

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

August 28, 2009

- I. **ATTENDANCE** - The Chair called the meeting to order at 1:00 p.m. in the Council Chambers, 200 East Main Street, on August 28, 2009. Members present were Chairman Peter Brown, Louis Stout, James Griggs, Carolyn Edwards, Barry Stumbo, and Kathryn Moore. Member Jan Meyer was absent. Others present were Jim Hume, Division of Building Inspection; Jim Gallimore, Division of Traffic Engineering; Capt. Charles Bowen, Division of Fire & Emergency Services, and Rochelle Boland, Department of Law. Staff members in attendance were Bill Sallee, Jim Marx and Wanda Howard.

- II. **APPROVAL OF MINUTES** - The Chair announced that the minutes of September 28, 2008 would be re-considered at this time.

Action – A motion was made by Mr. Stout, seconded by Mr. Stumbo, and carried unanimously (Meyer absent) to approve the minutes of the September 28, 2008 meeting.

III. **PUBLIC HEARING ON ZONING APPEALS**

Swearing of Witnesses – Prior to sounding the agenda, Chairman Brown asked all who wished to speak at today's meeting to raise their hand and be sworn. He administered the oath to several citizens in attendance.

- A. **Sounding the Agenda** - In order to expedite completion of agenda items, the Chair sounded the agenda in regard to any postponements, withdrawals, and items requiring no discussion.

1. **Postponement or Withdrawal of any Scheduled Business Item** - The Chair announced that any person having an appeal or other business before the Board may request postponement or withdrawal of such at this time.

- a. **A-2009-47: SANDRA SCHRYVER** - appeals for an administrative review to determine that the Division of Building Inspection's issuance of a fence permit was done in error, in a Single Family Residential (R-1T) zone, on property located at 2717 Chelsea Woods Court (Council District 7).

The Division of Building Inspection will report at the public hearing.

Representation – Ms. Sandra Schryver was present and requested an indefinite postponement. She told the Board that they were still trying to reach a settlement. Chairman Brown asked if this was the same as a withdrawal. Mr. Marx replied in the negative, but that new notice would be needed for all parties if this application were to be revived. Ms. Schryver apologized for taking the Board's time on this matter.

Action – A motion was made by Mr. Griggs, seconded by Ms. Moore, and carried unanimously (Meyer absent) to indefinitely postpone **A-2009-47: SANDRA SCHRYVER** - an administrative review to determine that the Division of Building Inspection's issuance of a fence permit was done in error, in a Single Family Residential (R-1T) zone, on property located at 2717 Chelsea Woods Court.

- b. **C-2009-50: ROBERT H. DOUGLAS** - appeals for a conditional use permit to establish a bed and breakfast facility in the Agricultural Rural (A-R) zone, on property located at 4417 Dry Branch Road (Council District 12).

The Staff Recommended: Postponement, for the following reasons:

- a. An amended and scaled site plan is needed showing the full extent of the subject property, with the location of the proposed residence identified relative to the front, side and rear property lines.
- b. Additional information is needed regarding the overall design of the proposed bed and breakfast facility and the intent of the owners as to where they will reside.

Representation - There was no one present for this application.

Mr. Marx stated that he had spoken with the applicant's attorney, who indicated a desire to postpone their appeal. Mr. Marx did warn him that someone might appear to object to a postponement. Chairman Brown asked if anyone was in the audience to speak to the postponement. There was no response.

Action - A motion was made by Mr. Stumbo, seconded by Ms. Edwards, and carried unanimously (Meyer absent) to postpone **C-2009-50: ROBERT H. DOUGLAS** - an appeal for a conditional use permit to establish a bed and breakfast facility in the Agricultural Rural (A-R) zone, on property located at 4417 Dry Branch Road, to the Board's September meeting.

2. No Discussion Items - The Chair asked if there were any other agenda items where no discussion was needed...that is, (a) The staff has recommended approval of the appeal and related plan(s), (b) The appellant concurs with the staff's recommendations. Appellant waives oral presentation, but may submit written evidence for the record, (c) No one present objects to the Board acting on the matter at this time without further discussion. For any such item, the Board will proceed to take action.
 - a. **V-2009-53: MICHAEL HUDSON** - appeals for a variance to reduce the required side street side yard from 30 feet to 17 feet, for a room addition over an existing garage, in a Single Family Residential (R-1C) zone, on property located at 1900 Appomattox Road (Council District 11).

The Staff Recommended: Approval, for the following reasons:

- a. Granting the requested variance should not adversely affect the public health, safety or welfare, nor alter the character of the general vicinity. The proposed room addition will not extend any closer to Holly Springs Drive than the existing garage, and will comply (by averaging) with the 20' platted building line originally established for several corner lots in this subdivision decades ago. A very similar building arrangement exists on the adjoining property at the corner of Appomattox and Stonewall Road, where a room projection and attached garage extend to within about 19' of the street right-of-way.
- b. The location of the existing garage is a special circumstance that contributes to justifying a reduction of the required side street side yard at this corner location.
- c. Strict application of the Zoning Ordinance would prevent the addition of any room over the garage that would extend any closer to Holly Springs Drive than the existing sunroom. Since the existing sunroom only covers about half of the garage, such a condition appears to be overly restrictive given that the entire garage could be covered by an addition that complies with the 20' platted building line.

This recommendation of approval is made subject to the following conditions:

1. The addition shall be done in accordance with the submitted application and site plan.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.
3. The side street side yard reduction to 17' is granted only for the purpose of allowing the proposed room addition over an existing garage.

Representation - Mr. Michael Hudson was present for his request. Chairman Brown asked if he had reviewed the conditions recommended for approval, and if he would agree to abide by those conditions. Mr. Hudson replied in the affirmative.

Mr. Griggs asked when the sun room was constructed. Mr. Hudson thought it was built in the mid-1980's. He and his parents have only owned the property since 1999. Chairman Brown asked to see a photo of the property, and asked if the footprint of the addition would occupy more area than the existing garage. Mr. Hudson replied in the negative, and that they only wished to extend the second floor over the existing garage.

Action - A motion was made by Mr. Stout, seconded by Mr. Stumbo, and carried unanimously (Meyer absent) to approve **V-2009-53: MICHAEL HUDSON** - an appeal for a variance to reduce the required side street side yard from 30 feet to 17 feet, for a room addition over an existing garage, in a Single Family Residential (R-1C) zone, on property located at 1900

Appomattox Road, for the reasons provided by the staff, and subject to the conditions recommended by the staff.

- b. **V-2009-54: SHOWPROP LEXINGTON, LLC** - appeals for a variance to increase the allowable height of a portion of a proposed theater building from 48 feet to 80 feet in a Heavy Industrial (I-2) zone, on properties located at 475 and 497 Angliana Avenue (Council District 2).

The Staff Recommended: Approval, for the following reasons:

- a. Granting the requested variance should not adversely affect the public health, safety or welfare, nor negatively alter the character of the general vicinity. The requested height variance will only apply to a portion of one of several new buildings to be constructed on the subject property, and there are no surrounding uses that are likely to be disturbed. A limited variance will enhance the architectural interest of the overall development, and thereby contribute to a positive redefining of the character of this redeveloping segment of Angliana Avenue.
- b. The large scale of this adaptive reuse project, its setting among a diversity of industrial and commercial uses, and its elevation relative to South Broadway are all special circumstances that contribute to justifying a limited height variance.
- c. Strict application of the Zoning Ordinance would require that all portions of all the new buildings proposed as part of this adaptive reuse project not exceed a height limit of 48'. While this is certainly possible, it would unreasonably restrict the ability of the appellant to provide some architectural interest for the many diverse uses that will be taking place.
- d. There will not be any circumvention of the Zoning Ordinance with this variance since the overall height limit for the I-2 zone, not involving an adaptive reuse of a building, is 75', which is measured to the mid-point of any roof trusses.

This recommendation of approval is made subject to the following conditions:

1. The theater building, with up to 50% of the building footprint to have a height not to exceed 80', shall be constructed in accordance with the submitted application and site plan, or as amended by the Planning Commission. The 50% stipulation shall apply to just the theater portion of the building, and not include the bowling center.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.

Representation – Ms. Christine Westover, attorney, stated that the applicant has read the staff report, and is in agreement with the conditions recommended for approval with their request.

Chairman Brown asked about the proposed pedestrian bridge. Ms. Westover replied that it will be built over the railroad tracks. Chairman Brown asked when that was planned to be done. Ms. Westover said that it will tie into a bridge planned to span South Broadway as part of the Newtown Pike Extension. She replied that one of the "feet" of the bridge is to be located near a planned restaurant at that location. Mr. Brown asked if her client would oppose a restriction that occupancy be withheld until that bridge is complete. Ms. Westover stated that phase 1 will be open prior to the construction of the Newtown Pike Extension. She assured Chairman Brown that the Planning Commission will be reviewing this issue at such time as they review a final development plan.

Chairman Brown asked why this variance is needed, and if it is for the movie theater or for visibility of the project from South Broadway. He asked if they had brought any renderings or three-dimensional drawings that could help answer his question. Ms. Westover had some photographs of other developments including Krikorian theater complexes in Southern California. She said that they utilize signature architecture, and six-story tall screens. She then displayed several photographs at this time for the Board, showing the type of architecture indicative of their movie theater developments. She told the Board that they incorporate really large screens in their theaters—and that is why a variance is only proposed for a portion of their movie theater building. Ms. Westover also showed photographs of soaring lobbies in many of their Southern California buildings, and said that these are not "garden variety" movie theaters. They need the added height to accommodate the larger screens.

Chairman Brown asked if she had any drawings of the proposed theater for Lexington. Ms. Westover submitted two concept drawings that have been shown to the Planning Commission, which will be part of the submission for a Tax Increment Financing proposal to the State in the near

future.

Ms. Moore asked why the height limit for an Adaptive Re-use Project is subject to a much lower height limit (48') than the 75' height limit in the I-2 zone for other industrial uses. Mr. Sallee stated that existing buildings would be utilized for these purposes, and there is such a building on this site, but he couldn't recall specifically any discussion of this issue by the Planning Commission. Ms. Westover stated that, coincidentally and on the behalf of a different client, she had represented the applicant for this text amendment, and she did not believe that a great deal of thought had been given to this originally.

Ms. Westover showed a concept drawing for the restaurant near the proposed pedestrian bridge and railroad overpass. Her client has unique developments. Mr. Griggs stated that he hasn't seen a photo of a six-story building yet in any of the drawings shown by Ms. Westover. She replied that, thus far, that they have not finalized their designs but would like the flexibility to propose a signature structure. Her client, Mr. Krikorian, would like the ability to develop such a signature structure on this site. Mr. Griggs stated that he understands the towers proposed, but saw no volume in the proposed buildings. Ms. Westover said that the developer wanted the certainty that they could develop the same type of building that has proven successful elsewhere. Mr. Griggs thought that each project that has been shown is unique and asked if a large building was proposed, or if the variance was to permit an attention-getting tower with neon. Ms. Westover replied that the tower would be at a different location from the theater. Mr. Griggs stated that the Board was being asked to trust the applicant without seeing the type of building that might be constructed. Ms. Westover said that until the TIF application and development plan are approved, he can not commit to a specific design. She said that they were amenable to bringing a plan back to the Board for review at a later date, as will be required for the Planning Commission on the final development plan.

Mr. Stout asked about the staff's recommendation for approval, given what he had read on the staff report. Mr. Marx explained that this is a large 17-acre development with multiple buildings, and only a portion of one building is proposed for the height variance. Often in the past, when the Board has considered height variances, the variation in building height for the development is a key consideration for approval in those situations. He said that those prior approvals have not been conditioned upon any design review by the Board. Mr. Marx understood Mr. Grigg's earlier concerns, but he cautioned the Board against the precedent of any such requirement in this case.

Ms. Westover reminded the Board that this proposed structure is adjacent to the railroad property, and that this building is not visible from South Broadway or from Angliana Avenue. She displayed a rendering of this building, separated from Angliana from others to be placed along that street frontage. Using the submitted site plan, she explained these building relationships. She identified the nearby land uses, that in essence, block the view of this building. Her client is worried about the visibility of this theater.

Ms. Moore asked about the site plan, and the features between the buildings just described. Ms. Sara Tuttle, Strand & Associates, replied that there is a landscaped plaza between these buildings. She stated that this plaza was shown on the rendering displayed earlier, and she identified the theater, the proposed bowling alley, and the adjacent parking that is to serve those uses. Ms. Westover stated that the variance is only for a part of one of the buildings. It is needed for visibility, and to ensure that the theater can have the same amenities that have proven to be successful in Southern California. She stated that this is planned to be a \$70 million project, and will have a great deal of public-private partnership. They felt that it is essential to maintain their critical formula for success.

Citizen Comments - Mr. Steve Robinson stated that he owned property across the street for Uptown Hounds, and that he is in support of this application. He stated that he must look at this property every day, and that there is an existing 80'-90' tower on the property at this time. He is thankful that someone wants to take existing land and try to develop this project on it.

Action – A motion was made by Mr. Stumbo, seconded by Ms. Edwards, to approve **V-2009-54: SHOWPROP LEXINGTON, LLC** – an appeal for a variance to increase the allowable height of a portion of a proposed theater building from 48 feet to 80 feet in a Heavy Industrial (I-2) zone, on properties located at 475 and 497 Angliana Avenue, for the reasons provided by the staff,

and subject to the recommended conditions.

The votes were as follows:

Ayes: Edwards, Griggs, Moore, Stout, Stumbo

Nays: Brown

Absent: Meyer

The motion passed by a vote of 5-1.

- c. **V-2009-55: DENNIS ANDERSON / TRAILSIDE AT McCONNELL'S, LLC** - appeal for a variance to eliminate the required hedge for a vehicular use area that adjoins a greenway in a Townhouse Residential (R-1T) zone, on properties located at 372, 380 & 384 McConnell's Trace and a portion of 3000 Leestown Road (Council District 2).

The Staff Recommended: Approval, for the following reasons:

- a. Granting the requested variance should not adversely affect the public health, safety or welfare, nor negatively alter the character of the general vicinity. Public safety should actually be improved with greater visibility of the greenway resulting from the elimination of the normally required hedge. Planting additional trees along the entire boundary of the greenway will result in a more natural, open, and park-like appearance.
- b. The presence of a greenway with a bike/pedestrian trail bordering nearly 2,000' of the subject property is a special circumstance that justifies a reevaluation of acceptable alternatives to providing a landscape buffer for vehicular use areas in a residential development that adjoins a greenway.
- c. Strict application of the Zoning Ordinance would require the installation of a minimum 3' tall hedge along approximately 994' of vehicular use area that adjoins the greenway. Visibility of the greenway would be reduced by such a hedge, especially if it grows to a much taller height. Access to the greenway by residents of the development would also be hindered by such a hedge.
- d. Significant existing landscaping will buffer this development from the nearby railroad, which is much more important than buffering the development from the adjacent greenway.

This recommendation of approval is made subject to the following conditions:

1. A landscape buffer with no hedge but additional trees (at an average spacing of one tree for every 25' of vehicular use area boundary) shall be provided, as depicted and described in the submitted application and site plan.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to installing the landscape buffer.
3. The final design of the buffer shall be subject to review and approval by the Landscape Examiner with the Division of Building Inspection.

Representation – Mr. Tony Barrett, Barrett Partners, was present representing the applicant. He stated that they have read the staff report, and are in agreement with the conditions recommended for approval. He told the Board that he was here with Dennis Anderson, and also had Commander Mark Barnard of the Division of Police.

Mr. Barrett stated that this request is for a townhouse development in McConnell's Trace, and that some of the proposed townhouses are to front on that public street, while others face each other--fronting upon a common green space. In those instances, the driveways are perpendicular to the street; and in those instances, landscaping is required along those "vehicular use areas" with a 3' hedge and trees every 40'. A pathway is located along the rear of the townhomes, along the railroad track; and along the railroad, the path is separated by thick vegetation.

Mr. Barrett stated that the Ordinance will require a corridor of the existing vegetation, and the required hedge along the pathway. They believe that this will impair the visibility of those on the path; and as a result, they have met with faculty of Eastern Kentucky University, to discuss "safety by design" options to that scenario. Crime is often a result of negative landscaping, and blocked

views of this trail could lead to negative behavior along the trail. Mr. Barrett said that their request is not to totally eliminate the hedge, but instead increase the number of trees to 25½' on center. This is for the areas where the driveways are located along the trail. He said that this involves 994' linear feet along the trail, and will result in 20 additional trees being planted along the trail.

Chairman Brown asked if the bike path was a public facility. Mr. Barrett replied in the affirmative.

Cmdr. Mark Barnard, Division of Police, was present to describe the "Safe by Design" program, similar to a program in England, which is modeled in the Netherlands entitled "Secure by Design." He stated that these programs are designed to reduce crime, via site design criteria. These initiatives locally are to reduce crime, since environments do influence crime. He said that he has worked in the Central Sector and in the East Sector to help reduce crime in times of shrinking budgets. Cmdr. Barnard said that they have taken common sense approaches and put them into a formal package. Cmdr. Barnard said that "Safe by Design" is a national program in England, and Lexington is the first city to put this in to effect locally.

Cmdr. Barnard said that their opinion about the shrubs is that, the more people that can see an area, "the better off you will be." The security and safety to the area is not benefited by sealing it off with landscaping. He said that in terms of the shrubs, the Police department would encourage the view not to be blocked by their installation.

Cmdr. Barnard said that they are excited by the "Safe by Design" program, which has reduced crime by 45% in England, and it will be presented in the near future. He said that the Woodhill Neighborhood Association asked for help in their neighborhood; and by limbing trees and removing shrubs, they helped increase visibility in their problem areas. This is a proactive program that is intended to help developers and citizens.

Mr. Griggs asked about the 300'-400' of garage doors that will be bordering this greenway, and noted that the developer has chosen this design. He said that some plant species will not grow taller than the 3' hedge required by the Ordinance, and asked if it was Cmdr. Barnard's opinion that a 3' hedge would result in a visual barrier that would lead to significant crime behind it. Cmdr. Barnard replied that he didn't have the background to answer about the landscaping. However, he was as concerned about the grade at this location that would accompany the hedge. It could result in a 6' screening in some locations. He noted that people do sometimes hide on the ground. Mr. Griggs thought that it was pretty level at this location. Cmdr. Barnard said that the hedge would block access to and from the pathway, creating a visual barrier. He said that the walkers along the path could also keep eyes on these properties, and that keeping eyes on the area is consistent with the "Safe by Design" criteria.

Mr. Barrett showed some photographs of the site along this portion of the trail. The photos showed that there is a slight grade up from the trail to the townhouses, and there is some undulation in the topography. Another photo along the street to the west of this location was shown, where there is no landscaping. At another location, the photo showed where the trail backs up to single family homes, where no landscaping is required, and where no fences have been erected. Mr. Barrett said that these three areas all offered open views of the pathway.

Mr. Stumbo asked if their proposal to require trees instead of a hedge was entirely a safety issue. Mr. Barrett replied that it was, entirely.

Action – A motion was made by Ms. Edwards, seconded by Mr. Stout, to approve **V-2009-55: DENNIS ANDERSON / TRAILSIDE AT McCONNELL'S, LLC** – an appeal for a variance to eliminate the required hedge for a vehicular use area that adjoins a greenway in a Townhouse Residential (R-1T) zone, on properties located at 372, 380 & 384 McConnell's Trace and a portion of 3000 Leestown Road, for the reasons provided by the staff, and subject to the three recommended conditions.

Discussion - Chairman Brown asked Mr. Barrett if they were in agreement with the conditions recommended by the staff. Mr. Barrett replied in the affirmative.

Mr. Hume asked if the Board should condition the spacing of the additional trees to be "25' on-

center.” Chairman Brown asked Mr. Hume if he was in agreement with condition #1. Mr. Hume replied in the affirmative.

The votes were as follows:

Ayes: Brown, Edwards, Moore, Stout, Stumbo

Nays: Griggs

Absent: Meyer

The motion passed by a vote of 5-1.

- d. **V-2009-56: LISA BARRETT** - appeals for a variance to reduce the required side yard from 8 feet to 4 feet in order to construct an attached carport in a Single Family Residential (R-1C) zone, on property located at 1350 Bordeaux Drive (Council District 11).

The Staff Recommended: Approval, for the following reasons:

- a. Granting the requested variance should not adversely affect the public health, safety or welfare, nor alter the character of the general vicinity. The carport will cover just a portion of an existing driveway, with the 4' side yard that is proposed providing adequate room for maintenance and emergency response purposes. Attached carports with similar side yards are not uncommon in this neighborhood.
- b. The layout of the residence and other improvements on the subject property is a special circumstance that contributes to justifying a reduction of the side yard requirement.
- c. Strict application of the Zoning Ordinance would force the appellant to construct a carport to the rear of the residence, which would require the relocation of a pool with extensive decking.
- d. The circumstances surrounding this variance request are to a large extent a result of how a previous property owner elected to develop the property.

This recommendation of approval is made subject to the following conditions:

1. The carport shall be erected in accordance with the submitted application and site plan.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.
3. The side yard reduction to 4' is granted only for the purpose of allowing the proposed attached carport over a portion of the existing driveway along the side of the residence.

Representation – Mr. Mark Stell, contractor, was present representing Ms. Barrett. Chairman Brown asked if they had reviewed the staff recommendation. Mr. Stell replied in the affirmative. Chairman Brown asked if they would agree to abide by the conditions. Mr. Stell again replied in the affirmative. Mr. Stumbo stated that the Board had received a letter from a next door neighbor, which stated that they had no objection. It was circulated to the Board.

Action – A motion was made by Mr. Griggs, seconded by Mr. Stout, and carried unanimously (Meyer absent) to approve **V-2009-56: LISA BARRETT** – an appeal for a variance to reduce the required side yard from 8 feet to 4 feet in order to construct an attached carport in a Single Family Residential (R-1C) zone, on property located at 1350 Bordeaux Drive, for the reasons provided by the staff, and subject to the three recommended conditions.

- e. **C-2009-49: RAY and KELLY VAN METRE / MONKEY JOE'S** - appeal for a conditional use permit to establish a children's entertainment center in a Light Industrial (I-1) zone, on property located at 1850 Bryant Road (Council District 6).

The Staff Recommended: Approval, for the following reasons:

- a. Granting the requested conditional use permit should not adversely affect any of the surrounding properties, which are not likely to be disturbed by the type of children's indoor entertainment that is proposed. Establishing the facility will not require any additions to the existing building. It is predicted that adequate off-street parking will be available on site for much of the time that the facility is operating, with additional parking to be provided if determined to be necessary.

- b. All necessary public services and facilities such as police and fire protection are available and adequate for the proposed use.

This recommendation of approval is made subject to the following conditions:

1. The facility shall be established in accordance with the submitted application and site plan.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to opening the facility, including an occupancy permit.
3. A sewer capacity study shall be undertaken during the permitting process should a determination be made by the Division of Engineering that such a study is necessary.
4. The facility shall be limited to a maximum occupancy of 250 persons, or as further limited by the Fire Marshall and/or the results of any applicable sewer capacity study.
5. The operation of the facility shall be reviewed by the Board one year from the date an occupancy permit is issued by the Division of Building Inspection to determine if off-street parking provided on site is adequate. Should a determination be made that such parking is inadequate; a specified number of additional off-street parking spaces shall be provided within a reasonable time frame, either through the construction of additional paved areas or by rearranging the layout of parking spaces in existing paved areas. Should such additional parking not be provided, the Board shall have the option of further limiting the maximum occupancy of the subject suite within the building.

Representation – Mr. Shawn Collett and Mr. Ray Van Metre (appellant) were present. Chairman Brown asked if they had reviewed the staff recommendation and would agree to abide by the recommended conditions. Mr. Collett replied in the affirmative.

Chairman Brown asked the staff if there needed to be a restriction upon additional kitchens on this property. Mr. Hume did not believe that a kitchen would be prohibited at this location, and that there would not ordinarily be living quarters associated with this use.

Action – A motion was made by Mr. Stumbo, seconded by Mr. Stout, to approve **C-2009-49: RAY and KELLY VAN METRE / MONKEY JOE'S** - appeal for a conditional use permit to establish a children's entertainment center in a Light Industrial (I-1) zone, on property located at 1850 Bryant Road, for the reason provided by the staff, and subject to the five recommended conditions.

Discussion - Chairman Brown asked when they planned to open Monkey Joe's. Mr. Van Meter replied that they hoped to be open by January 1.

The motion carried unanimously (Meyer absent).

- f. **A-2009-52: KAREN PAYNE** - appeals for an administrative review to allow a second story on a detached garage to remain, thereby exceeding the maximum square footage for all accessory buildings on the lot (1,302 square feet), in a Single Family Residential (R-1B) zone, on property located at 2445 Paris Pike (Council District 6).

The Staff Recommended: Approval, for the following reasons:

- a. Completing the addition of a second story to a detached garage should not create any disturbances in this neighborhood of 5 to 10-acre lots, and will not result in an unreasonable circumvention of the limitations of the Zoning Ordinance. The building footprint will not be enlarged as a result of the addition, and the height of the completed building will not exceed the height of the principal residence.
- b. The subject property is an oversized lot of five acres, and the garage is centrally located on the lot, over 90' away from the nearest adjoining property line and over 200' away from Paris Pike. Existing trees and other vegetation limit the visibility of the garage from the adjoining properties.
- c. The addition will be used for storage and as guest quarters (without a kitchen), both of which are customary accessory uses for a property of this type.

This recommendation of approval is made subject to the following conditions:

1. The second story of the garage may be completed in accordance with the submitted application and site plan, subject to the permitting requirements of the Division of Building Inspection.

2. A building permit shall be obtained within 30 days of action by the Board, with no additional work to be initiated during that interim time period.
3. The addition shall not have a kitchen and shall not be used for rental purposes.

Representation – Ms. Karen Payne was present. Chairman Brown asked if she had reviewed the conditions recommended by the staff. She took a moment to review the conditions. Chairman Brown asked to see photos of the structure involved in this appeal.

While Ms. Payne reviewed the conditions, Mr. Hume reminded the Board of a similar case, on Wyatt Parkway, where the Board disapproved this type of application, and the applicant was made to remove the construction and lower the structure. That case, like this one, involved a structure constructed without a building permit. Ms. Payne stated that she was in agreement with the staff's recommended conditions.

Chairman Brown asked if there was any question that a permit was necessary for this building. Mr. Hume replied that there was not in this case, as a permit is required. Chairman Brown asked Ms. Payne about her business. She replied that she has a business on Delaware Avenue, named Cowgirl Attic, which is for architectural salvage, and that she resides at the subject property.

Mr. Griggs asked how this construction got so far along without a permit. She replied that a storm blew a rubber roof off this building; and that in a weekend, they repaired the roof, as it had already been constructed for a second story. Mr. Griggs asked how she discovered that a permit was needed. Ms. Payne replied that she received a notice from someone, and she thought that a neighbor or a competitor complained in the fall when the leaves fell from the trees. Mr. Griggs asked if plans had been submitted. She replied in the negative, and added that they drew up plans over the weekend. Mr. Griggs asked if a kitchen was planned for this structure since, according to the staff report, her mother was to live in this building. Ms. Payne replied that a kitchen was not required for her mother to stay in that building. Mr. Griggs asked if she owned other rental property. She replied that she does, but that she resides at this location. Mr. Griggs stated that since the property is so large, that these type of structures tend to morph into rental units, over time. Ms. Payne replied that their plan was for her mother to move in with her in the future.

Chairman Brown asked if she was in the construction business. She stated that she had "flipped" houses before. Chairman Brown asked if she knew that she needed a permit. Ms. Payne replied in the negative. She stated that the work was a "split second" decision; with the damage to her roof, and a forecast for rain, it was a last-minute decision to repair the roof. She said that she would have obtained a permit if she had known that one was required for this work.

Mr. Stout suggested that there be a one-year review of this application. Mr. Griggs asked if it could be made one-year from the issuance of the Occupancy Permit. Mr. Stout was in agreement.

Ms. Moore asked Mr. Hume about this condition. Mr. Hume said that he did not object to it being added in this case. Ms. Payne said that she also did not object, as she had no desire to rent part of this five-acre property to someone. She said that it is a private area and that her only plans were to reside there with her mother.

Action – A motion was made by Mr. Stout to approve **A-2009-52: KAREN PAYNE** – an appeal for an administrative review to allow a second story on a detached garage to remain, thereby exceeding the maximum square footage for all accessory buildings on the lot (1,302 square feet), in a Single Family Residential (R-1B) zone, on property located at 2445 Paris Pike, for the reasons provided by the staff, and subject to the recommended conditions, adding a fourth condition that review by the Board is required one year after occupancy.

Discussion - Chairman Brown asked Ms. Payne whether or not she was agreeable to the fourth condition. She replied that she was in agreement. Mr. Sallee displayed the fourth condition on the overhead.

Mr. Stumbo seconded the motion.

The votes were as follows:

Ayes: Edwards, Stout, Stumbo

Nays: Brown, Griggs, Moore

Absent: Meyer

The vote was 3-3. The motion failed.

Discussion - Ms. Boland stated that the applicant's request was not approved. Chairman Brown asked if there were any other motions. There were no other motions offered by the Board.

Ms. Payne asked if it could be approved, given her promise and her agreement to the one-year review. She asked what her options were, and said that this is a \$1,000,000 property that she would like to sell one day.

Mr. Hume stated that his office will issue an Order to remove the construction. Ms. Payne said that she will appeal that order. Chairman Brown suggested that she speak with the Building Inspection staff about her options on the property.

- B. **Transcript or Witnesses** - The Chair will announce that any applicant or objector to any appeal before the Board is entitled to have a transcript of the meeting prepared at his expense and to have witnesses sworn.
- C. **Variance Appeals** - As required by KRS 100.243, in the consideration of variance appeals before the granting or denying of any variance the Board must find:

That the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the Board shall consider whether:

- (a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;
- (b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and
- (c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The Board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulations from which relief is sought.

There were no variance applications remaining.

D. **Conditional Use Appeals**

- 1. **C-2009-48: BHARATIYA TEMPLE and CULTURAL CENTER** - appeals for a conditional use permit to construct an outdoor covered pavilion (with storage space and restrooms) in the Agricultural Rural (A-R) zone, on property located at 3050 North Cleveland Road (Council District 12).

The Staff Recommended: Disapproval, for the following reasons:

- a. The existing church building has a size of 10,000 square feet, which is the maximum amount of square footage allowed by the Zoning Ordinance for a church on property in the A-R zone of less than 20 acres. As such, there is no additional "unused" square footage available for the construction of a permanent outdoor covered pavilion with a storage room and two restrooms.
- b. A covered pavilion with storage space and restrooms is appropriately considered as a "structure" subject to the size limitation prescribed by Article 8-1(d) of the Zoning Ordinance.
- c. The Board of Adjustment is not authorized to grant an appeal that would vary a numeric limit of

a particular zone, pursuant to Article 7-6(b) of the Zoning Ordinance.

Representation – Mr. John DeHart, Thought Space Architects, was present representing the appellant.

Chairman Brown stated that the staff had recommended disapproval of this request. Mr. DeHart replied that they hoped for advice from the Board as to whether their construction is really building space or not. He said that the sole purpose for this appeal is to allow a replacement for temporary tents that are costly to rent periodically. They are agreeable to deed restrictions to prevent it from being enclosed, and the church is open to any suggestions to allow this construction as a shelter.

Mr. Marx stated that this property is at the northwest corner of North Cleveland Road and Winchester Road. He showed an aerial photograph of the property, including the concrete pad next to the church where the structure is proposed. He said that this church use was approved by the Board in 2002. He also displayed a rendering of the proposed construction, submitted by the church. Mr. Marx stated that the Zoning Ordinance is clear that "all structures" are subject to the 10,000 square-foot limit of the A-R zone. He stated that the Ordinance does not permit variances of numeric limits in the A-R zone, and that is why the staff is recommending disapproval of this request.

Chairman Brown asked if rezoning the property was an option for this church. Mr. Marx replied that it was, although the staff was not recommending that option, given the Comprehensive Plan recommendation, and that this location is beyond the Urban Services Area boundary.

Ms. Edwards said that the key word to her is "enclosure" and asked if this was a structure. She asked that, if it is not enclosed, how could it be considered building area. Mr. Saltee displayed the 20-acre limit of the A-R zone for this use. Chairman Brown said that this church does not have 20 acres of land.

Mr. DeHart concluded that they could seek rezoning, or continue using temporary structures. Mr. Hume stated that temporary structures are permitted to be up for only 180 days. Chairman Brown thought that was helpful information for this appeal.

Objections - Ms. Knox Van Nagell was present on behalf of the Fayette Alliance. She stated that her organization is in agreement with the staff report. While they respect what the Temple stands for in the community, they believe this would set a dangerous land use precedent. The Alliance feels that this could lead to churches and other non-agricultural construction in the rural area. It is also questionable that the Board is authorized to grant this request. For all of those reasons, they requested that the Board follow the staff's recommendation.

Mr. David Royce, representing SOIL (Save Our Irreplaceable Land) also requested that the Board disapprove the request. He stated that this has nothing to do with the nature of this particular use, but instead comes from their desire for strict adherence to the A-R provisions dealing with the 10,000 square-foot restriction.

Mr. Royce stated that the 10,000 square-foot restriction came from lengthy study; and there have been lengthy battles to amend the Zoning Ordinance, and through zone changes, to change this restriction. He reminded the Board that, in Kentucky, there is no such thing as a land use variance, contrary to what the Ordinance provides. He wished the church well, but concluded that this is an extremely important issue locally to SOIL, to the A-R zone, and the Urban Service Boundary, and asked that this request be denied.

Chairman Brown asked Mr. DeHart if he understood that the Ordinance did not allow the Board to approve their request. He understood, and said that the church is not asking the Board for a change of use, but rather, what entails a "structure." They were not interested in the long, tenuous process of rezoning. Still, he thanked the Board for their time.

Action – A motion was made by Ms. Moore, seconded by Mr. Griggs, and carried unanimously (Meyer absent) to disapprove **C-2009-48: BHARATIYA TEMPLE and CULTURAL CENTER** – an appeal for a conditional use permit to construct an outdoor covered pavilion (with storage space and restrooms) in the Agricultural Rural (A-R) zone, on property located at 3050 North Cleveland

Road, for the reasons provided by the staff.

E. **Administrative Reviews**

1. **A-2009-51: COFFEE TIMES, INC.** - appeals for an administrative review to allow an outdoor patio for a coffee shop, considered by the Division of Building Inspection to be an expansion of a non-conforming use, in a Light Industrial (I-1) zone, on property located at 2571 Regency Road (Council District 10).

The Staff Recommended: Disapproval, and that the decision of the Division of Building Inspection be upheld, for the following reasons:

- a. An outdoor seating area for a coffee bar is not appropriately considered as accessory to a coffee roasting and packaging operation, which is a principal permitted use in the I-1 zone. Such a use falls under a much more rigorous regulatory structure that applies to food and beverage preparation and service, and restaurants are specifically identified in the Zoning Ordinance as a prohibited use in the I-1 zone.
- b. The proposed location for an outdoor seating area, within an existing parking lot and with no separation or buffer between the patio and already established vehicle movements, will compromise public health and safety.
- c. The appellant has not demonstrated that minimum off-street parking requirements for the uses within the existing building can be maintained with the proposed loss of three parking spaces directly in front of the coffee store.

Representation – Ms. Terri Wood was present for the applicant. Chairman Brown asked if she had read the staff report and recommendation. She replied that she had, and understood their recommendation. She stated that Coffee Times has been located there for 26 years, and had no idea that they were doing anything unacceptable. They went to the City originally, knowing that they wanted to roast coffee, to see what they needed to do to open a small business with a coffee shop. They wanted to not only roast coffee, but also have a retail component for their specialty roasts. They were advised at that time to be in an I-1 zone. Ms. Wood stated that they did not want to be in a typical I-1 industrial park. She said that Regency Road and Moore Drive were desirable for their roasting plant.

Ms. Wood said that at no time did they withhold what they wanted to do there on Regency Road. They proceeded with their business license, and went to the Health Department for the proper permits. She said that the Health Department permit was for a restaurant with a kitchen, but they did not want to “cook” in their shop. They wanted a coffee shop with food that goes with coffee, and provide their patrons with a good experience. Because they serve coffee in a mug, Ms. Wood said that they were treated as a restaurant. She said that they always agreed to abide by the Health Department requirements. They bring in their food, and prepare very little there, such as scones from Good Foods Co-Op, but she did not consider their use to be a restaurant. She was disappointed to learn that she has been operating improperly over the years.

Ms. Wood said that the I-1 zone on Regency Road is a “hodge-podge” of zoning and of businesses, and her customers have supported her business for 26 years. In order to stay competitive today, she said that they needed to be progressive and have an outdoor patio. Her proposed patio will have raised concrete and protective railings. She did not see it aligning it with the entrance to the parking lot, and that it would only occupy the space that two cars would.

Chairman Brown stated that he had read the materials provided to the Board, and concluded that her current operation was consistent with the I-1 zone. Ms. Wood said that she did not come to the same conclusion. Mr. Hume stated that a tasting room in an I-1 zone would be fine. However, the addition of a kitchen and food service becomes less incidental to the principal use of roasting coffee, and more like a restaurant, as would be the outdoor patio. Chairman Brown asked if Building Inspection thought this use was inappropriate. Mr. Hume thought that the food service component was problematic—if just more than serving coffee. The Division of Building Inspection felt that the I-1 requirements were being “stretched.” He said that they believed the patio was an additional stretch.

Ms. Moore opined that this was a non-conforming use that might now be proposed for an expansion

with the patio. Mr. Hume thought that the Health Department approval was for a restaurant, because of the tasting in a cup, which did allow an expansion, of sorts. The patio is beyond what Building Inspection would allow in an I-1 zone. He said that they did not meet the seating requirement for a restaurant. Ms. Wood said that the I-1 zone does allow retail sales, to which Mr. Hume replied that that use had different building code requirements.

Chairman Brown thought that he and Mr. Hume might have reached different conclusions. He felt that it was a bit murky with the sale of coffee by the cup. Ms. Wood said that it is a bit unfair that this is now an issue after 26 years of operation. Also, this I-1 zoned area is unique, and more retail in character. She felt penalized, since there are only two I-1 buildings remaining on Regency Road.

Mr. Marx reviewed the findings for disapproval in the staff report. He said that the staff focused upon the outdoor patio and seating area being proposed and had concerns about its location. Ms. Wood was less concerned about its exact location, and told the Board that it could be moved. Mr. Marx showed an aerial photo of the building, and reviewed the zoning in this area. He identified the proposed patio location, and oriented it to the entrance to the parking lot from Regency Road.

Ms. Wood said that she did consider placing the patio along the side of the building, where there are six parking spaces and originally considered this location for the patio. She can reduce the patio's size if it can be approved.

Chairman Brown said that Building Inspection has some issues with her proposed use. However, she is asking that the use is proposed to be larger, with the outdoor patio. He thought that there might be a non-conforming use issue here. He believed that the Board could not allow such an expansion.

Ms. Moore asked if a B-1 zone would allow the roasting of coffee. Both Ms. Wood and Mr. Hume replied that it would not. She said that no zone allows her unique business. Chairman Brown said that this combination is not allowed, but other coffee shops do not roast coffee beans. Mr. Sallee stated that it may be possible to zone part of the property to B-1, but that would be unusual. Otherwise it may be that both could be principal uses. Ms. Wood stated that the two suites have most of the space devoted to the coffee production; but the other part of those suites, about 30%, is devoted to the coffee shop. Chairman Brown said that the 30% figure was "the right answer."

Mr. Griggs opined that Ms. Wood could seek a rezoning or a text amendment, but either one could be a drawn out process. Chairman Brown asked Mr. Sallee about those options. Mr. Sallee replied that an Adaptive Reuse could also be sought, instead of either of these options. Under that designation, a combination use would be possible. He did not see how this could come back to the Board, unless some sort of dimensional variance was needed in the future.

Mr. Griggs stated that if the patio were to come back to the Board, then the redesign of the patio would be necessary. Ms. Wood agreed. Mr. Griggs suggested a withdrawal of this request. Chairman Brown thought that an indefinite postponement would be in order, and asked Ms. Boland for her opinion. Ms. Boland replied that, since this is an Administrative Appeal, a mixed use development plan approved by the Planning Commission would not require further review by the Board.

Chairman Brown stated that he wasn't sure that the Board could grant the relief that Ms. Wood was requesting. He did state that his wife likes their coffee. Ms. Wood expressed her thanks.

Mr. Stout asked if it is advisable for Ms. Wood to withdraw. Mr. Sallee stated that a withdrawal would allow her to return to the Board sooner, if necessary. Mr. Marx stated that the waiting period for a disapproval of a request for a property is a year.

Mr. Stout asked the staff as to what route Ms. Wood should take at this point. Mr. Sallee stated that the mixed use provisions may not be the best for her, but that she could meet with the staff to discuss possible options for her business to expand. Chairman Brown suggested that she do so.

Action – A motion was made by Ms. Moore, seconded by Mr. Griggs to disapprove **A-2009-51: COFFEE TIMES, INC.** – an appeal for an administrative review to allow an outdoor patio for a coffee shop, considered by the Division of Building Inspection to be an expansion of a non-conforming use, in a Light Industrial (I-1) zone, on property located at 2571 Regency Road, for

the reasons provided by the staff.

The votes were as follows:

Ayes: Brown, Griggs, Moore, Stout

Nays: Edwards, Stumbo

Absent: Meyer

The motion passed by a vote of 4-2.

- IV. **BOARD ITEMS** - The Chair announced that any items a Board member wishes to present would be heard at this time.

Ms. Edwards asked if the Board can not approve an appeal, why they come before the Board. Mr. Marx replied that applicants apply even though the staff advises that they might not "have a chance." Ms. Boland stated that any applicant can appeal a decision from Building Inspection. Ms. Edwards asked that if the Board has "no authority to rule," then why they rule on cases. She said that she read this statement in one of the letters submitted to the Board earlier in the meeting. Ms. Boland replied that in some instances, the Board has no authority to grant the relief being requested.

Ms. Stout stated that he had been reappointed to the Board. He stated that the Urban County Council had asked for advice from Board members, on cases that require their attention. The Board could recommend changes to rules "on the books." He did not know that previously. Over the years, there have been such issues that have been at issue at the Board of Adjustment. He appreciated that the Board could make recommendations to the Council, via the staff.

- V. **STAFF ITEMS** - The Chair announced that any items a Staff member wishes to present would be heard at this time. There were none.
- VI. **NEXT MEETING DATE** - The Chair announced that the next meeting date would be September 25, 2009.
- VII. **ADJOURNMENT** - There being no further business, Chairman Brown declared the meeting adjourned at 3:04 PM.

Peter Brown, Chairman

James Griggs, Secretary