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## Practicing Before a Board of Adjustment: Seven Practical Tips

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## Practicing Before a Board of Adjustment: Seven Practical Tips

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# Practicing Before a Board of Adjustment: Seven Practical Tips



By Kathryn L. Moore

After having taught land use planning at the University of Kentucky College of Law for more than a decade, I was appointed to the Lexington-Fayette Urban County Board of Adjustment (LFUC Board or Board) in July 2007. Over the past three years, I have seen some very experienced attorneys do a great job arguing before the board. These attorneys know that the board is an administrative agency, not a court of law, and practice before the board differs from general litigation. Not all attorneys, however, have the benefit of extensive experience. Thus, I would like to share some practical tips for attorneys new to the practice of law before a board of adjustment.

The Article will begin with a brief overview of the law governing appeals to boards of adjustment. It will then offer seven practical tips for a successful practice before a board.

## I. Brief Overview of the Law

### Governing Appeals to a Board of Adjustment

Chapter 100 of the Kentucky Revised Statutes (KRS) governs planning and zoning in Kentucky. It authorizes, but does not require, cities and/or counties to enact zoning regulations.<sup>1</sup> Currently, 26 of Kentucky's 120 counties have county-wide planning and zoning.<sup>2</sup>

If a city and/or county elects to enact zoning regulations, KRS §100.217 requires that the mayor and/or county judge/executive appoint three, five, or seven citizens to serve on a board of

adjustment before any zoning regulation may have legal effect. The board is an administrative agency that serves as a "safety valve" to ensure that the zoning ordinance is both workable and not arbitrary.<sup>3</sup> Under appropriate circumstances, the board provides a vehicle for relief from strict application of the zoning scheme.<sup>4</sup>

The board has jurisdiction over four basic types of appeals: (1) variances, (2) conditional use permits, (3) changes in nonconforming uses, and (4) appeals from the zoning administrator.

### A. Variances

KRS § 100.111(24) defines a "variance" as "a departure from dimensional terms of the zoning regulation pertaining to the height, width, length, or location of structures, and the size of yards and open spaces where such departure meets the requirements of KRS 100.241 to 100.247." KRS § 100.247 prohibits use and density variances.<sup>5</sup>

KRS § 100.243 requires that the board make four separate findings before it may grant a variance. Specifically, the board must find that: (1) the variance will not adversely affect the public health, safety, or welfare; (2) the variance will not alter the essential character of the general vicinity; (3) the variance will not cause a hazard or nuisance to the public; and (4) the variance will not allow an unreasonable circumvention of the requirements of the zoning regulations.<sup>6</sup> The statute directs the board to consider three specific factors in making these findings: (1) whether the requested variance arises

from special circumstances which do not generally apply to land in the general vicinity or in the same zone; (2) whether strict application of the regulation's provisions would deprive the applicant of reasonable use of the land or would create an unnecessary hardship; and (3) whether the circumstances giving rise to the request for a variance are the result of actions taken by the applicant after the adoption of the zoning regulation at issue.<sup>7</sup> The statute prohibits the board from granting a variance if the request arises from the applicant's willful violation of the zoning regulation.<sup>8</sup>

### B. Conditional Use Permits

KRS § 100.237 authorizes the board to hear and decide applications for conditional use permits. While variances authorize landowners to depart from the express dimensional terms of the zoning regulation, conditional uses are uses that are specifically named in the zoning regulation but require oversight by the board. Specifically, KRS § 100.111(6) defines a conditional use as

a use which is essential to or would promote the public health, safety, or welfare in one (1) or more zones, but which would impair the integrity and character of the zone in which it is located, or in adjoining zones, unless restrictions on location, size, extent, and character of performance are imposed in addition to those imposed in the zoning regulation.

Typical conditional uses include schools, churches, Sunday schools, parish houses, and cemeteries.<sup>9</sup>

KRS § 100.237(1) authorizes the board to modify or attach time limitations and other requirements to conditional use permits. A conditional use permit is defined as "legal authorization to undertake a conditional use" that consists of two parts: (1) a statement by the board of its factual determination which justifies the issuance of the permit, and (2) a list of the specific conditions imposed.<sup>10</sup> Unlike variances, no specific factual

findings are required for the board to grant a conditional use permit, but the board's factual determination should demonstrate that the board "has considered the effect of the proposed land use on the public health, safety and welfare in the zone affected, in adjoining zones and on the overall zoning scheme."<sup>11</sup>

### C. Changes in Nonconforming Uses

A nonconforming use or structure is "an activity or a building, sign, structure, or a portion thereof which lawfully existed before the adoption or amendment of the zoning regulation, but which does not conform to all of the regulations contained in the zoning regulation which pertain to the zone in which it is located."<sup>12</sup> KRS § 100.253 allows nonconforming uses to continue, but prohibits the board from allowing nonconforming uses to be extended or enlarged or changed from one nonconforming use to another unless the new nonconforming use is in the same or more restrictive classification.<sup>13</sup> Thus, the board may permit a nonconforming fourplex in a single-family residential district to be converted into a duplex but must prohibit a duplex from being converted into a fourplex.

### D. Administrative Appeals from the Zoning Administrator

KRS § 100.257 authorizes the board to hear cases in which the applicant contends that there is an error in an order, requirement, decision, grant, or refusal made in the enforcement of the zoning ordinance. Administrative appeals typically involve questions of interpretation of the zoning regulations or nonconforming use determinations.

## II. Seven Practical Tips

### A. Know Your Forum

Walter May, former chair of the Lexington-Fayette Urban County (LFUC) Planning Commission and a frequent guest lecturer in my land use planning class, advises the students to "know their forum." By this he means become familiar with the specific court, planning commission, or board of adjustment before arguing before that forum. He recommends that the students watch a proceeding in the particular

forum at least once before arguing before the forum. Just as individual judges have their predilections, so too do particular administrative bodies. An attorney is much more likely to argue successfully before a particular forum if the attorney is familiar with and adapts to the practice in the forum.

### B. Know the Law in Your Local Jurisdiction

Land use planning is inherently local in nature. KRS § 100.213 specifically authorizes cities and/or counties to enact zoning regulations. The local zoning regulations may be more restrictive than KRS Chapter 100. For example, although sign variances may be common in some areas, Article 17-8(a) of the LFUC Zoning Ordinance prohibits the LFUC Board of Adjustment from granting any variance that would increase the maximum total permitted sign area on a single lot or building. Thus, at public hearings, the board consistently rejects appeals for variances in sign size. There is no point in wasting

your time or your client's money appealing a building inspection decision limiting the size of a sign to that allowed by the zoning ordinance.

### C. The Rules of Evidence Need Not Apply

Boards of adjustment are administrative agencies, not courts of law. Although general due process requirements apply,<sup>14</sup> boards need not follow all of the formalities of courts of law.<sup>15</sup> Boards may, for example, dispense with the rules of evidence and permit attorneys to testify. Again, attorneys would be well-advised to observe at least one public hearing before arguing before any particular board so that the attorney may become familiar with the procedural rules and practices for that particular board.

### D. Establish Your Record and Move On

Members of the board of adjustment are required to be citizens.<sup>16</sup> They may be, but typically are not, lawyers.

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Board members receive training and are committed to serving the public. Nevertheless, it is the rare board member who fully understands the intricacies and nuances of the law. To illustrate, in February 2008, the LFUC Board heard the most legally interesting case of my tenure.<sup>17</sup> That case involved an appeal for an administrative review to allow a change in nonconforming use from public-school use to antique sales and an accessory restaurant. In January 2008, the staff recommended that the appeal be disapproved because the proposed use was not in the same or more restrictive classification as the prior use. The applicant's attorney requested that the case be postponed for a month and used that time to persuade the staff that "[u]nder these unique and special circumstances, utilizing the guidance of some related case law, it is appropriate to consider the sale of antiques with an accessory restaurant as being in the same classification as a public elementary school."<sup>18</sup>

The Board held a public hearing on the appeal in February 2008. At that hearing, the attorney spent about an hour making a very technical legal argument that the proposed use fell within the same or more restrictive classification as the prior use.

The Board voted 4-2 in favor of the appeal. Before making a motion to approve the appeal, one board member declared, "[W]e're not a court of law here. We're the board of adjustment, and we take a look at all the issues; and we either vote up or down on the appeal for this administrative review. . . I trust our planning and legal counsel that this has been thoroughly researched; and if it goes to a judicial appeal, that's not our purview."<sup>19</sup> Before voting against the appeal, another board member said, "I think your legal gymnastics to get us to this nonconforming use are questionable; and I have a lot of nervousness about this."<sup>20</sup>

The attorney did a great job of persuading the staff that it should adopt his interpretation of the law. The attorney, however, did not need to spend as much time as he did making his technical

legal argument at the public hearing. It appeared that most of the board members were satisfied with the staff's recommendation that the law supported the appeal and were more concerned with the likely impact of the proposed use on the surrounding property than whether the proposed use fell within the same or more restrictive classification than the existing use.

At the public hearing, lawyers should submit in writing whatever they need to establish the record in case there is an appeal. They need not, however, talk at length about technical legal arguments.

#### **E. Work with the Staff**

KRS § 100.223 authorizes the board of adjustment to hire a professional staff. The LFUC Board, like many boards across the state, has a professional staff. Each case is referred to a member of the professional staff who reviews the application, usually inspects the property, and prepares a written report making recommendations on the merits of the appeal. The report begins by identifying the zoning designation and existing land uses with respect to the property at issue and the surrounding property. It then identifies the proposed land use for the property at issue pursuant to the most recent comprehensive plan. It then clearly states the applicable legal requirements under the zoning ordinance. The report then provides a case review which includes the factual background and history, a discussion of the applicable law, and concludes with a recommendation as to whether or not the appeal should be approved. In setting forth the recommendation, the report offers specific reasons that correspond to the applicable legal standards. If the report recommends approval, it identifies any specific conditions that should be imposed.

Experienced land use attorneys know the importance of meeting with the staff and taking its recommendations seriously. If the staff recommends disapproval, attorneys will often ask to postpone the public hearing until they can convince the staff to recommend approval. They may amend their

request to garner staff approval<sup>21</sup> or simply try to make a more persuasive legal argument as did the attorney in the nonconforming-use case discussed above. Attorneys who are unable to convince the staff to recommend approval often withdraw the case rather than risk having the Board disapprove the case.<sup>22</sup>

#### **F. Don't Forget About the Neighbors**

In addition to working with the professional staff, attorneys should also try to address the concerns of neighbors. Although consent by the neighbors is not legally required, it makes a difference as a practical matter. In the 13 cases the board disapproved from July 2007 through December 2008, neighbors objected in eight of those cases. Perhaps more significantly, in more than half of the cases in which the board did not follow the staff's written recommendation, neighbors objected to the staff's recommendation. In fact, when sounding the agenda, the chair of the LFUC Board typically encourages applicants to discuss their case with objecting neighbors before the case is heard by the board.

On a related note, if you represent neighbors who object, be sure to attend the public hearing. Although the Board accepts and reads written objections, objections made in person tend to carry more weight.

#### **G. There are Different Ways of Reaching the Same Practical Result**

It is a canon of land use planning texts that landowners may reach the same practical result in different ways. For example, in a jurisdiction that allows use variances but does not permit barbershops in residential districts, a landowner might: (1) seek a use variance to allow a barbershop in a residential district; (2) seek to amend the text of the zoning ordinance to make barbershops conditional uses in residential districts and seek a conditional use permit for his barbershop; or (3) seek to amend the text of the zoning ordinance to make barbershops principal uses in residential districts.

Over the past three years, I have seen attorneys pursue alternate means to reach the same result in a number of cases. For example, in July 2007, an attorney requested an indefinite postponement of an administrative review of a digital-sign appeal so that the attorney could pursue a text amendment to the zoning ordinance which disallowed electronic message boards in planned shopping centers.<sup>23</sup> In another case, the applicant originally applied for a text amendment to the zoning ordinance seeking to add museums as conditional uses in agricultural rural zones.<sup>24</sup> When the proposed zone change met with resistance, the applicant amended the application to request an amendment to allow an expansion or enlargement of a nonconforming use under limited circumstances. The applicant then discovered that it had already been granted a conditional use permit to operate a museum on the land. Thus, the applicant sought, and was granted, a conditional use permit allowing the applicant to expand the museum.<sup>25</sup>

### III. Conclusion

Lawyers need to know the law. Yet knowing the law is not enough. In this Article, I have offered seven practical tips to help lawyers bridge the gap between theory and practice and argue successfully before a board of adjustment. ①



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where she teaches land use planning, property, employee benefits, and state and local tax. She currently serves as the vice chair of the Lexington-Fayette Urban County Board of Adjustment. She is a member of the American Law Institute and the National Academy of Social Insurance.

### ENDNOTES

1. KRS § 100.203.
2. See Marshall D. Slagle, *Land Use and Planning Issues*, in LEGAL ISSUES INVOLVING LOCAL GOVERNMENT 193, 197 (NBI April 2008).
3. See *Louisville & Jefferson Cnty. Bd. of Zoning Adjustment & Appeals*, 325 S.W.2d 324, 326 (Ky. 1959); *Thomson v. Tafel*, 309 Ky. 753, 760 (Ky. 1949); *Bourbon Cnty. Bd. of Adjustment v. Currans*, 873 S.W.2d 836, 837 (Ky. Ct. App. 1994).
4. See *Currans*, 873 S.W.2d at 837.
5. A use variance is a variance that permits a use other than that prescribed by the zoning ordinance.
6. KRS §100.243(1).
7. *Id.* § 100.243(1)(a)-(c).
8. *Id.* § 100.243(2).
9. These conditional uses are among the 13 different categories of conditional uses authorized in the single family residential (R-1A) zone in Lexington. See Zoning Ordinance Lexington-Fayette Urban County, Kentucky Art. 8-5(d).
10. KRS § 100.111(7).
11. *Davis v. Richardson*, 507 S.W.2d 446, 449 (Ky. 1974).
12. KRS § 100.111(13).
13. Without specifically referring to Churchill Downs, Kentucky law allows for expansions and extensions in Churchill Downs' nonconforming use. See KRS § 100.253(2) (allowing for expansions and extensions in nonconforming use "where the use consists of the presenting of a major public attraction or attractions, such as a sports event or events, which has been presented at the same site over such period of years and has such attributes and public acceptance as to have attained international prestige and to have achieved the status of public tradition . . .").
14. See, e.g., *Morris v. City of Catlettsburg*, 437 S.W.2d 753, 755 (Ky. 1969); *Am. Beauty Homes Corp. v. Louisville & Jefferson Cnty. Planning & Zoning Comm'n.*, 379 S.W.2d 450, 456 (Ky. 1964).
15. See also *Hilltop Basic Res., Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (noting that procedural due process does not include "the right to an impartial tribunal").
16. KRS § 100.217.
17. A-2008-6, Athens Schoolhouse Partners, LLC.
18. See Staff Recommendation in Minutes for the Board of Adjustment Meeting, February 29, 2008, at 14.
19. Transcribed by Board's Secretary at Author's request.
20. *Id.*
21. For example, a variance case, V-2008-40 Rev. & Mrs. George Naze, was first scheduled for a public hearing in April 2008. The applicants sought a variance to reduce the required rear yard from ten feet to 5.5 feet and to reduce the side yard from five feet to zero feet to allow a sunroom and deck to remain as built. The staff recommended the variance be disapproved and the case was postponed for several months. By the time the public hearing was finally held in August 2008, the applicant had withdrawn the request for a side yard variance, and the staff had recommended approval. The Board voted unanimously to approve the variance.
22. Between July 2007 and December 2008, applicants withdrew their requests in 10 different cases. In only one of the cases did the staff recommend approval. In that case, the applicant withdrew the request because the variance was no longer needed. In six of the cases, the staff recommended disapproval while the staff recommended postponement in two of the cases and made no recommendation in one case.
23. A-2007-59, The Lamar Companies.
24. A-2007-2, Headley-Whitney Museum, Inc.
25. In the interest of full disclosure, I must say that I voted against the request because I thought that the initial conditional use permit had been erroneously approved and granting the applicant's request would be an impermissible expansion of a nonconforming use.