

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

July 28, 2017

- I. **ATTENDANCE** - The Chairman called the meeting to order at 1:30 p.m. in the Council Chambers, 200 East Main Street, July 28, 2017. Members present were Branden Gross, Harry Clarke, Chad Needham, Thomas Glover and Joan Whitman. Absent: Jan Meyer. Others present were: Josh Dezarn, Division of Engineering; Tracy Jones, Department of Law; and Steven Parker, Traffic Engineering. Staff members in attendance were: Jim Marx, Autumn Goderwis, Barbara Rackers and Tammye McMullen.
- II. **APPROVAL OF MINUTES** - The Chair announced that the minutes of the May 19th and June 30, 2017, meetings would be considered at this time.

Action - A motion was made by Ms. Whitman, seconded by Mr. Clarke, and carried unanimously to **approve** the minutes of the May 19, 2017 meeting.

Action - A motion was made by Mr. Clarke, seconded by Ms. Whitman, and carried unanimously to **approve** the minutes of the June 30, 2017 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 with regard to any postponements, withdrawals, applicants present and objectors.

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. **PLN-BOA-17-00047: JAMES MITCHELL** – an administrative appeal to change one legal non-conforming use (retail market) to another legal non-conforming use (restaurant) in a Planned Neighborhood Residential (R-3) zone, at 201 East Fifth Street (Council District 1).

Representation – Jacob Walbourn, attorney for the applicant, requested a 30-day postponement in order for the applicant to be able to address some of the concerns raised by the Planning staff.

Action – A motion was made by Mr. Glover, seconded by Mr. Needham and carried unanimously to **postpone** **PLN-BOA-17-00047: JAMES MITCHELL** until the August 25, 2017 hearing.

B. **ABBREVIATED HEARINGS:**

1. **PLN-BOA-17-00048: CF REAL ESTATE SERVICES, LLC (DBA THE LEX)** – requests a variance to decrease the required number of parking spaces by 51 spaces at a property in the defined Infill and Redevelopment area in a Mixed Use (MU-3) zone, at 501 S. Broadway (Council District 3).

The Staff Recommends: Approval, for the following reasons:

- a. Granting the requested variance will not adversely affect the public health, safety or welfare; will not alter the character of the general vicinity; and will not cause a hazard or nuisance to the public. There are pedestrian facilities in the area as well as a transit stop, and The Lex offers a complimentary shuttle to campus for its residents.
- b. The variance request is not the result of any willful violation or attempt to circumvent the requirements of the Zoning Ordinance. In fact, the variance request is only a precautionary measure to insure that the property maintains compliance if presently leased property becomes unavailable in the future.

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

1. Action of the Board shall be noted on an amended Development Plan for the subject property.
2. A minimum of 587 off-street parking spaces shall be provided for the development which may be reduced to 524 should the appellant elect to implement the transit stop and bike rack reductions via Articles 16-10(a) and 16-10(b).

Representation – Nick Nicholson, attorney, was present on behalf of the applicant. He indicated that they had reviewed the conditions and agreed to abide by them.

Board Questions – Mr. Glover asked for clarification as to what “over parked” means. Mr. Nicholson explained. Mr. Glover also asked how the structure got built with so many unnecessary parking spaces. Again, Mr. Nicholson explained.

Mr. Clarke asked for clarification of the reduction relative to the bike and transit parking. Mr. Nicholson responded.

Action – A motion was made by Mr. Needham, seconded by Mr. Glover and carried unanimously to **approve PLN-BOA-17-00048: CF REAL ESTATE SERVICES, LLC (DBA THE LEX)** – a request for a variance to decrease the required number of parking spaces by 51 spaces at a property in the defined Infill and Redevelopment area in a Mixed Use (MU-3) zone, at 501 S. Broadway, based on the reasons provided by the staff and subject to the two conditions.

2. **PLN-BOA-17-00042: GRACE FREE WILL BAPTIST CHURCH** – requests a conditional use permit to construct an addition to an existing church building in the Agricultural Rural (A-R) zone, at 4281 Haley Road (Council District 12).

The Staff Recommends: Approval, for the following reasons:

- a. Granting the requested Conditional Use permit should not adversely affect the subject of surrounding properties. An addition to the church that does not increase the number of sanctuary seats should have little effect on the intensity of the use on this property.
- b. All necessary public facilities and services are or will be available and adequate for the proposed use, with police and fire protection being available and adequate; and with facilities such as trash pickup, septic system and storm water management being privately provided.

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

1. The structure shall be constructed in accordance with the submitted application and site plan.
2. All necessary permits shall be obtained from the Division of Building Inspection, prior to beginning construction.
3. The applicant shall consult with the Urban County Engineer to determine what, if any, additional stormwater provisions will be required.
4. Any changes to the septic system shall be reviewed and approved by the Fayette County Board of Health prior to the issuance of a building permit.

Representation – Emil Collins, trustee for the church, was present on behalf of the applicant. He indicated that he had not reviewed the conditions, which were then read by the Chair. Mr. Collins agreed to abide by them.

Board Questions and Comments – Mr. Glover asked if the size of the septic system would need to be changed. Mr. Collins responded that there would be no change in size. Mr. Glover also asked if the applicant had talked to the Health Department about the septic system. Mr. Collins responded that he had not. For clarification of the staff report, Mr. Glover noted that it said that “changes may be needed” to the septic system, which Ms. Goderwis explained.

Action – A motion was made by Mr. Glover, seconded by Ms. Whitman and carried unanimously to **approve PLN-BOA-17-00042: GRACE FREE WILL BAPTIST CHURCH** – a request for a conditional use permit to construct an addition to an existing church building in the Agricultural Rural (A-R) zone, at 4281 Haley Road, for the reasons recommended by the staff and subject to the four conditions.

C. Discussion items:

1. **PLN-BOA-17-00039: JOHN SAMSON** - requests a variance to increase the allowable area of an accessory building from 1,186 square feet to 3,420 square feet in order to construct a 2,700 square-foot accessory building with a 720 square-foot open air lean-to structure at one end in a Single Family Residential (R-1B) zone, at 280 Swigert Ave. (Council District 6).

*Note – The following case is a continuance from the June 30, 2017 hearing.

The Staff Recommends: Approval, for the following reasons:

- a. Granting the requested variance will not adversely affect the public health, safety or welfare; will not alter the character of the general vicinity; and will not cause a hazard or nuisance to the public. The proposed accessory structure is similar to others in the area and will not be very visible from the road.

- b. Strict application of the Zoning Ordinance would deprive the applicant of the reasonable use of his land as he would be unable to utilize his property to store personal vehicles and equipment, on a large, oversized lot in an R-1B zone.
- c. The variance request is not the result of any willful violation or attempt to circumvent the requirements of the Zoning Ordinance.

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

- 1. The structure shall be constructed in accordance with the submitted application and site plan.
- 2. All necessary permits shall be obtained from the Division of Building Inspection, prior to beginning construction.
- 3. That the applicant consult with the Urban County Engineer to determine what, if any, measure might be recommended to mitigate the potential for increased runoff from the property.
- 4. The two existing accessory structures shall be removed upon completion of the new structure.
- 5. The new accessory structure shall be used for personal use only and shall not be used for any business purposes.

*Note – At this time, Ms. Goderwis distributed several documents to the Board expressing opposition to and support of the proposed variance.

Staff Report – Ms. Goderwis gave a staff report with regard to the proposed variance, noting that the applicant had submitted revisions of the plan, which she presented on the overhead projector.

Representation – John and Julia Samson, applicants, were present, and indicated they had reviewed the new findings and conditions for approval, and agreed to abide by them. Mr. Samson presented and explained their new proposed site plan, with comments from Ms. Samson.

Board Questions and Comments – Mr. Gross questioned condition #1 with regard to the construction and whether any of it was part of the application. Ms. Goderwis responded affirmatively. At this time, the revised site plan and conditions were placed on the overhead projector and there was further discussion.

Mr. Needham asked what the difference was between an Urban County Engineer and a storm water management plan. Ms. Goderwis explained.

Citizen Comment – Flora Gutter, who lives at 238 Swigert Ave., distributed exhibits to the Board and spoke in opposition with regard to the proposed structure as it might relate to the water run-off.

Elizabeth Woodward, who lives at 282 Swigert Ave., indicated that she was neither an objector nor a supporter at this point, and noted that she and other neighbors have spoken with the applicants and that the applicants have considered what they were concerned about. Ms. Woodward read into the record, some of what she had written in a letter regarding conditions.

Jeff Creech, who lives at 276 Swigert Ave., and also owns the property at 272 Swigert Ave., spoke in opposition to the proposed variance, and noted that the applicants' new request seemed reasonable. Mr. Creech also noted that they would like to hold the applicants accountable as much as possible to the description Mr. Samson gave in his letter for the dimensions of his building.

Catherine Perkins, who lives at 258 Swigert Ave. and is secretary of Joyland Neighborhood Association, spoke in opposition to the proposed use, noting that they do not believe the plan is a "complete" plan.

Amy Clark, who lives at 628 Kastle Rd., presented information on the overhead projector and expressed her concerns with the proposed use with regard to storm water issues and contamination.

Applicant Rebuttal – Mr. Samson addressed the concerns of the neighbors in opposition at today's hearing and asked for approval of his requested variance.

Board Questions and Comments – Mr. Glover noted that he was not at the last hearing, and asked the applicant how the building was going to be used. Mr. Samson explained. Mr. Glover also asked if the applicant proposed to have gutters and down spouts. Mr. Samson responded affirmatively, with a comment from Ms. Samson.

Mr. Glover also asked about the water run-off. Mr. Dezarn responded and explained. At this time, there was some discussion between the Board and staff with regard to the water run-off.

At this time, Mr. Clarke expressed his general concern with regard to the storm water run-off, and the water run-off on neighboring streets, noting that he thought the plan was adequate and would fit well in the neighborhood. Mr. Needham also agreed that he thought the plan was adequate and would fit well in the neighborhood.

Action – A motion was made by Mr. Needham, seconded by Mr. Clarke and carried unanimously to **approve PLN-BOA-17-00039: JOHN SAMSON** – a request for a variance to increase the allowable area of an accessory building from 1,186 square feet to 2,000 square feet in order to construct a 1,800 square-foot accessory building with a 200 square-foot open air lean-to structure at one end in a Single Family Residential (R-1B) zone, at 280 Swigert Ave., based the three reasons outlined by the staff and subject to the six conditions with revisions, which read as follows:

1. The structure shall be constructed in accordance with the submitted application and revised site plan dated 7-24-17.
 2. All necessary permits shall be obtained from the Division of Building Inspection, prior to beginning construction.
 3. In addition to the installation of rain barrels, the applicant shall consult with the Urban County Engineer to determine what, if any, additional measure might be recommended to mitigate the potential for increased runoff from the property.
 4. The applicant shall consult with the Health Department to determine what, if any, restrictions or protective measures may apply to construction of the structure relative to the septic system and leach field.
 5. The two existing accessory structures shall be removed upon completion of the new structure.
 6. The new accessory structure shall be used for personal use only and shall not be used for any business purposes.
2. **PLN-BOA-17-00043: NICK WILLIAMS** – requests a conditional use permit to establish an indoor recreational facility in a Light Industrial (I-1) zone, at 117 Westhampton Drive (Council District 2).

The Staff Recommends: Approval, for the following reasons:

- a. Adverse impacts to surrounding properties are not anticipated, as the sports training should not be an inherently disturbing activity and will be confined to the interior of an existing building.
- b. Surrounding properties are exclusively industrial in nature, which should greatly limit the potential for any disturbances from indoor training activities, particularly since during most of the year the majority of training will be conducted during evenings and on weekends.
- c. Adequate parking will be provided on site, and all other necessary public facilities and services (roads, sewers, garbage collection) are already in place.

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

1. The sports training facility shall be confined to the interior of the existing building and shall be established in accordance with the submitted application and site plan.
2. All necessary permits, including a Zoning Compliance Permit and Certificate of Occupancy from the Divisions of Planning and Building Inspection, shall be obtained prior to opening the facility.

*Note – At this time, Ms. Goderwis distributed letters of opposition to the Board.

Representation – Nick Williams, applicant, was present. He indicated that he had reviewed the conditions and agreed to abide by them, and further explained his proposed use.

Board Questions and Comments – Mr. Gross noted that one of the issues in the letters received was with regard to off-street parking, and asked about the parking. Mr. Williams responded and discussed. At this time, there was further discussion with regard to the parking.

Mr. Clarke asked how many participants the applicant expected at one time. Mr. Williams responded.

Citizen Comments – James Smith, who owns the property at 112 Westhampton (right across the street from the proposed use), expressed his concerns with regard to the parking, safety concerns and zoning reasons.

Diana Sisk, who owns Auto Authority Cooperation at 2048 Mercer Rd., said that her property would adjoin the proposed use. She expressed her concerns regarding safety and on-street parking, noting that she had done a traffic study. Ms. Sisk noted that her company has been in this location for 28 years and she would like to keep it as an industrial park.

Mr. Glover asked what the property was used for prior to now. Ms. Sisk responded that it was Big Ass Fans temporarily; and prior to that, it was another manufacturing facility. Mr. Glover then asked if the construction to Citation Boulevard, linking the roads together, has helped the congestion in the area. Ms. Sisk responded, yes and no, and explained.

Clifford Allen, president of Lex Air, which has been at 2025 Mercer Rd since 1988, was present. He indicated that he is also president of the Westhampton Corners Association, and expressed his concerns with regard to the proposed use.

Mr. Gross asked if there were other recreational facilities inside this industrial park. Mr. Allen responded that there are not.

Mr. Needham asked if Mr. Allen could explain the boundary of his association s it relate to the proposed use. Mr. Allen explained and presented a photo on the overhead projector. At this time, there was further discussion.

Representation Rebuttal – Mr. Williams addressed the concerns of those in opposition regarding parking, safety and traffic.

Board Questions and Comments – Mr. Glover asked if the staff had had any pause before recommending approval. Ms. Goderwis responded with an explanation of the staff's assessment of the request.

Mr. Needham asked how many other indoor recreational facilities have been approved as conditional uses in the past. In response, Ms. Goderwis said that she did not have an exact number, and Mr. Marx said that there have been several.

Mr. Gross discussed the hours of operation and asked if there were other zones that have the proposed use. Mr. Marx responded.

Mr. Clarke addressed the concerns about the safety involved, and said that he felt that it could also fall on the responsibility of the parents when dropping off their children. Mr. Williams addressed Mr. Clarke's concerns. At this time, there was further discussion with regard to the entrance and parking of the facility, with comments from Ms. Jones.

Mr. Needham commented on the hours of operation for the proposed use and noted that he thought the hours were reasonable. Mr. Glover, Ms. Whitman, and Mr. Clarke agreed with Mr. Needham's comments.

Action – A motion was made by Mr. Clarke, seconded by Mr. Glover and carried 4-1 (Gross opposed) to **approve PLN-BOA-17-00043: NICK WILLIAMS** – a request for a conditional use permit to establish an indoor recreational facility in a Light Industrial (I-1) zone, at 117 Westhampton Drive, based on the staff's recommendations and subject to the two conditions.

3. **PLN-BOA-17-00049: JOHN & SHARON THELIN** – an administrative appeal to determine that the Division of Building Inspection erred in issuing a building permit in a Single Family Residential (R-1C) zone, at 121 Holiday Road (Council District 5).

*Note – At this time, Mr. Gross recused himself from this case, and turned the chair over to Mr. Glover.

Staff Report – Mr. Marx provided a presentation and a staff report, with questions from Mr. Turner. During Mr. Marx's discussion there were questions and comments from the Board with discussion to follow.

Representation – Bruce Simpson, attorney with Stolle, Keenon Ogden, PLLC, was present on behalf of the applicant. He distributed documentation to the Board. Mr. Simpson presented a slide presentation with discussion to follow. During his discussion, Mr. Simpson questioned Mr. Alex Olszowy with the Division of Building Inspection, and Mr. Kevin Phillips, President of Endris Engineering, with regard to the building permits and plan, with discussion to follow.

Darby Turner, attorney with Bingham Greenebaum Doll, on behalf of Mr. and Ms. Huffman (owners of the property), presented photos and discussed the current construction scope of the subject property. Present with Mr. Turner was Mr. Tom Wilmes with Wilmes & Associate Architects, PSC, who also provided a presentation on the overhead projector and discussed the case and its process. There were questions from Mr. Simpson and discussion to follow. Mr. Clarke also had a question about the structure on the property.

Rebuttal – Mr. Simpson presented a photo on the overhead projector of a wall on the subject property over the stormwater drain, and further discussed.

In response to Mr. Simpson's rebuttal, Mr. Turner responded.

Note: Mr. Glover declared a brief recess at 5:21 p.m. The meeting reconvened at 5:31 p.m., with the same members in attendance.

Discussion – At this time, there was discussion by the Board with regard to the decision making of the case, as well as

similar previous cases, with a comment from Ms. Jones.

Action – A motion was made by Ms. Whitman, seconded by Mr. Clarke and carried 4-0 (Gross recused) to **disapprove PLN-BOA-17-00049: JOHN & SHARON THELIN** – an administrative appeal to determine that the Division of Building Inspection erred in issuing a building permit in a Single Family Residential (R-1C) zone, at 121 Holiday Road, based on the four findings as follows:

1. The legal non-conformity of the two structures at issue (one corner of an existing accessory building and one corner of an existing residence) is due entirely to lack of compliance with setback requirements. Since the building footprint at each location will not be expanded, and the proposed additions at each location will not reduce the existing setbacks, there will not be an increase in non-conformity.
2. There are no provisions in Article 8-7 of the Zoning Ordinance requiring an additional setback as the height of a principal building in the Single Family Residential (R-1C) zone is increased. Likewise, there are no provisions in Article 15-6 of the Zoning Ordinance requiring an additional setback for an accessory building as the height increases.
3. Article 4-4(a) of the Zoning Ordinance provides that a non-conforming structure may be enlarged if done so in a manner that does not increase the non-conformity. Determining whether or not there will be an increase in non-conformity requires that focus be maintained on the specific factor that is causing the non-conformity, which in this case is lack of compliance with setback requirements.
4. A rigid and overly broad interpretation of the restrictive provisions in the Zoning Ordinance pertaining to non-conforming structures, to the exclusion of the critical language in Article 4-4(a) that allows enlargement under certain circumstances, is inappropriate, and forces applicants to consider design options that may not improve the overall project but result in technical compliance. For example, in this particular case involving a corner lot, if the currently defined side yard area was instead considered as a rear yard (associated with a redefining of the front entrance to the residence toward Fairway Drive), then the accessory building at the southwest corner of the property would not even be considered as non-conforming.

IV. **BOARD ITEMS**

None

V. **STAFF ITEMS**

- a. Landscape Review Committee - The appointment of Mr. Mark McCain, as member of the Landscape Review Committee.

Action – A motion was made by Mr. Clarke, seconded by Ms. Whitman and carried 4-0 (Gross absent) to **appoint** Mr. Mark McCain to serve on the Landscape Review Committee, representing the Tree Board.

- VII. **NEXT MEETING DATE** - The Chair announced that the next meeting date would be August 25, 2017.

- VIII. **ADJOURNMENT** - There was no further business. The Chair declared the meeting adjourned at 5:45 p.m.

Branden Gross, Chair

Joan Whitman, Secretary

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