

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
SIXTH JUDICIAL CIRCUIT, 5<sup>th</sup> DIVISION

KAYLIN HILLS WINGATE TRUST  
WINGATE NEIGHBORHOOD ASSOCIATION  
and CATHERINE JOHNSON

PETITIONERS

v. 60CV-18-8041

CITY OF LITTLE ROCK PLANNING COMMISSION  
and RODNEY CHANDLER d/b/a ICON HOMES, LLC

RESPONDENTS

**MEMORANDUM ORDER**

The parties appeared on March 15, 2019 for a hearing on the instant petition for injunctive relief and judicial review arising from a November 1, 2018 decision by Little Rock Planning Commission to approve a preliminary plat submission for a planned residential development to be known as Mergeron Court. Robert Cortinez II appeared for Petitioners. Marie Crawford appeared for separate respondent Rodney Chandler d/b/a ICON Homes, LLC. Shawn Overton appeared for separate respondent City of LR Planning and Zoning Commission. Hearing witnesses were sworn, the rule regarding witnesses was invoked, and witnesses were admonished as to the rule.

The Court denied the motion of separate defendant Rodney Chandler to be dismissed, and granted the oral motion by petitioners to amend the pleadings to conform to the proof and substitute separate defendant ICON Homes, LLC for Rodney Chandler. The Court also denied the motion of separate defendant ICON Homes, LLC to dismiss the petition for judicial review and injunctive relief on the part of Kaylin Hills Wingate Trust, Wingate Neighborhood Association, and Catherine Johnson for lack of standing.

Testimony was received from the following witnesses for Petitioners: Catherine Johnson; Byron Taylor; Lee Beverly; and Michael Hood. Testimony was received for separate Respondent ICON Homes, LLC from Patrick McGetrick. The Court also received the certified transcript of the November 1, 2018 meeting of the Little Rock Planning Commission (Joint Exhibit 1), the certified minute records from that meeting (City of Little Rock Exhibit 1), Little Rock Ordinance Sec. 31-90 (Petitioners Exhibit 1), a DVD containing the video of the November 1, 2018 meeting (Petitioners Exhibit 2), a video introduced through the testimony of Catherine Johnson showing flooding (Petitioners Exhibit 3), photos of Sheridan Creek which was also referred to by witnesses as a ditch (Petitioners Exhibit 4), the preliminary plat for Mergeron Court (Petitioners Exhibit 5), a survey map of the land on which Mergeron Court would be constructed by Thomas Engineering (Petitioners Exhibit 6), a PowerPoint presentation by witness Lee Beverly (Petitioners Exhibit 7), and the narrative report by Lee Beverly (Petitioners Exhibit 8).

Pursuant to Rule 65(a)(2) of the Arkansas Rules of Civil Procedure, the parties agreed to advance the trial on the merits and consider the merits on the record of the hearing for preliminary injunction.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. On November 1, 2018, Separate Respondent Little Rock Planning Commission approved a preliminary subdivision plat submission from Separate Respondent ICON Homes, LLC for a planned residential development known as Mergeron Court. The subdivision plat envisioned a development of twelve (12) houses on zero lot lines, a private drive and traffic circle, a detention pond, and other associated construction on approximately two

(2) acres of land situated between the Wingate and Kaylin Hills neighborhoods in west Little Rock.

2. Petitioners are residents of Pulaski County who are adjacent and/or adjoining property owners in the Wingate and Kaylin Hills neighborhoods.
3. When the Mergeron Court subdivision preliminary plat was submitted, Little Rock Ordinance 31-90 read as follows:

**Sec. 31-90 Engineering Analysis Requirement**

(2) Where a portion of a plat is suspected to be flood-prone, and that area is not covered by the flood insurance study prepared by the federal insurance administration for the national flood insurance program, or is not covered by available U.S. Army Corps of Engineers information, an engineering analysis shall be submitted. The analysis shall be submitted as part of the preliminary plat filing. The public works department shall be provided with copies for review and approval prior to submission of staff analysis to the planning commission. Such analysis shall be prepared by the engineer of record at owner's expense. The analysis shall determine to the best of the engineer's ability safe building line, and it shall be clearly and legibly drawn on the preliminary plat.

4. The Mergeron Court subdivision preliminary plat was not submitted with an engineering analysis as prescribed by Little Rock Ordinance Sec. 31-90(2).
5. The area where the Mergeron Court subdivision would be constructed is suspected to be flood-prone, and is not covered by the flood insurance study prepared by the federal insurance administration for the national flood insurance program, or is not covered by available U.S. Army Corps of Engineers information. The public works department of the City of Little Rock was aware of these facts when the Mergeron Court subdivision preliminary plat was submitted.

6. During the November 1, 2018 meeting of the Little Rock Planning Commission, Catherine Johnson, Byron Taylor, Lee Beverly, and Michael Hood acknowledged that the area of the Mergeron Court planned development is suspected to be flood-prone.
7. Petitioners have demonstrated that they are in imminent risk of irreparable harm if the Mergeron Court residential development is constructed without the engineering analysis prescribed by Little Rock Ordinance Sec. 31-90(2).
8. Petitioners have demonstrated a likely probability of succeeding on the merits.
9. Petitioners have no other adequate remedy aside from injunctive relief.
10. The November 1, 2018 decision by the Little Rock Planning Commission to approve the Mergeron Court subdivision preliminary plat occurred despite knowledge by the Commission, Commission staff, and public works department of the City of Little Rock that no engineering analysis was submitted by separate Respondent ICON Homes, LLC in compliance with Little Rock Ordinance Sec. 31-90(2).

### **DISCUSSION**

Arkansas Code Annotated § 25-15-212(h) of the Administrative Procedure Act provides the following framework for judicial review of the decision by the Little Rock Planning Commission concerning this land use dispute.

**(h)** The court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1)** In violation of constitutional or statutory provisions;
- (2)** In excess of the agency's statutory authority;
- (3)** Made upon unlawful procedure;
- (4)** Affected by other error or law;

(5) Not supported by substantial evidence of record; or

(6) Arbitrary, capricious, or characterized by abuse of discretion.

The evidence in this matter is clear and convincing. The Little Rock Planning Commission acted in violation of Little Rock Ordinance Sec. 31-90(2) when it approved the Mergeron Court subdivision preliminary plat submission. The Public Works Department of the City of Little Rock acted in violation of Sec. 31-90(2) when it accepted the Mergeron Court preliminary plat submission without the engineering analysis mandated by the ordinance. The staff of the Planning Commission recommended that the Commission approve the Mergeron Court preliminary plat submission despite knowledge that preliminary plat submission did not include the engineering analysis. All of these things occurred despite full knowledge by the Public Works Department, Planning Commission staff, and Planning Commission members that “a portion of [the Mergeron Court ] plat is suspected to be flood prone...” and that none of the other information required by Sec. 31-90(2) was available.

During the November 1, 2018 meeting of the Planning Commission, Michael Hood made the following statement to the Commission concerning the propensities of Sheridan Ditch, a waterway that borders the northwest portion of the Mergeron Court preliminary plat submission:

**What about this Sheridan Ditch here, or creek, or whatever you'd like to call it?** When the first flood studies were done when they did the Rock Creek channelization – probably a lot of you remember that when some of those early studies were done – the Corps of Engineers made it's [sic] decision based on certain criteria – the area of the drainage ways – that they would not go map every little tributary going up through this area. And it was a decision that was made then as a matter of policy as much as anything that not every little tributary would have a FEMA – mapped flood plain.

Now, that doesn't mean that some areas may not still experience occasional flooding, but nonetheless, it's a policy matter that not everything was mapped. **And, certainly, we're all mindful that there is a history of flooding there. There's no doubt. You can go to city records and see there's been calls over**

**the years about yard flooding, fences knocked down. It has been a nuisance to those residents, there's no doubt. It's a creek.**

See Joint Exhibit 1, p. 48, lines 4 thru 24, emphasis added.

Hood admitted when questioned by the Court during the March 15, 2019 hearing that the area of the Mergeron Court plat is suspected to be flood prone. Although Patrick McGetrick (a civil engineer engaged by Respondent ICON Homes, LLC concerning the Mergeron Court submission) testified during the March 15 hearing that the subject property is not flood prone, he later testified "I have no idea if the property along the creek is flood prone or not," testified that Sheridan Ditch floods "on both sides," and that no engineering analysis was done for flooding purposes.

The evidence is clear and convincing that the area adjacent to and which includes part of the Mergeron Court proposed development is "suspected to be flood prone" within the meaning of Section 31-90(2). There is no credible evidence otherwise. Meanwhile, the preliminary plat for the Mergeron Court development depicts an eighteen-inch (18") reinforced concrete type exchange from a catchment basin at the northwest corner of the plat that would empty into Sheridan Ditch. Thus, surface water from the development would be discharged into a tributary that Hood (civil engineering manager for the Little Rock public works department) acknowledged has been known as a cause of flooding "over the years." This proof, coupled with the testimony of area residents about recurring flooding of their property from the Sheridan Ditch/Creek, demonstrates that the petitioners will suffer irreparable harm unless respondents are enjoined from proceeding with the Mergeron Court development without compliance with Ordinance 31-90(2).

The evidence is abundantly clear that the November 1, 2018 decision by the Little Rock Planning Commission was taken in known violation of Ordinance 31-90(2). As the Arkansas

Supreme Court has declared, “it has become axiomatic that an agency is bound by its own regulations.” *Stewart v. Arkansas State Police*, 329 Ark. 46, 945 S.W.2d 377 (1977)).

The argument by Respondents that an engineering analysis will occur at some later point in time violates the plain wording of Sec. 31-90(2). The Ordinance requires an engineering analysis **before** a preliminary plat is submitted to the Planning Commission. The Ordinance requires that Planning Commission staff consider the engineering analysis before submitting a preliminary plat to the Commission for action. Section 31-90(2) plainly states that the engineering analysis “**shall** be submitted as part of the preliminary plat filing, the public works department **shall** be provided with copies for review and approval **prior to submission of staff analysis to the planning commission...**”

The Little Rock Planning Commission did not follow the ordinance that governs its procedure. There is no rational basis for that violation. Petitioners are threatened by irreparable harm because of the violation. The proof concerning this matter is clear and convincing.

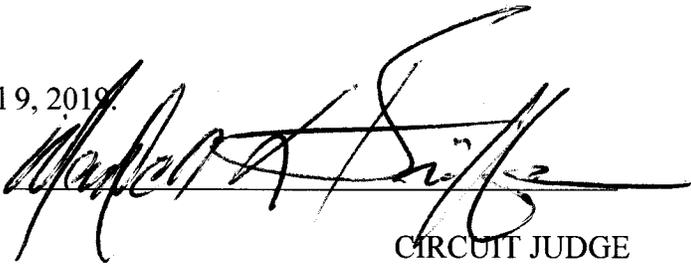
### CONCLUSION

The November 1, 2018 decision by the Little Rock Planning Commission to approve the Mergeron Court preliminary plat submission was made upon unlawful procedure (A.C.A. § 25-15-212 (h)(3)), is not supported by substantial evidence of record (A.C.A. § 25-15-212 (h)(5)), and is arbitrary, capricious, or characterized by abuse of discretion (A.C.A. § 25-15-212(h)(6)). Accordingly, the decision cannot stand.

The Petition for injunctive relief is GRANTED.

The November 1, 2018 Little Rock Planning Commission decision is REVERSED and REMANDED for further action consistent with this decision.

ORDERED April 9, 2019.



CIRCUIT JUDGE