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24-ORD-061

March 13, 2024

In re: Kenneth Tracy/Franklin County Planning and Building Codes
Department

Summary: The Franklin County Planning and Building Codes Department (“Department”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

Kenneth Tracy (“Appellant”) submitted a request to the Department seeking a “copy of all documentation pertaining to zone changes from 2010 to present with respect to” a particular parcel of land. In response, the Department stated, “After searching for records, there is no information available.” This appeal followed.

On appeal, the Department maintains that no documentation related to a zone change for the specified parcel exists because the identified parcel “has been zoned rural residential since at least 1992,” and “[n]o applications for a zoning change have been filed for th[e] property since 2010.” Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, then the public agency “may also be called upon to prove that its search was adequate.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here the Appellant has not made a *prima facie* case that the Department possesses records regarding a zone change of the identified parcel. Therefore, the Department did not violate the Act when it did not provide them.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
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Distributed to:

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