

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

February 26, 2016

- I. **ATTENDANCE** – The Chairman called the meeting to order at 1:30 p.m. in the Council Chambers, 200 East Main Street, February 26, 2016. Members present were Chairman Barry Stumbo, Thomas Glover, Joan Whitman (arrived at 1:37 p.m.), Chad Needham, Larry Forester, Jan Meyer and Branden Gross. Others present were: Casey Kaucher, Division of Traffic Engineering; Jim Marx, Zoning Enforcement; and Tracy Jones, Department of Law. Staff members in attendance were: Bill Sallee, Jimmy Emmons, and Tammy McMullen.

- II. **APPROVAL OF MINUTES** – The Chair announced that the minutes of the January 29, 2016 meeting would be considered at this time.

Action – A motion was made by Mr. Glover, seconded by Mr. Needham, and carried 6-0 (Whitman absent) to **approve** the minutes of the January 29, 2016 meeting.

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 staff members and other persons 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.

- a. **V-2016-3: JIM & MOLLIE SAWYER** – request a variance to reduce the required side setback from 25 feet to 8 feet in order to construct a garage between the house and the side property line in the Agricultural Rural (A-R) zone, at 4949 Hidden River Drive (Council District 12).

Staff/Board Comments – Mr. Emmons said that he had to share with the Board on this particular application. He said that there had been some discussion prior to the hearing between the neighbor and the applicants. Mr. Emmons said that on the previous Wednesday morning, one of the neighboring property owners came into the Planning office and talked with the staff about the application. The staff had spoken with the applicants, and then later that day had received a phone call from the applicants stating that they were going to request a postponement. He said that on Thursday, the same neighbor called back to the Planning office, and the staff relayed that the applicant was going to request a postponement at today's hearing. However, when the staff checked on the status of the application the morning of the hearing, the applicant indicated that they wanted to move forward with the application. Mr. Emmons said that the staff did call the neighbor and left a message, but was unable to speak with him directly.

The Chair said that this was perplexing because normally when there is opposition, the Board likes to give the oppose(s) the opportunity to come forward and state their case. He said that he did not feel comfortable going forward with the case. He asked the applicant if they would be opposed to a 30-day postponement in order to give the neighbor a chance to be heard.

Mr. Glover asked if the neighbor called to say they were opposition and wanted to speak. Mr. Emmons responded that there is a neighbor who has concerns about this variance request, and they even came into the Planning office and spoke with the staff about the staff report. Mr. Sallee said that he had spoken with the neighbor and it was hard to assess whether he was opposed or rather just trying to gain information. He did seem concerned about the application, and thought he might want to attend today. He said that he (the neighbor) would talk to the applicant and ask for additional time, which is why the staff tried to relay the information to him that morning.

Representation – Mr. Jay Copley, architect, was present representing the appellant and said the neighbor's concern was about the scale and the size of the project. He said with the variance request, the applicants' just want to build within the 25-foot setback; the current design is going to be within 8 feet of the property line. He said that he told the applicants that if they get the variance, they would only be allowed to build within the zone (part of the property) that typically they would not be allowed to build within. Mr. Copley said that they would want to go to the neighbor and show them that and where the size, design, and scale of the project would be to their fence line. Mr. Glover asked which neighbor it was. Mr. Copley responded that it was the adjacent neighbor. Mr. Glover asked if it was on the proposed garage side. Mr. Copley responded affirmatively.

At this time, the Chair asked the Board if they would like to proceed or postpone for 30 days. Mr. Gross asked if there would be any reason that a postponement would be detrimental to the applicants, to which Mr. Copley replied. Mr. Gross then said that he would be more comfortable if the neighbor at least had an opportunity to be able to speak about their concerns. Mr. Glover said that he wanted to be fair to everyone, and asked if the neighbor identified him/herself. Mr. Sallee responded that he had, noting that his understanding was that the addition was for a garage. Some of his concern was when he saw the plan; it was a two-story residence in addition to the garage, so he was trying to evaluate his understanding of the request versus what he was seeing in the drawings.

Action – A motion was made by Ms. Meyer, seconded by Mr. Forester and carried unanimously to **postpone V-2016-3: JIM & MOLLIE SAWYER** to the March 25, 2015 meeting.

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 would proceed to take action.

ABBREVIATED HEARINGS:

*Note – Mr. Forester and Ms. Whitman recused themselves from this case due to a conflict of interest.

- a. **V-2016-4: LEXINGTON COMMUNITY LAND TRUST, INC.** – requests a variance to reduce the required side yards from 3 feet to 0 feet in order to install fences in a Planned Neighborhood Residential (R-3) zone, at 708, 716, 730, 734, 738, 742, 746, 750, 770, 804 and 808 De Roode Street and 400, 401, 404, 408 and 409 Nathaniel Court (Council District 3).

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested variance will not adversely affect the subject or surrounding properties and will not cause a health, safety or welfare issue. Once installed, the fences will have gates, thereby not creating an obstruction in the side yards of these properties. Based on the overall design proposed by the CLT, it will not cause obstructions to the neighboring property owner because each property will share a single 4' tall fence in the side yard. Granting the requested variance will not prevent the use of the side or rear yards, especially by emergency responders, if necessary.
2. Granting the requested variance will not be an unreasonable circumvention of the Zoning Ordinance. This community redevelopment project is a direct result of the planned efforts for the Newtown Pike Extension Project, which began prior to the regulations from which they now seek relief.
3. The Community Land Trust (CLT), is a quasi-governmental 501(c)(3) non-profit organization, by virtue of its charter and creation, is a unique redevelopment project funded by a combination of the CLT, the Lexington-Fayette Urban County Government, and the KY Department of Transportation. Taken together this provides a level of justification for the variance request. Because of the unique nature of the CLT, they will be able to maintain the affordability and design features of this development through private restrictions such as fence heights and other design standards that have been adopted.
4. Strict application of the Zoning Ordinance would require the fences to be moved entirely to the rear of the homes. Functionally, this would be less desirable than the proposed fencing layout.
5. The requested variance is not the result of any willful violation of the Zoning Ordinance. The need for the requested variance was discovered during the normal permitting process.

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

- a. Gates shall be installed to allow access to the side yards, and the maximum height of the fence in the side yards shall be 4' tall.
- b. Fence permit(s) shall be obtained by the applicant from the Division of Building Inspection.

Representation – Ms. Barbara Navin, Executive Director of the Community Land Trust, and Mr. Ed Holmes with EHI Consultants, were present representing the appellant. They indicated that they had reviewed the recommended conditions and agreed to abide by them.

Action – A motion was made by Mr. Needham, seconded by Mr. Gross and carried 5-0 (Forester and Whitman recused) to **approve V-2016-4: LEXINGTON COMMUNITY LAND TRUST, INC.** – a request for a variance to reduce the required side yards from 3 feet to 0 feet in order to install fences in a Planned Neighborhood Residential (R-3) zone, at 708, 716, 730, 734, 738, 742, 746, 750, 770, 804 and 808 De Roode Street and 400, 401, 404, 408 and 409 Nathaniel Court, as recommended by the staff and subject to the two conditions.

- b. **C-2016-2: PINNACLE HOMEOWNERS ASSOCIATION** – a request to amend a conditional use permit to expand the existing neighborhood clubhouse in a Single Family Residential (R-1E) zone, at 621 Southpoint Drive (Council District 4).

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

1. The physical arrangement of the improvements on the subject property, along with the relatively large size of the lot, will minimize any potential negative impact of this conditional use upon the surrounding neighborhood. The proposed expansion of the existing clubhouse will provide a desirable service to the surrounding neighborhood, and is already located to be conveniently accessible by the neighborhood's existing collector streets.
2. All services and infrastructure are adequate and available for this expansion of the existing clubhouse building.

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

- a. The proposed clubhouse addition shall be constructed as indicated on the corollary site plan, and shall be operated in accordance with the submitted application.
- b. All necessary permits shall be obtained from the Divisions of Planning and Building Inspection, prior to the construction and/or occupancy of the site. This will include, at a minimum, a Building Permit, a Zoning Compliance Permit and a Certificate of Occupancy.

Representation – Mr. Dwayne Koller with Koller Warner Construction was present representing the appellant. He indicated that they had reviewed the recommended conditions and agreed to abide by them.

Action – A motion was made by Mr. Gross, seconded by Mr. Forester and carried unanimously to **approve C-2016-2: PINNACLE HOMEOWNERS ASSOCIATION** – a request to amend a conditional use permit to expand the existing neighborhood clubhouse in a Single Family Residential (R-1E) zone, at 621 Southpoint Drive, based on the staff's recommendation and subject to the two conditions.

- 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.

1. **V-2016-5: GARY MILTON** – requests a variance to increase the maximum allowable fence height from 4 feet to 7 feet (for the columns) and to 5 feet (for the fence) in a Single Family Residential (R-1C) zone, at 3101 Tates Creek Road (Council District 4).

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

- a. The requested variance does not arise from a special circumstance that does not generally apply to land in this same zone. There are no unique physical characteristics, such as topography or neighborhood character, that would serve as a justification to approve the requested variance to the fence height.
- b. Granting the requested variance would cause this property to have a front yard improvement that would be out of character with others in the neighborhood, as no adjacent properties and very few properties in the Tates Creek Road corridor have any front yard fences, much less at the height(s) requested by the applicant.
- c. Strict application of the Zoning Ordinance will not deprive the applicant of a reasonable use of the property, as a 4' tall fence in the front yard is allowed by right in this zone, with the issuance of a fence permit. Additionally, a 4' fence should accomplish the same goal of providing a secure outdoor space for children to play.

Staff Report – At this time, Mr. Emmons presented several photos on the overhead projector and discussed the staff's recommendation of disapproval. He said, as mentioned earlier, the subject property is a large tract of land located at

the corner of Tates Creek Road and Albany Drive zoned R-1C (Single Family Residential). The applicants have recently purchased the property; they propose to fence in the front yard and to put a driveway access to Tates Creek Road. He said that the variance that is being requested is to the height of the fence. Mr. Emmons clarified that whether or not there is a fence in the front yard is not up to the Board (a fence is allowed, but at a maximum height of 4 feet); and the driveway is not before the Board. At this time Mr. Emmons presented the following:

- The lot(s) in this part of the Tates Creek Road corridor have large front yards; they are platted at a 125-foot setback from Tates Creek Road;
- The staff defined the corridor of the area from Alumni Drive to New Circle Rd;
- The street view from Alumni Drive to New Circle Road (presented on overhead projector);
- Staff did note that there are back yard fences that face Glendover Road, and;
- One property a few doors down that does not have an actual fence, but does have a circular driveway and a gate for that property; they were issued a permit in 2005, before the current regulations on the fence height;
- Whether or not there was a special circumstance that would justify the fence height request, which the staff could not find for the subject property; and
- The general character of the vicinity - very few front yard fences in the entire corridor.

Mr. Emmons said, that in this particular instance, of the request would still allow the applicant reasonable use of their land, as there could be a fence up to 4 feet in height.

Board Questions – Mr. Glover asked if the back yard fences in this corridor were higher than 4 feet. Mr. Emmons responded generally that they are. For the properties on Glendover Road, their rear yards backup to Tates Creek Road (near the Old Mt. Tabor intersection). He said that he was familiar with those fences; the Board of Adjustment did grant one fence height variance in that instance because there was a lot of topography difference between their rear yard and the height of the fence. Mr. Glover said he was asking to see why a back yard fence is allowed to be one height and the front yard another. Mr. Emmons responded that, in May 2012, the regulations were changed; it used to be that front yards were allowed up to a 6-foot tall fence. After much study, the Council initiated a text amendment that lowered the fence height from the front wall of a building to the street to a maximum of 4 feet. At this time, Mr. Emmons discussed the reasoning behind lowering the fence heights, which included sight distances and overall aesthetics.

Mr. Glover asked, if this property was a side yard proposal, the staff would recommend something different. Mr. Emmons responded that when there is a side street side yard situation, with regard to a fence, if they go in from the right-of-way 3 feet, they are still allowed to go up to 6 feet in height, and that does not require a variance.

Representation – Mr. Gary Milton, applicant was present. He said that one thing he wanted to point out was that he did have a permit for an entrance. He said that on this lot, he has a tall (7-foot) wall on the back and side of the house. He said that the reason he is requesting to go from a 4-foot to a 5-foot fence, and for a 7-foot column where the gates would go, is because if one puts up a 4-foot fence and a 4-foot column, it is not going to look good, especially if it were to be gated. He said he didn't think it could be gated with a 4-foot column. Mr. Milton that the reason for the request is for it to look good; then where the gate would be, the columns would be 7 feet and they would be able to get a gate between the columns. He said that they have small kids and feel that it would be safer for them with a 5-foot fence than a 4-foot fence. Most of his yard is the front yard and the kids would like to play in the front yard, and have a safe place to play. They feel that it would be more suitable if they could raise it up to 5 feet.

Mr. Milton noted that three doors down (referencing the photo Mr. Emmons presented on the overhead projector) where they have two gates on the property, he believed the columns holding the gates are 7 feet. He said that he didn't know why the Board would have approved something three doors down with a 7-foot column, and hold him to a 4-foot column. He noted that his fence contractor, Mr. Troy Myers, was also present and asked him if one could actually get a gate on a 4-foot column. Mr. Myers, with Myers Fence, said that Mr. Milton purchased the property at the first of the year and came to his contracting company; they went out and looked at it and met with Building Inspection. He added that Mr. Milton is willing to do all the required setbacks because it is at a busy intersection. He noted that, as Mr. Emmons stated in his presentation, that it is a double lot; not all houses on this corner are double lots - some sit closer to the road. He said that the majority of the lot contains, the house, the garage, and another out-building, Mr. Milton doesn't really have any back yard. So upon purchasing the property, he wanted to fence the front yard to have a safe, secure place for his kids to be able to play. Mr. Myers said that the entrance that was approved by the State and also by the City, is a 12-foot, concrete entrance. He explained that typically when an automatic gate is put in, one would want it tall enough that it secures the property, so the gate would need to be at least 6 feet tall. Therefore, they were asking for the variance for the perimeter fence, which is 5 feet tall, and only at the gate that it be allowed to be 6 feet.

Mr. Myers noted that within a 2-block distance of this property, at 2655, 2665, 2705 and 2721, they all have fences in the front yard. He said that 2665 has a 6-foot tall, unsightly wood fence. Two properties within 500 feet of Mr. Milton

both have 7-foot tall columns in their front yard. He said that one of the properties has a double entrance, so it has 4 columns.

Mr. Milton said that he believed what he is proposing to do would enhance the neighborhood; it would be a nice fence compared to some of those on that road, and that just want it to be a safe place for their children. Mr. Milton said that they he felt that if the fence was dropped down to 4 feet; it would put it out of proportion with the rest of the property.

Board Questions - For clarification, Mr. Gross asked Mr. Milton if he had mentioned receiving a permit for the driveway. Mr. Milton responded affirmatively. Mr. Gross then asked if that information was given to the staff as to date. Mr. Emmons said that the staff was unaware, at the time the staff report was being written, that a permit had been issued and was under the impression that it had not. He said that it was after the report had been drafted that the staff learned it had been issued. The Chair asked if the permit was for the driveway only. Mr. Emmons responded that it is a permit for the driveway. Mr. Milton said that it was approved for the driveway in 2014 by the City and the State.

Mr. Gross asked what kind of design being proposed for the fence is; from the application it looked as though he had proposed a 5-foot tall aluminum fence. Mr. Myers responded that it would be the look of a wrought-iron fence, with a press point or spear top, with three horizontal rails, and the vertical rails would have 3-inch spacing. Mr. Myers mentioned that one of the issues they would like to note with regard to driveways is that there are numerous driveways throughout the area; their columns are above the maximum allowed, and Mr. Milton would like to see the fence variance be approved because why put in the driveway in if he could not secure it the way he would like to do.

Mr. Glover noted that the subject property was on the corner of Tates Creek Road and Albany Road – the property fronts on Albany Road as well. He said that it looked, according to the application and the map, like there is a brick garage off of Albany Road, and asked if this was correct. Mr. Milton responded affirmatively. Also, for clarification, Mr. Glover asked if it was correct that there is a driveway on that side as well. Mr. Milton responded that that was correct; that he is having a difficult time getting out of drive way because Albany Road is usually backed up all the way to the light. He said most of his back yard is taken up by a 3-car garage and another structure that is back there, and he really doesn't have enough room for his kids to play. If they had a fence in the front yard, they would have better yard to play in.

The Chair inquired about the 6-foot tall columns that are a couple of doors from the Milton residence, and asked why a building permit was issued for that. Mr. Emmons replied that when the staff looked at the building permit history on that particular property, it is not an entire fence, just the columns for the gate. That permit was issued in 2005 before the regulations were in place. It was allowed at the time that it was permitted.

Action – A motion was made by Mr. Glover, seconded by Ms. Whitman and carried unanimously to **disapprove V-2016-5: GARY MILTON** – a request for a variance to increase the maximum allowable fence height from 4 feet to 7 feet (for the columns) and to 5 feet (for the fence) in a Single Family Residential (R-1C) zone, at 3101 Tates Creek Road, for the three reasons stated by the staff.

*Note – After the motion was made and acted on, there was some discussion on whether or not there was anything that Mr. Milton could do to get his gate put up. Mr. Milton was advised that he could reapply with a different application.

D. Conditional Use Appeals

There were none remaining

E. Administrative Review

1. **A-2016-1: JONNY & LISA COX** – an administrative appeal to change one non-conforming use (antique sales/storage/office) to another non-conforming use (coffee shop/restaurant) in a High Density Apartment (R-4) zone, at 610 (aka 620) Ballard Street (Council District 9).

The Staff Recommends: Disapproval, for the following reasons:

- a. The requested use of a coffee shop/restaurant will result in an increase in scope and intensity from the previous use (antique sales/storage/office) and therefore does not meet the requirements of either Article 4-3(e) or 7-6(c) of the Zoning Ordinance.
- b. Indicators of the increased scope in intensity of the proposed use include the required parking for each of the uses, the proposed hours of operation, and the potential for noise or other nuisances to the nearby neighborhood.
- c. Disapproval of this requested use does not mean that this site will lose its non-conforming use status, as there are a number of other, less intense uses that could be approved by the Board for this location.

Staff Report & Discussion – At this time, Mr. Emmons presented photos on the overhead projector and discussed the

staff's recommendation of disapproval for the subject property, including the following points:

- Location of the property
- Entrance and exit for the property
- Surrounding properties
- Parking lots in the surrounding area

Mr. Glover said that where the subject property is located looks like an alley to him, and asked what the difference is between a street and an alley. Mr. Emmons responded that an alley serves as rear access for through lots, and they are generally much smaller with no curb and gutter –acting more as a service road. Ballard Street is a little bit of a hybrid between the two; it is somewhere between a standard local street and an alley.

Mr. Emmons said that when the Board is asked to look at changing one non-conforming use to another non-conforming use, Articles 4 & 7 of the Zoning Ordinance applies. He said when looking at that, there are three criteria that are reviewed: 1) If the use is in the same or a more restrictive classification than the previous use; 2) Is the proposed use going to expand in area of operation. He said that the applicants are not proposing to expand the building itself, so that was not an issue; and 3) If the scope and intensity of the operation is increasing. He provided an explanation of each of the criteria and how the staff looks at each.

The Chair asked what the hours of operation would be for this proposed use. Mr. Emmons responded that they would be open Monday through Thursday from 7:00 a.m. until 9:00 p.m., and Friday and Saturday from 7:00 a.m. until midnight, and closed on Sundays.

Mr. Glover asked if the street has sidewalks. Mr. Emmons responded that Ballard Street does not have sidewalks, and he said that he forgot to mention that there are ten non-conforming parking spaces that pull directly off of Ballard Street in front of the building. Under the current Zoning Ordinance, one could not design parking spaces that back directly onto the public street. The Chair asked if the parking spaces would have to be reconfigured. Mr. Emmons replied that he didn't believe that it would be necessary.

Mr. Gross noted from the application that there were no plans for entertainment and asked, if it were approved for a coffee shop, what type of entertainment they would have. Mr. Emmons said that there is no live entertainment allowed in the B-1 zone; it would not be allowed by right at this location; because live entertainment in a restaurant is allowed as an accessory use if it is located more than 100 feet away from a residential zone - this one is zoned residential, and it is surrounded by other properties that are zoned residential.

Mr. Glover asked why a coffee shop would need parking, and if it would be possible if the parking spaces could be eliminated. He said that he has been down the subject street before and it is hard to park in that area as it is. He also asked if all restaurants were required to have parking. Mr. Emmons responded that in the Neighborhood Business (B-1) zone, all restaurants are required to have parking unless they are in the downtown zone.

Mr. Needham said that with regard to reduction of parking, there are bus stops and bike racks that could help reduce the need for parking. Mr. Emmons said that there is the possibility of requesting "some" reduction in the parking; and within the Infill and Redevelopment Area, a variance could be requested to reduce the required parking up to a maximum of 50%.

Mr. Glover asked if the applicant would have to satisfy all three requirements in order to meet the qualifications. Mr. Emmons responded affirmatively, noting that he had summarized these in the staff's report.

Representation – Ms. Jessica Winters, attorney on behalf of the applicant, distributed several handouts to the Board. At this time, Ms. Winters gave a PowerPoint presentation on the overhead projector with regard to the applicant's proposed use. She said that she has been designated as the spokesperson on behalf of the applicants. Ms. Winters asked for a show of hands in the audience of those in support, and then those in opposition in order for the Board to have an idea as to where the neighborhood is with this proposal. This was in the event that anyone in the audience would need to leave prior to being heard.

Ms. Winters said that between the time the application was filed and today, Mr. and Mrs. Cox wanted to make an effort to communicate with the neighbors. She said, that she (herself), and the business owners are different than the property owners. The Coxes are the property owners, and the business owners are Ms. Olivia Lussi and Ms. Sara Brown. Ms. Winters said that they made appointments to go speak with the Northside Neighborhood Association and also with the Western Suburb Neighborhood Association. They gave a presentation as to what was being proposed and answered all questions. She wanted the Board to be aware of this so that the Board would know they have been in communication all along. At this time, Ms. Winters provided information with regard to the property owners' history of their business(s) and the subject property.

Ms. Winters said that an important point that was not mentioned in the staff report was that, for the past several years, the majority of the parking spaces in front of the subject building have been leased to Nick Ryan's; so there has been constant traffic coming and going for the last several years, all during the hours of Nick Ryan's operation. She said that the lease for Nick Ryan's parking spaces has expired; and if the coffee shop use is approved, then the parking spaces would be used by the coffee shop, and no longer by Nick Ryan's. At this time, Ms. Winters discussed the different mix of uses (mixed) that are in the surrounding area as she presented photos on the overhead projector, one of which was of the Jefferson Street Soiree, which is an annual food and entertainment event. She thought that an important aspect of what they are proposing to do has to do with the business that they are asking to locate on the subject property: Lussi Brown Coffee Bar, which is focused on bringing a new piece of coffee culture to Lexington. At this time, Ms. Winter presented additional photos and discussed the layout plan of the proposed use. She also discussed its hours of operation. Ms. Winters noted that she had included the Lussi Brown Coffee Shop's business plan in the in the Board's packet.

Ms. Olivia Lussi and Ms. Sara Brown, business owners of the proposed use, were present. Ms. Lussi said that Ms. Brown and she are a third party for this application. They knew nothing of the discrepancies prior to this, but hopefully would be able to add to the community. Ms. Lussi said that they have been in the coffee business for approximately six year. Coffee has been their passion for a long time, and would like to continue with their passion. She said that they were originally going to have their coffee shop at another location (Manchester Street) with live entertainment; however, the previous location did not work out for them. Therefore, they decided to go to Ballard Street, and realized that live entertainment was not going to work out at that location, and said that the Board could eliminate the live music from the business plan.

Ms. Lussi said that with regard to coffee in Lexington, it will not survive without something else; therefore, they are proposing coffee cocktails and desserts. At this time, Ms. Lussi further discussed their plans of the coffee cocktail shop that they were proposing.

Ms. Sara Brown reiterated that the hours of operation they were proposing would be Monday through Thursday, 7 a.m. until 9 p.m. She said that currently Nick Ryan's operation is using the parking spaces until 10:00 p.m., which would give them an hour before they actually close. She said in doing their research, they found that the Jefferson Street corridor did not have a coffee shop, and they were trying to bring a new element to the area.

Ms. Winters discussed the liquor license that is being proposed. She said that the business owners' plan for the liquor license is for an artisan bar, not just another bar; they were focusing on coffee themed cocktails, etc.

At this time, Ms. Winters discussed the regulations of the Zoning Ordinance with regard to the proposed use. On the overhead projector, Ms. Winters presented an analysis of questions and discussed each.

Board Questions - Mr. Glover asked if it was the classification that offers the test of restrictions. Ms. Winters responded affirmatively. Mr. Glover then asked if the question before the Board is whether or not a coffee shop is a more or less restrictive classification than an antique store. Ms. Winters responded affirmatively.

Mr. Gross asked if the issue regarding the use was not only if it is more or less restrictive, but if it was also the possible expansion of activities pertaining to the use in the building. He asked if staff would respond to that. Mr. Emmons said that with a change in use (one non-conforming use to another), the first thing that staff reviews is the classification of those uses and in which what zone it is first allowed, as well as in which zone the other use is first allowed. That is used as a comparison to see if they are in the same zoning classification. He said that the Zoning Ordinance also requires that there not be an increase in either scope or area of operation, and that the new use not be a nuisance to the subject or surrounding properties. Mr. Gross asked if, when Mr. Emmons said "scope of area," he meant the footprint of the use. At this time, there was further discussion of the meaning of scope of operation versus its footprint.

Mr. Glover asked how the staff determined that the previous non-conforming scope of use was less. Mr. Emmons said that primarily they looked at the required parking for the two uses, and the hours of operation between a typical antique store and a coffee shop. Mr. Glover asked what the hours of operation of the antique store were. Mr. Emmons responded that a typical antique store carries typical retail hours - 9:00 a.m. until 5:00 p.m., and sometimes some weekends, generally on Saturday.

Ms. Winters said that they could address the concerns regarding the scope of the operations and that the use would be more intense on the neighborhood. At this time, she presented the following information on the overhead projector, along with a discussion of each point:

- Parking calculation
- Parking requirements
- Applicants' revised floor plan

- Noise increase, and would this be a nuisance on the neighborhood
- Occupancy on the space
- Community support
- Letter of support from Transylvania University

Mr. Gross asked about the spaces being leased to Nick Ryan's. He asked if Nick Ryan's was using the spaces, at what times, and if they are restricted to certain times during the week and during the evening. Ms. Winters responded, affirmatively, and further discussed the information on the overhead projector.

Mr. Gross asked what time the other establishments in the area close. Ms. Winters said that one establishment stays open until midnight, but the others may close a little earlier. At this time, there was further discussion with regard to the hours of operation of the coffee shop compared the other establishments.

Ms. Winters concluded by saying that she had included, findings of fact supporting approval (Exhibit 15 in the packet she had distributed to the Board).

Opposition/Discussion – Mr. Bruce Simpson, on behalf of the Western Suburb Neighborhood Association, discussed the history of the area. He said that there have been substantial changes for the better that have taken place in that area. Mr. Simpson discussed the history of the neighborhood and the different uses that have gone on, and that are currently going on. He also discussed and compared the previous use that existed at the subject property. Mr. Simpson stated that there has been no proof that the subject property was ever an antique shop. He said that at least since 1974, it has been a warehouse, used by Bluegrass Upholstery Shop.

Mr. Simpson referred to and discussed the Zoning Ordinance (on the overhead projector) with regard to the "facts" of the actual use that has been on the subject property. At this time, Mr. Simpson distributed information to the Board and discussed it, noting that a restaurant is an illegal use in an R-4 zone.

Mr. Glover noted that Mr. Simpson was making the argument that the proposed use is not a non-confirming use at the current time. Mr. Simpson said that was correct. Mr. Glover said that the staff says that it is, and would like to know how to resolve that dispute of fact. Mr. Emmons said that the use, whether it is retail sales or storage, the commercial use of that property is not a use that is listed as an allowable use in the R-4 zone; it was legally there before the 1969 adoption of the new map atlas that changed it from a B-4 zone to an R-4 zone; therefore, in the staff's opinion, it is a legal non-conforming use that falls under those restrictions. Mr. Glover asked if they were saying that it was an antique store/warehouse before 1968. Mr. Emmons responded that it was, not necessarily an antique store - there is no doubt, however, that the subject building is a commercial building. There are records of commercial uses on this property, but there are sparse records between the time it was built and used legally and now, and then there were the uses that were found. At this time, there was further discussion with regard to the different uses at the subject property.

Mr. Simpson said that the only two pieces of evidence that have been introduced in this case are building permits that the applicant introduced to demonstrate that one of the uses before the zone was changed in 1969 was a plastic manufacturing facility, and the other one was something having to do with cabinets. He said that this is not a warehouse zone, and those types of uses were not permitted there.

Mr. Gross said that in 1968 this was a B-4 zone, which allowed warehouses; and in 1969 the City adopted a new map that made this an R-4 zone. For clarification, he asked if Mr. Simpson's argument was that in 1968, this was allowed to be a warehouse; and as long as it continued as a warehouse, it was a non-conforming use. Mr. Simpson responded affirmatively. There was continued discussion at this time with regard to non-conforming uses.

Mr. Gross asked Ms. Jones what standard the Board has to meet in moving to approve the staff's recommendation or disapprove an administrative appeal; and if they would have to make certain findings. Ms. Jones responded, that the actual standard requires that the Board find this to be another legal non-confirming use; that the non-conformity cannot increase the size of the structure and the scope or the area of operation; and that it wouldn't have an adverse effect on the existing or future development of the subject property and surrounding area. At this time, Ms. Jones further explained/discussed the subject matter.

At this time, Mr. Simpson continued with his discussion with regard to his arguments of a non-conforming use in the current zone for the subject property. Mr. Simpson said that his second point of argument is that, in Article 4 (non-conforming uses), what is found there is provision after provision that encourages their limitation. The intent provision states that "it is the intent of this Zoning Ordinance, to permit the non-conformities that are established in Article 4.1 to continue until they are removed, but not to encourage their survival."

Mr. Bill Johnston, who lives at 645 West Short Street, said that his wife and he have lived at this location for 29

years. Mr. Johnston said that this is a very small neighborhood. Starting from the Opera House on North Broadway, it goes to Newtown Pike and then to Main Street and almost to Second Street. Mr. Johnston shared and discussed a presentation on the overhead projector. Mr. Johnston discussed a timeline history of the buildings and different uses in the neighborhood. Mr. Johnston read a letter into the record with regard to their opposition. He said that at one point in time, he actually rented out part of the subject building; therefore, he is aware of some of the things that have gone on there.

Note: Chairman Stumbo declared a brief recess at 4:18 p.m. The meeting reconvened at 4:28 p.m. with the same members in attendance.

Opposition (cont.) – Mr. Jim McKeighen lives on Old Georgetown Street, was present. He said that he has lived in Lexington since 1975. He said he is a realtor who specializes in downtown properties. Mr. McKeighen said he bought his first property on Old Georgetown Street (one door up from Ballard Street), in 1997. He said in 2003 he bought his second property (his current residence) in the same area. Mr. McKeighen said that he frequently walks down Ballard Street, and he has never seen any activity at the subject property. He read into the record, and distributed a letter from Mr. Christian Henkel, who formerly leased out a section of the subject property.

In conclusion, Mr. McKeighen expressed his concerns about the impact that the proposed use could have on the parking for the subject property, as well as little amount of street lighting.

Board Questions – Mr. Gross asked what his primary objection was regarding the proposed use of the subject property. Mr. McKeighen responded that it was because there was no way for people to walk to the door, even if there were parking; there's no street lighting; there's no sidewalk; it is very narrow, and people tend to not obey the "no parking" signs; therefore, safety is the big issue.

Ms. Meyer noted that the subject property had been used for a parking area for Nick Ryan's all along, and asked if there had been any problems thus far. Mr. McKeighen responded affirmatively, noting likely increase in traffic.

Mr. Glover asked what he thought should become of the property. Mr. McKeighen said that he thought it would make a great residence.

Opposition (cont.) – Ms. Ellore Findley, who lives at 623 West Short Street, was present. She said that their property extends to Ballard Street –and is one of the few remaining large lots. Ms. Findley distributed and read a petition signed by some of the neighbors in the surrounding neighborhood. She also read a statement written by Mr. Mike and Mr. Paul McKenzie, the owners of Bluegrass Upholstery.

Mr. Jerold Woodward, who lives at 611 Ballard Street, directly across from the property, said that this change would probably affect him more than anyone else. He said that he has lived there for 8 years. They bought the house, which it had been previously renovated by Mr. Johnston, and they have done a lot of additional work on it (i.e., landscaping, newly renovated kitchen, bathroom, etc.). He said that they love it there and they have taken good care of the property. Mr. Woodward said that they bought the property primarily because it was off the main track of Jefferson Street. He said that they were interested in their property because it was a residential street and that is an important aspect to keep in mind, and that there should be some sort of boundary between commercial aspects and maintaining residential corridors.

Mr. Woodward said that for the 8 years they have lived there, the subject property has not been used as a retail space. There has been no activity, no hours of operation; it has only been a storage warehouse. He said that he believed the proposed use would be a substantial increase of use. He said that his bedroom is literally 40 feet from where the applicant is proposing their use. Mr. Woodward said that the patrons, noise impact, and more intense flow of traffic are going to adversely impact his residence. He said that he thought the coffee/cocktail idea would be great, but not for the proposed location.

Mr. Glover said that he was most interested in Mr. Woodward's perspective, since he was the closest to the subject property. He asked if he had a car and where he parks. Mr. Woodward said that he has off-street parking; however, the parking that is used for Nick Ryan's at the subject location is an easement that is co-owned by himself and Nick Ryan's. He drives up the driveway and to the left and has off-street parking spaces for two cars. Mr. Glover asked about the current noise level. Mr. Woodward responded that the noise level is reasonable. Every now and then some patrons are a bit noisy; however, he has realized that it is a part of living downtown. Mr. Woodward said that he isn't too crazy about the current parking situation to date, but that is another situation.

Ms. Jill Hall Rose was present. She said she lives at 610 West Short Street, and owns property at 609 West Short, which adjoins the subject property line. She said when they purchased the property, they discovered that the subject property was zoned B-4, and felt good about it. She said they have not seen anyone coming or going; a history of an upholstery store and warehousing; there's no activity; she asked why; residents would want to live there with a bar next door. Ms.

Rose said a bar that opens at 7:00 a.m. and is open till midnight on a Saturday makes a big difference right next to someone's residence. She said that if they want people to come and live downtown, they would need to protect the residential area; and the proposed use would be devastating to residential development and devastating to the neighbors around it.

Mr. Austin Mehr, co-owner with Ms. Rose of the adjoining property at 609 West Short Street, just east of the subject property, was also present. He said that agrees with everything Ms. Rose had said with regard to their intent and belief when they purchased their property. At this time, Mr. Meyer read and distributed a letter from Mr. Marc Naylor, from whom they purchased the house, who had lived there for 25 years. He could not attend today's hearing, but wanted to be heard.

Mr. Mehr noted that in the staff report, it stated: "would this use serve the surrounding residential neighborhood;" and said that if the Board took a look at the supporters and opposers, there are a lot of people that live in the neighborhood that came to oppose it, and there are 12 people who signed up in favor of the change, none of them live in the neighborhood.

Mr. Mehr said that he did not see any benefit to the coffee shop because there is one right on Main Street on his way to work. He said that he wouldn't go to the coffee shop at night because it has very limited lighting and no sidewalks - all right next door to his residence. Mr. Mehr said that he thought it was very dangerous because there are no places to park, etc. At this time, he referred to the applicants' exhibit (#6) and discussed where their property line is. He noted that there is about 8 feet of space between their property line and the building, and that is where cars are parked at an angle. At this time, Mr. Mehr distributed and discussed a survey that was done when they purchased their property, presenting it on the overhead projector.

Mr. Simpson said that he wanted to clarify one issue: under the B-4 zoning that was in effect prior to the change to R-4, one of the permitted uses under paragraph 7 is a parking lot. He said the use of a parking lot was/is a permitted use in B-4; so it would qualify as a non-conforming use if the applicant wanted to use it just for parking, but not for a restaurant type facility that is being proposed.

Mr. Simpson said that the overwhelming evidence of this application is that it has been a passive use, a warehouse use, which is in contrast to what is being proposed; i.e., to have six employees, operating Monday through Thursday from 7:00 a.m. to 9:00 p.m., and from 7:00 a.m. to 12:00 a.m. -14 hours four days a week, and 17 hours two days a week - from a use that traditionally was just closed up except when somebody was loading or unloading something is a drastic change. He said that the evidence was minimal. Mr. Simpson said that the proposal is clearly based on the evidence increasing a non-conforming use, which is not acceptable or something that the Board could approve. He also said that based on the evidence, the proposal does not qualify, and they would respectfully ask the Board to deny the application.

Representation Rebuttal – Ms. Winters said that with regard to the traffic intensity, the parking spaces in front of the subject building are currently being used by customers of Nick Ryan's, and people are coming and going at all hours of Nick Ryan's operation. She said that, currently, those people who are parking in those spaces are then walking across Ballard Street and walking between the properties to get to Nick Ryan's; however, with the change in the parking that would come with the coffee shop, people who would be parking they would not be crossing the street or creating more traffic in the street way. They would be parking there and going to the coffee shop.

Ms. Winters said that she was amazed by the changes that have been made in the neighborhood, and her clients were a part of that; they bought a blighted property on Short Street for their primary residence; they live right alongside the opposition; they have improved their property since they bought it - they removed a parking lot in their front yard and put grass.

She said one thing to think about is the current state of Ballard Street: with all of the amazing development going on around this area, Ballard Street has remained a little "pocket" that could still use some rehabilitation. She noted that some of the opposition has stated that the proposed building is an eyesore, and her clients want to change that. They want to make it a nice modern coffee shop, and keep the mural - the positive things the neighbors have done on the building- and they want to bring life to the neighborhood.

Ms. Winters said that she has walked Ballard Street many nights. There are street lights; and the front of the building is illuminated; and she was sure there would be some additional lighting as the result of the coffee/bar use. She said that this would be a positive impact on the neighborhood. She said that her family lives in this neighborhood as well (less than a mile from the proposed use), and she is 100% in favor of it.

Ms. Winters said that, with regard to the current use of the subject property, they have fully admitted that this is not an antique shop that is open Monday through Friday on a set schedule. She said that they have stated on the record that it is a "by appointment" only. Ms. Winters said that Mr. Zeph Maloney, who used to own the building, also owned Heritage Antiques on Main Street, and used this building as storage and an extension of his showroom. Therefore, if

he had clients that were interested in finding a particular piece and didn't find it in his showroom, he would open up the building on Ballard Street by appointment and take them down there, show them the furniture, and sell it to them out of this building.

Regarding evidence of records: as a legal matter, Ms. Winters said that she thought that they were dealing with the findings of the staff that the building has been used as retail; however, if they needed to present additional evidence of that, she had the testimony of the current building owner. She could also present testimony of Mr. Maloney to supplement the record with an affidavit, if the Board felt it was necessary. Ms. Winters said that the hard evidence of this property comes from the records with the City - documents from the City are included in the Board members' packets: the building permit that was issued in 1964 to the cabinet manufacturing company, and the occupancy permit that was issued in 1967 to the plastics manufacturing facilities and the auto body shop. At this time, Ms. Winters discussed the building permit and Certificate of Occupancy and the past and current uses for the proposed building.

Board Question – Mr. Gross said that he assumed that because this is an appeal, the staff had denied the switch of non-conforming uses. Mr. Emmons responded that the staff would consider this an administrative review - all things that come before the Board of Adjustment are considered "appeals" in the greater sense. He said that the staff did give a Board of Adjustment referral because, as they read the Ordinance, the change of one non-conforming use to another non-conforming use would require the Board of Adjustment's approval.

Mr. Gross then asked if the applicant had the burden of proof and not the opposition – if that is an accurate description. Ms. Jones responded that the Board is not acting as a court of law, so that is not exactly the case. She said, as Mr. Emmons had said, all things that come before the Board are listed as an appeal; however, in the staff's recommendation, they are saying that in their review, they would recommend disapproval to the Board in finding that this is a legal non-conforming use that could be permitted. It is still the Board's responsibility to determine if the staff's interpretation was correct.

Supporter Comments – Ms. Lisa Cox, owner of the subject property for 4 years, said that when she first bought the property it was Bluegrass Upholstery. She said she never had the impression or was aware that Bluegrass Upholstery had used the back building at all; however, they (Mr. and Mrs. Cox) did not own the back building at the time. She said that since they have owned the back building (they bought it with a tenant in place, which was Mr. Maloney); it was an extension of Heritage Antiques. She said that Mr. Maloney would be staying if the coffee shop did not get approved, but if the coffee shop is approved; he knows that he will need to find another place.

Ms. Cox said that a lot of the opposition that came out today is from people who no longer live in the neighborhood. She said that people that were in support do not live in the neighborhood, but do intend to frequent the coffee shop; so there is support within the community, just maybe not so much from the neighborhood. She said that it is attached to their house, and they have more vested interest than anyone else. She said she would go to the coffee shop every day. She said that they have been before the Board before with this property, and there doesn't seem to be too many other options of what can be done with this property. She said they would not want to put anything in there would devalue their property.

Mr. Needham asked if Ms. Cox had any idea that this many people would show up in opposition, and asked if it was discussed before. Ms. Cox responded that they allowed their prospective tenants to do a lot of the "leg work", and they were not really aware of the level of opposition.

Mr. Robert Garrison, who owns both residential and commercial property on Jefferson and Third Streets, was present. He said that the idea of mixed uses is what is happening on Jefferson Street, and there are a lot of commercial properties right against residential property. He said that he was actually planning to open a similar operation at Third and Jefferson Streets (coffee bar), and one would think he would be in opposition because of the competition; but he said that he is in favor because he feels that there is room for more business that is servicing this type of clientele. He said that he thought that there was quite of room for development along Jefferson Street. Mr. Garrison said that there are still some areas that need to be "stitched" in to continue to benefit from the prosperity that Jefferson Street is seeing right now.

Mr. Garrison said that there is property being developed at Maryland Avenue and Jefferson Street that is going to add two restaurants with townhomes behind it. He said he would like to do the same thing with an empty lot that he currently has – he would like to do a very similar conversion, from R-4 to B-1, which is mixed use and restaurant on the first floor and apartments above it. At this time, Mr. Garrison discussed what the area was like 2 years ago and the changes that have been made to make it better.

Action – A motion was made by Mr. Gross, seconded by Ms. Whitman and carried unanimously to **disapprove A-2016-1: JONNY & LISA COX** – an administrative appeal to change one non-conforming use (antique sales/storage/office) to another non-conforming use (coffee shop/restaurant) in a High Density Apartment (R-4) zone, at 610 (aka 620) Ballard

Street, for the reasons recommended by the staff.

IV. **BOARD ITEMS** - There were none.

V. **STAFF ITEMS** - There were none.

VI. **NEXT MEETING DATE** – Mr. Stumbo confirmed that the Board's next meeting date would be March 25, 2016.

VII. **ADJOURNMENT** - Since there was no further business, the Chair declared the meeting adjourned at 5:37 p.m.

Barry Stumbo, Chair

Joan Whitman, Secretary