

From Kentucky Resources Council

HOUSE BILL 72 HCS WOULD IMPOSE AN UNCONSTITUTIONAL FINANCIAL BARRIER TO ACCESS TO THE COURT OF APPEALS FOR REVIEW OF ZONING DECISIONS¹

House Committee Substitute to House Bill 72 would require posting of an appeal bond as a condition prerequisite to a non-governmental party appealing a rezoning decision from the Circuit Court to the Kentucky Court of Appeals.

Under the House Committee Substitute, on filing a Notice of Appeal, the appellee could request and the Circuit Court would have to hold a hearing on whether the appeal was “presumptively frivolous” – a term not fully defined.

If the Circuit Court deemed 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 Committee Substitute makes clear that the intent is to deter even meritorious appeals of rezoning decisions by pricing them out of the reach of most neighborhood groups and neighbors. The bill is a blatantly unconstitutional measure that violates the right to appeal under Kentucky Constitution Section 115, an infringement on the separation of powers and of the Judicial Branch, and is unnecessary, since 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. Civil Rule 73.02(4).

Requiring the filing of an appeal bond as a prerequisite to filing an appeal violates Kentucky Constitution Section 115, providing that “in all cases...there shall be allowed as a matter of right at least one appeal to **another court...**” (emphasis added). In *White v. Comm.*, 299 S.W.2d 618 (1957), the Court declined to apply the then-existing rule that an appeal bond be posted prior to any appeal from county court to circuit court to bastardy proceedings, since “to hold otherwise would ‘effectively’ deny a party the right of appeal granted by statute.” 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 would be unconstitutional.

¹ This analysis was prepared by Tom FitzGerald, Director, Kentucky Resources Council, Inc., www.kyrc.org

The exemption of governmental entities from the possible obligation to file an appeal bond, implicates equal protection issues, since it would place a burden on nongovernmental parties but exempt those similarly situated (i.e. desiring to file an appeal of a circuit court judgment). *Elk Horn Coal Corporation v. Cheyenne Resources*, 163 S.W. 3d 408 (Ky. 2005), struck down KRS 26A.300, which provided for a 10% penalty if a money judgment was affirmed or dismissed on appeal after the first appeal (i.e discretionary review), based both on Ky. Const. Sec 116 and as a violation of the equal protection provisions of Ky. Const. Sec. 2.

The bill also intrudes on matters of appellate procedure that are expressly reserved to the judicial branch under the state constitution, in violation of Section 116 of the Kentucky Constitution, which grants the 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.'" *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 576 (Ky. 1995); *Elk Horn Coal Corporation v. Cheyenne Resources*, 163 S.W. 3d 408 (Ky. 2005); *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987).

The bill conflicts with KRS 21A.050(2), which recognizes that the procedures for appellate review are within the exclusive jurisdiction of the Supreme Court.

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.

In short, the bill is a Developer's Dream and a Neighbor Nightmare, and should be rejected.