MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

February 10, 2020

I. **ATTENDANCE** - Chair Branden Gross called the meeting to order at 1:30 p.m. in the Council Chamber, 200 East Main Street, February 10, 2020. Members present were: Raquel Carter, Joan Whitman, Harry Clarke and Chad Needham. Janice Meyers and Thomas Glover were absent. Others present were: Josh Dezarn, Division of Engineering; Stephen Parker, Traffic Engineering and Tracy Jones, Department of Law. Staff members in attendance were: Autumn Goderwis, James Marx and Donna Lewis.

II. **APPROVAL OF MINUTES** – The Chair announced the minutes of the January 13, 2020 meeting would be considered for approval at this time.

Action – A motion was made by Mr. Clarke, seconded by Ms. Whitman, and carried 5-0 (Meyer and Glover absent), to approve the minutes of the January 13, 2020 meeting.

III. **PUBLIC HEARING ON ZONING APPEALS**

A. **Swearing of Witnesses** - The Chair asked all those present who would be speaking or offering testimony to stand and raise their right hand to be sworn in. The oath was administered at this time to several staff members and other persons in the audience.

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

C. **Postponements and Withdrawals**

There were none.

D. **Abbreviated Hearings**

1. PLN-BOA-20-00002: Diamond Ponds – requested a conditional use to expand an existing plant nursery in an Agricultural Rural (A-R) zone on property located at 4440 Athens Boonesboro Road.

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

a. Construction of the proposed pole barn should not adversely affect the subject or surrounding properties. The plant nursery and landscaping operations have taken place on this property for many years, and the barn will be used as additional storage of materials by existing employees, during the existing hours of operation.
b. All necessary public services and facilities are available and adequate for the proposed use.

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

1. Construction and use of the proposed pole barn shall be in accordance with the submitted application materials and site plan.
2. All necessary permits and/or approvals shall be obtained from the Division of Building Inspection, prior to construction.
3. The four proposed parking spaces and access drives shall be graveled or paved and otherwise improved in accordance with the recommendations of the Division of Traffic Engineering. Improvements to the access drive shall extend for a distance of at least 50’ from the front property line.

Representation - Mr. Matt Hill, employee of Diamond Ponds was present.

Action – A motion was made by Mr. Clarke, seconded by Ms. Whitman and carried 5-0 (Meyer and Glover absent), to **approve PLN-BOA-20-00002: Diamond Ponds** – request for a conditional use to expand an existing plant nursery in an Agricultural Rural (A-R) zone, on property located at 4440 Athens Boonesboro Road, based on staff’s recommendation and subject to the three conditions as listed.

E. **Discussion Items**

1. PLN-BOA-20-00001: PVO LLC – requested a conditional use for a home-based business (lash extensions and microblading) in a Single Family (R-1C) zone, on property located at 218 Jesselin Drive.

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

a. While the proposed use is likely less intense than that of a full-service salon, the proposed activities (facials, lash extensions, waxing, and microdermabrasion) are services that typically may be provided at a beauty parlor. As such, it is appropriate to consider these services as substantially similar to a beauty parlor, which is first permitted on a limited basis in the Professional Office (P-1) zone, and is specifically excluded from consideration as a home-based business by Article 1-11 of the Zoning Ordinance.

*Note – At this time, Ms. Goderwis presented a letter of opposition from a neighbor to the Board for review, then presented the staff report for this case.

Board comments and questions – Mr. Needham asked if an application for a home-based business for an esthetician had ever come before the Board before. Ms. Goderwis replied it had not.
Chair Gross had a question about the terminology of beauty parlor vs. beauty salon. Ms. Goderwis responded and explained.

Representation – The applicant Ms. Olga Parshenkova, was present, and presented her application..

Action – A motion was made by Ms. Carter, seconded by Mr. Needham, and carried 5-0 (Meyer and Glover absent), to **disapprove PLN-BOA-20-00001: PVO LLC – request for a conditional use for a home-based business (lash extensions and microblading) in a Single Family (R-1C) zone, on property located at 218 Jesselin Drive**, based on staff's recommendation.

2. **PLN-BOA-20-00006: Pensacola Park Neighborhood Association –** requested an administrative appeal to contest the Division of Planning's approval of the Final Development Plan and Final Record Plat subdividing 1847 Nicholasville Road; and the Division of Building Inspection's issuance of construction permits within the defined Infill & Redevelopment Area in a Planned Neighborhood Residential/Historic Overlay (R-3/H-1) zone, on property located at 86, 90, 94 and 98 Penmoken Park.

*Note – At this time, Ms. Goderwis presented a chronological timeline and fact sheet for this application, and explained the background details of this administrative appeal.

Board comments and questions – Mr. Clarke had a question about the date of approval, certification and recording of the final record plat. Ms. Goderwis responded and explained. Ms. Jones further explained the circumstances involved and the background of this appeal. She reiterated the issue before the Board today was whether or not the building permits which were issued were issued in error or not.
Chair Gross asked Ms. Jones if there was a law stating the Historic Overlay had to be published before it's effective. He also asked what the Law Department's position is, whether the Historic Overlay was effective on December 3, 2019, or at the date of publication. Ms. Jones responded the Law Department's position is that it was effective as of December 3, 2019. She provided further explanation.
Chair Gross asked for clarification of Law's position on the certification of the final plat and whether the Historic Overlay affects that certification. Ms. Jones responded and explained. There was further discussion.

Representation – Ms. Jessica Winters was present on behalf of the appellant, the Pensacola Park Neighborhood Association. She presented their appeal.

Board comments and questions – Chair Gross asked Ms. Winters if she agreed with the Law Department that the H-1 Overlay designation became effective on December 3, 2019. She stated that she did. Chair Gross also had a question for Ms. Winters regarding why she felt the final record plat should not have been certified. Ms. Winters responded and explained. There were no other questions from the Board. Chair Gross opened the floor to citizens speaking on behalf of the neighborhood association. The Chair advised the citizens they would only be speaking on behalf of legal issues, not whether they liked the development or not, as that was not the issue before the Board today.

Representation in support – Ms. Amy Clark, 628 Kastle Rd., spoke in support of the appellant. She presented documents to be placed into the record.
Mr. Mark Streety, 1020 Fincastle Rd., president of the Ashland Park Neighborhood Association, and also president of the newly formed Lexington Urban Neighborhoods Alliance, spoke on behalf of the appellant.

Opposition – Mr. Bruce Simpson was present on behalf of David Jones, the owner of the property at 86, 90, 94 and 98 Penmoken Park, and he presented their case. Mr. Simpson introduced several documents into the record.

Board comments and questions – Ms. Carter asked Mr. Simpson which date the process for developing the Historic Overlay began. Mr. Simpson responded and explained.
Mr. Clarke asked Mr. Simpson when Mr. Jones, the property owner, became aware of the Planning

Commission's approval of the H-1. Mr. Simpson deferred to Mr. Jones to answer this question. Mr. David Jones approached the podium and stated he became aware of the decision around October 24 or 25, 2019. There was further discussion.
Mr. Clarke asked Mr. Jones when it would have been obvious that there was going to be construction there Mr. Jones responded August of 2019.
Mr. Clarke asked Mr. Simpson a question about whether or not it was obvious that the H-1 was going to be going through, regardless of when it was approved or announced. Mr. Simpson responded and explained.
Mr. Clarke asked Mr. Jones about the quality, size and price of his plans were. Mr. Jones responded and explained.
Mr. Needham asked Mr. Jones what the difference is between what he is building and what the Historic District would require differently. Mr. Jones responded and explained.

*Note – At this time, Mr. Simpson asked the Board's permission to bring Mr. Dewey Crowe, Director, Building Inspection to the podium. Mr. Crowe approached the podium and was sworn in.

Mr. Simpson had several questions for Mr. Crowe, pertaining to the building permits in question, which he answered.

Rebuttal – Ms. Winters approached the podium and asked Mr. Crowe more questions about the building permits, which he answered.

Mr. Simpson also had more questions for Mr. Crowe, which he answered.

Ms. Winters asked Mr. Crowe a question about a fence permit for which Mr. Jones had applied. Mr. Crowe responded and explained.

Mr. Simpson asked Mr. Crowe another question about the Historic Overlay. Mr. Crowe responded.

Board comments and questions - Chair Gross asked Ms. Jones whether the Law Department still felt comfortable with their position of December 3, 2019 being the effective date. Ms. Jones responded and explained.
Ms. Carter asked Ms. Jones about the distinction of "final action" and "no action". Ms. Jones responded and explained. There was further discussion.

Summary – Mr. Simpson gave a brief summary on behalf of his client.

Rebuttal – Ms. Winters asked that it be made known for the record that several constituents were present who were in support of the appeal before the Board today, however they were letting counsel speak on their behalf. She presented a summary of the time line leading up to the appeal before the Board today. Ms. Winters read into the record section 4.502 of the Council Rules which states: "Control – All ordinances or resolutions, except as otherwise provided in the Urban County Charter shall be passed only by a majority vote of all council members. However, when the Planning Commission recommends that an amendment be made to the map of the Zoning Ordinance, as in an H-1 Zone Overlay, at least 8 council members must vote against the measure to disapprove it." She continued with the rebuttal.

*Note – At this time, Chair Gross announced the public portion of the hearing was closed and the Board would take a short recess. Recess began at 3:36 p.m. The hearing reconvened at 3:59 p.m.

Board comments and questions – Chair Gross once again announced the public portion of the hearing was closed and he opened the floor to any Board members comments and discussion.
Ms. Carter stated she didn't know if there was any further discussion and she was ready to make a motion, but before she did she wanted to say this did seem like a very complicated issue and both sides made valid points. She said she felt they must stick to the letter of the law.

Action – A motion was made by Ms. Carter, seconded by Ms. Whitman to **disapprove PLN-BOA-20-00006: Pensacola Park Neighborhood Association** – request for an administrative appeal to contest the Division of Planning's approval of the Final Development Plan and Final Record Plat subdividing 1847 Nicholasville Road; and the Division of Building Inspection's issuance of construction permits within the defined Infill & Redevelopment Area in a Planned Neighborhood Residential/Historic Overlay (R-3/H-1) zone, on property located at 86, 90, 94 and 98 Penmoken Park, based on the following: 1) KRS 100-2117 requires that a legislative body shall take final action upon a proposed zoning map amendment within 90 days of its final action; 2) the Planning Commission on this matter took final action on October 24, 2019 so the 90 days from that date was January 22, 2020; 3) on December 3, 2019, the Urban County Council could not accomplish 8 votes on any action related to the H-1, and therefore that was not final action, so the H-1 Overlay was not in effect until January 22, 2020 and the building permits were not issued in error.

Board discussion – Mr. Clarke stated a lot of discussion was needed, but this was not the time or the place. He stated Mr. Jones did what he needed to do to make this project happen, initially not knowing the H-1 was going to be in play. On the other hand, the neighborhood association saw it happening and wanted to prevent this kind of development so they did what they needed to do to make this happen. Mr. Clarke stated it was important to realize that a neighborhood like this has the right and the momentum to make something like this happen. He said he was disappointed to see this happen, but it was no one's fault. Mr. Clarke complimented both attorneys. He said he was going to vote against the motion, but at the same time, he understood the motion and the idea of it. He said he disagreed that the H-1 was not in place until January, he thought it was in place as soon as the Council failed to disapprove it. On the other hand, Mr. Jones has done a lot of work already anticipating this.

Action – The motion carried 3-2 (Meyers and Glover absent; Clarke and Needham voted nay), to **disapprove** the appeal.

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

There were none.

V. **STAFF ITEMS** - The Chair announced that any items a Staff member wished to present would be heard at this time.

There were none.

VI. **NEXT MEETING DATE** - The Chair announced that the next meeting date will be March 9, 2020, at 1:30 p.m.

VII. **ADJOURNMENT** - The Chair declared the meeting was adjourned at 4:05 p.m.

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Branden Gross, Chair

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Joan Whitman, Secretary