

**CAMPBELL COUNTY & MUNICIPAL BOARD OF ADJUSTMENT
MINUTES OF THE OCTOBER 12, 2017 SPECIAL MEETING**

MEMBERS PRESENT:

Mr. John Fessler
Mr. Joseph Williams
Mr. Michael Williams
Mr. Roger Mason, Vice Chair
Mr. Scott Bachmann, Chair

STAFF PRESENT:

Mr. Kirk Hunter, Principal Planner
Mr. Michael Duncan, Legal Counsel
Mr. Matt Smith, Legal Counsel
Ms. Stephanie Turner, Recording Secretary

MEMBERS ABSENT:

Mr. Justin Verst
Ms. Sharon Haynes, TPO

STAFF ABSENT:

Ms. Cynthia Minter, Director

This Special Meeting of the Campbell County & Municipal Board of Adjustment (“Board”) was held on Tuesday, October 12, 2017 at the Campbell County Administration Building, 1098 Monmouth Street, 1st Floor Fiscal Court Chambers, Newport, KY 41071 with a start time of 5:00 PM. The notice and agenda for this meeting was delivered in accordance with law to the members of the Board of Adjustments and posted on the Campbell County Planning & Zoning website as well as physically at the Campbell County Courthouse, 8352 E. Main St., Alexandria, KY; Campbell County Planning & Zoning Department, 1098 Monmouth Str., Suite 343, Newport, KY; and Campbell County Fiscal Court Chambers, 1098 Monmouth Str., 1st Floor, Newport, KY. Notice of the meeting and the agenda was forwarded to the applicant and his legal representative as well as the legal representatives for the affected property owner and its potential purchaser.

The following parties were represented at the meeting:

- Attorneys Michael Duncan and Matt Smith representing the Board.
- Attorney James Morgan representing Mr. Donnie Glenn, the applicant of the appeal.
- Attorney Chris Markus representing the Diocese of Covington, the property owner.
- Attorneys Mary Ann Stewart and George Kolentse representing the Brighton Properties, the potential purchaser of the property.
- Members of the general public

Meeting Called To Order

Mr. Bachmann called the meeting to order at 5:00 PM and asked everyone to stand and face the flag for the Pledge of Allegiance. Following roll call, a quorum was found to be present. Mr. Bachmann advised the audience that this meeting was a special meeting of the Board and not a public hearing. There is no testimony to be heard before the Board at this meeting. The public hearing is scheduled for October 17th and would be the venue to hear public testimony. This is a special meeting of the Board to review one legal question that has been argued between the applicant’s attorney and the attorneys of the property’s potential purchaser. The only item to be discussed and take action on tonight is the question: Does the Board of Adjustment have jurisdiction to hear the appeal?

With this, Mr. Bachmann introduced legal counsel. Mr. Michael Duncan introduced himself and Mr. Matt Smith. Mr. Duncan started by advising the audience that the public meeting tonight was called to address a very narrow legal question and that is the only thing to be discussed and decided tonight. Mr. Duncan thanked the audience for coming to the meeting. He stated that if

you are here tonight to be heard or to address the Board, tonight is not the time. The public hearing is scheduled for next week, which would be the appropriate time for your comments to be heard. Mr. Duncan also advised the audience that there was a court reporter in the room taking the information down tonight and thanked Mr. Morgan for bringing her with him.

Mr. Duncan introduced the issue before the Board as being the determination if the Board of Adjustment has the legal jurisdiction to hold a public hearing next week and to make the decisions that would be made if that hearing were held. The Zoning Administrator in Campbell County made the decision, a zoning decision, which an application has been received to appeal that decision. There is a specific statute that provides for legal redress if the zoning administrator makes a decision that someone believes injuriously affects their legal rights or if the person is aggrieved. The appeal was filed and there was a supplement to the appeal, but in neither of those papers were the words "injuriously aggrieved", "injuriously affected" or "aggrieved" used. Those are the words in the statute. The attorneys for the Brighton Center and Diocese of Covington have filed with this Board a challenge to the jurisdiction of this board to hear the appeal because of the lack of those specific words from the statute being in the appeal papers.

In response, Mr. James Morgan supplied this Board with a letter challenging the assessments arguments that the attorneys for Brighton Center and Diocese of Covington have made. He has replied that they have in fact properly perfected the appeal, and believes the court cases that the Diocese of Covington and Brighton Center relied on are not applicable to this particular case because they review those same words from a different statute.

Mr. Duncan continued that, as attorneys, we rely on precedents of the Courts of Appeals in Kentucky to give guidance on what statutes mean and how different facts, as applied to different statutes, might render a different outcome. Lawyers are always free to argue one side and the other. We are here to determine if this Board does have jurisdiction to hear this appeal. Just within the last 24 hours, there were two more letters filed by the attorneys on either side of this issue. The Diocese of Covington and Brighton Center filed one last evening rebutting the legal points contained in Mr. Morgan's letter to the Board, which was just received today because of the way it was routed through the emails. We also just received fresh off the presses, a letter Mr. Morgan issued earlier today. We believe, as the attorneys for the Board, that those four letters thoroughly and eloquently outline the legal issue before the Board.

Mr. Duncan stated that he did not want to keep the audience waiting, but it is very important that the Board be given a few minutes to review the latest correspondences exchanged last evening and earlier today so that they will have reviewed all the information provided before they start deliberating on this issue. With this, the Board began reviewing the latest information.

Mr. Duncan stated that for this meeting he has marked the following as exhibits to this meeting to be made part of the record of this meeting and to be attached to the minutes:

- 1st. Exhibit A: the appeal document that was filed with the Board;
- 2nd. Exhibit B: the supplement to the appeal document that was filed;

- 3rd. Exhibit C: the letter that the attorneys for Brighton Center and Diocese of Covington sent to initiate this legal review of whether or not the Board has jurisdiction to hear this appeal;
- 4th. Exhibit D: the email from Mr. Morgan, the attorney for the appellant, indicating that he is intending to file a letter to rebut the legal argument that was made in the letter from the Brighton Center and Diocese of Covington;
- 5th. Exhibit E: the email that I wrote back to Mr. Morgan saying that we would like to have his letter as soon as possible because we planned on supplying it to the Board so they would have it for tonight's meeting;
- 6th. Exhibit F: the letter from Mr. Morgan rebutting the arguments presented in the letter from the Brighton Center and Diocese of Covington attorneys;
- 7th. Exhibit G: the rebuttal letter that Brighton Center and Diocese of Covington attorneys filed just last night that the Board received today; and
- 8th. Exhibit H: the letter hot off the presses that I mentioned from Mr. Morgan filed just prior to the meeting tonight.

The audience was silent as the Board reviewed the information. Mr. Bachmann asked the Board if they had finished reading the letters. All acknowledged they had read the letters. Mr. Bachmann asked Mr. Duncan if he had any additional comments to make before the Board began their discussion. Mr. Duncan stated he had no additional comments at this time unless the Board had specific questions of him. Mr. Bachmann reminded the Board that they had just one single issue before them tonight and it is to determine if the Board has jurisdiction to hear the appeal.

Mr. Bachmann asked if there were any questions of legal counsel or if they felt they needed any additional information before they could discuss the issue at hand. Mr. J. Williams stated he did not know who to direct his question to. Mr. Bachmann advised him to address his question to legal counsel and if Mr. Duncan could not answer then we can determine who should be providing the answer. Mr. J. Williams stated he is not an attorney, so that may account for his confusion, but he has reviewed the papers and still does not see the "injurious" or "aggrieved" in the letters other than these cases back and forth. Mr. Duncan answered that would be because the statute that is applicable here starts out by saying "Appeals to the board may be taken by any person or entity claiming to be injuriously affected or aggrieved by an official act", in this case the decision by the Zoning Administrator.

Kentucky Revised Statutes (KRS) reads:

100.261 Procedure for all appeals to board.

Appeals to the board may be taken by any person, or entity claiming to be injuriously affected or aggrieved by an official action, order, requirement, interpretation, grant, refusal, or decision of any zoning enforcement officer.

100.347 Appeal from board of adjustment, planning commission, or legislative body action -- Final action defined.

- (1) Any person or entity claiming to be **injured or aggrieved** by any final action of the board of adjustment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the action of the board of adjustment, lies.

Mr. Duncan stated that the attorneys for Brighton Center and Diocese of Covington claim those words need to be specifically stated in the appeal documents. They cite a number of court cases that have reviewed similar language relating to an appeal from a Board of Adjustment or Planning and Zoning Commission to a Circuit Court. In those cases, the Court ruled that if those words are not present it constitutes a fatal defect in the appeal. The papers that you have in front of you argue on behalf of the Brighton Center and Diocese of Covington that the statute that applies here is so similar that those legal precedents should be binding for an appeal from a Zoning Administrator to a Board of Adjustment. Mr. Morgan and his group, on behalf of the appellant, argue that the cases cited do not apply because they concern an appeal from a Board of Adjustment or Planning and Zoning Commission to a Court. And even if they did, the way I understand their argument, they included it in the appendix or amendment to their appeal by listing all of the things that they believe Cindy Minter got wrong and that, if we were to allow the use of the property as proposed by Brighton Center, it would violate zoning and so on. Therefore, the injuriously affected needed to satisfy this Board's ability to hear this appeal, even though they have not used those specific words, were demonstrated by what they supplied in the appeal.

Mr. Bachmann asked Mr. Duncan to confirm that it is his personal opinion, and the opinion of the Courts at least in several cases, that those words must specifically be included in the appeal. Mr. Duncan advised that those Courts have said "yes" that it is required and that is my opinion as well. In the context of an appeal, from the Board of Adjustment or Planning and Zoning Commission to a Court interpreting almost exactly the same language, it is a fatal flaw to not include those words.

Mr. Smith added that, to clarify the logic behind the court cases, is that an appeal of an administrative decision is repeatedly referred to as a matter of "legislative grace" and is not a "right". Since it is a matter of legislative grace, the courts say you must strictly adhere to the language of the statutes. The established case law specifically says that, with respect to the administrative appeal in the Spencer County case from the Board of Adjustment to the Court of Appeals, you must use the magic words "*injured or aggrieved*". Otherwise, it is a fatal flaw because the statute is what gives you the authority to appeal. Even though the present appeal is under a different statute, it is still a matter of legislative grace to file an administrative appeal and it still uses the same language. That phrase has not been alleged in this application for the appeal to the Board.

Mr. Bachmann asked the Board if there were any other questions. Mr. M. Williams asked legal counsel to clarify. The cases that were cited by both parties dealt with KRS 100.347, which are claims to appeal to the Circuit Court, but the KRS 100.261 language is almost identical to the language in KRS 100.347, which deals with appeals from the Board to the Circuit Court. Does

counsel have any knowledge of any cases that interpreted KRS 100.261 differently? Mr. Duncan replied that he had no knowledge of any such cases that addressed KRS 100.261 directly. Mr. M. Williams asked if Mr. Duncan agreed that the language is essentially the same. Mr. Duncan replied that we have been referring to the language in KRS 100.261 and the statute that applies here says that the appeal can be *“taken by any person, or entity claiming to be injuriously affected or aggrieved”*. Here are the buzzwords, claiming to be *“injuriously affected or aggrieved”*. The statute that the courts have reviewed states that any person claiming to be *“injured or aggrieved”* so the only difference is that instead of “injured” our statute states “injuriously affected”. Those words are so close to being the same that it goes back to the precedent that the courts should interpret them the same way.

Mr. Smith referred back to what he stated previously. He is not aware of any court cases either, but the analogy should apply in the sense that this is an administrative appeal and it is a matter of legislative grace; it is very apt to follow the dictates of the statute; and since this is a straight up administrative appeal, it is in the same context. Whether it is an appeal of the Board of Adjustment final action to the Circuit Court, or an appeal of the Zoning Administrator decision to the Board of Adjustment, you have to apply the same logic that has been cited. In particular, the Spencer County case decision would equally apply to KRS 100.261 to the Zoning Administrator decision appealed to the Board of Adjustment. I see no difference in having the courts analysis apply here.

Mr. Bachmann asked if there were any other questions or comments. There being none, Mr. Bachmann called for a motion. Mr. M. Williams asked if, in Mr. Morgan’s writings, he suggest that his client or the applicant or appellant did in fact identify injury or aggrievement because he does see that in his papers is he missing something. Mr. Bachmann referred Mr. M. Williams to the “attachment” to the application that detailed the list of items upon which Mr. Morgan filed his appeal. Mr. M. Williams asked if that was it. Was there anything else submitted? Mr. Bachmann confirmed that no other information other than what was submitted in his letter in rebuttal of the attorneys for Brighton Center and the Diocese of Covington.

Mr. Duncan advised Mr. Bachmann that Mr. Morgan was attempting to get his attention. Mr. Bachmann recognized Mr. Morgan. Mr. Morgan stated that he wanted to make sure procedurally what was occurring this afternoon. Prior to the meeting, Mr. Morgan talked to Mr. Duncan, Ms. Stewart and Mr. Kolentse. They were advised that the applicant would not be able to make any presentation to the Board. Mr. Bachmann acknowledged this was correct. Mr. Morgan stated that the applicant would like to make an argument, but if the Board has made the decision that this is not what this meeting is for and we are not permitted to make an argument then he understands that is the Board’s decision. Mr. Morgan just wants to make it clear for the record that counsel is not permitted to make presentations for either side of this issue. Mr. Bachmann stated that was correct. Neither side is permitted to make arguments as the Board has the information they need to determine this one legal aspect that is being discussed presently.

Mr. Bachmann asked the Board if there were any other questions or comments for discussion. This is more or less a matter of procedure. Has the procedure been followed or not? Mr. Duncan referred the Board to the Agenda. If the Board feels that they have all the information they need from the legal briefs and discussion here tonight, the Board should take action to determine if they

have jurisdiction to conduct the public hearing scheduled for October 17. Do you have jurisdiction?

Mr. M. Williams apologized for belaboring the Board, but wanted to ask one additional question. Mr. Bachmann recognized Mr. M. Williams to do so. Mr. M. Williams stated that from the list attached to the appeal, from counsels' knowledge, would any of the items listed be qualified as a substitute for the language "injuriously affected or aggrieved". Mr. Duncan stated that based on limited case law available and interpreting the language "injuriously affected or aggrieved", my opinion is no, the appeal papers do not use those words or known substitutes of those words.

Mr. Bachmann asked if the Board felt they needed additional information or clarification on this issue. Mr. Fessler was recognized. Mr. Fessler stated that he wanted to make a motion. He knows it will be an unpopular decision, but he feels it is the only decision that can be made. Mr. Fessler made a motion based upon what has been presented, and what has been read, and I am not a lawyer by any means. On line C of the application under Appeals, it asks for a description of the action to be appealed and the reason it is being appealed. All it states on here is "appeal of decision of Cynthia Minter, Director of Planning & Zoning dated September 1, 2017, a copy of which is attached hereto." I know it seems like a technicality, but they left out the magic words. With that, I make a motion that the Board has no jurisdiction to hear this appeal or conduct any subsequent hearings and render any decision. I base my motion upon what we have heard, the statutes of case law submitted, the statutory requirements, discussion among the Board and the advice of Legal Counsel. Mr. J. Williams seconded the motion. Mr. Bachmann asked if there were any questions or comments on the motion. There being no other comments or questions, Mr. Bachmann called for a roll call vote. A roll call vote found Mr. Fessler, Mr. J. Williams, Mr. M. Williams and Mr. Bachmann in favor of the motion. Mr. Mason opposed the motion. No one abstained. Motion passed.

Mr. Bachmann announced that the motion has passed and it is the decision of this Board that we have no jurisdiction to hear the appeal. Mr. Duncan added that based upon the motion that just passed and the statement Mr. Bachmann just made, it will be necessary to cancel the hearing for next week. Mr. Bachmann asked if that was an administrative act or a motion would be required. Mr. Duncan stated, for clarity on the records, it would be best if a motion were made. Mr. Bachmann called for a motion. Mr. Fessler made a motion to cancel the public hearing scheduled for October 17. Mr. M. Williams seconded the motion. Mr. Bachmann called for a roll call vote. A roll call vote found Mr. Fessler, Mr. J. Williams, Mr. M. Williams and Mr. Bachmann in favor of the motion. Mr. Mason opposed the motion. No one abstained. Motion passed.

Mr. Bachmann announced to the audience that the motion has passed and therefore the public hearing scheduled for October 17 has been cancelled.

Mr. Bachmann asked legal counsel if any other business needed to be performed. Mr. Duncan stated that due to the Open Meetings Act, no other business could be performed tonight. Mr. Bachmann called for a motion to adjourn. Mr. J. Williams made a motion to adjourn. Mr. Fessler seconded the motion. Mr. Bachmann called for an oral vote. An oral vote found Mr. Fessler, Mr.

J. Williams, Mr. M. Williams, Mr. Mason and Mr. Bachmann in favor of the motion. No one abstained. Motion passed.

The meeting adjourned at 5:29 PM.

Prepared by:

Approved:

Kirk Hunter
Principal Planner

Scott Bachmann
Chair