

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

March 27, 2009

- I. **ATTENDANCE** - The Chairman called the meeting to order at 1:02 p.m. in the Council Chambers, 200 East Main Street, on March 27, 2009. Members present were Chairman Peter Brown, Barry Stumbo, Louis Stout, Kathryn Moore, Janice Meyer and James Griggs. Member Carolyn Edwards was absent. Others present were Jim Hume, of the Division of Building Inspection; Barry Brock, of the Division of Engineering; Jim Gallimore, of the Division of Traffic Engineering; and Rochelle Boland, of the Department of Law. Staff members in attendance were Jim Marx, Bill Sallee and Wanda Howard.

At this point, Chairman Brown asked all those present who would be speaking or offering testimony to stand, raise their right hand and be sworn.

- II. **APPROVAL OF MINUTES** - The Chairman announced that there were no minutes of past meetings available for consideration at this time.

III. **PUBLIC HEARING ON ZONING APPEALS**

- A. **Sounding The Agenda** - In order to expedite completion of agenda items, the Chairman sounded the agenda in regard to any postponements, withdrawals, and items requiring no discussion.

1. **Postponement or Withdrawal of any Scheduled Business Item** - The Chairman announced that any person having an appeal or other business before the Board may request postponement or withdrawal of such at this time.

- a. **C-2009-14: JOY & ASSOCIATES, INC.** - appeals for a conditional use permit to construct and operate a drive-through facility for a proposed pharmacy in the Downtown Business (B-2) zone, on properties located at 366, 370, 376 and 400 East Main Street. (Council District 3)

The Staff Recommended: Postponement, for the following reasons:

1. The staff has requested that the appellant prepare an amended site plan that better addresses traffic safety issues, as well as the need to increase the urban character associated with the proposed development.
2. With the possible elimination of the drive aisle proposed along the north side of the building, and the shifting of the building to front on East Main Street, there should be an opportunity to integrate the proposed building and parking lot in a manner that better serves this gateway location. This will likely require the use of a landscape buffer, possibly to include decorative walls, fencing and plant material, which softens the appearance of the parking lot and defines the gateway in a positive way. A postponement will allow sufficient time to develop a preliminary landscaping plan that focuses on these gateway features.
3. The proposed development of this site involves the provision of eight parking spaces, and related improvements, that actually encroach into the existing right-of-way of Water Street. Given the level of vehicle activity that is anticipated on Water Street, the provision of these spaces and any other encroachments may not be advisable.

Representation – Mr. Nick Nicholson was present representing the applicant and requested a one-month postponement of this appeal, until the April 24 meeting. He said they were working with the staff in order to resolve the traffic-related issues regarding the proposed CVS pharmacy; and that an amended site plan would be submitted to better address those issues.

Chairman Brown requested that Mr. Nicholson's client provide three-dimensional drawings for inclusion in the Board's packet mailing (prior to next month's meeting), as well as a model, if available.

Mr. Nicholson agreed to do so. Subsequently, the Chairman determined that there was no one present who came to offer testimony, or who opposed the requested postponement.

Action – A motion was made by Mr. Stout, seconded by Mr. Stumbo, and carried unanimously

(Edwards absent) to postpone **C-2009-14: JOY & ASSOCIATES, INC.** until the April 24 meeting.

- b. **CV-2009-9: BROADWAY CHRISTIAN CHURCH** - appeals for a conditional use permit to expand a church parking lot; and a variance to reduce the width of the required landscape buffer for the parking lot from 5 feet to 0 feet, in a High Density Apartment (R-4) zone, on property located at 179 Saunier Street. (Council District 2)

The Staff Recommended: Approval of the requested Conditional Use Permit, for the following reasons:

1. The addition of two parking spaces to this accessory parking lot should not adversely affect the subject or surrounding properties. A parking lot has existed at this location for many years, and there is sufficient room to install the required landscape buffers for the parking lot along West Second Street. Since there is currently no landscaping along West Second Street, a nonconforming situation will become compliant with the current provisions of Article 18 of the Zoning Ordinance pertaining to landscaping of these spaces.
2. All necessary public services and facilities are available and adequate for the proposed use.

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

1. Construction of the two additional parking spaces shall be done in accordance with an amended site plan indicating the provision of a full landscape buffer in the two islands of open space that will remain on the east and west sides of the parking lot entrance at West Second Street. At the minimum, each island shall have a 3' tall hedge along West Second Street and at least one small to medium sized tree. For the southeasterly island, at the corner of West Second Street and Saunier Street, the 3' hedge shall extend around the corner along Saunier Street up to the first parking space.
2. The array of parking spaces along Saunier Street shall be redesigned to include a 3' or 5' wide landscape buffer that separates the sidewalk from the parking spaces, depending on whether or not the redesign is to include or not include the ability for vehicles to overhang into the landscape area. This buffer shall be designed to merge with and complement the landscaping to be provided in the island at the corner of West Second Street and Saunier Street. The actual construction of the redesigned parking lot shall be done prior to or concurrent with the addition of the two parking spaces.
3. All necessary permits shall be obtained from the Division of Building Inspection prior to any construction or demolition activity taking place.
4. All landscaping shall comply with Article 18 of the Zoning Ordinance and shall be subject to review and approval by the Landscape Examiner with the Division of Building Inspection.
5. The final design of the parking space additions and parking lot revisions shall be subject to review and approval by the Division of Traffic Engineering.
6. A storm water management plan shall be implemented in accordance with the requirements of the adopted Engineering Manuals.

The Staff Recommended: Disapproval of the requested variance, for the following reasons:

- a. Granting the requested variance would result in an unnecessary continuation of a nonconforming situation with regard to required landscaping, and also result in no separation between pedestrian movement along the sidewalk and the existing parking lot, thereby adversely impacting the public health, safety and welfare.
- b. Special circumstances have not been identified by the appellant to warrant a total elimination of the required landscaping for a vehicular use area with 190' of frontage on Saunier Street. Circumstances relating to ensuring the stability of the rebuilt sidewalk do not have a direct bearing on the ability of the appellant to provide landscaping adjacent to the sidewalk on their property.
- c. Strict application of the Zoning Ordinance will require that a full landscape buffer be provided at this location, which is feasible given the 60' width of the parking lot. Any hardship associated with this requirement is due, to a significant degree, to the appellant's decision to pursue construction of an 8' wide sidewalk without the benefit of obtaining a permit from the Division of Building Inspection.

Representation – Mr. Darryl Nunnelley was present on behalf of the Broadway Christian Church to request an additional one-month postponement of the subject appeal, the reasons for which he explained to the Board.

Chairman Brown determined that there was no one present who would be offering testimony, or who opposed the requested postponement.

Action – A motion was made by Ms. Meyer, seconded by Ms. Moore, and carried unanimously (Edwards absent) to postpone **CV-2009-9: BROADWAY CHRISTIAN CHURCH** until the April 24 meeting.

- c. **C-2009-13: DARRIN DARNELL** - appeals for a conditional use permit to construct and operate a horse riding, training and boarding facility in the Agricultural-Rural (A-R) zone, on property located at 1210 Bel-Mar Lane. (Council District 12)

The Staff Recommended: Approval, for the following reasons:

1. Granting the requested conditional use permit should not adversely affect the subject or surrounding properties. The indoor riding and training arena will be centrally located on the property, in compliance with all applicable setback requirements. Noise and traffic disturbances are not anticipated due to the private nature of the horse training activities that will be taking place.
2. All necessary public facilities and services are available and adequate for the proposed use, and sewage treatment and garbage pick-up will be handled privately.

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

1. The riding and training arena shall be built and operated in accordance with the submitted application and site plan.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.
3. A storm water management plan shall be implemented in accordance with the requirements of the adopted Engineering Manuals, subject to acceptance by the Division of Engineering.
4. The privately operated sewage treatment system shall be inspected by the Fayette County Department of Health, and upgraded as necessary to comply with their requirements.
5. The facility shall be used for private horse riding and training purposes only, with no public events such as riding shows.

Mr. Marx related to the Board that a letter of withdrawal was received from the applicant; and that no action regarding this request was necessary.

2. No Discussion Items - The Chairman asked if there are any other agenda items where no discussion is needed...that is, (a) The staff has recommended approval of the appeal and related plan(s), (b) The appellant concurs with the staff's recommendations. Appellant waives oral presentation, but may submit written evidence for the record, (c) No one present objects to the Board acting on the matter at this time without further discussion. For any such item, the Board will proceed to take action.

ABBREVIATED HEARINGS:

- a. **V-2009-19: MANUEL HERNANDEZ** - appeals for a variance to reduce the required side street side yard (along Devonport Drive) from 20 feet to 15 feet in order to construct a building addition in a Neighborhood Business (B-1) zone, on property located at 1400 Alexandria Drive. (Council District 11)

The Staff Recommended: Approval, for the following reasons:

1. Granting the requested variance should not adversely affect the public health, safety or welfare, nor alter the character of the general vicinity, as it will result in a more complementary and functional building addition than what could take place absent a variance.
2. The alignment of the existing building wall along Devonport Drive, and the resulting potential for averaging the yard areas to be provided with an addition, is a special circumstance that adequately justifies the granting of a modest variance at this corner property.
3. Strict application of the Zoning Ordinance would possibly result in an addition of 48' in depth along the 80' deep building, resulting in a 32' by 12'8" open area at the rear, northeast corner of the building. Such an area might appear awkward, given that it would not be part of an

- intentional design, and would have limited functional value.
4. Off-street parking at this location would better meet the design criteria set forth by the Division of Traffic Engineering with the building addition proposed, and the corollary reduction in pavement.

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

1. The proposed addition shall be undertaken in accordance with a revised site plan indicating the elimination of the 9'6" wide one-way traffic aisle along the north side of the building. The revised plan shall also reflect the conversion of that area, and the adjoining ends on both the east and west sides, to parking and/or landscaping, as is determined to be feasible through consultation with the Divisions of Building Inspection and Traffic Engineering.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.

Chairman Brown asked whether or not there were objectors present to the subject appeal. There was no response; therefore, slides of the subject property were not presented.

Representation – Mr. Robert Dever, architect, was present representing the applicant. He noted the letter that was provided by the property owner across the street offering to lease additional parking to the applicant, if required.

Mr. Griggs noted that during his site visit, there was a chain across the rear entrance of the parking lot off Devonport. Mr. Dever responded that the rear entrance has been closed for some time, noting the access on Alexandria that is primarily used. He said he thought the chain was put there to deter the cut-through traffic that was trying to avoid the 4-way stop. Mr. Griggs said, according to the site plan, that access would be opened if the proposed construction was done. Mr. Dever responded that it could be opened, if that was what the Board desired.

Board Questions - Mr. Griggs asked for Traffic Engineer Jim Gallimore's opinion as to whether the rear entrance from Devonport, which is chained and has a post in the middle of it, would be opened if the variance is granted. Mr. Gallimore responded that he didn't realize it was closed, given that the site plan showed Devonport as being functional. He said that if an entrance is closed, it must be formally closed rather than just putting a chain across it and not allowing vehicles ingress/egress from the property; and that the curb and gutter and median would have to be restored if Traffic Engineering were to approve the closure of the entrance. Mr. Gallimore said they didn't have a problem with the closure of the entrance, as long as the other entrance allows full access to the property.

Mr. Stout asked if it would be more advantageous to keep the rear entrance from Devonport closed, with a permit from LFUCG, to prevent cars from taking a shortcut. Mr. Gallimore responded that one of the factors Traffic Engineering would consider is that Solid Waste, which they work closely with, is able to service dumpsters; and that he didn't know whether it would be an inconvenience to Solid Waste for the entrance in question to be closed or not. He noted that since the site plan didn't show the proximity to the 4-way stop, there wasn't sufficient information to make a recommendation regarding the possible closure. Mr. Stout commented that he didn't have a problem with approving the variance request, but he thought it needed to be clear as to whether the back area in question would be chained or not.

Mr. Dever reiterated that the rear entrance has been chained off for a few years; however, it is opened periodically for truck deliveries. He said they would do whatever the Board felt was needed there.

Chairman Brown inquired whether it would not be better to reduce the width of the proposed addition and widen the drive there to make it more user friendly. Mr. Gallimore said he would have no objection to that being done. Referring to the site plan, he said 9½ feet was definitely too narrow for a drive-through lane, particularly when the clearance on the side is minimal because of the existing building. He said they generally like to see a 12-foot-wide lane for proper clearance; but it appeared from the site plan that this was a 10-foot-wide lane with a 2-foot buffer. Mr. Gallimore noted the options the applicant would have, of either making the addition smaller and widening the narrow lane to possibly accommodate a drive-through window at some point; or enlarging the expansion and

formally closing the rear entrance due to the proximity of the 4-way stop, which was somewhat of an operational issue. Discussion followed.

Referring to Condition #1, Chairman Brown noted that the staff was recommending that the traffic aisle under discussion be closed. Mr. Dever responded that they were not opposed to the recommendation or the corresponding condition regarding the closure of the drive parallel with Devonport, considering Traffic Engineering's comment that it was too narrow. He also indicated being in agreement with the two conditions for approval.

Since there were no further questions or discussion, the Chairman called for a motion.

Action – A motion was made by Mr. Stout, seconded by Mr. Stumbo, and carried unanimously (Edwards absent) to approve **V-2009-19: MANUEL HERNANDEZ** (a variance to reduce the required side street side yard [along Devonport Drive] from 20 feet to 15 feet in order to construct a building addition in a Neighborhood Business [B-1] zone, on property located at 1400 Alexandria Drive) for the reasons listed by the staff; subject to the two conditions listed by the staff; and based on the Certificate of Land Use Restriction attached as an appendix to these minutes.

- b. **C-2009-12: ROZENNA BOYD** - appeals for a conditional use permit to establish a child care facility for up to 65 children in a Light Industrial (I-1) zone, on property located at 124 Trade Street. (Council District 12)

The Staff Recommended: Approval, for the following reasons:

1. A child care center at this location should not adversely affect the subject or surrounding properties. The property is surrounded on three sides by commercial uses, and to the rear by a wide area of open space. No new construction will be required. Traffic flow to and from the site will be facilitated by the signalized intersection at Trade Street and Leestown Road.
2. All necessary public services and facilities are available and adequate for the proposed use.

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

1. The child care center shall be established in accordance with the submitted application and site plan, with no more than 65 children to be cared for on Monday through Friday from 6:00 AM to 6:00 PM.
2. An occupancy permit shall be obtained from the Division of Building Inspection prior to opening the facility.
3. The single shrub at the northeast corner of the building, at the building end of the existing hedge, shall be removed to facilitate unimpeded access around the front corner of the building by persons exiting the building during an emergency.
4. The outdoor play area shall be fenced in accordance with the requirements of the Division of Building Inspection.
5. The child care center shall be operated at all times in compliance with the requirements of the Kentucky Cabinet for Health and Family Services.

Chairman Brown asked whether or not there were objectors present to the subject appeal. There was no response; therefore, slides of the subject property were not presented.

Representation – Ms. Rozenna Boyd, appellant, was present and stated that she understood, agreed with and would abide by the conditions for approval.

Mr. Marx noted the recommended 6th condition, based on input from the Division of Fire and Emergency Services. He said they wanted to have better assurance that no vehicles would be parked along the narrow drive aisle that is adjacent to the designated parking spaces. Mr. Marx read the added condition, which was shown on the overhead, as follows: "Vehicles shall only park in designated spaces."

In response to the Chairman, Ms. Boyd indicated that the 6th added condition was acceptable; and that she also understood that an increase in the number of children over the limit of 65 would make it necessary to return to the Board for further approval. Ms. Boyd noted the letter she had from the Fire Marshall's office regarding the evaluation of the building where the proposed child care facility would be operated.

Mr. Stumbo noted the letter of concern that was received from an adjoining property owner regarding the location of the proposed child care facility in an I-1 (Light Industrial) zone where there is heavy truck traffic, including 18 wheeler trucks, in relation to the safety of the children. Ms. Boyd assured the Board that the safety and well being of the children was a priority; and that the children in her care would be well supervised, particularly when they are taken outside to the fenced-in play area.

Action – A motion was made by Mr. Stumbo, seconded by Mr. Stout, and carried unanimously (Edwards absent) to approve **C-2009-12: ROZENNA BOYD** (a conditional use permit to establish a child care facility for up to 65 children in a Light Industrial [I-1] zone on property located at 124 Trade Street) for the reasons listed by the staff; subject to the five conditions listed by staff, including the addition of Condition #6: Vehicles shall only park in designated spaces; and based on the Certificate of Land Use Restriction attached as an appendix to these minutes.

- c. **A-2009-15: MOVEABLE FEAST** - appeals for an administrative review to allow a change from one non-conforming use (restaurant) to another non-conforming use (meal preparation and delivery service with offices) in a Planned Neighborhood Residential (R-3) zone, on property located at 474-476 Silver Maple Way. (Council District 1)

The Staff Recommended: Approval, for the following reasons:

1. A meal preparation and delivery service with office space, undertaken on a not-for-profit basis and not intended to service special events that require extensive mobile equipment (e.g., tents, tables and chairs), is appropriately considered as being substantially similar to activities of a social nature that also take place at a community center. A community center is first permitted in the Zoning Ordinance as a principal use in the Professional Office (P-1) zone, which is considered more restrictive than the business zones that allow restaurants. As such, it is reasonable to conclude that the proposed use is in the same or a more restrictive classification as the prior use, thereby satisfying the change in a nonconforming use criteria specified in Article 4-3(e) of the Zoning Ordinance.
2. Due to the limited scope of activity to be undertaken with the food preparation and delivery service, it is not anticipated that the proposed use will be any more objectionable or disturbing to area residents than a restaurant. The catering activity proposed is considered "limited" due to only one delivery vehicle being used, less than five employees being needed to maintain the activity, and only one delivery run being undertaken per day in the evening on weekdays.
3. A proposed activity of this limited intensity, which can be accomplished by using an existing building, should not adversely impact the existing or future development of the subject property or the surrounding area.

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

1. An occupancy permit, as well as any remodeling permits that might be needed, shall be obtained from the Division of Building Inspection prior to beginning the food preparation and delivery service.
2. The activity shall be undertaken in accordance with the submitted application, which includes supplemental information provided on March 12, 2009 relating to vehicles used, the number of employees, and other operational details.

Chairman Brown asked whether or not there were objectors present to the subject appeal. There was no response; therefore, slides of the subject property were not presented.

Representation – Ms. Blake Eames and Mr. Terry Mullins were present representing the appellant. They both indicated being in agreement with the two conditions for approval and abiding by those conditions.

Chairman Brown asked if this organization was a non-profit, to which Ms. Eames responded affirmatively. He then asked why this particular location was chosen for the proposed use/activity. Ms. Eames answered that it is the hub of the community where they serve their clients, and they wanted their base of operations to be downtown. She said they are currently located on Trent Boulevard; and the volunteer drivers run five routes Monday through Friday to deliver meals to persons in need all over Fayette County. It was noted that the proposed location would be more

convenient for the meal delivery service.

Chairman Brown inquired about the parking situation. Ms. Eames explained about the on-street parking, since the property has no on-site parking available. She said one cargo van, which is used to pick up donated food items and make meal deliveries, will be parked there; and that their volunteers will come between 5:00 and 5:30 p.m. to load up the meals and immediately leave. Chairman Brown voiced his concern about traffic and parking, as it relates to the proposed use/activity.

Mr. Marx noted that the concern raised by the Chairman may be addressed somewhat in Condition #2. He said that the applicant had provided detailed supplemental information regarding the proposed operation, including the use of one cargo van for the meal delivery service; and that the intent was for the general description and operational details that were furnished to be part of what was approved. The supplemental information that was provided to Mr. Marx was then reviewed by the Board, at the Chairman's request.

In response to the Chairman's inquiry about an additional condition to limit the number of delivery vans, Mr. Sallee made the point that since this is a nonconforming use, there could be some question, if the applicant were to increase the number of vehicles, as to whether that could be interpreted as an expansion. He advised the Board that they may want to set a limit to prevent this from happening in the future.

Considering the site location, Mr. Stout made the recommendation that the applicant have no more than two cargo vans; and in the event of an expansion, he wanted them to return to the Board for further consideration. Ms. Eames indicated that she was agreeable to that. Chairman Brown clarified that anything over the two-van limit would be considered an expansion of the nonconforming use.

At the Chairman's request, Ms. Boland drafted the wording for the added condition (#3), as follows: "No more than two delivery vans to be used in connection with this business." However, Ms. Moore noted that the way the condition was written, if cars were used for deliveries, there would be some sort of violation.

Chairman Brown concurred. He asked whether the cargo van the applicant has now is used for picking up supplies. Ms. Eames responded affirmatively. She reiterated that the cargo van makes one run a night to deliver meals and has five routes Monday through Friday; and that it is not left on the premises overnight. A brief discussion followed.

Ms. Meyer noted that there is a church directly across the street from the proposed site. She asked whether the volunteers' vehicles might be accommodated there. Ms. Eames responded that they could reach out to the church and ask about the use of available parking, if the Board wished. Mr. Mullins said he thought the concern about parking was related to the volunteers possibly being there for a while, which isn't the case. He explained that the volunteers come to the facility, load up the food for delivery and immediately leave. Ms. Meyer said her suggestion was just a way to keep cars off the street while the volunteers are preparing the food. Mr. Mullins replied that they have a staff of two that prepare the food and generally few volunteers during the day.

The revision of the added condition was shown on the overhead and read by Mr. Sallee as follows: "No more than two delivery vans shall be used for this business, except for volunteers' vehicles." Ms. Eames indicated that she was agreeable with the added condition.

Action – A motion was made by Ms. Moore, seconded by Mr. Stout, and carried unanimously (Edwards absent) to approve **A-2009-15: MOVEABLE FEAST** (an administrative review to allow a change from one nonconforming use [restaurant] to another nonconforming use [meal preparation and delivery service with offices] in a Planned Neighborhood Residential [R-3] zone on property located at 474-476 Silver Maple Way) for the reasons listed by the staff; subject to the two conditions listed by staff, including the addition of Condition #3 as stated herein; and based on the Certificate of Land Use Restriction attached as an appendix to these minutes.

- d. **A-2009-17: NADER IWEIMRIN** - appeals for an administrative review to allow a change from one non-conforming use (retail sales with accessory restaurant) to another non-conforming use (restaurant with accessory retail sales) in the Agricultural-Rural (A-R) zone, on property located

at 5569 Briar Hill Road. (Council District 12)

The Staff Recommended: Approval, for the following reasons:

1. Expanding the restaurant portion of this nonconforming use, and reducing the size of the retail sales area, complies with the limitations specified in Article 4-3(e) of the Zoning Ordinance, as both uses are first identified in the Zoning Ordinance as principal permitted uses in the Neighborhood Business (B-1) zone.
2. All of the proposed changes relate to the use of the existing interior space of the building, with no building expansion proposed.
3. An expanded restaurant use, and reduced area for retail sales, should not create any disturbances at this location, provided that adequate off-street parking is provided, comparable to that typically required for a restaurant and retail use in a B-1 zone.
4. It is not anticipated that this proposed change will adversely affect the existing rural settlement or the surrounding area, which includes several industrial properties.

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

1. All necessary permits, including an occupancy permit, shall be obtained from the Division of Building Inspection prior to implementing the rearrangement of space within the existing building.
2. Seating at the restaurant shall be limited to no more than 64, or as further limited by the Division of Fire and Emergency Services.
3. A minimum of 19 functional off-street parking spaces shall be maintained on the property.

Chairman Brown asked whether or not there were objectors present to the subject appeal. There was no response; therefore, slides of the subject property were not presented.

Representation – Mr. Nader Iweimrin, appellant, was present and stated that he understood, agreed with and would abide by the conditions for approval.

Action – A motion was made by Ms. Meyer, seconded by Mr. Griggs, and carried unanimously (Edwards absent) to approve **A-2009-17: NADER IWEIMRIN** (an administrative review to allow a change from one nonconforming use [retail sales with accessory restaurant] to another nonconforming use [restaurant with accessory retail sales] in the Agricultural-Rural [A-R] zone on property located at 5569 Briar Hill Road) for the reasons listed by the staff; subject to the three conditions listed by the staff; and based on the Certificate of Land Use Restriction attached as an appendix to these minutes.

- B. **Transcript or Witnesses** - The Chairman announced that any applicant or objector to any appeal before the Board is entitled to have a transcript of the meeting prepared at his expense and to have witnesses sworn.
- C. **Variance Appeals** - As required by KRS 100.243, in the consideration of variance appeals before the granting or denying of any variance the Board must find:

That the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the Board shall consider whether:

- (a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;
- (b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and
- (c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The Board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulations from which relief is sought.

None Remaining

D. **Conditional Use Appeals**

None Remaining

E. **Administrative Review**

1. **A-2009-16: EFREN ALAMI** - appeals for an administrative review to allow a liquor store and drive-through sales window in conjunction with a nonconforming grocery store in a Planned Neighborhood Residential (R-3) zone, on property located at 500-502 East Seventh Street. (Council District 1)

The Staff Recommended: Disapproval, and that the decision of the Division of Building Inspection be upheld, for the following reasons:

- a. Establishing a retail drive-through service window at this location, in a Planned Neighborhood Residential (R-3) zone, represents an expansion of a nonconforming use, which is not permitted pursuant to Article 4-3(a) of the Zoning Ordinance.
- b. Establishing the drive-through window service required an alteration to the exterior of the building, and additional land to be used outside of the building (for the gravel drive), neither of which is permitted pursuant to Articles 4-3(e) and 4-3(g) of the Zoning Ordinance.
- c. A drive-through service along the east side of the building has great potential to adversely impact the adjoining residential use, which could negatively impact the existing or future development/redevelopment of that property. Such an outcome would be contrary to the provisions of Article 7-6(e) of the Zoning Ordinance.

Representation – Mr. Steve Milner, attorney, was present representing the appellant, Mr. Efren Alami. A packet of information was distributed to the Board for review.

Mr. Milner asked when Mr. Alami started the business operation located at 500-502 East Seventh Street, to which he responded 2002. Mr. Milner referred to Exhibits 1A through 1F, consisting of a series of photos taken by Mr. Alami, which he described, showing the front, side and rear views of the grocery/liquor store. Referring to the photo of the drive-through window on the side of the building along Shropshire, Mr. Milner asked Mr. Alami if the drive-through window shown in Exhibits 1B and 1C existed when he moved into the property; and whether items were sold out of it. Mr. Alami responded affirmatively to both questions. Mr. Milner referred to photo Exhibits 1E and 1F, which Mr. Alami described as the other side of the building where the drive-through window they currently use is located. He stated that the drive-through window shown in the second photo (along Shropshire) was closed and no longer used because of traffic congestion, pedestrian safety concerns and the close proximity of the stop sign.

Reference was made to Exhibit 2, showing the submitted site plan for the property. In response to Mr. Milner, Mr. Alami described the front of the building along East Seventh Street; the blacktop surface along the Shropshire side of the building; the concrete/blacktop surface behind the building; and the gravel surface along the opposite side of the building. When Mr. Milner asked if these things were in place when he first occupied the building, Mr. Alami responded affirmatively. Referring to Exhibit #3, Mr. Milner questioned Mr. Alami regarding the permits he obtained for retail beer sales and retail package sales in December 2002 and August 2005, respectively. Mr. Alami affirmed that he has maintained these licenses (local and State) since the date of issuance, per Exhibit 5; that legal notice to advertise his application for those licenses was published in the local newspaper as required by ABC, per Exhibit 4; that approval was obtained from Building Inspection, the Fire Department and the Health Department in connection with said licenses; that, in relying on these permits, he and his wife invested money in the business; and that the front door entrance to the building was open to walk-in customers until a robbery incident (Exhibit #6) involving his wife in 2006 prompted the use of the drive-through window for all sales, for safety reasons. Further details of the attempted armed robbery were provided by Mr. Alami in response to Mr. Milner's questioning.

Chairman Brown asked Mr. Milner if his client was contending that a building permit was obtained to establish the drive-through in connection with his business operation. Mr. Milner responded no. He said it was their contention that, basically, a window existed on the west side of the building when Mr. Alami occupied the property, which subsequently was closed; and that another window on the east side of the building was opened and used instead. Chairman Brown asked when the appellant started using the window on the east side of the building. Mr. Alami responded that it was when he got the permit to open the liquor

store that the window on the west side was closed, and the window on the east side was opened. He noted that the drive-through window was operational when the building inspector came in 2005.

Referring to Exhibit #3, Mr. Milner clarified that the appellant was approved for the retail package license on August 9, 2005 by Building Inspection; and that the robbery/shooting incident occurred in 2006, per Exhibit #6, the related police report and the news article in the Lexington Herald-Leader, dated June 2006. He said Mr. Alami decided at that time that he didn't want to take any further chances with people being able to walk into the store, and the restriction of all sales through the window was instituted.

Mr. Stout asked Mr. Alami if the drive-through window was already in use. Mr. Alami said it has been operating for about three years, since he got the license. Mr. Stout then asked if Mr. Alami had secured the required permit(s) to do so. Mr. Alami said when he was given the Building Inspection permit, the window was there already; and that he did what he was told to do.

Chairman Brown asked Building Inspection to comment. Mr. Hume clarified that all they signed off on was the liquor license, copies of which were provided in the appellant's exhibits packet. He said Building Inspection had received a number of complaints regarding the grocery/liquor store operation; and that Mr. Alami has been taken to court twice on this matter, without any resolution. Of note was a scheduled pre-trial hearing court date on April 24. Mr. Hume went on to say that Mr. Alami was advised about the need to come to the Board of Adjustment if he wanted to have drive-through window service; and that three refusals were issued to the appellant before an application was made through Planning. In the meantime, Mr. Alami was cited to court a second time, but was able to get a continuance until such time as he could come to the Board of Adjustment with his (administrative) appeal. Mr. Hume pointed out that there was no permit for the drive-through window, which is considered as an expansion of the nonconforming grocery/liquor store use. He offered to provide photos from 2002 to illustrate the lack of a drive-through window, gravel or any kind of access on the east side of the building. Of note was that Mr. Alami has never complied with Building Inspection's requests for an accurate site plan of the property; nor has he addressed the gravel issue regarding the possible encroachment onto the adjacent neighbor's property.

Regarding access to the drive-through window in question, Mr. Stout asked if cars would have to go down the side (along Shropshire) and around the back of the building in order to come out onto Seventh Street. Mr. Hume answered yes. He offered to provide aerial photos of what existed previously on the property and what exists now.

With regard to the encroachment issue Mr. Hume raised, Mr. Milner said the property owner's name was Peter Wright, whom he had recently spoken with and anticipated would be present to testify at today's hearing. Mr. Milner asked for the Board's indulgence to allow Mr. Wright to come back next month to provide his testimony, noting that he didn't know why Mr. Wright was not present at this time. Mr. Milner then spoke about the petition that was provided in Exhibit #7, which was signed by a number of neighbors in support of Mr. Alami's request to allow the continued use of the drive-through window.

Mr. Stout asked whether Mr. Milner intended to advise the Board about the appellant's pending court case. He responded affirmatively. Mr. Stout said he had a problem with the way this matter was being handled, particularly if the court case is being heard right now and they are trying to get the Board to approve something to circumvent the court's action on the appeal. In response, Mr. Milner told the Board about the agreement they have with the County Attorney to table this matter until it could be heard by the Board; and in the event of the Board's approval, there would be no issue. He said this is something that is commonly done.

Mr. Hume reiterated about Mr. Alami's continued failure to cooperate with Building Inspection to get this matter resolved. Mr. Alami told the Board about having retained an attorney, being unfamiliar with procedure and dealing with Building Inspection-related issues. Mr. Hume commented that they met with Mr. Alami's (first) attorney to discuss what was going on; but there was no further contact with Building Inspection by that attorney after the initial meeting. Mr. Alami noted that Mr. Milner subsequently replaced the first attorney he hired.

For clarification, Ms. Moore asked if it was the appellant's argument that an expansion of the nonconforming use had not occurred, contrary to Building Inspection's determination, because there was a window on the west side of the building that now is on the east side. Mr. Milner replied that basically, that was correct. In response to Ms. Moore's further inquiry about the nonconformity, Mr. Hume responded that the retail sales

use (including beer, wine, groceries, etc.) is allowed and is not the issue; but rather, the expansion of the nonconforming use, because of the installation of the drive-through window.

Ms. Meyer inquired about the issue that is yet to be resolved regarding whether the gravel drive used in connection with the drive-through window was encroaching on the adjoining neighbor's property. Mr. Hume said that was actually a civil issue between the property owners.

Ms. Moore then asked what the court case involving the appellant was about. Mr. Hume replied that it was basically an extension of the case that the Board is hearing now, with respect to expanding a nonconforming use and having no permits. Chairman Brown inquired whether the court case would be dismissed if these issues can be resolved today. Mr. Hume responded no, that he would continue with the legal action against the appellant.

At this point, the Chairman asked to hear comments from the objectors who were present.

Opposition - Ms. Janet Coleman, president of the William Wells Brown Neighborhood Association and a resident at 422 Breckenridge Street, was present to express her objection to the continued use of the drive-through window that was constructed without a permit and the front door entrance to the store that has been permanently closed. She said the drive-through was an issue for the community to begin with; and it was really upsetting to know that the installation was done illegally. Ms. Coleman spoke about the potential traffic safety hazard related to the drive-through window service. She said the drivers of vehicles leaving the drive-through window are unable to see oncoming traffic along Seventh Street, especially when cars are parked along there; and that walk-up customers, including children, also utilize the drive-through window because the front entrance to the store is inaccessible, which she felt was unfair to the community. She said although the robbery/shooting incident that occurred at the store was unfortunate, it was one of the risks of operating any kind of business; and that she was concerned about the welfare of the neighborhood and the children living there as well.

Ms. Moore asked whether Ms. Coleman remembered the old (first) window being utilized. Ms. Coleman responded that she did not recall whether a window was there prior to when the appellant started operating the grocery/liquor store. Ms. Moore then asked about the new window, in terms of customer traffic. Ms. Coleman answered that the customer traffic was constant – both from people walking up and vehicles driving up. She reiterated that the drive-through poses a significant safety hazard; and that people should be able to go into a neighborhood grocery store without the front door being locked. She went on to say that if the store owner didn't feel safe operating in the neighborhood, perhaps they should move somewhere else.

Mr. Milner questioned Ms. Coleman about the signed petition, labeled Exhibit #7, that was submitted. He asked Ms. Coleman to examine the petition to determine whether the addresses shown were in her neighborhood. After reviewing the petition, Ms. Coleman responded that some, but not all, of the listed street addresses were in her neighborhood.

Ms. Carla Clark, 720 Shropshire Avenue, was present. Having been a neighborhood resident since 1977, she said this has always been a market – not a liquor store; and as the furnished photo she recently took indicated, the name of the store is SubCity Market. Ms. Clark stated that the signed petition she had for submittal consisted of 43 neighbors that live within a 4-block radius of the store's location (e.g., Seventh, Shropshire, Jackson, Shelby and Magoffin Streets). Referring to a photo from the PVA website, she noted that there originally was no window on the side of the building where the illegal drive-through window now is located; and that the appellant does not actually own the building he occupies, but rents it. She went on to say that since this is supposed to be a market, people wanted to be able to walk in and make their purchases, rather than having grocery items, etc. handed out through the window. The neon liquor store sign was also a point of contention. Two letters of opposition from concerned neighbors were submitted to the Board.

Discussion - Chairman Brown asked Ms. Clark if she recalled when the drive-through window on the east side of the building became operational. Ms. Clark responded that it was sometime around the end of summer or early fall of last year (2008) when they started using the drive-through; and that the front door entrance to the store was accessible to customers prior to that. Chairman Brown then asked Ms. Clark, as a long-time neighborhood resident, about the use of the previous window that fronts on Shropshire, and whether liquor was ever sold from said window. Ms. Clark responded that beer was sold from that window prior to the appellant occupying the building; and that grocery items also were sold, but

customers had access to the front entrance of the store previously. She added that, to her recollection, the window was for walk-up customers only, because of its close proximity to the stop sign at the corner of Seventh and Shropshire, as the photo she furnished illustrated.

At this point, Mr. Hume had the aerial photo shown on the overhead that was taken in 2002 of the subject property and the building, to illustrate that the wall in question had no drive-through window per se or gravel access; and there was grass along that particular side of the building. The second photo, taken in 2007, showed the expansion of the gravel (onto the neighbor's property), no curb cut, a new awning and a window placed in the wall.

Mr. Milner recalled Ms. Clark's testimony that the drive-through window on the east side of the building became operational in 2008, as well as Mr. Hume's statement that the appellant was cited twice prior to the 2007 aerial photo showing the drive-through window in question. He asked Mr. Hume whether Ms. Clark's testimony may have been incorrect. Mr. Hume responded that he could not testify for Ms. Clark.

At this point, Ms. Clark stated that, as far as she could remember, the front door was closed permanently and the new drive-through window was opened, with no other way to get into the store, in the late summer or early fall of 2008. She said the window on the Shropshire side of the building, which accommodated walk-up customers, probably was installed in 2002; however, there is substantially more traffic (e.g., walk-up and drive-through customers) associated with the newer window.

Mr. Milner asked the Chairman to be given the opportunity to have Mr. Wright, the adjacent property owner, present his testimony to address Mr. Hume's position on the encroachment issue. He requested that this matter be continued until next month, when Mr. Wright could be present. Chairman Brown responded that he didn't believe that issue was before the Board, concurring with Mr. Hume that this matter was between the two property owners and can be taken up in civil court. He said the matter before the Board was whether or not the appellant had a permit to establish the drive-through, which he thought Mr. Milner agreed the appellant had not – although there was some discrepancy as to when the drive-through on the east side of the building was established. The Chairman said he didn't think there was a dispute that a drive-through is an expansion of this already nonconforming use.

In response, Mr. Milner stated that there had been a lot of discussion about things that were not before this Board. He said there was no question that the appellant has the legal right and the permits to operate a liquor store, although it appears to be objectionable to the two neighbors who testified; however, to the number of people that signed the petition, many of whom live in the neighborhood, it was not. He clarified that there was a paved area on the west side of the building when the appellant occupied the property; and because of its proximity to Shropshire Avenue, the appellant wanted to close that one and move to the window on the other side of the building. Mr. Milner related that he didn't believe that substituting one window for another window constitutes an expansion. Discussion followed.

In response to Mr. Milner's request, Mr. Alami stated that they do sell all the grocery items through the window; and that the police had used the first window, when it was operational, and the second window on a daily basis. He further stated that he has always been cooperative with the police when asked.

Ms. Moore asked staff when this became a nonconforming use. Mr. Hume responded that the drive-through is the nonconformity, which was the result of a zone change; and since the property is zoned R-3, a drive-through is prohibited. Ms. Moore then asked about the retail use. Mr. Hume replied that the retail use is a grandfathered, legal nonconforming use, because it predates the zone change that now makes it a residential zone. Ms. Moore related her understanding that once the window was added, whether it was in 2003, when the appellant started doing business there or in 2008 on the other side, that was actually an expansion of the nonconforming use. Mr. Hume said that was correct. Discussion followed.

Mr. Sallee noted that according to the LFUCG zoning map, the property in question has been zoned R-3 since at least 1969.

Ms. Moore asked if the first window was added some time after 1969. Mr. Milner responded that there was no proof about that at all. However, Mr. Hume said there was no proof to the contrary.

Mr. Griggs asked if the appellant could prove that there was a drive-up window before the property was

zoned R-3 and became nonconforming, or prior to 1969. Mr. Milner replied that he could not offer any testimony about that today; but if it was the Board's pleasure, he would certainly look into the matter. Mr. Griggs said he thought the applicant may have an argument if it could be proven that there was a drive-through window before the use became nonconforming.

Ms. Clark offered comment regarding the previous restaurant use on the property. She said her family owned and operated a restaurant there when she was around 6 years old, which was about 46 years ago and predates 1969. Subsequently, there was another restaurant operation where customers walked in. She said there was no drive-through window involved when the restaurants existed.

Considering Ms. Clark's testimony, Mr. Griggs said he thought the drive-up window was new and had increased the nonconforming use; and therefore, it was illegal.

Ms. Clark added that there are new stores that have opened, such as Walmart in Hamburg and Meijer's, which have a separate entrance for the liquor store and the grocery store uses. She felt that if they are required to do that, then everyone should be required to do so.

Mr. Stumbo commented that the issue before the Board was not whether the appellant was licensed to sell beer and alcohol or the permanently closed entrance, but rather the expanded nonconforming use. He stated that a few things really disturbed him, which included not only the expanded nonconforming use and having no permit, but the appellant's reluctance to cooperate with Building Inspection and being cited twice by Mr. Hume. He said there seems to be a real lack of cooperation and listening to the people in the community as well. In addition, a safety hazard has been created as the result of the drive-through service when vehicles exit, which Mr. Stumbo personally observed on his site visit.

Action – A motion was made by Mr. Stumbo, seconded by Mr. Stout, and carried unanimously (Edwards absent) to deny **A-2009-16: EFREN ALAMI** (an administrative review to allow a liquor store and drive-through sales window in conjunction with a nonconforming grocery store in a Planned Neighborhood Residential [R-3] zone, on property located at 500-502 East Seventh Street) for the reasons recommended by the staff, upholding the Division of Building Inspection's decision.

2. **A-2009-18: MICHAEL CAVEY / JOHN PAPPAS / DAVID PONDER / WILLIAM VARELLAS** - appeal for an administrative review to determine that the Division of Building Inspection erred in issuing a permit for a crematory in a Light Industrial (I-1) zone, on property located at 606-608 West Fourth Street. (Council District 2)

Mr. Brown asked how this case would be handled, as it was a third-party appeal. Mr. Marx explained that there was no staff report and no staff presentation, although the staff would be available to answer any questions that might arise. Mr. Brown asked that Building Inspection explain why a permit for the crematory was granted. Mr. Marx clarified that no permit had been issued as yet, but a decision had been made that a crematory would qualify as a principal permitted use and could therefore be issued a permit. Mr. Hume (Building Inspector) verified that no permit had yet been issued and explained that the reason a permit could be issued was based on Building Inspection's history in issuing permits for crematories and their desire to be consistent with regard to interpretation. He said that there are currently two facilities in Fayette County, other than the crematory in Lexington Cemetery. One, which is an animal (pet) crematory, is on Floyd Drive, and came before the Board of Adjustment in 1998 for a conditional use permit because of its listing in the conditional uses of the Light Industrial (I-1) zone. Some years later, a second property owner applied for a permit for a (human) crematory on Eastland Drive. At that time, Building Inspection realized that "crematory" was also listed as a principal permitted use in the I-1 zone and subsequently issued a permit and a Certificate of Occupancy.

Mr. Hume said that when the applicant (Mr. Davis) applied for a permit in December 2008 for a crematory, the inspector who started the review process, for whatever reason, looked under conditional uses where crematories and columbaria are listed together. He noted that a crematory is also listed under principal permitted uses, although it is listed as only "crematory" rather than "crematory and columbarium." He said that they caught their error and rescinded the refusal form (the form that is issued as the first step in the process to the Board of Adjustment). Mr. Hume said that the basis for this interpretation was the fact that a crematory is used for the cremation process, which is more similar to a stand-alone industrial process, and therefore listed as a principal use. A crematory and a columbarium together constitute not only an industrial process, but a storage venue with associated visitation and services, which attracts traffic and

possibly other nuisance issues. Paired together, a crematory and columbarium warrant Board of Adjustment approval, and fairly so. He said that once the refusal form was rescinded, in order to be consistent with Building Inspection's past interpretation, Mr. Davis was able to go through the plan review process for his proposal. Building Inspection felt confident in doing that, as they were being consistent with past actions, and they believed it to be a correct interpretation. He added that, if Mr. Davis had been more ready with his paperwork, a permit would have already been issued, and construction would likely have commenced on the building.

Mr. Brown asked if looking only under conditional uses was an oversight, to which Mr. Hume responded that that was the case, and it was easily done. He said that after the first crematory was brought to and approved by the Board, they (Building Inspection) realized that a crematory alone was listed as a principal use; and when the second permit for a crematory was applied for, they acted accordingly and issued the permit. This time, the error was caught before it went to the Board, and Mr. Davis could have obtained a permit at any time.

Mr. Hume had no further comments at that time, and there were no questions from the Board.

Representation - Mr. Bruce Simpson, attorney, was present on behalf of the appellants (Cavey, Pappas, Ponder and Varellas). Mr. Brad Hawkins, attorney, was also present, specifically as legal counsel for Mr. David Ponder. Mr. Simpson said that he would focus on the issue of the appeal, which, to a certain extent, was legal in nature and for which he had to make his case before the Board. He said that the Board has the power to review determinations by Building Inspection in the interpretation of the Zoning Ordinance and make a collective decision, based on facts, evidence and policies that would apply to a decision; ultimately determining whether or not Building Inspection was correct in its interpretation of the Ordinance.

Mr. Simpson said that they were ready to be heard on the conditional use request on January 31. The applicant, Mr. Davis, applied for a permit from Building Inspection in December, and was denied the permit. On December 16, Mr. Murphy filed an application for a conditional use permit because it specifies in the Ordinance for the Light Industrial zone that columbaria and crematories are listed as a conditional use, which only the Board of Adjustment can approve. He added that there would likely be a discussion of the meaning of the word "and" later in his presentation, and that was discussed in his memo tendered for the Board's review as part of the record.

He said that when Building Inspection denied Mr. Davis' application for a permit on December 11, if he believed there to be an error (i.e., that he had a right to simply obtain a permit to operate a crematory), typically, with Mr. Murphy as his legal counsel, he would have appealed Building Inspection's decision within 30 days of that denial. No appeal was made to the Board of Adjustment, because there was no apparent disagreement with Building Inspection's decision; and an application was made for a conditional use permit because both Mr. Davis and Mr. Murphy believed one was needed. This would require a public hearing, and either approval or disapproval, based on the merits of the case, would be the end result. Notices were sent to all surrounding property owners and neighborhood associations; an ad was published in the Lexington *Herald-Leader*, which is required by law; and it was put on the docket to be heard. Then on January 22, Building Inspection determined that a crematory was a permitted use, and Mr. Murphy subsequently withdrew the conditional use application. The net effect of that action, according to Mr. Simpson, was that the surrounding property owners and others that might wish to offer testimony regarding the proposed use were denied the opportunity to be heard; and the consequence, in terms of Building Inspection's decision to change the interpretation they had made on December 11, was that it denied the right for people to even discuss the merits of a crematory in a public forum at this particular location. He said that the people he represented own a substantial amount of property in the area and indicated on a map (shown on the overhead) where those properties are located relative to the proposed crematory. The subject property (606 - 608 West Fourth Street) is located across from Eastern State Hospital, and his clients' properties surround the subject property on three sides.

In response to a question from Mr. Brown, Mr. Simpson clarified the location of the property and explained that the Eastern State Hospital site is the future location of the Bluegrass Community and Technical College (BCTC); and that other properties in the area are the subject of a great deal of debate on the part of planners, particularly as they relate to Newtown Pike being improved for revitalization (i.e., Newtown Pike/ West Fourth Street/Georgetown Street area). He said that many uses in that area had not been successful and that a lot of people were purchasing property and planning to change land uses to make it a real gateway into Lexington.

Mr. Stout asked if the neighborhood was or was not aware of this issue, to which Mr. Simpson responded that people in the area were given notification in January regarding the Board of Adjustment hearing when the conditional use request was scheduled to be heard. He said that the surrounding property owners were not able to voice their opinion(s) regarding whether or not a crematory was appropriate at this location, as Building Inspection had changed their interpretation and determined that a conditional use permit was not necessary; and a crematory could be located on the property as a matter of right. His clients' complaint was that they wanted to have the opportunity to discuss the pros and cons of putting a crematory at this particular location. They simply wanted to be heard, and believed that Building Inspection had erred. He said that he had provided a discussion of why he believed they had erred, as a matter of law, in failing to apply the correct principles of interpretation as set forth by the Urban County Government; the ordinances that apply (in this case) in terms of how to interpret those principles; and that when there is a conflict in an ordinance, which particular ordinance is the controlling one. He said he had also tendered the exhibits Mr. Murphy had presented to Building Inspection and to the Division of Planning when requesting the conditional use permit. He made the point that even Mr. Murphy had agreed, until January 22, that his client needed a conditional use permit, which was why they submitted the application. Mr. Simpson reiterated that he and his clients were seeking the opportunity to come before the Board with objections as to why a crematory would be inappropriate at this location.

Mr. Simpson said that there were legal reasons that justified overturning Building Inspection's determination that this is a permitted rather than a conditional use, and those were set forth in his memorandum. He said that it was clear that the intent of the I-1 zone was for manufacturing, industrial and related uses; not involving potential nuisances such as noise, smoke, odors, etc., or industrial waste. He added that the key language is that the zone "is intended for manufacturing, industrial and related uses," noting his belief that cremation does not fit within the intent of the I-1 zone. Mr. Simpson said that under the enumerated permitted uses (i.e., the uses permitted as a matter of right when dealing with an I-1 property), it specifies several industrial and manufacturing uses, one of which is a crematory. It was his opinion that, other than a crematory as such, it could equally be interpreted as the manufacture of crematory equipment or units used for cremation, which would (and should) be a permitted use. He asked the Board to look at Article 8-22(d), which contains the list of conditional uses in the I-1 zone. He pointed out that under sub-paragraph 3, one of the conditional uses, permitted only with Board of Adjustment approval, is listed as columbaria (facilities that store urns that come from a cremation facility) and crematories. He repeated that, until January 22, everyone understood that they should be here for a hearing; that changed, which was why they were there at that meeting.

Mr. Brown asked Mr. Simpson for clarification – i.e., if they were asking for the opportunity to have a hearing, to which he responded that they were, although not to be heard that day. The issue was that they wanted the Board to decide that a hearing was in order, which would give all the surrounding property owners and other concerned citizens the opportunity to be heard regarding the merits of the case. Then, once all the evidence was presented, the Board would make a determination as to whether locating a crematory on the subject property was appropriate or not. It was his belief that the Board, and not Building Inspection, had the sole right to determine appropriateness of the proposed use for the property in question. He referred to Mr. Hume's reference to the previous similar situation from 1998. He asked the Board to refer to Tab 5 of his handout, which was the staff case report for Julie B. and Paul J. DeBoor (C-98-148). Their request was for a conditional use permit to operate a pet crematory in an I-1 zone on Floyd Drive. Mr. Simpson noted that there is no distinction in the Zoning Ordinance between pet/animal and human crematories. He said that there were objectors to that request, but the Board granted it anyway. The point he wished to make was that a hearing was held that provided the opportunity for surrounding property owners to voice their concerns, and it was a fair hearing for all involved.

He then cited the later case of a crematory on Eastland Drive that was granted a permit and Certificate of Occupancy in 2005, also in an I-1 zone. It was Mr. Simpson's opinion that Building Inspection's interpretation in that case was inconsistent, at best, with its previous interpretation. He said that, to a certain extent, it may be possible to word-smith and parse words and conclude that a crematory is a permitted use; however, if the language of the Zoning Ordinance itself is applied, which is meant to guide situations like this, one must look at the General Provisions section of the Ordinance (Article 1, Section 4 [Interpretation] and Section 5 [Conflict of Ordinance]). He said that, for the sake of argument, looking at crematories in the permitted use section of the I-1 Ordinance (which he and his clients believe more aptly applies to the manufacture of crematory units or equipment), if a difference in interpretation existed, one would go to this section of the Zoning Ordinance (Article 1) for guidance. Under Section 1-4, it reads: "In

the interpretation and application of this Zoning Ordinance, the provisions herein shall be held to be the minimum or maximum requirements (as appropriate) adopted for the promotion of health, safety, morals, comfort, prosperity and general welfare.” He noted that this is a broad statement that simply says when there is at least some degree of argument that people may make as to whether a crematory is a permitted or a conditional use, one would look at this provision. The question, in his opinion, that should logically follow is whether it would or would not be fair, in order to promote all these qualities, to at least have a hearing on whether or not this kind of use was permitted in the I-1 zone, since the Board did, in fact, do that very thing in 1998 in terms of legal precedent.

Mr. Simpson said that Section 1-5 is another provision in the Zoning Ordinance designed to guide interpretation questions, stating that whenever these regulations are in conflict with any other ordinance, regulations or laws, the more restrictive shall be enforced by the appropriate local agency. He said that, in his judgment, considering that there is a provision relating to crematories as a conditional use, which is clearly stated, the more restrictive interpretation of the Zoning Ordinance should apply. This, then, would mean that the public should be given the opportunity to be heard in a public forum, which is what they are seeking through this appeal. He said that the Division of Building Inspection’s contention is that the word “and” (as listed in the conditional uses of columbaria and crematories) somehow changes things with regard to interpretation. He added that he had set forth in his memorandum to the Board that the word “and,” when used as a conjunction, under Kentucky law, does not mean that both must be approved; each term stands by itself, independently and legally, in terms of the Board’s decision as to whether or not a conditional use would be appropriate on a given piece of land in the community.

Mr. Griggs noted that, in the list of conditional uses, it also refers to penal or correctional institutions; therefore the argument with regard to the word “and” was not as applicable as Mr. Simpson believed it to be. He also said that where crematories are listed as permitted uses, it seemed that all the other industrial and manufacturing uses in the same section described a process (e.g., beverage manufacturing, lacquering, felt manufacturing, etc.). Based on that, it would logically follow that “crematory” would also be descriptive of the process; otherwise, it would list only furniture, as opposed to furniture manufacturing. In response, Mr. Simpson said that, in all the language before Section 8-22(b)(4), in terms of permitted uses, it refers to manufacturing and industrial uses. He said that perhaps someone might conclude that processing the human body in a crematory is similar to manufacturing and/or other industrial processes and, at best, it is ambiguous; but what controls it is the conditional use language.

He then referred to Mr. Griggs’s earlier comment about the use of the words “and” and “or” and said that he could provide several examples in the Zoning Ordinance where “and” is used both in the permitted uses and the conditional uses. He said that, according to Building Inspection’s theory, both uses, standing together (i.e., crematory and columbarium), would have to be present in order to be approved. He cited the example of a conditional use application for a church, with the language in the Ordinance stating “Churches and Sunday Schools,” as conditional uses. He asked if a Sunday school would have to be part of an application in order to be approved for a church, if the applicant’s only request was for a church. It was his opinion that too much emphasis was being placed on the word “and” in this case.

Mr. Griggs reiterated that all the other listed I-1 uses describe a process, which makes sense, to which Mr. Simpson replied that he was unable to explain the reason for that; but it was his opinion that a mistake was made when this particular provision was put in the Ordinance. He disagreed with Mr. Griggs’s argument, noting that whether it makes sense or not, what controls in this situation is the language in the conditional use section; and the fact that when there are conflicting provisions, under the rules of construction set forth in the Zoning Ordinance, in terms of rules and interpretation, the more restrictive provision applies; therefore, a conditional use permit would be required for a crematory in an I-1 zone.

Ms. Moore asked Mr. Simpson if he knew what kind of noise, smoke, odor, industrial waste, etc., is created by a crematory, versus what might be created in the manufacture of crematory units or equipment. She noted her agreement with Mr. Griggs’s idea that if it referred to the manufacture of equipment, it would need the word “manufacturing” as part of the notation. She added that, on the other hand, if it could be said that there are more problems created in using a crematory as a crematory, it would support Mr. Simpson’s manufacturing premise. In response, Mr. Simpson said that to answer that question would be getting into the merits of the case, with which Ms. Moore disagreed. She said that her question was, factually, whether there is something different about the manufacturing process of the equipment, versus its actual use, that would clearly suggest that the manufacturing process for the equipment is less obnoxious than its use as a crematory. In response, Mr. Simpson said that, with any kind of manufacturing process,

when referring to the types listed (e.g., battery or beverage manufacturing; or the manufacture, compounding, assembling, or processing of bakery goods), constitutes one type of use. The cremation process, however, was referring to the cremation of bodies. Ms. Moore repeated her question regarding the making of equipment, to which Mr. Simpson replied that he was not prepared to discuss the merits of the case or the pollution effects of what goes into making a crematory unit; however, there are several articles about cremation that discuss mercury and other contaminants as part of the process.

Mr. Murphy objected regarding Mr. Simpson's presentation, to which Mr. Simpson responded that he didn't believe they were getting into the merits of the use – i.e., that it wasn't appropriate at this point, but he would certainly respond to the Board's questions. He said that Mr. Hawkins was there to speak and would focus on another aspect of the case; but, according to the Zoning Ordinance and the guidelines suggested in Articles 1-4 and 1-5, in consideration of the Board's history in hearing the case in 1998, the consequence of what he had presented was simply conducting a hearing on Mr. Davis's request. He asked who would lose in that situation, and who would complain, because the applicant himself believed that he needed a conditional use permit and a hearing until January 22. It was Mr. Simpson's and his clients' position that those who wanted to be heard about the case and who might wish to address the merits of Ms. Moore's question were being denied the right to a hearing. They believed that Building Inspection had erred with regard to interpreting the Ordinance, under the guidelines it contains, which had been imposed by the Urban County Council through its enactment.

Mr. Hawkins said that he represented Mr. David Ponder, one of the appellants of this case, who owns property at 330 Newtown Pike. His property, which is the largest parcel outlined on the map (shown on the overhead), is bounded by Newtown Pike and West Fourth Street and is immediately adjacent to the property where the crematory is proposed. He described the provisions of the I-1 zone as ambiguous, adding that Building Inspection's history with regard to interpretation supported that description. He said that he had made an open records request to the Department of Law, the Division of Planning and the Council Clerk's office in order to look (historically) at zoning, how the ordinances got enacted, and how they got to where they are today. He said that he had records dating to 1953 that had been provided by the Council Clerk's office (including 1965, 1966 and 1969 records) and presented a copy of each to the Board.

In response to a question from Mr. Brown, Mr. Murphy approached the podium to review the records prior to their being tendered to the Board. Mr. Hawkins said that he had copies of the 1975 and 1983 Zoning Ordinances and thought that Mr. Murphy also had a copy. Mr. Murphy verified that he had already seen most of the materials.

Mr. Hawkins also presented the Board with a timeline and summary of ordinances that had been enacted since 1953, noting that he had found no reference to a crematory as a conditional use until 1969. Until that time it had always been considered a principal use in the I-1 zone. Something happened between 1966 and 1969, but no one could determine why it had changed and why columbaria and crematories were added as a conditional use. Mr. Hawkins said that, looking back at the history of the ordinances, beginning in 1953, it can be seen that crematories were treated differently than other light industrial uses, as they were restricted to no less than 100 feet from a residential area. At some point, it was seen as appropriate to further "carve them out" as a conditional use and only permit them in the I-1 zone as a conditional use, approvable by the Board of Adjustment. That's where crematories have been listed since that time, although they still remain listed in the permitted uses. He said that what sheds light on the situation is email correspondence between various LFUCG departments regarding his open records request. He said that there was a series of emails from various stakeholders (i.e., the Division of Planning, concerned citizens, et al.), and what he found to be enlightening was that it seemed that all were in agreement that something happened to the Ordinance that caused the ambiguity – likely sometime in the 1960s – and it should be fixed. Citing the last email correspondence in the batch, Mr. Hawkins described it as a proposed draft to correct the ambiguity, taking "crematory" out of the principal uses in I-1 and placing it in the Heavy Industrial (I-2) zone as a principal use, allowing it to remain as only a conditional use in the I-1 zone. Based on that draft, it was his belief that stakeholders within the LFUCG, as well as property owners in the area, were in agreement regarding the need to change the reference in the Ordinance, making columbaria and crematories a conditional use only in the I-1 zone.

Mr. Hawkins said that he joined, by reference, all of Mr. Simpson's comments on behalf of Mr. Ponder, and requested that a hearing be conducted, as it was clear that it was not clear how the issue should be handled. On behalf of the residents and property owners who will be severely impacted by this determination, not only as the properties currently exist, but considering the planning that is occurring in the

area to make it a gateway for the community, he asked if location of a crematory on the West Fourth Street property was appropriate and if that was what the City intended for the area. It was his opinion that that was not the case and asked for a hearing on the issue.

In concluding his comments, Mr. Hawkins said that, from a public policy perspective, it seems that Building Inspection struggles with the issue, and he was not sure if they should be spending their time interpreting ambiguous legislation or ordinances. He said it needs to be clarified rather than have them struggle with the issue every time it comes before them. He added that the future of the area is at stake, and there needs to be a hearing so that everyone can be heard. It was clear to him, from the materials that he and Mr. Simpson had submitted, that the intent of the Ordinance is that the crematory needs to be approved by the Board of Adjustment before it can locate in the West Fourth Street area. In response to a question from Mr. Murphy, Mr. Hawkins said that it was his client's position that his property would be severely impacted by locating a crematory on the subject property. Mr. Murphy also asked Mr. Hawkins his client's name, which property he owned and if he would be willing to testify. Mr. Hawkins responded to his questions, and said that if he needed any clarification from his client, he (Mr. Ponder) had just arrived.

Note: Mr. Ponder was sworn by Mr. Brown at this time, as he had not been present at the beginning of the hearing when the original oath was taken by participants.

Mr. Murphy asked Mr. Ponder to indicate on the map which property he owned, which he proceeded to do. He also asked if the property was in his name; and, if not, the name of the owner. Mr. Ponder responded that it was an LLC, and the name of his company is "The Newtown Group". Mr. Murphy then asked when the property was purchased, at which point Mr. Simpson noted that this testimony appeared to not relate to whether or not Building Inspection's issuance of a permit was done in error. In response, Mr. Murphy said that he asked those questions based on Mr. Hawkins' testimony that Mr. Ponder believed his property would be severely impacted if the crematory were to locate on the adjoining property. He said he wanted to establish what the impact would be; however, if the Board did not wish to get into those details, it shouldn't be stated that there would be a negative impact to the adjoining property, nor should there be any discussion of future plans for his property, as that was not the issue to be discussed at that time. Mr. Brown agreed, noting that they were not here for that purpose. The issue to be discussed was narrow; and, to be fair to both sides, there should be no testimony related to the property that was the subject of the appeal.

In response to a question from Mr. Brown, Mr. Simpson said that their testimony had concluded and asked that the Board rely on the record that had been introduced on behalf of his and Mr. Hawkins' clients. They believed they were entitled to a hearing, and that was their request.

Ms. Moore asked about the last email correspondence tendered as part of the record, noting that "crematory" was deleted from the principal permitted uses in the I-1 zone and listed in principal permitted uses in the I-2 zone. She questioned what it was, to which Mr. Hawkins responded that it was a draft produced as part of the response to his open records request. He said that it had been attached to an email from Mr. Bill Sallee (Planning Manager) to Ms. Traci Wade (Senior Zoning Planner), reflecting a possible text change to the Zoning Ordinance. In response to a second question from Ms. Moore, Mr. Sallee clarified that it had only recently been drafted and was not part of the history referenced by Mr. Hawkins in his presentation. Mr. Hawkins added that it reflected how the I-1 and I-2 Ordinances would read if "crematory" were to be removed from principal permitted uses in the I-1 zone and placed in the I-2 principal uses, leaving crematories and columbaria as conditional uses in I-1. This would hopefully eliminate the existing ambiguity.

Opposition - Mr. Richard Murphy, attorney, was present, as was Mr. Richard Davis. Mr. Murphy submitted handouts to the Board, containing several exhibits in support of his case. Mr. Murphy said that Mr. Davis had a contract to purchase the property at 606 - 608 West Fourth Street, noting that, unlike the representation on the map, it does have frontage on West Fourth Street. He said that the property is located in an I-1 zone, where it is heavily industrial. Mr. Murphy said that Mr. Davis had grown up in a family acquainted with the funeral business and has been working in that field for the past 10 years. His proposal is to locate a modern crematory on the Fourth Street property. Mr. Murphy told the Board that there was a description of what a crematory is and exactly what would be occurring on the property, located in the first two pages of his handout. He added that there is one major out-of-state manufacturer (Matthews International) that makes most of the crematory units and equipment used throughout the United States. Mr. Murphy said that, interestingly, most funeral establishments, including crematories, are located in

residential areas. In other states, the funeral business is a creature of custom, and crematories are often located in funeral homes, which are generally in residential areas.

Mr. Griggs clarified that the manufacture of equipment and crematory units was done out of state, and asked if there are many companies in that business. Mr. Murphy deferred to Mr. Davis, as an expert in the field, who confirmed that there are only two or three manufacturers of crematory units/equipment in the entire United States. Mr. Griggs said that he thought it odd that the manufacture of crematory units and equipment would be listed in our Zoning Ordinance as a principal use, as Mr. Simpson had contended, if there are only a few in the entire country.

Mr. Murphy said that, to alleviate any concerns regarding the crematory, the equipment operates completely without smoke or odor, and each installation must be permitted by the environmental authorities for the city, state or province in which one is installed. Surrounding residents/property owners will be unaware that it is even operating, as it has automatic and built-in pollution control devices. There are two other Matthews International units that have been installed in Lexington, one of which is in the Lexington Cemetery, just across Newtown Pike (near the columbarium), and is closer to the appellants' properties than the one proposed. The second is on Eastland Drive, which is the crematory previously mentioned by Building Inspection. Mr. Murphy said that the Fourth Street property is not visible from Newtown Pike. He also mentioned that Mr. Davis had had a meeting with the Northside Neighborhood Association, and they were very open and accepting of his proposal. In response to a question from Mr. Stout, Mr. Murphy said that the Neighborhood Association did not specifically take a vote on the issue.

In Mr. Murphy's opinion, this was a relatively straightforward case. He said that Mr. Simpson had made the case that they want a hearing on the issue; however, the issue to be discussed at this meeting is whether a crematory is a principal or a conditional use in the I-1 zone. Mr. Simpson has appealed on the basis that Building Inspection erred when they told Mr. Davis that a crematory is a principal permitted use in this zone, and that it should be considered a conditional use, which is what the discussion should consist of at this hearing. Mr. Murphy said that if the Board decides that a crematory is a principal permitted use, which he firmly believes to be the case, then a conditional use permit is not needed, nor would a hearing on its merits be required. If, on the other hand, the Board determines that it should be a conditional use, then a hearing will be required. He added that there is also a crematory on the University of Kentucky campus, in the Medical Center, which hasn't affected either the operation or the continued development of UK's campus.

Mr. Murphy then referred to the I-1 Ordinance, contained in his handout, noting that this was what the case was about. He explained that he had taken a course in Law School ("Legislation") that focused on how to interpret ordinances and statutes. Based on what he had learned in that course, it was clear that a crematory is a principal use in the I-1 zone, as it is listed under principal uses. A columbarium and crematory, on the other hand, would be a conditional use, and this was also pretty straightforward. He said that they had applied for a conditional use permit for the crematory, being aware of the Floyd Drive application several years ago for a pet crematory that was heard by the Board. He said that when they got into preparing for the case, they became aware of another crematory, which is the installation on Eastland Drive, having obtained an occupancy permit in 2005 (also included in the packet of information). Mr. Murphy said that when they realized that there was no conditional use permit obtained for that crematory, they looked further and found that a crematory is listed as a principal use in the I-1 zone. At that point, they checked with the Divisions of Building Inspection and Planning, as well as the Department of Law, and pointed out that a crematory is a principal use in the I-1 zone. He said that they saw crematories and columbaria listed as conditional uses in the I-1 zone, but all they were requesting was a crematory. He said that, based on the email correspondence at that time about the issue, everyone had agreed that it was a principal use, which is why they were not heard in January as anticipated. He said that Building Inspection's interpretation was correct, and they were treated in the same way that the property on Eastland Drive was treated in 2005.

Mr. Murphy asked the Board to look at pages 7 and 8 of his handout, which contained the 1975 Zoning Ordinance for the I-1 zone. That Ordinance showed "crematory" as a principal use and "columbarium and crematory" as a conditional use. He said that in 1983, there was a major re-write of the Zoning Ordinance; and the only change made to "crematory" was to correct a spelling error. The uses continued to be listed as they were in 1975. In looking at the current Ordinance, Mr. Murphy said that the reason it is different for columbaria and crematories, versus stand-alone crematories, is traffic issues. He explained that a columbarium is a place where ashes are laid to rest, often in urns and niches; and a columbarium is subject

to services and visitation, just as a cemetery is, which creates a lot of traffic. He said that he has been to Board of Adjustment hearings where a church asked to locate in an I-1 zone (Leestown Industrial Park) and was turned down because of the mix of church and large truck traffic associated with the industrial park. A similar situation occurred when a cheerleading facility wanted to locate in a light industrial zone. A columbarium brings additional traffic to an industrial zone; a crematory by itself does not, as it is only for the act or process of cremating, and generally there is no family there during that process. Generally the remains are brought back to a funeral home where they can be picked up by the family, and no additional traffic is generated by the use. A columbarium has traffic in and out, which is why, when operated together, a crematory should be a conditional rather than a principal use.

Mr. Murphy said that there are several cases in the Zoning Ordinance where a use is added to an existing use, thereby rendering it a conditional rather than a principal use. He gave the example of a restaurant in a B-1 (Neighborhood Business) zone, where it is considered a principal use if there is no live entertainment or dancing associated with it. In that same zone, if a bar is added and occupies more than 20% of the floor area; or if live entertainment and/or dancing is added, it becomes a conditional use.

Mr. Murphy again referred to the crematory on Eastland Drive, noting that he had a copy of the yellow pages, where "Care Cremation Service" is listed. He said that on page 16 of his handout was a copy of the final Certificate of Occupancy for the use, issued in 2005, adding that it was granted principal use status because Building Inspection had correctly interpreted the Ordinance. Mr. Murphy said that, according to what was taught in the Legislation class, one must look at the plain meaning of the Ordinance, meaning (in this case) that Mr. Davis is planning to operate a crematory; a crematory is listed as a principal use in the I-1 zone; and the property is located in an I-1 zone. Therefore, the plain meaning would be that a crematory is a principal use in the I-1 zone and should be permitted as such. He said that one of the flaws in Mr. Simpson's argument was that the only way to agree with him was essentially to delete the word "crematory" from the principal uses in the I-1 zone, and to ignore the fact that it's listed under principal uses. Additionally, if a crematory is only a place where the units and/or equipment are made, which is another of his arguments, then cremation would not be permitted anywhere in Lexington because the Zoning Ordinance lists "crematory" as a use. The totality of his two points renders the word "crematory" meaningless, and, in essence, he is asking the Board to re-write the Ordinance. Mr. Murphy said that the only way the Ordinance can be re-written is to take a text amendment to the Planning Commission, which goes to the Urban County Council; and, if approved, it becomes enacted legislation. He said that apparently his inquiries regarding crematories as principal vs. conditional uses in the I-1 zone prompted discussion among the Planning staff to do just that, adding that if there is a problem with the way the Ordinance is written, that is the way to proceed. It is the Council's job to amend the Ordinance, and it is the Board's job to interpret it in the case of any ambiguity. Mr. Murphy said that the Board could not render the word "crematory" meaningless by ignoring its presence in the list of principal uses.

Mr. Murphy's handout included citations from various dictionaries and major zoning legal authorities. He said that *Am Jur*, which is the one everyone uses for reference purposes, says that, in matters of interpretation, weight is given to the opinion of people who administer the ordinance or statute. In Fayette County, that would be the Division of Building Inspection. He quoted: "In determining the meaning of the Zoning Ordinance or planning regulation, the courts give weight to the construction of the Ordinance by those whose duty it is to administer it." He said that that's also Building Inspection's interpretation. Mr. Murphy said that the most important rule of zoning law (and the courts), in interpreting zoning language, is first: "No clause or provision of the Zoning Ordinance should be deemed superfluous, void or insignificant." He said that that was what Mr. Simpson was asking the Board to do. Mr. Murphy then quoted Rathkopf's *Compilation of Zoning Law*, which is the leading treatise on zoning law, noting that Kentucky follows this principle. It states, with regard to ambiguity in the Zoning Ordinance: "Strict Instruction Doctrine in Favor of Free Use of Land: Since a zoning law or ordinance is in derogation of the owner's common law rights in the use of his land, most state courts hold that ordinance provisions will be construed in favor of the free use of land. Where doubt exists as to the meaning of zoning restrictions, the courts hold that such restrictions will be strictly construed in favor of the landowner. Similarly, where doubt exists as to the meaning of permissive zoning, the courts also hold that such provisions will be liberally construed in favor of the landowner." Mr. Murphy explained that this is held to be true, both in Kentucky and nationwide. He quoted another leading zoning document, which stated the same principle.

It was Mr. Murphy's belief that Mr. Simpson had misinterpreted Article 1-5 of the Zoning Ordinance, adding that this section of the Ordinance was in the "General Provisions" section of the Ordinance, which refers to the entire document. He quoted the provision regarding application of the more restrictive regulation, and

explained that this section applies to the Zoning Ordinance relative to other local ordinances, such as the Code of Ordinances. He gave the example of one Ordinance, such as the Zoning Ordinance, specifying a certain distance (e.g., 30 feet) as a requirement and a second Ordinance (such as the Code of Ordinances) specifying a greater distance to be adhered to for the same situation; in that case, the Code of Ordinances would apply. Mr. Murphy said that Article 1-5 is not meant to apply to conflicts within the Zoning Ordinance itself or what is contained within the Ordinance, but to conflicts between it and other ordinances.

Based on Mr. Simpson's statement that crematories as a principal use could be interpreted as the manufacture of equipment or crematory units, Mr. Murphy provided definitions from four separate dictionaries, all of which defined "crematory" in the same basic terms (i.e., a furnace or building containing a furnace for the purpose of reducing a corpse to ashes, with no mention of manufacturing equipment or crematory units). He apologized for having to discuss this topic, but it was relevant to his client's ability to locate his business on the property in question, as well as his ability to provide a needed service in Lexington. He cited a recent article in *Newsweek* magazine that describes the growing trend for cremation in the United States: approximately one-third of all services nationwide and one-fourth of those in Lexington involve cremation. Mr. Murphy reiterated that Building Inspection was correct in its interpretation, and for that reason there is no need to seek a conditional use permit. As a result, the conditional use application was withdrawn. He said that Mr. Simpson's clients were not happy with Building Inspection's determination and did what anyone has the right to do – appeal it to the Board of Adjustment. He told the Board that the decision to be made was whether Mr. Davis' proposed use (crematory) was a principal use or a conditional use. He compared this to the word "hotel" if listed as a principal use and "hotels and convention centers" listed (together) as conditional uses. He said that if a hotel with only rooms (no restaurant, etc.) was brought to the Board for a determination as to whether it was more like a hotel or a convention center, it would be a simple decision, and it should be the same with this determination. He believed it to be clear and that a stand-alone crematory should be considered a principal use in this zone, as listed in the Ordinance; but until the Zoning Ordinance is amended to remove "crematory" from the list of principal permitted uses, it must be handled as a principal use. He strongly felt that the Divisions of Building Inspection and Planning and the Department of Law were correct when agreeing that a crematory is a principal permitted use in the I-1 zone.

Mr. Murphy said that Mr. Davis is an expert in the field and would be able to answer any question the Board may have relative to the use.

Rebuttal - In reference to a comment made by Mr. Murphy, Mr. Simpson said he would take responsibility for the Board having to hear this case. He agreed that the discussion of the word "and" with regard to "crematories and columbaria" was important to Mr. Murphy's client, but it was also important to his clients as well, who thought there would be a hearing on the merits of the case. He said that he and Mr. Murphy agreed that this case was a question of whether or not a crematory is a principal or a conditional use; and that they would both agree that the Ordinance is ambiguous, at best. Mr. Simpson said that the case law referred to by Mr. Murphy, as well as the zoning treatises discussing land uses, were all well and good; but they had no relevance to the facts of this case. The facts of this case deal with the ambiguous language in the same Ordinance – the same Ordinance that the public is expected to read, understand and follow – and this Ordinance contains conflicting provisions.

Mr. Simpson referred to Mr. Murphy's explanation about the listing of "crematories and columbaria" as a conditional use, due to traffic issues. He said that is only an evidentiary issue and does not pertain to the "four corners" of the Ordinance that the Board must consider. Mr. Simpson said it was difficult to fathom having a crematory in the same building as where urns of loved ones' remains were stored, and that it did not seem like a marketable situation. However, that is not the issue at hand and does not relate to the legal issue of interpreting and clarifying the ambiguous language contained in the Ordinance. He asked what was to be done when one use was listed as both a conditional and a permitted use in the same Ordinance. He said that the staff believed that it should be taken out of the principal uses, making it conditional only, obviously recognizing that someone made an error more than 30 years ago and left conflicting provisions in the Ordinance. That is why, in those rare instances, that Articles 1-4 and 1-5 exist regarding conflicting language and interpretation, providing guidance as to what to do in those cases. He said that Mr. Murphy wanted to have the Zoning Ordinance treated differently than other ordinances, but Articles 1-4 and 1-5 say nothing about the Zoning Ordinance being treated any differently than other ordinances when looking at how to interpret a situation where ambiguity exists. Mr. Simpson said that, if one reads these provisions, the only logical conclusion is that the more restrictive prevails, which means a crematory is a conditional use deserving of a hearing. This was in no way taking away Mr. Murphy's client's rights to come before the

Board and request a conditional use permit. The only thing that would change from the way it is at this point, is that a public hearing would be conducted on the merits of the case. This would give the public the benefit of a public hearing, because that is what the law requires.

Mr. Brown asked Mr. Hawkins if he had anything to add. He replied in the negative and deferred to Mr. Ponder.

Mr. Ponder said that he had had two conversations with the Northside Neighborhood Association. The first was in reference to his concern regarding the crematory and what was to come. He said that they had begun to discuss the upcoming public hearing and dates, times, etc. He said that, subsequently, a meeting with the neighborhood association (and others who could attend) was called by Mr. Davis, who said that he no longer needed to pursue a public hearing. He thought several people left the meeting confused, as they had assumed that they would have a voice in the process that was taken from them at the last minute. No real direction was given by either Mr. Murphy or Mr. Davis as to what was to come next. He said that that was why they were there at that point – i.e., to ensure that their voice (property owners and surrounding neighbors) would be heard.

Discussion - In response to a question from Mr. Stout, Mr. Hume said that Building Inspection had received no calls, and no concerns had been expressed to them (that he was aware of) regarding this issue.

Mr. Stumbo commented that he could see where the Ordinance would appear ambiguous, with crematories listed in one section and crematories listed with columbaria in another. He said that if it said "crematories and/or columbaria" rather than "and" only, it would make the situation clearer. However, it was his opinion that, although it was somewhat ambiguous, it was not as ambiguous as Mr. Simpson believed it to be. He asked Ms. Boland if she believed the way it was written was clear.

Ms. Boland replied that she was unfamiliar with the concept of columbaria and whether or not there are situations where they are connected to crematories. She said that, as the emails referenced by both Mr. Murphy and Mr. Hawkins reflected (stressing that those emails were extremely preliminary when the issue first arose), that she had not had the opportunity to consider the issue. She added that it had not been presented to the Planning Commission for their feedback, nor did she know if there was a draft of language they wanted to propose. Ms. Boland cautioned the Board against letting the emails influence their interpretation of the issue. She said that there may have been a reason that crematories were listed in both sections of the I-1 Ordinance. She added that two scenarios had been presented to the Board, with justification submitted for each: one was that there was a conscious intent to list crematories and columbaria together as a conditional use and why that may be the case. The second possibility was that an error was made. She said that she did not know what had happened, as it appeared to have happened in the 1960s, adding that she didn't believe the staff was sure either of why there was a dual listing.

Ms. Boland said that she didn't want to put herself in the Board's place and say which interpretation was the better of the two. She said that it could be approached in terms of it being the intent to have a crematory listed by itself as a principal use, and what would be the end result; or if this truly is an ambiguity, having been listed under both principal and conditional uses in error, what the end result would be for the property in question. Ms. Boland said that the Board could and should look at both scenarios, weighing everything that had been presented as testimony, to determine what the end result of each would be; they should then base their determination and final decision on having considered both possibilities.

Mr. Stout asked Building Inspection if there would be any effect, regarding zoning, on surrounding properties if the crematory was located where proposed. In response, Mr. Hume said that it would not affect them in any way. The property is a stand-alone parcel and is in the correct zone for the use. In theory, it is no different than a yard variance in a residential zone, in that it only applies to the property in question. He said that there had been no testimony given that it would affect the use of anything other than that lot. A crematory is a legal (permitted) use in that zone.

Mr. Richard Davis, applicant for the crematory, explained that the difference between a crematory and a columbarium is that a columbarium requires, by State statute, maintenance of a perpetual care fund. He said that if he were to start a columbarium, sell all of the niches and walk away with the money, that would not be permitted, just as for a cemetery. He said that the main (physical) difference between a columbarium and a columbarium combined with a crematory was that the retort (which is the unit used to reduce the body to ashes) could be taken out of the building/crematory and moved to another location. It is

a portable unit that can be located anywhere a crematory is to be established.

Ms. Moore said that it seemed that the testimony had clearly established that there are stand-alone crematories and asked Mr. Davis if there are stand-alone columbaria. He replied that there were none that he knew of, and he had traveled everywhere east of the Mississippi River (other than the Northeast) as a representative of the funeral business. He said that he wanted to establish a business in Lexington and had found a location that was zoned appropriately; unfortunately, there aren't that many appropriately zoned parcels of a suitable size. Mr. Davis said that they had started this process on the initial finding by Building Inspection. When Building Inspection said that they had to go through the conditional use process, Mr. Murphy submitted the application. After further research, and Building Inspection realizing their error, it was determined that they did not have to continue pursuit of a conditional use permit. He said that, during the process, they had reached out to several different people, including the individuals asking for the hearing.

Mr. Simpson objected, noting that the issue at hand was a very narrow legal issue. He said that even though they had diverted from it to a certain extent, he didn't believe they should get into any justification or discussion of all the meetings that had been conducted. They were not related to the core issue and would only be germane in a public hearing on the merits of the case. Mr. Davis disagreed, noting that it was only because Mr. Simpson's client had mentioned it that he brought it up. Mr. Brown asked Mr. Murphy if there was anything he wished to address regarding the discussion, to which he responded that Mr. Davis was reporting on the meeting that had previously been mentioned, as he had been there and would like to report the result of the meeting. Mr. Simpson rebutted, noting that the reason Mr. Ponder had mentioned the meeting was that Mr. Murphy had referred to it earlier. He repeated that it was not germane to the issue at hand. Mr. Brown subsequently asked Mr. Davis to limit his testimony to what he had observed at the neighborhood meeting.

Mr. Davis continued, noting that when he reached out to the surrounding property owners, he had heard from Mr. Ponder that there was a great deal of opposition from the neighborhood association. He said that he did not want to get into a bad situation; rather, he wanted to be a good neighbor. As a result, he found out who were the leaders of the Northside Neighborhood Association and contacted Ms. Cindy Olson, who is the Vice-President. He explained who he was and what he wanted to do. She said that she would speak to the President, after which a meeting was put together and invitations mailed. They met on January 22 in one of Transylvania University's meeting rooms. Mr. Davis said they sat and discussed his proposal. Initially, there was a great deal of concern because of their perception of a crematory (i.e., the associated odors, etc.). He said that the immediate Past President of the neighborhood association happens to own the property where Care Cremation Service is located on Eastland Drive; and if no one knew that a crematory was located in the building, it would not be obvious, as there are no odors or anything noxious associated with the use. Mr. Davis said that he left the meeting with a positive feeling. He said that no opposition had been expressed other than concern about what the building would look like, and whether or not its architecture would fit into the Northside neighborhood. He said that he didn't think it necessary to call Mr. Brewer or Ms. Olson to the hearing to testify on his behalf, as he did not think the merits of the case needed to be discussed.

Mr. Simpson said that Mr. John Pappas, one of his clients, would like to respond to Mr. Davis' comments.

Note: As he had not been present at the time the remainder of the speakers were sworn, Mr. Brown asked Mr. Pappas to raise his right hand and be sworn and administered the oath to him.

Mr. Pappas said that, being a co-owner, he has an interest in the property outlined on the map. He said that, as everyone was aware, BCTC was to locate directly across Fourth Street from the proposed crematory. He said that he had met with the firm from Northern Kentucky who had done the Downtown Master Plan and they had met several times regarding the planning of the area. He began discussing what they had suggested as the Master Plan for the area, when Mr. Murphy objected and said that they should not be discussing the merits of the case. Mr. Brown agreed, but Mr. Pappas said that what he had to say was very pertinent to the case, noting that he was told that hotels and housing could not be located within a certain distance of a crematory, and the Master Plan shows hotels and housing in the immediate area. He said that, by approving such a use, it would severely limit visitor hotels and student housing.

Mr. Murphy again objected and said that the merits of the case should not be discussed at that point. The only thing that was to be discussed was the zoning regulations and not the use of the property. Mr.

Simpson argued that Mr. Davis had been given great latitude in his comments, many of which he (Mr. Simpson) believed to be extraneous to the discussion at hand. Mr. Brown agreed with Mr. Murphy, and noted that Mr. Pappas had made his point. Mr. Pappas concluded his comments by saying that the neighborhood association would be opposed to this use, as would the school, to which Mr. Brown responded that those issues would be taken up if there was a public hearing for a conditional use.

In response to a question from Ms. Moore, Mr. Simpson said that he was totally unfamiliar with columbaria and crematories and therefore did not know if there were any stand-alone columbaria. He said that his point of reference was the words of the Ordinance in terms of notice given to the public.

Mr. Murphy told the Board that he had provided them findings at the end of his handout, as had Mr. Simpson. He said that it was a little unusual with regard to voting and explained how the Board should vote, depending on whether they agreed with Mr. Simpson's interpretation or with his. If they agreed with Mr. Simpson, they would vote to approve the appeal; if they agreed with him, his client and Building Inspection's determination, they would vote to disapprove the appeal.

Mr. Brown thanked him for the explanation and asked for a motion.

Action - A motion was made by Mr. Griggs, seconded by Ms. Moore, and carried 5-1 (Stout opposed, Edwards absent) to deny **A-2009-18: CAVEY, PAPPAS, PONDER and VARELLAS**, siding with Mr. Murphy, for the following reasons:

1. The decision follows the plain meaning of the Ordinance. A "crematory" is listed as a principal permitted use in the I-1 zone in Section 8-22(b)(4) of the Zoning Ordinance. It is uncontested that Mr. Davis wishes to operate a crematory, and that the property is zoned I-1.
2. The interpretation advocated by the Appellants would render the word "crematory" in Section 8-22(b)(4) void and meaningless. It would essentially amend the Zoning Ordinance to remove a crematory as a principal permitted use. This Board does not have the power to amend the Zoning Ordinance.
3. The Division of Building Inspection correctly found that the conditional use in the I-1 zone of "columbariums and crematories" [Section 8-22(d)(3)] applies when a columbarium is combined with a crematory.
4. This Board finds that Section 1-5 of the Zoning Ordinance applies when the Zoning Ordinance itself conflicts with another Ordinance of the Lexington-Fayette Urban County Government. It does not apply for interpretation issues relating only to the Zoning Ordinance itself.
5. Kentucky follows the rule that where doubt exists as to the meaning of a Zoning Ordinance, restrictions will be strictly construed in favor of the land owner. Similarly, where doubt exists as to the meaning of permissive zoning provisions, such provisions will be liberally construed in favor of the land owner.

Mr. Stout explained that his opposition to the motion was based in his concern for the surrounding neighborhood and property owners. He said that any time a facility of this nature is placed as close to a neighborhood as this is going to be, he believed that the neighborhood ought to have the right to come forward and voice its concern(s). In his opinion, it was wrong for the Board to prematurely approve the use without allowing the neighborhood to hear the case.

- IV. **BOARD ITEMS** - The Chairman announced that any items a Board member wishes to present will be heard at this time.
- V. **STAFF ITEMS** - The Chairman announced that any items a Staff member wishes to present will be heard at this time.
- VI. **NEXT MEETING DATE** - The Chairman announced that the next meeting date will be April 24, 2009.
- VII. **ADJOURNMENT** - There being no further business, the Chairman declared the meeting adjourned at 4:10 p.m.