IN THE COURT OF APPEALS OF TENNESSEE

WESTLAND WEST COMMUNITY ASSOCIATION, BRIAN JOHN BAXTER, GEORGE HANNYE, JAMES JOSEPH NEUTENS, MARY IRENE NEUTENS, NED RUSSELL, AUGUST DENNIG,	)	C/A NO. 03A01-9511-CH-00399
	)	KNOX COUNTY CHANCERY COURT
Plaintiffs-Appellees,	)	
	)	
	)	HONORABLE SHARON BELL,
	)	CHANCELLOR
v.	)	
	)	
	)	
	)	
	)	
KNOX COUNTY, COMMISSION OF KNOX COUNTY, THOMAS M SCHRIVER, JIMMY S. DOSS, MAURICE W HILL,	)	
	)	REVERSED
	)	COMPLAINT DISMISSED
Defendants-Appellants.	)	REMANDED

COURTNEY N. PEARRE of BAKER, DONELSON, BEARMAN & CALDWELL, Knoxville, for Appellants THOMAS M SCHRIVER, JIMMY S. DOSS, and MAURICE W HILL

MICHAEL W MOYERS, Senior Deputy Law Director of the KNOX COUNTY LAW DEPARTMENT, Knoxville, for Appellants KNOX COUNTY and COMMISSION OF KNOX COUNTY

G. W MORTON, JR., of MORTON & MORTON, Knoxville, for Appellees

OPINION

Susano, J.

This case involves the rezoning of some 16.8 acres of property located in the northwest quadrant of the intersection of Pellissippi Parkway and Westland Drive in Knox County. The Commission of Knox County (County Commission), the legislative branch of the government of Knox County, rezoned the subject tract from Agricultural (A) to Planned Commercial (PC). In response to a complaint filed by a neighborhood association and residents of surrounding neighborhoods, the Chancellor, following a non-jury hearing, held that the parties who sought the rezoning had failed to comply with T.C.A. § 13-7-105[1]. She concluded that the rezoning was "void and of no effect." Knox County, the County Commission, and the parties seeking to rezone the subject property, appeal, contending that the Chancellor erred, as a matter of law, in voiding the County Commission's decision to rezone the property. The plaintiffs, on the other hand, urge us to sustain the Chancellor's action on the T.C.A. § 13-7-105 issue. In the alternative, they argue that the action of the County Commission should be nullified because that body was not authorized to act, as it admittedly did, "by a single vote

[1]T.C.A. § 13-7-105 provides, in pertinent part, as follows:

> (a) The county legislative body may from time to time amend the number, shape, boundary, area or any regulation of or within any district or districts or any other provision of any zoning ordinance; but any such amendment shall not be made or become effective unless the same be first submitted for approval, disapproval or suggestions to the regional planning commission of the region in which the territory covered by the ordinance is located, and, if such regional planning commission disapproves within thirty (30) days after such submission, such amendment shall require the favorable vote of a majority of the entire membership of the county legislative body.

passage of a resolution rather than passage on two votes of an ordinance."

I

The relevant facts are not in dispute. On February 2, 1994, the appellant Thomas M. Schriver[2] filed a rezoning application[3] with the Knoxville-Knox County Metropolitan Planning Commission (MPC)[4] seeking to rezone the subject tract from A to Shopping Center (SC). On March 10, 1994, the MPC denied the requested change by a vote of 8-0. On April 11, 1994, Schriver appealed the MPC's decision to the County Commission.

The County Commission considered Schriver's application at a hearing on May 23, 1994. At that hearing, Schriver's representative orally asked the County Commission to rezone the property to PC rather than SC. By a vote of 12-7, the County Commission rezoned Schriver's property from A to PC.

The Chancellor held that when Schriver changed his request from SC to PC, he was required to resubmit his rezoning

[2]The other individual defendants in this case, Jimmy S. Doss and Maurice W. Hill, are reflected on the rezoning application as the holders of an option to purchase the subject property.

[3]The application also sought to rezone other property in the area of the Pellissippi Parkway-Westland Drive interchange. Those rezoning requests are not at issue on this appeal.

[4]The MPC is the regional planning commission for Knox County.

request to MPC, citing T.C.A. § 13-7-105. In so holding, the Chancellor observed:

> This Court cannot believe that the only test is whether the MPC recommendation would be the same, but believes the question at this stage should also be whether the decision of the County Commission might be affected, based on different information or suggestions afforded it.
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> Since the County Commission is not bound by the findings of the MPC, the Court can only surmise that it is not only the decision of the MPC, but also the rationale of the MPC, that is important.
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> The rationale of the MPC, when confronted with an application for Planned Commercial as approved [sic] to Shopping Center, cannot be presumed to be the same.

We disagree with the Chancellor's reasoning.

II

Our review is *de novo*. Rule 13(d), T.R.A.P. Since the facts are not in dispute, we are presented with a pure question of law. Therefore, the record of the proceedings below comes to us without a presumption of correctness. ***Presley v. Bennett***, 860 S.W.2d 857, 859-60 (Tenn. 1993); ***Union Carbide Corporation v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993).

A county legislative body is "vested with broad powers to enact and to amend zoning regulations governing the use of

land." ***Fallin v. Knox County Board of Commissioners***, 656 S.W.2d 338, 342 (Tenn. 1983). A zoning decision by such a body is valid "'if any possible reason can be conceived to justify it.'" *Id.* quoting from ***State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg, Tennessee***, 636 S.W.2d 430, 437 (Tenn. 1982). However, this limited scope of review presupposes that the legislative body has acted "under its delegated police powers." ***Fallin***, 656 S.W.2d at 342. *See also* ***McCallen v. City of Memphis***, 786 S.W.2d 633 (Tenn. 1990) differentiating between "substantive as opposed to procedural issues." *Id.* at 640.

The issue in this case is not whether "any possible reason can be conceived to justify" the rezoning in this case, ***Fallin*** at 342; but rather whether the rezoning application was pursued in compliance with T.C.A. § 13-7-105. That statute requires that before any amendment to a zoning ordinance is "made or become[s] effective," it must "first [be] submitted for approval, disapproval or suggestions to the regional planning commission,"--in this case, the MPC. This requirement has been held by us to be mandatory. ***State ex rel. Browning-Ferris Industries of Tennessee, Inc. v. Board of Commissioners of Knox County***, 806 S.W.2d 181, 188 (Tenn. App. 1990). The Supreme Court has reached the same conclusion with respect to a statute with similar language and identical import. ***Holdredge v. City of Cleveland***, 402 S.W.2d 709, 712-13 (Tenn. 1966).

In the instant case, Schriver first submitted his rezoning request to the MPC as required by T.C.A. § 13-7-105; however, at the time the application was filed with that body and at the time it was considered by MPC, the requested rezoning was to SC. By the time the matter reached the County Commission, the request had been changed to seek a rezoning to another commercial zone, i.e., PC. The question then is squarely presented: did the change from SC to PC require that the application be resubmitted to the MPC before County Commission could act upon it? Both sides find the answer to that question in the case of ***Wilgus v. City of Murfreesboro***, 532 S.W.2d 50 (Tenn. App. 1975) (Drowota, J.) It is to that case that we now turn for guidance.

In ***Wilgus***, the Middle Section of this court construed a statute (now codified at T.C.A. § 13-7-204[5]) similar to T.C.A. § 13-7-105. The regional planning commission in that case recommended a zoning change to permit a shopping center. The Murfreesboro City Council approved the change but modified it to require that a portion of the property be removed from the description of the rezoned tract. The property owner had agreed to plant trees in the removed "buffer zone" to shield adjacent residential property from the shopping center.

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[5]T.C.A. § 13-7-204 provides as follows:

> The zoning ordinance, including the maps, may from time to time be amended; but no amendment shall become effective unless it is first submitted to and approved by the planning commission or, if disapproved, receives the favorable vote of a majority of the entire membership of the chief legislative body.

The court in ***Wilgus*** held that the change undertaken by the City Council did not require that the rezoning application be resubmitted, despite the language of T.C.A. § 13-7-204 providing that "*no* amendment shall become effective unless it is first submitted to and approved by the planning commission or, if disapproved, receives the favorable vote of a majority of the entire membership of the chief legislative body." (Emphasis added). In addressing the type of zoning applications that had to be resubmitted, the court in ***Wilgus*** opined as follows:

> If a proposed zoning ordinance is amended so substantially that a new proposal is, in effect, created we think it clear that . . . the state statute . . . require[s] it to be submitted to the planning commission for its consideration before the municipal legislative body may finally act upon it. To hold otherwise would defeat the clear intent of the statutory requirement that the legislative body have available, before it acts, the recommendations of the commission. . . .
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> The purpose of requiring submission to the planning commission is to give the legislative body the advantage of the commission's expertise on land use planning with respect to the proposal that it must either adopt or reject. A revision in a proposed zoning ordinance that would not, under ***Mitchell***[6], create a new bill mandating passage for the requisite number of days under an applicable charter or statute, might nevertheless be so important as to require resubmission of the proposal to the commission. The test is whether the revision is so substantial as to create a strong probability that the commission's recommendation would have been affected by

[6]***Metropolitan Government of Nashville and Davidson County v. Mitchell, et al.***, an unreported opinion of the Court of Appeals, Middle Section, at Nashville, filed August 30, 1974.

> the revision. If the change is both inconsequential and produces no detrimental effects to those who would oppose it, then the revised proposal is not required to be resubmitted.
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> The lawmaking powers of the municipality being vested in its governing body, there is no requirement that it abide by the commission's suggestions. It is required, however, that it have before it those suggestions when it acts.

Wilgus, 532 S.W.2d at 53-54.

It is true that the rezoning approved by the County Commission was different from that presented to MPC. For example, Planned Commercial permits extensive commercial services and light distribution centers; the Shopping Center zone is limited to retail uses. The latter zone limits the height of buildings to three stories; under Planned Commercial, they may exceed four or more stories. However, it is clear that *both* zones are commercial in nature. About this, there can be no doubt.

When Schriver asked that his property be rezoned to Shopping Center, the staff of the MPC recommended that the request be denied. Significantly, it did so in a way that clearly reflected its opinion that *any commercial zone*, be it Shopping Center, Planned Commercial, or some other commercial zone, was contrary to the general zoning plan that had earlier been adopted by the County Commission for the area in which the

subject property was located. This can be gleaned from the report of the MPC staff to the MPC regarding Schriver's application:

> This property is within the study area examined as part of the Pellissippi Parkway Extension Corridor Study (9/88). This study, which amended the Southwest Knox County Sector Plan, proposed that low density residential (1 to 5 du/ac [dwelling units per acre]) be developed around the Pellissippi Parkway/Westland Dr. interchange. . .
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> * * *
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> Shopping Center zoning is proposed for Tract 1. The study stipulated that commercial uses at Westland Dr. should only be considered as part of the provision of the PR [Planned Residential] zone which permits one acre of commercial development for every 100 units of residential use. Such commercial use should also be integrated in the overall plan for the residential development and must be approved as part of a development plan. A shopping center developed on Tract 1 as proposed by the developer could generate as many as 8,967 trips per day. Added to the 1,669 trips which could be generated from medium density development on Tract 2, and over 1,300 trips from a related rezoning (3-L-94-RZ), this commercial traffic would further burden the traffic system near the interchange.
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> STAFF RECOMMENDATION: DENY. The requests for Shopping Center and Planned Residential zoning at 1 to 10 units per acre are clearly contradictory to the adopted Sector Plan. The plan proposes PR at 5 units per acre and prohibits commercial development except as approved under a PR development plan.

Based on the staff's *broad* determination that *any* commercial zone would be contrary to the Southwest Knox County Sector Plan, the

MPC voted to disapprove Schriver's commercial rezoning request. The motion adopted by that body was "to approve the staff recommendation,"-- the one that had said any commercial zone was objectionable.

While the zone approved by the County Commission was different from that addressed by the MPC, the rationale of that body--that a commercial zone violated the Southwest Knox County Sector Plan--applies with equal force to the request acted upon by the County Commission. In effect, the request ultimately addressed by the County Commission was answered by MPC's broad response to the earlier request. That response can be paraphrased as follows: "We will not approve a commercial zone in the area of the Pellissippi Parkway--Westland Drive interchange because such a zone is contrary to the Southwest Knox County Sector Plan." ***Wilgus*** teaches that only those revisions that are "so substantial as to create a strong probability that the [regional planning] commission's recommendation would have been affected by the revision," must be resubmitted. Here, it is clear, beyond any doubt, that upon resubmission the MPC would have responded exactly as it did on the SC request. Nothing had changed. A commercial zone in the area continued to be contrary to the Southwest Knox County Sector Plan. It can be argued, as the appellees do, that the PC zone is even more commercial, and hence more objectionable as far as the Sector Plan is concerned. There was no reason to go back to the MPC. The change was not so

substantial, *as that concept is defined in* ***Wilgus***, as to expect that the MPC's recommendation would be affected by it.

It is true that ***Wilgus*** discusses whether resubmission is necessary if the change made by the legislative body is both "inconsequential" and without a "detrimental effect[] to those who would oppose it." It is also true that the change here is arguably consequential and more onerous to the surrounding residential neighborhoods; but the reason the court in ***Wilgus*** emphasized the "inconsequential" nature of the rezoning was because the change in that case was clearly insignificant. ***Wilgus*** does not stand for the converse of its "inconsequential" pronouncement. It cannot be interpreted to mean that every significant change must be resubmitted to the regional planning commission. The more important aspect of ***Wilgus*** is the "test" as stated by the court--is there "a strong probability that the [regional planning] commission's recommendation would have been affected by the revision." The answer in this case is clearly "no." MPC would have opposed PC for the same reason it opposed SC--such a zone was contrary to the Southwest Knox County Sector Plan. Resubmission would have been a waste of time and effort. The law does not require an individual to pursue a futile act. ***Richardson v. Tennessee Board of Dentistry***, 913 S.W.2d 446, 456 (Tenn. 1995); ***Spellmeyer v. Tennessee Farmers Mut. Ins. Co.***, 879 S.W.2d 843, 848 (Tenn. App. 1993). The holding in ***Wilgus*** recognizes this concept.

It is clear from the transcript of the County Commission meeting that the commissioners clearly understood two things: first, that the MPC was opposed to a commercial zone in the Pellissippi Parkway--Westland Drive interchange area; and second, that the rationale for this opposition was the fact that *any* such zone was violative of the Southwest Knox County Sector Plan. This understanding, particularly with respect to the latter matter, is shown by the comments of Commissioner Frank Leuthold:

> Thank you, Mr. Chairman. What we have here is a motion to be in violation of our Sector Plan. I don't think we should be making motions in violation of sector plans. At best, if you think that sector plan is out of date, it ought to be sent back and have public hearings as you do in any amendment to a sector plan. That's not being recommended. So what we have is a motion that is a direct violation of a sector plan that essentially says the plans don't mean anything.
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> So Planned Commercial allows any type of commercial. It's not limited to office. Anything that's labelled commercial can go in there.
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> * * *
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> And, I'm not very pleased with the motion and the intent to what I think may happen here. So I would ask to [sic] fellow commissioners that they vote against this request and keep faith with the sector plan and the people that helped develop it and live in this area.

There was no reason for this matter to be resubmitted to MPC. That body had already spoken, without equivocation, on

the subject of commercial zoning in the area under consideration. The County Commission had before it the MPC's "suggestions," ***Wilgus***, 532 S.W.2d at 54, and "the advantage of the commission's expertise on land use planning with respect to the propos[ed]" rezoning. *Id.* at 53. We find and hold that the Chancellor erred, as a matter of law, in determining that this matter had to be resubmitted to MPC.

III

In the alternative, the appellees argue that the action of the County Commission should be invalidated because that body failed to pass the amendment to the zoning ordinance on two separate readings. Assuming, without deciding, that the appellees are correct, the point is now moot. On April 4, 1996, Governor Don Sundquist signed into law Chapter 715 of the Public Acts of 1996, which provides as follows:

> SECTION 1. Tennessee Code Annotated, Section 13-7-105, is amended by adding the following as a new, appropriately designated subsection:
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> ( ) Notwithstanding the provisions of this part or any other law to the contrary, any county having a charter form of government, adopted pursuant to Title 5, Chapter 1, Part 2, may amend its zoning ordinance by means of a resolution; and *all zoning amendments passed by resolution prior to July 1, 1995, shall be deemed to be valid and shall not be attacked on the grounds that the amendments were accomplished by means of resolution rather than by ordinance.*

> SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

(Emphasis added). This act applies to Knox County since it has a charter form of government.

For the foregoing reasons, the judgment of the trial court is reversed and the complaint is dismissed. Costs on appeal are assessed to the appellees. This case is remanded pursuant to applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

_____
Houston M. Goddard, P.J.

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Don T. McMurray, J.