

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

March 27, 2015

I. **ATTENDANCE** – The Chair called the meeting to order at 1:30 p.m. in the Council Chambers, 200 East Main Street, March 27, 2015. Members present were Chairman, Barry Stumbo; James Griggs; Janice Meyer; Joan Whitman; and Larry Forester. Absent were: Kathryn Moore and Thomas Glover. Others present were: Casey Kaucher, Division of Traffic Engineering; Chuck Saylor, Division of Engineering; Jim Marx, Zoning Enforcement; Tracy Jones and Andrea Brown, Department of Law. Staff members in attendance were: Bill Sallee, Jimmy Emmons, and Tammye McMullen.

II. **APPROVAL OF MINUTES** – There were no minutes to be considered at this time.

III. **PUBLIC HEARING ON ZONING APPEALS**

Swearing of Witnesses – Prior to sounding the agenda, the Chair 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 to several in the audience.

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.

There were none

2. **No Discussion Items** - The Chair asked if there were 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.

ABBREVIATED HEARINGS:

- a. **V-2015-19: SIDNEY VAN NESS** – appeals for a variance to reduce the required side setback from 8 feet to 1 foot for a new garage construction in a Single Family Residential and Neighborhood Design Character Overlay (R-1C & ND-1) zone, at 225 Chenault Road (Council District 5).

The Staff Recommends: **Approval**, for the following reasons:

1. Granting the requested variance should not adversely affect the public health, safety or welfare, nor will it alter the character of the general vicinity, as the new garage will be built on the footprint of the existing carport. The ND-1 design restrictions will further require that the new construction of the garage is compatible with the remainder of the area, as defined in the Chevy Chase ND-1 Neighborhood Character study.
2. The existing utility easements, particularly to the rear of the property, create a special circumstance that prevents the garage from being moved to the rear of the lot, where it could meet all setback requirements, and justifies the requested variance.
3. Strict application of the Zoning Ordinance requirements would either limit the construction of the garage to no more total square footage than the existing carport, or potentially cause it to be placed at a location in the rear yard that could destroy the functionality of the rear yard and possibly result in an existing deck being removed.
4. This is not the result of a willful violation of the Zoning Ordinance or other attempt to circumvent the regulations; but, rather, a reasonable request considering the number of easements located on this property.
5. The requested variance is not a direct result of the actions of the applicant, as the easements and the locations of the carport and house on this property predate the applicant's ownership of the lot.

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

- a. The garage shall be built according to the submitted application and site plan.
- b. Encroachment easements shall be obtained from the appropriate utility agencies, prior to construction of the garage.
- c. The applicant shall obtain all the appropriate building permits, which includes a review of the ND-1 design standards, prior to construction.

Representation – Ms. Chris Westover, attorney for the appellant, was present, and she indicated that they had reviewed the recommended conditions and agreed to abide by them.

Citizen Comments – There were no citizens present to comment on this request.

Action – A motion was made by Ms. Meyer, seconded by Mr. Forester and carried unanimously (Moore and Glover absent) to **approve V-2015-19: SIDNEY VAN NESS** – a variance to reduce the required side setback from 8 feet to 1 foot for a new garage construction in a Single Family Residential and Neighborhood Design Character Overlay (R-1C & ND-1) zone, at 225 Chenault Road, for reasons outlined by the staff and subject to the three conditions outlined by the staff.

- b. **V-2015-20: MARRILLIA COMMERCIAL PROPERTIES** – appeals for variances to: 1) reduce the required side street side yard setback from 20 feet to 6 feet; and 2) reduce the distance for an overhead door from 100 feet to 20 feet in order to construct a new warehouse/office building in a Light Industrial (I-1) zone, at 794 Manchester Street (Council District 1).

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested variances should not adversely affect the public health, safety or welfare, nor will it alter the character of the general vicinity. The large rights-of-way ensure that the proposed building setback will not be located within any sight triangles. Furthermore, although technically only 6 feet from the right-of-way, the proposed structure will have the appearance of having a setback (from the travel lanes) that will be more similar to the required 20-foot setback of the I-1 zone.
2. The small size and unique shape of the lot, the larger than normal rights-of-way bounding three sides of the property, and the topography of the site all create special circumstances that necessitate the requested variances in order to create a useable buildable area for the purpose of constructing the proposed office/warehouse use.
3. Strict application of the Zoning Ordinance requirements would limit the construction of the building to the point that it would no longer be functionally viable for the intended use.
4. This request is not the result of a willful violation of the Zoning Ordinance or other attempt to circumvent the regulations; but, rather, is a reasonable request considering the number of special and unique circumstances affecting this property.
5. The requested variances are not a direct result of the actions of the applicant, as the noted three front yard (20- foot setback) requirements all predate the applicant's ownership of the lot.

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

- a. The building shall be built according to the submitted application and site plan, allowing minor adjustments if required by the Divisions of Building Inspection, Traffic Engineering, or Engineering, if necessary, during the normal permitting process.
- b. The applicant shall obtain all appropriate permits, including a Zoning Compliance Permit and Building Permit from the Divisions of Planning and Building Inspection, prior to construction.

*Note – Mr. Emmons said that staff had received one letter in support of this application and he distributed it to the Board.

Representation – Ms. Billie Motsch, with Element Design; and Ms. Raven Mars, with Marrillia Design and Construction, were present. They indicated that they had reviewed the recommended conditions and agreed to abide by them.

Citizen Comments – There were no citizens present to comment on this request.

Action – A motion was made by Mr. Griggs, seconded by Ms. Whitman and carried unanimously (Moore and Glover absent) to **approve V-2015-20: MARRILLIA COMMERCIAL PROPERTIES** – an appeal for variances to: 1) reduce the required side street side yard setback from 20 feet to 6 feet; and 2) reduce the distance for an overhead door from 100 feet to 20 feet in order to construct a new warehouse/office building in a Light Industrial (I-1) zone, at 794 Manchester Street, based on the staff's recommendation of approval and subject to the two conditions.

- c. **C-2015-9: DMK DEVELOPMENT GROUP, LLC** – appeals for a conditional use permit to construct a nursing home and an assisted living facility in an Agricultural Urban (A-U) zone, at 4210 Nicholasville Road (Council District 4).

The Staff Recommends: Approval, for the following reasons:

1. Granting the request to permit an assisted living facility and nursing home as a conditional use will not adversely affect the subject or surrounding properties. Assisted living facilities and nursing homes do not typically generate high levels of traffic or other activities that are noisy or otherwise disturbing to

neighborhoods.

2. All necessary public services and facilities are available and adequate for the proposed use, including police, fire and EMS services.

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

- a. The use shall be constructed and operated according to the submitted application for 253 beds and site plan, except as amended by the Planning Commission on a final development plan. If further expansion of the number of beds is needed or desired, it will require Board of Adjustment approval.
- b. Landscaping shall be installed along the southern property line at the backs of the homes that front on Toronto Road to be equivalent to the zone-to-zone screening of an R-3 zone to an R-1 zone [Article 18-3(a)(1)(7)].
- c. The applicant shall obtain all appropriate permits prior to construction, including but not limited to a Zoning Compliance Permit and Building Permit, issued by the Divisions of Planning and Building Inspection.

Staff Comment – Mr. Emmons said that the staff had received two letters of opposition and distributed them to the Board.

Representation – Mr. Nick Nicholson, attorney, was present representing the appellant. Mr. Nicholson said that the letters that were being distributed to the Board members were from parishioners of the Pax Christi church, which is direct adjacent neighbor of the appellant. He said that the postponement that was requested for this application was in order to meet with the church to work out any issues, and they have come to an agreement. Mr. Nicholson said that the church was being represented at this hearing, and is in support of their project. He said that he wanted to point out that the development plan was amended by the Planning Commission the previous day, and the site plan was amended slightly from the originally submitted application. Mr. Nicholson said that their facility went from 251 beds to 253 beds, an increase in two beds. He indicated that they had reviewed the recommended conditions and agreed to abide by them.

Staff Comments – Mr. Emmons said that he had placed on the exhibit board the color-up for this particular case. He said that it was the development plan that was approved by the Planning Commission, which identified the two proposed structures on the subject property. The primary difference (as mentioned in the staff report) was that, instead of having access to Nicholasville Road, the development plan shows access to Man O' War Blvd. with a right in, right out. It also shows that it has access through the Pax Christi access easement over to Victoria Way, and that has not changed since the original application.

Mr. Emmons said that the staff recommends approval of the conditional use, with the development of the property subject to the Planning Commission's approval of the final development plan. He said that part of the reason it was important to hear Mr. Nicholson's comments at this hearing, was that the staff has recommended in condition number 1 that the "site be operated according to the submitted application and site plan, except as amended by the Planning Commission on a final development plan. If further expansion of the number of beds is needed or desired, in the future, it will require Board of Adjustment approval." He said that gets to the real intensity of the use- not just the issues with the built environment. Mr. Emmons said that the staff did not have a problem with the additional two beds; it did not make a significant difference in the staff report to have a total of 253 beds at this facility. He noted that the site has about 80 parking spaces, and the two extra beds would not require an additional parking space.

Board Questions – Ms. Meyer said that the opposition letter seemed to speak to access, and asked if Mr. Nicholson could explain how they resolved that issue. Mr. Nicholson responded that the only way they could put forth the development plan was with a right in/right out on Nicholasville Road. He said that the shifting from the right in/right out going to Man O' War significantly reduced the amount of traffic that would go across the church parking lot, and actually reduced it by half. He said that the agreement with the church is to now work together (with the church) in order to have an access to Toronto Road (just south of the property); it would involve an expansion of the church's conditional use permit.

Mr. Griggs asked if it was mentioned at the last meeting whether there would be an emergency generator for the facility. Mr. Nicholson responded that the emergency generator would be located inside the facility and would not be placed near any residential units.

Ms. Meyer asked the staff if the language in the first condition would remain the same in regard to the number of beds. Mr. Emmons said, to be clear and for the record, the Board may want to insert new language, as it was presented on the overhead projector.

Citizen Comments – There were no citizens present to comment on this request.

Action – A motion was made by Ms. Meyer, seconded by Mr. Forester and carried unanimously (Moore and Glover absent) to **approve C-2015-9: DMK DEVELOPMENT GROUP, LLC** – an appeal for a conditional use permit to construct a nursing home and an assisted living facility in an Agricultural Urban (A-U) zone, at 4210 Nicholasville Road, for the reasons outlined by the staff for approval and subject to the three conditions, with the amendment to condition #1 to permit 253 beds.

- d. **C-2015-18: MOUNT OLIVET BAPTIST CHURCH** – appeals for a conditional use permit to construct a building addition to an existing church in a Light Industrial (I-1) zone, at 1008 Delaware Avenue (Council District 1).

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested conditional use permit should not adversely affect the subject or surrounding properties, as the proposed expansion is relatively minor and will only result in a short extension of the building, and will not expand sanctuary seating. The site is well buffered from nearby residential areas by a railroad line and by a variety of commercial and industrial uses on immediately adjacent properties.
2. All necessary public facilities are available and adequate for the proposed use.

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

- a. The expansion shall be done in accordance with the submitted application and a revised site plan, as required by the Division of Traffic Engineering, to provide no less than 50 parking spaces, based on sanctuary seating for up to 250 persons.
- b. All necessary permits, including a Zoning Compliance Permit and Building Permit, shall be obtained from the Divisions of Planning and Building Inspection prior to construction.
- c. A storm water management plan shall be implemented in accordance with the adopted Engineering Manuals, subject to acceptance by the Division of Engineering.

Representation – Mr. Jack Stewart, was present, representing the appellant. He indicated that he had reviewed the recommended conditions and agreed to abide by them.

Citizen Comments – There were no citizens present to comment on this request.

Action – A motion was made by Ms. Meyer, seconded by Ms. Whitman and carried unanimously (Moore and Glover absent) to **approve C-2015-18: MOUNT OLIVET BAPTIST CHURCH** – an appeal for a conditional use permit to construct a building addition to an existing church in a Light Industrial (I-1) zone, at 1008 Delaware Avenue, for the reasons recommended by the staff and subject to the three conditions outlined by the staff.

- B. **Transcript or Witnesses** - The Chair 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.

*Note – The next hearing is a continuation from the Board's February 27, 2015 meeting.

1. **V-2015-5: BIG BLUE RENTALS, LLC.** – appeals for a variance to reduce the required front setback from 20 feet to 5 feet in order to install parking and drive aisles in a Planned Neighborhood Residential (R-3) zone, at 178 Leader Avenue (Council District 3).

The Staff Recommends: Approval, for the following reasons:

- a. Granting the requested variance should not adversely affect the subject or surrounding properties. The layout of the parking lot will be reviewed by LFUCG agencies to ensure the health, safety and welfare of the apartment occupants and that there will be no harm to the adjacent properties. Furthermore, the proposed parking lot

expansion will be landscaped in accordance with the requirements of Article 18 of the Zoning Ordinance, similar to those for multi-family dwellings in the existing neighborhood.

- b. Granting the requested variances will not result in an unreasonable circumvention of the Zoning Ordinance, as the parking lot expansion will permit the site to comply with the alternative parking requirement of Article 8-12(n) (for 0.9 spaces/bedroom) for this efficiency apartment building.
- c. The relocation of the existing storm water basin underground, and the inability for a lot of this width to obtain a second "curb cut" are special circumstances that do not generally apply to other R-3 zoned properties. It is the intent of the Infill & Redevelopment regulations to allow reasonable accommodations for more efficient development in order to promote development that is compatible with existing neighborhoods.
- d. Strict application of the Zoning Ordinance would create an unnecessary hardship on the appellant. This would have the effect of further limiting the available parking for the subject property, and it would be hard to recoup the investment in this property improvement.
- e. The requested variances are not the result of any willful violation of the Zoning Ordinance; but, rather, are consistent with the design of residential parking lots in this vicinity near University of Kentucky's campus.

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

1. The property shall be developed in accordance with the submitted application and site plan, allowing modifications, if required, by the Divisions of Engineering, Traffic Engineering, Solid Waste and Fire & Emergency Services. These divisions must approve this revised site plan prior to the issuance of any Zoning Compliance Permit.
2. A Zoning Compliance Permit and a Building Permit shall be obtained by the applicant prior to construction.
3. The variance shall be only for the purpose of providing pavement between the building line and the landscape buffer adjacent to the public sidewalk. No portion of the multi-family building on this lot shall be located closer than 20' to the right-of-way of Leader Avenue.

Staff Comment - Mr. Sallee said that an objector had arrived since the Chair first called this item.

Representation - Ms. Abbie Jones, engineer, was present on behalf of the appellant; and Mr. Matt Jones, appellant, were present. Ms. Jones said that they had been able to work with the staff and had copies of the approval letters for the technical design of the proposed parking lot expansion. She said that the staff has worked with them and they have resolved all of the technical questions that were left at the prior hearing for this (continued) case.

Ms. Jones said that they agreed to abide by the recommended conditions.

Opposition – Ms. Amy Clark, who lives at 628 Kastle Road, said that she had two objections to the proposed parking lot enlargement: 1) It appears to render the lot non-conforming with respect to open space (20% of the lot area requirement); 2) it is also non-conforming with respect to the required side yard. She said there is a provision in the Zoning Ordinance that states if the proposed building has its entrances not on the front, but to the side, the side yard is required to be 30 feet wide; and it may not include parking. Ms. Clark said that the open space requirement is 20% of the lot area, and it was her belief that once the additional parking has paved over what grassy patch there is, they would be non-conforming with respect to furnishing the minimum open spaces for the lot area.

Ms. Clark said that, in her view, the applicant has not demonstrated a needless hardship in uniform application of the Zoning Ordinance; there is no needless hardship in not being able to furnish sufficient parking by the testimony that is part of this hearing from its continuance last month. She said that the applicant is furnishing sufficient parking to his own tenants. She noted that his lease, available online, indicates that company policy with his properties is to furnish one parking space per bedroom, and it must go to the resident who obtains a parking permit. Ms. Clark said it would seem that there is no need to have more than one parking space per bedroom for a 21- unit apartment building. She said that she believed all the units were single bedroom units.

Staff Comments – Mr. Emmons said, with regard to the side yard requirement, that the building probably pre-dates the 30-foot side yard requirement. Mr. Sallee said that he was not familiar with the 30-foot side yard requirement mentioned earlier, without a specific citation of the Ordinance. He said that the staff would be glad to look into that; however, nothing comes to mind outside of Article 9, and this is not an Article 9 type of development.

Mr. Emmons said in regard to the issue that was brought up about open space and the useable open space on a lot, one of the things that can be counted is the outdoor balconies. He noted that the picture on the overhead projector showed that the subject property has balconies, and they are counted as useable open space.

Mr. Clark said, that she could not tell by the plans submitted (it didn't have all the dimensions recorded) whether or not the outdoor balconies were a 5 foot minimum width; it looked to her as though they weren't.

Representation Comments – Ms. Jones confirmed that the balconies are 5 feet in width. She said that since the last hearing, the previous site plan had been revised to meet the different staff comments, including open space; so there

are additional open space areas on the revised site plan that the staff has not reviewed.

Ms. Jones said that it was worth noting that the parking lot expansion utilizes permeable pavers, which do not count as pavement. They count as grass in the Water Quality sections of the codes; so they are actually providing for that (open space), as well as some additional detainment volume within in the design of that parking lot paver. She said that it has extra rock underneath it to count toward extra detention space. Ms. Jones said that Mr. Jones would speak about the need for additional residential parking.

Mr. Matt Jones, appellant, said that he has a lot of residents in his complex, and every year they request an extra parking space for their visitors, friends, etc. He said that there is no place for them to park when they come in. He said that, due to students looking to save money, there are several units that are double occupied. He said that sometimes he has vendors come in as well, with nowhere to park.

Ms. Jones said that one reason they are before the Board is to ask for a variance to the front yard setback to be within 5 feet of the back of the sidewalk. Most of the parking lots in the area are already at that dimension, so they are asking for the same treatment as other properties lots in the general area. She said they are able to enlarge the existing parking lot somewhat; but they wanted to square it up and make it the most efficient design, and make it acceptable for the fire trucks so that they can get around the parking lot as easily as possible. Ms. Jones said that they believed this to be the best design; and they have the approval of all the different staff (divisions) saying that the final design they have come up with does meet all of the criteria, including those that were mentioned earlier in this hearing.

Board Questions – Mr. Griggs said that the application stated (as he remembered from the last hearing as well), that the parking spaces would be rented out individually; and the staff was going to look into that to see if it was a legal use. Ms. Jones said that it was a misunderstanding on the part of her client. She said that a letter has been submitted to the staff saying that her client did agree to limit the parking lot spaces exclusively for the benefit of the residents of the property; so they were clarifying that previous issue. Mr. Griggs responded that this was not a misunderstanding, and asked if they were changing their business practices. Mr. Jones replied that originally he thought he would rent the majority of the parking spaces, but that is not going to happen now. Mr. Griggs said that he had been selling them according to what Mr. Jones said at the last hearing, and asked if he was stating that he is changing his business practice and that there was no misunderstanding. Mr. Jones responded affirmatively. Mr. Griggs asked why he would need these additional parking spaces if he has only 21 apartments. Mr. Jones said that currently he has 28 parking spaces; and for the reasons he mentioned prior: some of the apartments are double occupied, there is no place for visitors to park, and vendors are unable to find a place to park.

Staff Comment – Mr. Emmons said that based on the letter that the applicant had submitted, and the testimony that he had given, it might be that the Board could consider a fourth condition, such as “that the parking shall be used as accessory to the residence on the subject property.”

Opposition Rebuttal — Ms. Clark asked why a fourth condition would be necessary since the zoning actually requires that the parking be solely for the residents’ benefit. She said that she had corresponded with the manager of Planning Services and also the staff member for the Board of Adjustment prior to the hearing (earlier that day) and asked for any updates, and she received the information that the division staff had, in great part or all together, signed off on the issues that were raised last month, including the width of the drive aisle. She was told that there were no new application materials or plans or supplemental information that had been furnished by the applicant. She said that it is very hard for citizens to participate in the process of upholding the Zoning Ordinance, when they cannot have timely information about cases that are to come before the Board, and it is also difficult for the Board to weigh them in any fair way.

Ms. Clark said that it looked to her as if there was a competing request for a variance on the side yard requirement. She said that she believed that when one changes a property, it has to be brought up to current code, to current Zoning Ordinance requirements, which would require that side yard even if it was legally non-conforming before the enlargement was made. If the open space is included in the balconies, she said she had no objection in that regard; however, apparently the green space serves as its flood control now- the detention basin. Ms. Clark said to her, it does not look like progress and environmental stewardship to pave it and put in underground water retention.

Ms. Clark said that she wanted to add that the University is working aggressively on furnishing additional parking, as well as furnishing transit options to encourage both employees and students to not bring their cars to this already heavily paved area. She said that she attended a meeting on the day prior to this hearing and it was mentioned that there are over 260 parking spaces that will very shortly become available, authorized by the Board of Trustees, where the Reynolds Warehouse is located on Scott Street.

Board Comments – Chairman Stumbo said that the issue had been cleared up for him, knowing that the selling of the parking spaces is going to be exclusively for the residents. He said that he was not opposed to a fourth condition. That

it is a very dense situation around the university when it comes to parking, but one of those things that he thought was very important was that the applicant had gone back to the staff and had worked with Fire and Emergency Services, etc. The staff seemed to be satisfied, and so was he.

Staff Comments – Mr. Sallee, at this time, presented the Zoning Ordinance citation that was mentioned by Ms. Clark on the overhead projector, as Mr. Emmons gave a brief explanation of what Article 15-2(b)(3) entailed. Mr. Emmons said that if the appellant was applying for a new building, this section of the ordinance would apply. He said that he believed that this whole area was built out in this fashion a very long time ago, and that the subject building probably precedes that section of the ordinance; otherwise, it would not have been legally permitted to be built the way it was. He said that adding to the existing parking does not go against this or make it any worse, in his opinion. Mr. Emmons said that the staff does not see a conflict between it and the proponents' increase and the extension of the existing parking lot.

Opposition Rebuttal – Ms. Clark asked the staff if some of the green area intended to be paved over by the proposed enlargement in parking doesn't actually count toward the side yard open space that is required. They may not be fully furnishing it, and asked if that wouldn't be over on the side of the yard (in the western direction) that it is required. She asked if paving it over would constitute increasing a non conformity. She thought the date of the building was 1979, but said she was not in a position to tell when the ordinance was adopted. Mr. Emmons said that his response was the same as earlier in the- that the building pre-dates the Ordinance.

Action – A motion was made by Mr. Forester to **approve V-2015-5: BIG BLUE RENTALS, LLC.** – a variance to reduce the required front setback from 20 feet to 5 feet in order to install parking and drive aisles in a Planned Neighborhood Residential (R-3) zone, at 178 Leader Avenue, based on the staff's recommendation.

The motion failed due to lack of a second.

Action – A motion was made by Mr. Griggs, seconded by Ms. Meyer and carried 4-1 (Forester opposed; Moore & Glover absent) to **disapprove V-2015-5: BIG BLUE RENTALS, LLC.** – an appeal for a variance to reduce the required front setback from 20 feet to 5 feet in order to install parking and drive aisles in a Planned Neighborhood Residential (R-3) zone, at 178 Leader Avenue, based on the following findings:

1. The strict application of the Zoning Ordinance will not create an unnecessary hardship on the applicant, as he has already been operating without the requested variance.
2. Granting the requested variance will adversely affect surrounding properties by creating an unnecessarily more dense parking and traffic flow situation in an already congested area.

D. Conditional Use Appeals

(None Remaining)

E. Administrative Review

1. **A-2015-17: ELVIS LEE SIMMONS** - an administrative appeal for the denial of a permit for a pool hall in a Planned Neighborhood Residential (R-3) zone, at 400 Chestnut Street (Council District 1).

Representation – Mr. Andre' Regard, attorney for appellant; Mr. Elvis Simmons, property owner; and appellant Ms. Brenda Mack and Mr. William Clay, lessees were present.

Staff Report - Mr. Emmons reported that this particular case involved an appeal of a denial of a Zoning Compliance Permit for the subject property. He then presented and explained three items on the overhead projector. Mr. Emmons noted that there was not a staff report for this case; however, two packets of information were distributed to the Board: a letter from Mr. Regard, which constitutes the applicant's appeal, and the letter from the staff that explains why the staff denied the Zoning Compliance Permit.

Mr. Emmons said that the property is in a Planned Neighborhood Residential zone (R-3) zone; this particular property does have a history of non-conforming uses, but the zoning has always been R-3. He also noted that the map on the overhead projector was the current (2015) zoning map, showing that the property is zoned R-3. Mr. Emmons further discussed the zoning of the property and the history of the zoning and uses back several decades.

He said that when speaking with the applicant, the staff could not find any non-conforming uses that have been at the subject property since 2009. Mr. Emmons said that they did find that there had been several churches that had occupied this structure, and churches are an allowable conditional use for this zone; but the staff could not find where those churches had ever come to the Board of Adjustment to request approval of a conditional use permit for the subject property.

Mr. Emmons said that, in the end, the staff had determined that the applicant had lost the non-conforming use

status on the subject property. He noted that, in Article 4-3(c) it states that "once a non-conforming use is discontinued or abandoned for one year or more, that non-conforming use status is lost." Mr. Emmons then noted that it also states in Article 4-3(d): "whenever one non-conforming use is replaced by a permitted use, then the non-conforming use shall not be resumed." Mr. Emmons said that, in conclusion, based on the information that the staff had available to them, it was determined that the applicant had lost the non-conforming use status in this particular case. There were about three days between the time they came to Planning to request the Zoning Compliance Permit the time letter presented to the Board was completed because the staff wanted to give the applicant additional opportunity to bring more information to the staff.

Mr. Emmons said that the staff did not provide an application to request a change from one non-conforming use to another because the staff could not get over the "hump" that the non-conforming use was lot; therefore, there was not a valid non-conforming use of the property to allow the Board to consider such a request. Mr. Emmons said that one cannot get to the next regulatory step a conclusion cannot be reached with regard to the first part.

He said that staff did recognize that the requested use for a pool hall for the subject property is first permitted in the (Highway Service Business) (B-3) zone; and whereas the last documented use for the subject property was the beauty salon, which is first allowed in the Neighborhood Business (B-1) zone; so even if it could be established that the applicant had not lost the non-conforming use status, the staff still had a hard time recommending the requested use of a pool hall because it is a more intense use than the previous non-conforming use.

Board Questions - Chairman Stumbo asked what was currently in the subject building, and when it was last occupied. Mr. Regard responded that he believed that the proposed tenant has moved some of their equipment in the building for the use of a pool hall. He said that the building was not operational as anything at this time. Mr. Regard said that the building's last use was a church group who used the property as a meeting place, but they didn't rent. He said the last paid tenant was in 2009, which was the beauty salon. Chairman Stumbo asked when there was a tenant last in the proposed subject property. Mr. Regard replied that it was in 2009. Chairman Stumbo asked if they did or did not pay rent. Mr. Regard responded that the last occupant of the building (the church) was in 2012.

Representation – Mr. Regard distributed additional information and discussed the outline for his presentation. He said, as pointed out by Mr. Emmons, there are two particular issues in front of the Board regarding the property. The first issue deals with a non-conforming use and what it means to discontinue a non-conforming use. Mr. Regard said that he thought it was important that the Board know that the property was built in the 1930s as a commercial structure. He then presented a PVA informational sheet (exhibit B in original letter of appeal) and said that the structure had been clearly identified as a retail and commercial structure. Mr. Regard said that the property has been built, constructed and taxed as a commercial use. He said that the property was intended to be a mixed use when built. He then discussed the background of the commercial use of the property.

Mr. Regard referenced Article 4-3(c) and noted that he didn't believe that it was a well written provision, as he read the following: "when a non-conforming use is discontinued or abandoned, showing a gross lack of diligence in use for a year or more." Mr. Regard said that he questioned what it meant to "show a gross lack of diligence in use for a year or more." He noted that Mr. Simmons could testify that he has attempted to make the property available; he has placed a "for rent" sign on the property. He cannot control the economic situation. Mr. Regard said that they now have a tenant who is interested in renting the property to use in a commercially viable manner to produce more taxes for the City; and to provide a location for members of the community to gather, to socialize, and to share each other's company. He said that Ms. Mack was at today's hearing to testify to that and to present a petition of over 35 people in the community who are in favor of the proposed use.

Mr. Regard then said that he would not say that showing a gross of lack diligence in use for a year or more is the situation in this case. He said that the property has not been allowed to decay; the taxes have been paid; the utilities have been paid; and it currently has utilities - it is just vacant. Therefore, Mr. Regard said that they believe that the loss of non-conformity is not applicable in this situation.

Mr. Regard said that the question then becomes what the non-conforming uses are that are applicable. He said that the most recent paying tenant was a beauty salon; a beauty salon does appear in a B-1 zone, and it also appears in a B-3 zone. He said one of the problems at hand, are pool halls. Mr. Regard said that Ms. Mack and Mr. Clay would like to open up a small pool hall with 3 pool tables (not 6-8); TVs to watch sports events; playing tables to play cards, dominos, etc.; - just gathering place for members of the community, they may even apply for a malt beverage license in the future.

Mr. Regard then discussed the different uses in the different zones and said that he did not feel the proposed use is a more intense use than a beauty salon.

Board Questions – Mr. Griggs asked to be reminded of the names of the B-1 and B-3 zones. Mr. Regard responded that the B-1 zone is the Neighborhood Business zone, and B-3 is highway access (the highway business zone). Mr. Griggs asked if the pool halls were listed in any of the business zones separately, not connected to taverns. Mr. Regard responded that a pool hall is both a defined term and a listed use; its defined term is “3 or more pool tables.” Mr. Griggs then asked if the intensity of the uses as one proceeds through the business zones becomes more intense from zone to zone (i.e., B-4, B-6, etc.). Mr. Regard said that his personal opinion was that the zoning laws were politically written for what people think are appropriate uses, not necessarily for the intensity. There was further discussion in regard to the intensity of uses in the business zones, comparing the various zones and their allowable uses.

Mr. Griggs said that he believed that the “struggle” with this case is, if the Board could get past the hump of having lost the non-conforming use, the intensity. He noted that there is another ordinance that says if there is a non-conforming use, and it is changed, that it would need to be the same or less intensity. Mr. Griggs said that, in this case, the Board may need to look at the hours of operation that the beauty salon was open and the number of patrons that visited it, compared to a pool hall: the number of people there, the hours of operation, and maybe the amount of noise. Mr. Regard responded that he thought that was a fair amount of conditions that could be put on the proposed use and noted that, as he said before, the Board does allow a restaurant and brew pub under a B-1 zone. He then further discussed the intensity of other uses compared to the proposed use. Mr. Griggs responded that the subject property is not in a B-1 zone; it is a non-conforming use. He said that there are a lot of permitted uses in a B-1 zone, some being much more intense than others; and he was stating that a beauty salon was much less intense than a pool hall with a liquor license.

Appellant (cont) – Mr. Regard asked Mr. Simmons to explain to the Board about the historic use of the property, to the best of his knowledge. Mr. Simmons said that he and a partner purchased the property in 1979; it had been an operating laundromat. He said they had operated the property as a laundromat for approximately 4-5 years and then converted and remodeled it, and started seeking tenants. He said in all the years that he has owned the building, it has been used for church groups (in and out - not necessarily in succession); a Muslim group; a used furniture store; a used clothing store; and a video rental store, which have come and gone over the years. He said during the course of those years, apparently, the various tenants did not pursue requests from the Board and neither did he; he wasn't aware that they needed to.

Mr. Regard then asked Mr. Simmons if he had attempted to get tenants over the last four years. Mr. Simmons replied affirmatively, as he discussed the different groups who expressed an interest in renting the building, but never followed through.

Mr. Regard asked Mr. Simmons if the property is not eligible for a commercial use, if it would be eligible for a residential use. Mr. Simmons said that the property is not eligible for residential use; it is one large room with a ½ - bath at the back of the building (divided by a wall), and ceilings approximately about 14 to 16 feet tall.

Mr. Regard asked Ms. Mack (prospective tenant) to explain to the Board the intent of the proposed use. Ms. Mack said that they were trying to do something positive for the neighborhood. Mr. Regard asked Ms. Mack if she believed that it would benefit the community to have that resource available. Ms. Mack responded affirmatively. Mr. Regard asked Ms. Mack if she had received any complaints from the community about this proposed use. Ms. Mack replied that she had not received one complaint. Mr. Regard then asked Ms. Mack if she has had any comments from others about the proposed use, to which she replied “nothing but good.”

Mr. Regard then presented a petition of support from the community to the Board.

Board Questions – Mr. Griggs asked Ms. Mack if she lived in the vicinity of the building. Ms. Mack replied that she did not, but that she had in the past.

Representation (contd.) – Mr. Regard said that he wanted to address the question brought up by Mr. Griggs in regard to the intensity of the use. He said that in looking at the zoning regulation, it does not say the intensity of use, it says “provided that the proposed use is the same or more restrictive classification than the previous use”. Mr. Regard further discussed the restrictiveness of the different uses in the “B” zones in regard to what is or is not more intense.

In conclusion, Mr. Regard said that he believed that the proposed facility is going to be a positive (economic and social) improvement for the community; the building has no other use, and they would ask that the Board would approve it. Mr. Regard noted, in regard to the last page of his documentation that was presented to the Board, a proposed (ideal) resolution for the prospective tenant. He said that if there were conditions that the Board would like to discuss, they would be happy to discuss those.

Board Questions/Comments – Mr. Griggs said that if the Board was to consider the proposed pool hall, if the Board would be granting the final approval for it; and if they would need to look at things such as parking, etc. Mr. Regard responded that they did not anticipate parking being an issue; the whole idea is that it is a creating a place for people to be able to walk to. At this time, there was some further discussion on the required parking, etc. for the proposed use of the property. Mr. Griggs said that there is quite of bit of detail that would need to be discussed before moving further with this application, such as whether or not the use is non-conforming, parking, etc.

Ms. Meyer asked staff, as an alternative, if Mr. Simmons could apply to have the property zoned B-1. Mr. Emmons responded that any property owner could apply for any zone change; however, some of the issues on the subject property (because the property is built out from property line to property line), without parking, may run into some difficulty meeting the parking requirements unless there was some off-site parking. Mr. Emmons said that they could apply for change of zoning; but he could not say whether it would be successful or not, or what types of issues would or would not come out during that type of zone change.

Representation (cont.) – In closing, Mr. Regard said that the parking issue is a fair issue; but even under the non-conforming use of the church and the beauty salon, to the extent that there were parking issues that would have existed, they were allowed at the time and it wasn't a prohibitive issue to the use of the property.

Board Questions/Comments – Mr. Griggs asked if the Law Department had any opinion regarding the "puzzle" that is being faced by the Board. Ms. Jones said that, when looking at the ordinance on non-conforming uses, they were having a hard time finding some rationale as to how it would be a continuation of a non-conforming use. She said that if the Board was going to deal with it as it currently exists, it would have to fit in a hole of a non-conforming use; and a non-conforming use would have to be the same or very similar to what was there. Ms. Jones said, overall, it would have to be determined whether or not the non-conforming use has been lost; and if it has, one cannot use a non-conforming use argument to allow another non-conforming use to occupy the property.

Staff Rebuttal - Mr. Emmons said that his first overarching comment may or may not add some clarity to the Board's decision-making at today's hearing, but the real issue at this hearing is whether or not the subject property has or has not lost its non-conforming use status. He said that is the reason the staff denied the Zoning Compliance Permit; that is also the reason the staff did not provide the applicant an application to change one non-conforming use to a new non-conforming use. Mr. Emmons said that, in a technical sense, he would be a little concerned if the Board made the decision at today's hearing to allow the use, because that type of appeal has a different type of notification that would be required if they were asking to change one non-conforming use to another. Mr. Emmons provided further information in regard to the requested application and what would be considered appropriate in this case, as well as whether or not this use can be considered a non-conforming use.

Legal Comments – Ms. Jones addressed Mr. Emmons' comments by saying that she would agree with what he discussed, procedurally. She noted that this appeal was because the applicant was denied a Zoning Compliance Permit by the Division of Planning, and said that they couldn't find an existing non-conforming use to submit an application to change it to another non-conforming use. She said that she didn't think that the Board could grant this use today. Ms. Jones said that if the Board had enough evidence that there wasn't a discontinuance, and there wasn't an abandonment of a non-conforming use, the Board could direct the Planning staff to accept an application to change it from one non-conforming use to another; and then there would have to be a subsequent hearing on that application, which would probably include more details about things that are not subject to today's request.

Discussion – At this time, there was further discussion about whether or not the subject property was a legal non-conforming use, as well as what the options would be if granted (or not) at today's hearing. Chairman Stumbo said that he was not convinced that the subject property has been a continuous non-conforming use, and he could not support the appeal, as of today. He said that the building has been vacant for 3 years; and he didn't see how, as a Board, they could approve this request. Mr. Griggs said that he felt differently than the Chairman. He said that he thought having a "for rent" sign up for the building indicated Mr. Simmons' intent to put another commercial use in the building, and when he found one; therefore, he didn't feel like he had abandoned the property. Chairman Stumbo clarified that he wasn't stating that the property has been abandoned; he felt that the non-conforming use was discontinued.

There was additional discussion about to whether or not the subject property should be considered abandoned and/or the non-conforming use discontinued. Chairman Stumbo said that he believed that there are just too many unanswered questions. Ms. Meyer said that she agreed with Chairman Stumbo that the non-conforming use has been discontinued, and there is documentation for that. Ms. Whitman also said that she agreed with Chairman Stumbo that the issue is whether the subject property has continued as a non-conformity, and it has not. She said she understood the intent, but it has not. Mr. Forester said that he agreed as well, but wanted to give some credence to Mr. Simmons at least trying to lease the property; it is not Mr. Simmons' fault that he could not get the property leased; but if the pool hall is not allowed by the regulations, he didn't think that it was something the Board

should consider.

Mr. Griggs said that, in reading the wording in this part of the Zoning Ordinance, he felt that it could be read in both ways, and the applicant had not shown a gross lack of diligence. Mr. Griggs said maybe it is where the commas are in the sentence. He said that the subject building will not be converted into a residence; and if it is left vacant, that would be a problem for the neighborhood as well. Mr. Griggs said that he was not in favor of a pool hall that could morph into a loud draw for trouble in the wee hours of the morning; but he thought that if the building had a barbershop or some kind of business with normal hours, it could be a benefit to the neighborhood.

Citizen Comment - Ms. Mack said that they have been talking with the local community, and they think their use would be something positive for the children in the neighborhood. She said that the police officers frequent the area often, and there would not be any "trouble" coming from their operation.

Discussion - Ms. Meyer said that she thought it was great what they were trying to do, and she didn't know if there was something in the R-3 zone that they could possibly do differently to be more fitting in the neighborhood. Ms. Mack said that it did not have to be a pool hall; it could be more like a community center. At this time, there was further discussion as to what other options that could be put in place for the property.

Mr. Forester asked Ms. Mack if she had spoken with some of the non-profit groups that are in the area already to see if they would be willing to support what they are proposing. Ms. Mack said that everyone that she has talked to in the community is supporting them.

Discussion - Ms. Jones said that one thing that may be able to be done in terms of how to handle the situation is that, based on the language of the "or," if the Board believed what they heard at today's hearing- i.e., that there was not an intent to abandon the non-conforming use and if there are facts in what was provided by Mr. Regard about what those would be, the Board could allow them to file some type of application with the staff. This would allow some additional time for discussion about what it could be, and what kind of restrictions would be needed. That may be enough to get the Board over the "hump" of whether or not this is a legal non-conforming use.

Citizen Comment (cont.) - Mr. William Clay addressed Mr. Forester's question in regard to the intent of the use. He said that their intent is to do things for the homeless, such as feeding them, etc, at this location. He said they were trying to uplift the neighborhood. Mr. Clay said that it is to be something good for the kids- nothing illegal, and all positive.

Discussion - Chairman Stumbo said that the Board really appreciated what they were trying to do; however, what is before the Board today is all about whether or not the subject property still has a non-conforming use. Chairman Stumbo asked Ms. Jones if it would be a good idea to continue this hearing, or if she had some other resolution to offer about this case. Ms. Jones said that if the applicant wanted to file something with the staff to open up that discussion, the Board would have to authorize that at today's hearing because the staff had already taken action saying that they were not going to accept the filing for a change in one non-conforming use to another.

Mr. Regard said that he agreed that there were two aspects of this appeal. He suggested that the applicant would withdraw the current requested use at this point, if the Board could address the issue of it not being a discontinued or abandoned non-conforming property. If the Board could vote on that in their favor, they could have the opportunity to go back to the Division of Planning and present a conditional use permit application.

Ms. Whitman asked, if this appeal was denied, if the applicant would be able to come back with a revised application. Ms. Jones responded that she didn't think they could because the staff has denied them a Zoning Compliance Permit based on what they were told- that they didn't feel it was an existing non-conforming use.

Ms. Whitman said that she had an issue with the proposed malt beverages and having children in the same vicinity. She said that those two things don't seem to quite go together. Her thought was that if the Board turned down this appeal, that maybe the applicant would come back with something more fitting within the R-3 zone. Ms. Jones said that if the Board turned down the appeal, they wouldn't be able to come back; but if the Board based it on findings that they can file something based on today's testimony, then the Board could have those kinds of discussions.

Mr. Sallee agreed with Ms. Jones and said that he would like to clarify the two different types of applications that the Board has been considering over the course of the hearing indicates that the uses proposed. He said the staff has no trepidation of accepting an application for an allowable conditional use in the R-3 zone at this location; however, much of the testimony heard at today's hearing, are more intense than what are allowed as conditional uses; and once one gets to those categories of uses (pool hall or other commercial uses), that's when one is really considering a change in one non-conforming use to another. The Board's decision on this appeal informs whether or not they can file that particular application, not necessarily an application for a conditional use permit.

Ms. Jones said that the applicant may even have a change of heart in what they may want to file or not, but at least it allows the door to open for more discussion to be had about this property.

Chairman Stumbo said that if the Board did not reach some type of compromise, they would have to deny the appeal; and he would much rather reach some type of compromise and find middle ground so that the applicant could reapply and have them work with the staff, then come back before the Board.

Mr. Regard addressed Mr. Emmons' previous statement and agreed that the disapproval was based on the loss of the non-conforming use. He agreed that it had probably gotten too much off track at this point into what would be a conditional or change in a non-conforming use. He asked that the Board address the issue of whether the non-conforming use was lost, because it would affect the second discussion as to whether they are going to the Division of Planning discuss another non-conforming use, or if they are going to discuss what is allowable under the R-3 zone. Chairman Stumbo said that he believed that was what they were trying to accomplish.

Action – A motion was made by Mr. Griggs, seconded by Ms. Meyer and carried unanimously (Moore and Glover absent) to **find in case A-2015-17: ELVIS LEE SIMMONS**, that the appellant has not intended to discontinue or abandon the non-conforming use of the property based on facts supplied by the applicant at this hearing, as follows:

- The economic depression of 2009 made the rental of the property difficult;
- The owner has not acted with gross lack of diligence in continuing the eligibility of the property for a non-conforming use;
- The property taxes and assessments have been kept up to date;
- It is a benefit to the community to have a tax paying business use the property; and
- By not allowing a continued commercial use, the property will become worthless.

Mr. Griggs asked the Planning staff to use those facts and directed the staff to accept a conditional use application and to further discuss the non-conforming uses that may be allowable on the property.

Mr. Marx noted that that type of application would not be a conditional use application; it would be an administrative appeal to change one non-conforming use to another. Mr. Griggs clarified that the Board is directing the Planning staff to accept an application for a non-conforming use- to further discuss the non-conforming uses that may be allowable on this property.

IV. **BOARD ITEMS** - No such items were presented.

V. **STAFF ITEMS** - No such items were presented.

VI. **NEXT MEETING DATE** - The Chair announced that the next Board's meeting date would be April 24, 2015.

VII. **ADJOURNMENT** - Since there was no further business, the Chair declared the meeting adjourned at 3:14 p.m.

Barry Stumbo, Chair

James Griggs, Secretary