

**BOONE COUNTY BOARD OF ADJUSTMENT
BOONE COUNTY ADMINISTRATION BUILDING
BOONE COUNTY FISCAL COURTROOM
BUSINESS MEETING**

August 13, 2014

6:00 P.M.

Mr. George Whitton called the meeting to order at 6:05 P.M.

BOARD MEMBERS PRESENT:

Mr. George Whitton
Mrs. Sherry Hempfling
Mr. Richard Miller
Mr. Bradley Shipe
Mrs. Phyllis Sparks

LEGAL COUNSEL PRESENT:

Mr. Dale T. Wilson

APPROVAL OF MINUTES

Mr. Whitton stated that the Board members received copies of the minutes of the Boone County Board of Adjustment meeting of July 9, 2014. He asked if there were any comments or corrections. There being no changes, Mrs. Sparks moved that they be approved as written and Mr. Shipe seconded the motion. Mr. Whitton called for a vote and it carried unanimously.

ACTION ON REVIEWS

- 1. Request of James Kelley and Ann Kelley for an Appeal of the Zoning Administrator's decision regarding a pre-existing, nonconforming flea market/yard sale use. The 5.0113 acre site is located at 11941 U.S. 42, Boone County, Kentucky, and is zoned Agricultural Estate (A-2) and Rural Suburban (RS).**

Kevin T. Wall, AICP, Zoning Administrator for the Fiscal Court, presented the history of the issue and the Zoning Administrator's decision that was rendered on May 21, 2014 (see Staff Report). This presentation included a Powerpoint slide of the Site Map that is attached to the Staff Report as Exhibit D. He noted that in order for the Appeal to be granted, the Board must find that the administrative decision is in error. He also noted that he does not have discretion to reject a use as pre-existing, nonconforming if it meets the terms of the statute. A contention that any activities on the site may have been distasteful or a nuisance is not a factor in the decision.

Ed Massey, Attorney for the Appellants, James Kelley and Ann Kelley, read KRS 100.253(3) pertaining to an illegal use existing for 10 years without adverse orders and then being deemed a nonconforming use. Mr. Massey stated that they have proof that two zoning complaints had been filed against the Keetons by Mitch Light, Assistant Zoning Administrator/Enforcement Officer, of the Boone County Planning Commission. The first complaint was in 2012 and was for allowing a multi-vendor yard sale and camping, and that

these activities are a violation of the regulations that apply to the subject property. The second complaint was in 2013. The Appellants contention is that pursuant to KRS 100.253(3), there was not a 10 year period where the use existed without adverse action.

Mr. Massey stated that the Zoning Administrator "denied" the Keetons' initial request for a pre-existing, nonconforming use determination, and said that the information provided was insufficient. The Zoning Administrator granted pre-existing, nonconforming status after a supplementary presentation of materials. Mr. Massey quoted the Zoning Administrator's 5/21/14 determination letter in regards to not permitting overnight camping, parties, and the like. In short, it was initially denied and then later approved by the Zoning Administrator. There had been adverse conditions before it was determined to be a nonconforming use as reflected by the criminal complaints that had been filed in 2012 and 2013. He doesn't think that his clients have any objection to a yard sale as their contention is that it has been more of a flea market where vendors rent space. They have photographs which show a multitude of cars and recreational vehicles. Strangers were entering his clients' property and they have a concern regarding safety and security. They don't want to be bad neighbors and he thinks that probably everyone in Boone County and Kentucky love the 127 yard sale.

The use of the property is a violation of the zoning code and the issue comes down strictly to the 10 year rule. He talked with Rick Brueggemann, Attorney for Ernest Keeton and Darlene Keeton, owners of the subject property, about a potential mediation, but that there really wasn't much to mediate. They have exhausted their efforts otherwise.

Rick Brueggemann, Attorney for the property owners, noted that a number of adjoining property owners were present including Michael Paul, Dan Berkemeier, and John Coppage and provided signed affidavits and could testify if needed. He believes that Mr. Massey missed something that was in the Zoning Administrator's initial decision dated 4/16/2014. He did not deny the initial request for a finding of a pre-existing, nonconforming use. Page 2 of the letter states that he was not in a position to make a final decision, but that additional corroborating evidence was needed, which was subsequently provided and included a copy of an ad.

Mr. Brueggemann stated that in order for the Appeal to be granted, the Board must find whether or not Mr. Wall committed error. The Appellants have not even alleged error because they can not. The record is clear. The Appeal is primarily based on two things. One is that there was an adverse action in 2012, which was primarily concerned with overnight camping, but it has nothing to do with the decision that is before the Board. It can not as a matter of law be overturned, as the activity goes back further than 10 years before 2012. The submitted ad for the yard sale was from 2003, and there are numerous affidavits. The adjoining property owners like the fact that they can use Mr. Keeton's property and that there is available parking. Mr. Brueggemann joked that he avoids US 42 during the yard sale due to traffic issues, but that his wife uses the road purposely for the yard sale.

Mr. Brueggemann stated that Gary Hedrick, who provided an affidavit, retired from the Highway Department and believes that the Keetons' operation is far safer and he helps there every year. As a matter of law, a complaint being filed in 2012 cannot disturb the Zoning Administrator decision. The second issue raised was that it was a Variance, and that is not before the Board because the use is pre-existing, nonconforming. Any other

issues are time barred because they were not raised within 30 days. That is all that is before the Board. The property owners and other parties are present and could speak to the Board, but he believes that the record is clear. He stated that he could answer any questions.

Chairman Whitton asked if there was anyone present who had participated in the yard sale prior to 2000. Several audience members raised their hands. He asked if anyone had participated prior to 1998. Several audience members raised their hands. He asked if anyone had participated in 1996. Several audience members raised their hands.

Chairman Whitton asked if there were questions from the Board. Mr. Miller stated that it was his understanding that if the condition had existed for 10 consecutive years that it would then be a legal pre-existing, nonconforming use under the statute, and subsequent years would just be tacking onto that status. Mr. Wall responded that his understanding was correct.

Chairman Whitton asked Counselor Wilson if he had any comments. Counselor Wilson read over the statute relative to "adverse action," and that the Zoning Administrator could be questioned regarding such actions. Mr. Wall stated that he is aware of the criminal complaints filed in 2012 and 2013. The request for a pre-existing, nonconforming use determination was made by the property owners' Attorney in response to the 2013 criminal complaint. It was part of the defense and the case was continued. The 2012 complaint was dismissed. The 2013 complaint has a motion pending for dismissal. The prosecutor for the County Attorney's office did not want to dismiss the case since the Appeal was filed. Mr. Brueggemann is confident that the pending criminal complaint will be dismissed regardless of the outcome of the Board's hearing because the Zoning Administrator's finding is that the property owner has an absolute constitutional right to continue the use. The use had been existing for more than 10 years before 2012. It cannot be proven beyond a reasonable doubt that he broke the law.

Mr. Miller stated that he didn't want to get into the merits of the pending criminal case, but asked for clarification on what constituted an adverse action, does there have to be a verdict to make it an adverse action? Counselor Wilson advised that there doesn't have to be a verdict to have an adverse action, but there has to be a zoning enforcement adverse action and not just an inquiry into an alleged violation. Mr. Brueggemann stated even if we assume that what happened after the yard sale in 2012 was an adverse action, it doesn't matter because the 10 year period had been established before that time. Mr. Miller stated that he understood, and he was just asking for a definition of adverse action.

Mr. Massey stated that we just have a disagreement on this issue and that he would argue that the complaint filed by zoning personnel would be an adverse action. Just because it ended favorably for the property owner doesn't mean that it wasn't adverse, but it was a challenge to what was going on. The difference of opinion goes to the timing of when the nonconforming use kicked-in, when the adversarial actions were brought, and whether that nonconforming use pursuant to the regulations allows that activity to continue despite the adversarial actions.

Chairman Whitton asked if there were any other discussion or questions, either for or against. Mr. Miller moved that the Appeal be denied based on the 10 year rule and that the interpretation of the Zoning Administrator is correct based on the statute. Chairman

Whitton asked Counselor Wilson if the motion was appropriate. He responded that it is a legal motion. Mrs. Sparks seconded the motion. Chairman Whitton asked if there was any other discussion. Seeing none, he called for a vote on the motion. The motion to deny the Appeal carried by a vote of 5 to 0.

ADJOURNMENT

Mr. Whitton asked for motion to adjourn the meeting. Mr. Miller made the motion to adjourn and Mrs. Hempfling seconded the motion. Mr. Whitton called for the vote and the meeting was adjourned by unanimous consent at 6:29 p.m.

APPROVED

Mr. George Whitton, Chairman**ATTEST:**

**Kevin T. Wall, AICP
Director Zoning Services**

Exhibits: