

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

February 8, 2021

I. CALL TO ORDER - Acting Chair Branden Gross called the meeting to order at 1:30 p.m. **via video teleconference**.

Due to the COVID-19 pandemic, state of emergency and Governor Beshear's Executive Orders regarding social distancing, this meeting is being held via teleconference pursuant to Senate Bill 150 (as signed by the Governor on March 30, 2020) and Attorney General Opinion 20-05, and in accordance with KRS 61.826, because it is not feasible to offer a primary physical location for the meeting.

II. ATTENDANCE – Members present via video teleconference were: Raquel Carter, Harry Clarke, Branden Gross (acting chair), Chad Walker and Joan Whitman. Thomas Glover and Chad Needham were absent. Others present via video teleconference were: Tracy Jones, Department of Law and Steve Parker, Traffic Engineering. Staff members in attendance were: Traci Wade, Autumn Goderwis, Stephanie Cunningham and Debbie Woods.

III. APPROVAL OF MINUTES – The Chair announced that the minutes of the December 14, 2020 and January 11, 2021 would be considered for approval at this time.

Action – A motion was made by Mr. Clarke, seconded by Ms. Carter and carried 5-0 (Glover and Needham absent) to approve the minutes from the December 14, 2020 and January 11, 2021 minutes.

IV. PUBLIC HEARING ON ZONING APPEALS

A. Swearing of Witnesses - The Chair announced that any applicant or objector to any appeal before the Board who planned to speak, will be sworn in at this time.

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.

Postponements and withdrawals

Ms. Goderwis advised the Board that the applicants for **PLN-BOA-20-00071: MEGAN RILEY & HARRY TOLSON RICHART, IV** wished to postpone their application for a variance to increase the allowable height of a fence within 3 feet of the public right-of-way in a side street side yard from 4' to 4.5' in a Single Family Residential (R-1C) zone, on property located at 118 Vista St.

Representation – Mr. Andrew Bryson, attorney, was present via video teleconference on behalf of the applicants and confirmed their wish to postpone until the March 8, 2021 hearing, to allow time to research and prepare a viable presentation for their application.

Action – A motion was made by Ms. Carter, seconded by Ms. Whitman and carried 5-0 (Glover and Needham absent), to approve the postponement of **PLN-BOA-20-00071: MEGAN RILEY & HARRY TOLSON RICHART, IV** - request for a variance to increase the allowable height of a fence within 3 feet of the public right-of-way in a side street side yard from 4' to 4.5' in a Single Family Residential (R-1C) zone, on property located at 118 Vista St.

Staff comments - Ms. Goderwis advised the Board that attorney Bruce Simpson, on behalf of **PLN-BOA-21-00003: HUGH AND KIM BLOOMFIELD**, had indicated they wished to postpone their application for a third party appeal to contest the Division of Planning's certification of a retracement plat (PLN-MNSUB-19-00049) within the defined Infill and Redevelopment Area in Two-Family residential (R-2)/Historic District Overlay (H-1) zones on property located at 444-446 W. Third St., for an indefinite period of time.

Board comments – Mr. Gross disclosed that he had discussed this real estate with fellow attorneys in the past; however, he did not feel that it warranted that he recuse himself from hearing this case under KRS Chapter 100. Mr. Gross stated that he had spoken with Wayne Collier and Missy Palmer regarding some of the underlying land use and real estate issues with this particular piece of property.

Representation – Mr. Bruce Simpson, attorney, was present via video teleconference on behalf of the applicants, Hugh and Kim Bloomfield, who own property on W. Third St. He thanked Mr. Gross for the disclosure and stated he did not have any concerns regarding Mr. Gross presiding over this case, and did not feel it was necessary for him to recuse himself. Mr. Simpson affirmed that his clients did wish to postpone their appeal for an indefinite period of time, to determine ownership of the property in question. He further elaborated on the circumstances that led to the request for this appeal by Mr. and Mrs. Bloomfield.

Board comments – Mr. Gross interjected, noting the length of Mr. Simpson's request for postponement. Mr. Simpson stated that he was almost finished with his explanation and mentioned that there were two other attorneys present via video teleconference and he was concerned that the discussion could potentially go down avenues that were not germane to the postponement request. Mr. Gross advised Mr. Simpson to continue given that he was almost finished. Mr. Simpson continued with his request for indefinite postponement.

Mr. Gross acknowledged the request for a postponement and explained that an indefinite postponement is not desirable by the Board of Adjustment or the Planning Commission.

Audience comments – Linda Gosnell, 452 W. Third Street, stated she had no objection to an indefinite postponement, nor was she concerned with the ownership of the property. She expressed her concerns with the certification of a minor subdivision plan (PLN-MNSUB-19-00049), stating that the Division of Planning staff approved the subject plat showing lots that had been previously adjudicated by two courts, not to exist. Ms. Gosnell commented that this might have caused some confusion. She said she did not want staff to "go behind" the actions of the courts and the Planning Commission and do something different merely because Mr. Collier's client hired another surveyor and filed a plat saying there were additional lots. Ms. Gosnell referred to the litigation in 1983, which said this property could not be subdivided into lots. She said that was the thrust of her appeal.

Wayne Collier, attorney, Kinkead and Stilz, was present on behalf of the Kissling Estate via video teleconference. He said that he did not believe that the retracement plan referenced by Ms. Gosnell had anything to do with this action and there was no point in postponing or continuing, because the Board of Adjustment does not have jurisdiction over actions made by the Planning Commission. He stated that postponing indefinitely would put burden on their property unjustly. Mr. Collier cited Attorney General Opinion 82-390.

Staff comments – Ms. Goderwis stated that staff would object to postponement of any length of time because they do not believe that this appeal is within the Board's purview. She explained that the Director of the Division of Planning, acting as the Planning Commission Secretary, signed off on the retracement plat and that is subject to the Subdivision Regulations. Ms. Goderwis stated that the Board could only act on third party appeals related to the Zoning Ordinance, not to the Subdivision Regulations and those are two separate documents.

Mr. Gross asked Ms. Jones if she would like to add anything before the Board decided whether to postpone this appeal or not. Ms. Jones stated that she did not have anything to add. She affirmed that the Board needed to decide whether to postpone the appeal to a later date, or have it heard before the Board at this hearing.

Mr. Simpson commented that anytime there are two opposing attorneys, it rules out clear jurisdiction, which should warrant a postponement of at least one month. His client believes an erroneous survey was the basis for the staff's decision and his clients want to do their own survey. Mr. Simpson said that any decision other than postponement would deny his clients due process. He also stated that they did not have time to review new information submitted by Mr. Collier, therefore, if not postponed, it could result in a number of lawsuits that could have easily been avoided. Mr. Simpson argued that postponement for at least one month was "compelling and almost mandatory," considering the Constitutional due process rights of the parties that have expressed an interest in this appeal.

Ms. Gosnell agreed with Mr. Simpson's comments, stating she had not seen any of the documents Mr. Collier said that he had sent today.

Mr. Collier commented that the Bloomfield's filed the appeal, not his clients. He stated that the only action to be taken related to the retracement plat is to appeal directly to the Fayette Circuit Court, not the Board of Adjustment, and that no testimony can be taken or legal arguments made.

Mr. Simpson cautioned the Board about making a decision today, without his client having time to get their own survey. He stated a one-month postponement would not harm Mr. Collier's client.

Board comments – Mr. Gross asked Mr. Collier if he had sent the information that he had submitted to Planning staff to Mr. Simpson as well. Mr. Collier stated that he had not. Mr. Gross asked him to do so. Mr. Collier stated he would also send it to Ms. Gosnell.

Mr. Gross opened the floor to the Board for discussion. Ms. Whitman commented that she had received Mr. Collier's new information that morning. She asked the Law Department to clarify whether the Board had jurisdiction over this matter. Mr. Gross said that before Ms. Jones answered that question, he would prefer that the Board hear the case, otherwise it is moot. He stated that he would like to allow Mr. Simpson to argue why he felt the Board did have jurisdiction. Mr. Gross asked Ms. Whitman how she felt about that. She stated that she disagreed. He asked the other Board members how they felt. Ms. Carter said she thought they needed to determine if they have jurisdiction. Ms. Jones stated no action could be taken until the Board determined if they had jurisdiction and if the Board was inclined to postpone the case to get more information on the jurisdictional question, they could. She stated that these circumstances are unusual, but if the Board wanted to hear the case on the issue of whether or not the Board had jurisdiction and if it is determined that the Board does have jurisdiction, the Board could decide to postpone on the request of Mr. Simpson. Ms. Jones stated she felt the jurisdictional question is the first issue. She said there were actually two things to consider regarding a postponement: 1) Mr. Simpson is asking for a postponement of the appeal that he has filed, in light of the other matters that are pending, and 2) if the Board believed the argument made by Mr. Simpson and the other parties regarding the dispute as to jurisdiction, the Board could also choose to postpone in order to hear the jurisdictional question next month.

Mr. Gross asked how jurisdiction would be determined. Ms. Jones said the Board could make a decision on whether to postpone on the question for jurisdiction. If interested in trying to decide jurisdiction today, the case will need to go to the full docket, the Board would hear the information about jurisdiction, then make the decision. The outcome of that decision would determine what happened next with this case.

Mr. Clarke commented that the Board had received a good report from the staff about this case. However, he felt that he did not have enough information to make a decision on the jurisdiction at this point. Mr. Gross stated that information regarding jurisdiction could be heard today, then continued if members of the Board did not feel sufficient information had been presented.

Ms. Carter stated that she felt the case needed to be heard by the Board. Mr. Gross asked which of the Board members wanted to postpone this case until next month. Mr. Clarke stated he wished to postpone the case to next month. Ms. Whitman, Ms. Carter and Mr. Gross indicated they wished to hear the case at today's meeting, after the other cases on the abbreviated docket were heard.

C. Variance Appeals

1. **PLN-BOA-21-00001: FRIENDLY PROPERTIES, LLC** - requested a variance to reduce the required side yard setback from 18" to 14" for a detached accessory structure within the defined Infill and Redevelopment Area in Historic District Overlay (H-1)/Two Family Residential (R-2) zones, on property located at 143 Shawnee Place. (Council District 3)

The Staff Recommended: Approval, for the following reasons:

- a. While it is unfortunate that the applicant began work without a permit, the requested variance is generally reasonable and its approval would not result in an unreasonable circumvention of the requirement of the Zoning Ordinance. The average yard between the proposed structure and the side lot line exceeds the yard that would exist if the entire garage were set back 18 inches.
- b. Granting the variance should not have adverse effects on the public health, safety, or welfare. The requested variance is reflective of a previously existing condition. While the new garage will be somewhat larger than the previous structure, only a portion of the structure will be closer to the property line than 18 inches. This should have little impact on the adjacent neighbor.

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

1. Construction shall be in accordance with the submitted application materials and site plan.
2. All necessary permits and/or approvals shall be obtained from the Divisions of Building Inspection and Historic Preservation prior to construction and use.

Representation – Mr. Friend Bechtel, applicant and owner, Friendly Properties, was present via video teleconference and was sworn in by Mr. Gross. Mr. Bechtel indicated his agreement to abide by the two conditions set forth by staff, should the Board approve his application.

Action – A motion was made by Ms. Carter, seconded by Mr. Clarke and carried 5-0 (Glover and Needham absent), to **approve PLN-BOA-21-00001: FRIENDLY PROPERTIES, LLC** – request for a variance to reduce the required side yard setback from 18" to 14" for a detached accessory structure within the defined Infill and Redevelopment Area in Historic District Overlay (H-1)/Two Family Residential (R-2) zones, on property located at 143 Shawnee Place, based on staff's recommendation and subject to the two conditions as listed.

3. **PLN-BOA-21-00002: CROW ISLAND, INC** – requested a variance to increase the allowable floor area ratio (FAR) from 0.35 to 0.71 in order to construct an addition to a single-family dwelling within the defined Infill and Redevelopment Area in Historic District Overlay (H-1)/Two Family Residential (R-2) zones, on property located at 243 N. Mill St. (Council District 1).

The Staff Recommended: Approval, for the following reasons:

- a. Granting the variance should not adversely affect the public health, safety, or welfare, nor alter the character of the general vicinity. The proposed addition to the rear of the house will enclose an existing two-story porch and should have little to no impact on the appearance of the house from the public rights-of-way.
- b. The variance request is generally reasonable, as the intent of the Infill and Redevelopment regulations is to allow new construction that is compatible with existing development patterns in older, established neighborhoods. The Zoning Ordinance specifically states that BOA action may sometimes be required in order to facilitate appropriate development without creating an unusual hardship or development that is incompatible with the existing pattern of the neighborhood. The proposed construction is compatible with the existing neighborhood, as each of the other eight single-family houses fronting Gratz Park has a non-conforming Floor Area Ratio, with a range from 0.41 to 0.67.
- c. The variance request does not attempt to circumvent the provisions of the Zoning Ordinance because the requested Floor Area Ratio will not result in an increase in density in this location and the applicant has applied for the variance as soon as it was determined that one was needed during the permit process, and prior to beginning construction.

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

1. Construction shall be in accordance with the submitted application materials and site plan.
2. All necessary permits and/or approvals shall be obtained from the Divisions of Building Inspection and Historic Preservation prior to construction and occupancy.

Representation – Mr. Darren Taylor, Gibson Taylor Thompson Architecture and Design, was present via video teleconference on behalf of the applicant, and was sworn in by Mr. Gross. Mr. Taylor indicated the applicant, Crow Island, Inc., was in agreement with the conditions set forth by staff.

Action – A motion was made by Mr. Clarke, seconded by Ms. Whitman and carried 5-0 (Glover and Needham absent), to **approve PLN-BOA-21-00002: CROW ISLAND, INC** – request for a variance to increase the allowable floor area ratio (FAR) from 0.35 to 0.71 in order to construct an addition to a single-family dwelling within the defined Infill and Redevelopment Area in Historic District Overlay (H-1)/Two Family Residential (R-2) zones, on property located at 243 N. Mill St., based on staff's recommendation and subject to the two conditions as listed.

4. **PLN-BOA-21-00003: HUGH AND KIM BLOOMFIELD** – requested a third party appeal to contest the Division of Planning's certification of a retracement plat (PLN-MNSUB-19-00049) within the defined Infill and Redevelopment Area in Two-Family residential (R-2)/Historic District Overlay (H-1) zones on property located at 444-446 W. Third St. (Council District 1)

The Staff Recommended: Disapproval of the third party appeal and to uphold the Division of Planning's certification of PLN-MNSUB-19-00049, for the following reasons:

- a. The Director of the Division of Planning, acting as the Planning Commission Secretary, has certified a Retracement Minor Subdivision plat in accordance with Article 2-3(f) of the Subdivision Regulations.
- b. The Land Subdivision Regulations, and the activities defined within, are the authority of the Planning Commission. An appeal of Planning Commission action should be made to Fayette County Circuit Court, not the Board of Adjustment.
- c. While the appellants may feel that they have been aggrieved by this action of the Division of Planning, they have not provided evidence that the Retracement Minor Subdivision plat was certified and recorded in error. It is not within the Board's authority to overturn the certification of the Retracement Minor Subdivision plat based on a private property dispute.

*Note – Mr. Gross called for a brief recess at 2:29 p.m. The Board reconvened at 2:43 p.m. The parties wishing to speak on behalf of this case were sworn in at this time.

Board comments – Mr. Gross asked Ms. Jones to present the Law Department's position concerning this case. He also asked her to give background information on what Mr. Duncan, Director of the Division of Planning, did and why he did it, for the benefit of those present who were not very familiar with retracement plats.

Ms. Jones stated that retracement plats are something that this Board rarely sees, nor does the Planning Commission see on a regular basis. She gave an explanation of a retracement plat, as well as background information on the subject property. Ms. Jones explained the reasons for Mr. Duncan signing the subject minor subdivision plat in his capacity as the Planning Commission's Secretary.

Mr. Gross summarized, stating the Board of Adjustment does not oversee actions of the Planning Commission; those are overseen by the circuit court or the city council, depending on the issue. Ms. Jones confirmed that to be true. Mr. Gross asked if the Board of Adjustment ever reviewed an approval of the Planning Commission. Ms. Jones replied that they did not. Mr. Gross asked if it was staff's position that Mr. Duncan signed and approved the retracement plat as an officer of the Planning Commission. Ms. Jones stated that was correct. Mr. Gross said therefore, the Board of Adjustment does not have jurisdiction to hear an appeal regarding an approval made by the Planning Commission. Ms. Jones confirmed that to be correct. She said that there was an exception to that, and the word "never" might be a little extreme. As an example, she stated that if the Planning Commission was hearing a zone change, and part of that zone change was a request for a variance or a conditional use permit, and it was heard at the same time as the zone change, the Planning Commission would hear that. This would only happen if it were in conjunction with a zone change. If the Planning Commission were to grant a conditional use permit in that circumstance, and if later on there was a change or an issue with the conditional use permit, it would be reviewed by the Board of Adjustment.

Mr. Gross asked if it was the Law Department's position that the Board of Adjustment did not have jurisdiction in this instance, to hear this matter. Ms. Jones confirmed that to be true. Mr. Gross asked if anyone from the Board had any questions for Ms. Jones or Ms. Goderwis. He stated that the only issue he was interested in discussing at this point was whether the Board could review the actions taken by Director Jim Duncan in approving the retracement plat.

Ms. Whitman asked if this case was currently in circuit court. Ms. Jones replied that there is a matter of litigation currently pending in front of the Kentucky Supreme Court, on a motion for discretionary review. It involves attorneys, Simpson, Collier and Gosnell, but it is for a different plat.

Representation – Mr. Bruce Simpson, attorney for the applicant, presented the appeal filed by his clients, and explained their reasons for doing so. Mr. Simpson argued that the Board of Adjustment was allowed to review the basis of Mr. Duncan's decision.

Board comments and questions – Ms. Whitman asked Mr. Simpson if his clients had obtained the new survey they stated they wished to obtain. Mr. Simpson responded that they had hired a surveyor, but the survey was not yet completed. Ms. Whitman asked if the Bloomfield's had a survey done when they purchased the property. Mr. Simpson replied that he did not know.

Ms. Carter asked Mr. Simpson if it was his assessment that KRS 100.261 applied to Mr. Duncan regardless of whether he was acting in his capacity as Planning Director or in his capacity as Planning Commission Secretary; whether it was applicable in both capacities. Mr. Simpson replied that he did believe that this statute covered all of roles that Mr. Duncan acted pursuant to signing off on this plat, based upon the language that is in the LFUCG Zoning Ordinance and Subdivision Regulations and that is overlaid by this particular State statute.

Ms. Whitman asked Ms. Jones about the terminology used by Mr. Simpson, in stating that Mr. Duncan signed off on this plat. Ms. Jones responded that Mr. Duncan signed the plat as Planning Commission Secretary, and there was also a signature line for the person who did the survey and plat. She further elaborated stating that there are numerous things that the Planning Commission acts on that do not give notice to people that might be affected by them. An example of such is development plans that come after a zone change. Mr. Duncan signs those as the Planning Commission Secretary, as well. Ms. Jones stated that this Board does not get review of those if someone believes Mr. Duncan signed a development plan in error.

Audience comments - Ms. Linda Gosnell asked why the Zoning Ordinance did not give the Board authority to review actions by the Planning Commission. She commented that she took exception with what Ms. Jones said about this being a different plat than the one that is currently in litigation; there is only one address in existence and that is 443 W. Third. She stated that by filing this plat, Mr. Duncan has allowed additional lots with varying addresses of 447 W. Second and 446 W. Third to be approved in some sort of governmental action. She continued with her comments on this matter.

Mr. Wayne Collier addressed comments previously made by Ms. Gosnell, Mr. Simpson and others. He referred to the minor subdivision plat, which Ms. Goderwis displayed on her shared screen. He further explained the background of the plat, the tracts included in it, and how it pertains to his clients. He argued that the Board does not have jurisdiction over the actions of the Planning Commission.

Representation rebuttal – Mr. Simpson gave his rebuttal to Mr. Collier's presentation and expanded on his client's cause for appeal to the retracement plat signed by Mr. Duncan.

Board comments – Mr. Gross asked Ms. Jones if she had any other comments prior to closing the discussion. Ms. Jones noted that this appeal sounded like a quiet title action which is not something that the Planning Commission could decide on their own or through Mr. Duncan. She said that the only type of plats that Mr. Duncan is designated to act on by the Planning Commission are those that are set forth in the Subdivision Regulations with very clear parameters. If there is a dispute about interpreting a deed or how a surveyor interprets the deed, that is not an action that the Planning Commission or Mr. Duncan is going to be deciding on as the secretary of that commission. Ms. Jones stated that the Law Department still stands by their original position on this.

Mr. Gross stated that he believed Mr. Duncan was acting in his capacity as Planning Commission Secretary when he signed the plat in question. He asked Ms. Goderwis to display the retracement plat on her shared screen, stating he wanted to focus on the note on the plat which stated, "No permits shall be issued for the property depicted or created by the plat until such time as the amended plat is recorded, creating appropriate public and private utility and access easements." Mr. Gross stated that even if this plat is a legal plat, it does not make it a buildable plat. He said that retracement plats are not uncommon in downtown Lexington. For the record, he said, no one is supposed to build on this lot, therefore, he did not know who would be interested in buying it.

Action – A motion was made by Ms. Whitman, seconded by Ms. Carter and carried 5-0 (Glover and Needham absent), that the Board of Adjustment does not have jurisdiction to act on **PLN-BOA-21-00003: HUGH AND KIM BLOOMFIELD AND LINDA GOSNELL** – request for a third party appeal to contest the Division of Planning's certification of a retracement plat (PLN-MNSUB-19-00049) within the defined Infill and Redevelopment Area in Two-Family residential (R-2)/Historic District Overlay (H-1) zones on property located at 444-446 W. Third St. for the three reasons provided by staff.

- IV. **BOARD ITEMS** - The Chair announced that any items a Board member wished to present, would be heard at this time.
- V. **STAFF ITEMS** - The Chair announced that any items a Staff member wished to present would be heard at this time.
- VI. **NEXT MEETING DATE** - The Chair announced that the next meeting date would be March 8, 2021, at 1:30 p.m. via teleconference.
- VII. **ADJOURNMENT** – There being no further business, the Chair declared the meeting adjourned at 4:01 p.m.

Thomas Glover, Chair

Joan Whitman, Secretary

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