

**BOONE COUNTY BOARD OF ADJUSTMENT
BOONE COUNTY ADMINISTRATION BUILDING
BOONE COUNTY FISCAL COURTROOM
BUSINESS MEETING
APRIL 9, 2014
6:00 P.M.**

Mr. George Whitton called the meeting to order at 6:00 P.M.

BOARD MEMBERS PRESENT:

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

BOARD MEMBERS NOT PRESENT:

Mr. Richard Miller

LEGAL COUNSEL PRESENT:

Mr. Dale 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 March 12, 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 Waterloo Holiness Church for a Conditional Use Permit to allow a church. The approximate .23 acre tract is located at 5952 & 5954 Jefferson Street, Boone County, Kentucky and is currently zoned Suburban Residential Two/Small Community Overlay (SR-2/SC).**

Staff Member, Todd Morgan, AICP, presented the Staff Report which included a PowerPoint presentation (see Staff Report).

Ms. Betty Sallee said she is the owner of the parcel and Burlington Antiques. She introduced Pastor Timothy Webb.

Mr. Whitton asked Pastor Webb how many people they could accommodate on Sundays? He said they currently have a congregation of about 50 people so they will probably set up the sanctuary to hold 80 people.

Mr. Whitton asked if they would be constructing a handicapped ramp? Pastor Webb said they will not be constructing one immediately but do intend on constructing one in the future.

Mr. Shipe said the letter in the Staff Report provides their typical hours of operation. He asked if there would be any other times during the week the property would be used? Pastor Webb said there may be three times a year where they have special services. These services could take place Monday through Friday.

Mr. Whitton asked if anybody in the audience wanted to speak regarding the request?

Mr. Butch Wainscott said he is the owner of Tousey House restaurant across the street. He is not opposed to the request but would like clarification on a couple of things. He said Mr. Morgan addressed his first concern because he understands that the church has been granted permission to use the Boone County Administration parking lot. He said they also had to approach the county for parking when they opened Tousey House seven years ago. The parking on Jefferson Street and his lot is limited. His permission letter states that his employees and customers have permission to use the county lot but that this approval could be taken away in the future. The second thing he would like addressed is noise because his restaurant has outdoor dining approximately six months out of the year. He did some research on Waterloo Holiness Church and they are affiliated with the Pentecostal Church. He has attended Pentecostal services in the past and they are different than a lot of other services. They have a lot of music. He has seen services with pianos, trumpets, drums, guitars, banjos, tambourines, and wash boards. He is all in favor of businesses and churches moving into Burlington and has been on the Business Association since its inception. His only concern is the church having an intrusive amount of noise. Their website indicates that listening to sermons on site can have serious side effects on its listeners. He doesn't know what that means and would like to know if it can be explained.

Pastor Webb said they do have music as part of their services. He said their style of worship may be louder than some other churches. He pointed out that the church across the street, Souls Harbor, is also a Pentecostal Church. Washington Square Café and Catering also has musicians perform in their outside seating area when the weather permits. He knows these outdoor concerts can be loud because he can hear them at his house on Idlewild Road. He doesn't see music coming from a church as being a problem. Mr. Whitton asked when the church services were? Pastor Webb said Sunday mornings at 10:00 AM, Sunday evenings at 6:00 PM, and Wednesday evenings at 7:30 PM.

Mr. Whitton asked if anybody else in the audience would like to speak regarding the request?

Mr. Wainscott said he would like to know if this church handles snakes? Pastor Webb said they did not. He asked how many people play instruments? Pastor Webb said they have about 5 musicians, including a piano player, bass player, and electric guitar player. The electric guitar isn't loud. They do not have any wash boards.

Mrs. Sparks asked if the building has central air or if they are going to rely on open windows? Ms. Sallee said the back part of the church (the addition) is air conditioned but the original church is not. The ceilings are 20 to 25 feet high so heat has never been an issue.

Mr. Whitton asked if the windows and doors will be left open or closed during church services. Pastor Webb said they will be closed and they also have plans on putting air conditioning in the original part of the church.

Mr. Whitton asked if anybody else in the audience would like to speak regarding the request? There was no response.

Mr. Whitton asked for a motion. Mr. Shipe made a motion to approve the request as submitted and Mrs. Hempfling seconded the motion.

Mr. Whitton asked Mr. Wilson if noise became an issue what would the neighbors remedy be? Mr. Wilson said it would be a private nuisance issue unless the Board imposed a condition. Mr. Whitton asked what would a condition sound like if they were to create one? Mr. Wilson said the Board would have to come up with a standard. Mr. Morgan said that standard would have to deal with a decibel level and he is not clear what decibel level would create a noise impact on Tousey House or other neighbors.

Mr. Whitton asked if the Board would like to have any other discussion? There was no response.

Mr. Whitton called for the vote on the motion and it carried unanimously.

2. **Request of Gerald Hardcorn for a Variance to modify building setback conditions imposed by the Boone County Board of Adjustment on October 9, 2013. The approximate .43 acre tract is located at Section 1, Lot 10 (Northwest corner of Edgewood Drive & Alder Court) Arborwood Subdivision, Boone County, Kentucky and is currently zoned Rural Suburban/Planned Development (RS/PD).**

Staff Member, Todd Morgan, AICP, presented the Staff Report which included a PowerPoint presentation (see Staff Report).

Mr. Tom Sutter said he was with Sutter Homes and was hear speaking for Gerald and Andrea Hardcorn. He said the owners have gotten a little bit too large with the home on the Alder Court side of the lot. Mr. Whitton asked if the home plan was altered after the Board approved the first set of applications? Mr. Sutter said the plans were altered. He doesn't believe Mr. Hardcorn understood that the house had to meet larger side yard setbacks. Mr. Whitton asked what was the status of the construction? Mr. Sutter said they have a full set of plans and have applied for permits. Mr. Whitton asked if any dirt had been moved? Mr. Sutter said just to install silt fence. He said they looked at building different houses on the lot. It would have been possible to build a 6,500 square foot house, facing Alder Court, that met setback requirements. The current house is 5,200 square feet. Mr. Whitton asked what the property owners thought about the option that met setbacks? Mr. Sutter said that design did not fit the style they wanted. He has never heard of neighbors complaining that a house is too big but has heard about neighbors complaining that a house looks too small on a lot. He thinks the proposed house will look good on the lot.

Mr. Whitton asked if anybody else in the audience would like to speak regarding the request?

Mr. Scott Allhands said he lives to the north of the proposed home on lot 11. He did sign off on the proposed home and thinks it will be a beautiful. His only concern is water runoff. The proposed house is large and a lot of roof water could dump onto his lot. The plans that were submitted show two sump pumps and he is curious where the sump pumps are located and where the water will discharge. He is trying to protect himself because his basement flooded about a year ago.

Mr. Whitton asked Mr. Morgan to address Mr. Allhands comments. Mr. Morgan stated that a Zoning Permit will need to be submitted to Boone County Planning Commission before construction can start on the house. Planning Commission Staff will analyze the lot grading and drainage. Staff can show these permits to their engineer or the County Engineer if there are drainage issues or concerns. Mr. Sutter added that the subject lot drains towards lot 11. He said they are looking to take all the roof water and sump pump water towards the front property line because there are storm drains in the street. He believes this will improve the situation.

Mr. Pete Sourvelis said he lives on lot 9 on Alder Court. He believes the original agreement of 35 feet on the corner side yard is a better plan. He said the last approval allowed the house to be 20 feet from the rear property line. He doesn't believe moving the house closer to lot 11 should be considered either because it will not look right.

Mr. Joe Eubanks said he lives on Alder Court. He doesn't have a problem with the corner side yard setback being reduced to 30 feet but would have a problem if it was reduced any further.

Mr. Whitton asked if anybody else in the audience wanted to speak regarding the request? There was no response.

Mr. Whitton asked for a motion. Mr. Shipe made a motion to approve the request with the following condition:

- 1. Roof and sump pump water from the house shall be directed towards Edgewood Drive or Alder Court and away from lots 9 and 11 of Arborwood Subdivision.**

Mr. Morgan asked Mr. Sutter if he has alright with the condition? He replied that he was agreeable.

Mrs. Hempfling seconded the motion. Mr. Whitton called for the vote and it carried unanimously.

- 3. Request of Troy Sturgeon for a Conditional Use Permit to allow an auto repair business. The approximate .34 acre tract is located at 2011 Verona Mudlick Road, Boone County, Kentucky and is currently zoned Suburban Residential One/Small Community Overlay (SR-1/SC).**

Mr. Whitton announced the applicant has submitted an email indicating that he would like to postpone the application for up to two months (see Exhibit 1). Mr. Morgan said new legal notices will be prepared if the application is reactivated.

4. **Request of Christina R. Edmondson, Attorney, for an Appeal of the Zoning Administrator's determination regarding the scope of a pre-existing, non-conforming truck repair business. The approximate 7.13 acre site is located at 15487 Lebanon-Crittenden Road, Boone County, Kentucky, and is zoned Rural Suburban Estates (RSE).**

Mrs. Sparks stated that she recused herself when the Change in Non-Conforming Use application was heard last year and would recuse herself again this evening. She left the room at this time.

Staff Member, Kevin Wall, AICP, presented the Staff Report. He indicated that the Board denied a Change in Non-Conforming Use application on the same property last year. After that denial occurred he worked with the property owner's attorney to determine what non-conforming use limits had been established on the property. On January 17, 2014, he wrote a determination outlining the activities and number of vehicles (business vehicles, vehicles waiting for repair, and towing) that had been established. In regards to towing, Mr. Brueggemann provided evidence that the last owner did have vehicles towed in for on-site repair but did not run a towing business. As a result, he concluded that Mr. Branscum could not dispatch a tow truck to do a AAA run out on the freeway from this location. In response to his determination a group of neighbors, represented by Ms. Edmondson, have filed an Appeal. In their packets, the Board will find a notice of Appeal that was emailed to the Planning Commission office within 30 days from the time he wrote his determination. This was followed up with a formal application and some affidavits. This application is an Appeal of his decision that determines the limits of the pre-existing, non-conforming use. The entire record is about 125 pages. He added that the statutory criteria the Board needs to analyze is if the administrative decision is in error. The Board should not consider whether the decision is distasteful or whether people like it.

Mr. Whitton asked who was present to speak on behalf of the Appeal? Ms. Tina Edmondson said she was present on behalf of the property owners that filed the Appeal. In their packets, the Board will find affidavits from the home owners that dispute the findings from Mr. Wall's January 17, 2014 determination. They have issues because he found that the hours of operation were acceptable. The permitted hours are defined as 8:00 AM - 5:00 PM. Mr. Branscum's website clearly states that it is a 24 hour business which operates 7 days a week and includes towing. The neighbors affidavits states that there is towing going in and out of the property all hours of the evening and on weekends and it is very disruptive to their families. Mr. Branscum is clearly not abiding by the decision and they also argue that Mr. Wall's decision is in error because he is operating in unacceptable hours. Mr. Wall's January 17, 2014 letter lays out 11 trucks are permitted on site at any time and the homeowners affidavits state that they have observed far more than 11 cars and trucks on the site at a given time. A storage facility, which was not approved by the County, has also been added onto the facility. The former business operator, Mr. Thomas, did not own the property. Tax documents show the property was owned by Edna Centers so the decision stating the former property owner's prior use of the land is applicable to Mr. Branscum is false because Mr. Thomas never owned the property in question. In addition, the homeowners were not aware that they could appeal the April 19, 2013 determination from the Zoning Administrator. Beyond that, Mr. Thomas' prior business never included a towing business. Although Mr. Wall's January 17, 2014 letter acknowledges this, the fact is that it is going on. So in addition to the Appeal, they want to know who is going to hold Mr. Branscum accountable for his violations. If the Appeal is turned down they would ask that

Mr. Branscum: (1) be held to the parameters that were laid out by Mr. Wall, (2) plant more trees because the property is an eyesore, and (3) limit the number of vehicles and hours. Lebanon Crittenden Road is a very narrow road and his trucks create safety issues by regularly crossing the street centerline. They have photos of trucks crossing the centerline. This is a serious safety issue.

Mr. Whitton asked Ms. Edmondson to sum up her main points. She stated trees, hours, number of vehicles, the parking expansion without permits, concrete dumping, and the fact the business continues to run in violation of the Boone County Board of Adjustment decision.

Mr. Whitton asked if the Board had any questions for Ms. Edmondson?

Mr. Shipe asked if the relationship between Mr. Morgan Thomas and Ms. Edna Centers could be explained. Mr. Morgan Thomas said he owned the property between 1986 and the time he sold it to Mr. Branscum. Mr. Rick Brueggemann said the ownership issue is irrelevant because case law well establishes that non-conforming uses can be acquired through leases. It is the operation on the property, not the ownership. But more important, he takes exception to Ms. Edmondson's comment that false information was submitted to the Board. If the Board takes a look at the Memorandum that he submitted on behalf of Mr. Branscum on April 5, 2013, they will see that the first page explains that the property was owned such that Mr. Thomas was a remainderment to a life estate of Mr. and Mrs. Centers. This is certainly not false information. The bottom line is that it was owned in a life estate named to his parents and he operated it. It really doesn't matter under the law whether he owned it or not.

Mr. Brueggemann said Kentucky Revised Statutes 100.261 states clearly that an Appeal must specify the grounds for the error in the Appeal that is filed within 30 days. The document that was filed within 30 days listed only two issues. The first was the ownership of Mr. Morgan Thomas and the second was the hours of operation and they listed Mr. Branscum's website. The website doesn't prove anything other than there is an advertisement for roadside repair and towing if needed. Mr. Whitton asked if any hours are noted on the website? Mr. Brueggemann said the website lists the hours as 24 hours and 7 days a week but the site also provides Mr. Branscum's Walton address because the impound lot was turned down at this location. Mr. Branscum has planted over 50 trees and has put dirt over part of the parking lot expansion as part of the agreement. Requests for additional actions are moot at this point because he is no longer asking for a change in use. He is simply using his right to the non-conforming use that has been established on the property as a matter of law.

Concerning the use of the property, the Appeal time for the April 19, 2013 decision ran 272 days before they filed their Appeal. He doesn't think they can elude to the fact that there was a lack of awareness because opposing counsel for at least one of the complaining parties, Larry and Pat Thomas, were copied on that decision. That decision was also part of the record at the September and October 2013 Board of Adjustment meetings for the Change in Non-Conforming Use application. The Change in Non-Conforming Use application was turned down and two attorneys represented claimed parties. They object to the Appeal because it was filed improperly and aside from that it lists many persons that under case law would not be aggrieved parties. They are not adjoining property owners or neighbors. Some of them live on Teal Road, which is a mile or so away. He is prepared to

submit additional comments if the Board wants to hear them. He has Mr. Morgan Thomas in the audience if needed. They have a thick record which includes insurance records and other things. He also has Mr. Walt Ryan, an adjoining property owner, in the audience and he can testify to what he recalls. He submitted a Memorandum and two letters in to the record (see Exhibits 2, 3, and 4).

Mr. Wilson stated it seems to him that what has been Appealed is relative to not undoing what the Zoning Administrator determined but contesting things like the business website. The Zoning Administrator's decision did not approve a 24 hour operation on the site. The decision indicates the business can operate between 8:00 AM - 5:00 PM. He does not see how the Board could rule against the Zoning Administrator as far as the business operating between 8:00 AM - 5:00 PM. The Appeal is also contending that there are more than 11 trucks on site at a given time but the Zoning Administrator's determination holds them to 11 trucks. To him, these issues do not sound like things for this Board but for enforcement through the Boone County Planning Commission office. Mr. Whitton asked if the business hours would also be an enforcement issue? Mr. Wilson and Mr. Wall said the hours of operation would be an enforcement issue because the determination limits the hours of operation between 8:00 AM and 5:00 PM. Mr. Wilson added that case law is supportive of the argument that Mr. Brueggemann made. It is not ownership but the use or activity on the land that determines whether or not there is protection of pre-existing uses.

Mr. Whitton said that Mr. Brueggemann is arguing that while the RBI website states that 24 hour towing available, Mr. Branscum does not tow from this location. Mr. Brueggemann said the towing work is not being done from this location. Mr. Branscum does provide repair and roadside repair from this location. There would be no prohibition that would prevent him from taking one of his service trucks to go get a pizza. Mr. Whitton asked if trucks can be towed back to this location? Mr. Brueggemann said he can tow vehicles back to be worked on but not part as a towing/impound business.

Mr. Brueggemann said the hours supplied by the last property owner went from 5:00 AM to 7:00 PM in the winter and 5:00 PM to 11:00 PM in the summer. Mr. Branscum's hours do not go nearly that long so he voluntarily agreed to 8:00 AM to 5:00 PM. He offered to answer any questions and said he has two witnesses present if the Board would like to hear from them. He thinks the Appeals fails to comply with the Statutes. They have not shown that the Zoning Administrator acted in error and they have the burden of proof.

Mr. Shipe asked Mr. Branscum if he has added more trees to the site? Mr. Branscum said he has planted more than 50 trees on the site. He offered to plant more when the Change in Non-Conforming Use application was heard. Mr. Shipe asked if any additional trees have been planted since the last meeting? Mr. Branscum replied that he had installed more trees since that time.

Mr. Whitton asked Mr. Wilson what they should allow as other testimony? He asked if they only needed to hear from the principal attorneys on either side? Mr. Wilson said that is correct. He believes legal counsel from both sides have pretty much stated their cases. They have not presented any requests to go forward with additional testimony.

Ms. Edmondson said the Appeal did address the decision that it relied on a prior owner's non-conforming use. The prior owner was not Mr. Thomas but was Ms. Centers. Mr. Thomas' remainderment was a future interest and not current ownership. While she is

aware that non-conformity is based on use and not ownership the decision states that it was based on the prior owner's use. They are just not saying that the 24 hour, 7 day a week advertisement is listed on the website. All of the homeowners affidavits state that he is running the business till 10:30 at night and in violation of the determination. Mr. Whitton asked if any complaints had been filed with the Boone County Planning Commission office regarding the hours? Ms. Edmondson replied "not yet" because they were waiting for the outcome tonight.

Ms. Edmondson stated the Mr. Branscum's LLC has an address in Walton. She believes the Secretary of State shows it to be on Dickerson Road. However, last May he changed the address to this location. RBI's principal address in 15487 Lebanon Crittenden Road.

Mr. Wilson asked Ms. Edmondson if she had anything additional to add to her case? She replied she did not.

Mr. Brueggemann said the Walton address on Dickerson Road was the prior address that Mr. Branscum worked from. He does have an arrangement with a property owner to park vehicles that he cannot bring to this site. The address of this property is 13121 Walton-Verona Road. Secondly, he really did not address the issue that Mr. Branscum and his employees are working longer than he should because it is irrelevant. If the Board would like to hear it, they have employees present that can testify to what time they go home. Mr. Whitton said they do not need to hear it because any issues regarding the hours of operation would be an enforcement issue. Mr. Whitton asked who the public would contact regarding enforcement issues? Mr. Morgan stated that Mitch Light is the Zoning Enforcement Officer and he works out of the Boone County Planning Commission office.

Mr. Whitton asked if there were any other questions or comments? There was no response.

Mr. Whitton asked what the motion should be? Mr. Wilson said the motion would be whether or not Ms. Edmondson and her clients have carried their burden that the Zoning Administrator was in error in reaching his decision. Mr. Wilson added that Mr. Wall did not reach a decision that the business could operate until 10:30 PM. His decision speaks for itself. The ownership issue is non-determinative of whether or something is pre-existing non-conforming.

Mr. Whitton asked for a motion. Mr. Shipe made a motion to deny the Appeal. He said any enforcement actions against Mr. Branscum are not issues for this Board to deal with. Mrs. Hempfling seconded the motion. Mr. Whitton asked if the Board would like to have any discussion on the motion? Mrs. Hempfling stated that there was a lot of discussion when the Change in Non-Conforming Use application was heard that this Board does not handle zoning enforcement.

Mr. Whitton asked for the vote on the motion and it carried unanimously.

ADJOURNMENT

Mr. Whitton asked for motion to adjourn the meeting. Mr. Shipe made the motion to adjourn and Ms. Hempfling seconded the motion. Mr. Whitton called for the vote and the meeting was adjourned by unanimous consent at 7:08 p.m.

APPROVED

Mr. George Whitton, Chairman

ATTEST:

Todd K. Morgan, AICP
Senior Planner, Zoning Services

Exhibits

1. Email from Troy Sturgeon
2. Memorandum Submitted By Richard Brueggemann
3. Letter From Lee Anne Ryan Submitted By Richard Brueggemann
4. Letter From Rhonda Goodman Submitted By Richard Brueggemann