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Opinion No. 08-140

Auction of tracts of real property prior to approval of subdivision plat by regional planning commission

QUESTION

May a regional planning commission's approval of a plat of subdivision be obtained after holding an auction of tracts that are less than five acres and prior to the closing of the purchase and sale of those tracts?

OPINION

No. In accordance with Tenn. Code Ann. § 13-3-410 (1999), the regional planning commission must approve a plat of subdivision prior to, not after, the auction.

ANALYSIS

The question involves the following fact scenario:

> An auctioneer advertises an upcoming auction of a large parcel of real property. The parcel will be auctioned in several smaller lots, some of which will be less than five acres. The advertisement of the auction states that the purchase and sale of each of the auctioned lots are subject to the regional planning commission's approval of the subdivision plat[1] that shows the large parcel divided into the smaller lots for the auction. The purchase and sale of any of the auctioned lots will not close until the commission has approved the plat.[2] Also,

[1] As defined by Tenn. Code Ann. § 13-3-401(1) and (4)(B) (1999), a plat of subdivision is a "plat, plan, plot, or replot" of "the division of a tract or parcel of land into two (2) or more lots, sites, or other divisions requiring new street or utility construction, or any division of less than five (5) acres for the purpose, whether immediate or future, of sale or building development[.]"

[2] In addition to requiring plat approval, Tenn. Code Ann. § 13-3-410(a) (1999) requires the "plat [to be] recorded in the office of the appropriate county register[.]" The county register may not record a plat until it has been approved by the commission. Tenn. Code Ann. § 13-3-402(c) (Supp. 2007). This opinion focuses on when the commission's approval of the plat must be obtained and assumes the recordation of the plat would occur immediately thereafter.

> a person who has the highest bid on multiple lots has the option of combining lots that are less than five acres with other lots upon which the person successfully bid so that, at the closing of the purchase and sale of those lots, none of the lots will be less than five acres.

Tenn. Code Ann. § 13-3-410(a) (1999) makes it illegal for the owner of certain real property, or the owner's agent, to transfer, sell, agree to sell, or negotiate to sell the property by use of a plat of subdivision that has not been approved by the regional planning commission.

> (a) Whoever, being the owner or agent of the owner of any land, ***transfers or sells or agrees to sell or negotiates to sell*** such land by reference to or exhibition of or by other use of a plat of subdivision of such land without having submitted a plat of such subdivision to the regional planning commission and obtained its approval as required by this part and before such plat is recorded in the office of the appropriate county register . . . commits a Class C misdemeanor. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from such penalties. . . . The county, through its county attorney or other official designated by the county legislative body, may enjoin such transfer or sale or agreement by action or injunction.

(emphasis added). The statute clearly states that the owner, or owner's agent, must obtain the approval of the commission for the plat prior to transferring or selling the subdivided property. Thus, at the least, the commission's approval must be obtained before the closing of the purchase and sale of the subdivided property. If the statute's language only referred to the actual transfer or sale of the property, holding an auction without plat approval would not violate the statute as long as the approval was obtained prior to closing. However, the statute also provides that the owner or the agent acts illegally if he or she "agrees to sell or negotiates to sell" the property. Tenn. Code Ann. § 13-3-410(a) (1999). Thus, if auctioning the property constitutes agreeing or negotiating to sell, the plat must be approved before the auction is held, not just prior to closing.

The term "agree" is defined as "[t]o unite in thought; to concur in opinion and purpose" or "[t]o exchange promises; to unite in an engagement to do or not do something." Black's Law Dictionary 73-74 (8th ed. 2004). The term "negotiate" means "[t]o communicate with another party for the purpose of reaching an understanding" or "[t]o bring about by discussion or bargaining[.]" *Id*. at 1064. In the above-described fact scenario, the purchase and sale of the subdivided property are subject to the commission's approval of the subdivision plat. Under similar circumstances, the Tennessee Court of Appeals found that the owner and the highest bidder at the auction had entered into a conditional contract. *Sparks v. Barnes*, No. 03A01-9412-CV-00433, 1995 WL 328195 at *7 (Tenn. Ct. App. June 2, 1995).

Thus, the owner has agreed and negotiated to sell the auctioned property. The plat must be approved before the auction, not in the period after the auction but before the closing. The parties communicated, reached an understanding, and united in thought via the auction process. The purchase and sale price was offered by the bidder and accepted by the owner. Tenn. Code Ann. § 62-19-101(2) (1997) (definition of "auction"). The terms and conditions announced at the auction, whether they include an earnest money requirement, a deadline for closing, or a condition that the purchase and sale are subject to the approval of the plat, were offered by the owner and agreed to by the bidder, even if the bidder did not hear the announcement. *Sparks*, 1995 WL 328195 at *5. The fact that the bidder may combine lots so that none of them will be less than five acres does not save the owner or agent from violating Tenn. Code Ann. § 13-3-410(a) (1999). The owner would violate the act by agreeing or negotiating to sell a lot that is less than five acres before the bidder even has the opportunity to combine that lot with another one.

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