

**FLORENCE BOARD OF ADJUSTMENT
FLORENCE GOVERNMENT CENTER
BUSINESS MEETING
SEPTEMBER 11, 2019
7:30 P.M.**

Mr. Pieper called the meeting to order at 7:30 P.M.

BOARD MEMBERS PRESENT

Mr. Timothy Pieper, Chairman
Ms. Dee Begley
Mrs. Lois Evans, Vice-Chairwoman
Mrs. Linda Schaffer

BOARD MEMBERS NOT PRESENT:

Mr. Charlie Reynolds

LEGAL COUNSEL PRESENT

Mr. Dale Wilson

APPROVAL OF THE MINUTES

Mr. Pieper stated the Board members received copies of the minutes of the Florence Board of Adjustment meeting of August 14, 2019. He asked if there were any comments or corrections? Ms. Begley made a motion to approve the minutes as written and Mrs. Evans seconded the motion. Mr. Pieper called for a vote and it carried unanimously.

AGENDA ITEMS

1. Request of Legacy Living of Florence for an Appeal of the Zoning Administrator's decision. The applicant is appealing the Zoning Administrator's Decision that increasing the number of townhouse units and increasing the size of a townhouse building is a major amendment to the approved Concept Development Plan per Section 314 of the Boone County Zoning Regulations. The 14.7136 acre site is located at 8520 Gunpowder Road, Florence, Kentucky, and is zoned Public Facilities (PF).

Kevin Costello, Executive Director of the Boone County Planning Commission, explained the Board's role when evaluating administrative appeals. He prepared a handout (Exhibit 1) which was distributed to the Board members and the Appellant's attorney which outlines the State law regarding appeals. Key words are underlined and the key issue is error or mistake by the Zoning Administrator. This application is somewhat different because it involves a zone change that was approved by the Planning Commission and Florence City Council subject to conditions that were agreed by the developer in writing. That information was provided in the Staff Report. Mr. Costello stated that he does not recall an appeal of this nature previously coming before the Board.

Kevin Wall, Zoning Administrator for the City of Florence, presented the Staff Report which included a PowerPoint presentation (see Staff Report).

Gerald Dusing, attorney for the Appellant, said that the purpose of the meeting is to decide whether the proposed modification to the plan is a major or minor change. He introduced the partners for Legacy Living which included Tony Schantz, Al Wurster, and Steve

Hodgson. Mr. Schantz and Mr. Wurster stated that their address is 8463 Castlewood Drive in Indianapolis, Indiana, 46520.

Mr. Schantz stated that the concept for Legacy Living is to offer multiple levels of care for seniors including intermittent, independent living services in the townhomes. They also have 71 assisted living apartments in three stories for seniors who need more routine services and have a memory care area. In addition to those services, they wish to include a one bath, one bedroom townhome product. This appeals to singles and widows due to space needs. The market study was based on two bedroom, two bathroom units and this misses the singles market. They wish to replace two fourplexes with a smaller building version with one bedroom, one bathroom units. The area of the nine unit building is actually smaller than the two fourplexes combined. The aesthetics of the building is identical. The only difference is that there would be no gap between buildings. This would allow a lesser price point.

Mr. Pieper asked if the Board had any questions. Ms. Begley confirmed that Mr. Schantz answered her question about whether the building would be smaller, but asked why they needed to add a unit. Mr. Schantz responded that the average price for this type of unit in this market is about \$3,500.00 a month. Their two bedroom product is \$3,000.00 per month. They would like to serve more seniors at a lower price point so they added an extra unit to make up the extra income. It came down to meeting their pro forma and investor expectations. The \$3,000.00 a month includes one meal a day for the townhomes, security, and other services like transportation.

Ms. Begley stated that she understands how the product is needed, but questioned why ten months ago the approved plan was a good idea, but not now. Mr. Schantz responded that they wanted to serve single people at a lower price point, but to make up the revenue they needed to add a unit. He said that the nine unit building is 400 square feet smaller than the two fourplexes combined.

Mr. Dale Wilson asked Mr. Schantz if he disputed whether the plan on the screen (with seven, four unit townhome buildings) was approved as part of the rezoning. Mr. Schantz responded, "not at all." Mr. Schantz said that they knew to ask the Planning Commission's staff about the change and that they may not have the authority to approve it. He believes that staff pointed them in the right direction, but that in the overall scheme of the development, it's very minor and will help them market at a lower price point and to a single person.

Mr. Wilson questioned whether they are asking the Board to approve this change. Mr. Dusing stated, "as a minor change under the zoning code." Mr. Wilson stated that he was asking Mr. Schantz if he was asking this Board to change it. Both Mr. Dusing and Mr. Schantz responded in the affirmative. Mr. Schantz said that they would like the Board to deem it a minor change.

Mr. Dusing handed out copies of the proposed plan (Exhibit 2), approved plan (Exhibit 3), and Section 314 of the Boone County Zoning Regulations (Exhibit 4). He stated that Section 314 defines what is a minor change and a major change. The concept is not changing and the 100 units in the larger building is not changing. The 28 units around the

perimeter is the only change. He planned on putting the approved plan and the proposed plan side by side and asking the Board if they could see the difference. He did this with several people before the meeting and they had a difficult time discerning the difference.

Mr. Dusing stated that the legal argument pertains to error. The whole purpose of Section 314 is that if something is a minor change, you don't have to go through the whole process again. It's the interpretation of the Zoning Administrator that putting the two buildings together and having less overall square footage is a major change. In light of the overall Concept Development Plan, they "vehemently disagree." He stated that he was taken aback by the decision, especially when considering the Zoning Administrator's rationale. That including making a building bigger, although it is smaller than the two buildings separately, and because it is a condition of approval from the City. To make combining the buildings as some type of stumbling block for the Board is wrong and not fair. Every zone change in Boone County has conditions which require conformity with the Concept Development Plan. This isn't a special condition that's unique to this development. Section 314 is in the zoning code so that minor changes are not a stumbling block. Mr. Dusing read through Section 314 regarding the differences between major and minor amendments. He stated that there is no change in the development concept, and if there is, it is inconsequential in terms of the overall development. It is not substantial or significant. It is not even necessary to define minor change in the code because if it's not major, it's minor. Mr. Dusing said that his wife is an English teacher who concluded that the sentence regarding minor changes is ambiguous because it refers to, in addition to development concept, uses, intensity, and supplemental conditions of approval, "any other elements of substantive effect." He asked if this change is of substantive effect in comparison to everything else on the Concept Development Plan.

Mr. Dusing stated that the Board should use the same logic that they use when evaluating a Variance or a Conditional Use Permit. They use common sense and asked that they use the same approach when considering the proposed change to this Concept Development Plan. The zoning regulations have criteria for Variances and Conditional Use Permits but it boils down to whether it is hurting anybody, will have detrimental effects on the neighbors, or will cause issues with traffic or to the property to the rear. This proposal is not only hurting anybody, but is helping the community. Mr. Dusing pointed to the adjoining lot where construction of a senior housing project is pending. There is a synergy between the two projects. The two projects are going to work with each other to provide services. It also abuts commercial property. No residents will be affected. It's only going to help both properties.

Mr. Dusing stated that the Board should also consider the consequences and cost/benefit of denying the application. It will cause the developer to go back to the Planning Commission and start from scratch like it's vacant land, have a pre-application meeting, the developer will come down from Indianapolis with the architect and construction managers every time, and then file the application. The same people will get notice again and will be confused after seeing the proposed change. They pay an application fee of several thousand dollars and have a public hearing. There are fifteen commissioners who will wonder why they are looking at it. Then there is a meeting with the Zone Change Committee who will wonder the same thing. It was originally approved unanimously by the Zone Change Committee and he believes by a vote of 11 or 12 to 1 by the full Planning Commission. Then the full Planning Commission looks at the Committee Report and votes on it. Three months have been spent at this point. Then they go back to the City of

Florence and have a meeting with the City Council committee, and then the City staff, which may include the Mayor.

Ms. Begley stated that she doesn't mean to cut him off, but the Board is not involved with that process. Mr. Dusing responded that she was right and he didn't want to belabor the point. He said that he wanted to emphasize the consequences in light of the data. There's 100 units in the large building and 28 units in the peripheral buildings. They are proposing to add 1 unit. That's about 3 percent. If it's viewed from the perspective of 1 unit out of 28 units, it's about 7 percent. However, they are decreasing the number of beds. They are decreasing the amount of buildings and the square footage from about 11,000 to a little more than 10,000. They are decreasing the possible number of people from 16 beds to 9 beds. The Zoning Administrator says that the number of beds don't count. Mr. Dusing stated that he won't represent zone change proposals that involve three bedroom apartments because he represents the school district and they generate kids. It's a huge difference. That needs to be taken into account. The proposal involves decreasing and consolidating. Smaller square footage, smaller number of buildings, and smaller size of units. Every way that he looks at it makes it a minor change. He asked the Board to weigh the benefit versus the consequences, use common sense, and look at the legal definitions in Section 314.

Mr. Pieper asked the Board if they had any comments or questions for Mr. Dusing. Seeing none, he stated that he will give the Board a small amount of time to look over the materials and make a motion.

Mr. Wilson stated that Mr. Wall would like to make a rebuttal. Mr. Wall stated that Mr. Dusing outlined a number of issues which he believes the Board should consider, like "common sense" in context of Variances, Conditional Use Permits, etc., which have more subjective criteria. Mr. Wall stated that his determination considers the argument that the proposal could be evaluated in terms of "just one unit." Maybe it is, but it wasn't contemplated through the zone change process. The nine unit building falls under the issue of elements of substantive effect and density. The supplemental conditions of approval are tied to this Concept Development Plan. Mr. Wall stated that he is not authorized to make this change. The City Council has determined that this type of change is outside of the administrative official's purview. The reason for granting an appeal is statutory and it does not give the same latitude that it does for Variances and Conditional Use Permits.

Mr. Pieper asked if there were any questions from the Board. Seeing none, he asked the Board to review the materials and make a motion. Mr. Wilson advised that the Board can deliberate.

Mrs. Schaffer stated that she appreciates the information that the Appellant provided, but she believes that the only issue for the Board is whether the decision is in error. The Concept Development Plan was approved by the Planning Commission and the City and following the Concept Development Plan was a condition of approval. She stated that she can appreciate that since the plan is what was before them for consideration. She stated that if the regulations are wrong then they should be changed, but the Board members must use what is before them. Minor amendments do not involve changes to the development concept, uses, or other plan elements. The proposal involves a change to the concept and combining the buildings could be considered substantial and significant since it's different

than what the governing bodies approved.

Mr. Pieper asked if there were any other comments from the Board. Seeing none, he asked if anyone was prepared to make a motion or make any other comments. Ms. Begley stated that she agrees with what Mr. Dusing said about the building being smaller and there is a housing need for singles. She said she doesn't know exactly what steps are involved for approval, but thinks if they had to go through that process it may get approved because it makes sense. It would be nice if the Board could conclude that it's a minor change so that the formal process could be avoided. She doesn't want them to have to go through an extended process, but in her opinion it is different than what was originally approved. She stated that it's a great concept. Mrs. Schaffer commented that the Board does not know about the deliberations which resulted in the approved plan. Ms. Begley agreed.

Mrs. Schaffer moved to uphold the Zoning Administrator's decision with the finding that it is not in error since it is based on the conditions of the Planning Commission and the City which the Applicant approved, and the submitted report.

Mr. Pieper asked if there was a second to the motion. Mrs. Evans seconded the motion. Mr. Pieper asked for a roll call note. Mrs. Schaffer, Mrs. Evans, and Ms. Begley voted in favor of the motion and Mr. Pieper voted against. The motion passed by a vote of 3-1.

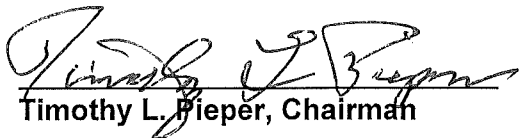
OTHER

No other matters were discussed.

ADJOURNMENT

Mr. Pieper asked for a motion to adjourn. Mrs. Evans so moved and Ms. Begley seconded the motion. Mr. Pieper called for a vote and the meeting adjourned by unanimous consent at 8:15 P.M.

APPROVED


Timothy L. Pieper, Chairman

ATTEST:


Kevin T. Wall, AICP
Director, Zoning Services

Exhibit 1 - KRS 100.257 Administrative Review
Exhibit 2 - Proposed Site Plan
Exhibit 3 - Approved Concept Development Plan
Exhibit 4 - Section 314 of Boone County Zoning Regulations