

HCS 72: THE DEVELOPERS' DREAM BILL

February 14, 2017

HCS 72 would impose an unconstitutional financial barrier to access to the Court of Appeals for review of zoning decisions.

- The legislation would require the posting of an appeal bond as a prerequisite for a non-governmental party, like a neighborhood, to appeal a zoning decision from the Circuit Court to the Court of Appeals.
- A developer after winning a decision in Circuit Court could request and the Circuit Court would have to have a hearing to determine on whether the appeal was “presumptively frivolous,” a term not fully defined.
- If the Circuit Court found the appeal “presumptively frivolous,” a bond would be required to cover lost profits, lost cash flow, interest, costs, and attorney fees, up to \$250,000.
- Even if the Circuit Court found the appeal to be non-frivolous, a mandatory bond for all interest, costs, and attorney fees would be required to be posted as a condition of appeal, up to \$100,000.
- The bond would be forfeited if the Court of Appeals affirmed the circuit court decision, even if the appeal raised arguments that had merit.
- The bill is unnecessary because the Court of Appeals can already assess damages and 1-2x costs if it determines an appeal to have been brought that was frivolous and in bad faith.

Constitutionality

- With the 1976 constitutional amendment creating a right in Ky. Const. 115 to one level of appellate review of a judicial decision, any legislative interference with the exercise of that right likely would be unconstitutional.
- Section 116 of the Kentucky Constitution grants the Kentucky Supreme Court the power to prescribe rules governing appellate jurisdiction and has been construed as vesting “exclusive jurisdiction in the Supreme Court to prescribe ‘rules of practice and procedure for the Court of Justice.’”
- The bill also implicates equal protection and due process provisions of the Kentucky Constitution and constitutes “special legislation” that singles out a group of litigants seeking review of administrative decisions.

Impact on Neighborhoods

- The passage of the bill would effectively end a neighborhood's ability to appeal a zoning decision in district court to the Kentucky Court of Appeals. The risk and cost of doing would be too great.