

Cadiz Trigg County Planning Commission

PO Box 1484

Cadiz, KY 42211

December 12, 2011

To Whom It May Concern;

The Cadiz Trigg County Planning Commission has dealt with the "Agricultural land" versus subdivisions on several occasions in the past year. To try to clear up this issue, we have discussed with our lawyer what we could do to address this issue. In our November meeting the following guidelines were adopted by our commission starting January 1, 2012. Enclosed is the information from Mr. Butler to try and help each person with this issue. We are requesting the assistance of all those involved in land sales, land owners, surveyors, engineers, city and county officials and our commission to utilize the information in determining if a tract of land or lots should come before our commission as a subdivision or is it truly a farm.

RE; **Guidelines concerning Agriculturally Exempt Divisions of Land**

Chairman Bob Brame has requested that I provide the Trigg County Planning Commission guidelines, in a format easily understood, concerning when divisions of land are exempt from planning commission approval. Specifically the issue is when divisions are exempt from planning commission review under the agricultural exemption granted in KRS 100.

KRS 100.111 (22) states in part when defining what "subdivision" is; "...providing that a division of land for agricultural use and not involving a new street shall not be deemed a subdivision". KRS 100.111 (2) provides the definition of agricultural use which boiled down means the use of 5 acres or more for the production of crops and/or other agricultural activities plus the provision for a farm dwelling. When you put the 2 definitions together it yields the agricultural exemption from subdivision requirements that seems to be abused in Trigg County. I have provided the following guidelines to help consideration of such divisions. They are presented in the form of questions and answers. I did this for ease of use and understanding. This is a complex area of land use in no small part due to the lack of clarity in the definitions mentioned. It would seem that everyone that uses these definitions has a slightly different take on them. The law in this area is not completely settled but is more so than it had been due to a recent case decided by the Kentucky Supreme Court in April of this year. That case has just recently been declared final and doesn't have a citation yet. The case is Paul Nash, Et Al. v. Campbell County Fiscal Court, Et. Al., No. 2009-SC-000152-DG, decided April 21, 2011. I'm making sure that Bob has a copy.

1. **How does the Planning Commission find or learn of divisions if not presented to it for review?**

It is important to know what plats or divisions are out there. That's the only way to even know if there is a particular problem. There are a few ways that the planning commission can find out about plats/divisions that might need to be reviewed. One way would be to have someone regularly review the new deeds and/or plats being recording in the County Clerk's office. This could be a little time consuming but would probably be the most thorough solution. Another way would be to develop better relationships with realtors/developers/surveyors encouraging them to essentially "self-report". Lastly, it might be best to develop a solid relationship with the County Clerk who could inform the commission through any one of several means about new divisions. This will be dealt with later in this memo. Practically speaking a combination of all three will probably be necessary.

2. **What does the planning commission do if and when it finds a division that it suspects should have been submitted for approval?**

If the planning commission finds a division that it believes should have been submitted for approval but might be agriculturally exempt, it should review the plat or division for compliance with the case mentioned above, Paul Nash et. al. v. Campbell County et. al. here after referred to as the Nash case. We'll discuss the criteria next. If a division is not exempt then the planning commission should seek compliance (see below). If it is legitimately exempt then let it go.

3. **What exactly must happen or exist for a division to be agriculturally exempt?**

Per the Nash case, which is applying/interpreting KRS 100.111 (22), KRS 100.111 (2) and KRS 100.203 (4) there are three requirements that must be met or exist for a division to be considered an agriculturally exempt. First, the use of the property must be restricted to agriculturally use. Second, all parcels created or leftover must be at least 5 acres or greater in size. Third and last, the division must not involve construction of a new street.

4. **What does "restricted to agricultural use" mean or involve?**

Again, per the Nash case, the use of the property must be restricted to agricultural use which is defined in KRS 100.111 (2). Please refer to the definition for specifics. That means a parcel may only be used for production of crops and/or other agricultural activities and may have a dwelling for family members engaged in the agricultural activities. That would appear to me to be a fairly rigid restriction. The restriction must take one of two forms. It must be a restriction noted in the deeds for the parcels created and conveyed or it must be a restriction noted on the plat that is recorded. In my opinion this restriction should scare both buyers and lending institutions to death since it would obviously limit the use and related value of the property. If a division does not have this restriction in the form required it is not exempt and must be approved by the planning commission.

5. **The exemption limits divisions to tracts of 5 acres in size or greater. Is that as simple as it sounds?**

Maybe not. Per the Nash case and KRS 100.111 (2) the five acres must be contiguous. This means that you can't add two parcels separated by another or by dedicated roadway right-of-way or some other divider together to get the minimum 5 acre requirement. Additionally, all tracts created or leftover must be 5 acres in size or greater. For example, if there is a 7 acre tract it can't mathematically be used to create 2 exempt tracts.

6. **"Not involving a new street"; What does that mean?**

This has been a gray area for years given the rather vague and overly broad definition of the term "street" in state law (KRS 100.111 (20)) where it is defined as "any vehicular way". All tracts must have frontage on a public road or street. If a division involves a new street to provide frontage to the new tracts it is subdivision and needs planning commission approval no matter what the use or size of the tracts. "Any vehicular way" as the definition of street would appear to allow someone to create tracts off of their driveway and still be exempt. Luckily, the Nash case has narrowed that definition down a bit. That case confirms that a tract must have frontage on an existing road. It also requires by my reading that the road be open to the public. If a road could be or is gated it doesn't qualify since it is not open to the public. That would eliminate driveways. Also according to the Nash case "open to the public" is most easily determined if the road is dedicated to public use (is a county, city or state road). For a road to be dedicated there is a process that local government establishes. It doesn't happen by chance. A road may also be open to the public through prescriptive use which means that even though it is on private property the public has actually been using it for several years to access other tracts. Very few if any roads will be open to public use due to prescription. This requirement, that a division "not involve a new street" will be a hard one for some people to meet. You would already appear to have some people in violation of this requirement.

7. **What happens if a plat or deed is recorded that creates tracts that do not meet the requirements for exemption or for that fact are otherwise in violation?**

If the planning commission becomes aware of a division that seems to have skirted the requirement for planning commission review and approval, there are several courses of action that can be taken. First I would recommend that you contact the parties involved, explain the planning commission's position on the matter and request that they submit the plat for review and approval if appropriate. If that doesn't work you may be able to coerce compliance by informing relevant parties such as attorneys, owners, surveyors, and especially lending institutions that there is a legal problem. In particular you would need to inform them that pursuant to KRS 100.277 (3) deeds to the questionable tracts are voidable. That mere fact should be sufficient to scare a bank that has a mortgage on a property or an owner wishing to sell the tract into compliance. If a plat is submitted and approved reflecting the previously questionable tracts and that plat is recorded even after the fact, that action makes the deeds, even ones already recorded, good (not voidable) per the requirements of KRS 100.292 and KRS 100.277. If all else fails the planning commission has the right per KRS 100.292 and KRS 100.337 to file suit to void the deed and/or to compel compliance with the requirements of the subdivision regulations.

Likewise, on the other side if the planning commission compels or cajoles compliance and a property owner or developer thinks the commission is wrong then they can file a declaration of rights action in court (according to the Nash case). Just remember that if a plat is submitted it must meet the requirements for approval. Some people will submit a plat after the fact with problems in the age old theory that it is better to ask forgiveness than permission.

8. What is the role of the land owner?

The land owner who is dividing the property must comply with the requirements of state law. If the proposed division is not exempt, they must take steps to comply with the requirements of KRS 100 and local subdivision regulation. If the proposed division meets the requirements for exemption as outlined then the new owner must comply with the restrictions placed on the property specifically that the property be limited to agricultural use. If that property owner wants to remove that restriction then it would be my opinion that they must submit the plat for approval after the fact. Remember it is the responsibility of the land owner who is dividing the property (if exempt) to place the restriction to agricultural use on the property by note on the plat or deed restriction. The land owner may file a lawsuit if they feel they have been wronged at any point during the process.

9. What is the role of the surveyor?

A surveyor must comply with the professional standards that apply to the surveying profession. I have been told by persons involved with the profession that a surveyor is bound by ethical obligations to comply with local and state laws which include local subdivision regulations. It is important to remember that surveyors are an important link or conduit to the landowner when it comes to informing them of requirements and issues relating to the division of land.

10. What is the role of the County Clerk?

The Nash case provides some important clarification as to the role of the County Clerk in the division of property, particularly agriculturally exempt property. It should be noted that a County Clerk must record a plat of deed reflecting a division that meets the requirements of state law and local regulations. That puts an obvious burden on the clerk concerning the validity of a division. The Nash case specifically says that if a County Clerk has a question concerning the validity of a plat or whether it meets the requirements for agricultural exemption they have a few different options. The clerk can consult a private attorney for advice. The clerk can also consult with the County Attorney concerning the requirements. The Nash case also says that the clerk can refer the matter to the Planning Commission for its advice and opinion as to whether a proposed division meets the requirements for exemption. As stated above it can be important to cultivate a good working relationship with the County Clerk.

11. Do you have to enforce these restrictions retroactively?

Once you know what is illegal, a decision has to be made concerning those plats/divisions that have already been recorded that would appear to involve illegal divisions. One alternative would be to retroactively enforce the provisions as stated in the memo. In other words sue everyone that

you know has violated previously or seek voluntary compliance. Another option would be to enforce the restrictions from now on. Don't worry about someone arguing that since others before have violated the rules that you must now allow everyone to violate. Past violations do not guarantee the validity of future violations. Once the restrictions are known don't be surprised if some people bring prior plats/divisions in for approval that may be questionable. They might do this to remove any cloud on the title to the property to make it more marketable. I would beware of approving anything retroactively or otherwise that doesn't fully meet requirements. You may be setting a bad precedent.

12. Do you have to look carefully at all divisions, even those with very large tracts?

There may be some divisions that are obviously exempt. In particular some jurisdictions consider or presume that tracts over a certain size (minimum) are agricultural. The minimum tract size for assuming agricultural use varies from place to place in the state. In the bluegrass area around Lexington the minimum acreage is closer to 30 acres. Some set the presumption at 15 acres. I wouldn't go below 10 acres since, as I understand it, the Property Valuation Office (PVA) taxes 10 acres at a minimum at the lower agricultural land value.

Summary

In summary I would recommend the following:

- Try to get cooperation from all parties involved including the property owners, realtors, surveyors, engineers, attorneys and the County Clerk.
- Develop and use a method to check for deeds/plats that may be recorded improperly.
- Use the information above to determine if there is or appears to be a problem.
- If a problem is found or suspected, contact the person(s) involved to encourage compliance or to determine if there are other facts that might clarify the situation.
- As appropriate bring the matter to the full planning commission for review and action.
- Document any action taken, wither by staff or the planning commission and share that information with the people involved.
- If all else fails, take the appropriate enforcement actions as outlined above.

As can be seen from the length of this memo, this is a complex and unsettled area of land use law. I hope that the guidelines presented are helpful. Remember that there is no magic wand with which to make these problems go away. Voluntary compliance always works best but can't be counted on. If the Planning Commission proceeds in a deliberate and informed manner with the guidelines as outlined in mind, it should be fine.