STATE OF TENNESSEE, EX REL FIRST AMERICAN NATIONAL BANK and DOUBLE M PARTNERS,	)	
Plaintiff/Appellant,	)	Williamson Chancery No. 22642
Vs.	)	Appeal No. 01-A-01-9408-CH-00394
CITY OF FRANKLIN MUNICIPAL PLANNING COMMISSION,	)	
Defendant/Appellee.	)	

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF WILLIAMSON COUNTY

AT FRANKLIN, TENNESSEE

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AFFIRMED AND REMANDED

LEE RUSSELL, SPECIAL JUDGE

CONCUR:
HENRY F. TODD, PRESIDING JUDGE
SAMUEL L. LEWIS, JUDGE

STATE OF TENNESSEE, EX REL)

FIRST AMERICAN NATIONAL BANK and DOUBLE M PARTNERS,	)	
Plaintiff/Appellant,	)	
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O P I N I O N

This is an appeal taken from the trial court's refusal to issue a writ of mandamus to the Appellee City of Franklin Municipal Planning Commission ("FMPC") to conduct a hearing and rule on the application of the Appellants-Relators First American National Bank ("First American") and Double M Partners ("Double M") for issuance of a site permit to build a convenience storage facility at an intersection in Franklin, Tennessee, and dismissing the complaint for mandamus and for declaration that City of Franklin zoning ordinance 94-16 was invalid. The trial court is upheld in its conclusion that the Relators had no vested interest in the continuity of zoning and that the FMPC acted lawfully in twice deferring action on the Relators' site plan while a new zoning ordinance was being passed which rendered the site plan out of compliance with zoning. The trial court is affirmed in its ruling that a writ of mandamus should not have been issued in this case.

On April 17, 1991, the City of Franklin enacted a comprehensive amendment to its Zoning Ordinance, rezoning extensive areas and setting forth detailed schedules of permitted uses within each of the zones created. Under this new ordinance, the site which is the subject of this litigation, located in Aspen Grove Subdivision at the intersection of Cool Springs Boulevard and Mark Hatcher Parkway, was zoned General Commercial ("GC"). It is undisputed that this zone initially permitted "convenience storage" as a use. In December of 1993, Appellant Double M, a partnership, contracted with Appellant First American to purchase the subject real estate to construct a convenience storage facility. Double M retained Anderson-Delk & Associates ("Anderson-Delk"), a civil engineering firm, to prepare and submit a site plan to the City of Franklin for the proposed project.

In the fall of 1993, Franklin Mayor Jerry W. Sharber and several of Franklin's aldermen and FMPC commissioners became concerned about the need to control more strictly the development of the so called "gateways" or undeveloped corridors into Franklin. Cool Springs Boulevard in Aspen Grove is one such gateway. In November of 1993, Mayor Sharber and Alderman Steve Smith ("Smith"), who also serves as a commissioner on the FMPC, discussed concerns about the development of the Cool Springs Boulevard corridor. In November and December of 1993, Smith had multiple discussions with the Mayor and other City and FMPC officials about the need to review the zoning in the Cool Springs area. During the same period, Smith became aware of and concerned about the possibility of the convenience storage project at the subject site. In December of 1993, Smith requested that FMPC Chairman Tom Miller ("Miller") convene a uses study committee of the FMPC ("Uses Committee") to study generally the uses and restrictions in the GC zone.

On January 5, 1994, Harold Delk ("Delk") of Anderson-Delk met with the staff of the FMPC for a pre-application conference which was preliminary to submission of a site plan for the convenience storage project. Approval of a site plan by FMPC was required prior to issuance of a building permit. FMPC staff members may have expressed some minor reservations about the site at the meeting. On January 6, 1994, while discussing unrelated projects, Miller and Smith made reference to upcoming meetings scheduled for January 18, 1994, and February 8, 1994, at which the FMPC would discuss generally uses permitted in the various zoning districts.

At the January 18, 1994, meeting of the FMPC, the agency appointed the three-member Uses Committee to review uses permitted in the various zoning districts and to make recommendations to the full FMPC. On February 8, 1994, Double M submitted its site plan for review by the FMPC staff, and the site plan was placed on the agenda of the March 15, 1994, meeting of the FMPC. After February 8 but before the scheduled March meeting of the FMPC, Delk became aware of the Uses Committee and of concerns about the Double M project, and he advised Doyle Monday ("Monday"), a partner in Double M, about the creation of the Uses Committee.

Neither Delk nor Monday went to the FMPC staff or to FMPC members about the Uses Committee's purpose. However, on the recommendation of the other partner in Anderson-Delk, Monday contacted a private citizen, the head of Franklin's Heritage Foundation. This contact was made at least two weeks before the March 15, 1994, meeting of the FMPC. Delk recognized the apparent connection between the creation of the Uses Committee and the Double M project. Monday testified that only on March 15, before the scheduled meeting, did he learn from a letter by the head of the Heritage Foundation that Franklin was considering a zoning change that might affect the Double M project.

At the FMPC meeting on March 15, 1994, the Double M project was on the agenda, and it is undisputed that the site plan met the then existing zoning requirements. On Miller's recommendation, action on the site plan was deferred until April 26, 1994, and action was also deferred on the site plan for a mini-storage facility in the Woodlands Subdivision. The reason given for deferring action was to await receipt of the recommendations of the Uses Committee on the GC district. On March 17,1994, the Uses Committee met for the first and only time and recommended that a draft of what would become Ordinance 94-16 be presented to the FMPC at its April meeting and that it be passed by the Board of Mayor and Aldermen.

Ordinance 94-16 amended the earlier zoning ordinance to delete or further restrict several permitted uses in the GC zone. Convenience storage use was not the only use amended. The ordinance did not eliminate convenience storage as a use, but merely precluded this particular use within five hundred feet of a major arterial roadway. The Double M site plan would not meet this new restriction. On April 12, 1994, Ordinance 94-16 passed a first reading before the Franklin Board of Mayor and Aldermen. Then on April 26, 1994, the FMPC again met and had on the agenda the Double M site plan. Action on the Double M site plan was deferred for an additional sixty days because of the pendency of Ordinance 94-16. At the same meeting, the Woodlands Subdivision mini-storage facility was approved because it was more than five hundred feet from an arterial street. The FMPC also voted to refer to the Uses Committee the issue of whether gateway zoning should be adopted in order to impose additional restrictions on main entryways into Franklin.

On May 16, 1994, the Mayor and Board of Aldermen passed Ordinance 94-16 on second reading, and on May 31, 1994, the ordinance was passed on third reading. In the meantime, on April 27, 1994, this mandamus action had been filed by First American in the Chancery Court of Williamson County to force the FMPC to act on the site plan. Double M intervened on June 14, 1994, and the trial began on June 15, 1994. At no time subsequent to April 26, 1994, was the site plan presented to the FMPC, either in its original form or in a form altered to meet the additional restrictions of Ordinance 94-16. The FMPC therefore has never acted on the site plan.

The reasons given at trial by FMPC commissioners for enactment of Ordinance 94-16 varied somewhat, but generally fell into two categories. First, there were purely aesthetic concerns, and second, it was believed that there was an inconsistency between convenience storage and other general commercial uses. Double M put on testimony that it expended between $55,000.00 and $70,000.00 in designing the proposed project and site plan. Engineering drawings cost $12,000.00 and showed the building on the site and the location of the infrastructure, but were not what is generally considered construction drawings for the building as such. Monday also made claims for his time spent on the project, billed at his rate as an expert real estate appraiser, and for his legal fees and the costs of drawings used at trial but not used before the FMPC. No actual construction ever commenced.

The trial court ruled that the Relators had no vested right to the benefit of the zoning ordinance in effect on March 15, 1994, and on April 26, 1994. The trial court also held that as of March 15, 1994, the Relators "had such knowledge of the ongoing study of the Uses Committee as to constitute pending legislation." It was ruled that deferral was "the best choice" by the FMPC on April 15, 1994, because subsequent final approval of Ordinance 94-16 would have allowed retroactive disallowance of the plan site and building permit. The trial court expressly ruled that Ordinance 94-16 was constitutionally valid.

The Relators urge that the ruling of the trial court should be reversed for three reasons. First, the Relators insist that it was error for the trial court not to address the issue of whether the FMPC's initial deferral of action on March 15, 1994, on the site plan was arbitrary, unreasonable,

or wrongful. Second, the Relators contend that the trial court erred in ruling that Ordinance 94-16 was "pending legislation" on March 15, 1994. Third, the Relators argue that the trial court erred in failing to consider their argument that they had detrimentally relied on the prior existing zoning in Franklin and had relied on the representations of the FMPC.

The trial court's findings of fact in this case are to be reviewed *de novo* with a presumption of correctness unless the preponderance of the evidence is to the contrary. Where the issue is one of law because the facts are not in dispute, there is no presumption in favor of the trial court's conclusions. *See* Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993). In this case, the Relators do not challenge any of the numerous specific findings of fact made by the trial court, which findings are essentially those set out hereinabove. The Relators challenge what they insist the trial court failed to find, and they challenge the legal conclusions reached by the trial court.

The general rule is well established and is agreed by all parties here to be that there is no "vested right" to continuity of zoning or in the issuance of a building permit or approval of a site plan based on prior zoning unless actual construction has commenced. *State ex rel. SCA Chemical Waste Services, Inc. v. Komigsberg,* 636 S.W.2d 430 (Tenn. 1982); *Schmieder v. Lazarov,* 390 S.W.2d 197 (Tenn. 1965); *Howe Realty Co. v. City of Nashville,* 141 S.W.2d 904 (Tenn. 1940). In the case now pending no construction had commenced There existed no state statute and no procedural rule of the FMPC and no ordinance of the Board of Mayor and Aldermen of Franklin that required the FMPC to act within a specified period of time on a given site plan. No caselaw is cited that supports the proposition that an applicant has an absolute right to have a site plan voted on the first time it is placed on the agenda of the regulatory body.

Although the trial court did not expressly rule that the deferral on March 15, 1994, was not arbitrary, unreasonable, or wrongful, it is clear from the record that the initial decision to defer was none of these things. The delay from the initial application on February 8, 1994, to the March 15, 1994, hearing was approximately a month and a week, and the first deferral was

only an additional thirty days. The reason for the deferral was that concerns had arisen in 1993 about convenience storage and other uses in this and other gateways into Franklin. These concerns were similar to those with which municipal planning commissioners normally involve themselves and concerns in response to which such commissioners normally make recommendations concerning needed legislation by the primary governing bodies of the municipalities. There is no hint in the record that the FMPC or anyone involved in Franklin government had or acted upon any animosity toward the Relators or that anyone in Franklin government had any agenda except the preservation and promotion of the orderly and aesthetically pleasing development of Franklin. The initial deferral was not arbitrary, unreasonable, or wrongful.

By the time of the second deferral of action by the FMPC on April 26, 1994, Ordinance 94-16 was pending. The Uses Committee had met and recommended the ordinance, and the FMPC staff had communicated the recommendation over a month earlier. The FMPC could on April 26, 1994, have refused to approve the site plan on the basis of it being contrary to the pending and later enacted Ordinance 94-16. *See SCA Chemical* at 436. It is clear in the record that the second deferral was not arbitrary, unreasonable, or wrongful, but was intended to allow the Board to make a final determination on a pending ordinance.

The *SCA Chemical* case is instructive. In that case, a chemical company applied for a clean air permit from the Shelby County Health Department on September 4, 1990, as part of the process of building a waste disposal facility in Memphis. Over a month later, on October 6, 1980, the governing bodies of Memphis and Shelby County jointly passed a comprehensive new zoning scheme which, among other things, added restrictions to waste processing. The new zoning had an effective date of January 1, 1981. On October 9, 1980, SCA Chemical applied for a grading permit to begin the process of constructing its new facility. The Chief Building Officer of Shelby County did not act on the application. On October 22, 1980, the Board of Shelby County passed a resolution which directed all county agencies not to issue permits to SCA Chemical until January 15, 1981, and then to require SCA Chemical to meet all standards

in effect on January 15, 1981. The resolution was directed at SCA Chemical by name and

applied to no other entity.

On October 27, 1980, SCA Chemical went into court seeking a mandamus to force the Shelby County Health Department to issue the clean air permit. On November 3, 1980, Shelby County amended its resolution of October 22, 1980, to make it apply to any proposed plant for hazardous waste treatment. The trial court ruled that the County Board of Commissioners had not acted arbitrarily, capriciously, illegally, unlawfully, or beyond its jurisdiction in adopting the resolutions of October 22, 1980, and November 3, 1980, and that therefore the Health Department was under no obligations to issue the permit. After the trial but not until January 15, 1981, over four months following the initial application, the clean air permit was issued.

Our Supreme Court observed that ordinances of the type passed by Memphis and Shelby County are called "stopgap" or "interim" ordinances and that their "function and purpose is to preserve temporarily the status quo of the municipality or section thereof to which they apply until a pending permanent zoning regulation [can] be finally adopted." *Id.* at 434. The Supreme Court goes on to explain that "because it takes much time to work out the details of a comprehensive zoning plan and it would be destructive of the plan if, during the period of its incubation and consideration, persons seeking to evade its operation should be permitted to enter upon a course of construction that would progress so far as to defeat, in whole or in part, the ultimate execution of the plan." *Id.* at 435 *citing with approval Miller v. Board of Public Works*, 195 Cal. 777, 234 P. 381 (1925).

The facts in *SCA Chemical* are somewhat different from those in the case now pending. In *SCA Chemical*, the agencies initially deferred action themselves but it was the chief legislative body of the county that ultimately stalled action by its agencies, whereas the FMPC in the case now pending decided itself to defer action twice. This appears to be a distinction without a difference. The facts are actually stronger in *SCA Chemical* than in the pending case for the proposition that the target of the zoning changes was a particular company and a particular project, as the initial stopgap resolution in *SCA Chemical* specified a company and a project. In the case now pending, while it is conceded by the FMPC that the proposed convenience storage project was an impetus for the passage of Ordinance 94-16, the concerns of the FMPC and of the

City of Franklin were broader and involved more generally development of the gateways into the city. It is noted that in *SCA Chemical,* a clean air permit was sought before passage of the new zoning and before passage of a stopgap ordinance, similar to the situation in the case now pending.

Ordinance 94-16 was never actually applied by the FMPC to deny approval of the Relators' site plan, but the constitutionality of the ordinance is challenged in a less than vigorous manner by the Relators. It is well established that legislative classification in a zoning law, ordinance, or resolution is valid if any possible reason can be conceived to justify it. *SCA Chemical* at 437; *Davidson County v. Rogers,* 184 Tenn. 327, 198 S.W.2d 812 (1947). It is clear in the record that there are legitimate aesthetic concerns to be considered in the placement of convenience storage facilities, and there is possible conflict between convenience storage operations and other general commercial uses. It was reasonable for the City of Franklin to deal specifically and particularly with convenience storage operations. Courts should not substitute their judgment for that of local government officials on the appropriateness of legislation and should not invalidate an ordinance unless it is illegal, arbitrary or capricious. *See Whitemore v. Brentwood Planning Commission,* 835 S.W.2d 11 (Tenn. App. 1992).

The final issue raised by the Relators is whether the trial court erred in failing to conclude that the Relators relied to their detriment on the then existing zoning scheme and spent sums for construction or would have spent sums for construction had they been allowed to do so. Rights under an existing ordinance do not vest until "substantial construction or substantial liabilities are incurred relating directly to construction." *SCA Chemical,* 636 S.W.2d at 437. The expenditures by the Relators were not for construction but were for pre-construction planning, for legal fees, and for art work associated with the litigation. Substantial expenses were for the time spent by Monday on the project, which was certainly not for construction and is a questionable expense item because it is not out of pocket and is valued as if it were expert appraisal work, which it was not. The Relators assert that they would have expended additional sums but for the refusal of the FMPC to approve their site plan, but under Tennessee caselaw, estoppel results from expenditures that were made and not from expenditures being thwarted. Construction had not commenced and therefore the doctrine of estoppel should

not be applied here.

The initial deferral of action on the Relators' site plan was within the FMPC's discretion and was in all respects reasonable and lawful, regardless of whether Ordinance 94-16 was actually pending at the time. The Relators had no vested right to continuation of the previously existing zoning scheme, given the fact that construction had not commenced. By the time of the second deferral of action by the FMPC, on April 26, 1994, Ordinance 94-16 was actually pending, and the FMPC had that additional basis for deferring action on the Relators' site plan. There was nothing unlawful, wrongful, unreasonable, or discriminatory about the second deferral. Based on the record in the case, the FMPC acted entirely for the benefit of their community and not from any other motive. The new zoning law was passed within a reasonable period of time, and the new ordinance was constitutional. The trial court is therefore affirmed in its refusal to issue a writ of mandamus and dismissal of the complaint for mandamus on declaration of invalidity of the city ordinance.

AFFIRMED AND REMANDED.

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LEE RUSSELL, SPECIAL JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE

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SAMUEL L. LEWIS, JUDGE