by Kenneth J. Heinz

WHEN IS A PUBLIC HEARING NOT A PUBLIC HEARING?

Editor's Note: The following summary is reprinted with some edits, with permission of the author Howard Wright, attorney.

Union Electric Company (UE) owns and operates an electric power generating facility in Franklin County. In conjunction with the operation of the power generating facility, UE also has a coal-ash landfill. UE announced that it would build a new coal-ash landfill on land it had recently acquired near its current plant.

In order for UE to operate the new coal-ash landfill, it was necessary to amend the County Zoning Ordinance. The amendment required any coal–ash landfill to be located within 1,000 feet of an existing electric utility power generation plant and under common ownership with the adjacent power plant. There was only one electric generating power plant in the county that was owned and operated by UE.

The county planning and zoning commission held a public hearing, as well as the county commission. At the start of the public hearing, before the zoning commission and the county commission, the chair announced that speakers could not discuss the UE proposal for a coal–ash landfill because: "We are not here to discuss any particular project." The amendment to the zoning ordinance did not specify a specific project since it was an amendment to the permitted uses under the zoning ordinance.

As a consequence, speakers were denied the right to discuss the amendment to the zoning ordinance as it pertained of the UE proposal to construct a new coal–ash landfill. Although they were allowed to speak generally to the amendment, they could not discuss the specifics of the UE proposal particularly as it related to the property and the location of the landfill. The commission approved the amendment to the zoning ordinance and a group opposing the landfill (Neighbors) filed in circuit court a petition for writ of certiorari alleging that the adoption of the amendment was illegal because the zoning commission and the county commission failed to conduct valid public hearings, and that the amendment did not promote the health, safety and general welfare of the citizens of the county.

After the petition was filed, the trial court issued a writ of certiorari to the commission directing it to provide the court with a full transcript and complete record pertaining to the matter and UE intervened in the proceedings. Upon certifying the record of the proceedings to the trial court, the county commission and UE filed motions for judgment on the pleadings or in the alternative to dismiss for failure to state a cause of action upon which relief could be granted. Specifically, the defendants alleged that the allegations in the petition for writ of certiorari showed that the Neighbors were allowed to provide testimony and evidence at both the zoning commission and the county commission hearings in general, but not specifically about the impact of the UE proposal prior to the enactment of the amendment to the zoning ordinance that was on record. The trial court sustained the motion to dismiss, and the Neighbors appealed to the appellate court for the Eastern District that reversed on grounds that the commission did not conduct a valid public hearing for the purpose of adopting a zoning amendment.

The opinion of the court noted that the Missouri courts have not defined the exact contours of a valid public hearing for purposes of adopting a zoning amendment; therefore, the court was plowing new ground. It starts with an analysis of the phrase "public hearing" by applying the ordinary dictionary meaning of these words.

State law requires notice of the "public hearing." The published notice of the hearing stated that the subject matter would be "utility and non-utility waste landfills in the definitions and

locations thereof." The court concluded that: "Proper notice and a proper hearing were mutually dependent."

Citizens at a public hearing should be able to speak on the subject of a zoning amendment as "… would reflect upon the mind of an ordinary layman." The right of the public to speak at a hearing should not be suppressed due to technicalities relating to laws and rules of the governmental bodies. In this case, the public could not speak regarding the UE coal-ash landfill proposal that was the real subject of the amendment. The public was not allowed to discuss the impact of the coal-ash landfill on their property or the fact that the landfill would be located in the 100-year floodplain and earthquake hazard zone, and that most of it was within the regulatory floodway delineated by the Federal Emergency Management Agency. In addition, they were not able to discuss the history of the existing coal-ash landfill in the county, which was owned and operated by UE that had been leaking since 1992 with no action by UE or the state. The court concluded that the hearing was unfair and remanded to the circuit court the case for further action consistent with the opinion.

There was a vigorous dissent arguing that the plaintiffs had been afforded a public hearing and had sufficient opportunity to comment on the zoning amendment. Based upon the importance of this question, its uniqueness and the vigorous dissent, the case was transferred by the court to the Missouri Supreme Court. *Campbell et al., v. County of Franklin*, (ED 99622, 07/22/14).

COMMENT HOWARD: When reading this case one is reminded of "The Three Blind Mice." The facts in this case are compelling although the implications for local government hearings with respect to legislation certainly won't make city attorney jobs easier because it requires them to caution their clients that public hearings, particularly when required by law, need to have some sort of reasonableness. It also seems that the citizens were denied their constitutional right for redress of grievances under the Missouri Constitution. The ordinance that was proposed seems to be special legislation falling squarely, at least in my mind, within the Branson case because it is exacting as to its specificity. The case is also extremely appealing because building a coal-ash landfill in an earthquake zone, in the floodplain, and floodway of the Missouri River is extremely questionable at best.

COMMENT HEINZ: This is a lengthy and confusing opinion for a non-lawyer to follow. It is nearly 35 pages and filled with long footnotes, especially on the procedural aspects of the case. While two of the judges found that the public hearing was inadequate, the third judge disagreed. All three judges, however, agreed that the case was important enough to send to the Supreme Court, which may render an entirely different decision.❑

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