lafferty v. City of Winchester*, 46 S.W.3d 752, 759 (Tenn. Ct. App. 2000). The City concedes that that fears of members of the community alone, in the absence of material evidence, will not support the denial of the application for approval of a PUD. *See Sexton v. Anderson County*, 587 S.W.2d 663, 666 (Tenn. Ct. App. 1979).

The City maintains that material evidence exists to support the decision. First, the city states that the independent engineering firm confirmed that water runoff problems exist. While the engineering firm noted that runoff problems exist now, a fact corroborated by the testimony of several local residents, that recognition is not evidence that the development would make the runoff worse.

Second, the City maintains that Cost's expert could not state that the problems would not become worse when the PUD was developed. The testimony to which the City refers occurred at the March 21, 2006 council meeting:

MS. WARMATH: Do you think they're [Cost] going to be in a position to give assurances for the backyards of the folks that actually inhabit the new water?

UNIDENTIFIED:<sup>7</sup> That's a difficult question to answer. They may be willing. I would advise them not to simply because we will design it to the best of our ability within, you know, the guidelines of good engineering practice. Unfortunately, you have some existing homes whose finished floors are probably too low, who have basements that are too low. You have a downstream system that is probably inadequate given the right event. To make an assurance that we're going to make it better, it's hard to quantify after the fact how much better did we do. I have no problem making the assurance that the calculations and the design my firm presents to the city will meet or exceed the city standards, but to say that -- to give a general statement to say it's going to be better, it's hard to quantify how much better and it's impossible to prove it.

MS. WARMATH: Well, how about this statement to be able to say that you're not going to make it worse. Is that more quantifiable?

UNIDENTIFIED: Yes, we will design it within the guidelines of good engineering practice. We will meet or exceed the city standards. Making it worse again is sort of a subjective measure and it's hard to say -- you know, I've been around long enough and I've sat and worked with these gentlemen long enough to know that regardless of what we do, there will be someone who will call, probably shortly after the ground is broken, to say it's never been this bad, and I wouldn't argue with them.

Reading this testimony as a whole, we understand Wrye to be saying that "better" and "worse" are subjective terms, so that it is hard to argue with someone either way. This testimony does not constitute material evidence that supports a denial of the application for the PUD.

The trial court noted that the Regan Smith study "states that the Chestnut Ridge PUD will reduce the drainage rate of water into the surrounding area. Specifically, the report states that ponds included in the Chestnut Ridge PUD design 'will reduce runoff to the main channel from the south to rates that are less than pre-development flows.'" The City argues that the trial court ignored the portions of the Regan Smith report that called for additional examination into the sink hole, channels, culverts, and 100-year storm event. In our opinion, the trial court did not mention this because it was not relevant. If the flow is "less than pre-development flows," the effect of the PUD

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<sup>7</sup>The City indicates in its brief that this unidentified person is Cost's engineer, Mark Wrye.

can be nothing but beneficial to the downstream landowners. It appears that the report called for these additional examinations because of flooding events that have already taken place downstream.

After a thorough examination of the record, we are convinced that the trial court was correct in its determination that there was no material evidence to support the Lebanon City Council's decision.

One more point is deserving of note. It appears from the record that the city council may have held Cost's PUD to some undefined, undisclosed and unanticipated standard. Councilperson Warmath stated at the November 21, 2006 meeting, "Can we talk about in this plan it says we meet city standards? I hate to tell you the City standards are very minimum [sic], and they're not really designed for these big hills." The Lebanon City Council must apply the PUD standards that it has enacted in its ordinances. Applying some other undefined, undisclosed and unanticipated standard would make the council's decision regarding the PUD illegal, arbitrary and, perhaps, fraudulent. *See Harding Acad. v. Metro. Gov't of Nashville & Davidson County*, 222 S.W.3d 359, 363 (Tenn. 2007) ("In proceedings involving a common law writ of certiorari, illegal, arbitrary, or fraudulent actions include: . . . the misrepresentation or misapplication of legal standards . . .")

#### Conclusion

The decision of the trial court is affirmed. Costs of appeal are assessed against the appellant, the City of Lebanon.

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ANDY D. BENNETT, JUDGE