

**MINUTES FOR THE BOARD OF  
ADJUSTMENT MEETING**

April 10, 2023

- I. **CALL TO ORDER** - Chair Raquel Carter called the meeting to order at 1:35 p.m. in the Council Chambers, 200 East Main Street, Lexington, Kentucky.
- II. **ATTENDANCE** – Board members present were Raquel Carter, Harry Clarke, Branden Gross, Chad Needham, Carolyn Plumlee, Linda Tucker and Chad Walker. Others present were: Brittany Smith and Tracy Jones, Department of Law, Dewey Crowe, Division of Building Inspection and Stephen Parker, Division of Traffic Engineering. Planning staff members present were: Jim Duncan, Traci Wade, Autumn Goderwis, Meghan Jennings, Daniel Crum and Donna Lewis.
- III. **APPROVAL OF MINUTES** – Ms. Carter announced that the minutes from the March 13, 2023 meeting would be considered at this time.

Action – A motion was made by Ms. Plumlee, seconded by Mr. Clarke and carried 7-0 to **approve** the minutes from the March 13, 2023 meeting of the Board of Adjustment.

**IV. PUBLIC HEARING ON ZONING APPEALS**

- A. **Swearing of Witnesses** - Ms. Carter asked that any applicant or objector, or anyone in the audience who planned to speak to any appeal before the Board, please stand in order to be sworn in at this time. The oath was administered to several members of the audience who planned to speak.
- B. **Sounding the Agenda** - In order to expedite completion of agenda items, Ms. Carter sounded the agenda with regard to any postponements, withdrawals, and items requiring no discussion. She advised the members of the audience that everyone who wished to speak would be allowed to; but in order to do so, she asked that speakers not repeat what had been said by anyone who spoke before them. Ms. Carter informed the audience members that everyone who spoke would have a time limit of three minutes, and added that a timer would be in use.

There were no postponements or withdrawals.

**C. Abbreviated Hearing**

1. **PLN-BOA-23-00023: TINA THOMAS** – requested a variance to increase the allowable size of an accessory structure from fifty percent (50%) to sixty-nine percent (69%) in order to construct a detached accessory structure in a Planned Neighborhood Residential (R-3) zone, on property located at 1449 Anniston Drive. (Council District 6)

The Staff Recommended: Approval of a reduced variance from 50% to 59% for the following reasons:

- Granting the lesser variance should not adversely affect character of the general vicinity. With a reduction in the proposed size, the single-family residence will remain the focal point and clearly the principal use of the site.
- The request will not negatively impact the public health, safety, or welfare of the general vicinity as the structure will be partially screened from view by the single family home, a drop in topography, and existing trees and vegetation along adjoining property lines.

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

1. Construction shall be in accordance with the submitted application materials and an updated site plan depicting accessory structures totaling no more than 1,053 square feet by reducing the size of the proposed garage and/or removing the existing shed.
2. All necessary permits and approvals shall be obtained from the Division of Building Inspection prior to construction.

Applicant Representation – Ms. Tina Thomas, applicant and property owner, was present on behalf of her application. Ms. Carter asked Ms. Thomas if she had read Staff's recommendations and the conditions of approval for a reduced variance, and if she agreed to abide by them. Ms. Thomas confirmed that she had read the recommendations and conditions, and had received some clarification of them from Staff prior to the start of the meeting. She stated that she did agree to abide by the conditions of approval for the reduced variance of fifty-nine percent (59%).

Action – A motion was made by Mr. Clarke, seconded by Mr. Needham and carried 7-0 to **approve PLN-BOA-23-00023: TINA THOMAS** – request for a variance to increase the allowable size of an accessory structure from fifty percent (50%) to fifty-nine percent (59%) in order to construct a detached accessory structure in a Planned Neighborhood Residential (R-3) zone, on property located at 1449 Anniston Drive, based on Staff's recommendation and subject to the two conditions as listed.

2. **PLN-BOA-23-00027: JAY INGLE** – requested variances to reduce the required rear yard setback from forty-three feet and nine inches (43' 9") to four feet (4') and to increase the allowable floor area ratio (FAR) from 0.35 to 0.38 in order to construct an addition to an existing single family detached dwelling within the defined Infill and Redevelopment Area in a Planned Neighborhood Residential (R-3) zone, on property located at 633 Bellaire Avenue. (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 of the general vicinity, nor alter the character of the general vicinity. The proposed garage addition should have little visual impact on the surrounding properties as it is located to the rear of the property, other residences in the vicinity feature garages to the rear of the property, and a garage has existed in this location for forty years.
- b. The unique configuration and historic nature of the lot are special circumstances that justify the need for the variance.
- c. The granting of this variance will not allow an unreasonable circumvention of the requirements of the Zoning Ordinance because the applicant has applied for the necessary variance as soon as it was determined that it was needed and prior to construction.

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

1. The addition shall be constructed in accordance with the submitted application materials and site plan.
2. All necessary permits and approvals shall be obtained from the Division of Building Inspection prior to construction.

Board comment – Mr. Needham commented that he was looking forward to the improvement of the property.

Applicant representation – Mr. Jay Ingle, applicant and property owner, was present on behalf of his application. Ms. Carter asked Mr. Ingle if he had read Staff's recommendations and the conditions of approval. Mr. Ingle indicated that he had read the recommendations and conditions and that he was in agreement with them.

*Note – Prior to this hearing, Staff determined that the second variance, which was to increase the allowable floor area ratio (FAR) from 0.35 to 0.38, was no longer needed as the finished basement of the existing home does not meet the height clearance requirements of the Zoning Ordinance's definition of floor area. With the proposed attached garage, the property's FAR will total 0.31 which is compliant with the maximum 0.35 FAR allowed in the R-3 zone. The staff report reflects this determination; however, the second variance request inadvertently remained on the agenda, but was not included in the motion.*

Action – A motion was made by Mr. Needham, seconded by Ms. Tucker and carried 7-0 to **approve PLN-BOA-23-00027: JAY INGLE** – request for a variance to reduce the required rear yard setback from forty-three feet and nine inches (43' 9") to four feet (4') in order to construct an addition to an existing single family detached dwelling within the defined Infill and Redevelopment Area in a Planned Neighborhood Residential (R-3) zone, on property located at 633 Bellaire Avenue, based on Staff's recommendations and subject to the two conditions as listed.

3. **PLN-BOA-23-00029: GIBSON TAYLOR THOMPSON ARCHITECTURE & DESIGN** - requested a variance to reduce the side yard setbacks for a deep building from five feet (5') to three feet (3') in order to construct a new single family dwelling unit within the defined Infill and Redevelopment Area in a High Density Apartment (R-4) zone, on property located at 366 Jefferson Street. (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 of the general vicinity, nor alter the character of the general vicinity. The applicant's proposal is similar to existing setbacks in the surrounding area, as well as the setback for the previous structure on the subject property.
- b. The restrictive configuration of the lot is a special circumstance that justifies the need for the variance, as the lot is a narrow lot within the defined Infill and Redevelopment Area. The Zoning Ordinance specifically calls for increased flexibility in review of variances to accommodate compatible development on existing small lots within the defined Infill and Redevelopment Area.
- c. The granting of this variance will not allow an unreasonable circumvention of the requirements of the Zoning Ordinance as the applicant has applied for the variance as soon as it was determined that it was needed and prior to 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 approvals shall be obtained from the Division of Building Inspection prior to construction.

Applicant representation – Mr. Vince Thompson, applicant, was present on behalf of this application. Having arrived late to the meeting, he was sworn in at this time.

Ms. Carter asked Mr. Thompson if he had read Staff's recommendations and conditions of approval, and if he agreed to abide by them. Mr. Thompson indicated that he had read them and did agree to abide by the conditions.

Action – A motion was made by Mr. Clarke, seconded by Mr. Needham and carried 7-0 to **approve PLN-BOA-23-00029: GIBSON TAYLOR THOMPSON ARCHITECTURE & DESIGN** – request for a variance to reduce the side yard setbacks for a deep building from five feet (5') to three feet (3') in order to construct a new single family dwelling unit within the defined Infill and Redevelopment Area in a High Density Apartment (R-4) zone, on property located at 366 Jefferson Street, based on Staff's recommendation and the two conditions as listed.

4. **PLN-BOA-23-00026: JUAN MELENDEZ** – requested a conditional use permit in order to operate a home-based auto detailing business in a Planned Neighborhood Residential (R-3) zone, on property located at 509 Lucille Drive. (Council District 2)

The Staff Recommended: Approval, for the following reasons:

- a. Granting the requested conditional use should not adversely affect the subject or surrounding properties, as it should not create disturbing levels of traffic, noise, or odors. The operation of the business will be confined to the garage, where it will be enclosed, screened from view, and noise-proofed.
- b. All necessary public facilities and services are available and adequate for the proposed use.

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

1. The home-based automobile detailing use shall be operated in accordance with the submitted application materials, modified site plan, and supplemental justification statement, with appointments only on an individual basis.

2. The operation of the detailing business be confined to the attached garage, and shall be enclosed at all times.
3. All wastewater from the use shall be disposed of within the home's sanitary sewer system.
4. No more than one vehicle shall be detailed at one time, and appointments shall not overlap.
5. No more than eight (8) appointments per week shall be permitted.
6. Hours of operation shall be limited to 4:00 P.M.–8:00 P.M. on Tuesdays and Thursdays, and 8:00 A.M. to 4:00 P.M. on Saturdays and Sundays.
7. All necessary permits including a Zoning Compliance Permit and a Certificate of Occupancy shall be obtained from the Divisions of Planning and Building Inspection prior to initiation of the use.
8. The conditional use shall become null and void should the applicant no longer reside at this address.

Applicant representation – Mr. Juan Melendez, applicant and property owner, was present on behalf of his application for a conditional use permit. Ms. Carter asked Mr. Melendez if he had read Staff's recommendations, along with the eight conditions of approval, and if he was comfortable with those conditions. Mr. Melendez replied that he had read them and was comfortable with those eight conditions.

Board questions and comments - Ms. Carter asked Staff if there had been any public comment regarding this application. Mr. Crum replied that there were several letters of opposition, all of which were included in the information packet that was available for the Board members to review on the Granicus program.

Ms. Carter asked the Board members to take a few minutes to review those letters, which they did. She mentioned that the main concern was that the business stay within the confines of the garage and not operate outside of the house so that it qualifies as a home-based business. Ms. Carter asked Mr. Melendez if he was comfortable with that criteria. Mr. Melendez replied that he was comfortable with that criteria.

Mr. Gross stated that Staff reviews such conditional uses that have been permitted by the Board of Adjustment to ensure compliance on a yearly basis, and additionally, as the result of a complaint. He added that he wanted Mr. Melendez to be aware of this.

Ms. Carter added that of particular concern to the neighbors was that Mr. Melendez would convert his home from a residence to a business. She clarified by stating that was not the case here.

Action – A motion was made by Mr. Clarke, seconded by Mr. Walker and carried 7-0 to **approve PLN-BOA-23-00026: JUAN MELENDEZ** – request for a conditional use permit in order to operate a home-based auto detailing business in a Planned Neighborhood Residential (R-3) zone, on property located at 509 Lucille Drive, based on Staff's recommendations and subject to the eight conditions as listed.

5. **PLN-BOA-23-00028: ZION CHURCH BUILDERS** – requested to amend an existing conditional use permit and a variance to reduce the required side street side yard setback from thirty feet (30') to ten feet (10') in order to construct an addition to an existing place of religious assembly in a Single-Family Residential (R-1C) zone, on property located at 3416 Clays Mill Road. (Council District 9)

The Staff Recommended: Approval for the following reasons:

- a. Granting the requested conditional use permit and variance will not adversely affect the public health, safety, or welfare of the subject property or general vicinity, nor alter the character of the surrounding area. The addition will be located within an existing parking area which should minimally impact stormwater runoff, as well as minimally impact neighboring residential uses. The addition of landscaping along the property's Clays Mill Road and Merrimac Drive frontages should sufficiently buffer the use from neighboring residential uses.
- b. The utilization of the proposed building addition to replace the existing retaining wall is a unique circumstance which justifies the requested variance. Strict application of the Zoning Ordinance would create an unnecessary hardship for the applicant due to the high costs associated with adding in fill to the site. The addition will be constructed in what is likely the most practical and economically feasible manner, given the layout of the existing building, impermeable area, and retaining wall.
- c. The granting of this variance will not allow an unreasonable circumvention of the requirements of the Zoning Ordinance because the applicant has applied for the necessary variance as soon as it was determined that it was needed, and prior to beginning construction.
- d. 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. The addition shall be constructed in accordance with the submitted application materials and revised site plan showing existing and proposed landscaping along Clays Mill Road and Merrimac Drive.
2. The applicant shall submit a landscape plan that fulfills and exceeds the requirements of Article 18 of the Zoning Ordinance for review and approval by the Division of Environmental Services to include the following:
  - a. Reinstallation of deciduous trees along the length of the retention basin in accordance with C-1998-91: Cravens & Associates Architecture, PSC.
  - b. Installation of the medium to large trees and shrubs, both evergreen and deciduous, in accordance with CV-2001-30: T & O Designers, Inc. & Bethel Harvest Church and along the full building frontage adjacent to the Merrimac Drive frontage.
3. An updated stormwater management plan shall be implemented in accordance with the requirements of the adopted Engineering Manuals, subject to the acceptance by the Division of Engineering.
4. All necessary permits and approvals shall be obtained from the Divisions of Building Inspection and Engineering prior to construction.

Applicant representation – Mr. Richard Murphy, attorney representing Greater Faith Apostolic Church along with Zion Church Builders, was present on behalf of this application. He introduced Mr. Jim Hinze and Mrs. Debbie Hinze, Zion Church Builders, who were also present in the audience. Mr. Murphy stated that Mr. William McGraw, Pastor and Mr. Todd Ison, Assistant Pastor, Greater Faith Apostolic Church, along with several trustees were also in attendance. He stated that the applicant had reviewed Staff's recommendations and the conditions of approval and was in agreement with them.

Mr. Murphy emphasized that Greater Faith Apostolic Church purchased the subject property in 2004. Prior to that time, the property had been owned by two different churches. He added that Greater Faith Apostolic Church was not aware of the previous conditions regarding the landscaping. Mr. Murphy said that after speaking with the pastors last week about the landscaping requirement, they are in total agreement with fulfilling that requirement, and already have a draft of a plan for doing so.

Action – A motion was made by Mr. Needham, seconded by Ms. Plumlee and carried 7-0 to **approve PLN-BOA-23-00028: ZION CHURCH BUILDERS** – request to amend an existing conditional use permit and a variance to reduce the required side street side yard setback from thirty feet (30') to ten feet (10') in order to construct an addition to an existing place of religious assembly in a Single-Family Residential (R-1C) zone, on property located at 3416 Clays Mill Road, based on Staff's recommendations and subject to the four conditions as listed.

#### **D. Discussion Items**

1. **PLN-BOA-23-00005: JACKSON'S WINE & SPIRITS, LLC** – requested a conditional use for accessory drive-through facilities in order to construct a retail use within the defined Infill and Redevelopment Area in a Neighborhood Business (B-1) zone, on property located at 1406 & 1408 N. Limestone. (Council District 1)

The Staff Recommended: **Disapproval of the conditional use permit for accessory drive-through facilities**, for the following reasons:

- a. The proposed drive-through facility will adversely affect the surrounding properties, as the request places the proposed drive-through in closer proximity to the adjoining residential use at 102 Bermuda Ave. The proposed hours of operation would allow for vehicle stacking, with associated noise, lights, and emissions to impact existing single-family residential units within the immediate vicinity.
- b. The proposed drive-through will negatively affect pedestrian safety in the area, and will conflict with planned pedestrian infrastructure improvements along the N. Limestone corridor.
- c. The request is out of character with the N. Limestone corridor, between downtown and New Circle Road, where commercial development is more neighborhood oriented, and drive-through uses are not commonly found.
- d. The Central Sector Small Area Plan was adopted by the Planning Commission in 2009 and focuses on retaining the unique character of N. Limestone. The proposed drive-through is inconsistent with the recommendations of the Central Sector Small Area Plan, particularly those for Subarea D

related to the desire for traditional neighborhood retail focused on serving residents of the Central Sector.

Staff Presentation – Mr. Crum directed the Board's attention to the overhead screen on which aerial images of the vicinity surrounding the subject property were displayed. He explained that there were a mixture of uses on various properties in the area. Mr. Crum mentioned that 1406 N. Limestone is the current location of Jackson's Wine & Spirits, which is a liquor store with a current drive-through component. He added that the adjacent property, 1408 N. Limestone previously was used as a furniture store but is now vacant due to a fire and demolition of the structure. Mr. Crum explained the applicant's intent to consolidate the lots into one and construct a five thousand square foot retail liquor store use with an accessory drive-through. He explained how customers currently access the existing drive-through and stated that data from the State Highway Patrol shows there have been approximately eight vehicular collisions at the intersection of N. Limestone and Bolser Ave. since 2018.

Mr. Crum displayed a copy of the site plan which had been submitted by the applicant. He explained that the applicant was proposing to increase the retail facilities on site, as well as increase the size of the new structure from approximately fifteen hundred (1,500) square feet to nearly five thousand (5,000) square feet. Mr. Crum added that the applicant wished to increase the scope of the drive-through facilities on the site. He further explained the proposed access points and other features which were identified on the subject site plan.

Mr. Crum noted that there was limited documentation found to show whether the use of the existing drive-through use was ever reviewed or approved. Prior to 2013, drive-through facilities were considered to be an accessory use to these retail uses. In 2013, a Zoning Ordinance Text Amendment (ZOTA) was done to adjust the allowable uses in the B-1 zone, and reconsider the impacts such uses may have on the adjoining properties. He added that the applicant had indicated that this is largely going to be a drive-through site, with approximately seventy-five percent (75%) of the traffic visiting this site, using the drive-through facility. Currently, this is the only drive-through use in the N. Limestone corridor until you reach the drive-through pharmacy located at N. Limestone and New Circle Road. Mr. Crum explained Staff's reasons for recommending disapproval of this application.

Board comments and questions – Mr. Gross asked whether allowing the applicant to have the proposed drive-through would solve the existing problem of using Bolser Avenue as the drive-through lane. Mr. Crum replied that any redevelopment would trigger the need to clean up that access, adding that the current drive-through is located on the wrong side of Bolser Avenue. There was further discussion.

Mr. Gross asked if the Board were to deny the applicant's request for drive-through facilities, would the applicant be allowed to continue to use the drive-through on Bolser Avenue. Mr. Crum indicated that the applicant could do so, as it is an existing element.

Ms. Wade stated that Staff was unable to find any evidence that the applicant had ever obtained a permit for a drive-through window of any type. She opined that the Division of Traffic Engineering would never have permitted a drive-through on the wrong side of the road. Ms. Wade stated that as there are no records showing the applicant was granted any permission for a drive-through. She added that unless the applicant can produce such evidence, this use is considered to be illegal and non-conforming, and Staff could pursue closing it.

Mr. Clarke asked if city officials would consider closing the existing drive-through. Ms. Wade stated that the Division of Building Inspection could consider it as an enforcement action against the applicant. Mr. Clarke added that he had driven by the site the previous week and expressed his concerns regarding serious problems with this use on the subject property.

Ms. Carter mentioned the issue of stacking at the proposed drive-through facility and asked if there had been conversations with the applicant regarding the issue of stacking. Mr. Crum replied that those issues had been identified in initial conversations with the applicant. Ms. Carter expressed her concerns with this applicant leaving the neighborhood as it is one of the longest standing commercial businesses in the neighborhood. She referred to preserving the character of the neighborhood.

Applicant representation – Mr. Wes Harned, attorney, was present on behalf of the applicant, and distributed an exhibit packet to the Board members and to Staff for the record. He introduced Mr. John Ledford, owner, Jackson's Wine & Spirits, LLC, and Mr. Tony Barrett, landscape architect, Barrett Partners. Mr. Harned gave

a brief history of the business, and explained the applicant's intentions for the subject property. He directed the Board's attention to the overhead screen on which he displayed aerial images of the subject property and the surrounding vicinity as well as an image of the proposed site plan and the proposed new structure. Mr. Harned opined the necessity of the drive-through facility requested by the applicant. He mentioned that the owner, Mr. Ledford, had spoken with some of the neighbors who indicated they had no issues with the proposed drive-through, as Mr. Ledford had explained the proposed project to them. Mr. Harned mentioned letters of support which the applicant had received, and copies of which were in the exhibit packet he had distributed earlier. He displayed a copy of the applicant's proposed findings of fact and conditions of approval, should the Board recommend approval of this application, on the overhead screen, and also explained that copies of those were included in the exhibit packet he had distributed earlier.

Board question – Mr. Gross questioned the proposed conditions Mr. Harned had spoken of. Mr. Harned responded. There was further discussion.

Applicant representation – Mr. Tony Barrett addressed the Board regarding the access points for the proposed drive-through facility. He also spoke on parking and stacking for the drive-through facility for the proposed project. Mr. Barrett explained the proposed fencing and landscape buffer. There was further discussion.

Board questions and comments – Mr. Clarke opined the proposed project was an improvement on the N. Limestone corridor. He added that he wasn't opposed to the drive-through facility itself, but he was concerned with the placement of the building, adding that having two entrances to the stacking was a mistake. Mr. Clarke asked about the possibility of the new structure being closer to Bolser Avenue, with no parking on that side of the building. He asked Mr. Barrett to respond. Mr. Barrett replied that he felt the drive-through would function fully without the Bolser Avenue entrance. He added that the applicant may be agreeable to closing the Bolser Avenue entrance if that is what the Board required. There was further discussion regarding relocating the building.

Ms. Carter asked if the drive-through window could be shifted so that it is closer to the end of the building. Mr. Barrett replied that relocating the window would be a concern with the layout of the inside of the building. He added there is an issue with the grade of the property in the corner. Discussion continued.

Mr. Gross suggested that it may be beneficial to everyone concerned to continue this application for a month to allow sufficient time for the applicant and Staff to work together to make the changes needed for the proposed site plan. An improved site plan and application may garner more favor.

Mr. Harned stated that the applicant was amenable to a one-month continuance, given all that has been discussed.

Mr. Clarke mentioned that he felt there were enough good things about the project that it needs to be considered positively, but there are enough negative issues which could be satisfied with more discussion.

Action – A motion was made by Mr. Gross, seconded by Mr. Clarke and carried 7-0, to **continue PLN-BOA-23-00005: JACKSON'S WINE & SPIRITS, LLC** – request for a conditional use for accessory drive-through facilities in order to construct a retail use within the defined Infill and Redevelopment Area in a Neighborhood Business (B-1) zone, on property located at 1406 & 1408 N. Limestone, for one month to allow the applicant and their representatives to meet with Staff to evaluate some of the points of discussion among the Board, to the May 8, 2023 meeting.

\*Note –The Board took a brief recess at approximately 3:00 p.m. and reconvened approximately ten minutes later.

## **E. Administrative Appeals**

1. **PLN-BOA-23-00006: WHITETAIL HEAVEN OUTFITTERS** – requested an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 5701 Jacks Creek Pike. (Council District 12)

The Staff Recommended: Disapproval, for the following reasons:

- a. There is sufficient evidence provided by the Lexington Police Department and Kentucky Department

of Fish and Wildlife Resources to confirm the use of the subject property and other related properties for recreational outfitters (commercial guided hunting) by Whitetail Heaven Outfitters.

- b. The applicant has not provided sufficient justification to determine that the use of the subject property for recreational outfitters (commercial guided hunting) existed prior to the 2016 Zoning Ordinance Text Amendment which explicitly prohibited the use within the Agricultural Rural (A-R) zone.
- c. The issuance of the Notices of Zoning Violation by the Division of Building Inspection was done in compliance of Article 5 of the Zoning Ordinance.

2. **PLN-BOA-23-00014: WHITETAIL HEAVEN OUTFITTERS** – requested an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 5725 Jacks Creek Pike. (Council District 12)

The Staff Recommended: Disapproval, for the following reasons:

- a. There is sufficient evidence provided by the Lexington Police Department and Kentucky Department of Fish and Wildlife Resources to confirm the use of the subject property and other related properties for recreational outfitters (commercial guided hunting) by Whitetail Heaven Outfitters.
- b. The applicant has not provided sufficient justification to determine that the use of the subject property for recreational outfitters (commercial guided hunting) existed prior to the 2016 Zoning Ordinance Text Amendment which explicitly prohibited the use within the Agricultural Rural (A-R) zone.
- c. The issuance of the Notices of Zoning Violation by the Division of Building Inspection was done in compliance of Article 5 of the Zoning Ordinance.

3. **PLN-BOA-23-00015: WHITETAIL HEAVEN OUTFITTERS** – requested an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 5751 Jacks Creek Pike. (Council District 12)

The Staff Recommended: Disapproval, for the following reasons:

- a. There is sufficient evidence provided by the Lexington Police Department and Kentucky Department of Fish and Wildlife Resources to confirm the use of the subject property and other related properties for recreational outfitters (commercial guided hunting) by Whitetail Heaven Outfitters.
- b. The applicant has not provided sufficient justification to determine that the use of the subject property for recreational outfitters (commercial guided hunting) existed prior to the 2016 Zoning Ordinance Text Amendment which explicitly prohibited the use within the Agricultural Rural (A-R) zone.
- c. The issuance of the Notices of Zoning Violation by the Division of Building Inspection was done in compliance of Article 5 of the Zoning Ordinance.

4. **PLN-BOA-23-00016: WHITETAIL HEAVEN OUTFITTERS** – requested an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 5837 Jacks Creek Pike. (Council District 12)

The Staff Recommended: Disapproval, for the following reasons:

- a. There is sufficient evidence provided by the Lexington Police Department and Kentucky Department of Fish and Wildlife Resources to confirm the use of the subject property and other related properties for recreational outfitters (commercial guided hunting) by Whitetail Heaven Outfitters.
- b. The applicant has not provided sufficient justification to determine that the use of the subject property for recreational outfitters (commercial guided hunting) existed prior to the 2016 Zoning Ordinance Text Amendment which explicitly prohibited the use within the Agricultural Rural (A-R) zone.
- c. The issuance of the Notices of Zoning Violation by the Division of Building Inspection was done in compliance of Article 5 of the Zoning Ordinance.

5. **PLN-BOA-23-00017: WHITETAIL HEAVEN OUTFITTERS** – requested an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 3508 Crawley Lane. (Council District 12)



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

- a. There is sufficient evidence provided by the Lexington Police Department and Kentucky Department of Fish and Wildlife Resources to confirm the use of the subject property and other related properties for recreational outfitters (commercial guided hunting) by Whitetail Heaven Outfitters.
- b. The applicant has not provided sufficient justification to determine that the use of the subject property for recreational outfitters (commercial guided hunting) existed prior to the 2016 Zoning Ordinance Text Amendment which explicitly prohibited the use within the Agricultural Rural (A-R) zone.
- c. The issuance of the Notices of Zoning Violation by the Division of Building Inspection was done in compliance of Article 5 of the Zoning Ordinance.

6. **PLN-BOA-23-00018: WHITETAIL HEAVEN OUTFITTERS** – requested an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 7418 Old Dry Branch Road. (Council District 12)

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

- a. There is sufficient evidence provided by the Lexington Police Department and Kentucky Department of Fish and Wildlife Resources to confirm the use of the subject property and other related properties for recreational outfitters (commercial guided hunting) by Whitetail Heaven Outfitters.
- b. The applicant has not provided sufficient justification to determine that the use of the subject property for recreational outfitters (commercial guided hunting) existed prior to the 2016 Zoning Ordinance Text Amendment which explicitly prohibited the use within the Agricultural Rural (A-R) zone.
- c. The issuance of the Notices of Zoning Violation by the Division of Building Inspection was done in compliance of Article 5 of the Zoning Ordinance.

Staff presentation – Ms. Jennings explained that there were six administrative appeals before the Board, and the fact that there were six different properties involved. She added that all six would be presented in one presentation. Ms. Jennings stated that because these applications were appeals, it was up to the Board to decide whether the Notices of Violation which were issued by the Division of Building Inspection were issued in error. She referred to Article 7-6(e) of the Zoning Ordinance which explains the role of the Board of Adjustment concerning administrative appeals, and directed the Board's attention to the overhead screen on which she displayed a copy of Article 7-6(e). Ms. Jennings also displayed an aerial map identifying the six subject properties on the overhead screen. She gave a brief history of what had taken place prior to the applicant's filing of these appeals. She explained the two different levels of notices that were issued to these properties; both formal, official Notices of Violation, and also advisory notices. Ms. Jennings stated that the formal Notices of Violation were sent to 5701, 5725 and 5751 Jacks Creek Pike and the advisory notices were sent to 5837 Jacks Creek Pike, 3508 Crawley Lane and 7418 Old Dry Branch Road.

Ms. Jennings referred to additional aerial images of the subject properties on the overhead screen and noted the acreage and owners of each property. She displayed a timeline accounting for the steps leading up to the appeals before the Board today. Ms. Jennings stated that LFUCG Staff began investigating these properties in the early fall of 2022 to the winter of 2023. She added that throughout the fall, Staff was gathering information related to the extent of the purported operations on these properties. The Division of Building Inspection formally opened the investigation within Zoning Enforcement and Notices of Violation were sent to the properties owned by McGregor Enterprises, LLC: 5701, 5725 and 5751 Jacks Creek Pike. Ms. Jennings stated that later in December, the Division of Building Inspection issued advisory notices to the other three properties, and the appellant submitted their official appeal letter just before the holidays. She added that the appeals were first slated to be heard at the February 2023 Board of Adjustment meeting; however, they requested postponement at both the February meeting and subsequently at the March meeting.

Ms. Jennings introduced Officer Nalley of the Lexington Police Department, who responded to an incident in the Jacks Creek Pike area on November 13, 2022. She said that the police report summarizes the officer's interactions with hunters crossing property boundaries to retrieve a deer, as well as conversations with an individual who identified themselves as a Whitetail Heaven Outfitters guide.

Witness testimony – Officer N. B. Nalley gave a short synopsis of the encounter that took place between officers of the Lexington Police Department, representatives from the Department of Fish and Wildlife and individuals who were present in the subject area on November 13, 2022.

Staff presentation – Ms. Jennings continued with her presentation, explaining the remaining steps leading up to the applicant filing the appeals. She also displayed a copy of the appellant's justification of appeal, which was for all six properties.

Ms. Jennings explained to the Board that what they were to decide on at this meeting was whether the issuances of Notices of Violation to the subject properties leased by Whitetail Heaven Outfitters for the operation of recreational outfitting was done in error by the Division of Building Inspection. She added that should the Board rule in favor of the appellant by finding that the Notices of Zoning Violation were issued in error, the subject property and other properties related to Whitetail Heaven Outfitters could continue their operations.

Ms. Jennings continued, stating that should the Board rule against the appellant, the decision made by the Division of Building Inspection to issue the Notices of Zoning Violation would be upheld and Whitetail Heaven Outfitters would be required to cease all recreational outfitting services in Fayette County on the properties in question and any other property in the Agricultural Rural (A-R) zone.

Board questions – Mr. Gross asked whether the Board would need to find that hunting is considered to be a recreational activity, as it (hunting) is not listed in the Zoning Ordinance as such, if the Board were to uphold the Staff's zoning violation notices.

Ms. Jones responded, stating that what the appellant was cited for was guided hunting in the Agricultural Rural zone, which makes them fall in the definition of a recreational outfitter and recreational outfitting is prohibited in the A-R zone. There was further discussion.

Applicant representation – Mr. Wes Harned, attorney, was present on behalf of the appellant, Whitetail Heaven Outfitters. He distributed an exhibit packet to the Board members and Staff for the record. Mr. Harned briefly explained the type of business operated by Whitetail Heaven Outfitters and the three grounds for their appeals. He added that these grounds for appeal were also outlined in the packet he provided earlier.

Mr. Harned advised the Board that Mr. Joe Kines, the owner of one of the subject properties, 3508 Crawley Lane, was present in the audience and would be speaking later to state that Whitetail Heaven Outfitters does not use his property for the activities suggested. Mr. Harned stated that the appellant would be asking for that notice of violation to be withdrawn or rescinded for that reason. He also mentioned that the property at 5837 Jacks Creek Pike, which is owned by the Whitman Trust, has not been used by Whitetail Heaven Outfitters for the alleged activity. Therefore, there will not be any witness testimony for that appeal.

Board questions - Mr. Gross had a question about the McGregor properties. Mr. Harned replied that there would be testimony about the McGregor properties. He added that a copy of the written lease by McGregor pertaining to 5725 Jacks Creek Pike, dating back to 2008, was in the packet of information that he had previously distributed.

#### Witnesses for the Appellant

Mr. Joe T. Kines, owner of 3508 Crawley Lane, Lexington, KY testified that Whitetail Heaven Outfitters had never used that property for hunting operations. Mr. Harned asked Mr. Kines if a Notice of Violation about Whitetail Heaven Outfitters using that property for hunting operations on his property would be just plain wrong. Mr. Kines stated "correct." Mr. Harned asked Mr. Kines if he owned other properties in the Agricultural Rural zone near 3508 Crawley Lane. Mr. Kines stated that he did. Mr. Harned asked Mr. Kines if Whitetail Heaven Outfitters had used those properties for hunting operations. Mr. Kines stated that they had. Mr. Harned asked Mr. Kines if, to the best of his knowledge and belief, did Whitetail Heaven Outfitters' use of those other properties for hunting operations date back to prior to 2016. Mr. Kines said "considerably." Mr. Harned asked Mr. Kines if Whitetail Heaven Outfitters had consistently used those other properties dating back prior to 2016 for those operations. Mr. Kines stated that was correct. Mr. Harned asked Mr. Kines if he agreed to permit Whitetail Heaven Outfitters to use those properties for

hunting operations. Mr. Kines indicated that was correct. Mr. Harned asked if Whitetail Heaven Outfitters paid Mr. Kines to use his property. Mr. Kines stated "no." Mr. Harned asked Mr. Kines if the reason he permitted Whitetail Heaven Outfitters to use his property was due to the fact that his son knows Tevis McCauley. Mr. Kines said that was correct. Mr. Harned asked him who Tevis was and Mr. Kines stated that he was the proprietor of Whitetail Heaven Outfitters. Mr. Harned asked Mr. Kines if he let Mr. McCauley use his other properties predating to 2016 because it controls the deer population. Mr. Kines stated that was correct.

Mr. David Gordon, 1580 Beaumont Rd., Nicholasville, KY was the next witness. Mr. Harned asked him if he was familiar with the property located at 7418 Old Dry Branch Rd. in Fayette County. Mr. Gordon replied "yes." Mr. Harned asked Mr. Gordon what his connection was to that property. Mr. Gordon replied that his grandfather took care of it and it was left to him in a trust and Mr. Gordon's mother gained control of that property in approximately 2007 or 2008. Mr. Harned asked if Mr. Gordon's grandfather was still alive. Mr. Gordon replied that his grandfather passed away in 2013. Mr. Harned asked Mr. Gordon if he takes care of the property at this point. Mr. Gordon responded that he did. Mr. Harned asked if Whitetail Heaven Outfitters was leasing the property for hunting operations in 2013 at the time Mr. Gordon's grandfather passed away. Mr. Gordon responded "yes." Mr. Harned asked Mr. Gordon if, to his knowledge, Whitetail Heaven Outfitters was leasing the property for hunting operations prior to his grandfather passing away in 2013. Mr. Gordon replied that they were leasing the property and that he did not know Whitetail Heaven Outfitters existed, but through his grandfather. He added that is how he learned of Whitetail Heaven Outfitters before 2013. Mr. Harned asked Mr. Gordon if Whitetail Heaven Outfitters had leased and used the property for hunting operations each year since his grandfather's passing in 2013. Mr. Gordon replied "yes." Mr. Harned asked if Whitetail Heaven Outfitters paid to lease the property for its hunting operations. Mr. Gordon replied "yes." Mr. Harned asked if that property was 7418 Old Dry Branch Rd., in Fayette County. Mr. Gordon responded "yes."

Mr. Sam Burton, 1580 Beaumont Rd., Nicholasville, KY was the next witness. Mr. Harned asked him if he was related to David Gordon, the gentleman who just spoke. Mr. Burton replied that he is Mr. Gordon's step-father. Mr. Harned asked Mr. Burton if he was familiar with 7418 Old Dry Branch Rd. Mr. Burton replied "yes." Mr. Harned asked Mr. Burton if he was married to Mr. Gordon's mother and he replied "yes." Mr. Harned asked Mr. Burton if he knew Mr. Gordon's grandfather before he passed away in 2013. Mr. Burton replied, "yes, I did." Mr. Harned asked Mr. Burton if he was familiar with Whitetail Heaven Outfitters leasing and using the property at 7418 Old Dry Branch Rd., both before and after David's grandfather passed away in 2013. Mr. Burton replied "yes." Mr. Harned asked Mr. Burton if he had personal knowledge that Whitetail Heaven Outfitters used it before 2013. Mr. Burton replied that they were leasing it. Mr. Harned asked Mr. Burton if he had ever talked to, or been approached by any neighbors in the Dry Branch Rd. about Whitetail Heaven Outfitters and their use of the property. Mr. Burton stated that he had, by phone, and that they were trying to lease the property, but Mr. Burton would not take the lease from Whitetail Heaven Outfitters as they had leased it for approximately ten or twelve years, and give it to the neighbors. Mr. Harned asked if Mr. Burton knew who the neighbors that were interested in leasing the property were and if he could name them. Mr. Burton replied "yes." Mr. Harned asked if he could name any of them and Mr. Burton replied "Falcone and Todd Jenkins."

Mr. Harned asked if Mr. Falcone owns the property that borders the property near Jacks Creek Pike. Mr. Burton replied that Mr. Falcone's property is to the north of the property on Jacks Creek Pike. Mr. Harned asked if Mr. Falcone was one of the neighbors that called Mr. Burton and asked to take the lease away from Whitetail Heaven Outfitters. Mr. Burton stated that he presumed that he did.

Mr. Tevis McCauley, 2047 Hall Rd., Nicholasville KY was the next witness. Mr. Harned asked Mr. McCauley if he was the proprietor of Whitetail Heaven Outfitters. Mr. McCauley replied "yes sir." Mr. Harned asked him how long he had been the proprietor and operated Whitetail Heaven Outfitters. Mr. McCauley replied, "over twenty years; since 2002, twenty-one years." Mr. Harned named the six properties that were being discussed and asked Mr. McCauley if he was familiar with them. Mr. McCauley replied that he was very familiar with all of them. Mr. Harned asked him if he was present in Council Chambers for the testimonies of Mr. Kines, Mr. Gordon and Mr. Burton, regarding 3508 Crawley Ln. and 7418 Old Dry Branch Rd. Mr. McCauley stated that he was. Mr. Harned asked Mr. McCauley if he would agree with Mr. Kines that Whitetail Heaven Outfitters does not use 3508 Crawley Ln. for hunting activities, but has used other properties of Mr. Kines with his agreement and permission for hunting services dating back, well prior to 2016. Mr. McCauley replied "yes, that is true."

Mr. Harned asked Mr. McCauley if he would agree with Mr. Gordon's and Mr. Burton's testimony that Whitetail Heaven Outfitters has leased and used 7418 Old Dry Branch Rd. since well before 2016. Mr. McCauley stated, "that is correct." Mr. Harned asked if it was also true that Whitetail Heaven Outfitters leased and used 5701 Jacks Creek Pike, 5725 Jacks Creek Pike and 5751 Jacks Creek Pike owned by McGregor Enterprises since before 2016. Mr. McCauley stated that was correct. Mr. Harned asked how long before 2016 could Mr. McCauley recollect Whitetail Heaven Outfitters engaging in hunting activities on the McGregor properties prior to 2016. Mr. McCauley replied that it was in the early 2000's at least. He added they (Whitetail Heaven Outfitters), had been leasing from the McGregors for a very long time.

Mr. Harned directed the Board's attention to the first page of the exhibit packet he distributed earlier, referred to in the record as Exhibit 1. He asked Mr. McCauley to review that document and explain what that document was. Mr. McCauley replied that it was a lease agreement that was entered into in 2008 by Mr. Al McGregor, for the properties that had been discussed on Jacks Creek Pike. He added that was the oldest document he could come up with, but he felt that he had rented the land prior to that time as well. Mr. Harned asked if it was exemplary of Mr. McCauley's testimony that his use of the McGregor Enterprises properties located at 5701 Jacks Creek Pike, 5725 Jacks Creek Pike and 5751 Jacks Creek Pike well predated 2016. Mr. McCauley stated that was correct.

Mr. Joe Morris, 2075 John Watts Rd., Nicholasville, KY was the next witness. Mr. Harned asked Mr. Morris if he was affiliated with Whitetail Heaven Outfitters. Mr. Morris replied that he was. Mr. Harned asked how he was affiliated with the company. Mr. Morris replied that he was a hunting guide. Mr. Harned asked him if he had been present for the prior testimonies about Whitetail Heaven Outfitters' lease and use of the six properties being discussed. Mr. Morris stated that was true. Mr. Harned asked him if he was familiar with the McGregor properties, 5701 Jacks Creek Pike, 5725 Jacks Creek Pike and 5751 Jacks Creek Pike. Mr. Morris said that he was. Mr. Harned asked him if he had taken Whitetail clients hunting on the McGregor Enterprises properties since prior to 2016. Mr. Morris replied that he had. Mr. Harned asked him if he could recall how long before 2016 he took clients hunting on those McGregor Enterprises properties. Mr. Morris replied that it was in the early 2000's; several years before 2016. Mr. Harned asked Mr. Morris if, based on his personal knowledge, was that use for hunting activities by Whitetail Heaven been consistent year after year, since that timeframe, up to present. Mr. Morris replied "yes sir."

Mr. Rick Abbott, 20 Craig St., Plymouth, MA. Mr. Harned asked Mr. Abbott if he was affiliated with Whitetail Heaven Outfitters. Mr. Abbott responded "yes." Mr. Harned asked him how he was affiliated. Mr. Abbott stated that he was a hunting guide. Mr. Harned asked Mr. Abbott if he had been present for all of the prior testimony about Whitetail Heaven Outfitters' use and lease of the properties being discussed. Mr. Abbott stated that was correct. Mr. Harned asked him if he knew what he was referring to when he said the McGregor Properties. Mr. Abbott replied "yes sir." Mr. Harned asked Mr. Abbott if he had taken Whitetail clients hunting on 5701, 5725 and 5751 Jacks Creek Pike, to which Mr. Abbott replied "yes sir." Mr. Harned asked whether, based on his personal knowledge that activity dated back to prior to 2016. Mr. Abbott replied "yes sir." Mr. Harned asked him what his recollection of how long prior to 2016 that activity had been on-going. Mr. Abbott replied that he had been with Whitetail Heaven Outfitters since approximately the late fall of 2009. Mr. Harned asked if since that timeframe, late 2009, Whitetail Heaven Outfitters had consistently been using those McGregor Enterprises properties for their operation. Mr. Abbott replied "yes sir."

Mr. James Mulcahy, 3804 Brookdale Circle, Lexington KY was the next witness. Mr. Harned asked Mr. Mulcahy if he was affiliated with Whitetail Heaven Outfitters. He replied that he was an employee, but not a hunting guide. Mr. Harned asked him what his role or title. Mr. Mulcahy replied that he was involved with the bookkeeping and administrative side. Mr. Harned asked him if he ever interfaced with clients. Mr. Mulcahy replied that he did; "tons of them." Mr. Harned asked Mr. Mulcahy if he had been present for the testimonies about the properties at issue in these appeals. Mr. Mulcahy replied that he had been present. Mr. Harned asked him if he was familiar with the McGregor Enterprises properties. He replied, "yes, I am." Mr. Harned asked him if he was aware, based on his personal knowledge, of Whitetail Heaven Outfitters clients hunting on the McGregor Enterprises Properties dating back prior to 2016. Mr. Mulcahy replied "yes sir."

Mr. Harned stated that there would not be any more of the same testimony, and there would not be anyone that could say that Whitetail Heaven Outfitters was not conducting those activities prior to 2015. He opined that the testimony was incontrovertible that they were. Mr. Harned commented that gunfire from the

Crawley Lane property was mentioned at the prior month's Board of Adjustment meeting, from which these applications were granted a one-month postponement. He added that after that meeting he learned there was a lot of confusion about what goes on in that area. Mr. Harned stated that Mr. Kines is permitted to fire his own rifle on his own property, and given the testimony from Mr. Kines, stating that Whitetail Heaven Outfitters does not use his property at 3508 Crawley Lane, as was heard today, Mr. Harned opined that is what happened in this instance.

Mr. Harned requested that the Notice of Violation as to 3508 Crawley Lane be rescinded, because the testimony today is uncontroverted that the activities in question have not been engaged in at 3508 Crawley Lane. He added that having gone over the appellants' two legal grounds, the two interpretation grounds for appeal with respect to the remaining properties, he requested that each of the Notices of Violations be rescinded or set aside based on those two legal grounds, the interpretive grounds. Mr. Harned requested that the notices be rescinded, set aside, dismissed for 7418 Old Dry Branch Rd. and what has been referred to as the McGregor Enterprises properties, 5701, 5725 and 5751 Jacks Creek Pike, based on the third ground for the appeal which is the activities at issue, that Whitetail Heaven Outfitters has engaged in on those properties has been continuously on-going and pre-dates the 2016 adoption of the definition of Recreational Outfitter and its inclusion in Article 8-1(e)(26) as a prohibited use in the Agricultural Rural zone.

Board comments and questions – Mr. Gross stated there had been a lot of testimony and it may be helpful to go through the applications quickly. He asked Mr. Harned if he was stating that the evidence provided for 5701, 5725 & 5751 Jacks Creek Pike was that they were all legal non-conforming, pre-existing uses. Mr. Harned indicated that to be correct and added those properties were what he had referred to as the McGregor Enterprises and the activities in question have been continuously on-going on those properties since well prior to 2016.

Mr. Gross asked if that also included 7418 Old Dry Branch Rd. Mr. Harned stated that was correct. Mr. Gross asked Mr. Harned if it was his position that 3508 Crawley Lane had not been used for hunting activities. Mr. Harned stated that was correct and added that Mr. Kines attested to that and Whitetail Heaven Outfitters confirmed it.

Mr. Gross asked if it was correct that hunting activities by Whitetail Heaven Outfitters on 5837 Jacks Creek Pike may have started after 2016. Mr. Harned replied that if it occurred, then yes, there is no argument that any activity to the extent that it was engaged in was engaged in prior to 2016; however, the first two arguments for appeal still pertain to that property.

Ms. Carter stated that legal representation for the community would speak next and that each member of the audience who wished to provide additional information would be given up to three minutes each to do so. She asked that anyone wishing to speak line up in an orderly fashion.

Community representation – Mr. Jon Woodall, attorney, on behalf of several land owners in the Jacks Creek Pike corridor, distributed information to the Board members and Staff for the record. He briefly explained how the business of guiding and hunting outfitting works. Mr. Woodall stated that his clients do not have a problem with guiding and hunting outfitting when done in the right context. He opined why businesses such as Whitetail Heaven Outfitters are interested in conducting their business activities on the subject properties. Mr. Woodall stated that on October 15, 2007, Whitetail Heaven Outfitters filed its Articles of Organization to become a Limited Liability Company (LLC) with the Secretary of State of Kentucky, which is public record. On November 1, 2008 they were administratively dissolved; no longer a viable Limited Liability Company in the Commonwealth of Kentucky. He added that they were not reinstated by the Secretary of State until April 27, 2021, which meant that during that thirteen year period including 2016, the Commonwealth of Kentucky did not recognize Whitetail Heaven Outfitters as a viable entity in the state of Kentucky. Mr. Woodall remarked that after being reinstated in 2021, Whitetail Heaven Outfitters was dissolved again in October of 2022. He added that they have not been reinstated to date.

Mr. Woodall stated that Fayette County requires anyone wanting to do business in this county to be registered. However, an Open Records Request revealed that Whitetail Heaven Outfitters has never been registered to do business in Fayette County by that name or any other name. He added that neither Mr. McCauley, nor Whitetail Heaven Outfitters have ever paid taxes for any guided services in Fayette County. Mr. Woodall stated that in order to be a non-conforming use that use must be continuing. He stated that

an Open Records Request with the Department of Fish and Wildlife Resources using both Mr. McCauley's name and that of Whitetail Heaven Outfitters, revealed that Whitetail Heaven Outfitters had registered for guide services in January of 2007 and in January of 2008, but no registration until 2012, 2013 and 2014. He added that they did not register in 2015, they did register in 2016, but did not in 2017. Records showed that they did register for a guide license in 2018 through 2022. Mr. Woodall clarified that the Department of Fish and Wildlife Resources requires this registration and charges a fee for the license in order to regulate who is hunting. He added that not only was Whitetail Heaven Outfitters not a viable entity, they did not pay taxes here, they were not registered, and there is a break up in the registration sequence of when their guides were lawful. Mr. Woodall stated that there was no way to sustain non-conforming use status when you have not been a viable business with the state or locally, and are not one now.

Mr. Woodall referred to the copy of the lease which had previously been distributed by the appellant, stating it was a lease dated November 4, 2008, at which time Whitetail Heaven Outfitters was not a viable entity. He added that the lease was entered into by Mr. McCauley in 2008. Mr. Woodall mentioned there being some confusion as to who the appellant was; whether it was Mr. McCauley or Whitetail Heaven Outfitters. He further elaborated on how the Zoning Ordinance is written regarding what is and is not allowed concerning hunting and commercial outfitting.

#### Community opposition

Ms. Karen Mundy, 4413 Ravens Crest Lane, Lexington, KY, stated that she lives in the neighborhood that is contiguous to the McGregor properties. She expressed her concerns and those of some of her neighbors, with the hunting outfitters activities that have been taking place in that area, noting dangers to the residents, children and pets. Ms. Mundy mentioned the fact that Whitetail Heaven Outfitters is not licensed in Fayette County, nor are they paying taxes.

Mr. Richard Shadwick, 5421 Jacks Creek Pike, Lexington, KY, stated he is in agreement with Ms. Mundy that the Jacks Creek area is not the area it was in 2002. He also expressed concern with employees of Whitetail Heaven Outfitters trespassing on his property by bringing hunters with guns for the purpose of turkey hunting.

Mr. Matt Falcone, 6169 Jacks Creek Pike, Lexington, KY, stated that he has owned his property for approximately fifteen years and that he has had numerous experiences with Whitetail Heaven Outfitters, none of which have been positive. He expressed his concern with the hunters that have been brought in by Whitetail Heaven Outfitters, and they were not familiar with their surroundings. Mr. Falcone stated that he and his bird dogs have been threatened in the past by some of the Whitetail Heaven Outfitters guides. He remarked that he had used hunting outfitters in the past, which he opined were reputable and unlike his experiences with Whitetail Heaven Outfitters.

Mr. Craig Handman, representing 6174 Jacks Creek Pike, Lexington, KY, explained where this property is in relation to where the hunting activities have been taking place. He stated there are approximately 200 head of horses and thirty or so employees that are in the fields starting around 7:00 a.m. every day. Mr. Handman stated that the deer stands can be seen from this property during certain times of the year, but when the foliage comes in, they cannot see the deer stands. He expressed his concern for protecting the employees and the horses from the stray rounds of bullets.

Ms. Elizabeth Crane, 6301 Old Jacks Creek Rd., Lexington, KY, explained the location of her property in relation to the subject properties. She stated that a neighbor was walking on her own property and found a deer stand there that she was unaware of and did not give permission for. Ms. Crane stated that recently there has been non-stop shooting in the area. She expressed her concern with people that are not familiar with the area or the property lines, hunting there.

Mr. Matt Walker, 4105 Kentucky River Parkway, Lexington, KY, stated he and his wife had moved into the subject area a couple of years ago. He explained that shortly after they moved into their home, he and his wife were out for a drive and it happened to be during hunting season. Mr. Walker stated that when they came to a junction in the road, at Dry Branch Road. and Old Jacks Creek, they were met by outfitters who told them that they could not proceed down Dry Branch Road. He added that the gentleman who met them was very aggressive, very angry and carrying a firearm. Mr. Walker did not insinuate that the outfitter was aggressive with the firearm; however, it was made clear to them that they could not proceed, but must turn

around on a public road because the outfitters stated they had hunters out there. He expressed his concern and displeasure with a business operating against the law and against the Zoning Ordinance.

Ms. Carolyn Singh, 4109 Kentucky River Parkway, Lexington, KY, asked that everyone who was opposed to the hunting activities being conducted by Whitetail Heaven Outfitters on the subject properties please stand. Ms. Carter advised Ms. Singh that she needed to speak to the Board members. Ms. Singh stated that the people present were her neighbors and she didn't want to see any of her neighbors get hurt, and that "these people," indicating Whitetail Heaven Outfitters, do not behave like an honorable hunter would behave.

Appellant rebuttal – Mr. Harned thanked the members of the community for their feedback. He addressed some of the arguments and statements made by Mr. Woodall in his presentation, as well as some of the statements made by the community members who had expressed their concerns. Mr. Harned reviewed the appellant's three grounds for appeal and remarked that some of the points made did not address the ground for appeal. He asked Mr. McCauley to step back to the podium.

Mr. Harned addressed the comments made about bullets flying around certain properties, people crossing property lines and being confrontational with some of the folks who spoke, and also some comments about people coming from out of town and not knowing where the property lines are and being misinformed about where they were about certain properties. He asked Mr. McCauley if there was ever a time when his clients ever move on a property or are hunting without a local guide. Mr. McCauley replied, "Absolutely not. All of our hunting is done from tree stands, so there is no walking around or anything like that, and very rarely are you shooting; when you shoot at a whitetail deer, generally you shoot one time and it's over. Now I'm sure they hear a lot of shooting when dove season and squirrel season and rabbit season and various others seasons that do extend the entire length of the fall, but the rifle season in the State of Kentucky is only fifteen days long." Mr. Harned asked Mr. McCauley if his group has had interactions with Mr. Falcone over time. Mr. McCauley replied that he personally had not and that he really didn't know Mr. Falcone, but he knew that he had had a lot of complaints from where Mr. Falcone is a neighboring property land owner and he does drive up and down the road a lot and shoots a lot of guns and "hoot and holler" and do various things to try to make it so that their hunters don't have success. Mr. Harned thanked Mr. McCauley.

Mr. Harned referred to Exhibit 3 in the record, which was also in the appellant's packet. He stated this was a list of proposed Findings of Fact pertinent to the appeals, and Conclusion of Law, due to the legal basis for the appeals in this matter. Mr. Harned thanked the Board for their attention.

\*Note – Ms. Wade asked Ms. Carter for five minutes so that Staff could convene amongst themselves to discuss the points that they would like to present to the Board. Ms. Carter stated that the Board would take a brief five minute recess. The Board reconvened approximately seven minutes later.

Staff rebuttal – Ms. Jennings addressed the two properties that the appellant stated were not being utilized for hunting or outfitting, which were 3508 Crawley Lane and 5837 Jacks Creek Pike. She added that because of that, the appellant is able to withdraw their two administrative appeal applications because the notices that were sent to those two properties were just advisory notices, not formal Notices of Violation. If the appellant withdrew those two applications, the Board would not be required to make a decision for those two properties.

Board comments and questions – Ms. Carter asked Ms. Jennings to clarify her statements about the property at 5837 Jacks Creek Pike. There was further discussion. Ms. Jennings stated that for the sake of clarification, the appellant is stating that hunting was taking place on 5837 Jacks Creek Pike, but not prior to 2016 when it was listed as a prohibited use.

Ms. Carter stated that is correct, according to her notes, and she asked Mr. Harned if he was using the "prior to 2016" argument about that particular case. Mr. Harned replied that there were three grounds for appeal; the first two being the interpretation and application of the Zoning Ordinance.

Ms. Wade stated those would be addressed. Ms. Goderwis added that what was in question was on which properties the activity was not occurring on. Mr. Harned responded that he did not want to withdraw any of the appeals because the appeals stand on the interpretation and application of the Zoning Ordinance with respect to all of the properties. There was further discussion.

Mr. Gross stated that he would like some clarification from Staff on advisory notices and appeals.

Ms. Jones stated that the situation is confusing and the circumstances have made it more confusing. She explained the differences between an advisory notice and a Notice of Violation. Ms. Jones pointed out that an advisory notice was a request for additional information as there were multiple properties on which these activities were taking place. She added that no additional information was given by the appellant, which made it more difficult to ascertain exactly what the circumstances were. She further explained.

Staff rebuttal - Ms. Jennings addressed the lease that was presented as an exhibit by the applicant. She stated that it was made with the property owner at the time to Tevis McCauley, not specifically to Whitetail Heaven Outfitters, and line twelve of the lease states that the premises are to be occupied only as a residence. Ms. Jennings stated that Staff understood the lease to be a residential lease between the property owner and Mr. McCauley.

Ms. Jennings referred to Mr. Woodall's comments regarding Whitetail Heaven Outfitters, LLC and that it was dissolved. She submitted into record a print out from the Secretary of State's website with the dates of when the Articles of Organization were established in 2007 and then were administratively dissolved in 2008 and were not reinstated until 2021. Ms. Jennings next presented a letter from Jeff McGregor of McGregor Enterprises, to Whitetail Heaven Outfitters, on which their personal attorney, Nick Wallingford was copied. The letter was dated November 21, 2022 and states that Whitetail Heaven Outfitters is given notice that they are prohibited from guided hunting on all of the McGregor properties. She submitted it into the record as well.

Ms. Jennings stated that the Department of Law would be addressing statements made by Mr. Harned regarding the uses and the interpretations of the Zoning Ordinance.

Ms. Jones addressed the Board regarding Mr. Harned's argument that the Zoning Ordinance is not specific enough and does not include hunting. She reminded the Board that every section of the Zoning Ordinance does not include its own definitional section. Ms. Jones added that it is not uncommon when reading a section of the Zoning Ordinance, to need to refer back to the definition section in order to know exactly what that means. She added that doesn't mean the Zoning Ordinance is vague or overly broad, or wide open to interpretation, it just means that you can't put everything in every section. Ms. Jones then referred to Article 8 of the Zoning Ordinance, where activities that are prohibited in the Agricultural Rural zone are listed. She read Section 26 which listed those activities, which included recreational outfitters. Ms. Jones added that, as hunting was not mentioned, it was necessary to look up recreational outfitters in Article 1-11, the definition section. She read the definition of recreational outfitters which included among other things, guide services. Ms. Jones elaborated further.

Board question – Mr. Gross asked Ms. Jones if he understood correctly that commercial recreation is prohibited in the Agricultural Rural zone. Ms. Jones replied that commercial recreational facilities are prohibited in the Agricultural Rural zone, and that the goal of the 2016 text amendment which had been previously discussed, was to allow certain types of activities in the Agricultural Rural zone that promoted the agricultural uses and agricultural production in the zone. It was also designed to limit other ones that would be more commercial in nature rather than agricultural.

Ms. Jones addressed the argument concerning a non-conforming use. She stated that the Board heard testimony that the subject use was in place going on sometime in the early 2000's. However, the lease that was submitted, shows that it is a lease for property at 5725 Jacks Creek Pike between McGregor and McCauley, month to month for a rental rate of \$1200.00, specifically to be occupied only as a residence.

Ms. Jones stated that Staff had asked, early on in the investigation, for leases and information about the claims of activities occurring on the subject properties, but did not receive anything; not even a copy of the submitted lease. She explained that a non-conforming use is a use under Article 4 in the Zoning Ordinance that is something that was legal and then the government changed it by Ordinance, which was done in 2016. That change makes a use that was legal prior to that change, now illegal. However, there are provisions in the Zoning Ordinance that state if a use is on-going in the same manner, the change in the Zoning Ordinance will allow that use to continue, so long as you do not stop doing it and create a gap; so long as it was legal to begin with; so long as you are not expanding the use or broadening the use; if it involves a structure, you are not creating a bigger structure. If you do any of those things, your status of



having what is referred to as a legal non-conforming use, no longer exists. She asked the Board to think about the testimony heard and evaluate what she had just explained, as it is significant to the appellant's argument. She continued with her rebuttal of the appellant's presentation. Ms. Jones added that the Law Department felt it best to respond to the legal arguments rather than ask Staff to respond to them.

Appellant request – Mr. Harned requested an opportunity to briefly respond to Ms. Jones's response to the legal arguments.

Board comments - Ms. Carter opined that would be out of order at this time. Mr. Gross commented that it may be beneficial to allow counsel to do a short rebuttal on those legal issues.

Appellant rebuttal - Mr. Harned briefly addressed some of the points Ms. Jones made in her presentation.

Board questions and comments – Ms. Carter asked Mr. Harned if he was contesting, or would like to speak to the fact that the non-conforming use was expanded. Mr. Harned asked for clarification of in what way the use was expanded. There was further discussion. Ms. Carter closed the floor to public comment.

Mr. Gross asked if the Board could rely upon the common meaning of the term "outfitter" to be able to read into it that hunting is included as one of the activities listed in the definition of "outfitter". Ms. Jones replied that it was her understanding that was the reason it was defined very broadly in the Zoning Ordinance, and terms like "such as" were used rather than "limited to" or "only." There was further discussion.

Mr. Gross stated that he was comfortable with interpreting recreational outfitters to include the term "hunting." There was further discussion.

Action – A motion was made by Mr. Gross, seconded by Ms. Plumlee and carried 7-0 to **disapprove PLN-BOA-23-00016: WHITETAIL HEAVEN OUTFITTERS** – request for an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 5837 Jacks Creek Pike, based upon the reasons provided by Staff and the testimonies heard today.

Action – A motion was made by Mr. Gross, seconded by Mr. Walker and carried 7-0 to **remand PLN-BOA-23-00017: WHITETAIL HEAVEN OUTFITTERS** – request for an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 3508 Crawley Lane, back to the Division of Building Inspection for further review in light of the evidence and testimony brought to the Board today regarding the fact that no commercial guided hunting was occurring on this property.

Action – A motion was made by Ms. Plumlee, seconded by Ms. Tucker and carried 6-1 (Gross opposed) to **disapprove PLN-BOA-23-00006: WHITETAIL HEAVEN OUTFITTERS** – request for an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 5701 Jacks Creek Pike, based on the three reasons provided by Staff as stated and the testimonies heard today.

Action – A motion was made by Ms. Plumlee, seconded by Ms. Tucker and carried 6-1 (Gross opposed) to **disapprove PLN-BOA-23-00014: WHITETAIL HEAVEN OUTFITTERS** – request for an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 5725 Jacks Creek Pike, based on the three reasons provided by Staff as stated and the testimonies heard today.

Action – A motion was made by Ms. Plumlee, seconded by Ms. Tucker and carried 6-1 (Gross opposed) to **disapprove PLN-BOA-23-00015: WHITETAIL HEAVEN OUTFITTERS** – request for an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 5751 Jacks Creek Pike, based on the three reasons provided by Staff as stated and the testimonies heard today.

Action – A motion was made by Ms. Plumlee, seconded by Ms. Tucker and carried 6-1 (Gross opposed) to **disapprove PLN-BOA-23-00018: WHITETAIL HEAVEN OUTFITTERS** – request for an administrative appeal to contest the issuance of Notices of Zoning Violations by the Division of Building Inspection for recreational outfitters (commercial guided hunting) in an Agricultural Rural (A-R) zone, on property located at 7418 Old Dry Branch Road, based on the three reasons provided by Staff as stated and the testimonies heard today.

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

**A. Amendment to findings of fact in PLN-BOA-23-00013: THE PADDOCK.**

Ms. Carter stated that upon review of the minutes, it was discovered that some of the findings for **PLN-BOA-23-00013: THE PADDOCK** needed to be amended.

The motion as made by Mr. Needham at the March 13, 2023 meeting and reflected in the minutes from that meeting read as follows:

Action – A motion was made by Mr. Needham, seconded by Mr. Clarke and carried 7-0, to **approve PLN-BOA-23-00013: THE PADDOCK** – request for a conditional use permit for a cocktail lounge with indoor and outdoor live entertainment, and a variance to reduce the required setback from a residential zone from one-hundred (100) feet to thirty-five (35) feet within the defined Infill and Redevelopment Area in a Neighborhood Business (B-1) zone, on property located at 319 S. Limestone, based partially on Staff's recommendation as well as the information presented, the findings below and subject to the conditions as listed:

The Board Recommended: **Approval of the conditional use for a cocktail lounge with live outdoor entertainment**, for the following reasons:

- a. The proposed cocktail lounge should not adversely affect the subject property or surrounding properties as the subject property has functioned in a commercial capacity throughout much of its history. The general vicinity features a mix of commercial, residential and professional healthcare uses typical of a downtown area.
- b. All necessary public facilities and services are available and adequate for the proposed use.

The Board Recommended: **Approval of the variance for a cocktail lounge**, for the following reasons:

- a. Granting the variance should not adversely affect the subject or surrounding properties, nor alter the character of the general vicinity, as the area features a mix of commercial, residential, and university-related uses.
- b. Live entertainment will be limited to the interior of the cocktail lounge and located at least 90 feet from the nearest residential zone. Use of the courtyard for outdoor seating and gathering with live entertainment should not create a nuisance.
- c. The granting of this variance will not allow an unreasonable circumvention of the requirements of the Zoning Ordinance.

These recommendations of approval were made subject to the following conditions:

1. The cocktail lounge shall be operated in accordance with the submitted application materials and site plan, including the amended justification statement.
2. Hours of operation shall be limited to 12:00 P.M. – 2:00 A.M., Monday-Sunday.
3. Interior areas in which live entertainment is provided shall be sound-proofed to the maximum extent feasible by using existing technology, with noise or other emissions not creating a nuisance to the surrounding neighborhood.
4. All necessary permits including a Zoning Compliance Permit and a Certificate of Occupancy shall be obtained from the Divisions of Planning and Building Inspection prior to expansion of the use.
5. Outdoor live entertainment shall be limited to acoustic performances and DJs. Amplification shall be limited to that of The Paddock's permanent sound system including an electronic governor mechanism. Outdoor live entertainment shall not include additional speakers or other amplification.
6. Speakers are oriented toward the center of the property, or facing the rear of the building.

Action – A motion was made by Mr. Needham, seconded by Mr. Clarke and carried 7-0 to **amend** Part B of the Board's findings of fact which the Board issued in its support of approval for a variance of a cocktail lounge at their hearing on March 13, 2023 to reflect that the Board approved the variance that "live entertainment will be over one hundred feet (100') from the nearest residential structure; use of the courtyard for outdoor seating and gathering with live entertainment should not create a nuisance." All other findings of fact as well as conditions for approval that the Board issued in the matter of **PLN-BOA-23-00013: THE PADDOCK** on March 13, 2023 remain unchanged.

Applicant representation – Mr. Jon Woodall, attorney for the applicant, indicated that the applicant was in agreement with the amendment.

The final approved findings of fact and conditions for approval for The Paddock shall read as follows:

The Board Recommended: **Approval of the conditional use for a cocktail lounge with live outdoor entertainment**, for the following reasons:

- a. The proposed cocktail lounge should not adversely affect the subject property or surrounding properties as the subject property has functioned in a commercial capacity throughout much of its history. The general vicinity features a mix of commercial, residential and professional healthcare uses typical of a downtown area.
- b. All necessary public facilities and services are available and adequate for the proposed use.

The Board Recommended: **Approval of the variance for a cocktail lounge**, for the following reasons:

- a. Granting the variance should not adversely affect the subject or surrounding properties, nor alter the character of the general vicinity, as the area features a mix of commercial, residential, and university-related uses.
- b. Live entertainment will be located over 100 feet (100') from the nearest residential structure. Use of the courtyard for outdoor seating and gathering with live entertainment should not create a nuisance.
- c. The granting of this variance will not allow an unreasonable circumvention of the requirements of the Zoning Ordinance.

These recommendations of approval were made subject to the following conditions:

1. The cocktail lounge shall be operated in accordance with the submitted application materials and site plan, including the amended justification statement.
2. Hours of operation shall be limited to 12:00 P.M. – 2:00 A.M., Monday-Sunday.
3. Interior areas in which live entertainment is provided shall be sound-proofed to the maximum extent feasible by using existing technology, with noise or other emissions not creating a nuisance to the surrounding neighborhood.
4. All necessary permits including a Zoning Compliance Permit and a Certificate of Occupancy shall be obtained from the Divisions of Planning and Building Inspection prior to expansion of the use.
6. Outdoor live entertainment shall be limited to acoustic performances and DJs. Amplification shall be limited to that of The Paddock's permanent sound system including an electronic governor mechanism. Outdoor live entertainment shall not include additional speakers or other amplification.
7. Speakers are oriented toward the center of the property, or facing the rear of the building.

**VI. STAFF ITEMS** - The Chair will announce that any items a Staff member wishes to present will be heard at this time.

**VII. NEXT MEETING DATE** - The Chair will announce that the next meeting date will be May 8, 2023 at 1:30 p.m. in Council Chambers, 2<sup>nd</sup> Floor, 200 E. Main St., Lexington, KY 40507.

**VIII. ADJOURNMENT** – As there was no further business, Chair Carter declared the meeting adjourned at 6:13 p.m.

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Raquel Carter, Chair

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Harry Clarke, Secretary

The media and public may view the hearing on LexTV Spectrum channel 185, MetroNet channel 3, or via live stream at the following link: [http://fucg.granicus.com/MediaPlayer.php?publish\\_id=12](http://fucg.granicus.com/MediaPlayer.php?publish_id=12)