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The Lexington-Fayette Urban County Board of Adjustment: Fifty Years Later

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Recommended Citation

Kathryn L. Moore, *The Lexington-Fayette Urban County Board of Adjustment: Fifty Years Later*, 100 Ky. L.J. 435 (2011-2012).

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Notes/Citation Information

Kentucky Law Journal, Vol. 100, No. 3 (2011-2012), pp. 435-529

ARTICLES

The Lexington–Fayette Urban County Board of Adjustment: Fifty Years Later

*Kathryn L. Moore*¹

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¹ Laramie L. Leatherman Professor of Law, University of Kentucky College of Law. I would like to thank Chris King, Bill Sallee, Bill Fortune, and Michael Healy for their valuable insights and assistance; Kirk Gaetz for his programming assistance; and Gwendolyn Junge, Joe Bilby, and Catherine Barrett for their research assistance.

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INTRODUCTION

FIFTY years ago, Jesse Dukeminier, Jr. and Clyde L. Stapleton published a case study of the practice of law before the Lexington–Fayette Urban County (LFUC) Board of Adjustment.² Described as “perhaps the seminal early inquiry into the recurring criticism that variance-granting boards pay little attention to the legal limitations on their powers,”³ the article was sharply critical of the Board of Adjustment.⁴ Indeed, the article was subtitled “A Case Study in Misrule.”⁵ Professor Dukeminier and Mr. Stapleton were not alone in criticizing the Board of Adjustment;⁶ many articles, published both before and after the Dukeminier–Stapleton study, have criticized boards of adjustment for their failure to apply the law properly.⁷

In the fifty years since the Dukeminier–Stapleton study, the LFUC Board of Adjustment and its practices have matured and improved considerably. That, however, is not to suggest that the Board of Adjustment and its practices are free from criticism.

This Article presents a new empirical study of the LFUC Board of Adjustment. Specifically, the study covers the eighteen-month period from the Board’s July 2007 meeting through its December 2008 meeting.⁸

2 Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 274 (1962) [hereinafter *Study*].

3 Randall W. Sampson, *Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Consciously Ignored, or Something In Between?*, 39 URB. LAW. 877, 894 (2007).

4 The *Study* authors state:

Our general conclusion is that the Board has not operated in such a manner as to assure citizens equal protection of the law. It has not, during the seventeen months of our study, produced a pattern of consistent, sound, and articulate judgments. Nor have its operations assured the public that the comprehensive plan is not being thwarted through the variance device. We do not mean by this to imply any personal criticism of the individual members of the Board. To the best of our knowledge they are all honest men and good citizens, serving without pay in a thankless job. Our criticism goes to the institution, which we find is functioning badly.

Study, *supra* note 2, at 322.

5 *Id.*

6 In fact, boards of adjustment and their power to grant variances have been subject to criticism since the drafting of the Standard Zoning Enabling Act in the 1920s. *See* Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, LAND USE & ZONING DIG., Feb. 1996, at 3, 5–6.

7 *See* Sampson, *supra* note 3, at 893–918 (citing and discussing a multitude of studies criticizing variance practices by various boards and then describing and critiquing variance practice in three jurisdictions in Colorado); David P. Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 769, 770 & n.4 (1976–77) (stating that “[f]ew legal institutions have been more consistently and vigorously criticized than zoning boards of adjustment” and citing eighteen studies, including the Dukeminier–Stapleton study).

8 I was appointed to the Lexington–Fayette Urban County Board of Adjustment in July,

During this period, 168 separate appeals were filed before the Board. This Article discusses how the practice has changed and improved in the years since the Dukeminier–Stapleton study and the problems and difficulties that still remain.

The Article begins by describing the current procedure before the LFUC Board of Adjustment and how it has changed since the Dukeminier–Stapleton study. It then addresses the three basic types of appeals the Board considers: (1) variances, (2) conditional use permits, and (3) administrative appeals from the zoning administrator. With respect to each type of appeal, the Article first describes the governing law and how it has changed since the Dukeminier–Stapleton study. It then provides an empirical study of the Board’s voting behavior. The Article concludes with an overview of the ways in which the law and practice have changed since the Dukeminier–Stapleton study and the problems that remain.

I. PROCEDURE BEFORE THE LEXINGTON–FAYETTE URBAN COUNTY BOARD OF ADJUSTMENT

The procedure before the LFUC Board of Adjustment has changed in a couple of significant ways since the Dukeminier–Stapleton study. This section begins by describing the current procedure. It then discusses the ways in which this procedure has changed significantly since the Dukeminier–Stapleton study.

Chapter 100 of the Kentucky Revised Statutes grants the Board of Adjustment original jurisdiction over variances,⁹ conditional uses,¹⁰ and changes in nonconforming uses.¹¹ It also authorizes the Board to hear appeals from the building inspector’s interpretation of the zoning ordinance.¹² Although the Board has original jurisdiction in some cases, the Board never

2007. This study covers my first eighteen months of service on the Board. While some critics may wish to discount the study for that reason, I do not believe that my presence on the Board significantly changed the way it operated. Indeed, the fact that I was the only dissent (or just one of two dissenters) in a number of cases that I criticize in this Article suggests that I did not significantly impact the Board’s voting behavior. *See, e.g.*, Section II.B.3, *infra* (critiquing Board’s decision in *Fantasy Friends Costuming*); Section III.C.1.b, *infra* (critiquing Board’s decision in *Athens Schoolhouse*); Section III.C.3.a, *infra* (critiquing votes to approve *Kangaroo Bob’s*); *cf.* Sampson, *supra* note 3, at 887 & n.48 (stating that study’s author used a mix of open-ended and closed-ended interviews with board members and planning staff to avoid Hawthorne effect, which is the change in an “individual or group’s behavior that occurs when the individual or group is aware of being observed”); Ronald M. Shapiro, *The Zoning Variance Power – Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 14 n.80 (1969) (criticizing study of Philadelphia Board of Adjustment because researchers “worked very closely” with Board and caused Board to be “on its best behavior” and which arguably led to Hawthorne effect).

9 KY. REV. STAT. ANN. § 100.241 (West 2006).

10 KY. REV. STAT. ANN. § 100.237 (West 2006).

11 KY. REV. STAT. ANN. § 100.253 (West 2006).

12 KY. REV. STAT. ANN. § 100.257 (West 2006).

acts except on appeal from the Division of Building Inspection.¹³ Thus, before the Board will consider any matter, the applicant must first apply to the Division of Building Inspection for a building permit or certificate of occupancy. If the applicant, or any affected person, is dissatisfied with the building inspector's decision, an appeal may be made to the Board.

The appeal must be made within thirty days after the applicant or his agent receives notice of the building inspector's decision.¹⁴ In order to appeal, the applicant must complete an application form that is available in the Secretary's office¹⁵ and file a notice of appeal with the Board and the building inspector whose decision is being challenged.¹⁶ Once the building inspector has been notified that his decision is being appealed, the inspector must forward all papers constituting the record of his decision to the Board.¹⁷ After the notice of appeal has been received, the Board sets a time for a public hearing and provides public notice in the local newspaper.¹⁸ As a courtesy, the Board also sends notice to all adjacent property owners advising them of the appeal and the time of the hearing.

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.

The Board holds a public meeting one afternoon each month to hear appeals. There are typically ten to twelve cases scheduled for the hearing each month. The Chair begins the meeting by sounding the agenda. First, the Chair asks whether anyone wishes to postpone or withdraw any items scheduled to be heard that day. Requests for postponement or withdrawal

¹³ LEXINGTON–FAYETTE URBAN COUNTY GOV'T, BY–LAWS OF THE LEXINGTON–FAYETTE URBAN COUNTY. BD. OF ADJUSTMENT art. IX.A. (1987) [hereinafter BY–LAWS].

¹⁴ *Id.* art. IX.A.

¹⁵ *Id.* art. IX.C. Copies of the variance, conditional use permit, and administrative appeal application forms are contained in the Appendix.

¹⁶ *Id.* art. IX.A.

¹⁷ *Id.* art. IX.A.

¹⁸ *Cf.* KY. REV. STAT. ANN. § 100.263 (West 2006) (requiring that public notice be provided in accordance with KRS Chapter 424 which requires publication of legal notice in newspaper).

are almost always granted without discussion. After disposing of requests for postponement or withdrawals, the Board considers other agenda items that can be completed in an expedited manner. Those items consist of items in which (1) the staff recommends that the appellant's appeal be approved as requested; (2) the appellant concurs with the staff's recommendation; and (3) no one present at the meeting objects to the Board acting on the matter without discussion.¹⁹ Typically, those items are approved without discussion.²⁰ Occasionally, Board members may ask the staff or appellant a few questions before voting to approve the request.²¹ In a few rare instances, the Board may engage in an extended discussion of an appeal despite the fact that the staff recommended approval, the appellant agreed with the staff's recommendation, and no one appeared before the Board to object to the staff's recommendation.²²

After disposing of the expedited items, the Board turns to the contested items. Discussion of contested items will typically begin with the staff discussing its report. The appellant is then given the opportunity to respond, and any objectors may testify. Although appellants and objectors are required to swear in before testifying, the procedure otherwise remains very informal. Attorneys represent some appellants, but most applicants appear without legal counsel.²³ In a few instances, attorneys represent objecting neighbors.²⁴

There have been two significant changes in procedure since the Dukeminier–Stapleton study. First, the parties are no longer required to

19 Between July 2007 and December 2008, 82 of the 168 separate appeals before the Board could be decided on an expedited basis.

20 Forty-six of the eighty-two appeals that qualified for expedited treatment were approved by the Board without discussion.

21 There was a brief discussion in thirty-four of the eighty-two appeals that qualified for expedited treatment.

22 There was an extended discussion in three of the eighty-two appeals that qualified for expedited treatment. *See* Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment, Minutes for the Bd. of Adjustment Meeting (Dec. 12, 2008) (on file with author) (discussing an appeal for conditional use permit to allow mining in Vulcan Lands, Inc., V–2008–107, which was filed after virtually identical appeal ended in tie vote in October and Board ultimately voted to approve); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Oct. 31, 2008) (on file with author) (discussing Vulcan Lands, Inc., C–2008–95, an appeal for conditional use permit to allow mining; ended in tie vote); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment, Minutes for the Bd. of Adjustment Meeting (Mar. 28, 2008) (on file with author) (discussing Christ Centered Church, C–2008–21, an appeal for conditional use permit to expand church and add parking; Board ultimately voted to approve).

23 Attorneys represented appellants in forty-four cases. For practical advice on how to argue before a board of adjustment, see Kathryn L. Moore, *Practicing Before a Board of Adjustment: Seven Practical Tips*, KY. BENCH & BAR, Jan. 2011, at 10.

24 In two of the forty-four cases in which attorneys represented appellants, attorneys also represented the objecting neighbors. In another four cases, the objecting neighbors were represented by an attorney but the appellant did not have legal representation.

bring in, at their own expense, a stenographer to take proof for the purpose of preparing a record for appeal to the circuit court.²⁵ Now a member of the planning staff records the meeting and prepares relatively detailed minutes of the meeting. Although an appellant must pay to have the complete record transcribed, the appellant can wait until the end of the hearing after the Board has rendered its decision to decide whether to incur this expense.²⁶ Second, unlike at the time of the Dukeminier–Stapleton study,²⁷ the minutes provide some detail about the arguments and questions raised in the hearing and explicitly state the reasons why the Board voted to approve or disapprove each item. The Dukeminier–Stapleton study found that, as a practical matter, Board decisions were typically final simply because the paucity of the minutes and the unwillingness of most applicants to pay for a stenographer prior to the Board's decision ordinarily foreclosed judicial review. Now that the minutes are sufficiently detailed and a complete record is readily available, appellants need not, as a practical matter, waive their right to appeal. Nevertheless, applicants rarely appeal the Board's decisions.²⁸ In fact, not a single Board decision made between July 2007 and December 2008 was appealed to the Fayette County Circuit Court.²⁹

II. LAW AND PRACTICE BEFORE THE BOARD OF ADJUSTMENT

Chapter 100 of the Kentucky Revised Statutes, sometimes referred to as Kentucky's planning and land use control enabling legislation, governs planning and zoning in Kentucky. It authorizes, but does not require,

25 Cf. *Study*, *supra* note 2, at 277 (stating that parties must bring in a stenographer at their own expense if they wish to take proof for purposes of an appeal).

26 In a case that was appealed after the study period, the appellant submitted a video transcript of the hearings on the appeal. The hearings on that case exceeded six hours. *See* Vulcan Constr. Materials, LLP, C–2010–110 (Dec. 2010).

27 *Study*, *supra* note 2, at 277 (describing the limited details provided in Board of Adjustment's minutes).

28 There is nothing new or surprising about the fact that decisions of the Board are rarely appealed. Only two of the 167 cases Dukeminier and Stapleton reviewed were appealed. *See Study*, *supra* note 2, at 278; David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 316 (2004) (noting that of the 1,806 variance appeals considered by North Carolina jurisdictions responding to survey conducted in 2002, only forty-eight—or 2.5%—were appealed to superior court); Shapiro, *supra* note 8, at 16 (noting that in a study done in the 1960s, the substance of only a handful of the decisions rendered by boards in Baltimore and Boston were appealed); Thomas B. Donovan, Comment, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101, 101 n.7 (1962) (noting that no judicial appeals were taken from any final administrative decisions in a year in which 332 variance applications were filed).

29 My research assistant, Joe Bilby, did an extensive search of the Fayette Circuit Court's docket and did not find a single case filed against the Board of Adjustment between July 2007 and January 2010.

cities and/or counties in the state to enact zoning regulations.³⁰ Currently, twenty-six of Kentucky's 120 counties, including Fayette County, have county-wide planning and zoning.³¹

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. Seven citizens serve on the Fayette–Urban County Board of Adjustment.³²

Kentucky courts have described the Board as an administrative agency that serves as a “safety valve” to ensure that the zoning ordinance is both workable and not arbitrary.³³ Under appropriate circumstances, the Board provides a vehicle for relief from strict application of the zoning scheme.³⁴

The Board considers three basic types of appeals: (1) variances, (2) conditional use permits, and (3) administrative appeals from the zoning administrator. This section will first address the law and practice governing variances. It will then turn to conditional use permits, which were called special exceptions at the time of the Dukeminier–Stapleton study. Finally, it will address administrative appeals from the zoning administrator, including appeals involving nonconforming uses.

A. Variances

In common parlance, there are two different types of variances: (1) use variances and (2) dimensional variances (sometimes referred to as bulk³⁵ or area variances).³⁶ A use variance, as its name suggests, permits

30 KY. REV. STAT. ANN. § 100.203 (West 2006).

31 See Marshall D. Slagle, *Land Use And Planning Issues, National Business Institute Seminar on Legal Issues Involving Local Governments* (Apr. 2008), in NAT'L BUS. INST., LEGAL ISSUES INVOLVING LOCAL GOVERNMENTS 193, 197.

32 BY–LAWS, *supra* note 13, art. III.A.

33 See *Bourbon Cnty. Bd. of Adjustment v. Currans*, 873 S.W.2d 836, 837 (Ky. App. 1994); *Kline v. Louisville & Jefferson Cnty. Bd. of Zoning Adjustment & Appeals*, 325 S.W.2d 324, 326 (Ky. 1959); *Thomson v. Tafel*, 218 S.W.2d 977, 981 (Ky. 1949).

34 See *Currans*, 873 S.W.2d at 837.

35 The Dukeminier–Stapleton study used the term “bulk variance.” *Study*, *supra* note 2, at 281.

36 According to Anderson's *American Law of Zoning*, “[t]he distinction between ‘area’ and ‘use’ variances, and the imposition of separate requirements for the granting of each type, are inventions of the court.” KENNETH H. YOUNG, 3 ANDERSON'S AMERICAN LAW OF ZONING § 20.06, at 424 (4th ed. 1996); see also DANIEL R. MANDELKER, *LAND USE LAW* § 6.42 (5th ed. 2003) (“Although the zoning statutes do not usually make this distinction, the courts have always distinguished use from area variances.”). Interestingly, KRS Chapter 100 expressly used the term “dimensional variance” for twenty years. See Act of Mar. 23, 1966, ch. 172, § 1, 1966 Ky. Acts 708, 709 (defining “dimensional variance”). In 1986, Chapter 100 was amended, among other ways, to delete the modifier, “dimensional,” from the term “variance” in the definition section. See Act of Mar. 27, 1986, ch. 141, § 1, 1986 Ky. Acts 343, 344.

the use of land in a manner other than that expressly permitted by the zoning ordinance.³⁷ A dimensional variance, in contrast, does not permit a prohibited use. Instead, a dimensional variance permits a departure from the dimensional terms of a zoning ordinance, such as the height, width, or location of structures, and the size of yards and open spaces.³⁸ There is some debate as to whether density requirements invoke use variances or dimensional variances.³⁹

With respect to variances, the Dukeminier–Stapleton study began by critiquing the Board’s decisions regarding use variances. It then discussed bulk variances, excluding sign variances. Finally, it separately critiqued the Board’s decisions regarding sign variances. Thus, this section will begin by discussing use variances. It will then turn to dimensional variances (other than sign variances) and conclude by discussing sign variances.

1. Use Variances.—The Dukeminier–Stapleton study noted that at the time of the study, it was unclear whether Kentucky law permitted use variances. It contended that two Kentucky cases⁴⁰ could be interpreted as holding that the Board of Adjustment does not have the power to grant use variances.⁴¹ Nevertheless, Dukeminier and Stapleton contended that the cases should not be so interpreted and that the Board should be viewed as having the power to grant use variances.⁴²

The authors criticized the Board for granting three of the twelve use variances requested because “[i]n none of them was there any evidence on record that could even come close to satisfying the legal requirements for

37 YOUNG, *supra* note 36, § 20.06, at 4. The Dukeminier–Stapleton study defined a use variance as “allow[ing] a structure or use in a district restricted against such structure or use.” *Study, supra* note 2, at 281.

38 See KY. REV. STAT. ANN. § 100.111(24) (West 2006) (defining variances for purposes of KRS Chapter 100); see also YOUNG, *supra* note 36, at § 20.07, at 426–27 (“Area variances involve matters such as setback lines, frontage requirements, height limitations, lot-size restrictions, density regulations, offstreet parking, and yard requirements.” (footnotes omitted)). The Dukeminier–Stapleton study defined a bulk variance as “giv[ing] the property owner relief from some ordinance requirements with respect to area, height, setback, parking spaces, and such.” *Study, supra* note 2, at 281.

39 See MANDELKER, *supra* note 36, § 6.42 (“The courts are divided on whether an increase in density requires a use or an area variance.”).

40 *Bray v. Beyer*, 166 S.W.2d 290 (Ky. 1942); *Arrow Transp. Co. v. Planning & Zoning Comm’n*, 299 S.W.2d 95 (Ky. 1957).

41 *Study, supra* note 2, at 281–82.

42 *Id.* at 282–83.

a variance.”⁴³ In contrast, Dukeminier and Stapleton were more supportive of the remaining cases⁴⁴ in which the Board denied the requests. They said:

In none of these cases was there any evidence in the minutes of the Board or in the petition that the petitioner had met even one of the requirements for a variance set forth above. If no additional evidence was presented at the hearing, the Board had no authority to grant the requests, and they were properly denied.⁴⁵

Shortly after the Dukeminier–Stapleton study, the General Assembly amended KRS Chapter 100 to make it clear that the Board does not have the power to grant use variances.⁴⁶ Specifically, KRS 100.247 now provides that “[t]he board shall not possess the power to grant a variance to permit a use of any land, building, or structure which is not permitted by the zoning

43 *Id.* at 285.

44 The Board denied seven use variance requests. One request had not been disposed of at the time of the study and one variance was granted as a use variance but in fact involved a use that was permitted as a special exception. *Id.* at 283.

45 *Id.* at 284.

46 Act of Mar. 23, 1966, ch. 172, § 54, 1966 Ky. Acts 708, 728–29. In his extensive study of the 1966 Act, Professor Tarlock noted that Kentucky law was once unclear as to whether use variances were permitted but did not otherwise provide any explanation as to why the Kentucky enabling legislation was amended to expressly prohibit use variances. See A. Dan Tarlock, *Kentucky Planning and Land Use Control Enabling Legislation: An Analysis of the 1966 Revision of K.R.S. Chapter 100*, 56 Ky. L.J. 556, 609 (1968).

Presumably, the Kentucky legislature decided to expressly prohibit use variances because of the risk of harm they create. As the Wisconsin Supreme Court has explained:

Use variances by their nature have the potential to bring about great changes in neighborhood character, but area variances usually do not have this effect. While area variances provide an increment of relief (normally small) from a physical dimensional restriction such as building height, setback and so forth, use variances permit wholesale deviation from the way in which land in the zone is used.

Ziervogel v. Wash. Cnty. Bd. of Adjustment, 676 N.W.2d 401, 408, 563–64 (Wis. 2004) (citations omitted); see also Owens, *supra* note 28, at 289–90 (noting that one of the justifications given for judicial gloss imposing lower standard for dimensional variance than for use variance is that “dimensional variances pose less of a risk of harm to neighbors”).

regulation in the zone in question, or to alter density requirements in the zone in question.”⁴⁷

Thus, not surprisingly, no applications requesting use variances were filed between July 2007 and December 2008, and no use variances were granted during that period.⁴⁸

2. Dimensional Variances (Excluding Variances for Signs).—At the time of the Dukeminier–Stapleton study, Kentucky law clearly authorized the Lexington–Fayette Urban County Board of Adjustment to grant dimensional variances. Specifically, KRS 100.470(c) granted the Board the power to:

[a]uthorize, upon application or appeal, such variances from the terms of the ordinance or of any plans, rules or regulations made thereunder, as will not be contrary to the public interest, where a literal enforcement of the provisions of the ordinance, plans, rules or regulations would result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.⁴⁹

The Dukeminier–Stapleton study found that dimensional variances (excluding variances for signs) were the most common type of relief requested,⁵⁰ and that the vast majority of applications (eighty-eight percent) were granted despite the fact that the staff only recommended that about forty percent of the requests be granted.⁵¹ Dukeminier and Stapleton noted that this high rate of approval “would be justified if the Board acted within its powers and granted only those petitions which met the requirements of hardship.”⁵² Nevertheless, after discussing the individual cases in some detail, Dukeminier and Stapleton concluded:

If we judge the Board’s actions by the standards set forth at the beginning of this section on variances, the conclusion

47 KY. REV. STAT. ANN. § 100.247 (West 2006). The Lexington–Fayette Urban County Zoning Ordinance uses similar language to expressly prohibit use variances. LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 7–6(b)(2) (2007).

48 This apparently is not true in all jurisdictions. According to a study of variance practices in 441 cities and counties in North Carolina, some use variances were granted despite the fact that use variances have been illegal in North Carolina for more than fifty years. *See* Owens, *supra* note 28, at 308–10.

49 KY. REV. STAT. § 100.470(1)(c) (1953) (repealed 1966) (applicable to cities of the second class). Similar, though not identical standards applied to cities of the first class. *See* KY. REV. STAT. § 100.082(3) (1953) (repealed 1966).

50 *Study, supra* note 2, at 286 (“The Board acted on fifty cases involving fifty-one such requests . . .”).

51 *Id.* (“Of these requests the board granted forty-four—or 88%—and denied seven.”).

52 *Id.* at 286–87.

seems inescapable that in a great number of these cases the Board abused its discretion, in that there were no allegations or evidence of legal hardship in the petitions, no substantial evidence in the minutes to support any finding of hardship, and no findings that conditions or hardships alleged were not typical or recurrent (a finding which section 24.4222 of the zoning ordinance expressly makes a prerequisite for a variance in every case).⁵³

Variance requests continue to be relatively common, and the Board continues to approve most requests. Specifically, between July 2007 and December 2008, applicants requested variances (other than for signs) in fifty-one different cases.⁵⁴ The Board approved thirty-eight of the fifty-one cases, or about seventy-five percent of the cases. The Board disapproved six cases, reached a tie vote in two cases, and the remaining five cases were either withdrawn or postponed indefinitely.

Although the disposition of cases has been similar, there have been three significant changes with respect to variances since the Dukeminier–Stapleton study: (1) the legal standards applicable to variances have been relaxed; (2) the Board typically makes findings that generally track the legal requirements; and (3) the Board is now much more likely to follow the recommendations of the professional staff than it was during the Dukeminier–Stapleton study. This section will address each of these changes.

(a) Change in Applicable Legal Standards

Commentators, including Dukeminier and Stapleton, have long criticized boards of adjustment for granting variances in the absence of unnecessary hardship.⁵⁵ As discussed above, at the time of the Dukeminier–Stapleton study, KRS 100.470(c) authorized the Board to grant dimensional variances “where a literal enforcement of the provisions of the ordinance, plans, rules or regulations would result in unnecessary hardship”⁵⁶ In

⁵³ *Id.* at 291.

⁵⁴ Seven of the appeals involved requests for conditional uses as well as variances, and two of the appeals involved administrative reviews as well as appeals for variances.

⁵⁵ *See supra* note 7.

⁵⁶ KY. REV. STAT. § 100.470(1)(c) (1953) (repealed 1966) (applicable to cities of the second class). Similar, though not identical standards applied to cities of the first class. *See* KY. REV. STAT. § 100.082(3) (West 2006) (repealed 1966).

This language closely tracked the variance standard under the Standard State Zoning Enabling Act. Specifically, Section 7 of the Standard Act grants the Board of Adjustment power:

[t]o authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and

1988, the Kentucky legislature amended KRS Chapter 100 to eliminate the requirement that the Board find unnecessary hardship (or deprivation of reasonable use)⁵⁷ before granting a variance.⁵⁸ Instead, the 1988 legislation made unnecessary hardship (or deprivation of reasonable use) one of three factors that the Board of Adjustment should consider in deciding whether to grant a variance.⁵⁹ Specifically, KRS 100.243 now provides:

- (1) Before any variance is granted, 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.⁶⁰ 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

substantial justice done.

A STANDARD STATE ZONING ENABLING ACT § 7(3) (U.S. Dep't of Commerce 1928), *available at* <http://www.planning.org/growingsmart/pdf/SZENablingAct1926.pdf>.

57 In 1966, the Kentucky General Assembly substantially revised Kentucky's planning and land use control enabling legislation to create uniform law applicable to all classes of cities. Prior to 1966, different enabling legislation applied to different classes of cities. *See* KY. REV. STAT. § 100.031–830 (1953) (repealed 1966); *cf.* Tarlock, *supra* note 46 (providing a detailed discussion of the 1966 legislation and the changes it wrought).

Among other things, the 1966 legislation replaced the unnecessary hardship standard with a requirement that the Board find that strict application of the zoning ordinance would “deprive the applicant of a reasonable use of the land” before granting a dimensional variance. Act of Mar. 23, 1966, ch. 172, § 53(b), 1966 Ky. Acts 708, 728.

In 1986, the Kentucky General Assembly resurrected the unnecessary hardship standard. Specifically, it amended KRS 100.243 to provide that prior to granting a variance, the board must find that strict application of the zoning ordinance “would deprive the applicant of a reasonable use of the land *or would create an unnecessary hardship on the applicant.*” Act of Mar. 27, 1986, ch. 141, § 26, 1986 Ky. Acts 343, 353 (emphasis added).

58 Act of March 31, 1988, ch. 144, § 4, 1988 Ky. Acts 372, 374–75.

59 *Id.*

60 Interestingly, the Standard Zoning Act and most state zoning laws do not require boards of adjustment to make findings of fact in variance cases. MANDELKER, *supra* note 36, § 6.52. Some, but not all courts, require boards to make findings of facts in variance cases. *Id.*

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.
- (2) 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 regulation from which relief is sought.⁶¹

According to the co-sponsor of the 1988 amendment, Bill Lear, the new legislation was intended to grant the Board of Adjustment more discretion in deciding when to grant a variance.⁶² The legislature recognized that under the existing law, the Board of Adjustment had to make findings that were “essentially impossible to make.”⁶³ The legislature viewed the Board as a safety valve and wanted the Board to have the ability to grant variances when, in its discretion, it thought variances were appropriate. Accordingly, the legislature amended Chapter 100 to make unnecessary hardship simply a factor the Board should consider in deciding whether or not to grant a

61 Not surprisingly, the Lexington–Fayette Urban County Zoning Ordinance Article uses virtually identical language to describe the findings required for a variance. *See* LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 7–6(b)(1) (2007). Interestingly, however, the By–Laws of the LFUC Board of Adjustment are identical to the standards promulgated in the 1986 Act and do not reflect the changes introduced by the 1988 Act. *See* BY–LAWS, *supra* note 13, art. VIII.A. This is likely due to the fact that the By–Laws have not been amended since 1987.

62 According to the 1988 Legislative Record, HB 240 is described as, among other things, “simplify[ing] the findings necessary for granting variances.” 18 Leg. Rec. 68 (Ky. 1988). Unfortunately, there is little other legislative history available. The House Cities Committee and Senate Cities Committee submitted no written reports and did not audiotape their meetings during the 1988 session. At the suggestion of John McKee of the Legislative Research Commission, I contacted Bill Lear, who was co-sponsor of the 1988 Act and chair of a Task Force on Chapter 100.

63 Telephone Interview with Bill Lear, Co-Sponsor of the 1988 Act & Chair of a Task Force on Chapter 100 (Nov. 19, 2009); *cf.* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 847 (1983) (“[J]urisprudence of land decisions is bound to fail unless it takes account of how these decisions are actually made.”).

variance, and ceased to require the Board to find unnecessary hardship before granting a variance.⁶⁴

One could argue⁶⁵ that the 1988 amendment to KRS 100.243 impermissibly grants the Board too much discretion in violation of Kentucky's strict separation of powers doctrine.⁶⁶

Section 27 of the Kentucky Constitution provides:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.⁶⁷

Section 28 of the Kentucky Constitution further provides that “[n]o person or collection of persons, being of one of those departments, shall

64 See Act of Mar. 31, 1988, ch. 144, § 4, 1988 Ky. Acts 372, 374–75. In 1992, the New York legislature enacted a similar change to its law governing dimensional variances. Specifically, it eliminated the “practical difficulties” requirement applicable to dimensional variances. See Act of June 30, 1992, ch. 248, § 11, 1992 N.Y. Laws 2869, 2871. Instead, New York law now requires that the Board weigh the benefit to the applicant of granting a variance “against ‘the detriment to the health, safety and welfare of the neighborhood or community’” in deciding whether to grant a dimensional variance. *Sasso v. Osgood*, 657 N.E.2d 254, 264 (N.Y. 1995); see also James A. Coon et al., *The Land Use Recodification Project*, 13 PACE L. REV. 559, 580, 587–89 (1993) (noting that law governing dimensional variances had been in “total confusion” prior to 1992 amendment and describing new statutory requirements).

65 On the other hand, if the Board were characterized as a mediator rather than a quasi-judicial body, the important question would be whether potential objectors were given notice and the opportunity to be heard rather than whether the flexible standards constitute an impermissible delegation of legislative power. Cf. Rose, *supra* note 63, at 860 (describing variance boards as “representative groups of concerned but fair-minded citizens, compromising and smoothing conflicts among neighbors,” and noting that “[i]f this view of board-as-mediator had prevailed, we might have seen a very different jurisprudence of local land use matters”); David M. Friebois, Note, *A New Uncertainty in Local Land Use: A Comparative Institutional Analysis of State v. Outagamie County Board of Adjustment*, 2003 WIS. L. REV. 571, 586 (contending that dimensional variances “appear to be tailor-made for boards of adjustment, which have the kind of local expertise necessary to make these decisions and the capacity to [handle] the large number of claims that might be brought before them. Consequently, there would appear to be a presumption in favor of more discretion and a need for flexibility in terms of area variances rather than use variances”).

66 See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 5.16 (2d ed. 2007) (“As with any delegation of legislative authority, standards must be sufficiently clear to guide the administrative decisionmaking and prevent the exercise of uncontrolled discretion.”); cf. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1158 n.14 (1985) (noting that courts in Illinois and Maryland overturned the variance process in the 1930s because it was an “improper delegation of ‘legislative’ powers”).

67 KY. CONST. § 27.

exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”⁶⁸

The Kentucky Supreme Court has interpreted these provisions to require a strict separation of powers.⁶⁹ In fact, the Kentucky Supreme Court has declared that “in the area of nondelegation, Kentucky may be unsurpassed by any state in the Union.”⁷⁰ Under this strict nondelegation doctrine, “it is fundamental that the legislature must prescribe some standard governing the scope of administrative action.”⁷¹ Moreover, the requirement that “the legislature must lay down policies and establish standards”⁷² is not as toothless as the federal “intelligible–principle rule.”⁷³

No Kentucky⁷⁴ case has expressly addressed the question of whether KRS 100.243 provides adequate standards to satisfy Kentucky’s strict separation of powers doctrine.⁷⁵ In dicta, however, the Kentucky Supreme

68 KY. CONST. § 28.

69 See *Fletcher v. Commonwealth*, 163 S.W.3d 852, 862 (2005) (“Likewise, we and our predecessor court have interpreted Sections 27 and 28 to mandate a strict separation of powers.”); see also Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 580–82 (1994) (describing Kentucky as a state following strict standards or safeguards delegation doctrine); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1196 (1999) (describing Kentucky as state “following a ‘strong’ nondelegation approach”).

70 Bd. of Trs. of the Judicial Form Ret. Sys. v. Att’y Gen., 132 S.W.3d 770, 782 (Ky. 2003).

71 *Kerth v. Hopkins Cnty. Bd. of Educ.*, 346 S.W.2d 737, 741 (Ky. 1961).

72 *Bloemer v. Turner*, 137 S.W.2d 387, 391 (Ky. 1939).

73 *Bd. of Trs.*, 132 S.W.3d at 782.

74 For a discussion of the delegation of power doctrine and local land use decisions in Maine, see Orlando E. Delogu & Susan E. Spokes, *The Long-Standing Requirement that Delegations of Land Use Control Power Contain “Meaningful” Standards to Restrain and Guide Decision-Makers Should Not Be Weakened*, 48 ME. L. REV. 49 (1996).

75 The “adequate standards” test has had a checkered history in Kentucky law. Cf. JOHN M. ROGERS, MICHAEL P. HEALY, & RONALD J. KROTOSZYNski, JR., *ADMINISTRATIVE LAW* 367 (2d ed. 2008) (“The nondelegation doctrine has lurched back and forth in Kentucky.”).

The Kentucky Supreme Court was said to have rejected the “adequate standards” requirement in favor of a general “safeguards” test to determine the constitutionality of statutes delegating discretion to administrative agencies in *Butler v. United Cerebral Palsy of Northern Kentucky, Inc.*, 352 S.W.2d 203, 207–08 (Ky. 1961). See *Ky. Comm’n on Human Rights v. Barbour*, 587 S.W.2d 849, 850–51 (Ky. Ct. App. 1979) (“[T]he necessity for standards or guidelines accompanying legislative delegations was expressly rejected by the former Kentucky Court of Appeals in *Butler* . . .”); Edward H. Ziegler, Jr., *Legitimizing the Administrative State: The Judicial Development of the Nondelegation Doctrine in Kentucky*, 4 N. KY. L. REV. 87, 107 (1977) (stating that in *Butler*, “the court repudiated the adequate standards requirement and adopted a general ‘safeguards’ test for determining the constitutionality of statutes delegating discretion to administrative agencies”).

In *Butler*, the court clearly applied a “safeguards” approach rather than the “adequate standards” approach. See *Butler*, 352 S.W.2d at 208 (“Let us, then, examine this law in terms of the practical needs of effective government, and in terms of safeguards against abuse and injustice.”). Whether it “expressly rejected” the “adequate standards” approach is less clear. In *Butler*, the court noted the proposition that “[t]he need is usually not for standards but for

Court has suggested that section 100.243 of the Kentucky Revised Statutes would survive such a challenge.

In *Louisville and Jefferson County Planning Commission v. Schmidt*,⁷⁶ the Kentucky Supreme Court considered a challenge to Jefferson County's "Innovative Residential Development Regulations." Those regulations "were designed to 'encourage flexibility of design by allowing zero lot line, row house, cluster housing and other innovative designs which meet the intent of the guidelines of the Comprehensive Plan.'" ⁷⁷ Under the regulations, a developer could build on lots that were smaller than those required by the zoning ordinance if the developer provided an area of common open space, generally equal to the reduction in lot sizes.⁷⁸ The regulations permitted the Planning Commission to grant "waivers" of the zoning regulation's requirements regarding minimum lot size, minimum width size, yard requirements, and distance between buildings and floor area ratio.⁷⁹ The grant of waivers was subject to three conditions: "1) the specifics for the zoning district and subdivision regulations cannot be met; 2) the proposal meets the intent of the Innovative Regulation; and 3) the waivers do not harm the public health, safety and welfare."⁸⁰

The court held that the regulations were an unlawful delegation of legislative power to the Planning Commission. The court stated the general rule that "[t]he 'delegation of discretion is not unlawful' only 'if sufficient standards controlling the exercise of that discretion are found in the act.'" ⁸¹ The court found that the three standards failed to "limit the Planning

safeguards," but never expressly held that the "adequate standards" approach should never apply. *Id.* at 207 (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 151 (1958)).

In the years since *Butler*, the court has applied the adequate standards approach. *See, e.g.,* Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 915 (Ky. 1984) ("[D]elegation must have standards controlling the exercise of administrative discretion."). Indeed, in recent years, the Kentucky Supreme Court has applied the adequate standards test without even referring to the general safeguards test. *See Bd. of Trs.*, 132 S.W.3d at 781–85; *see also* Fletcher v. Commonwealth, 163 S.W.3d 852, 862–63 (Ky. 2005) (stating that "while the General Assembly cannot delegate its power to make law, it can make a law that delegates the power to determine some fact or state of things upon which the law makes its own action depend—so long as the law establishes policies and standards governing the exercise of that delegation" and referring to *Board of Trustees v. Attorney General* "for a detailed discussion of the 'nondelégation doctrine.'").

In light of these recent cases, this article will assume that the "adequate standards" test is the appropriate test for examining whether a delegation to an administrative agency survives a separation of power challenge under Kentucky law today.

⁷⁶ *Louisville & Jefferson Cnty. Planning Comm'n v. Schmidt*, 83 S.W.3d 449 (Ky. 2002).

⁷⁷ *Id.* at 452 (quoting JEFFERSON COUNTY, KY., DEVELOPMENT CODE § 9.5A (1982)).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 454.

⁸¹ *Id.* at 455 (quoting *Holsclaw v. Stephens*, 507 S.W.2d 462, 471 (Ky. 1973)).

Commission's discretion in any way."⁸² With respect to the first condition that the specifics of the zoning district and subdivision regulations cannot be met, the court found that the developer need only intentionally propose a subdivision that would not fit within the zoning district to satisfy that requirement.⁸³ With respect to the second condition that the proposal meet the intent of the Innovative Development Regulations, the court found that "a developer [could] easily satisfy [that] requirement by submitting a proposal that meets the general requirements for an innovative subdivision."⁸⁴ Finally, the court found that the third requirement providing that the waiver must not harm the public health, safety and welfare was "vague and, in essence, grants almost unbridled discretion."⁸⁵

The court did not specifically address the constitutionality of Section 100.243 of the Kentucky Revised Statutes. The court did, however, contrast waivers under the Innovative Development Regulations with the requirements KRS 100.243 imposes on variances and described the requirements under KRS 100.243 as "very strict requirements"⁸⁶ that "severely limit[] the conditions under which a variance may be granted."⁸⁷ Although I would not describe the KRS 100.243 standards as "very strict requirements," the court's dicta in *Schmidt* suggests that the Kentucky Supreme Court would view KRS 100.243 as imposing "sufficient standards" to control the exercise of Board of Adjustment's discretion in granting variances and thus not constitute an impermissible delegation of power to the Board of Adjustment in violation of Kentucky's strict separation of powers doctrine.

(b) *Board's Findings*

I believe that the Board's decisions in the six cases in which the Board denied the applicant's request for a variance and the two cases in which it

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 451 ("Again the developer must meet very strict requirements, but a Board of Adjustment can grant the variance.").

⁸⁷ *Id.* ("Before a variance is granted the empowering legislation requires a public hearing, but more importantly the legislation . . . *severely limits* the conditions under which a variance may be granted. Among other things, a variance can be granted only upon a finding that it will not alter the essential character of the general vicinity nor unreasonably circumvent the requirements of the zoning regulations." (alteration in original) (emphasis added) (citing Ky. REV. STAT. ANN. § 100.243 (West 2006)); *see also id.* at 454 ("Thus, the zoning regulations that permit the establishment of an innovative subdivision without meeting the *strict requirements* of KRS 100.243 for a variance are unlawful." (emphasis added)); *id.* at 455 ("Once a comprehensive plan is adopted, it can only be avoided through rezoning or variance, neither easy to obtain as both are *strictly circumscribed*." (emphasis added)).

reached a tie vote are fully supportable under the law. In these cases, the applicant, not the Board, bears the burden of proof.⁸⁸ Thus, the Board need not grant the applicant a variance unless the applicant offers compelling evidence such that the denial of relief is arbitrary.⁸⁹ In none of these eight cases did the applicant offer compelling evidence. Moreover, in each of the six cases in which it voted to disapprove, the Board expressly found that at least one of the requirements or relevant considerations for a variance was not satisfied. For example, in denying an appeal for a number of variances to allow front yard paving that exceeded the zoning ordinance's requirements, the Board found, among other things, that "[g]ranteeing the requested variances would result in over fifty percent of the front yard area being maintained as pavement, which would be out of character with other properties in the general vicinity and detrimental to the appearance of the neighborhood."⁹⁰ In denying a variance to reduce the required setback for dancing and live entertainment from 100–feet from a residential zone to 30–feet, the Board found, among other things, that "[g]ranteeing the requested variance has significant potential to adversely impact a well established residential area located as close as 30' from the building to be used for live entertainment and dancing."⁹¹

With respect to the thirty–eight cases in which the Board approved the applicant's request for a variance, it is difficult to criticize the substance of those decisions because the standards for granting a variance under current Kentucky law are fairly easy to satisfy.⁹² If Kentucky law still required that the Board find unnecessary hardship or deprivation of reasonable use before granting a dimensional variance, the Board would deserve considerable criticism. The Board only expressly found unnecessary hardship or deprivation of reasonable use in twenty of the thirty–eight cases in which it granted a variance. Kentucky law, however, no longer requires that the Board find unnecessary hardship or deprivation of reasonable use before granting a dimensional variance. Instead, unnecessary hardship/deprivation of reasonable use is simply one of three factors KRS 100.243 directs the Board to consider before granting a variance.

Not only has the change in the law made it more difficult to criticize the substance of the Board's decisions granting variances, but the Board's

88 See *Bourbon Cnty. Bd. of Adjustment v. Currans*, 873 S.W.2d 836, 838–39 (Ky. Ct. App. 1994).

89 *Id.*

90 See Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 12, 16 (Aug. 31, 2007) (on file with author) (making finding c in *Kenneth & Virginia Jones*, V–2007–76).

91 See Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 9, 12 (Oct. 26, 2007) (on file with author) (making finding a in *James Lamont Hudson*, V–2007–80).

92 See § 100.243. The requirements are discussed in detail *supra* Part II.A.2.a. As noted above, I disagree with the *Schmidt* court's characterization of the standards as "very strict." See *supra* Part II.A.2.a.

decisions, as reported in the minutes of the Board's meetings, have improved considerably since the Dukeminier–Stapleton study. First, and most significantly, the decisions recite specific facts in support of the findings as required by KRS 100.243.⁹³ For example, in *Farah Builders, LLC*, the Board offered the following reasons for granting the variance:

1. Granting the requested variance will not adversely affect the public health, safety or welfare, nor alter the character of the general vicinity. There are a number of brick walls that appear to be taller than 6' in the immediate vicinity, and the fence/wall on the adjoining property to the north has a height of between 8.5' and 9', as authorized by the Board just a few years ago.
2. Granting the requested variance will not allow an unreasonable circumvention of the requirements of the Zoning Ordinance, as there are similar walls on both sides of Tates Creek Road in this area.
3. Strict application of the Zoning Ordinance would force the appellant to construct a fence/wall with a maximum height of 6', which would likely result in a loss of privacy and disturbances from noises associated with traffic on Tates Creek Road. Also, a 6' tall fence or wall would likely appear out of character, given the taller height of the wall on the immediately adjoining property to the north.
4. The requested variance is not the result of a willful violation of the Zoning Ordinance, as the fence/wall has not yet been constructed.⁹⁴

Second, the Board does a better job of tracking the law by making findings required by KRS 100.243. Specifically, in all thirty-eight of the cases in which the Board granted a variance, the Board made the first two specific findings required by KRS 100.243: (1) that the variance “will not adversely affect the public health, safety or welfare,” and (2) that the variance “will not alter the essential character of the general vicinity.”⁹⁵ In addition, in all but one of the cases, the Board expressly considered and

93 *Cf.* Clifford v. Harrison Cnty. Bd. of Adjustment, No. 2005–CA–001990–MR, 2007 WL 29426 (Ky. Ct. App. Jan. 5, 2007) (vacating Board of Adjustment's grant of conditional use permit where Board only made conclusory statement that requirements of ordinance had been met and did not make any findings of fact); Shapiro, *supra* note 8, at 13 (criticizing boards for supporting their decisions with boilerplate language lacking substance); Donovan, *supra* note 28, at 107 (criticizing commission and board for using “nearly identical standardized resolutions to reduce their decision to writing”).

94 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjust. 4 (Aug. 2007) (on file with author) (discussing Farah Builders, LLC, V–2007–75).

95 § 100.243.

found at least one of the three factors KRS 100.243 directs the Board to consider in determining whether to grant a dimensional variance. Moreover, in sixteen of the cases the Board expressly found two of the three factors, and in one of the cases the Board found all three factors.

Nevertheless, the Board of Adjustment's decisions granting dimensional variances still do not fully comply with the law. Current law requires that the Board make four specific findings before approving a variance.⁹⁶ In not a single case did the Board expressly make all four of the required findings before granting a variance, and in only two cases did the Board expressly make three of the four findings. Arguably, the Board implicitly made the third finding, that the variance will not cause a hazard or a nuisance to the public, each time it expressly made the first finding that the variance will not adversely affect the public health, safety, or welfare. In only one case, however, did the Board expressly make the third finding as required by KRS 100.243.⁹⁷ And, in only one case did the Board expressly make the fourth finding, that the variance will not allow an unreasonable circumvention of the requirements of the zoning ordinance, as required by KRS 100.243.⁹⁸

Thus, while the Board of Adjustment's decisions are more supportable now than they were during the time of the Dukeminier–Stapleton study, they still do not fully comply with the law. Because Kentucky no longer requires a finding of undue hardship/deprivation of reasonable use before a variance can be granted, the Board can no longer be criticized for granting variances in the absence of undue hardship/deprivation of reasonable use. Nevertheless, the Board can and should be criticized for granting variances without expressly making all four of the findings required by KRS 100.243.

(c) Role of Staff's Recommendations

Dukeminier and Stapleton implicitly criticized the Board for failing to follow the staff's recommendations. They noted that after investigating the facts, the planning staff recommended that the Board only grant twenty of the requests. Then, presumably referring to the same twenty cases, Dukeminier and Stapleton declared, “[o]n the basis of the facts alleged in the petition and the evidence in the minutes, in not more than twenty, or

⁹⁶ See *id.*; *supra* Part II.A.2.a.

⁹⁷ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 3–4 (Aug. 22, 2008) (on file with author) (discussing Rev. & Mrs. George Naze, V–2008–40).

⁹⁸ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 4 (Aug. 31, 2007) (on file with author) (discussing Farah Builders, LLC, V–2007–75).

approximately forty percent of these cases were the legal requirements for a variance satisfied.”⁹⁹

No one could criticize the current Board for failing to follow the staff’s recommendations today. Indeed, the staff recommended approval in all thirty-eight cases in which the Board voted to approve,¹⁰⁰ and the staff recommended disapproval in all but one of the six cases that the Board voted to disapprove. In the two cases in which the Board reached a tie vote, the staff recommended approval. Thus, the Board followed the staff’s recommendation in forty-three of the forty-six cases that were neither withdrawn nor indefinitely postponed, or ninety-three percent of the cases. The Board did not always adopt the staff’s recommendation verbatim. Sometimes it made modifications to the staff’s recommendation. Nevertheless, it is fair to say that the Board was quite deferential to the staff.

(d) Summary

The Board of Adjustment’s bulk variance decisions (excluding variances for signs) from July 2007 through December 2008 are subject to less criticism than those rendered at the time of the Dukeminier–Stapleton study.

First, and perhaps most significantly, the Board can no longer be criticized for granting variances where there is no evidence of unnecessary hardship because Kentucky law no longer requires that the Board find unnecessary hardship before granting a variance. Instead, KRS 100.243 now provides that unnecessary hardship is simply a factor the Board should consider in deciding whether to grant a variance.

Second, the Board of Adjustment appears to have done a better job of tracking the legal requirements for a variance in its decisions rendered between July 2007 and December 2008 than it did during the Dukeminier–Stapleton study. In addition, the Board has done a good job of providing specific facts in support of its decisions granting variances.

Finally, the Board of Adjustment can no longer be criticized for disregarding the professional staff’s recommendations. The Board of Adjustment followed the staff’s recommendation in forty-three of the forty-six dimensional variance requests (other than sign variances) it decided between July 2007 and December 2008.

Despite its improvements, the Board’s decisions are not entirely free from criticism. First, and most significantly, the Board has not fully complied with KRS 100.243’s requirement that the Board make four separate findings before granting a variance. The Board did not expressly

⁹⁹ *Study, supra* note 2, at 287.

¹⁰⁰ In three instances, the staff changed its initial recommendation from disapproval to approval.

make all four required findings in a single case approving the applicant's request for a variance between July 2007 and December 2008. Moreover, in only one of the thirty-eight cases granting variance requests did the Board expressly address the three factors (including unnecessary hardship) that KRS 100.243 directs the Board to consider when deciding whether to grant a variance.

3. Dimensional Variances for Signs.—Although Dukeminier and Stapleton were critical of the Board's decisions regarding dimensional variances that did not apply to signs, they saved their harshest criticism for the Board's decisions regarding dimensional variances for signs. Indeed, Dukeminier and Stapleton began their discussion of sign variances by stating that "in this subsection we present a batch of cases that show how a board of adjustment can rewrite the zoning ordinance and bring about almost complete breakdown in enforcement of the law."¹⁰¹

Dukeminier and Stapleton noted that the Board only granted three of fourteen variance requests for signs between January, 1960, and September, 1960.¹⁰² In September, 1960, one member of the Board changed, and with it, apparently, the Board's approach to sign variances.¹⁰³ With respect to the twenty-eight requests¹⁰⁴ made between September, 1960, and June, 1961, the Board ultimately¹⁰⁵ granted twenty-six, or ninety-three percent, of the requests.¹⁰⁶ The planning staff, in contrast, recommended that the Board only grant three of the requests.¹⁰⁷

In critiquing these decisions, Dukeminier and Stapleton declared:

In not a single one of these cases did the petitioner in his petition attempt to show evidence to meet all the requirements for a variance. Indeed, in very few did the petitioner show sufficient evidence to meet even one requirement. Various hardships were

¹⁰¹ *Study, supra* note 2, at 291.

¹⁰² *Id.* at 292.

¹⁰³ Dukeminier and Stapleton illuminated the role of the change in personnel on the Board as follows:

Some observers of the Board have inferred from these cases that the Board's policy shifted when one membership changed in September, 1960. This is not verifiable, however, since the decisions were unanimous except in the few cases where dissents have been noted in the footnotes. Yet, without some such explanation, it is difficult to reconcile these apparently inconsistent decisions. Of course consistency may not have been a virtue sought by the Board. We recognize that these decisions may simply be the result of an *ad hoc* approach under which equal treatment in equal circumstances is of minor importance.

Id. at 302.

¹⁰⁴ Four of those requests sought to reverse earlier decisions. *Id.* at 292.

¹⁰⁵ Twenty-four of the requests were granted on the first hearing and two others were granted on rehearing. *Id.* at 293.

¹⁰⁶ *Id.* at 292–93.

¹⁰⁷ *Id.* at 292.

alleged, such as it was “extremely necessary to the success of the commercial enterprise,” petitioner’s sign could be seen better if it were nonconforming, there were other nonconforming signs in the area, and the building had been so designed that there was no place to put a conforming sign (clearly a self-made hardship). None of these so-called “hardships” is a hardship under the enabling act and ordinance,¹⁰⁸ and none of them is sufficient reason for granting a variance. The minutes of the Board are as devoid of substantiating evidence as the petitions.¹⁰⁹

After describing the myriad cases in which the Board disregarded the legal requirements for variances, Dukeminier and Stapleton concluded:

In the area of sign regulation the Board’s decisions reflect very little concern with the rule of law and the values that emanate therefrom. It is arguable that the rule of law has been replaced here by rule by fiat, but more probably it has been largely replaced by anarchy.¹¹⁰

The law and practice regarding sign variances have changed considerably since the time of the Dukeminier–Stapleton study. First, the LFUC Zoning Ordinance now strictly regulates signs and severely circumscribes the Board’s authority to grant sign variances. Second, the current Board is much more deferential to the planning staff’s recommendations regarding

108 At the time of the Dukeminier–Stapleton study, the Lexington–Fayette County Zoning Ordinance–Resolution, with the judicial gloss put on that language, required that five conditions be found before a finding of “unnecessary hardship” that would justify a variance:

- (1) because of the uniqueness of the lot, the land will not yield a reasonable return if the signs must conform to the ordinance;
- (2) the hardship is not created by the petitioner;
- (3) the owner’s plight is peculiar to the lot and not caused by general conditions in the neighborhood;
- (4) the conditions are not so typical or recurrent that they can be dealt with by a general regulation; and
- (5) the variance will not result in substantial impairment of the community plan.

Id. at 292; *see also id.* at 279–80.

109 *Id.* at 293; *see also id.* at 295 (stating that cases “show, as do the New Circle Road cases, that having let one nonconforming sign in, the Board feels it cannot deny others the same privilege”).

110 *Id.* at 303. The staff expressed a similar sentiment. According to Dukeminier and Krier, the staff decried in one staff report:

The Board has, by their own actions, in the past, all but amended this particular provision of the Zoning Ordinance–Resolution along the Beltline and other arteries. It is unfortunate that the Board’s usurpation of legislative authority has not been brought to the attention of the courts before the intent and effect of the Ordinance was destroyed.

Id. at 295.

sign variances. This section will discuss these two changes in more detail.

(a) Law Governing Sign Variances

The Kentucky Revised Statutes authorize cities and counties to regulate the size, width, height, bulk, and location of signs.¹¹¹ In addition, the Kentucky Revised Statutes authorize boards of adjustment to grant variances with respect to signs.¹¹² The Kentucky Revised Statutes, however, do not impose any particular restrictions on sign variances. Sign variances are subject to the general rules governing all dimensional variances.¹¹³

The current LFUC Zoning Ordinance imposes very strict and detailed regulations regarding the number, size, height, type, and location of signs.¹¹⁴ In addition, the LFUC Zoning Ordinance limits the Board's power to grant sign variances.¹¹⁵ Specifically, the ordinance prohibits the Board from granting variances (1) to increase the number of permitted signs; (2) to permit any sign, design feature, information, copy, or design type that is not specifically permitted in the zone in which the sign is to be located; and (3) to increase the maximum total permitted sign area on a single lot or building.¹¹⁶

(b) Board's Findings

In light of the severe limitations the zoning ordinance places on the power of the Board to grant sign variances, it is perhaps not surprising that

¹¹¹ KY. REV. STAT. ANN. § 100.203(1)(b) (West 2006).

¹¹² See KY. REV. STAT. ANN. § 100.241 (West 2006) (granting board the power to hear and decide applications for variances); KY. REV. STAT. ANN. § 100.111(24) (West 2006) (defining "variance," in relevant part, as "departure from dimensional terms of the zoning regulation pertaining to the height, width, length, or location of *structures*") (emphasis added); *id.* § 100.111(21) (defining "structure" to include signs).

¹¹³ See KY. REV. STAT. ANN. §§ 100.241–.247 (West 2006).

¹¹⁴ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 17 (2007).

¹¹⁵ The express limitations on sign variances were incorporated as part of a comprehensive revision of the zoning ordinance in 1983. The express limitations were thought to be necessary as a result of the Chapter 100 prohibition on use variances. See Minutes, Lexington–Fayette Urban Cnty. Planning Comm'n, Pub. Hearing 2 (June 1, 1983) (on file with author) ("The Board of Adjustment, under KRS 100, has the power to grant dimensional variances. Therefore, the variances related to the sign regulations would be strictly of a dimensional nature. The Board would not have the power to increase the total number of signs, permit otherwise prohibited signs, or increase total sign area for a lot.").

¹¹⁶ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 17–8(a) (2007). Interestingly, the Zoning Ordinance incorporates the 1986 statutory variance standards for sign variances rather than the current standards adopted in 1988. Cf. *supra* note 53 (discussing the current statutory requirements and the requirements applicable under the 1986 Act).

Specifically, Section 17–8(b) of the LFUC Zoning Ordinance provides:

Before granting a variance to the dimensional requirements for a sign, the Board

the Board rarely hears sign variances now. Indeed, in the eighteen month period between July 2007 and December 2008, the Board only considered one appeal for a sign variance.¹¹⁷ In that case, the Board followed the staff's recommendation and approved a "variance to reduce the required setback for a free standing sign from 10 feet to 5.67 feet to allow an existing sign to remain" in its current location.¹¹⁸

In approving the sign variance, the Board specifically made two of the four necessary findings required for a variance: (1) that the variance should not adversely affect the public health, safety, or welfare, and (2) that it would not alter the character of the general vicinity. It did not specifically find (1) that the variance would not cause a hazard or nuisance to the public, or (2) that the variance would not allow an unreasonable circumvention of the requirements of the zoning regulations.

The Board arguably considered whether the requested variance arose from special circumstances which do not generally apply to land in the general vicinity, or in the same zone when it found that "[t]he design features of the sign, in particular its low height, and the location of the required landscaping for the parking lot, resulted in a special situation that favored placement of the sign a few feet less than the 10' minimum required setback."¹¹⁹ It arguably considered undue hardship when it found that:

Strict application of the Zoning Ordinance would force the appellant to move the sign 3.33' feet farther back from the street. At that location it would have to be elevated, probably on a pole, thereby making it much more visually intrusive and possibly

shall find all of the following, which shall be recorded along with any imposed conditions or restrictions in the minutes and records and issued in written form to the applicant to constitute proof of the variance:

- (1) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity or in the same zone.
- (2) The strict application of the provisions of the sign regulations of this Zoning Ordinance would deprive the applicant of a reasonable use of the land or would create unnecessary hardship on the applicant.
- (3) Such special circumstances are not the result of actions of the applicant taken subsequent to the adoption or amendment of the sign regulation of this Zoning Ordinance.
- (4) Reasons that the variance will not adversely affect the public health, safety and welfare, and will not alter the essential character of the general vicinity, and will not cause a hazard or a nuisance to the public.

117 See Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 3 (Jan. 25, 2008) (on file with author) (discussing Charleston Dev., Inc., V-2008-7). A second sign case, involving both an administrative appeal and variance, was filed. The staff recommended that both the administrative appeal and variance request be denied. After seeking an initial one month postponement, the applicant withdrew the case. Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 3 (Oct. 26, 2007) (on file with author) (discussing Castleton Lyons, Inc., AV-2007-84).

118 Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 3 (Jan. 25, 2008) (on file with author) (discussing Charleston Dev., Inc., V-2008-7).

119 *Id.* at 3-4.

interfering with sight triangles for each access drive that serves the property. Moving the sign farther back would also result in a loss of parking spaces, as well as a potentially awkward appearance of the parking lot and associated landscaping.¹²⁰

In addition to the single sign variance the Board considered between July 2007 and December 2008, seven administrative appeals involving signs were filed during that period of that time. Those appeals are discussed in section III.C.2.b.

(c) Role of Staff's Recommendations

The current Board of Adjustment, unlike the Board of Adjustment at the time of the Dukeminier–Stapleton study, was deferential to the professional staff's recommendations. In the single sign variance case, the Board followed the staff's recommendation and approved the request without discussion for the reasons recommended by the staff.

(d) Summary

Dukeminier and Stapleton were extremely critical of the Board's decisions regarding sign variances in their study. Since then, the zoning ordinance has been amended to severely circumscribe the Board's power to grant variances. As a result, the Board only decided one sign variance case between July 2007 and December 2008. In that case, the Board voted, without discussion, to approve the variance for the reasons recommended by the staff.

B. Conditional Uses

After critiquing the Board of Adjustment's variance decisions, Dukeminier and Stapleton turned to "special exceptions." Accordingly, this section will turn to conditional uses, the term now used for special exceptions. It will begin by discussing the law governing conditional uses. It will then discuss the Board of Adjustment's decisions regarding conditional use applications for uses other than for home occupations.¹²¹ It will then turn to conditional use applications for home occupations.¹²² Finally, it will

¹²⁰ *Id.*

¹²¹ After discussing the Board's special exception decisions, Dukeminier and Stapleton turned to temporary permits. At the time of the Dukeminier–Stapleton study, the Board had the power to grant temporary permits for uses that did not conform to the zoning ordinance. *Study*, *supra* note 2, at 309. The Board no longer has the power to grant temporary permits. *Cf.* LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 7 (2007) (outlining the Board's powers). Thus, this article does not address temporary permits.

¹²² At the time of the Dukeminier–Stapleton study, home occupations were not treated

address the Board's decisions in hearings reviewing previously-approved conditional use permits.

1. Law Governing Conditional Uses.—At the time of the Dukeminier–Stapleton study, the Kentucky enabling legislation authorized the LFUC Board of Adjustment to “hear and decide appeals and applications for special exceptions.”¹²³ The enabling legislation neither defined the term “special exception,”¹²⁴ nor imposed any particular standards for the granting of special exceptions.¹²⁵ It did, however, require the “concurring vote of four members of the board” before a special exception could be granted.¹²⁶

Citing case law, Dukeminier and Stapleton explained that “[s]pecial exceptions are uses permitted by the zoning ordinance when specified facts and conditions enumerated in the ordinance are found by the board to exist.”¹²⁷ Dukeminier and Stapleton found that the Lexington ordinance authorized two different types of special exceptions: (1) uses that were permitted in specified districts if certain conditions were met; and (2) uses that were permitted in specified districts “when authorized by the Board of Adjustment.”¹²⁸ Dukeminier and Stapleton viewed the first type of special exception as “‘true’ special exception[s] or conditional use[s], which require[d] the Board to act as a fact-finding body and exercise some limited discretion” in determining whether the applicant met the stated conditions.¹²⁹ Dukeminier and Stapleton described the second type of special exception as “absolutely discretionary,” and noted that the “only

as conditional uses. Instead, they were considered in appeals from the building inspector's interpretation of the zoning ordinance. Thus, Dukeminier and Stapleton did not consider them in conjunction with special use decisions but instead with appeals from the building inspector. Because home occupations are now treated as conditional uses, this article considers them in conjunction with conditional use decisions.

¹²³ KY. REV. STAT. § 100.470(1)(b) (1953) (repealed 1966). That statute was applicable to cities of the second class. As noted in *supra* note 53, at the time of the Dukeminier–Stapleton study, different enabling legislation applied to different classes of cities.

¹²⁴ The statute simply provided, in relevant part, that “[a]pplications to the board of adjustment for special exception or relief by way of variance may be made by any property owner or tenant aggrieved.” KY. REV. STAT. § 100.450 (1953) (repealed 1966).

¹²⁵ Kentucky's enabling legislation differed from the Standard State Zoning Enabling Act in that the Standard Act authorized the board “in appropriate cases and subject to appropriate conditions and safeguards, [to] make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.” ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT § 7 (U.S. Dep't of Commerce 1926), available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>.

¹²⁶ KY. REV. STAT. § 100.470(3) (1953) (repealed 1966).

¹²⁷ *Study, supra* note 2, at 304 (citing *Kline v. Louisville & Jefferson Cnty. Bd. of Zoning Adjustment*, 325 S.W.2d 324 (Ky. 1959)).

¹²⁸ *Id.*

¹²⁹ *Id.*

standard,” if it could be called a standard, was the requirement found in the Board’s rules of procedure that “‘if the Board finds the use as proposed does not conflict with the purpose and intent of the ordinance, it must approve the application.’”¹³⁰

Dukeminier and Stapleton questioned the constitutionality of the “absolutely discretionary” special exceptions.¹³¹ They noted that the court of appeals had held that similar land use control regulations were unconstitutional when no reasonably definite standard was provided to guide discretion.¹³² They contended that even if the first section of the ordinance providing that the ordinance is “for the purpose of promoting the public health, safety, morals or the general welfare” were treated as a standard applicable to the granting of special exceptions, it would not be a sufficiently definite standard under prior Kentucky case law.¹³³

A few years after the Dukeminier–Stapleton study, the Kentucky legislature substantially revised chapter 100 of the Kentucky Revised Statutes,¹³⁴ and, among other things, replaced the term “special use” with the term “conditional use.”¹³⁵ The Kentucky Revised Statutes now define 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,

¹³⁰ *Id.* (quoting LEXINGTON–FAYETTE COUNTY ZONING BD. OF ADJUSTMENT, RULES AND PROCEDURE 2 (1961)).

¹³¹ *Id.* at 304.

¹³² *Id.* at 305 (citing *Bowman v. Bd. of Councilman*, 196 S.W.2d 730 (1946)); *Town of Jamestown v. Allen*, 144 S.W.2d 807 (1940); *Town of Bloomfield v. Bayne*, 266 S.W. 885 (1924)).

¹³³ *Study, supra* note 2, at 305–06 (discussing in detail the Kentucky Court of Appeals case striking down an ordinance giving the Board of Commissioners authority to license a trailer park when it would not “jeopardize the public health, safety, morals and welfare of the inhabitants of the City of Covington, . . . [taking] into consideration the topography and density of the population of the location applicable in the particular case” (alteration in original) (quoting *Schneider v. Wink*, 350 S.W.2d 504, 504–05 (Ky. 1961)).

¹³⁴ *See* Act of Mar. 23, 1966, ch. 172, 1966 Ky. Acts 708. For a detailed discussion of the 1966 legislation and the changes it wrought, see Tarlock, *supra* note 46.

¹³⁵ Act of Mar. 23, 1966, ch. 172, § 1(e), 1966 Ky. Acts 708, 709 (defining conditional use); *cf.* *Carlton v. Taylor*, 569 S.W.2d 679, 681 (Ky. Ct. App. 1978) (“Historically, the term ‘conditional use’ has replaced the term ‘special exception’ in most modern zoning ordinances.”).

size, extent, and character of performance are imposed in addition to those imposed in the zoning regulation[.]¹³⁶

The Kentucky Revised Statutes define a “conditional use permit” as:

legal authorization to undertake a conditional use, issued by the administrative official pursuant to authorization by the board of adjustment, consisting of two (2) parts:

- (a) A statement of the factual determination by the board of adjustment which justifies the issuance of the permit; and
- (b) A statement of the specific conditions which must be met in order for the use to be permitted[.]¹³⁷

Section 100.237 authorizes the Board of Adjustment to “hear and decide applications for conditional use permits to allow the proper integration into the community of uses which are specifically named in the zoning regulations which may be suitable only in specific locations in the zone only if certain conditions are met[.]”¹³⁸ It further authorizes the Board to impose “necessary conditions such as time limitations, requirements that one (1) or more things be done before the request can be initiated, or conditions of a continuing nature.”¹³⁹ It does not, however, impose any particular standards on the granting of conditional uses. Indeed, one commentator has described the Board’s power to grant conditional uses as “extensive and gives it a fulcrum to bargain with a landowner for favorable concessions in return for the issuance of a permit.”¹⁴⁰

The LFUC Zoning Ordinance authorizes the Board of Adjustment “to hear and decide applications for conditional use permits. . . .”¹⁴¹ Although the zoning ordinance does not specifically define the term “conditional use,” the provision granting the Board the power to grant conditional uses begins

¹³⁶ KY. REV. STAT. ANN. § 100.111(6) (West 2006). The definition of the term “conditional use” has remained virtually unchanged since it was introduced in the 1966 Act. The only difference is that the current definition includes the number “(1)” after the word “one” while the definition in the 1966 Act did not. *Compare id.*, with Act of Mar. 23, 1966, ch. 172, § 1(e), 1966 Ky. Acts 708, 709.

¹³⁷ § 100.111(7). Like the definition of the term “conditional use,” the definition of “conditional use permit” has remained virtually unchanged since its introduction in 1966. The only notable difference is that the current definition includes the number “(2)” after the word “two” while the definition in the 1966 Act did not. *Compare id.*, with Act of Mar. 23, 1966, ch. 172, § 1(f), 1966 Ky. Acts 708, 709.

¹³⁸ KY. REV. STAT. ANN. § 100.237 (West 2006).

¹³⁹ *Id.* § 100.237(1).

¹⁴⁰ Tarlock, *supra* note 46, at 612.

¹⁴¹ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 7–6(a) (2007).

by closely tracking the definition of conditional uses in Section 100.111(6) of the Kentucky Revised Statutes.¹⁴² It then adds an additional element to the definition of conditional use. Specifically, it describes conditional uses as uses “which would not have an adverse influence on existing or future development of the subject property or its surrounding neighborhood.”¹⁴³

The zoning ordinance also imposes two additional requirements on the Board before it may grant a conditional use. First, it requires that the Board find that the necessary public facilities and services are or soon will be adequate to serve the proposed use.¹⁴⁴ Second, it requires that the Board “provide for the continuation of existing or proposed collector streets, and whenever possible, provide for the continuation of local streets.”¹⁴⁵

Like the zoning ordinance at the time of the Dukeminier–Stapleton study, the current zoning ordinance authorizes two types of conditional uses: (1) uses that are permitted in specified districts if certain conditions are met; and (2) uses that are permitted only with Board approval, but without any specific conditions attached. For example, Article 8–22(d)(8) of the ordinance imposes six specific conditions on banks as conditional uses in the light industrial district.¹⁴⁶ Article 8–22(d)(1) of the LFUC zoning

¹⁴² Specifically, Article 7–6(a) of the Lexington–Fayette Urban County Zoning Ordinance provides:

The Board shall have the power to hear and decide applications for conditional use permits to allow the proper integration into the planning area of uses which are specifically named in [the] Zoning Ordinance, which may be suitable only in specific locations in the zone only if certain conditions are met, and which would not have an adverse influence on existing or future development of the subject property or its surrounding neighborhood.

Id. (emphasis added).

¹⁴³ *Id.*

¹⁴⁴ Specifically, Article 7–6(a)(2) provides that:

In approving a conditional use permit, the Board shall find that the public facilities and services that will be needed are, or will soon be, adequate to serve the proposed use. The Board shall give consideration to the road system sewage disposal facilities, utilities, fire and police protection and other services and facilities as are relevant to the proposed use. The Board may establish conditions to ensure that the proposed conditional use will not have an adverse influence on the subject property or the surrounding neighborhood.

Id. art. 7–6(a)(2).

¹⁴⁵ *Id.* art. 7–6(a)(3).

¹⁴⁶ Specifically, Article 8–22(d)(8) of the Lexington–Fayette Urban County Zoning Ordinance provides:

Banks, with or without drive-through facilities, except as provided as part of an Industrial Mixed–Use Project, provided:

- a. The site lies within the area of a development plan approved by the Planning Commission, having a minimum one hundred (100) acres zoned industrial;
- b. There shall be an on-site stacking capacity of a minimum of twenty (20) cars for each bank having drive-through facilities;
- c. The site shall not have direct access to an arterial street;

ordinance, in contrast, lists automobile race tracks as a conditional use in the light industrial zone, but does not impose any specific conditions with respect to automobile race tracks.¹⁴⁷

In the years since the Dukeminier–Stapleton study, the Kentucky Court of Appeals has repeatedly stated that “a zoning ordinance must contain standards to be used in determining whether to permit or deny a conditional use, so as not to vest absolute and arbitrary power in the administrative agency.”¹⁴⁸ The court, however, has provided limited guidance on what constitutes sufficient standards.

In the first case, to declare that a zoning ordinance must delineate sufficient standards to guide the board of adjustment in deciding whether or not to grant a conditional use permit, the Kentucky Court of Appeals struck down a special exception/conditional use provision in a zoning ordinance for failure to delineate standards.¹⁴⁹ The zoning ordinance in *Carlton v. Taylor*¹⁵⁰ provided an itemized list of businesses permitted in the “local” business districts.¹⁵¹ It then authorized the Board of Adjustment to “grant ‘special exceptions’ for other retail businesses ‘if it determines that the proposed use would not be detrimental to the development of the district as a retail shopping area.’”¹⁵² The court did not find any problem with the portion of the ordinance listing the specific businesses that were permitted in the “local” business districts.¹⁵³ With respect to the provision in the ordinance authorizing other retail businesses, under which the Board can authorize a retail business “if [the Board] determines that the proposed use would not be detrimental to the development of the district as a retail shopping area,”¹⁵⁴ the court found that that provision did not provide the board with sufficient guidance in deciding whether to grant or deny

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- d. There exists, within the development plan area, industrial businesses having a full-time, non-seasonal, on-site total employee population of at least five hundred (500) employees;
 - e. There exists, within a one-mile radius of the property boundaries of the proposed site, industrial businesses having a full-time, non-seasonal, on-site total employee population of at least twenty-five hundred (2,500) employees;
 - f. A site development plan is submitted to, and approved by, the Board of Adjustment and the Planning Commission.

LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 8–22(d)(8) (2007).

¹⁴⁷ See *id.* art. 8–22(d)(1).

¹⁴⁸ *Keogh v. Woodford Cnty. Bd. of Adjustments*, 243 S.W.3d 369, 372 (Ky. Ct. App. 2007) (quoting *Hardin Cnty. v. Jost*, 897 S.W.2d 592, 595 (Ky. Ct. App. 1995)).

¹⁴⁹ *Carlton*, 569 S.W.2d at 681. The court found the term “special exception” used in the zoning ordinance synonymous with the term “conditional use.” *Id.*

¹⁵⁰ *Id.* at 679.

¹⁵¹ *Id.* at 682 (Park, J., concurring).

¹⁵² *Id.*

¹⁵³ *Id.* at 681.

¹⁵⁴ *Id.* at 682 (Park, J., concurring).

a special exception and thus was unconstitutional for failure to delineate standards.¹⁵⁵

In the second case to announce that a zoning ordinance must delineate sufficient standards, the Kentucky Court of Appeals struck down a zoning ordinance that authorized a very unique kind of conditional use. In *Hardin County v. Jost*,¹⁵⁶ the zoning ordinance designated the entire unincorporated area of the county as a single zone and designated three types of uses for the zone: (1) “uses-by-right,” (2) “prohibited uses,” and (3) “conditional uses.”¹⁵⁷ “Agricultural and single family residential uses [were] designated as ‘uses-by-right,’” while uses that had “a negative impact on the quality and supply of water, or which endangered public health, or historic sites, [were] designated as ‘prohibited uses.’”¹⁵⁸ All other uses were designated as “conditional uses,” defined as “use[s] of land or activit[ies] permitted only after fulfillment of all local regulations.”¹⁵⁹ The local regulations applied a complex “Development Guidance System” that included a point system and individual “compatibility assessment” meetings to determine whether a conditional use permit should be granted.¹⁶⁰ The court found that the zoning ordinance failed to contain adequate standards to guide the planning commission in deciding whether to grant or deny a conditional use permit. It declared, “While application of the growth guidance assessment can place a prospective property owner on notice as to what uses cannot be made of the property, it cannot tell him with any degree of certainty whether any particular use can be made of the property.”¹⁶¹

In the most recent case to announce that zoning ordinances must contain sufficient standards, the Kentucky Court of Appeals held that a zoning

¹⁵⁵ *Id.* at 680.

¹⁵⁶ *Hardin Cnty. v. Jost*, 897 S.W.2d 592 (Ky. Ct. App. 1995).

¹⁵⁷ *Id.* at 593.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 593–94. The Development Guidance System first required a “growth guidance assessment” pursuant to which proposed land uses were evaluated using a point system that awarded points based on the project’s proximity to previously developed areas and amenities and the suitability of the soil for agricultural purposes. If a proposed project received sufficient points, it would be submitted for a “compatibility assessment” pursuant to which the applicant, neighboring property owners, and the commission staff would meet to discuss the proposed development. If no consensus were reached at the compatibility meeting, a public hearing would be held and the planning commission would decide whether to reject the project or place conditions on the project to make it “compatible.” *Id.*

¹⁶¹ *Id.* at 595. The court further declared:

The ordinance must be drafted to conform to the definition [of conditional use contained in KRS 100.111(6)], not vice versa. Since the entire Development Guidance System is predicated upon virtually every use being a “conditional use,” and since that term, as defined in KRS 100.111(6), makes no sense when applied in that context, the system is not workable.

Id. at 596.

ordinance that listed “Tourist home along State or Federal highways” as a conditional use in the agricultural (A-1) zone without defining the term “tourist home” did not impermissibly grant the Board of Adjustment unfettered discretion to determine whether the landowner’s application met the standards for a conditional use permit for a “tourist home.”¹⁶² In *Keogh v. Woodford County Board of Adjustments*, the court found that when the term “tourist home” was considered within the context of the zoning ordinance’s scheme for granting conditional uses, it provided a sufficiently definite framework for the Planning Director and Board to act.¹⁶³ The court, however, did not describe that framework in any detail. Instead, it simply noted the neighbors did not argue that the zoning ordinance conflicted with the definition of conditional use contained in Section 100.111(6) of the Kentucky Revised Statutes or that the ordinance failed to set specific guidelines for granting conditional uses.¹⁶⁴

The court of appeals also addressed the issue of standards in an unreported opinion. In *Burke v. Oldham County Board of Adjustment and Appeals*,¹⁶⁵ homeowners challenged the granting of a conditional use permit to allow underground quarrying of limestone. The zoning ordinance at issue provided:

In the interest of the public convenience, safety, morals and welfare and to encourage the best use of land, certain land uses, due to their extent, nature of operation, limited application, or relationship to certain natural resources, must be considered as singular cases. The uses listed in this section may be allowed by the Board of Adjustments in certain districts, after public hearing, by Conditional Use Permit, provided the Board of Adjustments finds such uses to be essential or desirable [sic] and not in conflict with the elements and objectives of the Comprehensive Plan.¹⁶⁶

The zoning ordinance then listed twenty-three different conditional uses, including the extraction of minerals.¹⁶⁷ The ordinance imposed

¹⁶² *Keogh v. Woodford Cnty. Bd. of Adjustments*, 243 S.W.3d 369, 373 (Ky. Ct. App. 2007).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Burke v. Oldham Cnty. Bd. of Adjustment & Appeals*, No. 2002-CA-001695-MR, 2003 WL 22025917, at *1 (Ky. Ct. App. Aug. 29, 2003).

¹⁶⁶ *Id.* at *2 (alteration in original) (quoting OLDHAM COUNTY, KY., ZONING ORDINANCE § 211).

¹⁶⁷ *Id.*

three specific conditions on conditional use permits for “Extraction, Rock Quarries, Mineral and Earth Products”:

- (1) Establishment by the responsible authority or approved engineer of the final ground elevations to be attained for the operations.
- (2) Filing of a performance bond equal to \$5,000.00 per acre with the County or City to insure proper finishing of the area into a usable condition.
- (3) Plan of use of the area following completion of the operation.¹⁶⁸

The court rejected the landowners’ claim that allowing conditional uses in the first place was an impermissible delegation of zoning power reserved by the legislature to the fiscal court.¹⁶⁹ The court found that the fiscal court properly exercised its zoning power by identifying the specific conditional uses that were permissible.¹⁷⁰ The court then rejected the landowners’ claim that the ordinance gave the Board unlimited discretion and thus was an unconstitutional delegation of power.¹⁷¹ In reaching this result the court took four factors into account. First, the Board was limited to granting conditional uses for the twenty-three listed uses, or uses that are similar to those listed.¹⁷² Second, the ordinance required the Board to find that the use was “essential or desirable [sic] and not in conflict with the elements and objectives of the Comprehensive Plan.”¹⁷³ Third, the zoning ordinance imposed the three separate conditions on conditional use permits for mineral extraction as described above.¹⁷⁴ Finally, the Board was required to consider other conditions it “fe[lt] necessary to further the purposes of this regulation and further the public’s best interest.”¹⁷⁵

No reported case has addressed the question of whether conditional uses under the LFUC zoning ordinance satisfy the requirement that the zoning ordinance contain sufficient standards so as not to vest absolute

¹⁶⁸ *Id.* at *2–3 (footnote omitted) (quoting OLDHAM COUNTY, KY., ZONING ORDINANCE § 211).

¹⁶⁹ *Id.* at *2.

¹⁷⁰ *Id.* at *2. The court noted that the ordinance was consistent with the requirements of section 100.237 of the Kentucky Revised Statutes and that the landowners were not challenging the constitutionality of section 100.237. *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* (alteration in original) (quoting OLDHAM COUNTY, KY., ZONING ORDINANCE § 211) (internal quotation marks omitted).

¹⁷⁴ *Id.* at *2–3.

¹⁷⁵ *Id.* at *3 (quoting OLDHAM COUNTY, KY., ZONING ORDINANCE § 211) (internal quotation marks omitted).

and arbitrary power in the Board.¹⁷⁶ Based on the four cases described above, however, it appears that conditional uses under the LFUC zoning ordinance would survive any such challenge.

First, the LFUC zoning ordinance closely tracks the definition of conditional use contained in KRS 100.111(6).¹⁷⁷ Thus, conditional uses under the LFUC zoning ordinance are unlikely to run into the problems posed by the zoning ordinance in *Hardin County v. Jost*, which strayed far from the definition of conditional uses under the Kentucky enabling legislation. Second, in each of the twenty-four scheduled zones in the LFUC zoning ordinance, conditional uses are specifically identified and listed.¹⁷⁸ Thus, conditional uses under the LFUC zoning ordinance do not raise the same problems as the zoning ordinance in *Carlton v. Taylor* that authorized the Board to grant special exception for “other retail businesses” if the Board determined the use would not be detrimental to the development of the district as a shopping center.¹⁷⁹

Finally, like the zoning ordinance in *Burke v. Oldham County Board of Adjustment and Appeals*, the LFUC zoning ordinance does impose some,

¹⁷⁶ Nor am I aware of any unreported case addressing the issue.

¹⁷⁷ See *supra* note 32.

¹⁷⁸ See LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE arts. 8-1(d), 8-2(d), 8-3(d), 8-4(d), 8-5(d), 8-6(d), 8-7(d), 8-8(d), 8-9(d), 8-10(d), 8-11(d), 8-12(d), 8-13(d), 8-14(d), 8-15(d), 8-16(d), 8-17(d), 8-18(d), 8-19(d), 8-20(d), 8-21(d), 8-22(d), 8-23(d), 8-24(d) (2007). Specific conditional uses are also identified in other zones, such as the expansion area zones, that do not fall within the article 8 scheduled zones. See LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE arts. 10-2, 11-4, 12-4, 22A-3(d), 23(A)-4(d), 23A-5(d), 23A-6(d), 23A-7(d), 23A-8(d), 23A-9(d), 23A-10(d), 24B-5, 28-3(d), 28-4(d), 28-5(d) (2007).

¹⁷⁹ *Carlton v. Taylor*, 569 S.W.2d 679, 682 (Ky. Ct. App. 1978). Arguably, a few conditional uses may be too broad. For example, all of the agricultural zones include as a conditional use:

Any uses that are clearly incidental and subordinate to a small farm winery operation licensed as such by the Commonwealth of Kentucky, other than those specifically outlined in KRS 100, and permitted by Article 8-1(c)(2), which may include special events with or without live entertainment or a small bistro/restaurant of up to (2) seats per 1,000 gallons of wine, brandies and cordials produced or compounded on site per year.

LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 8-1(d)(27) (2007); see also *id.* art. 8-2(d)(16); *id.* art. 8-3(d)(12); *id.* art. 8-4(d)(13).

Arguably, this provision may grant too much discretion to the Board, because it does not specifically identify any of the incidental and subordinate uses that may be authorized. It is worth noting, however, that the ordinance does impose limitations on special events. Specifically, it provides:

For special events, documentation shall be provided that arrangements have been made with the LFUCG Division of Fire and Emergency Services for approval of fire suppression and control; that Fayette County Health Department approval has been obtained for the septic system and/or portable toilets; that Fayette County Health Department approval has been obtained for any food services offered, whether it be provided on site or catered for each event; and that approval be obtained from the Division of Building Inspection for any temporary structures used (i.e., tents).

albeit limited, standards on conditional uses.¹⁸⁰ First, it requires that the Board “find that the necessary public facilities and services that will be needed are, or will soon be, adequate to serve the proposed use.”¹⁸¹ Second, it requires the Board to “provide for the continuation of existing or proposed collector streets, and whenever possible, provide for the continuation of local streets.”¹⁸² In addition, like the zoning ordinance in *Burke*, it authorizes the Board to “attach necessary conditions such as time limitations, requirements that one or more things be done before the request can be initiated, or conditions of a continuing nature and which would not have an adverse influence on existing or future development of the subject property or other property in the neighborhood,”¹⁸³ and to “establish conditions to ensure that the proposed conditional use will not have an adverse influence on the subject property or the surrounding neighborhood.”¹⁸⁴

A fifth case also arguably supports the view that the LFUC zoning ordinance provides the Board with sufficient standards to decide applications for conditional uses so long as the Board makes factual determinations that show that it has considered the effect the proposed land use would have on public health, safety and welfare.¹⁸⁵ In *Davis v. Richardson*, the court of appeals, then the highest court in Kentucky, reviewed a Board’s decision to grant a conditional use permit for a social club under a zoning ordinance that authorized social clubs as conditional uses in any zone.¹⁸⁶ The court noted that the fact that social clubs were conditional uses in any zone meant that the Board of Adjustment rather than the legislature made “the only effective determination concerning whether the particular land use at the particular location is consistent with and promotes the public health, safety or welfare in the overall zoning scheme.”¹⁸⁷ The delegation doctrine was not at issue in the case, and the court did not strike down the conditional use provision for failure to provide the board with sufficient standards. Instead, the court remanded the case for the Board to make factual determinations to demonstrate that the Board had “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.”¹⁸⁸

Id. art. 8–1(d)(27); *see also id.* art. 8–2(d)(16); *id.* art. 8–3(d)(12); *id.* art. 8–4(d)(13).

¹⁸⁰ *See Burke v. Oldham Cnty. Bd. of Adjustment & Appeals*, No. 2002–CA–001695–MR, 2003 WL 22025917, at *1–2 (Ky. Ct. App. Aug. 29, 2003).

¹⁸¹ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 7–6(a)(2) (2007).

¹⁸² *Id.* art. 7–6(a)(3).

¹⁸³ *Id.* art. 7–6(a)(1).

¹⁸⁴ *Id.* art. 7–6(a)(2).

¹⁸⁵ *Davis v. Richardson*, 507 S.W.2d 446, 449 (Ky. 1974).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 448.

¹⁸⁸ *Id.* at 449.

Of course, *Davis v. Richardson* would be stronger support for the proposition that the LFUC zoning ordinance provides sufficient standards to guide the Board in deciding conditional use applications if the delegation doctrine were expressly raised and discussed in the opinion.

In sum, chapter 100 of the Kentucky Revised Statutes now permits the Board of Adjustment to authorize conditional uses, rather than special exceptions, which was the terminology used at the time of the Dukeminier–Stapleton study. Like the zoning ordinance at the time of the Dukeminier–Stapleton study, the current LFUC zoning ordinance authorizes two types of conditional uses: (1) uses that are permitted in specified districts if certain conditions are met; and (2) uses that are permitted “only with Board approval” without attaching any specific conditions.¹⁸⁹ Although Dukeminier and Stapleton questioned the constitutionality of the latter type of conditional use, dicta in a number of cases decided since the Dukeminier–Stapleton study suggest that such conditional uses under the LFUC zoning ordinance would survive a challenge under the delegation doctrine.¹⁹⁰

2. Conditional Use Applications for Uses Other than for Home Occupations.—

The Board considered seventeen requests for special exceptions during the period of time covered by the Dukeminier–Stapleton study.¹⁹¹ Two of the requests were for “true” special exceptions—that is, special exceptions for which the zoning ordinance set forth specific conditions that were required to be met.¹⁹² The remaining fifteen requests were for “discretionary” special exceptions.¹⁹³

The Board granted the two “true” special exceptions and thirteen of the fifteen “discretionary” requests.¹⁹⁴ Dukeminier and Stapleton criticized the Board for granting the two “true” special exceptions, because the applicants did not meet the specific conditions in either case.¹⁹⁵ With respect to the discretionary requests, Dukeminier and Stapleton declared:

On the basis of the disposition of these cases it is not possible to say whether the Board acted wisely or unwisely, fairly or unfairly, or whether a sound or unsound planning theory

189 See LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 7–8 (2007).

190 See *Burke v. Oldham Cnty. Bd. of Adjustment & Appeals*, No. 2002–CA–001695–MR, 2003 WL 22025917, at *1–3 (Ky. Ct. App. Aug. 29, 2003).

191 *Study*, *supra* note 2, at 306. One case involved two requests, so the Board considered sixteen cases with a total of seventeen requests. *Id.*

192 *Id.*

193 *Id.* at 308. Some of the discretionary special exception requests were appealed to the Board as variance requests, but Dukeminier and Stapleton classified them as special exceptions to resolve all doubts in favor of the Board. *Id.* at 308–09.

194 *Id.* at 306–08.

195 *Id.* at 306–07.

underlay the Board's actions. The minutes of the Board are sketchy, and no written opinions are filed. Without any policies, standards, or rules to guide the Board's decisions, and without any requirement that the Board justify its actions by an opinion, the possibilities of arbitrary use of power are great. But there is no proof here that they have been realized or not realized. We are simply in the dark.¹⁹⁶

From July 2007 through December 2008, 104 conditional use applications for uses other than home occupations appeared on the Board's agenda.¹⁹⁷ The Board approved 89 of the 104 conditional use applications and disapproved six.¹⁹⁸ The Board reached a tie vote in three of the cases, and the applicants withdrew six of the applications.¹⁹⁹

(a) Board's Decisions

It is not clear how many of the 104 conditional use applications Dukeminier and Stapleton would characterize as "true" conditional uses, and how many they would describe as "discretionary" conditional uses.²⁰⁰ Because, unlike Dukeminier and Stapleton, I believe that the "discretionary" conditional uses are not likely to be stricken for violating the impermissible delegation doctrine, I will not attempt to distinguish the "true" conditional uses from the "discretionary" conditional uses.

¹⁹⁶ *Id.* at 309.

¹⁹⁷ Eight of the conditional use applications also included a variance request, and one of the applications included an administrative review.

¹⁹⁸ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (July 2007 – Dec. 2008) (on file with author).

¹⁹⁹ *Id.* In one case about the Worldwide Church of God, the applicant postponed the case and it never returned to the agenda. Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 6 (July 25, 2008) (on file with author) (discussing Worldwide Church of God, C–2008–57). At the Board meeting, the staff advised the Board that the applicant had been working with the Division of Building Inspection and that applicant might withdraw the case. *Id.* Since the case never again appeared on the Board's agenda, it appears that the applicant withdrew the application before the staff prepared the following month's agenda. Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Aug. 22, 2008) (on file with author).

²⁰⁰ Arguably, the application for a bed and breakfast establishment would qualify as a "true special exception" because the zoning ordinance imposes eleven specific requirements for a use to qualify as a bed and breakfast establishment. LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 1–11 (2007). Those conditions, however, are contained in the definition of "bed and breakfast" and do not relate to the location of the bed and breakfast. Thus, they may not qualify as "true" special exceptions. *Id.* Arguably, the three applications to permit dancing and live entertainment would qualify as "true" special exceptions because the zoning ordinance imposes a specific condition related to location: such uses must be at least 100 feet from a residential zone. LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 12–4(a) (2007). The zoning ordinance, however, does not identify many other specific conditions with respect to those uses. Thus, it is not clear whether they would qualify as "true" special exceptions. *Id.*

Nevertheless, I will note that in every case in which the zoning ordinance imposed specific conditions with respect to a conditional use, the Board found that the specific conditions were satisfied before granting the conditional use permit. If a specific condition was not satisfied, the Board disapproved the request.

The Board clearly appeared to be acting within the bounds of the law in the six conditional use permit applications it disapproved. The Board disapproved two of the applications because the applicant did not meet specific additional conditions imposed by the zoning ordinance.²⁰¹ The Board disapproved another application because testimony at the hearing revealed that the applicant planned to use the property in a way that was not permitted under the zoning ordinance.²⁰² The Board disapproved two family child care applications due to specific concerns related to the proposed site: one site had inadequate on-street parking²⁰³ and the other site raised traffic and safety concerns.²⁰⁴ Finally, the Board disapproved an application to continue operation of a night club with live entertainment and dancing due to the disruptive manner in which the night club had

201 In *Krista Meadows*, the Board disapproved a request for a family child care, because it did not satisfy the ordinance's minimum off-street parking requirements. Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 17-18 (May 30, 2008) (on file with author) (discussing *Krista Meadows*, C-2008-42).

In *James Lamont Hudson*, the applicant applied for a conditional use permit for a night club with live entertainment and dancing. Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 9-12 (Oct. 26, 2007) (on file with author) (discussing *James Lamont Hudson*, CV-2007-80). The ordinance required that such a use be at least 100 feet from a residential zone. Because the proposed use was to be within thirty feet of a residence zone, the applicant also sought a variance. The Board rejected the applicant's request for a variance to locate the use within thirty feet of a residential zone because, among other reasons, it had significant potential to adversely affect the nearby well-established residential area. It then disapproved the conditional use application because it did not satisfy the mandatory 100-foot setback requirement. *Id.*

202 In *Johnny Winchester*, the applicant sought a conditional use permit for vehicle storage. Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 10 (July 25, 2008) (on file with author) (discussing *Johnny Winchester*, C-2008-32). Testimony at the hearing revealed that wrecked and inoperable vehicles would be stored on the site. Because the ordinance explicitly states that a vehicle storage yard does not include storage of inoperable vehicles, the Board disapproved the application. The Board also disapproved the application because testimony at the hearing indicated that the storage lot would not be paved as required. *Id.* For the definition of vehicle storage yard, see LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 1-11 (2008).

203 Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 18-19 (May 30, 2008) (on file with author) (discussing *Carla Jackson-Stovall*, C-2008-32). The Board also disapproved that application because the proposed extended hours of operation increased the potential for disturbing residents in the area. *Id.* at 19.

204 Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 14 (Feb. 29, 2008) (on file with author) (discussing *Assia Tounova-Stoencheva*, C-2008-13).

been operating in that location and the adverse impact it had had on the surrounding area.²⁰⁵

Two of the cases that resulted in a tie vote also included requests for variances.²⁰⁶ Much of the testimony before the Board in those cases focused on the variance requests.²⁰⁷ As discussed above, in neither of those cases did the applicant present compelling evidence in favor of its variance request.²⁰⁸ Thus, I do not believe that the Board erred in failing to grant relief in those two cases.

With respect to the third case that resulted in a tie vote after its first application, I believe that the Board should have voted to approve it initially.²⁰⁹ Indeed, the Board considered an identical application two months after the first application, and the Board approved the request the second time.²¹⁰

In that case, the applicant requested a conditional use permit to conduct an underground mining/quarrying operation on land located below the Royal Spring Aquifer.²¹¹ Although no member of the public appeared to object and the staff members of the Board recommended approval, the Board held a very lengthy hearing on the matter.²¹² Two of the four Board members present and voting on the matter²¹³ were very concerned

205 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 23–24 (July 25, 2008) (on file with author) (discussing La Bamba, LLC, C–2008–69).

206 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 13–19 (Dec. 12, 2008) (on file with author) (discussing Panagia Pantovasilissa Greek Orthodox Church, CV–2008–24); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2–4 (Feb. 29, 2008) (on file with author) (discussing Ky. Data Link, Inc., CV–2007–106).

207 *See* Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 13–19 (Dec. 12, 2008) (on file with author) (discussing Panagia Pantovasilissa Greek Orthodox Church, CV–2008–24); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 19–27 (Apr. 25, 2008) (on file with author) (discussing Panagia Pantovasilissa Greek Orthodox Church, CV–2008–24); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2–4 (Feb. 29, 2008) (on file with author) (discussing KY Data Link, Inc., CV–2007–106).

208 *See supra* Part II.A.2.b.

209 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 11–20 (Oct. 31, 2008) (on file with author) (discussing Vulcan Lands, Inc., C–2008–95).

210 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5–10 (Dec. 12, 2008) (on file with author) (discussing Vulcan Lands, Inc., C–2008–107). Because the first application resulted in a tie vote, the applicant was entitled to and did file a second conditional use application asking for the same relief. *See* Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 20 (Oct. 31, 2008) (on file with author) (discussing Vulcan Lands, Inc. C–2008–95); (Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5–10 (Dec. 12, 2008) (on file with author) (discussing Vulcan Lands, Inc., C–2008–107).

211 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 11–20 (Oct. 31, 2008) (on file with author) (discussing Vulcan Lands, Inc., C–2008–95).

212 *See id.*

213 Five Board members attended the hearing. I was one of those members, but I abstained from voting in that case. The applicant proposed to swap land with the University of Kentucky as part of its proposed operations. Prior to the meeting, the applicant's attorney

about the project and its potential harm to the Royal Spring Aquifer. In response to these Board member's concerns, two members of the Royal Spring Wellhead Protection Committee testified before the Board.²¹⁴ They explained that the Committee had held two meetings with the applicant where they had the opportunity to ask very difficult and detailed questions regarding the protection of the Aquifer.²¹⁵ As a result of these meetings, the Committee proposed that two conditions be added to the conditional use permit to address their concerns.²¹⁶ The Committee members testified that they supported the application so long as it was subject to the two proposed conditions.²¹⁷ The staff's recommendation to the Board included these two conditions, as conditions four and five.²¹⁸ An employee for the Kentucky Division of Water, Watershed Management Branch, also testified.²¹⁹ He testified that he was responsible for including groundwater protection in the third proposed condition,²²⁰ which requires that the facility comply with the Mining/Quarrying Ordinance as well as Federal and State regulations.²²¹ He noted that the Division of Water does not have a legal right to say whether it supports or opposes the project but urged the applicant to use caution.²²² A number of other witnesses testified for the applicant. They all stated that they believed that mining operations were safe and would not adversely affect the Aquifer.²²³ Two Board members voted to disapprove the application because the applicant

failed to support the burden of proving that the proposed mining operation will not become detrimental to the Royal Spring Aquifer, as the property lies within the Recharge Area. Due to

suggested that he thought I should abstain from voting because I am an employee of the University of Kentucky. Accordingly, I abstained from voting.

214 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment at 14–15 (Oct. 31, 2008) (on file with author) (discussing Vulcan Lands, Inc., C–2008–95).

215 *Id.* at 14.

216 *Id.*

217 *Id.*

218 *Id.* at 11–12. The first condition (recommended by the staff as condition four) required that the applicant (1) “provide final plans for the design and construction of the [entrance] portals to the [] Royal Spring Aquifer Wellhead Committee”; (2) “meet with the Committee to review/discuss the plans”; and (3) provide the Committee sufficient time to report any concerns with the plans to the Division of Building Inspection prior to construction of the portals. *Id.* The second condition (recommended by the staff as condition five) required the applicant to provide monthly reports to the Committee and the Georgetown Municipal Water and Sewer Service during construction of the entrance portals. *Id.*

219 *Id.* at 18.

220 *Id.*

221 *Id.* at 11.

222 *Id.* at 19.

223 *Id.* at 11–19.

its proximity to the Aquifer, the burden is very high to prove that a major water source will not be adversely impacted.²²⁴

Two members of the Board voted against the motion to disapprove.²²⁵

Two months after the tie vote, the Board reconsidered the matter.²²⁶ The Board again held a lengthy hearing on the matter.²²⁷ Again, the staff recommended approval and no members of the public opposed the application. In fact, a number of citizens attended the meeting to support the application.²²⁸ This time, four members of the Board voted to approve the application and only one member opposed.²²⁹ None of the members who had voted in the preceding hearing changed their vote. The final vote changed because two members who were not present at the earlier hearing voted to approve the application, and one member who had voted against the application in the earlier meeting was not present at the second meeting. I believe that the Board was right in approving the application.²³⁰ I believe that the applicant provided sufficient evidence to show that its mining operations would not compromise the aquifer and otherwise satisfied the requirements for a conditional use permit.

Unlike at the time of the Dukeminier–Stapleton study, we are not in the dark as to why the Board approved the eighty-nine conditional use permits. In each and every case in which the Board approved a conditional use permit, it provided reasons why it was approving the permit. At a minimum, in each case the Board found that the proposed use would not adversely affect the subject or surrounding property. The Board's finding in each instance was not simply a conclusory statement. Instead, the Board offered specific facts with respect to the property and proposed use. To illustrate, in approving a conditional use for the expansion of an existing church, the Board found that:

Granting the requested conditional use permit should not adversely affect the subject or surrounding properties, as

²²⁴ *Id.* at 19.

²²⁵ *Id.* at 20.

²²⁶ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5–10 (Dec. 12, 2008) (on file with author) (discussing Vulcan Lands, Inc., C–2008–107). Because the first application resulted in a tie vote, the applicant was entitled to and did file a second conditional use application asking for the same relief. *See id.*

²²⁷ *See id.*

²²⁸ *See id.* As noted above, the applicant planned to swap some land in the deal, and the swapped land included land that would be used as part of the “Legacy Trail,” a “9-mile walking/biking trail that w[ould] begin in the East End area of Lexington” and end at the Horse Park. *See* Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 15 (Oct. 31, 2008) (on file with author) (discussing Vulcan Lands, Inc., C–2008–95). The citizens appeared at the meeting to support the Legacy Trail. *See id.*

²²⁹ *Id.* at 10.

²³⁰ As discussed in note 213, I abstained from voting in this matter. *See supra* note 213.

the proposed expansion will be immediately adjacent to the existing church building and will satisfy all applicable setback requirements. The site is well buffered from nearby residential areas by a railroad line and by a variety of commercial and industrial uses on immediately adjacent properties.²³¹

As discussed above, the Kentucky zoning enabling legislation does not impose any explicit standards on the granting of conditional use permits.²³² It does, however, define a conditional use permit as consisting of two parts: (1) “[a] statement of the factual determination by the board of adjustment which justifies the issuance of the permit;” and (2) “[a] statement of the specific conditions which must be met in order for the use to be permitted.”²³³ It appears that the Board satisfied the first part of the legislative definition of conditional use permit in each case in which it granted a conditional use permit because it offered specific reasons why the permit should be issued in each case, and those reasons always included specific facts explaining why the proposed use would not adversely affect the subject or surrounding property.

Second, the Board appears to have satisfied the second element of the statutory definition of a conditional use permit in each case in which the Board approved a conditional use permit, because the Board imposed specific conditions on the granting of every permit. The most typical conditions were that (1) the use comply with the submitted site plan; (2) all necessary permits be obtained from the Division of Building Inspection; and (3) a storm water management plan be implemented.²³⁴ Where necessary and appropriate, more tailored conditions were imposed. For example, in a case in which the Board approved a conditional use permit for a temporary modular classroom building, the Board required that the modular building “be removed within three years after action by the Board, or at the time the second floor of the main school building has been finished and can be occupied, whichever comes first.”²³⁵

Perhaps the most unique and interesting condition the Board imposed was a requirement that parents be provided information “encouraging

231 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7–8 (Aug. 31, 2007) (on file with author) (discussing Jack C. Stewart, C–2007–70).

232 See *supra* Part II.B.1.

233 See KY. REV. STAT. ANN. § 100.111(7) (2006).

234 See, e.g., Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5 (July 27, 2007) (on file with author) (discussing conditions 1, 2, and 4 with respect to Majestic Dev. Co., LLC, C–2007–56); *id.* at 8 (discussing conditions 1, 2, and 3 with respect to Headley–Whitney Museum, Inc., C–2007–64); *id.* at 5–6 (discussing conditions 1 and 2 with respect to New Horizons Church, C–2007–61); *id.* at 7–8 (discussing conditions 1 and 2 with respect to The Church for All Nations, C–2007–63).

235 *Id.* at 4–5 (discussing condition 4 with respect to Lexington Universal Acad., CV–2007–65).

them to use the YMCA's parking lot and footpaths to access the fields, and explaining why on-street parking can lead to safety and other problems."²³⁶ That condition was imposed in a case in which the YMCA sought to expand its facilities. Neighbors were very concerned about, among other things, the impact the expansion would have on parking in the neighborhood. The YMCA agreed to that condition, among others, after meeting with the neighbors and two neighborhood associations.²³⁷ Although the YMCA had met with neighbors and the neighborhood association, neighbors appeared to object to the request at the first hearing scheduled to hear the matter.²³⁸ In light of the opposition, the Board continued the hearing until the following month.²³⁹ The following month, neighbors again objected, and the Board approved the request with a number of modifications.²⁴⁰ Those modifications included conditions that "the multi-purpose fields will not be used beyond or after 7:00 p.m." and that "[t]he scheduled activities may begin no earlier than 10:00 a.m. on Saturday, and 12:00 p.m. on Sunday, and 8:00 a.m., Monday through Friday."²⁴¹

Unlike the Kentucky enabling legislation, the LFUC Zoning Ordinance does impose specific requirements on the granting of conditional use permits. First, the zoning ordinance describes a conditional use as a use that does "not have an adverse influence on existing or future development of the subject property or its surrounding neighborhood."²⁴² Second, it requires that the Board "find that the necessary public facilities and services . . . are, or will soon be, adequate to serve the proposed use."²⁴³ Finally, it requires that the Board "provide for the continuation of existing or proposed collector streets, and whenever possible, provide for the continuation of local streets."²⁴⁴

In every case in which the Board granted a conditional use permit, the Board offered specific facts in support of a finding that the conditional use would not have an adverse affect on the subject or surrounding property.

²³⁶ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 13 (Sept. 28, 2007) (on file with author) (discussing condition 4 with respect to YMCA of Cent. Ky., C–2007–67).

²³⁷ See Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 19–20 (Aug. 31, 2007) (on file with author) (discussing YMCA of Cent. Ky., C–2007–67, and stating that council member testified that he worked with the YMCA, neighbors and two neighborhood associations regarding the proposal).

²³⁸ See *id.* at 19–22.

²³⁹ See *id.* at 22.

²⁴⁰ See Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 17–22 (Sept. 28, 2007) (on file with author) (discussing YMCA of Cent. Ky., C–2007–67).

²⁴¹ *Id.* at 22 (adding new conditions 6 and 7).

²⁴² LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 7–6(a) (2007).

²⁴³ *Id.* art. 7–6(a)(2).

²⁴⁴ *Id.* art. 7–6(a)(3).

Thus, the Board clearly appears to have satisfied the first conditional use permit requirement under the LFUC Zoning Ordinance.

Second, in all but one case in which the Board approved a request for a conditional use permit,²⁴⁵ the Board found that all necessary facilities and services are, or soon will be, adequate to serve the proposed use. Usually, the Board simply declared that “[a]ll necessary public facilities are available and adequate for the proposed use,”²⁴⁶ that “[a]ll necessary public and private facilities and services are available and adequate for the proposed use,”²⁴⁷ or something along those lines. When necessary, additional facts were offered to support the finding.²⁴⁸

In none of the cases in which the Board granted a conditional use permit did the Board expressly address the requirement that the use provide for the continuation of existing or proposed collector streets. This is because most cases did not require the creation of new streets. For example, granting a conditional use permit to allow a temporary modular

245 In approving a conditional use permit to extend the regulations of the Planned Neighborhood Residential zone up to fifty feet into the adjoining single-family residential and agricultural-urban zones on the same property for the purpose of providing additional parking spaces, the Board did not make a finding that all necessary facilities and services are, or soon will be, adequate to serve the proposed use. Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 7-8 (Dec. 14, 2007) (on file with author) (discussing CMW, Inc., C-2007-107). The failure to make a finding with respect to facilities and services could have been based on a belief that additional parking does not require any facilities or services. More likely, however, the failure to find that facilities and services were adequate was simply an oversight. *Cf.* Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 7-8 (Jan. 25, 2008) (on file with author) (discussing DJ Acquisitions, LLC, C-2007-103) (finding that “[a]ll necessary public services and facilities are available and adequate for the proposed use” in a case in which the Board approved a conditional use permit to construct a parking lot to serve an adjoining commercial use); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 8-9 (June 27, 2008) (on file with author) (discussing Am. Ave. Baptist Church, C-2008-60) (making similar finding in appeal for conditional use to expand church parking lot); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 21-23 (May 30, 2008) (on file with author) (discussing CMW, Inc./Copper Hill Kingdom Hall, C-2008-50) (making similar finding in a case in which Board approved a request to amend a previously approved site plan “for the purpose of revising proposed storm water management basins and associated parking”).

246 *E.g.*, Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 10 (June 27, 2008) (on file with author) (discussing First Fed. Bank, C-2008-62).

247 *E.g.*, Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 8 (Oct. 26, 2007) (on file with author) (discussing Holston Gases, Inc., C-2007-90).

248 *See, e.g.*, Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 13 (June 27, 2008) (on file with author) (discussing Keeneland Ass’n, Inc., C-2008-64) (finding that “[t]rash pickup/disposal and sewer treatment (septic system) are privately provided; there is adequate space for any storm water management treatment that might be required; and public services such as police and fire protection are available and adequate for the proposed uses”); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 9 (Nov. 30, 2007) (on file with author) (discussing Hargus S. Sexton, C-2007-94) (finding that “[s]ewage treatment will be provided on site, and all necessary public services, such as police and fire protection, are available and adequate for the proposed use”).

classroom building on a school's property did not require the creation of new streets.²⁴⁹ In the two cases in which new access roads were created, the Board required that the new access roads be subject to review and approval by the Division of Traffic Engineering.²⁵⁰ Thus, although the Board never expressly addressed street continuations, in no case does it appear that the Board violated the requirement that the use provide for the continuation of existing or proposed collector streets.

I believe that the Board generally satisfied the legal requirements for granting conditional use permits in almost all of the cases in which it granted a conditional use permit. I do, however, believe that the Board erred in granting a conditional use permit in one case.

In that case, the applicant sought a conditional use permit to expand a museum in the Agricultural–Rural (A–R) zone.²⁵¹ Museums are not authorized as conditional uses in the A–R zone.²⁵² In 1984, the applicant was granted “a conditional use permit in order to erect and occupy an addition to existing museum facilities in the Agricultural–Rural (A–R) zone.”²⁵³ At that time, “[t]he staff and the Board found that the museum’s educational focus was sufficient to allow the expansion as a use similar enough to a ‘school for academic instruction.’”²⁵⁴ Schools for academic instruction are authorized as conditional uses in the A–R zone.²⁵⁵ The zoning ordinance does and did define “schools for academic instruction” as “all schools offering primarily classroom instruction with participation of teachers and students, limited to elementary, junior and middle high schools, high schools, junior colleges,

249 See Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 4 (July 27, 2007) (on file with author) (discussing Lexington Universal Acad., CV–2007–65).

250 See Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 9 (Nov. 30, 2007) (on file with author) (discussing condition 4 with respect to Hargus S. Sexton, C–2007–94); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7 (Aug. 31, 2007) (on file with author) (discussing condition 4 with respect to Keeneland Ass’n, Inc., C–2007–69).

251 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 8 (July 27, 2007) (on file with author) (discussing Headley–Whitney Museum, Inc., C–2007–64).

252 See LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 8–1(d) (2007) (listing all conditional uses permitted for structures located in an A–R zone, which does not include museums). Interestingly, prior to filing the conditional use application, the applicant had applied for a text amendment to the zoning ordinance to allow museums as conditional uses in the A–R zone. There was opposition to this request. Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2 (July 16, 2007) (on file with author) (discussing Headley–Whitney Museum, Inc., C–2007–64). When the applicant discovered that the museum had been granted a conditional use permit in 1984, it decided to postpone the request for the text amendment and pursue the conditional use permit. Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 9 (July 27, 2007) (on file with author) (discussing Headley–Whitney Museum, Inc., C–2007–64).

253 Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2 (July 16, 2007) (on file with author) (discussing Headley–Whitney Museum, Inc., C–2007–64).

254 *Id.*

255 See LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 8–1(d)(20) (2007).

colleges, theological seminaries, bible colleges, and universities; but not including business colleges, technical or trade schools.”²⁵⁶ The museum may have had an educational mission, but it clearly did not offer “primarily classroom instruction.” Thus, I do not believe that it should have qualified as a school for academic instruction, and the conditional use permit to expand operations should not have been granted.²⁵⁷

(b) Role of Staff's Recommendations

The staff recommended approval in all eighty-nine cases of the conditional use cases in which the Board voted to approve,²⁵⁸ and the staff recommended disapproval in four of the six cases that the Board voted to disapprove. In the three cases in which the Board reached a tie vote, the staff recommended approval. Thus, the Board followed the staff's recommendation in ninety-three of the ninety-eight cases that were neither withdrawn nor indefinitely postponed, or ninety-five per cent of the cases. That is not to suggest that the Board always accepted the staff's recommendation without change. Occasionally, at the hearing, the Board would make some modifications to the staff's recommendation. For example, in one case, the Board added two conditions to a conditional use permit for family child care for up to twelve children in a Single Family Residential Zone, in response to neighbors' objections to the request.²⁵⁹

256 LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 1-11 (2007). The zoning ordinance has defined “schools for academic instruction” in this manner since before 1983. *See* LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 24.89, 6-7 (Proposed Text, Feb. 8, 1983) (on file with author) (containing identical definition of schools for academic instruction).

257 The Board voted 4-2 to approve the conditional use permit. I was one of the two Board members to vote against the request. *See* Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 13-14 (July 27, 2007) (on file with author) (discussing Headley-Whitney Museum, Inc., C-2007-64). At the meeting, a staff member said it was not clear whether a new museum with no prior history would be granted a conditional use permit as a “school for academic instruction.” *Id.* at 9-10.

258 In one case, the staff changed its initial recommendation from disapproval to approval. *See* Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 14-23 (Feb. 29, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A-2008-6).

259 *See* Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 9-10 (Aug. 22, 2008) (on file with author) (discussing Tara Richard, C-2008-75). The Board added the conditions that (1) “this conditional use permit shall be null and void if the appellant no longer resides at this location,” and (2) “[t]he bottom portion of the fence shall be covered next to 2820 Winter Garden Drive.” *Id.* at 10.

On the whole, however, the Board was quite deferential to the staff and its recommendations.

(c) *Summary*

Unlike at the time of the Dukeminier–Stapleton study, the Board now clearly explains why it is granting or denying a request for a conditional use permit.²⁶⁰ I believe that the Board clearly identified appropriate reasons in each of the cases in which it denied the relief. In addition, in each of the cases in which the Board granted the conditional use permit, the Board offered specific facts explaining why the proposed use would not have an adverse affect on the subject or surrounding property and imposed appropriate specific conditions.²⁶¹ Thus, I believe that, on the whole, the Board's decisions are supportable. I do, however, disagree with the substance of two of the Board's decisions.

3. *Decisions Regarding Conditional Use Applications for Home Occupations.*—At the time of the Dukeminier–Stapleton study, the local zoning ordinance granted the Board the power to authorize any “customary incidental home occupations when conducted within a dwelling and not in any accessory building.”²⁶² The zoning ordinance did not define home occupations in any way. Instead, the Board was charged with interpreting which home occupations were customarily incidental to the use of the premises as a residence.²⁶³ During the period of the Dukeminier–Stapleton study, the Board considered twenty-eight requests for home occupations.²⁶⁴ The proposed home occupations included fourteen beauty shops, three repair shops, two real estate offices, an accountant's office, an antique shop, and a printing shop.²⁶⁵ The Board granted twenty-four of the requests, and denied four.²⁶⁶ Dukeminier and Stapleton concluded “that the Board classified as

260 See, e.g., Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment, 7–8 (Aug. 31, 2007) (on file with author) (discussing Jack C. Stewart, C–2007–70).

261 See, e.g., Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 8–15 (July 27, 2007) (on file with author) (discussing Headley–Whitney Museum, Inc., C–2007–64).

262 Study, *supra* note 2, at 311 (quoting LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE § 8.24 (1962)).

263 *Id.*

264 *Id.*

265 *Id.* at 311–12. The three remaining requests were for “a shop for fabricating rubber stamps, a business telephone for a washing machine repairman who did none of his work at home, and a permit for ‘breeding and merchandising tropical fish.’” *Id.* at 312.

266 *Id.* at 311.

a home occupation almost any occupation that can be performed in, and might occasionally be found in, a home.”²⁶⁷

The Lexington–Fayette Urban County Zoning Ordinance now defines a “home occupation” as “[a] gainful occupation or profession carried on in a residence, such as the studio of an artist or sculptor; dressmaking and tailoring; upholstery; handicrafts; tutoring; individual musical instruction (provided no instrument is amplified); and professional services . . .”²⁶⁸ It specifically excludes from the definition of home occupation: “barber shops, beauty parlors, offices for escort services, massage parlors, automobile and small engine repair, medical or dental office, photo studios, palm reading or fortune telling, home cooking and catering; and uses, other than upholstery, which are first permitted in the B–4, I–1 or I–2 zone.”²⁶⁹ The ordinance requires that home occupations satisfy eight separate conditions, including requirements that (1) the use occupy “no more than twenty-five percent (25%) or three hundred (300) square feet of the dwelling, whichever is less;” (2) the use be “conducted entirely within the dwelling and not in any accessory building;” (3) the use be “carried on only by residents of the dwelling;” and (4) there be no outside signage on the premises.²⁷⁰

The ordinance lists home occupations as accessory uses in the agricultural zones²⁷¹ and as conditional uses in the residential and apartment zones.²⁷²

²⁶⁷ *Id.* at 314.

²⁶⁸ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 1–11 (2007).

²⁶⁹ *Id.*

²⁷⁰ *Id.* Specifically, the ordinance requires that the home occupation be performed under the following conditions:

- (1) The use is clearly incidental and secondary to use for dwelling purposes and occupies no more than twenty-five percent (25%) or three hundred (300) square feet of the dwelling, whichever is less;
- (2) The use is conducted entirely within a dwelling and not in any accessory building;
- (3) The use is carried on only by residents of the dwelling;
- (4) No commodities are sold or stored, except as are produced by the residents on the premises;
- (5) The use does not require external alteration of the dwelling;
- (6) The use does not adversely affect the uses permitted in the immediate neighborhood by excessive traffic generation or noise;
- (7) No outside signage shall be permitted on the premises;
- (8) No additional blacktop, concrete or gravel parking shall be permitted beyond that normally provided in comparable neighborhood homes.

Id.

²⁷¹ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 8–1(c)(3), –2(c)(3), –3(c)(3) (2007).

²⁷² *Id.* art. 8–5(d)(3), 8–6(d)(1), 8–7(d)(1), 8–8(d)(1), 8–9(d)(1), 8–10(d)(1), 8–11(d)(1), 8–12(d)(1), 8–13(d)(1), 8–14(d)(1); *id.* art. 22A–3(d) (1983); *id.* art. 23A–5(d)(1), 23A–6(d)(1), 23A–7(d), 23A–8(d), 23A–9(d)(1).

The Board decided five separate appeals for conditional use permits for home occupations between July 2007 and December 2008. Requests were made for five different types of home occupations: (1) dressmaking,²⁷³ (2) embroidery,²⁷⁴ (3) wedding florist,²⁷⁵ (4) gunsmith²⁷⁶ and (5) hat making.²⁷⁷ The staff recommended approval in all five cases and the Board followed the staff's recommendation and approved all five requests.²⁷⁸

In each case, the Board conditioned the approval upon, among other things, compliance with the eight conditions set forth in the zoning ordinance.²⁷⁹ The Board imposed two additional conditions on almost each approval: (1) prohibiting customers from coming to the home for any reason,²⁸⁰ and (2) limiting its approval to the specific appellant, so that each permit was to be null and void if the appellant ceased to own or occupy the residence.²⁸¹

I believe that the Board followed the law in all but one case, the dressmaking case. In that case, the property owner and co-owner of

273 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5 (Sept. 28, 2007) (on file with author) (discussing Fantasy Friends Costuming, LLC, C–2007–79).

274 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5 (Feb. 29, 2008) (on file with author) (discussing Karen Rardin, C–2008–10).

275 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7 (Apr. 25, 2008) (on file with author) (discussing Jeanie Gorrell, C–2008–28).

276 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7 (June 27, 2008) (on file with author) (discussing Ronald F. Adams, C–2008–58).

277 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7 (Sept. 26, 2008) (on file with author) (discussing Blythe Savage, C–2008–83).

278 *See supra* note 245, at 5–6; *supra* note 246, at 5–6; *supra* note 247, at 7–8; *supra* note 248, at 7–8; *supra* note 249, at 7–8.

279 *See supra* note 241; Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7 (Sept. 26, 2008) (on file with author) (discussing condition 1 with respect to Blythe Savage, C–2008–83); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7–8 (June 27, 2008) (on file with author) (discussing condition 4 with respect to Ronald F. Adams, C–2008–58); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7 (Apr. 25, 2008) (on file with author) (discussing condition 2 with respect to Jeanie Gorrell, C–2008–28); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 6 (Feb. 29, 2008) (on file with author) (discussing condition 1 with respect to Karen Rardin, C–2008–10); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5–6 (Sept. 28, 2007) (on file with author) (discussing condition 1 with respect to Fantasy Friends Costuming, LLC, C–2007–79).

280 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7–8 (Sept. 26, 2008) (on file with author) (discussing condition 3 with respect to Blythe Savage, C–2008–83); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7–8 (Apr. 25, 2008) (on file with author) (discussing condition 4 with respect to Jeanie Gorrell, C–2008–28); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 6 (Feb. 29, 2008) (on file with author) (discussing condition 3 with respect to Karen Rardin, C–2008–10); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 6 (Sept. 28, 2007) (on file with author) (discussing condition 3 with respect to Fantasy Friends Costuming, LLC, C–2007–79).

281 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7–8 (Sept. 26, 2008) (on file with author) (discussing condition 4 with respect to Blythe Savage, C–2008–83); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7–8 (June 27, 2008) (on file with author)

the business stated that a part-owner of the business lived a few blocks away and would work, but not reside, at the property.²⁸² One of the eight conditions the zoning ordinance imposes on home occupations requires that “[t]he use [be] carried on only by residents of the dwelling.”²⁸³ Legal counsel advised the Board that this was “an appropriate issue for the Board to interpret.”²⁸⁴ The staff asserted that traffic disruptions are the key concern with home occupations and that might explain the residency requirement.²⁸⁵ The staff and legal counsel suggested that the condition be interpreted as a clear prohibition against hiring employees and that the following condition be added to the approval: “Only the co-owners of the business shall participate in the business, and no outside employees shall participate.”²⁸⁶ The Board voted to approve the conditional use permit with this additional condition.²⁸⁷

I am sympathetic to the Board’s decision to approve the conditional use permit. Only one person other than a resident of the property would work on the property and thus, it is unlikely that the proposed home occupation would cause a great deal of additional traffic and/or disrupt the neighborhood. Nevertheless, I do not believe the Board had the power to grant the conditional use permit.²⁸⁸ I do not believe that the language, “[t]he use is carried on only by residents of the dwelling”²⁸⁹ is either ambiguous or means that employees may not be hired. It means what it says: the use may only be carried on by “residents” of the property. A co-owner who does not reside at the property is no more a “resident” of the property than an employee who does not reside at the property. Moreover, a single, non-resident co-owner causes no more additional traffic than does a single, non-resident employee. In fact, a single employee who lives next door

(discussing condition 12 with respect to Ronald F. Adams, C-2008-58); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 7-8 (Apr. 25, 2008) (on file with author) (discussing condition 7 with respect to Jeanie Gorrell, C-2008-28); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 6 (Feb. 29, 2008) (on file with author) (discussing condition 4 with respect to Karen Rardin, C-2008-10); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 6 (Sept. 28, 2007) (on file with author) (discussing condition 4 with respect to Fantasy Friends Costuming, LLC, C-2007-79).

282 Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 6 (Sept. 28, 2007) (on file with author) (discussing Fantasy Friends Costuming, LLC, C-2007-79).

283 LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 1-11 (2007) (providing condition 3 within the definition of “Home Occupation”).

284 Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 6 (Sept. 28, 2007) (on file with author) (discussing Fantasy Friends Costuming, LLC, C-2007-79).

285 *Id.*

286 *Id.*

287 *Id.*

288 I was the sole member of the Board present to vote against the appeal. *See id.*

289 LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 1-11 (2007) (providing condition three within the definition of ‘Home Occupation’).

and walks to the house may create less traffic than a single co-owner who lives several blocks away and drives to the house. Although the conditions may be intended to protect the neighborhood from traffic disruptions, the zoning ordinance does not authorize the Board to waive the conditions if the proposed use will not disrupt the neighborhood. Thus, I believe that the Board erred in granting this conditional use permit.

In sum, the Board decided five appeals for conditional use permits between July 2007 and December 2008. The staff recommended approval in all five cases and the Board followed the staff's recommendation in all five cases. I believe that the Board acted within the bounds of the law in all but one case. In that case, I believe that the Board impermissibly interpreted an unambiguous condition so as to waive the condition.

4. Decisions in Conditional Use Permit Reviews.—Occasionally, the Board may review a conditional use permit that it has already approved. These reviews arise in two different situations. First, the Board may include as a condition to approving the permit that the permit be reviewed after a set period of time.²⁹⁰ Second, if the building inspector determines that one or more conditions imposed by the permit have been violated, the building inspector may request a hearing before the Board to consider whether the Board should revoke the permit.²⁹¹

Dukeminier and Stapleton did not mention any conditional use permit reviews in their study of the Board's decisions between January 1960 and May 1961. In the current study of the Board's decisions between July 2007 and December 2008, hearings were scheduled to review five different conditional use permits.

Hearings for four of the permits were scheduled as conditions to the granting of the permits.²⁹² Three of the permits were approved following

290 See, e.g., Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5 (July 25, 2008) (on file with author) (discussing Peter Taylor, C–2006–4) (“At its January 2006 public hearing, the Board approved a conditional use permit for a riding arena, subject to nine conditions, one of which was a review of the conditional use one year from the date the Certificate of Occupancy was issued . . .”).

291 See, e.g., Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2 (Aug. 31, 2007) (on file with author) (discussing James G. Wilhite, C–2000–28) (“The Division of Building Inspection has requested a revocation hearing for failure to comply with the conditions imposed by the Board.”).

292 See Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 4 (Oct. 31, 2008) (on file with author) (discussing Hardwood Holdings, C–2005–138, involving a conditional use permit for recreational facility to include sports bar/café in a light industrial zone); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5 (July 25, 2008) (on file with author) (discussing Peter Taylor, C–2006–4, involving a conditional use permit for riding arena in an agricultural–rural zone); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 5 (Jan. 25, 2008) (on file with author) (discussing Carolyn Wagoner, C–2005–139, involving a conditional use permit to allow vehicle storage in a light industrial zone); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 4 (Sept. 28, 2007) (on file with author) (discussing Robert

the scheduled hearings.²⁹³ The hearing scheduled for the fourth permit was postponed for one month and removed from the Board's agenda when the appellant sent a letter to the Board stating that she would no longer pursue the conditional use permit.²⁹⁴

The building inspector requested a revocation hearing for the fifth permit.²⁹⁵ The revocation hearing was first requested in August 2007.²⁹⁶ In August, September, and October, the permittee requested, and the Board granted, without discussion, one-month postponements.²⁹⁷ When the permittee requested his fourth postponement in November, a Board member expressed concern about the repeated requests for postponement and suggested that this might be the final postponement.²⁹⁸ The Chair of the Board asked the building inspector to comment on the request for yet another postponement.²⁹⁹ The building inspector said that "he had no objection to another month's postponement; and that he appreciated the Board's indulgence."³⁰⁰ He explained that this was a complicated situation involving the approved site as well as an adjacent lot and that the permittee

H. Vanlandingham, C-2005-120, involving a conditional use permit for a plant nursery in an agricultural-urban zone).

One of the four permits, the permit for Robert H. Vanlandingham, was scheduled for a six-month and a twelve-month review. It was approved both times. *See* Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 4-5 (Sept. 28, 2007) (on file with author) (discussing Robert H. Vanlandingham, C-2006-120); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 4 (Mar. 28, 2008) (on file with author) (discussing Robert H. Vanlandingham, C-2006-120).

293 *See* Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 5 (Oct. 31, 2008) (on file with author) (discussing Hardwood Holdings, C-2005-138); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 4 (Mar. 28, 2008) (on file with author) (discussing Robert H. Vanlandingham, C-2006-120) (declaring approval after twelve-month review); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 5 (Sept. 28, 2007) (on file with author) (discussing Robert H. Vanlandingham, C-2006-120) (declaring approval after six-month review); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 6 (July 25, 2007) (on file with author) (discussing Peter Taylor, C-2006-4).

294 Because the case was withdrawn before the agenda was written, it does not appear on the agenda. So, the fact that it is not on the agenda for the next meeting means that it was withdrawn. *See* Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment (Feb. 29, 2008) (on file with author).

295 Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 2 (Aug. 31, 2007) (on file with author) (discussing James G. Wilhite, C-2000-28).

296 *See id.*

297 *See id.*; Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 2-3 (Sept. 28, 2007) (on file with author) (discussing James G. Wilhite, C-2000-28); Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 1-2 (Oct. 26, 2007) (on file with author) (discussing James G. Wilhite, C-2000-28).

298 *See* Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 2 (Nov. 30, 2007) (on file with author) (discussing James G. Wilhite, C-2000-28).

299 *Id.*

300 *Id.*

was working to resolve the problems.³⁰¹ The Board granted a two-month postponement in November with the understanding that this would be the last postponement.³⁰² Apparently the permittee resolved the problems and the building inspector withdrew the request for a revocation hearing, because the matter never again appeared on the Board's agenda.

In each of the five conditional use permit review cases, the Board deferred to the building inspector's recommendation. In a couple of cases, however, members of the Board questioned the building inspector's actions and recommendations. First, in the case that the Board postponed and the appellant later withdrew the request for a conditional use permit, the Chair of the Board of Adjustment questioned why the building inspector had granted a certificate of occupancy to the landowner.³⁰³ In that case, the landowner had requested a conditional use permit to allow a vehicle storage yard in a light industrial zone.³⁰⁴ The Board had granted a conditional use permit subject to eleven conditions, including conditions that (1) the property "be paved and resurfaced, as necessary, prior to obtaining an occupancy permit"; and (2) the permit be reviewed six months after the issuance of a certificate of occupancy.³⁰⁵ The landowner did not appear at the scheduled hearing.³⁰⁶ The building inspector explained that the landowner had never fully exercised the permit because satisfying the conditions, especially the requirement that the lot be paved, proved to be more expensive than the landowner had anticipated.³⁰⁷

Thus, the building inspector thought that the landowner had decided never to operate the business, but was awaiting confirmation of that fact from the owner in writing.³⁰⁸ The Chair of the Board questioned why a certificate of occupancy had been issued when all of the required conditions had not been satisfied. The building inspector explained that the certificate had been issued "in good faith after some discussions regarding the appellant's plans and contracts out for bids; but for whatever reason(s), they didn't follow through."³⁰⁹

In a case that required both a six-month and twelve-month review of a conditional use permit, a Board member questioned the landowner's actions and the building inspector's recommendation.³¹⁰ In that case, the

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 6 (Jan. 25, 2008) (on file with author) (discussing Carolyn Wagoner, C–2005–139).

³⁰⁴ *Id.* at 5.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 6.

³⁰⁸ *See id.*

³⁰⁹ *Id.*

³¹⁰ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2–3 (Mar. 28, 2008)

Board granted a conditional use permit for a plant nursery in an agricultural–urban zone.³¹¹ At the twelve–month review, a Board member questioned whether the landowner had been manufacturing mulch at the rear of the property and noted that manufacturing mulch was not something that had been anticipated by the Board to be part of the nursery.³¹² The landowner explained “that he had been grinding branches and trunks from storm–damaged trees on his property and was using the wood chips to stabilize his nursery stock.”³¹³ He contended that “[h]e was not manufacturing mulch.”³¹⁴ The building inspector agreed that the landowner was not manufacturing mulch, and that manufacturing mulch was a totally different and much more complex process.³¹⁵ The building inspector noted that no complaints had been received about the operation of the property, and “everything seemed to be in order.”³¹⁶ The building inspector asserted that the wood grinding was not a violation of his conditional use permit and that the landowner had been “very cooperative in the past to take care of any problems that might arise as a result of the business.”³¹⁷ The Board, with the exception of the member who questioned the wood grinding operation, voted to approve the one–year review.³¹⁸

It appears that the Board acted appropriately and within the limits of the law in approving two of the three conditional use permit reviews.³¹⁹ Technically, the Board should not have approved the conditional use permit reviews in the nursery case, because the landowner did not satisfy one of the eight conditions imposed in that case. Specifically, the landowner did not satisfy condition five, which provided that

[t]he existing southerly access to be used for the plant nursery shall be improved in accordance with a permit issued by the

(on file with author) (discussing Robert H. Vanlandingham, C–2006–120). Apparently the two scheduled reviews were required because the landowner had a history of noncompliance. *See id.* at 4 (noting that the president of the neighborhood association states that she was present at twelve–month review, because appellant had a history of noncompliance).

³¹¹ *See id.* at 4.

³¹² *Id.* at 3.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 4.

³¹⁸ *Id.*

³¹⁹ *See* Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 4 (Oct. 31, 2008) (on file with author) (discussing Hardwood Holdings, C–2005–138) (noting that the building inspection reports stated that no complaints have been received since issuance of the Certificate of Occupancy and that licenses were intact and in good standing); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 6 (July 25, 2008) (on file with author) (discussing Peter Taylor, C–2006–4) (noting that the building inspector reported that the riding arena is a great facility and that the landowner has been very cooperative with the building inspection).

Kentucky Transportation Cabinet. This permit shall be obtained, and all required improvements completed, prior to establishing the plant nursery. At a minimum, this access shall be paved from Liberty Road for a distance of 50' back from the right-of-way.³²⁰

As a practical matter, however, I believe that the Board acted reasonably despite the fact that this condition was not satisfied. At the six month review, the attorney distributed a letter from the Lexington–Fayette Urban County Government stating that “the city [was] installing a sewer in front of [the landowner]’s property, and within [50’] of Liberty Road.”³²¹ The attorney stated that the landowner had not yet paved the driveway as required by condition five, because the landowner was waiting for the sewer improvements to be completed before paving.³²² When approving the six month review, the Board added the following language to condition five: “Pavement shall be completed within six months, prior to the one-year review.”³²³

At the twelve-month review, the attorney reported that “[t]he sewers were now in, and final grading work was being done” but that the drive had not yet been paved.³²⁴ The attorney said that the landowner “had obtained two estimates for paving, but the work [had] not [been] done due to the weather.”³²⁵ The attorney asked that the building inspector verify that the work had been completed and bring it back to the Board for review if not done properly.³²⁶ Without further discussion of the paving issue, the Board voted to approve the one-year review “based on the finding that [the landowner] appeared to be in compliance with the conditions that were imposed and the fact that there [had] been no disturbance to surrounding property owners.”³²⁷

Although technically the landowner did not satisfy condition five at the twelve-month review, it does not seem unreasonable for the Board to have approved the permit and rely on the building inspector to bring any problems with the paving to the Board’s attention at a later date. It would have been unnecessarily harsh for the Board to revoke the permit because the drive had not yet been paved when paving appeared imminent. And it would have been inefficient to have scheduled another hearing simply

³²⁰ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 4 (Sept. 28, 2007) (on file with author) (discussing condition five with respect to Robert Vanlandingham, C–2006–120).

³²¹ *Id.* at 4–5.

³²² *See id.* at 5.

³²³ *Id.*

³²⁴ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 3 (Mar. 28, 2008) (on file with author) (discussing Robert H. Vanlandingham, C–2006–120).

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.* at 3–4.

so that the building inspector could report that the drive had been paved as required. It was more efficient to approve the conditional use permit at the hearing and leave it to the building inspector to schedule a revocation hearing if the drive turned out not to be properly paved.

In sum, the Board deferred to the building inspector's recommendation in the three cases in which it reviewed conditional use permits that had already been granted. The Board acted appropriately and within the bounds of the law in two of the three cases. Technically, it should not have approved the third case, but its decision to approve the case was not unreasonable under the circumstances. It is worth noting that although the Board followed the building inspector's recommendation in all of the conditional use permit review cases, members of the Board did question the building inspector's actions and recommendations in a couple of the cases.

C. Appeals from the Zoning Administrator

Since the Dukeminier–Stapleton study, Kentucky law has authorized the Board to hear appeals from the building inspector's interpretation of the zoning ordinance.³²⁸ Dukeminier and Stapleton divided these cases into three separate categories: (1) home occupations, (2) nonconforming uses and (3) miscellaneous.³²⁹

Dukeminier and Stapleton included home occupations in this section of their paper, because, at the time of their study, the Lexington Zoning Ordinance had a separate section authorizing incidental home occupations.³³⁰ Today, home occupations are listed as accessory or conditional uses in the LFUC Zoning Ordinance.³³¹ Thus, the home occupation cases are included

328 At the time of the Dukeminier–Stapleton study, section 100.450 of the Kentucky Revised Statutes provided that “appeals to said board [of adjustment] may be taken by any property owner or tenant, or any city officer, department, board or bureau, affected by any ruling of any administrative officer in the enforcement of KRS 100.320 to 100.490 or any ordinance, regulations or rules enacted pursuant thereto.” KY. REV. STAT. § 100.450 (1953) (repealed 1966). Section 100.257 of the Kentucky Revised Statutes now provides:

The board of adjustment shall have the power to hear and decide cases where it is alleged by an applicant that there is error in any order, requirement, decision, grant, or refusal made by an administrative official in the enforcement of the zoning regulation. Such appeal shall be taken within thirty (30) days.

KY. REV. STAT. ANN. § 100.257 (West 2006).

329 *Study, supra* note 2, at 310–11.

330 *See id.* at 311 (quoting LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 8–24).

331 *See, e.g.*, LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 8–1(c)(3), 8–2(c)(3), 8–3(c)(3), 8–5(d)(3) (2007).

in the discussion of conditional uses in the preceding section rather than in this section.³³²

The sixteen separate appeals from building inspection's interpretation of the zoning ordinance that the Board considered between July 2007 and January 2009 are most logically separated into the following three categories: (1) nonconforming uses and structures, (2) signs, and (3) miscellaneous.³³³ This section will begin by discussing the nonconforming use cases. It will then turn to the sign cases. Finally, it will address the remaining, miscellaneous cases.

1. Nonconforming Uses and Structures.—The Kentucky Revised Statutes define a “[n]onconforming use or structure” as “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

³³² See *supra* Part II.B.3.

³³³ Seven of the cases were postponed or continued at least one time. In only two of these seven cases, did the applicant receive the relief it requested. In one case, Athens Schoolhouse Partners, LLC, A–2008–6, the staff initially recommended that the Board disapprove. Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2 (Jan. 25, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6). The applicant postponed the case for a month, and convinced the staff to change its interpretation of the law and recommend approval. *Id.*; see Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 14–15 (Feb. 29, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6). When the case was heard the following month, the Board voted 4–2 to approve the application. Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 23 (Feb. 29, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6). In the second case, Emergency Disaster Services, the applicant postponed the case for two consecutive months. Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 1 (Nov. 21, 2008) (on file with author) (discussing Emergency Disaster Servs., A–2008–111); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 3 (Dec. 12, 2008) (on file with author) (discussing Emergency Disaster Servs., A–2008–101). Then, in January 2009, the applicant withdrew the request because building inspection no longer objected to the applicant's use of the property. Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2 (Jan. 30, 2009) (on file with author) (discussing Emergency Disaster Servs., A–2008–101). The remaining five cases were indefinitely postponed, withdrawn, or ultimately disapproved by the Board. Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 18 (Mar. 28, 2008) (on file with author) (discussing Triumph Signs, A–2008–18); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 23 (Jan. 25, 2008) (on file with author) (discussing Clayton Signs, Inc., A–2007–73); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 3 (Oct. 26, 2007) (on file with author) (discussing Castleton Lyons, Inc., AV–2007–84); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 23 (Jan. 25, 2008) (on file with author) (discussing Clayton Signs, Inc., A–2007–73); see Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment, Minutes for the Board of Adjustment Meeting 16 (July 27, 2007) (on file with author) (discussing Darnell Watkins, A–2007–57); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2 (July 27, 2007) (on file with author) (discussing The Lamar Cos., A–2007–59); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 18 (Mar. 28, 2008) (on file with author) (discussing Triumph Signs, A–2008–18); see Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 16 (July 27, 2007) (on file with author) (discussing Darnell Watkins, A–2007–57).

conform to all of the regulations contained in the zoning regulation which pertain to the zone in which it is located[.]”³³⁴

(a) *Law Governing Nonconforming Uses and Structures*

In some ways, the Kentucky law governing nonconforming uses and structures has remained unchanged since the Dukeminier–Stapleton study. Specifically, since the Dukeminier–Stapleton study, Kentucky law has permitted nonconforming uses and structures to continue³³⁵ and has permitted nonconforming uses or structures to be changed to another nonconforming use, so long as the new nonconforming use is in the same or more restrictive classification.³³⁶

On the other hand, the Kentucky enabling legislation and Lexington zoning ordinances with respect to nonconforming uses have changed in several significant ways since the Dukeminier–Stapleton study. First, at the time of Dukeminier–Stapleton study, the Lexington zoning ordinance required that “‘any nonconforming use of land not involving any structure’ and ‘any nonconforming sign, billboard and other similar structure valued at \$750.00 or less’ within the city must cease or be removed within two years after the enactment of the ordinance.”³³⁷ Dukeminier and Stapleton pronounced these two provisions “undoubtedly void” as contrary to the enabling legislation.³³⁸ The LFUC Zoning Ordinance no longer requires

334 KY. REV. STAT. ANN. § 100.111(13) (West 2006). Although the Kentucky enabling legislation at the time of the Dukeminier–Stapleton study did not have a separate provision defining nonconforming uses and structures, the current statutory definition is consistent with the use of this term at the time of the Dukeminier–Stapleton study. Compare *id.*, with *Study*, *supra* note 2, at 314–15, and KY. REV. STAT. ANN. § 100.355 (1953) (repealed 1966).

335 Section 100.253 of the Kentucky Revised Statutes currently provides that “[t]he lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it, may be continued, although such use does not conform to the provisions of such regulations, except as otherwise provided herein.” KY. REV. STAT. ANN. § 100.253(1) (West 2006). At the time of the Dukeminier–Stapleton study, section 100.355 provided:

- (1) The lawful use of land for trade, industry or residence, in cities of the second class and in counties containing such a city, existing at the time of the adoption of any zoning regulation or restriction, or at the time of the adjustment or revision thereof, or amendment thereto, although such use does not conform to the provisions of such new regulations or restrictions, may be continued.
- (2) The use of a building or structure existing at the time of the adoption of any zoning regulation or restriction, or at the time of any adjustment or revision thereof or amendment thereto, although such use does not conform to the provisions of such new regulations or restrictions, may be continued

§ 100.355.

336 At the time of the Dukeminier–Stapleton study, section 100.355(2) provided that “a nonconforming use of the building or structure may be changed to another nonconforming use of the same or more restricted classification.” *Id.* § 100.355(2).

337 *Study*, *supra* note 2, at 315 (quoting § 100.355).

338 *Id.*

such nonconforming uses or structures to cease. Instead, the LFUC Zoning Ordinance now permits all nonconforming uses and structures to continue so long as they otherwise remain lawful.³³⁹

Second, at the time of the Dukeminier–Stapleton study, the Lexington zoning ordinance prohibited the reconstruction of nonconforming buildings when more than sixty-five percent of the fair market value of the building had been destroyed or damaged by fire, flood, or act of God,³⁴⁰ and prohibited the extension of a building containing a nonconforming use.³⁴¹ Dukeminier and Stapleton contended that these two prohibitions were inconsistent with a Kentucky Court of Appeals decision in which the court held that a “land owner could demolish [an] existing structure and construct a new, larger building for carrying on his business.”³⁴² The LFUC Zoning Ordinance no longer prohibits the reconstruction of buildings that have been destroyed or damaged. It does, however, limit the reconstructed building to the size of the building before the destruction or damage.³⁴³ Although the latter part of this zoning provision may be inconsistent with the case cited by Dukeminier and Stapleton, the current zoning enabling legislation expressly prohibits “the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted”³⁴⁴ Thus, this provision in the current zoning ordinance clearly appears valid.

Third, at the time of the Dukeminier–Stapleton study, the Lexington zoning ordinance authorized the “use of a nonconforming building or structure to ‘be changed to a use permitted in the most restricted district in which such nonconforming use is permitted.’”³⁴⁵ The Lexington–Fayette Urban County Zoning Ordinance now provides that “[a]ny non-conforming use may be changed to another non-conforming use . . . provided the proposed use is in the same or a more restrictive classification than the previous use.”³⁴⁶ This provision governing changes in use under the LFUC Zoning Ordinance will be discussed in more detail below.

Fourth, the enabling legislation now has an interesting exception to the general rule that the board of adjustment may not “permit a change from

339 LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 4–3 to –4 (2007).

340 *Study, supra* note 2, at 315 (citing LEXINGTON, KY., ZONING ORDINANCE § 5.223 (1962)).

341 *Id.* at 316 (citing LEXINGTON, KY., ZONING ORDINANCE § 5.225 (1962)).

342 *Id.*

343 LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 4–3(f), –4(b) (2007).

344 KY. REV. STAT. ANN. § 100.253(2) (West 2006).

345 *Study, supra* note 2, at 315 (quoting LEXINGTON, KY., ZONING ORDINANCE § 5.221).

346 LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 4–3(e) (2007).

one (1) nonconforming use to another unless the new nonconforming use is in the same or a more restrictive classification . . . ”³⁴⁷

Specifically, section 100.253(2) of the Kentucky Revised Statutes provides that:

[T]he board of adjustment may grant approval, effective to maintain nonconforming–use status, for enlargements or extensions, made or to be made, of the facilities of a 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 a public tradition, contributing substantially to the economy of the community and state, of which prestige and status the site is an essential element, and where the enlargement or extension was or is designed to maintain the prestige and status by meeting the increasing demands of participants and patrons.³⁴⁸

This provision was added in 1978³⁴⁹ to permit the expansion of Churchill Downs, a nonconforming racetrack located in a residential zone.³⁵⁰ Although the Kentucky Constitution prohibits “special legislation” “where a general law can be made applicable,”³⁵¹ the exception does not appear to run afoul of that Constitutional prohibition because the exception expressly applies not just to Churchill Downs, but to any use that is “a major public attraction, . . . 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 a public tradition.”³⁵²

Finally, the enabling legislation now permits an illegal use to become a legal nonconforming use if (1) the use has been in continuous existence for ten years and (2) the use “has not been the subject of any adverse order or other adverse action by [building inspection] during said period.”³⁵³ This

347 § 100.253(2).

348 *Id.* § 100.253(2).

349 Act of March 30, 1978, ch. 327, sec. 3(2), § 100.253, 1978 Ky. Acts 931, 932.

350 Mike Brown, *Senate Approves Bill on Churchill Downs Zoning*, COURIER-J. (Louisville), Mar. 9, 1978, at B9.

351 KY. CONST. § 59, cl. 29.

352 § 100.253(2). *But c.f.*, *Schoo v. Rose*, 270 S.W.2d 940 (Ky. 1954) (holding that the statute in issue was too specific to satisfy the Kentucky Constitution). The Kentucky Court of Appeals declared in this seminal case that to satisfy Section 59, “(1) [the legislation] must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification.” *Schoo*, 270 S.W.2d at 941.

353 § 100.253(3). In 1986, the Kentucky legislature amended Chapter 100 to permit an illegal use to become a nonconforming use. Act of March 25, 1986, ch. 141, sec. 28(3), § 100.253,

provision, however, does not apply in all jurisdictions in Kentucky, including Lexington–Fayette County, because it has an urban county government.³⁵⁴ At the time of the Dukeminier–Stapleton study, the Kentucky enabling legislation did not expressly authorize long-standing illegal uses in any jurisdictions to be converted into nonconforming uses.

(b) Board's Nonconforming Use and Structure Decisions

The Board considered four separate nonconforming use cases in the Dukeminier–Stapleton study.³⁵⁵ Dukeminier and Stapleton found that in all four cases the Board followed the applicable law as it should have.³⁵⁶

Five different nonconforming use cases appeared on the Board's agenda between July 2007 and December 2008. In the first case, the appellant sought to expand a nonconforming structure.³⁵⁷ The staff recommended disapproval because the LFUC zoning ordinance prohibits the expansion of nonconforming uses.³⁵⁸ The appellant did not appear at the hearing so the Board voted to postpone the case.³⁵⁹ The appellant later withdrew his application.

In the second case,³⁶⁰ the appellant sought to change from one nonconforming use to another. For many years, the property, located in a two family residential/historic district overlay zone, had been used as a wholesale tobacco and candy facility distribution facility. In 2006, the Board approved a change in nonconforming use to permit the building to be converted to three residential units with a real estate office and a showroom. The appellant then decided to eliminate the retail/office space and filed an appeal asking for permission to convert the property into five loft-style

1986 Ky. Acts 343, 354.

354 See § 100.253(4) (excluding application of Ky. REV. STAT. ANN. § 100.253(2) “to counties containing a city of the first class, a city of the second class, a consolidated local government, or an urban–county government.”).

355 *Study*, *supra* note 2, at 316–17.

356 In two of the cases, Dukeminier and Stapleton contended that the zoning regulations' limitations on alterations and enlargements were inconsistent with the Kentucky Court of Appeals' decision in *Butler v. Louisville & Jefferson Cnty. Bd. of Zoning Adjustment & Appeals*, 224 S.W.2d 658 (Ky. 1949). See *Study*, *supra* note 2, at 316. Nevertheless, Dukeminier and Stapleton approved the Board's decision to follow the zoning ordinance as written because “[t]he Board has no power to consider whether the ordinance is valid.” *Id.* at 317. In the other two cases, Dukeminier and Stapleton believed that the Board followed the proper legal principle and substantial evidence, respectively, to arrive at the correct decision. *Id.*

357 Agenda, Lexington–Fayette Urban Cnty. Bd. of Adjustment (July 27, 2007) (on file with author) (discussing Darnell Watkins, A–2007–57).

358 See LEXINGTON–FAYETTE URBAN COUNTY, Ky., ZONING ORDINANCE art. 4–3, –4 (2007).

359 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (July 27, 2007) (on file with author) (discussing Darnell Watkins, A–2007–57).

360 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Sept. 28, 2007) (on file with author) (discussing WML Props., LLC and Kerry T. Cauthen, AV–2007–85).

dwelling units, with no office or showroom. The staff recommended that the appeal be approved because “the additional residential units that are proposed are first permitted in a more restrictive zoning classification (a residential zone) than an office/retail use (first permitted in a P-1 and B-1 zone)”³⁶¹ and thus satisfies the principal requirement for a change in nonconforming use under the LFUC zoning ordinance that “the proposed use [be] in the same or a more restrictive classification than the previous use.”³⁶² After a brief discussion, the Board voted unanimously to approve the change in nonconforming use. This decision appears to be consistent with the enabling legislation and zoning ordinance.

The third case was undoubtedly the most legally interesting and technically difficult case the Board heard between July 2007 and December 2008. In that case,³⁶³ the appellant owned two lots totaling just under eleven acres. One lot, about ten acres in size, had been zoned agricultural rural since 1969. The other lot, about one acre, was in a single family residential zone. A 30,000 square foot building that had been used since the 1930s as a public school was located in the agricultural rural zone. A parking lot was located partially in the agricultural rural zone and partially in the single family residential zone. The appellants sought permission to change the use to antique sales with an accessory restaurant.

The case first appeared on the Board’s agenda in January 2008. The staff recommended that the Board disapprove the request. At the hearing, the appellant requested a one-month postponement, which was granted. The appellant’s attorney met with the staff to discuss the case before the February hearing, and the staff changed its recommendation to approval. After a lengthy hearing, the Board voted 4–2 to approve the request.

The first question the case raised was whether the prior use as a school was a nonconforming use. The appellant argued that the school was a nonconforming use because it did not meet the lot and structure size requirements contained in the zoning ordinance. The zoning ordinance imposed a 10,000 square foot limit on all structures used for certain conditional uses, including schools for academic instruction, established

361 See Staff Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Sept. 28, 2007) (on file with author) (discussing WML Props., LLC and Kerry T. Cauthen, AV–2007–85).

362 LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 4–3(e) (2007). The appellant proposed 121 square-foot window projections in two of the lofts. Ordinarily, such projections would be impermissible because they would cause an increase in the size of the nonconforming building. The appellant, however, planned to demolish a nonconforming garage and thus decrease the overall size of the nonconformity and thus the application did not violate the requirement that building not be enlarged. See Staff Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Sept. 28, 2007) (on file with author) (discussing WML Props., LLC and Kerry T. Cauthen, AV–2007–85).

363 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Feb. 29, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6).

in the agricultural rural zone after January 26, 1995.³⁶⁴ Because the school building was 30,000 square feet, it clearly exceeded the maximum size currently permitted for schools for academic instruction in the agricultural rural zone. In addition, the agricultural rural zone imposed a minimum lot size of forty acres.³⁶⁵ The agricultural rural portion of the appellant's land was significantly less than the required minimum of forty acres.

In arguing that the school constituted a nonconforming use, the appellant focused on the language in KRS 100.111(13) defining a "nonconforming use or structure." Specifically, it defines a nonconforming use or structure as:

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.³⁶⁶

The appellant also noted that the LFUC zoning ordinance provided that "[i]ncluded in this definition [of nonconforming uses] are uses that would otherwise be permitted in the zone by this Zoning Ordinance, but do not meet the requirements associated with such uses, e.g., parking, open space, and the like."³⁶⁷

On its face, the language supports appellant's argument that the school was a nonconforming use because the structure and lot do not comply with the structure and lot size requirements of the applicable zoning district. In *Grannis v. Schroeder*,³⁶⁸ however, the Kentucky Court of Appeals distinguished nonconforming uses from nonconforming structures. In that case, a landowner sought a conditional use permit for a home occupation on property zoned for agricultural use.³⁶⁹ The landowner sought to use a barn for a base of operation to store equipment such as a dump truck, backhoe, trailer, and construction trailer.³⁷⁰ In addition, the landowner proposed to put a concrete floor in the barn and a water hydrant outside.³⁷¹

Neighbors objected to the landowner's request. They contended that because the barn did not comply with a seventy-five foot setback applicable

³⁶⁴ See LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 8-1(d)(20) (2008).

³⁶⁵ *Id.* art. 8-1(f).

³⁶⁶ KY. REV. STAT. ANN. § 100.111(13) (West 2006).

³⁶⁷ Applicant's Exhibits at tab 7, Athens Schoolhouse Partners, LLC, A-2008-6 (Lexington-Fayette Urban Cnty. Bd. of Adjustment Feb. 29, 2008) (quoting LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 4-1(a)).

³⁶⁸ *Grannis v. Schroeder*, 978 S.W.2d 328 (Ky. Ct. App. 1997).

³⁶⁹ *Id.* at 329.

³⁷⁰ *Id.*

³⁷¹ *Id.*

to the proposed conditional use, granting the landowner's request would constitute an impermissible expansion or enlargement of a nonconforming use. The court explained that the home occupation was a conditional use, not a nonconforming use.³⁷² The barn, in contrast, was a nonconforming structure.³⁷³ The court noted that there were limitations on the expansion of nonconforming structures but found that the landowner's proposed modifications to the barn were sufficiently modest so as not to constitute an impermissible expansion of the nonconforming structure.³⁷⁴

The LFUC zoning ordinance clearly differentiates among nonconforming uses, nonconforming structures, and nonconforming lots. Nonconforming uses are defined as:

Uses of land or structures that were lawful prior to the adoption or amendment of this Zoning Ordinance but would be prohibited, regulated or restricted under this Zoning Ordinance in the zone in which they are located. Included in this definition are uses that would be otherwise permitted in the zone by this Zoning Ordinance, but do not meet the requirements associated with such uses, e.g., parking, open space, and the like.³⁷⁵

Nonconforming structures, in contrast, are defined as “[s]tructures that were lawful prior to adoption or amendment of this Zoning Ordinance but do not conform with the yard, coverage, height or other structural restrictions of this Zoning Ordinance for the zone in which the structure is located.”³⁷⁶ Finally, the ordinance defines nonconforming lots as, “[l]ots of record at the time of the adoption or amendment of this Zoning Ordinance that do not meet the minimum lot square footage and/or frontage requirements prescribed for the zone in which the lot is located.”³⁷⁷

Article 4–3(e) of the LFUC zoning ordinance permits a nonconforming use to be changed to another nonconforming use provided the proposed use is in the same or more restrictive classification than the previous use.³⁷⁸ This provision, however, only applies to nonconforming uses.³⁷⁹ It does not apply to nonconforming structures or lots.³⁸⁰ Thus, I believe that the Board erred in approving the appellant's request that the school, a conditional use,

³⁷² *Id.* at 331.

³⁷³ *Id.*

³⁷⁴ *Id.* at 332.

³⁷⁵ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 4–1(a) (2008).

³⁷⁶ *Id.* art. 4–1(b).

³⁷⁷ *Id.* art. 4–1(c).

³⁷⁸ *Id.* art. 4–3

³⁷⁹ Article 4–3 of the ordinance is titled “Regulation of Non-Conforming Uses.” *Id.*

³⁸⁰ Non-conforming structures are regulated by Article 4–4 while non-conforming lots are regulated by Article 4–5 of the zoning ordinance. Neither Article 4–4 nor Article 4–5 authorizes a change from one use to another use. *See id.* art. 4–4, 4–5.

be changed to a nonconforming use, antique sales with accessory restaurant. The nonconforming lot and structure did not make the conditional use a nonconforming use and thus the zoning ordinance did not authorize a change to a nonconforming use.

The Board, however, should not be faulted for failing to distinguish among nonconforming uses, nonconforming structures, and nonconforming lots. The staff never raised this issue, and neither the staff nor the appellant's attorney brought *Grannis* or the LFUC zoning ordinance's regulation of nonconforming structures and lots to the Board's attention. Arguably, the appellant's attorney should be faulted for failing to bring this contrary law to the Board's attention.³⁸¹ Indeed, had the case been argued on or after July 15, 2009,³⁸² Section 3.3(a)(2) of the Kentucky Rules of Professional Responsibility arguably would have required the lawyer to have disclosed this contrary authority.³⁸³

Although the staff did not raise the issue of whether the property involved a nonconforming structure and nonconforming lot but not a nonconforming use, the staff did raise a separate issue of whether the school was an exempt use, not a nonconforming use. Section 100.361(2) of the Kentucky Revised Statutes provides that any proposal affecting land use by any instrumentality of state government does not require approval of the local planning unit. The governmental entity must provide the planning commission with adequate information about the proposal, but the proposal need not be approved by the planning commission or board of adjustment.³⁸⁴ Thus, public schools, as instrumentalities of

³⁸¹ The attorney spent about an hour presenting the case to the Board. Most of the attorney's argument was very technical and focused on whether the proposed use for antique sales with an accessory restaurant was in the same or a more restrictive classification than the school use.

As a Board member, at the hearing, I stated that the case involved a conditional use. The attorney responded by turning to tab 7 of his Exhibits, which quoted the definitions of nonconforming uses under KRS 100.111(13) and Article 4-1(a) of the LFUC zoning ordinance, and argued that the school use was a nonconforming use under the statutory and regulatory definitions of the term nonconforming use. Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment, (Feb. 29, 2008) (on file with author). The attorney did not mention or refer to *Grannis v. Schroder* or Articles 4-1(b), 4-1(c), 4-4, and 4-5 of the LFUC zoning ordinance, which define and regulate nonconforming lots and structures. Moreover, his supplement of exhibits, which was almost 100 pages long, did not include *Grannis* or Articles 4-1(b), 4-1(c), 4-4, and 4-5 of the LFUC zoning ordinance. I had not done independent legal research on this issue before the meeting and did not raise *Grannis* or Articles 4-1(b), 4-1(c), 4-4, and 4-5 of the LFUC zoning ordinance at the hearing.

³⁸² See Ky. SUP. CT. R. 3.130(3.3)(a)(2).

³⁸³ Section 3.3(a)(2) of the Kentucky Rules of the Supreme Court provides that "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . ." Ky. SUP. CT. R. 3.130(3.3)(a)(2). For the definition of "tribunal," see Ky. SUP. CT. R. 3.130(1.0)(m).

³⁸⁴ See *Hopkinsville-Christian Cnty. Planning Comm'n v. Christian Cnty. Bd. of Educ.*,

state government, are exempt from local zoning regulations.³⁸⁵ The staff declared:

[I]t is very doubtful that the intent of either KRS 100 or the Zoning Ordinance is to include exempt uses under the umbrella of how nonconforming uses should be regulated. Obviously, if a particular use is exempt, there is no intent for that use to have to comply with all of the restrictions that would apply to a use that is not exempt.³⁸⁶

No Kentucky case has addressed the question of whether changes in exempt governmental uses should be regulated as nonconforming uses. The appellant cited two non-Kentucky cases in support of its claim that prior exempt governmental uses should be treated as nonconforming uses. The first case, *Town of Coventry v. Glickman*,³⁸⁷ involved a change in use from United States military housing to private housing. The second case, *Tausch v. Parker*,³⁸⁸ involved a change in use from a United States post office to a retail store. Despite the appellant's claim to the contrary, neither case involved a change from an exempt governmental use to a private nonconforming use. Rather, both cases involved a change from a federal governmental nonconforming use to a private nonconforming use.

KRS 100.316 exempts state governmental entities from local zoning regulations.³⁸⁹ The exemption does not extend to federal agencies.³⁹⁰ In *Town of Coventry v. Glickman*, the court noted that federal governmental instrumentalities are exempt from local zoning regulations that are contrary to federal law.³⁹¹ There was no suggestion, however, that the zoning ordinance in that case was contrary to federal law. Instead, both parties agreed that the federal government had a legal nonconforming use.³⁹² The principal question was whether the federal government had abandoned its nonconforming use. In *Tausch v. Parker*, governmental exemptions

903 S.W.2d 531, 532–33 (Ky. Ct. App. 1995).

385 See Op. Ky. Att'y. Gen. 69–ORD–659 (1969) (opining that school facilities, being state property, are exempt from local planning and zoning regulations under the terms of KRS 100.361); see also Op. Ky. Att'y. Gen. 75–ORD–108 (1975) (citing KRS 100.361(2) in support of opinion that public “school property is not subject to regulation by a zoning board”); Op. Ky. Att'y. Gen. 73–ORD–209 (1973) (noting that Attorney General's office has taken position that “school facilities, being state property, are exempt from local planning and zoning regulations under the terms of KRS 100.361”).

386 Revised Staff Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment (2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6).

387 *Town of Coventry v. Glickman*, 429 A.2d 440 (R.I. 1981).

388 *Tausch v. Parker*, 217 N.Y.S.2d 953 (N.Y. Sup. Ct. 1961).

389 KY. REV. STAT. ANN. § 100.316 (West 2006).

390 See Op. Ky. Att'y. Gen. 73–ORD–315 (1973).

391 *Town of Coventry*, 429 A.2d at 442.

392 *Id.*

were never even mentioned. There was no question but that the federal government had a nonconforming use.³⁹³ The issue was whether the proposed change from a post office to a retail store was to the same or a higher classification.³⁹⁴

As the staff noted, treating an exempt governmental use as a nonconforming use seems to be contrary to the intent of chapter 100 and the zoning regulations.³⁹⁵ First, if the state governmental instrumentality sought to change from school use to any other use, the change in use would not be regulated as a nonconforming use.³⁹⁶ Rather, the new use would also be exempt from the zoning regulations.³⁹⁷ The question of whether an exempt state use qualifies as a nonconforming use arises only when the state government sells the property and the property ceases to be exempt from the zoning regulations. The exempt status of state governmental property arises from the state government's sovereignty.³⁹⁸ Nonconforming use status, in contrast, is designed to protect private property from being taken by the government.³⁹⁹ State property, by definition, is not private property, and thus does not give rise to takings concerns.

Second, the limitations on changes in nonconforming uses are designed to promote the elimination of nonconforming uses.⁴⁰⁰ According to the Kentucky Court of Appeals, “[a]s a matter of policy and consistent with the spirit of zoning laws, nonconforming uses are to be gradually eliminated and are to be held strictly within their boundaries.”⁴⁰¹ Indeed, the LFUC zoning ordinance expressly provides that:

It is the intent of this Zoning Ordinance to permit the non-conformities established in Article 4-1 to continue until they are

393 *Tausch*, 217 N.Y.S.2d at 954.

394 *Id.*

395 *Cf.* *Beshear v. Haydon Bridge Co.*, 304 S.W.3d 682, 703 (Ky. 2010) (“[T]he cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.”) (quoting *Travelers Indem. Co. v. Reker*, 100 S.W.3d 756, 763 (Ky. 2003)).

396 *Cf.* *Grannis v. Schroder*, 978 S.W.2d 328, 330 (Ky. Ct. App. 1997) (“[B]y exempting agricultural land from application of the zoning ordinance, the provisions of KRS 100.203, which deals with changes in nonconforming uses, do not apply.”).

397 Adequate information regarding the change would have to be submitted to the planning commission, but approval by the planning commission would not be required. *See* Ky. REV. STAT. ANN. § 100.361(2) (West 2006).

398 *Id.* (“Nothing in this chapter shall impair the sovereignty of the Commonwealth of Kentucky over its political subdivisions.”).

399 *See* *Dempsey v. Newport Bd. of Adjustments*, 941 S.W.2d 483, 485 (Ky. Ct. App. 1997) (noting that nonconforming use status gives the landowner legitimate, vested property rights that enjoy broad constitutional protection).

400 *See* *Louisville Metro Bd. of Zoning Adjustment v. A-1 Sanitation*, No. 2007-CA-000484-MR, 2008 WL 399642, at *3 (Ky. Ct. App. 2008) (“KRS 100.253(2) . . . reflects an intent to gradually eliminate any nonconforming uses of property.”).

401 *Legrand v. Ewbank*, 284 S.W.3d 142, 145 (Ky. Ct. App. 2008); *see also* *Holloway Ready*

removed, but not to encourage their survival. It is also intended that non-conformities shall not be enlarged or extended beyond the scope and area of their operation at the time of the adoption or amendment of this Ordinance, nor to be used as grounds for adding additional structures or uses not permitted in the same zone.⁴⁰²

Based on the intent and spirit of chapter 100 and the LFUC zoning ordinance, I believe that the Board erred in treating the exempt use as a nonconforming use. Nevertheless, the Board probably should not be faulted for taking this position. In its February 2008 report, the staff declared that *Glickman* and *Tausch* “confirm that in some instances it is legitimate to approach a proposed change from an exempt use to another use that is subject to regulation as a change in a nonconforming use.”⁴⁰³ Although I do not agree with the appellant’s use of these cases, it does not seem unreasonable for the Board to rely on its professional staff to decide the technical question of whether a change in an exempt governmental use should be regulated as a change in nonconforming use.

The third issue raised by the case was whether the proposed antique sales with accessory restaurant use was in the same or a more restrictive classification than the school use. Section 100.253 of the Kentucky Revised Statutes prohibits the Board from permitting a change from one nonconforming use to another nonconforming use “unless the new nonconforming use is in the same or a more restrictive classification.”⁴⁰⁴ The LFUC zoning ordinance similarly requires that “the proposed use [be] in the same or a more restrictive classification than the previous use.”⁴⁰⁵

In its January 2008 staff report, the staff recommended that the board disapprove the request because it believed that the proposed change was not in the same or a more restrictive classification.⁴⁰⁶ The staff explained that “the ‘traditional’ comparison focuses on where the uses first appear in the Zoning Ordinance as an allowable use, the logic being that the progression

Mix Co. v. Monfort, 474 S.W.2d 80, 83–84 (Ky. 1968) (“This conclusion is consistent with the spirit and intent of zoning to eventually eliminate nonconforming uses.”).

402 LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 4–2 (2011).

403 Revised Staff Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Feb. 22, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6); see also Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Feb. 29, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6) (noting that staff member “said two relevant cases from other states were brought to the staff’s attention, which showed that prior exempt uses such as a school can be legitimately considered as nonconforming uses; and after reviewing those two cases, the staff was comfortable considering the prior exempt public school use as nonconforming”).

404 KY. REV. STAT. ANN. § 100.253(2) (West 2006).

405 LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 4–3(c) (2011).

406 Revised Staff Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment 3, 5 (2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6).

of zones in the Zoning Ordinance is generally from the most restrictive to the least restrictive.”⁴⁰⁷ Using this approach, the staff contended that the proposed use clearly was not in the same or a more restrictive classification because retail sales of antiques are prohibited in the agricultural rural zone while schools for academic instruction are listed as conditional uses in the agricultural rural zone.⁴⁰⁸

The appellant objected to comparing where the existing and proposed uses are first permitted in the zoning ordinance. The attorney contended that “[t]he order in which the various zones appear in the Zoning Ordinance is of little help in determining if one zone is more or less restrictive than the zone appearing immediately prior to or after it.”⁴⁰⁹ In support of this position, he cited a number of instances in which particular uses are first permitted in a later zone.⁴¹⁰ The lawyer argued that the staff’s “traditional” approach of looking at where a use first appears in the ordinance was contrary to the provisions of the statute and ordinance and that “the specific language of the statute and ordinance requirement would have to be changed” to permit the use of this “first appearing” approach.⁴¹¹

Instead, the appellant offered a number of arguments in support of the claim that the proposed antique sales use with accessory restaurant should be considered to be in the same or more restrictive classification than the school. First, he contended that the two uses should be treated as being in the same classification because “(i) schools for academic instruction,

⁴⁰⁷ *Id.* at 3.

⁴⁰⁸ *Id.*

⁴⁰⁹ Letter to Lexington–Fayette Urban Cnty. Bd. of Adjustment (Dec. 20, 2007) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6).

⁴¹⁰ The appellant’s attorney began with the following example:

[T]he following zones are listed in the following order in the Zoning Ordinance: P–1, B–1, B–2, B–2A, and B–2B. In addition, all of the zones in the Expansion Area follow most of the other business or industrial zones. While schools for academic instruction are permitted in the P–1, B–1 and the B–2B zones and the sale of antiques are permitted only in the B–1 and B–2B zones, the following uses are permitted in the P–1 zone, but not in the B–1 and B–2B zones: funeral parlor; hospitals, nursing homes and rest homes; business colleges, technical or trade schools or institutions; athletic club facilities; and assisted living facilities and rehabilitation homes. Therefore, to the extent that the P–1 zone permits uses not permitted in the B–1 or B–2B zones, the B–1 zone and the B–2B zone are more restrictive classifications than the P–1 zone even though the P–1 zone appears in the Zoning Ordinance before the B–1 and B–2B zones.

Id.

⁴¹¹ Revised Staff Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment 3 (Feb. 22, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6); *accord* Minutes, Lexington–Fayette Bd. of Adjustment 18 (Feb. 29, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6).

(ii) establishments for the retail sale of antiques or antique shops and (iii) restaurants are principal permitted uses in the B-1 and B-2B zones.”⁴¹²

Second, citing *Smith v. Howard*⁴¹³ and *Prewitt v. Johnson*,⁴¹⁴ he contended that determining whether a proposed use is in the same or more restrictive classification should not be determined by focusing on the zoning categories. Instead, the proposed use should be compared with the previous use to determine whether the proposed use is no more objectionable or obnoxious than the previous use. Specifically, the appellant argued, “[I]f the proposed new nonconforming use will have no more of an adverse effect on the adjacent property, then the test has been met, and the Board is clearly entitled to approve the change from one nonconforming use to another.”⁴¹⁵ The appellant argued that the proposed use was no more objectionable than the school use and thus the board should approve the change in nonconforming use.

In its amended report submitted to the Board before the February 2008 hearing, the staff abandoned its traditional approach of determining whether a use is in the same or more restrictive classification by looking at where the use first appears in the zoning ordinance and recommended that the Board approve the proposed change in use. The staff offered the following reasons in support of its recommendation:

a. Under 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. Such circumstances include:

- (1) the prior school use was exempt from the regulations of the Zoning Ordinance for many years, and was first established prior to the adoption of the First Zoning Ordinance in Fayette County.
- (2) the prior activity took place in what is now considered a historic building

412 Letter to Lexington–Fayette Urban Cnty. Bd. of Adjustment (Dec. 20, 2007) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6).

413 *Smith v. Howard*, 407 S.W.2d 139 (Ky. 1966). In *Smith*, in considering whether to permit a change from one form of light industry to another, the court declared that “[t]he phrase ‘more restricted classification’ within the meaning of the above statute is synonymous with ‘less objectionable’ or ‘less obnoxious.’” *Id.* at 142 (quoting KY. REV. STAT. ANN. § 100.069 (West 2006)).

414 *Prewitt v. Johnson*, 710 S.W.2d 238 (Ky. Ct. App. 1986). In that case, the court found that the operation of a retail used car business was in the same classification as a service station and garage, but did not explain what “same classification” means. *Id.*

415 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 19 (Feb. 29, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6).

that is recommended for preservation in Lexington–Fayette County’s 2007 Comprehensive Plan; and

- (3) items for display and sale at an antique gallery potentially have historic and cultural significance, often of a rural nature consistent with the agricultural zoning and rural setting of the subject property.

b. It is not anticipated that the proposed antique gallery will be any more “objectionable or obnoxious” than the prior use as a public school. Retail sales are planned to take place only on weekends (Friday, Saturday and Sunday), and only on one or two weekends (6 days) per month. The former use operated 20 days per month, except during early summer. The antique gallery will not be open after 6:00 PM, with the accessory restaurant (the former school cafeteria) to be open only at times that the gallery is open. Minimum off–street parking required by the Zoning Ordinance for the proposed use can be provided in the existing paved areas, which were sufficient for the former school’s needs. Traffic is expected to be intermittent during weekend sales events.

c. An antique gallery at this location should not adversely affect the existing or future development of the subject property or the surrounding area. The historic school building will be preserved and maintained, with no external changes to take place. No significant property improvements are needed to accommodate the proposed use, other than some possible renovations to the interior of the building. The nature of the activity proposed, which is not inherently noisy and does not involve offensive materials of any kind, should not result in any disturbances to surrounding farms, or to the residential and business uses found in the Athens Rural Settlement.⁴¹⁶

After a lengthy hearing, the Board voted 4–2 to approve the appellant’s request for the reasons recommended by the staff and subject to the conditions imposed by the staff. I was one of the two Board members to vote against the proposal.⁴¹⁷ I voted against the proposal because I believed that the proposed change was not in the same or a more restrictive classification.

⁴¹⁶ Revised Staff Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment 6–7 (Feb. 22, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6).

⁴¹⁷ Revised Staff Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment 23 (Feb. 22, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6).

It seemed clear to me that since schools were listed as a conditional use in the A–R zone, the zone at issue, and the proposed use was prohibited in that zone, the proposed use clearly was not in the same or a more restrictive classification.⁴¹⁸ Perhaps this is simply another way of saying, as I have argued above, that the existing school use was not a nonconforming use in the first place.⁴¹⁹

Since I voted against the proposal and a majority of the Board voted in favor of the proposal, I obviously think that the Board erred in approving the request. On the other hand, that does not mean that I think that the Board's decisions were unreasonable. Prior to moving that the Board approve the request, one Board member said:

[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 think these folks have put a lot of time, a lot of effort, a lot of money in this project. I think it's going to be preserved for perpetuity. 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.⁴²⁰

Although these comments might appear a bit troubling at first blush, I do not think they are unreasonable. The Board of Adjustment is a lay body. Most Board members are not lawyers and are not trained in the law. It does not seem unreasonable for Board members to rely on the staff to decide technical legal issues, like those raised in this case. Thus, while I think

⁴¹⁸ Not surprisingly, the appellant's attorney objected to this approach. He argued that "if the zone in which the property presently exists were relevant, then you could never change from one nonconforming use to another." *Id.* at 21. I disagree. I believe that the zone in which the property is presently located is always relevant. The existing use will only be listed in that zone if the nonconformity arises because the lot or structure is nonconforming, or the use does not meet the other requirements associated with such uses, such as parking, open space, and similar requirements. To the extent that the nonconforming use is a use that is not permitted in the present zone, then, and only then, is it appropriate to look outside the zone in which the property is presently located to determine which uses are in the same or a more restrictive classification.

⁴¹⁹ See *supra* text accompanying notes 364–80. As noted above, I did not do independent legal research before the hearing. After having done some research, I now believe, for the reasons discussed above, that I was wrong in conceding at the hearing that the school use was a nonconforming use.

⁴²⁰ Meeting Transcript, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Feb. 29, 2008) (on file with author) (discussing Athens Schoolhouse Partners, LLC, A–2008–6). Prior to voting against the appeal, another Board member declared, "I think your legal gymnastics to get us to this nonconforming use are questionable; and I have a lot of nervousness about this." *Id.*

the Board reached the wrong result, I do not think the Board should be criticized for its decision.

The fourth nonconforming use case involved an appeal from the building inspector's decision that allowing an American Legion Post to have Sunday liquor sales would constitute an impermissible expansion of a nonconforming use.⁴²¹ In that case, the building inspector characterized the American Legion post as a nonconforming use because it did not qualify as a "private club"⁴²² or any other specifically permitted use under the ordinance. The Post already had a license permitting liquor sales on Monday through Saturday and sought permission to extend sales to Sunday. The staff recommended that the appeal be approved and the building inspector's decision be overturned.⁴²³ In recommending that the appeal be approved, the staff noted that the Post's characterization as a nonconforming use was not due to the sale of liquor, that Sunday activities at the Post were already common and extending liquor sales to Sunday was not likely to result in a noticeable increase in patrons, and that no building or other physical expansions were necessary to accommodate the proposed use.⁴²⁴ The Board voted unanimously to approve the appeal for the reasons recommended by the staff.⁴²⁵ This decision appears to be consistent with the enabling legislation and zoning ordinance.

In the fifth and final nonconforming use case, the appellant sought permission to allow a fire-damaged cottage/accessory building to be rebuilt and used for rental purposes.⁴²⁶ While there was evidence that the building had been used for rental purposes as a dwelling unit for a lengthy period of time, perhaps as long as fifty years, there was no evidence that that use had ever been legal. Instead, there was evidence that the City had disapproved use of the building for rental purposes fifty years earlier, and that the Board of Adjustment had upheld that determination on November

⁴²¹ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Feb. 29, 2008) (on file with author) (discussing Am. Legion Post #8, A–2008–15).

⁴²² *See id.* at 8. The property at issue was located in an R–4 zone, and "private clubs" are listed as a conditional use on R–4 property. "Private club[s]" are defined as "Buildings and facilities, the purpose of which is to render a social, educational, or recreational service to members and their guests; and not primarily to render a service customarily carried on as a business or to render a profit. Private club shall include country club." LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 1–11 (2008). Building Inspection took the position that the American Legion Post did not qualify as a "private club" because the public could access the facility without accompanying a Legionnaire, and the Post could not provide a membership list, other than a national roster.

⁴²³ *See* Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 7 (Feb. 29, 2008) (on file with author) (discussing Am. Legion Post #8, A–2008–15).

⁴²⁴ *See id.* at 8.

⁴²⁵ *See id.*

⁴²⁶ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Mar. 28, 2008) (on file with author) (discussing Gary Taghizadeh, A–2008–25).

5, 1958.⁴²⁷ The Board voted unanimously to disapprove the appeal because the appellant failed to prove that the use had ever been legal and thus qualified as nonconforming use.⁴²⁸ This decision appears to be consistent with section 100.111(13) of the Kentucky Revised Statutes, which defines a “nonconforming use” as a use “which lawfully existed before the adoption or amendment of the zoning regulation.”⁴²⁹

(c) Role of Staff's Recommendations

The Board considered five separate nonconforming use appeals. The staff recommended that three of the appeals be approved and two of the appeals be disapproved. The Board followed the staff's recommendation in all four of the cases in which it rendered a final decision. (The appellant withdrew its appeal in one of the two cases in which the staff recommended disapproval.)

(d) Summary

I believe that the Board's decision was clearly consistent with the enabling legislation and zoning ordinance in three of the four cases. I believe that the Board reached the wrong result in one of the cases. I do not, however, believe that the Board should be faulted for its decision in that case. The case raised a number of very technically difficult legal questions, and it was not unreasonable for the Board to defer to the staff's recommendation under the circumstances.

2. *Signs.*—During the period between July 2007 and December 2008, seven separate administrative appeals regarding signs were filed. One of the cases, which also involved a variance request, was withdrawn.⁴³⁰ A second case was indefinitely postponed so that the applicant could pursue a text amendment to the zoning ordinance.⁴³¹ Thus, the Board decided five

⁴²⁷ See *id.*

⁴²⁸ See *id.* at 18, 20.

⁴²⁹ In some jurisdictions, the use would have been a legal nonconforming use because section 100.253(3) of the Kentucky Revised Statutes provides that an illegal use which has been in continuous use for ten years shall be deemed a nonconforming use if it has not been subject to an adverse order or other adverse action by the administrative official during that ten year period. This provision converting illegal uses to nonconforming uses, however, does not apply to urban-county governments. KY. REV. STAT. ANN § 100.253(4) (West 2006).

⁴³⁰ Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 3 (Oct. 26, 2007) (on file with author) (discussing Castleton Lyons, Inc., AV-2007-84).

⁴³¹ Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment (July 27, 2007) (on file with author) (discussing Lamar Cos., A-2007-59). In that case, the applicant sought an administrative review to determine that a digital/electronic advertising sign should be permitted in a planned shopping center zone when the zoning ordinance specifically disallows electronic

separate administrative appeals involving signs. The Board approved three of the appeals and disapproved the other two.

(a) Law Governing Signs

As discussed above,⁴³² the Kentucky Revised Statutes authorize cities and counties to regulate the size, width, height, bulk, and location of signs.⁴³³ The LFUC Zoning Ordinance, however, imposes very strict and detailed regulations regarding the number, size, height, type, and location of signs,⁴³⁴ and prohibits the Board from granting variances (1) to increase the number of permitted signs; (2) to permit any sign, design feature, information, copy, or design type that is not specifically permitted in the zone in which the sign is to be located; and (3) to increase the maximum total permitted sign area on a single lot or building.⁴³⁵

(b) Board's Administrative Sign Decisions

Although the zoning ordinance prohibits the Board from increasing the maximum total permitted sign area on a single lot or building, it does not prohibit the Board from permitting an applicant to combine the allowable square footage of more than one permitted sign into a single sign. Thus, in two of the three cases that the Board approved, it allowed the applicant to combine the square footage of two permitted signs into a larger single sign.⁴³⁶

The third case that the Board approved involved the interpretation of the term, “roof sign.” The zoning ordinance prohibits roof signs in all zones.⁴³⁷ It defines a “roof sign” as “[a] sign which projects above the cornice of a flat roof or above the top edge of any roof, including the ridge line of a gable or hipped roof. Such top edge shall not include any cupolas,

message boards in that zone. *Id.*

⁴³² See *supra* Part II.A.3.a.

⁴³³ KY. REV. STAT. ANN. § 100.203(1)(b) (West 2006).

⁴³⁴ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 17 (2007).

⁴³⁵ *Id.* art. 17–8(a).

⁴³⁶ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Aug. 31, 2007) (on file with author) (discussing Miami North Park, LLC, A–2007–74); Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Apr. 25, 2008) (on file with author) (discussing Laura Scott Adkins/Cummings Signs, Inc., A–2008–37). In the second of these cases, the applicant initially requested that the Board allow a 176 square-foot freestanding sign and a logo on a non-continuous parapet for a Saturn dealership in a Highway Service Business zone. At the hearing, the staff noted that the applicant was entitled to two seventy-five square foot signs because the property was located on a corner and recommended that the applicant transfer unused square footage to the proposed sign. The applicant agreed to a single freestanding sign of 150 square feet and withdrew the request for a parapet sign. *Id.*

⁴³⁷ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 17–5(b) (2007).

pylons, chimneys or other minor projections above the roof line.”⁴³⁸ In *Greer Land Co. Man O’ War, LLC*,⁴³⁹ the applicant sought to place the text “Casual Café” on top of the canopy of a Cheddar’s restaurant. Both the building inspector and the planning staff determined that the proposed sign was a prohibited roof sign, and the staff recommended that the Board disapprove the appeal.⁴⁴⁰

Citing Webster’s definition of a “roof” as “the external covering of a house or other building,” the applicant argued that the canopy was not a roof and thus the sign on the canopy was not a prohibited roof sign.⁴⁴¹ The applicant recognized that roof signs are prohibited throughout the country, but contended the proposed sign was not such a sign.⁴⁴² The applicant pointed out that there are fifty-seven Cheddar’s restaurants with this type of sign package, and that no other city has considered the Casual Café sign to be a prohibited roof sign.⁴⁴³ The applicant then argued that the proposed sign was like the marquee for the Royal Cinema in Hamburg that was permitted and did not require a variance.⁴⁴⁴ In response to this contention, the building inspector asserted that “Building Inspection is holding a fine line in this case” and that “Article 17 of the Zoning Ordinance hasn’t kept up with the times.”⁴⁴⁵

The Board provided three reasons in support of its approval of the appeal:

1. The extension above the entrance area of the restaurant is not the roof of the structure, as contemplated in the definition of a roof sign in the Zoning Ordinance. It is more comparable to a canopy than a roof, covering only an open area, not an enclosed structure.
2. The proposed sign does not project above the level of the rest of the structure. In appearance, the impact of this sign is comparable to a wall sign, and as such is

⁴³⁸ *Id.* art. 17–3(c)(10).

⁴³⁹ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment (Oct. 26, 2007) (on file with author) (discussing *Greer Land Co. Man O’War, LLC*, A–2007–91).

⁴⁴⁰ Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2 (Oct. 16, 2007) (on file with author) (discussing *Greer Land Co. Man O’ War, LLC*, A–2007–91).

⁴⁴¹ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 16 (Oct. 26, 2007) (on file with author) (discussing *Greer Land Co. Man O’War, LLC*, A–2007–91).

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

permitted so long as it does not exceed the applicable limitations for wall signs.

3. Alternatively, the proposed sign also more closely resembles a canopy or awning sign in that the structure at issue serves only as a canopy over the entranceway.⁴⁴⁶

I believe that the Board's interpretation of the zoning ordinance was reasonable.⁴⁴⁷ The zoning ordinance does not define the term "roof," and the Board was within its discretion when it determined that the "canopy"⁴⁴⁸ was not part of the building's roof. Indeed, in conjunction with a comprehensive amendment to the zoning ordinance's sign regulation in 2009, the Lexington–Fayette Urban County Council amended the zoning ordinance to conform with this interpretation of the ordinance.⁴⁴⁹ The ordinance now separately defines "above canopy signs"⁴⁵⁰ and "marquees" and expressly permits the sign at issue in the Cheddar's case.

The first sign appeal that the Board denied involved a freestanding pre-sale menu board in a Planned Shopping Center zone.⁴⁵¹ The LFUC zoning ordinance does not expressly permit such signs in that zone⁴⁵² and provides that all signs that are not expressly permitted are prohibited.⁴⁵³ An exemption from the permitting requirements, however, is made for signs that are not visible beyond the boundaries of the lot.⁴⁵⁴ The staff noted that the case had been postponed several times in an effort to work out an exemption for the signage "by virtue of it not being visible from the surrounding properties."⁴⁵⁵ The proposed sign did not fall within that exemption and the staff recommended that the appeal be denied.⁴⁵⁶

⁴⁴⁶ *Id.*

⁴⁴⁷ I did not attend the October 2007 hearing and thus did not participate in this appeal.

⁴⁴⁸ Webster's II New College Dictionary defines a "canopy" as "[a] *rooflike* ornamental architectural structure," not as a "roof." WEBSTER'S II NEW COLLEGE DICTIONARY 167 (3d ed. 2008) (emphasis added).

⁴⁴⁹ See Minutes, Lexington–Fayette Urban Cnty. Planning Comm'n 18–20 (Mar. 26, 2009) (on file with author) (discussing Amendment to Article 17 of Lexington–Fayette Urban Cnty. Zoning Ordinance).

⁴⁵⁰ See LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 17–3(c)(4) (2007).

⁴⁵¹ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 22–23 (Jan. 25, 2008) (on file with author) (discussing Clayton Signs, Inc., A–2007–73).

⁴⁵² Cf. LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 17–7(k)(1) (2008).

⁴⁵³ *Id.* art. 17–7.

⁴⁵⁴ *Id.* art. 17–2(a).

⁴⁵⁵ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 22–23 (Jan. 25, 2008) (on file with author) (discussing Clayton Signs, Inc., A–2007–73).

⁴⁵⁶ *Id.*

Neither the applicant nor a representative for the applicant appeared at the hearing, and the Board disapproved the appeal.⁴⁵⁷

The second sign appeal that the Board denied involved a request to allow a wall sign on the side of a building that exceeds the total allowable square footage for that building.⁴⁵⁸ As noted above, the zoning ordinance provides that the Board of Adjustment is not authorized to increase the maximum total permitted sign area on a lot or building.⁴⁵⁹ The Board followed the staff's recommendation and disapproved the appeal.⁴⁶⁰

In sum, it appears that the Board complied with the governing law in all seven of the administrative sign appeals it decided. It was within its power to permit the applicant to combine the allowable square footage of multiple signs into a single sign, and its interpretation of the term "roof sign" was reasonable. Accordingly, the Board acted within its powers in the three cases in which it granted the appeal. In the two cases in which it disapproved the appeal, the Board recognized and complied with the express limitations of its power imposed by the zoning ordinance.

(c) Role of Staff's Recommendations

The Board followed the staff's recommendations in all but one of the seven sign appeals that the Board heard between July 2007 and December 2008.⁴⁶¹ Moreover, in the single case that the Board did not follow the staff's recommendation,⁴⁶² the staff and Division of Building Inspection signaled to the Board in a number of ways that the staff's recommendation was somewhat flexible. First, in its written recommendation, the staff stated that since "no arguments have been presented by the appellant to support that it is not a roof sign, it appears that the Division of Building Inspection has made the correct determination in this case."⁴⁶³ Second, at the beginning of the hearing, legal counsel stated that "she agreed with the staff at this

⁴⁵⁷ *Id.*

⁴⁵⁸ Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 18 (Mar. 28, 2008) (on file with author) (discussing Triumph Signs, A-2008-18).

⁴⁵⁹ LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 17-8(a) (2007).

⁴⁶⁰ Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 17-18 (Mar. 23, 2008) (on file with author) (discussing Triumph Signs, A-2008-18).

⁴⁶¹ In one of the cases, the staff initially recommended that the appeal be denied. Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 27 (Apr. 25, 2008) (on file with author) (discussing Laura Scott Adkins/Cummings Signs, Inc., A-2008-37). The staff worked out a compromise with an applicant during the hearing and the Board approved the appeal in part, and the applicant withdrew part of its request. *See supra* note 378.

⁴⁶² Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 15-17 (Oct. 26, 2007) (on file with author) (discussing Greer Land Co., Man O' War LLC., A-2007-91).

⁴⁶³ Case Report, Lexington-Fayette Urban Cnty. Bd. of Adjustment 2 (Oct. 16, 2007) (on file with author) (discussing Greer Land Co., Man O' War LLC., A-2007-91).

point in time, not yet having heard from the applicant.”⁴⁶⁴ Finally, as noted above, after the applicant offered its arguments, the building inspector asserted that “Building Inspection is holding a fine line in this case” and that “Article 17 of the zoning ordinance hasn’t kept up with the times.”⁴⁶⁵ Thus, while the Board did not defer to the staff’s recommendation in one of the cases, the staff’s recommendation in that case was not particularly strong.

(d) Summary

The Board decided five administrative appeals involving signs. It approved three of the appeals and disapproved two of the appeals. I believe that all five of the Board’s decisions were legally correct and adequately supported. The Board followed the staff recommendation in four of the five cases. In the single case that the Board did not follow the staff’s recommendation, the staff signaled to the Board that its recommendation was not strongly held.

3. Miscellaneous.—In addition to the five nonconforming use and seven sign administrative appeals, four other administrative appeals appeared on the Board’s agenda between July 2007 and December 2008. The Board approved one of the appeals. The Board reached a tie vote in the second appeal. The appellants withdrew the two remaining appeals.⁴⁶⁶

(a) Board’s decisions

The case that the Board approved involved a request to allow a church to use a parking lot as a principal, rather than as an accessory, use on property located in a two-family residential zone. In that case, the church building was located on one lot, and the church wanted to use the lot across the street for parking for the church.⁴⁶⁷ Parking lots are permissible accessory, but not principal, uses in two-family residential zones.⁴⁶⁸ The LFUC zoning ordinance prohibits accessory uses from being constructed before principal uses.⁴⁶⁹ The building inspector opposed the application because it was

⁴⁶⁴ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 15 (Oct. 26, 2007) (on file with author) (discussing Greer Land Co. Man O’War, LLC, A–2007–91).

⁴⁶⁵ *Id.* at 16.

⁴⁶⁶ One of the cases was postponed during the study period and withdrawn the following month, January 2009.

⁴⁶⁷ Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 9 (Aug. 31, 2007) (on file with author) (discussing Glen Arvin Ave. Church of Christ, A–2007–72).

⁴⁶⁸ *See* LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE arts. 8–11(c), 8–5(c) (1) (2007).

⁴⁶⁹ LEXINGTON–FAYETTE URBAN COUNTY, KY. ZONING ORDINANCE art. 1–11 (2007) (defi-

prohibited by the zoning ordinance. At the hearing, the building inspector stated that he was sympathetic to the applicant but urged the Board to disapprove the application because it “would set a precedent by allowing a prohibited use in the zone.”⁴⁷⁰ The staff, on the other hand, noted that the church was a conditional use, rather than a principal use, under the terms of the ordinance, and recommended that the Board approve the appeal for the following reasons:

- a. An overly strict interpretation of the Zoning Ordinance provision related to off-street parking for churches would be inconsistent with past approvals by the Board (specifically CV-2006-87 and CV-95-76).
- b. Use of the subject lot for off-street parking for a church, without a principal structure on the lot, is reasonable in this particular case due to the location of the church directly across the street.
- c. The off-street parking arrangement proposed is not unusual, and similar situations have been approved by the Board at other locations, such as at the corner of Jefferson and West Sixth Streets.⁴⁷¹

After a fairly lengthy discussion, the Board approved the appeal for the reasons recommended by the staff.⁴⁷²

I believe that the Board’s decision was technically wrong. Parking is not a principal use in a two-family residential zone. Thus, the Board did not have the power to approve the appeal, and the applicant should only have been permitted to use the lot for parking if the applicant sought and was granted a text amendment to the zoning ordinance. On the other hand, I am sympathetic to the Board’s decision.⁴⁷³ At the hearing, the staff noted that the Board had approved a nearly identical request in the past. Although the Board is not bound to follow its earlier decisions and consistently wrong application of the law does not make it correct,⁴⁷⁴ I am sympathetic

dition of accessory structure) (“No accessory structure can be constructed on a lot before a principal structure.”).

470 Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 10 (Aug. 31, 2007) (on file with author) (discussing Glen Arvin Ave. Church of Christ, A-2007-72).

471 Case Report, Lexington-Fayette Urban Cnty. Bd. of Adjustment 3 (Aug. 24, 2007) (on file with author) (discussing Glen Arvin Ave. Church of Christ, A-2007-72).

472 Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 11 (Aug. 31, 2007) (on file with author) (discussing Glen Arvin Ave. Church of Christ, A-2007-72).

473 In fact, I must confess that the Board’s decision was unanimous and I voted to approve the appeal. *See id.*

474 Cf. Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 549 (2001) (discussing principle of *communis error facit jus* [common error makes law]).

to the Board's desire to be fair to all applicants by treating their requests consistently.⁴⁷⁵

The case that resulted in a tie vote involved conditional zoning restrictions imposed on property in a highway service business zone.⁴⁷⁶ The property at issue was rezoned from light industrial to highway service business in 1999.⁴⁷⁷ Pursuant to Article 6–7 of the LFUC zoning ordinance,⁴⁷⁸ sixteen different uses were expressly prohibited at the time of the zone change.⁴⁷⁹ Among the expressly prohibited uses were: (1) “[i]ndoor amusements such as billiards or pool halls, dancing hall, skating rinks, or bowling alleys;” and (2) “[i]ndoor and outdoor athletic facilities such as a field house, gymnasium, football stadium, tennis courts, soccer field or polo field, and baseball fields.”⁴⁸⁰ The appellant sought to establish a “Kangaroo Bob’s” facility on the property but the building inspector determined that the proposed use was similar to an indoor athletic facility or indoor amusement facility and thus was prohibited by the conditional zoning restrictions on the property.⁴⁸¹ The staff concurred with the building inspector’s determination and recommended that the Board disapprove the appeal.⁴⁸²

At the hearing, the appellant argued that Kangaroo Bob’s was a unique facility that emphasized learning and teamwork and was neither an indoor athletic facility nor an indoor amusement facility.⁴⁸³ Kangaroo Bob’s

475 Cf. Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 592–93, 627–28 (2011) (describing “the need to ensure that local government treats applicants equally” as one of the underlying principles or norms of the traditional land use system); Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1070–72 (1990) (criticizing Iowa City Zoning Board of Adjustment for failing to treat two applicants in similar situation equally when one applicant was granted variance and other was denied variance); *Study*, *supra* note 2, at 302 (implicitly criticizing LFUC Board of Adjustment for failing to treat landowners equally).

476 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 29 (Feb. 29, 2008) (on file with author) (discussing Tiverton Way, LLC, A–2008–17).

477 Exhibits Tendered on Behalf of Appellant Tiverton Way, LLC, exhibit 1, A–2008–17 (Lexington–Fayette Cty. Bd. Adjustment Feb. 29, 2008) [hereinafter Exhibits for Tiverton Way] (on file with author) (describing Zone Change Request for I–1 to B–3 for 128 and 148 West Tiverton Way).

478 LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE, art. 6–7 (2008) (“Pursuant to KRS 100.203(8), Planning Commission or the Urban County Council may, as a condition to granting a map amendment, restrict the use of property affected to a particular use, a particular class of use, or a specified density within those permitted in a given zoning category . . .”).

479 Exhibits for Tiverton Way, *supra* note 477, exhibit 1.

480 *Id.*

481 Exhibits for Tiverton Way, *supra* note 477, exhibit 2 (Board of Adjustment refusal letter dated Jan. 29, 2008).

482 Case Report, Lexington–Fayette Urban Cnty. Bd. of Adjustment 2 (Feb. 22, 2008) (on file with author) (discussing Tiverton Way, LLC, A–2008–17).

483 Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 25 (Feb. 29, 2008) (on

executive director explained that children are taught teamwork in a fun environment through a series of fifty original educational team games.⁴⁸⁴ Instructors run the games every fifteen minutes, and at the end of each game, the instructor takes the children to the back of the room where they discuss the lesson that was just learned (such as awareness, leadership, or emotional control).⁴⁸⁵ The appellant contended that the program is different “because it is innovative, imaginative and creative, in addition to which the children have fun and are engaged in physical activity.”⁴⁸⁶ He further explained that “[t]he emphasis on learning and structured teamwork puts the proposed use in a different category than an indoor amusement or athletic facility.”⁴⁸⁷ Citing *Hamner v. Best*,⁴⁸⁸ the appellant argued that the zoning restriction should be construed strictly in favor of the land owner. The appellant argued that the proposed use was neither an indoor amusement nor an indoor athletic facility but was substantially similar to four principal permitted uses in the highway service business zone: (1) restaurant;⁴⁸⁹ (2) establishment for the retail sale of merchandise,⁴⁹⁰ (3) school for academic instruction,⁴⁹¹ and (4) kindergarten, nursery school, and child care center.⁴⁹² Specifically, the appellant contended that Kangaroo Bob’s was “substantially similar to a child care center with a mixture of education, a restaurant and a retail component.”⁴⁹³

Three members of the Board of Adjustment voted to approve the appeal. The following reasons were given for approving the appeal:

1. The proposed facility will not have the typical characteristics of an athletic center. There is no gymnasium, no soccer facilities or basketball equipment. The use does not include competitive athletic activities in the traditional sense.
2. The proposed facility will not have the typical characteristics of an indoor amusement facility. It does not include arcade or video games, or other electronic

file with author) (discussing Tiverton Way, LLC, A-2008-17).

484 *Id.*

485 *Id.*

486 *Id.*

487 *Id.* at 26.

488 *Hamner v. Best*, 656 S.W.2d 253 (Ky. Ct. App. 1983).

489 *See* LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. 8-20(b)(3) (2008).

490 *See id.* art. 8-20(b)(11).

491 *See id.* art. 8-20(b)(20).

492 *See id.* art. 8-20(b)(21).

493 Minutes, Lexington-Fayette Urban Cnty. Bd. of Adjustment 26 (Feb. 29, 2008) (on file with author) (discussing Tiverton Way, LLC, A-2008-17).

amusements. The children are not free to use amusement equipment at will, as in an indoor amusement facility.

3. Employees are trained in instruction methods and are retained with an emphasis on persons with training in childhood development and education.
4. Children's activities are strictly structured and goal oriented toward specific teaching accomplishments, with a stress on the educational component of values. Therefore, the proposed use is more substantially similar to an innovative school for academic instruction and value instruction than it is to an athletic center or an indoor amusement facility. A school for academic instruction is a principal permitted use in this zone.⁴⁹⁴

Three members of the Board voted against approval.⁴⁹⁵ One member of the Board was absent.⁴⁹⁶ Because the vote was tie, the appeal was neither approved nor disapproved.

I voted against the appeal because I believed that the proposed facility was more similar to an indoor athletic or amusement facility than a school for academic instruction. Nevertheless, I believe that the three members of the Board who voted to approve the appeal were acting within the bounds of their discretion in voting to approve the appeal for reasons number one and two above.

The fourth reason given for approval, however, was clearly wrong. The LFUC Zoning Ordinance defines schools for academic instruction as “[a]ll schools offering primarily classroom instruction with participation of teachers and students, limited to elementary, junior and middle high schools, high schools, junior colleges, colleges, theological seminaries, bible colleges, and universities; but not including business colleges, technical or trade schools.”⁴⁹⁷ The proposed Kangaroo Bob's clearly did not primarily offer “classroom instruction.” Yet, again, I do not fault the Board members for adopting this finding. Neither the appellant nor the staff brought the zoning ordinance's definition of “schools for academic instruction” to the Board's attention.⁴⁹⁸ Thus, it was not unreasonable for the Board to

⁴⁹⁴ *Id.* at 29.

⁴⁹⁵ *See id.*

⁴⁹⁶ *See id.*

⁴⁹⁷ LEXINGTON–FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE art. I–12 (2007) (defining schools for academic instruction).

⁴⁹⁸ The appellant's attorney introduced a package of fourteen different exhibits in addition to the Kangaroo Bob's Game Training Manual and the Arts and Crafts Class schedule. None of the exhibits included the definition of “school for academic instruction.”

interpret “school for academic instruction” loosely to be any program that emphasizes learning.⁴⁹⁹

(b) Role of Staff's Recommendations

The Board followed the staff's recommendation in one of the two miscellaneous administrative appeals the Board decided between July 2007 and December 2008. The second appeal ended in a tie vote. Three members of the Board voted against the appeal as recommended by the staff. Three members of the Board voted in favor of the appeal contrary to the staff's recommendation.

(c) Summary

The Board decided two “miscellaneous” administrative appeals between July 2007 and December 2008. The Board approved one of the appeals and reached a tie vote in the second appeal. I believe that the Board was technically wrong in the case in which it approved the appeal. Technically, the Board did not have the power to grant the appeal. Nevertheless, the Board had granted similar relief in the past and thus it was not unreasonable for the Board to approve the appeal as a matter of fundamental fairness. I believe that the Board should have disapproved the second appeal. Nevertheless, I believe that the members of the Board who voted to approve the appeal acted reasonably under the circumstances.

III. REFLECTIONS

In their study of the LFUC Board of Adjustment fifty years ago, Jesse Dukeminier and Clyde Stapleton harshly criticized the Board and many of its practices. Much has changed, and improved, since that study. Nevertheless, some problems remain. This section will discuss the ways in which the law and practice have changed since Dukeminier–Stapleton study and the problems that remain.

A. Changes in Substantive Law

The substantive law has changed significantly since the Dukeminier–Stapleton study. Three changes have been implemented that reduce the Board's discretion. First, and most significantly, the Kentucky legislature

⁴⁹⁹ This loose interpretation of school of academic instruction is consistent with the Board's decision in the museum case. Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 8–9 (July 27, 2007) (on file with author) (discussing Headley–Whitney Museum, Inc., C–2007–64). As discussed above, I believe that the Board erroneously interpreted the term “school of academic instruction” in that case. See *supra* Part II.B.2.a.

amended KRS Chapter 100 to expressly eliminate the Board's power to grant use variances.⁵⁰⁰ Second, the Lexington–Fayette Urban County Council amended the zoning ordinance to severely constrain the Board's power to grant sign variances.⁵⁰¹ Third, the Lexington–Fayette Urban County council amended the zoning ordinance to clarify and tighten the standards governing home occupations.⁵⁰²

On the other hand, the Kentucky legislature amended the enabling legislation to greatly enhance the Board's discretion with respect to the findings required to make dimensional variances. Specifically, the Board is no longer required to find unnecessary hardship/deprivation of reasonable use before granting a dimensional variance.⁵⁰³ Instead, unnecessary hardship/deprivation of reasonable use is simply one of three factors that the Board is directed to consider in deciding whether to approve an appeal for a dimensional variance.⁵⁰⁴

Because the Board takes the limits on its power seriously,⁵⁰⁵ and the new standards governing dimensional variances grant the Board much more discretion to grant dimensional variances, the Board's current practice conforms much more closely to the governing law than it did at the time of the Dukeminier–Stapleton study.

B. Changes in Procedure

At the time of the Dukeminier–Stapleton study, zoning was just coming out of its infancy, and the Board's procedures left much to be desired. The LFUC Board's procedures have matured and improved considerably since the time of the Dukeminier–Stapleton study.

First, applicants requesting a dimensional variance must file an application that clearly sets forth the legal requirements that must be satisfied in order for the Board to grant a dimensional variance.⁵⁰⁶ Applicants

⁵⁰⁰ See *supra* Part II.A.1.

⁵⁰¹ See *supra* Part II.A.3.a.

⁵⁰² See *supra* Part II.B.3.

⁵⁰³ See *supra* Part II.A.2.a.

⁵⁰⁴ See *id.*

⁵⁰⁵ To illustrate, one poor applicant sat through a six-hour hearing only to learn that the Board did not have the power to grant the applicant's administrative appeal regarding a sign. See Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 29–30 (Feb. 29, 2008) (on file with author) (discussing Triumph Signs, A–2008–18). Because the applicant had sat through such a long hearing, the Board continued the meeting to give the applicant an opportunity to discuss the matter further with the staff to determine if there was some way to grant the applicant relief. See *id.* The staff was unable to find a way to accommodate the applicant's request so the following month the Board disapproved the appeal when the applicant did not appear at the hearing. See Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 17–18 (Mar. 28, 2008) (on file with author) (discussing Triumph Signs, A–2008–18).

⁵⁰⁶ See Appendix A, *infra*, part F.

must answer five separate questions, each of which the Board must either find or consider before granting a variance.⁵⁰⁷ Thus, the form helps applicants and the Board to focus on the legal requirements that apply to variances.⁵⁰⁸

Second, a member of the planning staff records the meeting and prepares minutes of the meeting that provide some detail about the arguments and questions raised in the hearing and explicitly state the reasons why the Board voted to approve or disapprove each request. These changes in procedure make it much easier for an applicant to appeal the Board's decisions.

Third, an attorney for the LFUCG attends every meeting. If the Board decides not to follow the staff's recommendation, the attorney is available to help the Board draft findings that focus on and satisfy the legal requirements.⁵⁰⁹

C. Changes in Practice

In practice, the Board's decisions have changed in two significant ways. First, the Board is much more likely to make specific factual findings than it was at the time of the Dukeminier–Stapleton study. Second, the Board is much more deferential to the staff's recommendations than it was at the time of the Dukeminier–Stapleton study. Nevertheless, problems remain with the Board's decisions in practice.

1. Board's Findings.—Unlike at the time of the Dukeminier–Stapleton study, the Board now makes explicit findings in support of its decisions, and the findings are recorded in the Board's minutes. Thus, we are no longer left in the dark as to why the Board reached a particular decision. Moreover, the Board's findings tend to track the applicable legal requirements and offer specific facts rather than simply boilerplate conclusory findings.⁵¹⁰

That is not to suggest that the Board's findings are entirely flawless. First, the Board does not expressly make all of the findings the enabling legislation requires that it make in dimensional variance cases. KRS 100.243 requires that the Board make four specific findings before granting a dimensional variance.⁵¹¹ In none of the thirty-nine cases in which the

⁵⁰⁷ See *id.*

⁵⁰⁸ Because the enabling legislation does not require explicit findings for conditional use permits like it does for variances, the application form for conditional use permits does not distill specific legal issues that must be addressed. See Appendix A, *infra*.

⁵⁰⁹ Cf. Jack S. Hawbaker, *Appeals Boards Need to Clean Up Their Act*, PLANNING, Nov. 1982, at 23 (“[C]ounties that have the assistance of planning staff or a lawyer produce better opinions than counties that don’t. Their opinions are less likely to be reversed by a circuit court, even if the court arrives at a different conclusion about the case.”).

⁵¹⁰ See, e.g., *supra* Part II.A.2.b; Part II.A.3.b; Part II.B.2.a.

⁵¹¹ See KY. REV. STAT. ANN. § 100.243 (West 2006).

Board granted a dimensional variance (including the sign case) did the Board expressly make all four of the findings required by the KRS 100.243. Thus, in none of the cases did the Board entirely satisfy the applicable legal requirements. In addition, KRS 100.243 directs the Board to consider three separate factors in deciding whether to grant or deny a dimensional variance. In only one of the thirty-nine cases approving a dimensional variance request did the Board expressly address all three factors. Although the Board was not technically wrong for failing to consider all three factors in every case, it would be a better practice for the Board to consider all three factors in every case.

2. Deference to Staff's Recommendations.—Unlike at the time of the Dukeminier–Stapleton study, the Board today is highly deferential to the professional staff. The Board followed the staff's recommendation in 145 of the 154 separate cases on which the Board voted, or 94 percent of the cases. In addition, the Board deferred to the Division of Building Inspection's recommendation in all five of the conditional use permit cases it reviewed.

The current Board clearly takes the recommendations of the staff and the Division of Building Inspection to heart in making its decisions. In fact, in one case, a Board member virtually chastised the staff and Division of Building Inspection for failing to agree on their recommendations to the Board in light of “the importance of their assessments in helping the Board with its decision on these matters.”⁵¹²

Generally, the Board's faith in the staff and Division of Building Inspection appears to be well-placed. Unlike the members of the Board, the staff members are professional land use planners. This expertise makes them “uniquely qualified to maintain the integrity of both neighborhood zoning and the overall city plan.”⁵¹³

That is not to suggest, however, that the staff and Division of Building Inspection never make mistakes and that the Board should simply rubberstamp their recommendations.⁵¹⁴ The Division of Building Inspection has made mistakes,⁵¹⁵ and I do not believe that the staff's recommendations are always correct.⁵¹⁶ Nevertheless, most of the time it is

⁵¹² Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 10 (Aug. 31, 2007) (on file with author) (discussing Glen Arvin Ave. Church of Christ, A–2007–72).

⁵¹³ Shapiro, *supra* note 8, at 12.

⁵¹⁴ Cf. Bryden, *supra* note 7, at 774 n.36 (“The planners’ recommendations, however, are not necessarily based primarily upon analyses of the land use consequences of variances.”); Sampson, *supra* note 3, at 908 nn.158–59 (noting that staff may make recommendations contrary to governing standards).

⁵¹⁵ For example, in one case, the Division of Building Inspection issued a certificate of occupancy to a landowner before the landowner had satisfied all of the conditions imposed in its conditional use permit. *See* Minutes, Lexington–Fayette Urban Cnty. Bd. of Adjustment 6 (Jan. 25, 2008) (on file with author) (discussing Carolyn Wagoner, C–2005–139); *supra* Part II.B.4.

⁵¹⁶ *See, e.g., supra* Part II.B.2.a. (critiquing recommendation and decision in Headley–

appropriate for the Board to defer to recommendations by the staff and the Division of Building Inspection.

D. Changes in Training for Board Members

In 2001, Kentucky became the first state to require that members of the Board of Adjustment receive comprehensive training.⁵¹⁷ Specifically, Kentucky law requires that Board members (1) attend at least four hours of orientation training within one year prior to appointment or within 120 days after appointment, and (2) receive at least eight hours of continuing education every two years.⁵¹⁸

On a related note, in 2011, Lexington launched its first voluntary Citizens Planning Academy. The twelve-hour program provided its thirty-two participants with an in-depth understanding of the principles and process of community planning in Lexington. The program was very successful and the organizers plan to offer the program again in 2012. The Mayor attended the last session of the 2011 Academy and said that he hoped to select future appointees to the Planning Commission and Board of Adjustment from the pool of graduates from the program. The program's organizers hope that participation in the program will eventually become a prerequisite for appointment to the LFUC Planning Commission and Board of Adjustment.⁵¹⁹

This mandatory (and voluntary) training is intended to, and does, make Board members more knowledgeable about their duties and responsibilities as well as the law governing their decisions. It does not, however, make them an adjudicative body with judicial impartiality,⁵²⁰ nor does it provide them with the expertise to decide technical questions of law.⁵²¹ Thus, while

Whitney Museum); *supra* Part II.B.3 (critiquing recommendation and decision in Fantasy Friends Costuming); *supra* Part II.C.3.b (critiquing recommendation and decision in Athens Schoolhouse Partners).

517 PATRICIA E. SALKIN, 1 AMERICAN LAW OF ZONING § 4:8 (5th ed. Supp. 2011); *see also* Marshall Slagle, *Kentucky Enacts Continuing Education Requirements for Planning Officials: The Inside Story*, 53 LAND USE L. & ZONING DIG. 11 (2001).

518 KY. REV. STAT. ANN. § 147A.027(1)(a)–(b) (West 2006).

519 E-mails from Steve Austin, Organizer of the Citizens Planning Acad., to Kathryn L. Moore, Laramie L. Leatherman Professor of Law, Univ. of Ky. Coll. of Law (Sept. 29, 2011, 10:37 AM, 11:22 AM) (on file with author).

520 *Cf. Rose, supra* note 63, at 868 (noting that *The Federalist* attributes judicial due consideration and fairness in part to “secure tenure of office, in order to promote judicial steadiness, impartiality, and insulation from irrelevant pressures”).

521 *Cf. supra* Part II.C.1.b (critiquing Athens Schoolhouse decision).

the training is certainly desirable and beneficial,⁵²² it does not eliminate all of the problems with a lay board.⁵²³

CONCLUSION

The law and practice before the LFUC Board of Adjustment has matured and improved considerably since Jesse Dukeminier and Clyde Stapleton studied the Board fifty year ago. Many of the suggestions offered by past critics of boards of adjustment, such as mandatory training for Board members and able assistance from professional staff and legal counsel, have been incorporated. In addition, the law governing variances has been substantially changed. As a result, the Board no longer deserves to be described as a case study in misrule.

This is not to suggest, however, that the Board of Adjustment is without fault. First, although the Board's dimensional variance decisions have improved considerably since the Dukeminier-Stapleton study, they still do not fully comply with the law. Specifically, the decisions approving dimensional variances do not expressly include all four of the findings required under KRS 100.243. It would be relatively easy for the Board to correct this problem. The staff could easily draft its recommendations to expressly include all four findings required under KRS 100.243. In addition, on a related note, it would be better practice for the staff's recommendations (and the Board's decisions) to expressly address all three factors KRS 100.243 directs the Board to consider in its dimensional variance decisions.

The second, and more difficult problem to correct, is the Board's tendency to make decisions that seem fair and practical rather than technically legally correct. Indeed, I am not sure that it is possible or even reasonable to expect a lay body to prefer technically legally correct decisions to practical and fair decisions, especially when the staff recommends the practical decision over the legally correct decision. When

522 The American Planning Association's Legislative Guidebook recommends mandatory training for Board of Adjustment members. *See* MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE § 10-404 (Am. Planning Ass'n 2002).

523 *Cf.* The Mun. Art Soc'y of N.Y., *Zoning Variances and the New York City Board of Standards and Appeals*, 30 COLUM. J. ENVT'L. L. 193, 241-44 (2005) (discussing advantages and disadvantages of replacing boards with a zoning administrator charged with overseeing requests for hardship variances and describing how zoning administrators used in variety of states); Sampson, *supra* note 3, at 927-29 (discussing inherent limitations of citizen boards and providing a number of suggestions on how to address these limitations—many of which have been adopted in Lexington); Shapiro, *supra* note 8, at 18 (discussing inherent limitations of citizen boards and contending that the crucial shortcoming is its lack of expertise).

Of course, replacing the lay body with a board of professional planners or locally elected judges still would not guarantee that the Board would always reach the legally correct result. *Cf.* Ann Martindale, Comment, *Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances*, 20 CONN. L. REV. 669, 709 (1988) (noting that fifty percent of Connecticut superior court decisions reversed by Connecticut Supreme Court).

express limitations are placed on the Board's power, the Board respects those limitations. The Board does not grant use variances or sign variances in contravention of the express limitations on its power. On the other hand, when its authority is more discretionary, or at least the staff advises the Board that its authority is more discretionary, the Board tends to defer to the staff and prefer the practical to the technically legally correct. For example, in one case, the Board deferred to the staff's recommendation and approved a conditional use permit for a dressmaking home occupation that would permit a nonresident co-owner to participate in the business despite the fact that the zoning ordinance expressly limits home occupations to residents of the dwelling.⁵²⁴ In another case, the Board deferred to the staff's recommendation and approved a church parking lot as a principal rather than an accessory use on property located across the street from a church when the zoning ordinance expressly identifies parking lots as accessory, not principal, uses.⁵²⁵

Fortunately, the Board's legally incorrect decisions are the exception rather than the rule. Overall, the LFUC Board of Adjustment does a good job of mediating and resolving land use disputes in Lexington-Fayette County.

524 See, e.g., *supra* Part II.B.3 (discussing Fantasy Friends Costuming, LLC, C-2007-79).

525 See, e.g., *supra* Part II.C.3.a (discussing Glen Arvin Ave. Church of Christ, A-2007-72).

APPENDIX

Urban County Board of Adjustment
101 E. Vine St. Suite 700, Lexington, KY 40507

Filing Date _____
Public Hearing Date _____

Filing Fee \$ _____
Case # _____

DIMENSIONAL VARIANCE APPLICATION

A. APPLICANT INFORMATION

B. CONTACT PERSON or REPRESENTATIVE INFO

Name:	Name:
Address:	Address:
City, State, Zip Code:	City, State, Zip Code:
Phone # (w/ area code):	Phone # (w/ area code):

C. PROPERTY INFORMATION

Address:	Current Zoning:
Proposed Use:	Current Use:

D. URBAN SERVICES STATUS (Indicate whether existing, or how to be provided)

Storm Sewers	<input type="checkbox"/> Existing OR <input type="checkbox"/> To be constructed by: <input type="checkbox"/> Developer <input type="checkbox"/> Others:
Sanitary Sewers	<input type="checkbox"/> Existing by: <input type="checkbox"/> LFUCG <input type="checkbox"/> Septic System OR <input type="checkbox"/> To be constructed by: <input type="checkbox"/> Developer <input type="checkbox"/> Others
Refuse Collection	<input type="checkbox"/> LFUCG OR <input type="checkbox"/> Other (please list):

E. POSSIBLE DISPLACEMENT OF TENANTS

Are there any existing dwelling units on the subject property that will be removed if this application is approved?
☐ Yes ☐ No **If yes, please answer the next two questions:**

1. Have any such dwelling units on the property been occupied within the past 12 months? ☐ Yes ☐ No

2. Are these units currently occupied by households earning less than 40% of the median income in Lexington-Fayette County? ☐ Yes ☐ No **If yes, please answer the next two questions:**

3. How many units? [_____ units]

4. Have any efforts already been taken to assist those residents in obtaining alternative housing? ☐ Yes ☐ No **If yes, provide an attachment and give details about those efforts.**

F. DETAILS OF VARIANCE REQUESTED

This variance requested is from _____ feet to _____ feet, in order to _____

G. FINDINGS AND JUSTIFICATION FOR VARIANCE (Please feel free to use an attachment, if necessary.)

In order to grant a variance, the Board must find that the granting of the variance:
1) will not adversely affect the public health, safety or welfare;
2) will not alter the character of the general vicinity;
3) will not cause a hazard or a nuisance to the public; and
4) will not allow an unreasonable circumvention of the requirements of the zoning regulations.
The answers to these questions will help the Board in their deliberation and, therefore, should be thorough yet concise.

1. Why will the granting of this variance not negatively affect the public health, safety or welfare, not alter the character of the general vicinity, and not cause a hazard or nuisance to the public?

Page 1 of Dimensional Variance Application

Urban County Board of Adjustment
101 E. Vine St. Suite 700, Lexington, KY 40507

Filing Date _____
Public Hearing Date _____

Filing Fee \$ _____
Case # _____

CONDITIONAL USE PERMIT APPLICATION

A. APPLICANT INFORMATION

Name:	Name:
Address:	Address:
City, State, Zip Code:	City, State, Zip Code:
Phone # (w/ area code):	Phone # (w/ area code):

B. CONTACT PERSON or REPRESENTATIVE INFO

C. PROPERTY INFORMATION

Address:	Current Zoning:
Conditional Use Requested:	Current Use:

D. URBAN SERVICES STATUS (Indicate whether existing, or how to be provided)

Storm Sewers	<input type="checkbox"/> Existing OR <input type="checkbox"/> To be constructed by: <input type="checkbox"/> Developer <input type="checkbox"/> Others:
Sanitary Sewers	<input type="checkbox"/> Existing by: <input type="checkbox"/> LFUCG <input type="checkbox"/> Septic System OR <input type="checkbox"/> To be constructed by: <input type="checkbox"/> Developer <input type="checkbox"/> Others
Refuse Collection	<input type="checkbox"/> LFUCG OR <input type="checkbox"/> Other (please list):

E. POSSIBLE DISPLACEMENT OF TENANTS

Are there any existing dwelling units on the subject property that will be removed if this application is approved?
☐ Yes ☐ No **If yes, please answer the next two questions:**

1. Have any such dwelling units on the property been occupied within the past 12 months? ☐ Yes ☐ No
2. Are these units currently occupied by households earning less than 40% of the median income in Lexington-Fayette County? ☐ Yes ☐ No **If yes, please answer the next two questions:**
3. How many units? [_____ units]
4. Have any efforts already been taken to assist those residents in obtaining alternative housing? ☐ Yes ☐ No **If yes, provide an attachment and give details about those efforts.**

F. PROJECT DETAILS (If additional space is required, please use a separate page)

Describe in detail the proposed activity, including any operational or design provisions that will be used to limit the potential for disturbing surrounding properties. Please see the "Supplemental Application Requirements" listed on the reverse side of this page for guidance.

G. APPLICANT CERTIFICATION

I do hereby certify that to the best of my knowledge and belief, the information supplied with this application is true and accurate. I further certify that if I am not the current owner of this property, that I have obtained written permission from the current property owner, and that it has been submitted as part of this application.

SIGNATURE OF APPLICANT _____ DATE _____

SIGNATURE OF LFUCG EMPLOYEE/OFFICER (if applicable) _____

