

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

January 10, 2022

- I. **CALL TO ORDER** - Chair Glover called the meeting to order at 1:30 p.m. in the Council Chambers, 200 East Main Street, Lexington, Kentucky.
- II. **ATTENDANCE** – Members present were: Harry Clarke, Thomas Glover, Branden Gross, Chad Needham, Raquel Carter and Joan Whitman. Chad Walker was absent. Others present were: Tracy Jones, Department of Law. Planning staff members present were: Traci Wade, Autumn Goderwis, Daniel Crum and Donna Lewis.
- III. **APPROVAL OF MINUTES** – Mr. Glover announced that the minutes from the December 13, 2021 meeting would be considered at this time.

Action – A motion was made by Mr. Gross, seconded by Ms. Whitman and carried 6-0 (Walker absent), to **approve** the minutes from the December 13, 2021 Board of Adjustment meeting.

IV. PUBLIC HEARING ON ZONING APPEALS

- A. **Swearing of Witnesses** – Mr. Glover announced that any applicant or objector to any appeal before the Board who planned to speak, would be sworn in at this time.

The oath was administered to several members of the audience and staff who wished to speak during the meeting.

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

There were no postponements or withdrawals.

C. Abbreviated Hearing

1. **PLN-BOA-21-00072: YAHUAH'S** – requested a conditional use to establish a personal care facility in a Planned Neighborhood Residential (R-3) zone, on property located at 2813 Snow Rd. (Council District 5)

The Staff Recommended: Approval, for the following reasons:

- a. Approval of the proposed conditional use should not adversely affect the subject or adjoining/nearby properties, provided that the required off-street parking is available and that all necessary permits and approvals are secured prior to occupancy.
- b. All necessary public services and facilities are or will be available and adequate for the proposed use.

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

1. The property shall be developed and operated in accordance with the submitted application materials and site plan, subject to any alterations to the parking area required throughout the permitting process.
2. All necessary permits and/or approvals shall be obtained from the Divisions of Planning and Building Inspection, as well as necessary state agencies, prior to occupancy.
3. Any alterations to the parking area shall be subject to review and approval by the Division of Traffic Engineering.

Representation – Ms. Angela Shaw, applicant, was present on behalf of this application. Mr. Glover asked if the Board had any questions or comments regarding this application. There being none, Mr. Glover stated he would entertain a motion from the Board.

Action – A motion was made by Ms. Carter, seconded by Mr. Clarke and carried 6-0 (Walker absent), to **approve** **PLN-BOA-21-00072: YAHUAH'S** – request for a conditional use to establish a personal care facility in a Planned Neighborhood Residential (R-3) zone, on property located at 2813 Snow Rd., based on staff's recommendation and subject to the three conditions as listed.

2. **PLN-BOA-21-00070: RYAN DAWSON** – requested an administrative appeal to allow for construction of an in-ground swimming pool accessory to a non-conforming single family dwelling unit located within the B-1 zone on split-zoned property in Neighborhood Business (B-1)/Agricultural Rural (A-R) zones, located at 8660 Tates Creek Rd. (Council District 12)

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

- a. This request does not represent a circumvention of the provisions of the Zoning Ordinance. The construction of the accessory pool, as proposed, will not result in an increase in the size or scope of the property's non-conforming residential use.
- b. This request will not have an adverse effect on the public health, safety, or welfare; nor on the existing or further development of the surrounding area, because the proposed pool will be located to the rear of the principal structure, where it will be screened from view from adjacent properties, as well as the public right-of-way.

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

1. All necessary permits and/or approvals shall be obtained from the Division of Building Inspection prior to construction.

Representation – Mr. Steve Taylor, contractor with Taylor Made Swimming Pools, was present on behalf of the applicant, Mr. Ryan Dawson. The oath was administered to Mr. Taylor at this time, as he was not previously sworn in.

Board comments – Mr. Glover asked if the Board had any questions or comments regarding this application. There being none, Mr. Glover stated he would entertain a motion from the Board.

Action – A motion was made by Mr. Needham, seconded by Ms. Whitman and carried 6-0 (Walker absent), to **approve PLN-BOA-21-00070: RYAN DAWSON** – request for an administrative appeal to allow for construction of an in-ground swimming pool accessory to a non-conforming single family dwelling unit located within the B-1 zone on split-zoned property in Neighborhood Business (B-1)/Agricultural Rural (A-R) zones, located at 8660 Tates Creek Rd., based on staff's recommendation and subject to the one condition as listed.

D. Discussion Items

1. **PLN-BOA-21-00066: HPI PRESERVE LLC** – requested a variance to increase the allowable height of a fence in a front yard from 4' to 6.75' in order to allow components of a front yard fence (vehicular gate and columns) to exceed the 4-foot height maximum in a High Density Apartment (R-4) zone, on property located at 845 Red Mile Rd. (Council District 11)

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

- a. The applicant has not provided a sufficient justification to meet the requirements of Article 7 of the Zoning Ordinance or KRS 100.243. There do not appear to be special circumstances that are unique to the subject property that do not generally apply to land in the general vicinity, or in the same zone that justify the need for the variance. Four-foot tall fences, including all components, such as columns and gates are typical across residential zones.
- b. The applicant has not provided sufficient information to determine that strict enforcement of the Zoning Ordinance will result in an unnecessary hardship or deprive the applicant of the reasonable use of their land. Columns and gates with a maximum height of four feet could be installed in this location and would provide a similar aesthetic value and level of security.

*Note – Prior to hearing this case, Ms. Goderwis noted that the applicant had submitted a revised site plan and justification statement earlier in the day. She stated that staff had reviewed the revised site plan and created an amended staff report in which staff recommended approval of a lesser variance than originally requested by the applicant. Ms. Goderwis said that she did not know whether the applicant was in agreement with staff concerning the approval of a lesser variance.

Representation – Mr. Christian Elliott, applicant, was present on behalf of this application and indicated that he had seen the amended staff report prior to the meeting and was in agreement with staff in their approval of a lesser variance.

Board comments – Mr. Glover stated that he had not yet reviewed the revised site plan and amended staff report. He took the opportunity for the Board to do so at this time. Mr. Glover noted that staff's recommendation was now to approve the columns and gates from a height of 4' to 5.75'. He asked Ms. Goderwis if there were any other revisions. Ms. Goderwis stated that, based on the updated justification statement the applicant provided, staff felt comfortable making the recommendation to approve a lesser variance. Also, taking into consideration the conversations that the Board had at the December public hearing, staff still did not feel comfortable recommending approval of the full variance that the applicant had initially requested for a height of up to 6.75'. She added that staff felt this was an appropriate compromise that would fit in well with the existing non-conforming fence that is 5'3" along the frontage of Red Mile Rd.

Mr. Glover asked if there were any questions or comments from the Board regarding this application. Mr. Clarke asked Mr. Elliott if he was in agreement with the approval of a lesser variance. Mr. Elliott replied that the applicant was in agreement with the approval of the lesser variance, and they were able to work within the parameter of 5.75'.

There were no further questions or comments.

Action – A motion was made by Mr. Gross, seconded by Ms. Whitman and carried 6-0 (Walker absent), to **approve PLN-BOA-21-00066: HPI PRESERVE LLC** – request for a lesser variance to increase the allowable height of the columns and vehicular gates from 4' to 5.75' in order to allow components of a front yard fence (vehicular gates and columns) to exceed the 4-foot height maximum in a High Density Apartment (R-4) zone, on property located at 845 Red Mile Rd., based on staff's revised recommendation and subject to the two conditions listed in the amended staff report, as follows:

The Staff Recommends: Approval of a lesser variance to increase the allowable height of the columns and vehicular gates from 4' to 5.75', for the following reasons:

- a. The lesser variance is generally reasonable, as it will allow the columns and gates to be up to 6 inches taller than the existing non-conforming four-plank wood fence along the Red Mile Road frontage, creating a more cohesive appearance.
- b. Granting a lesser variance should not have a negative impact on the public health, safety, or welfare because the variance will only apply to the columns and vehicular gates. The visual impact of vehicular gates and columns that are slightly taller than the existing fence will be minor and will not create a "shy zone", where pedestrians do not feel comfortable walking directly adjacent to a fence due to its height creating a "walled-off" or oppressive environment.

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

1. The height of the columns and vehicular gates shown on the submitted site plan shall be reduced to a maximum height of 5.75'.
2. A fence permit shall be obtained from the Division of Building Inspection, prior to construction.

2. **PLN-BOA-21-00071: ECTON FARM LLC** – requested an administrative review to determine whether the Division of Planning made an error in their decision to not accept an additional application related to a previously approved conditional use, the issuance of which has been appealed and is currently being litigated in the Court of Appeals, in an Agricultural Rural (A-R) zone, on property located at 7524 Old Richmond Rd. (Council District 12)

Board comments – Mr. Glover remarked that the Board was familiar with the subject property and the ongoing dispute. He stated that the Board had read the staff report for this application and would now like to hear, in the applicant's words, what this most recent matter was about.

Representation - Mr. Doug Martin, attorney for the property owner, Ecton Farm, LLC, was present on behalf of the applicant. He introduced Mr. Michael Ecton, also present in the audience. Mr. Martin explained the purpose of this administrative appeal, and gave a detailed background of the subject property and the most recently approved conditional use permit from 2020 for a plant nursery.

Board comments and questions – Mr. Glover interjected during Mr. Martin's presentation, stating he thought the situation could be summed up as a single issue, which he thought was a legal issue of whether an applicant could file an application to amend a conditional use while the approved conditional use was on appeal. Mr. Martin agreed that Mr. Glover's summation was correct. Mr. Glover asked Mr. Martin if that was the only issue before the Board. Mr. Martin affirmed that to be true also.

Mr. Glover summarized the process this case had gone through so far. Mr. Martin agreed that Mr. Glover's summary was correct. There was further discussion. Mr. Glover asked Ms. Jones from the Law Department to explain the policy of the LFUCG, whether to accept an additional application if there is a matter connected with that application that is on appeal.

Staff comments – Ms. Jones explained that the policy referred to was a long-standing policy; however, it was not a written policy. She explained staff's position over the years as being based on KRS 100.347. Ms. Jones added that if an applicant or another aggrieved party chose to appeal a final action of a board or commission, which in this case is the decision of the Board of Adjustment; the appeal then goes to the Fayette County Circuit Court, and then to the Court of Appeals. The jurisdiction transfers from the administrative body to the circuit court, then to the appellant court. Ms. Jones explained that over the years it has been the Law Department's interpretation when that happens to not allow for another application to be filed. She added this conditional use was approved based on the site plan the Board had previously reviewed and all of the circumstances that were discussed during that time.

Ms. Jones added that what is being proposed at this point would constitute some type of an amendment to that conditional use and some change in what the Board had approved; which is what is on appeal. She added that it has been the Law Department's position over the years that the jurisdiction has gone on to the courts on appeal. While that appeal is still pending, the Board should not accept a new application.

Board questions and comments – Mr. Glover asked if either court had issued an injunction against either party on appeal about not amending the application or asking for a new application. He also asked if there was any prohibition by the court stating that the applicant can't do what they have done or want to do. Ms. Jones replied

there were no requests for any type of injunctive action and there was no granting of that. There was further discussion.

Mr. Glover asked who the parties on the appeal were in this particular case. Ms. Jones replied that Lisa Gannoe, a neighbor, made the appeal as an aggrieved party; first to Circuit Court and after the circuit court upheld this Board's decision, she made an appeal to the Court of Appeals. Ms. Jones added that the parties in the appeal were the government in the form of the Board of Adjustment, Mr. Ecton, the property owner and Ms. Gannoe as the appellant.

Mr. Gross asked Ms. Jones about the Notice of Violation that was issued by the Division of Planning on November 5, 2021. Ms. Jones stated that the government was required to continue to enforce the conditional use that has been granted. She added that the notice was based on what was granted by this Board. Therefore, when a complaint is made to the Board of Adjustment staff or the Zoning Enforcement staff about something going on that was not granted by the Board, it is usually investigated as some type of a violation. Mr. Gross asked if the Notice of Violation was before the Board at this time. Ms. Jones stated it was not.

Mr. Glover asked what would happen if the Board granted Mr. Martin's request for this appeal. Ms. Jones replied that part of the reason for the policy was so that the Boards and Commissions would not be changing or altering things resulting in potentially inconsistent results. There was further discussion.

Opposition – Ms. Lisa Gannoe, 7525 Old Richmond Rd. advised the Board that a letter had been submitted in opposition on behalf of the Old Richmond Rd. Neighborhood Association, as well as a letter of opposition from herself along with two photos of the subject property. She stated that she also wanted to read her letter aloud.

Mr. Glover interjected and advised Ms. Gannoe that it wasn't necessary for her to read her letter as the Board had already reviewed it and it would be part of the record. Ms. Gannoe disagreed, stating she had read her letters before and so had others. Mr. Glover denied her request.

Ms. Gannoe expressed her opposition to the appeal before the Board and gave her reasons for opposing. She stated there were other neighbors who opposed the appeal as well. Ms. Gannoe argued that the subject temporary structure was actually a permanent structure and in violation of the conditional use permit that was granted in 2020. Ms. Gannoe requested that the photos she submitted be shown on the overhead screen.

As the photos were shown, Ms. Goderwis reminded the Board that the images on the screen were not what was before the Board at this time.

Ms. Gannoe described the images on the screen.

Board comments – Mr. Clarke told Ms. Gannoe that, while he understood her concerns; it appeared that the Board was debating whether the additional conditional uses were appropriate, and that was not the issue before the Board at this time. He reiterated that the issue the Board was to determine was whether the Law Department was correct. Ms. Gannoe replied that the structures were built without the Board's approval or the neighbors having any input in the matter. There was further discussion.

Action – A motion was made by Mr. Gross, seconded by Mr. Clarke and carried 4-2 (Carter, Gross, Needham and Clarke in favor; Glover and Whitman opposed; Walker absent), to **deny PLN-BOA-21-00071: ECTON FARM LLC** – request for an administrative review to determine whether the Division of Planning made an error in their decision to not accept an additional application related to a previously approved conditional use, the issuance of which has been appealed and is currently being litigated in the Court of Appeals, in an Agricultural Rural (A-R) zone, on property located at 7524 Old Richmond Rd., based upon, in this particular instance, finding that the underlying application based upon the testimony today would be so related to the litigation that it is reasonable for the staff to deny an application in this instance.

V. BOARD ITEMS – Mr. Glover announced that any items a Board member wished to present would be heard at this time.

Mr. Glover advised the Board that he would be unable to attend next month's meeting. Therefore, Mr. Needham, Vice-Chair would preside over that meeting.

VI. STAFF ITEMS – Mr. Glover announced that any items a Staff member wished to present would be heard at this time.

There were no Staff items.

VII. NEXT MEETING DATE – Mr. Glover announced that the next meeting date would be February 14, 2022 at 1:30 p.m. in the Council Chambers at 200 E. Main St.

VIII. ADJOURNMENT – There being no further business, Mr. Glover declared the meeting adjourned at 2:39 p.m.

Thomas Glover, Chair

Joan Whitman, Secretary

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