

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

April 26, 2013

- I. **ATTENDANCE** - The Chairman called the meeting to order at 1:00 p.m. in the Council Chambers, 200 East Main Street, on April 26, 2013. Members present were Chairman Barry Stumbo, Noel White, Joseph Smith, Thomas Glover, James Griggs, Janice Meyer and Kathryn Moore. Others present were Chuck Saylor, Division of Engineering; Jeff Neal, Division of Traffic Engineering; Jim Marx, Zoning Enforcement; and Tracy Jones, Department of Law. Staff members present were Jimmy Emmons, Bill Saltee and Wanda Howard.

Swearing of Witnesses – The Chairman asked all those persons present who would be speaking or offering testimony to stand, raise their right hand and be sworn. The oath was administered at this time.

- II. **APPROVAL OF MINUTES** - The Chairman announced that the minutes of the March 29, 2013 meeting would be considered at this time. Prior to the approval of the minutes, Chairman Stumbo stated, with respect to C-2013-13: CHAD DICKEN, that the appeal in question was postponed last month to the April 26th Board of Adjustment meeting (instead of March 29th). The correction was noted by the staff.

Action – A motion was made by Ms. Meyer, seconded by Ms. White, and carried unanimously to approve the minutes of the March 29, 2013 meeting, including the noted correction.

III. **PUBLIC HEARING ON ZONING APPEALS**

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

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

- a. **C-2013-13: CHAD DICKEN** – appeals for a conditional use permit to establish a garden center and future plant nursery in an Agricultural-Urban (A-U) zone, at 3280 Clays Mill Road. (Council District 9)

The Staff Recommended: Disapproval, for the following reason:

1. The proposed conditional use will not meet the following minimum requirements of the Zoning Ordinance:
 - a) This use is not proposed to be “operated in conjunction with a commercial greenhouse or plant nursery on the same premises” as required by Article 8-4(d)(3).
 - b) The subject lot does not meet the minimum size requirements (of 10 acres) set forth by Article 8-4(f) for garden center uses. Further, the proposed retention of the existing single family dwelling on the property will further limit the available portions of this two-acre property for the proposed use.
 - c) The proposed off-street parking area of this garden center, by proposing the use of only gravel for twelve parking spaces and the associated drive aisles, will not meet the requirements of Article 16-2(e).

Representation – Mr. Chad Dicken, appellant, was present to request a withdrawal of the subject appeal, with the understanding that there is a six-month waiting period before a new conditional use application can be submitted for the same property address. No action by the Board was required for the requested withdrawal.

Note: Mr. Emmons noted at this time that signs were posted for each request on today’s agenda for Conditional Use permits; and that notices were mailed to nearby neighborhood associations as well.

2. No Discussion Items - The Chairman asked if there are any other agenda items where no discussion is 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-2013-23: BALL HOMES, LLC** - appeals for a variance to reduce the required 25-foot setback from the floodplain in order to construct a duplex in an Expansion Area Residential (EAR-1) zone, at 501 Lorenzo Place. (Council District 7)

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested variance should not adversely affect the subject or surrounding properties, as the location of the proposed duplex is about 40' from the floodplain as approved by FEMA on Conditional Letter of Map Revision (CLOMR) case #09-04-8336R; and all of the necessary floodplain improvements between Hays Boulevard downstream to the regional detention basin are complete and functioning properly, as per the approved CLOMR.
2. The proposed structures are not located in the regulatory floodplain; and the possibility of this variance is noted on the current Development Plan approved for this location.
3. Upon completion of all of the storm water improvements within the 500+ acre Gess development, and approval by FEMA of the final Letter of Map Revision (LOMR), this variance will no longer be necessary. Thus, there would be no circumvention of the Zoning Ordinance.
4. Strict application of the Zoning Ordinance would create an unnecessary hardship for the appellant, since a client has chosen these lots, and the issuance of the LOMR appears to be some (unknown) time in the future.
5. It is only the timing of the proposed construction that necessitates the variance. Once the CLOMR becomes a LOMR (sometime in the future), the need for the variance will no longer be applicable.

This recommendation is made subject to the following conditions:

1. This development of the subject property shall take place in accordance with the submitted application and site plan, or as amended by the Planning Commission.
2. All necessary permits shall be obtained from the Division of Building Inspection and any other applicable Division of the Urban County Government prior to any construction activity on the subject site.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response.

Representation – Ms. Rena Wiseman, attorney, was present on the appellant's behalf. She indicated that they had read and understood the staff's recommendation and agreed to abide by the conditions for approval.

There were no questions or comments from the Board.

Action – A motion was made by Ms. White, seconded by Ms. Moore, and carried unanimously to approve **V-2013-23: BALL HOMES, LLC** (a variance to reduce the required 25-foot setback from the floodplain in order to construct a duplex in an Expansion Area Residential [EAR-1] zone, at 501 Lorenzo Place) as recommended by the staff and subject to the two conditions as recommended by the staff.

- b. **V-2013-24: LEXINGTON HABITAT FOR HUMANITY** - appeals for a variance to reduce the required setback along Willard Street from 30 feet to 10 feet in order to construct a single-family residence in a Single-Family Residential (R-1D) zone, at 969 Valley Avenue. (Council District 2)

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested variance will not adversely affect the subject or surrounding

properties; nor will it affect the public health, safety, or welfare, as the sight triangle for this intersection will not be adversely impacted. It will not alter the character of the vicinity or cause a nuisance to the public, since many other properties in neighborhood are located at similar setbacks from the street.

2. Granting this variance will not allow an unreasonable circumvention of the Zoning Ordinance since it is clear that the intent of the current Infill & Redevelopment regulations is to create compatibility with the existing development patterns of older, established neighborhoods such as this.
3. The subject property was developed prior to the adoption of the current Zoning Ordinance, particularly Articles 8-8(h) and 15-2(b)(4), which now require the side street side yard to be 30 feet in many areas.
4. Strict adherence to the Zoning Ordinance would constitute a hardship to the appellant, as this lot is only 39.8 feet wide, which would only leave 4.8' on which to build a residence.
5. The requested variance is not the result of a willful violation of the Zoning Ordinance. The appellant has halted the site preparation and construction until such time as the Board approves the requested variance to allow the residence to be built and to provide the required parking space to be in the driveway.

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

1. That a building permit be obtained from the Division of Building Inspection prior to resuming construction.
2. That an Administrative Action and/or Easement Minor Amended Plat be certified prior to the issuance of a building permit in order to record the action of the Board and to create the necessary "public passageway easement" for the sidewalk improvements.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response.

Representation – Mr. Kevin Phillips, with Endris Engineering, was present representing the appellant. He indicated that they had read and understood the staff's recommendation and agreed to abide by the conditions for approval.

There were no questions or comments from the Board.

Action – A motion was made by Ms. Meyer, seconded by Mr. Glover, and carried unanimously to approve **V-2013-24: LEXINGTON HABITAT FOR HUMANITY** (a variance to reduce the required setback along Willard Street from 30 feet to 10 feet in order to construct a single-family residence in a Single-Family Residential [R-1D] zone, at 969 Valley Avenue) as recommended by the staff and subject to the two recommended conditions.

- c. **V-2013-25: CHRISTINA K. RAZAVI** - appeals for a variance to reduce the required side yard from 3 feet to 0 feet in order to install a privacy fence along the property line in a Planned Neighborhood Residential (R-3) zone, at 316 Loblolly Court. (Council District 9)

The Staff Recommends: Approval, for the following reasons:

1. Reducing the required side yard from 3' to 0', only for the purpose of allowing a portion of the fence to be constructed on the property line (where depicted on the site plan), should not adversely affect the public health, safety, or welfare, nor alter the character of the area.
2. The pie-shaped configuration of the subject lot and the location of the home thereon, result in side yards well in excess of the minimum 3' requirement, which constitutes a unique circumstance.
3. The location of the fencing is in an area with at least a 10' wide side yard; and, in no circumstance, will the proposed fence create a situation with an obstructed side yard of less than 6' on the subject or neighboring properties. Therefore, there will be no resulting circumvention of the Zoning Ordinance.
4. Strict application of the Zoning Ordinance would result in all portions of the fence being relocated to the rear of the structure, which would result in a much smaller fenced yard for the appellant.
5. There is not a willful violation or other attempt to circumvent the requirements of the Zoning Ordinance by the appellant, as a fencing permit has been applied for and construction of the

fence has not yet begun.

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

1. A fencing permit shall be obtained from the Division of Building Inspection, as depicted in the submitted application and site plan, prior to construction.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response.

Representation – Ms. Christina Razavi, appellant, was present. She indicated that she had read and understood the staff's recommendation and agreed to abide by the single condition for approval.

There were no questions or comments from the Board.

Action – A motion was made by Mr. Griggs, seconded by Mr. Glover, and carried unanimously to approve **V-2013-25: CHRISTINA K. RAZAVI** (a variance to reduce the required side yard from 3 feet to 0 feet in order to install a privacy fence along the property line in a Planned Neighborhood Residential [R-3] zone, at 316 Loblolly Court) for the reasons recommended by the staff and subject to the single recommended condition.

- d. **C-2013-19: STEVE MILLERD** - appeals for a conditional use permit to establish a home occupation (leatherworking) in a Single Family Residential (R-1D) zone, at 4264 Forsythe Drive. (Council District 9)

The Staff Recommends: Approval, for the following reasons:

1. A home occupation is permitted as a conditional use in the Single Family Residential (R-1D) zone with Board of Adjustment approval.
2. Granting this conditional use permit will not adversely affect the subject property or any surrounding properties since there will be no traffic associated with the use other than three or four deliveries per month and occasional trips to the post office on the part of the appellant. The work area is limited to a small portion of his attached garage, and there will be no sign or any other indication on the property that this use is taking place. Any noise generated will be minimal and will be no more than is typical of everyday living (hammer, electric drill and small vacuum); and only small hand tools will be used for the leather working/craft itself. The use is clearly incidental to use of the property as a single family residence, as the appellant does his leather working for only 5 to 7 hours per week. This type of home occupation is therefore well within the limitations of Article 1-11 regarding home occupations.
3. All public facilities are available and adequate for the proposed use.

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

1. That the home occupation be limited to the area within the appellant's residence, as indicated on the site plan included with this application; and that it be limited to leather working, as requested.
2. That a Zoning Compliance Permit be obtained from the Division of Planning and an Occupancy Permit be obtained from the Division of Building Inspection prior to establishing the use as a home occupation.
3. That no sign be posted on the property, and that the appellant comply with all other stipulations of Article 1-11 regarding home occupations.
4. That the only traffic associated with the use be the infrequent (3 to 4 times per month) deliveries, as noted in the application.
5. That should the appellant cease to own or occupy the subject property, the conditional use permit shall become null and void.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response.

Representation – Mr. Steve Millerd, appellant, was present. He indicated that he had read and

understood the staff's recommendation and agreed to abide by the conditions for approval.

Mr. Emmons noted that the staff had received one letter of strong support from a neighboring property owner, which was submitted to the Board for review at this time.

There were no questions or comments from the Board.

Action – A motion was made by Mr. Glover, seconded by Ms. Meyer, and carried unanimously to approve **C-2013-19: STEVE MILLERD** (a conditional use permit to establish a home occupation [leatherworking] in a Single-Family Residential [R-1D] zone, at 4264 Forsythe Drive) for the reasons recommended by the staff and subject to the five conditions listed by the staff.

- e. **C-2013-21: STH ENTERPRISES, LLC** - appeals for a conditional use permit to establish a new indoor recreational facility (go-carts, miniature golf, games, concessions, etc.) in a Wholesale and Warehouse Business (B-4) zone, at 3025 Blake James Drive. (Council District 7)

The Staff Recommended: Approval, for the following reasons:

1. Granting the requested conditional use permit should not adversely affect the subject or surrounding properties. Adequate off-street parking will be provided, and the facility will have convenient access to Todds Road and Man o' War Boulevard. The surrounding land uses (commercial, industrial and professional office), are unlikely to be adversely affected by activities at an indoor recreational facility.
2. All necessary public facilities and services are available and adequate for the proposed use.

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

1. The facility shall be operated and conducted in accordance with the submitted application and site plan, or as amended by the Planning Commission.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to any construction or remodeling of the building. In addition, prior to a certificate of occupancy being obtained from the Division of Building Inspection, a zoning compliance permit shall be obtained from the Division of Planning.
3. The final design of the parking lot shall be subject to review and approval by the Division of Traffic Engineering.
4. The parking lot shall be paved, with spaces delineated, and landscaped/screened in accordance with the requirements of Articles 16 and 18 of the Zoning Ordinance and the approved Final Development Plan.
5. A storm water management plan shall be implemented in accordance with the requirements of the adopted Engineering Manuals, subject to acceptance by the Division of Engineering.

Chairman Stumbo asked whether there were objectors present to the subject appeal. There was no response.

Representation – Mr. Steve Hatton was present on the appellant's behalf. He indicated that they had read and understood the staff's recommendation and agreed to abide by the five conditions for approval.

There were no questions or comments from the Board.

Action – A motion was made by Ms. Moore, seconded by Mr. Griggs, and carried unanimously to approve **C-2013-21: STH ENTERPRISES, LLC** (a conditional use permit to establish a new indoor recreational facility [go-carts, miniature golf, games, concessions, etc.] in a Wholesale and Warehouse Business [B-4] zone, at 3025 Blake James Drive) for the reasons recommended by the staff and subject to the five conditions recommended by the staff.

- f. **C-2013-22: HOLSTON GASES, INC.** - appeals for a conditional use permit for the storage and sale of propane gas in a Light Industrial (I-1) zone, at 600 Blue Sky Parkway. (Council District 12)

The Staff Recommended: Approval, for the following reasons:

1. Granting the requested conditional use permit should not adversely affect the subject or

- surrounding properties. All of the immediately adjoining properties are zoned for light industrial uses. There are no physical impediments on the property to prevent the safe installation of the propane storage tank(s), which must comply with national, state, and local regulatory requirements, including National Fire Protection Association (NFPA) guidelines.
2. All necessary public facilities and services are available and adequate, which includes fire stations less than three miles away at two separate locations.

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

1. No more than two storage tanks shall be installed on the site and this use shall be operated in accordance with the submitted application and site plan.
2. All necessary permits shall be obtained from the Division of Planning and the Division of Building Inspection prior to placing the tanks on the property.
3. The facility shall at all times comply with the provisions of Article 8-22(d)7 of the Zoning Ordinance, which includes standards of the Fire Marshall.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response.

Representation – Mr. Joe Baxter was present on the appellant's behalf. He indicated that they had read and understood the staff's recommendation and agreed to abide by the conditions for approval.

Board Questions - With respect to the issue of security, Mr. Griggs asked if the property was entirely fenced in. Mr. Baxter responded that the property was already fenced, gated and locked. Mr. Griggs then asked if there are motion sensors. Mr. Baxter replied that there are none right now. With respect to Mr. Griggs' further inquiry, Mr. Baxter concurred that there is a security company that patrols the properties along Blue Sky Parkway; however, he said they currently are not subscribers to that service. He noted that they intend to have motion sensor lights installed on all four corners of the building. Mr. Griggs inquired whether an added condition to that effect would be acceptable to Mr. Baxter, to which he responded affirmatively. Mr. Griggs asked about possibly utilizing security cameras on site. Mr. Baxter said there currently are no security cameras; and that, with the gates, alarms and lights on the building, they typically have not had to do that in the past, noting another property of theirs across the street.

The drafted condition (#4) by the staff was shown on the overhead projector, as follows: The appellant shall install motion-sensitive security lights on the property.

Ms. Meyer related her feeling that having security cameras on site for protection purposes seemed like a reasonable request. She said although someone is patrolling the area, they are not there 24/7. For clarification, Mr. Baxter inquired whether it was preferred to have a security camera system that records.

Mr. Griggs commented that he was impressed with the way security cameras were utilized to apprehend the perpetrators responsible for the recent (bombing) incident at the Boston Marathon. He said even the sight of these cameras above the propane tank on the property could be a deterrent to criminal mischief. Mr. Baxter noted the use of dummy cameras at their current site where gases are stored.

In order to satisfy the concerns raised by the Board and to give the applicant some leeway to install both lighting and cameras if he wished, Mr. Glover suggested modifying the proposed condition as follows: "The applicant shall install motion-sensitive security on the property." Mr. Baxter responded that he was agreeable with the proposed condition. Mr. Sallee subsequently suggested replacing the word "lights" with "equipment" instead, with which Mr. Glover concurred. A brief discussion between the Board and the applicant followed with respect to the kind of security equipment to be used on the premises.

For clarification, Chairman Stumbo asked if Mr. Glover wished to add the wording "lights and cameras" to the proposed condition. Mr. Glover said he wasn't going to suggest that, but he was sensitive to the applicant's willingness to abide by the Board's request to provide security; and that

he would leave it up to the applicant to decide the best way to protect his property. Mr. Baxter noted that it would be relatively inexpensive to purchase a security camera (with infrared) that records from Walmart, for instance. Mr. Glover reiterated that he was comfortable leaving it up to the applicant to determine the kind of equipment that would be utilized to protect his property; and he also agreed that there should be some kind of security provided because of the nature of the material that will be stored there, which was the Board's concern.

Mr. Griggs suggested having lights and cameras as a requirement, with which Mr. Baxter and Mr. Glover concurred. Mr. Sallee directed the Board's attention to the further revised condition offering three options for the Board to choose from when a motion was made.

Action – A motion was made by Mr. Griggs, seconded by Ms. White, and carried unanimously to approve **C-2013-22: HOLSTON GASES, INC.** (a conditional use permit for the storage and sale of propane gas in a Light Industrial [I-1] zone, at 600 Blue sky Parkway) based on the staff's recommendation and subject to the three listed conditions, including the addition of Condition #4: "The appellant agrees to install security lighting and recording cameras on the property."

- B. **Transcript or Witnesses** - The Chairman announced 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.

None Remaining

D. **Conditional Use Appeals**

None Remaining

E. **Administrative Review**

- 1. **A-2013-20: NEW REPUBLIC, LLC** - appeals for an administrative review to change one legal non-conforming use (major automobile and truck repair) to another (micro-brewery) in a Neighborhood Business (B-1) zone, at 266 Jefferson Street. (Council District 1)

The Staff Recommends: Disapproval, for the following reasons:

- a. The request for a micro-brewery at this location would result in a more intense use, first allowed as a principal use in the I-1 zone, than the existing non-conforming major automobile repair shop, which is first permitted in the B-4 zone.
- b. The requested micro-brewery will be expanded in its scope of operation from the current non-conforming use by placing the silos/grain storage bins (an integral part of the beer manufacturing process) outside of the building, which is in direct conflict with Article 4-3(g) of the Zoning Ordinance.

Chairman Stumbo asked to hear from the staff first, followed by the applicant.

Presentation – Mr. Emmons initially stated that the staff had received several letters, both in support and opposition, with respect to the applicant's request. The letters were submitted to the Board for review.

Mr. Emmons said this is an administrative appeal to change one nonconforming use to another; and that the existing nonconforming use on the property is major automobile repair in a B-1 zone. He said the applicant is proposing a micro-brewery in addition to a restaurant. It was pointed out that the restaurant portion is a principal permitted use in the B-1 zone and technically is not subject to the review and approval of the Board. Photos were shown of the subject property and the surrounding uses. Mr. Emmons stated that the "L"-shaped property, located at 266 Jefferson Street, has frontage along Miller Street and Hugh Alley; and there is one residential property (zoned B-1) immediately adjacent to it. A photo was shown of the front of the building, where the restaurant is proposed and the former location of the convenience store portion of the service station use; and the attached (blue) building, where the micro-brewery is proposed and the former location of the automobile service station. Mr. Emmons said the staff's research revealed that major automobile repair has consistently occupied this portion of the building since the Board first approved a dimensional variance in July 1940, to allow the service station to be within 10 feet of a residential zone. It was noted that the Zoning Ordinance did not distinguish between minor and major automobile repair at that time. A rear view of the property was shown, with a privacy fence along the Hugh Alley side and a brick wall along the opposite side that separates this property from the adjacent residential properties.

Mr. Emmons stated that the regulations allow the Board to approve a change in nonconforming uses, as long as the intensity of the requested use is equal to or less than the intensity of the existing use, and there is no expansion of the use. He said the staff, in evaluating the requested change in nonconforming uses, looks at where those uses are first allowed; and that major automobile repair is first allowed as a principal permitted use in the B-4 (Wholesale and Warehouse) zone, whereas the requested micro-brewery is first allowed as a principal permitted use in the I-1 (Light Industrial) zone. He said the I-1 zone is considered a more intense zone than the B-4 zone. It was noted that both major auto repair and a micro-brewery are first allowed as accessory uses the B-2 zone.

Mr. Emmons reviewed the two factors that led the staff to the recommendation of disapproval: 1) the applicant was proposing to have a canning operation in conjunction with the micro-brewery (to be able to brew, can and distribute beer for sale); and 2) the applicant was proposing to use the rear portion of the lot for outdoor grain storage in bins (an integral part of the manufacturing process that would expand to the exterior of the building). He said the staff also felt this was an indication that the proposed nonconforming use was more intense than the previous use of major automobile repair; and it would be an expansion of the use in question.

Mr. Glover inquired why the applicant requested a change from one nonconforming use to another, rather than a conditional use in the B-1 zone. Mr. Emmons explained that in the B-1 zone, a brew pub, which is defined as half restaurant and half brew pub, is an allowable conditional use. However, a brew pub is not allowed to have any permanently installed bottling equipment, which the staff interpreted the proposed canning process as, or outdoor storage. He said, because the applicant's business plan involved the canning process and outdoor storage, they did not request a conditional use for a brew pub, but a change in nonconforming use instead.

Mr. Glover then asked if the reason for the distinction in the zoning regulations between a micro-brewery and a brew pub was because of noise, odor and/or light pollution. Mr. Emmons said, in reviewing the Planning Commission minutes for when text amendments were being done in 1995 to allow the micro-brewery use, the consensus was that adding the canning and bottling equipment made the distinction that this was more akin to an industrial manufacturing use. In addition, there was some concern about customers leaving the restaurant with a bottled alcoholic beverage (beer) in hand.

Mr. Griggs asked why the applicant was opposed to storing the grain inside the building. Mr. Emmons responded that Mr. Murphy, the applicant's counsel, would be able to address that question.

For clarification, Mr. Glover asked if the subject property was at the corner of three different zones. A color-coded zoning map was shown to orient the Board to the uses surrounding the subject property,

which included properties zoned B-1, R-2 and R-4. Mr. Emmons noted that there is a combination of business and residential zoning in this corridor; and that Jefferson Street itself would be considered a mixed-use corridor, having commercial and residential uses. He said in the last five years, there has been a rebirth of that corridor, with several new uses, both residential and commercial, going in.

Representation - Mr. Richard Murphy, attorney, was present on behalf of New Republic, LLC. Hand-out materials were distributed to the Board, including several letters of support from neighboring property owners. He introduced the principals in the business (Robert Garrison, Christopher Heflin and Tony Mancuso), as well as Mr. Tony Barrett (designer), with Barrett Partners, Inc.

Mr. Murphy said that Mr. Garrison and Mr. Heflin currently operate the Chase Tap Room in Victorian Square and have been there for about five years; and that they have developed an upscale clientele of young professionals. However, due to a change in ownership of Victorian Square, they will be relocating the business to 266 Jefferson Street. It was noted that they were already renting the concrete block building to the rear because they are sports car enthusiasts and do major auto repair on their racing cars. This portion of the property was rented from the owner, Abe Martha, who previously operated Abe's Foreign Auto at this location. Photos were shown of the previous use, Corner Mart Deli, at the front of the building and the renovation of the façade for the proposed new use.

Mr. Murphy spoke about the long-standing nonconforming use of performing major automobile repair on the property; and that the building currently has hydraulic lifts, a ventilation system, a compressed air system and engine hoists. He noted that there has been a service station in this location since the 1930s. Reference was made to a memo from the Building Inspection file indicating that in 1940, a permit was granted through the Board of Adjustment for a gasoline service station (Dixie Bell Dairy Company) on the southeast corner of West Third and Jefferson Streets. Reference also was made to a copy of the 1950 Sanborn map outlining the existing corner building and the concrete block building. Mr. Murphy said research into the old city directories showed a number of past uses of automobile service and repair businesses on the property. He said that up until the 1950s, there was not a distinction between major and minor auto repair; and that a service station could do work on transmissions, paint cars, inflate tires, etc. Since that time, the property has continued to be used for major auto repair. Reference was made to a letter from the current property owner, Mr. Martha, in which he states that he occupied the property in 1990 and operated Abe's Foreign Auto for over 15 years, performing major auto repair that included engine work, transmission work, body work, glass work, etc. When Mr. Martha moved into the building, it was equipped with four lifts, a ventilation system, an exhaust system, a compressed air system and engine hoists. He moved from the property in mid-2000 but continued to own it. The property subsequently has been leased to Car Tech Repair, Lewis Car Technology, Salvador Automotive and Foreign Affair Automotive, as well as to the applicant. Prior to the property being purchased by Mr. Martha, it was occupied by Wheel's Auto Repair and Pennington's Auto Repair (for about 20 years), both of which offered major automobile repair service.

Mr. Murphy referred to the staff report and the noted concern about outdoor storage on the property. He told the Board that after conferring with Mr. Garrison and Mr. Heflin, they were agreeable to moving all the storage inside. He reiterated that there would be no outdoor storage on the property at all. He said another concern raised by the staff was regarding the canning and bottling of beer on site, because it was more like (akin to) an industrial operation; and that after some discussion with his clients, they were agreeable to not doing this activity on the premises. He said a third concern from the neighbors was the use of Miller Street (an alley) for deliveries, which his clients were agreeable not to do. Instead, deliveries will be made at the front or side of the property. Mr. Murphy stated that they are mindful of the staff's and the neighbors' concerns. He said what they have essentially done is to have no greater impact from the proposed micro-brewery use than the principal permitted restaurant use in the B-1 zone would be. He said the only difference in impact that they will have is being able to make beer on the premises, rather than having it delivered by truck. He said they have seriously and sincerely tried to address the concerns of the staff and the neighborhood; and that he was aware of the general concern of some neighborhood residents about the service of alcohol at other restaurants/bars along Jefferson Street and on the corner. He said that they are located across the street from the Green Lantern Bar and up the street from a number of establishments that have been cited as part of the rebirth of Jefferson Street and are promoted by this community (i.e., Nick Ryan's Saloon, The Grey Goose, The Blue Heron, etc.). He pointed out that alcohol really isn't the issue here, because a restaurant, which is a principal use and requires no approval from the Board, can sell more alcohol than this use.

Mr. Murphy cited the ruling in a Kentucky Court of Appeals case in 1966 regarding a nonconforming use provision of the zoning ordinance of the city and the right of the property owner to continue the use of his property after 12 months, because there was no evidence of an intention to abandon it (as a continued effort was being made to lease the property). He related his understanding that there had been some statements made that the nonconforming use status of this property was lost a year-and-a-half ago, when Foreign Affair Auto moved out. However, he reiterated that Mr. Garrison and Mr. Heflin have been leasing and using the property for major auto repair since that time; and there has been no gap in usage. The State statute regarding nonconforming uses, KRS 100.253(2), was shown on the overhead projector, a portion of which was read as follows: "The Board of Adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes it nonconforming was adopted, nor shall the Board permit a change from one nonconforming use to another unless the new nonconforming use is in the same or a more restrictive classification . . ." Mr. Murphy said the courts have interpreted this to mean not just "in the same or more restrictive classification," but to include equal or less intensity of use. He pointed out that this provision does not say "unless the new nonconforming use is first allowed in the same or more restrictive classification." He reviewed a chart that was shown to illustrate the zones where major and minor automobile repair, a micro-brewery and a brew-pub are allowed as principal, accessory or conditional uses. He noted that major automobile repair and a micro-brewery are allowed in the same zones in the Zoning Ordinance.

Mr. Griggs asked why a conditional use for a brew pub was not requested, rather than an administrative appeal for a micro-brewery, since the beer canning operation and outside storage were eliminated. Mr. Murphy responded that a brew pub is listed as a conditional use in the B-1 zone. However, he stated that when they initially applied, they wanted the outdoor storage and the canning operation, which had to be done through the change in nonconforming uses. He said the issue with a brew pub as a conditional use is the spacing requirement between the subject property and the residential zone, which would necessitate a variance. It was noted that the adjacent residential property is zoned B-1. He said they are still allowed to change from major automobile repair to even a brew pub as a nonconforming use, as opposed to a conditional use.

For clarification, Ms. Moore asked whether the applicant would be producing beer on the premises, or if they were planning to bottle it elsewhere. Mr. Murphy responded that they still are going to produce beer there; and that, according to Mr. Emmons, they would be allowed to take kegs off site to be bottled elsewhere and the excess production could be sold at other locations. It was noted that a brew pub also would be allowed to do this.

Mr. Murphy read excerpts from several letters received in support of this appeal that were submitted to the Board earlier. In closing, he said the applicant has proven that they will be an asset to Jefferson Street, and the proposed use will be a positive addition to this area. He asked for the Board's favorable consideration of this request.

Opposition - Mr. Steve Bale, a 33-year resident at 466 West Third Street, was present to speak in support of the staff's report and conclusions. However, he opined that the concessions made by the applicant were much more conducive for another business in the neighborhood. He said the issue of the grain silo referenced in the staff report had not been addressed. Therefore, he asked if that was still part of the applicant's proposal, to which Mr. Murphy indicated that outside storage was no longer a consideration. Mr. Bale felt that, in view of Mr. Murphy's response, there should be an added condition to that effect.

Ms. Barbara Houseman-Smith, who resides at 455 West Third Street, was present. She said although this (use) is an improvement, it still sounds like the applicant intends to operate a micro-brewery rather than a brew pub. She expressed concern that the applicant would be manufacturing beer in a B-1 zone, as it relates to air quality and the effect on the neighborhood, which had not been addressed. She also questioned that there has been major automobile repair service performed at this site for the past year-and-a-half, but rather private storage for the applicant's cars that were being worked on there. She related to the Board that she was opposed to the change in nonconforming use for a micro-brewery.

Mr. Hank Jones, who lives at the corner of West Main and Jefferson Streets, was present to speak in support of this appeal. He said the first floor of the building where he and his wife reside is leased to a hair salon. He spoke about the revitalization of Jefferson Street over the past seven years since he's been there and the increased value of his and other properties in the area. He noted that there is now a trolley

line that runs along Jefferson. Being acquainted with the principals of this business who have operated other establishments downtown, he told the Board they ran a class operation. He said in his past experience with brew pubs, the beer vats were very large; however, the micro-brewery equipment he observed during his site visit at the invitation of Mr. Garrison was smaller in size and compact.

Mr. Sam Matheny, 474 West Third Street, was present. He said his property abuts the subject property. He related his objection to the change in nonconforming use to a micro-brewery on this property, particularly since the outdoor space is directly adjacent to the rear of his property and noise could be a potential problem. He expressed his initial concern about the safety of the children in the neighborhood who use Miller Street (narrow alley) to walk to and from a nearby school; however, he was pleased to hear from the applicant's attorney that there would be no delivery truck traffic on that side of the property.

Rebuttal – Mr. Murphy stated that he appreciated hearing the neighbors' comments and concerns. With respect to the issue of the continuation of the nonconforming use, he said they have been performing major automobile repair, but not as a business; instead, they were doing repair work on their cars as well as others'. He reiterated that they have continued major automobile repair work at this site, which he opined qualifies under the land use regulations. He said they will be producing beer here; and there are limits on the amount of beer that a micro-brewery can produce, which the ABC enforces. He reiterated that they will not be using outdoor storage. In closing, he told the Board that Mr. Garrison, Mr. Heflin and their partner will do an outstanding job; and that the proposed use will be an addition to the revitalization of this area.

Mr. Glover asked Mr. Murphy if, in the event of the Board's approval, there were proposed written conditions with the concessions the applicant made regarding not using Miller Street for deliveries; no outdoor storage; and no bottling or canning on the premises. Mr. Murphy responded that he did not have those in writing; and that Mr. Glover had expressed succinctly what they had agreed to. However, he said there were four reasons or findings for approval submitted with this application.

Chairman Stumbo inquired whether the staff's recommendation for disapproval had changed, given the applicant's concessions (i.e., no deliveries on Miller Street; no outdoor storage; and no bottling or canning on site). Mr. Emmons responded that only one of the two reasons for disapproval (finding "b") was addressed by the concessions; and that the staff and the applicant have different interpretations on the issue of the intensity of the use, which he briefly explained.

Ms. Moore asked whether the proposed use is a brew pub or a micro-brewery. Mr. Sallee responded that he thought the applicant is still proposing a micro-brewery, primarily because a brew pub is permitted only when it is more than 100 feet from a residential zone; and they cannot meet that standard. Ms. Moore related her understanding that if the applicant wanted a brew pub, they would have to ask for a variance from the 100-foot distance requirement. Mr. Sallee said that was correct.

Ms. Houseman-Smith asked, with respect to the proposed condition prohibiting deliveries on Miller Street, what the neighbors should do if that does occur. Mr. Marx responded that this is an unusual situation since this appeal is not a conditional use. He opined that the conditions would need to be woven into the findings in some way; and that the staff would have to work with the property owner/operator to try to resolve the issue, noting that it would be a little more complicated than usual.

Mr. Chris Heflin (partner) stated that Miller Street has recently become a one-way street; and there would never be any need to have a truck drive down Miller Street to deliver anything to them. He said they didn't have a problem with putting it in writing that no truck deliveries are allowed on Miller Street. He noted that access to the front door from Jefferson Street will be used for all deliveries, which is what other businesses in the immediate area do.

Mr. Matheny pointed out that there is access to Miller Street, which is one way, from Second Street. Mr. Murphy responded that all the vendors can be instructed not to make any deliveries on Miller Street.

Mr. Glover said that, with assistance from counsel, he had some drafted language to propose if the Board was inclined to grant this appeal.

Ms. Moore responded that she was uncomfortable with the idea of approving the change in nonconforming use when it sounds like this now is really a brew pub that the applicant could request a conditional use

permit for, and a variance for the distance requirement from a residential zone. Mr. Glover said he didn't think it was a brew pub from the description of what they intended to do -- making beer; and they would have to have permanent equipment.

Mr. Robert Garrison (partner) related to the Board that they are going to make beer. He said the distinction between a brew pub and a micro-brewery really is about zoning at the city level; and the reason they went forward with the request for a micro-brewery is because they are trying to reconcile this with the State law. He pointed out that only a micro-brewery license is available; and there is no such thing as a brew pub license. He said it was very important to them to be able to sell kegs off site to other restaurants and neighboring businesses because that, as their business model, would allow them to focus on the production of the beer as a source of revenue instead of having to stay open later and relying solely on bar and restaurant business.

In response to Ms. Moore's inquiry, Mr. Garrison said there will be no bottling or canning on site. He said the reason they made that concession was because, even though the technology has progressed where the canning equipment really isn't so intrusive any more (with respect to noise), they understood that was a major concern of the neighborhood residents. He also said it was not essential to their business model. A brief discussion followed.

Mr. Murphy made the point that, whether they are called a brew pub or a micro-brewery, they are still nonconforming. He said if they are called a brew pub, they are nonconforming because of the 100-foot spacing requirement from a residential zone (even though the house next door is in a B-1 zone). He said either way, they are asking for a change to a nonconforming use. The Zoning Ordinance's definition of brew pub was displayed on the overhead projector.

Chairman Stumbo said he thought some of the Board members, including himself, would probably like to see language drafted by counsel that included the concessions made by the applicant today.

(The Chairman called a recess of the meeting at 2:34 p.m., and reconvened at 2:45 p.m.)

Following the recess, Mr. Griggs asked how the 100-foot distance to a residential zone is measured. Mr. Sallee responded that, to his understanding, it has always been measured from the building to the zone line. Mr. Griggs then asked what was the actual distance from this building to the zone line. Mr. Emmons responded that the staff could try to determine the distance using a scale map. Mr. Griggs commented that it seems like the applicant is really asking for a brew pub; but they are getting it through this round-about way that sort of circumvents the 100-foot requirement from a residential zone. He said he was just wondering how much of a circumvention it is, in terms of the distance.

Ms. Moore related her understanding that this would not be a conditional use anyway because the micro-brewery would not be accessory to the restaurant use. Mr. Emmons responded that the definition of a brew pub is a restaurant with an accessory micro-brewery without permanently installed bottling equipment, all within the same building. He said he thought part of the issue here is the distinction of whether the micro-brewery the applicant is asking for is considered accessory to the restaurant; or the way they have structured their request where they are allowed the restaurant by right and are asking for the micro-brewery side-by-side. He said the micro-brewery they are requesting would not necessarily have to be accessory and clearly subordinate to the restaurant. A brief discussion followed regarding the zones in which all the uses under discussion first appear in the Zoning Ordinance, and a previous case of a similar nature that was heard by the Board.

With regard to the distance measurement, Mr. Murphy directed the Board's attention to the site plan displayed on the overhead projector. He said the zone line goes from the edge of the building to the center line of the street (Miller) and the distance is about 60± feet. He also noted that to the center line of Jefferson Street, it is about 48 feet; and on the side near Third Street, it is about 62 feet.

Since there were no further comments or questions, the Chairman called for a motion.

Action – A motion was made by Mr. Glover, and seconded by Ms. White to approve **A-2013-20: NEW REPUBLIC, LLC** (an administrative review to change one legal nonconforming use [major automobile and truck repair] to another [micro-brewery] in a Neighborhood Business [B-1] zone at 266 Jefferson Street) for

the four reasons stated in the submitted application [excluding the wording "with bottling and canning equipment" under reason #3] and the fifth added reason, as follows:

FINDINGS FOR APPROVAL

1. The original use was established as a conforming use when both major and minor automobile repair were the use of the property in the 1950's and earlier.
2. The ordinance was changed to allow only minor automobile repair in the B-1 zone in the 1950's or 1960's. At that point, the major automobile repair became a legal nonconforming use, which has continued through various operators to the present day.
3. Major automobile repair is now first permitted in the B-2 zone as an accessory use, and in B-4 and I-1 zones as a principal use. A micro-brewery or brew pub would be a much less intensive or obtrusive use on this property than the current major automobile repair. Major automobile repair creates noise, exhaust gases and traffic. The proposed use will be much quieter, will not have automobile exhaust gases and will result in no greater truck traffic than a restaurant which receives beer or alcohol deliveries.
4. The proposed use will be compatible with the emergence of the Jefferson Street corridor as a dining and entertainment destination in Lexington.
5. The fact that the appellant has indicated that there will be no outdoor storage, no bottling and canning of beer on site and no Miller Street deliveries to this business, there will be no opportunity for an expansion of this nonconforming use.

Votes were as follows:

Ayes: Smith, Moore, Griggs, White, Glover, Stumbo

Nay: Meyer

The motion for approval carried, 6 to 1.

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

- A. Retirement of Staff Member – Chairman Stumbo stated that this was the last Board of Adjustment meeting that Wanda Howard (BOA staff) would be attending before her retirement from the LFUCG. He thanked Ms. Howard for her dedication and service, and wished her the best. Applause followed.
- B. Notice of Violation Hearing - Mr. Chris King, Director of the Division of Planning, was present to update the Board about the NOV recently issued for property located at 8291 Old Richmond Road, noting that this matter is scheduled to be heard at the BOA meeting on May 31. Regarding a separate issue for the same property, Mr. King spoke about the potential revocation of the existing conditional use permit under which this property operates; and the Board's authority to use its subpoena powers, if necessary.
- C. Change in Meeting Time for the BOA – Mr. Glover spoke about the Official 2013 Meeting and Filing Schedule in relation to his previous proposal to change the starting time for the Board of Adjustment meetings from 1:00 p.m. to 1:30 p.m.

Action – A motion was made by Mr. Glover and seconded by Mr. Griggs to amend the 2013 Meeting and Filing Schedule to begin the Board of Adjustment meetings this year at 1:30 p.m. instead of 1:00 p.m.

Discussion - Mr. Saltee stated that the staff had no problem with starting the meetings at 1:30 p.m.; and that the only question the staff had was whether this change would take effect at next month's meeting or the June 28 meeting. He noted that the Council Chambers are reserved for the Board's meetings on Friday afternoon for the remainder of the year. None of the Board members had any objection to the proposed 1:30 p.m. starting time.

Ms. Moore suggested amending the motion to reflect that the 1:30 p.m. start time would take effect in June,

which Mr. Glover accepted. The pending motion carried unanimously.

- V. **STAFF ITEMS** - The Chairman announced that any items a Staff member wished to present would be heard at this time.
- A. **House Bill 55 Training Opportunity** – Mr. Sallee reminded the Board that there would be an APA audio conference offered in the Division of Planning conference room on Wednesday, May 15, 2013 at 4:00 p.m. The title of this audio conference is "Rethinking the Role of the Urban Freeway", which will count for 1.5 hours of training.
- VI. **NEXT MEETING DATE** - The Chairman announced that the next meeting date would be May 31, 2013.
- VII. **ADJOURNMENT** - Since there was no further business, the Chairman declared the meeting adjourned at 3:03 p.m.

Barry Stumbo, Chairman

James Griggs, Secretary