



OFFICE OF THE KENTON COUNTY ATTORNEY • HON. STACY H. TAPKE

KCA Memorandum 2015-11

October 21, 2015

Kenton County Fiscal Court
Kenton County Administration Bldg.
303 Court Street
Covington, KY 41011

Subject: Summary of Zoning in Kenton County

Discussion

I. The Planning Commission & the Comprehensive Plan

Cities and Counties in Kentucky are required to create a “planning unit” before commencing with planning and zoning.¹ In Kenton County, the Fiscal Court and cities created a joint planning unit, the Kenton County Planning Commission, (originally known as the Kenton County and Municipal Planning Commission) which is comprised of twenty members. 15 cities appoint one member each to the Commission, Covington appoints three members, and the Fiscal Court appoints two members. Each member serves for a four year term.

KRS Chapter 100 requires that before planning and zoning can be undertaken the Commission must adopt a “Comprehensive Plan.” The purpose of the Comprehensive Plan is to provide guidance as to the physical, economic, and social development of the area. The Comprehensive Plan must have a plan for land use, transportation and community facilities. The Comprehensive Plan must be reviewed and re-adopted, with or without amendments, every five years.² Once a Comprehensive Plan is adopted by the Planning Commission, the member jurisdictions enact their own zoning laws. Planning and Development Services of Kenton County (formerly NKAPC) provides uniform model ordinances for the member jurisdictions to facilitate as much uniformity across the county as possible. Because initially Campbell County was a part of the jurisdiction of PDS it too has adopted the general format and terms of the “model

¹ KRS 100.113

² The current comprehensive plan is branded as “Direction 2030”

ordinance.” Planning and zoning power ultimately lies with the cities and county elected officials. While the Planning Commission lays out the comprehensive plan it must be adopted by the cities and county. Likewise, the Planning Commission makes recommendations to the cities and county as to zoning text and maps, however the final zoning power remains with each local government.

II. Kenton County Zoning Ordinance

The Kenton County zoning ordinance delineates and defines twenty-eight possible zones for which unincorporated Kenton County may be divided. The zones can be more generally described as agricultural, residential, commercial, or industrial. The zoning ordinance also includes three “overlay” zones which may be superimposed over certain residential zones to allow mobile home parks and other planned unit developments.

The zones are then overlaid onto the official zoning map of unincorporated Kenton County, in concert with the Comprehensive Plan recommended by the Planning Commission and adopted by the Fiscal Court. In unincorporated Kenton County, the vast majority of the map is zoned as Agricultural-One (A-1) Zone which, for example, allows for agriculture and single family residences as permitted uses, and churches, government offices, veterinary offices, schools, funeral homes, etc., as conditional uses. The other zones which comprise the zoning map of unincorporated Kenton County are Rural Commercial (RC), Neighborhood Commercial (NC), Rural Industrial (I-6), Eco-Commerce Park (ECP), and several different residential zones which vary based on the different housing density permitted.

Each zone consists of a list of “Permitted Uses,” “Accessory Uses,” and in some cases, “Conditional Uses.” Each zone also sets out standards for lot size, building heights, parking, lighting, etc.

A. Permitted Use

A permitted use within the zoning code is a use which is specifically allowed and upon application to the zoning administrator (an assignment delegated by interlocal agreement to PDS), is granted a zoning permit.

B. Conditional Use

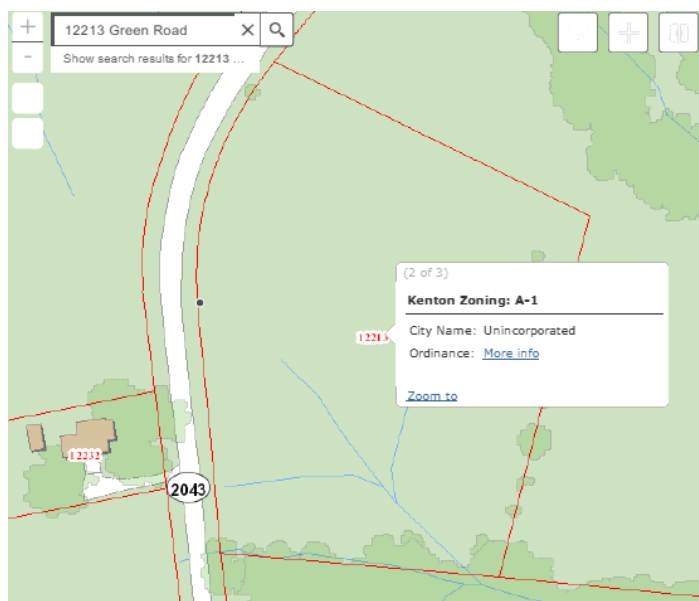
A conditional use is one that is essential to, or promoting of, the public health, safety, or welfare, but would impair the integrity and character of the zone in which it is located without restrictions on its location, size, etc. A property owner wishing to engage in a conditional use must apply to the Kenton County Board of Adjustment for a “Conditional Use Permit.” The zoning staff at PDS will make a recommendation as to whether or not the conditional use should be approved, however, the Board of Adjustment has the ultimate authority to grant or deny the application for a conditional use permit.

The Board of Adjustment may grant a conditional use permit when the applicant can establish beyond a reasonable doubt that the proposed use is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood and such use will not be detrimental to the health, safety, or general welfare of residents or workers in the vicinity. The Board of Adjustment may also place restrictions on the conditional use that are either prerequisite to the initial use by the applicant or continue for as long as the conditional use continues. It is appropriate for a continuing policing of the conditions to ensure that the “conditions” are maintained. If they are not the use could be discontinued and the zoning permit revoked.

C. Accessory Use

An accessory use includes customary accessory buildings which serve the principal building or use (i.e. a valet stand near a restaurant), or those expressly allowed in the zone, for example, signs and fencing. The accessory use must be included on the initial application for a zoning permit. If an application is denied by the zoning administrator the applicant may appeal to the Board of Adjustment for review of the decision.

Example – X owns a 3.66 acre parcel at 12213 Green Road in unincorporated Kenton County. He currently uses the property as passive farmland, but would like to build a new residence with a large riding pen and stable for his horses. He is also a veterinarian and would like to move his office to a separate building he will construct on the property. He pulls up the Kenton County Zoning Map³ and finds his parcel, which is zoned as Agricultural One (A-1).



X then finds the applicable section of the zoning ordinance⁴ which allows single family residences and stables as permitted uses. A fence is an accessory use, regulated by another section of the zoning ordinance, but the only relevant limitation on fencing in an agricultural zone is a maximum height of 96 inches.⁵ He then discovers that his veterinary office is a conditional use which will require the review of the Board of Adjustment. He submits an application for a zoning permit which includes a map of the proposed structures and fencing along with the applicable setbacks from the roadway and

property boundaries. Because a portion of his use will be conditional, he applies to the Board of Adjustment for a conditional use permit.

The staff at PDS, as Zoning Administrator reviews and recommends approval of the application on the grounds that the veterinary service will be beneficial to the area since X specializes in equine veterinary medicine, and the traffic impact on the residents nearby will be minimal since Green Road connects KY-16 to KY-25. The Board of Adjustment reviews the application and recommendation of the Zoning Administrator and agrees with their finding and approves the conditional use. Assuming X meets the remaining procedural requirements, the Zoning Administrator will then grant a zoning permit for the remaining portions of the property as they are permitted uses. X may then use the zoning permit and approved site plan, among other requirements, to obtain his building permits and begin construction on his property.

³ <http://www.pdkc.org/services/kenton-county/zoning-ordinances/unincorporated-kenton-county.aspx>

⁴ Kenton County Zoning Ordinance §10.1

⁵ Kenton County Zoning Ordinance §13.2

III. Exceptions to the Zoning Code – Variances and Non-Conforming Uses

Variances and Non-Conforming uses operate to except certain use of property from limited portions of the zoning ordinance. A variance is a permissive exception to certain requirements of the zoning ordinance, while a non-conforming use is allowed to continue despite its not otherwise being permitted in the zone in which it is located. Non-conforming uses occur when the zoning is changed in a way that renders it inconsistent with the existing use.

A. Variances

A variance is a departure from the dimensional requirements of the zoning ordinance pertaining to the height or width or location of structures within a parcel or the size of the yards or open spaces required by the zoning ordinance. A variance can never permit the use of any land which is not permitted by the zone in which the use is located (i.e. a variance cannot be used to change an area from residential zone to a commercial zone, or from low-density residential to high-density residential). In most instances, variances are requested for the purposes of adjusting set back requirements for the construction or expansion of structures. Similar to an application for a conditional use, an application for a variance is first reviewed by the staff at PDS and is submitted to the Board of Adjustment for a final determination on the merits.

In order to grant the variance, the Board of Adjustment must determine that the variance is not adverse to the public health, safety or welfare, will not fundamentally alter the character of the area, will not cause a hazard or nuisance to the public, and will not unreasonably circumvent the requirements of the zoning regulations. The Board of Adjustment must consider whether there are special circumstances which do not generally apply to other land in the area, whether the strict application of the zoning ordinance would deprive the property owner of reasonable use of the land or create unnecessary hardship, and whether the circumstances necessitating a variance were the result of actions of the property owner subsequent to the adoption of the zoning ordinance. The Board of Adjustment “shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant...” KRS 100.243(2).

B. Non-Conforming Uses

Any building, sign, fence, or other structure which lawfully existed before the adoption or amendment of the zoning ordinance, but which does not currently conform to the regulations contained in the zoning ordinance pertaining to the zone in which it is located is a “legal non-conforming use,” as opposed to an “illegal use,” i.e., a use that was never permitted. A non-conforming use can arise through the amendment of the text of the zoning code, or by amending the zoning map which changes a location’s zone from one type of zone to another.

A non-conforming use may continue in perpetuity, even if sold or transferred to another user, so long as the use continues in the same manner as it was at the time it originally became non-conforming, or upon application to the Board of Adjustment to allow for a change to another non-conforming use.⁶ Any change from one non-conforming use to another must be at least as restrictive or more restrictive on the

⁶ The transfer of a use from one non-conforming use to another requires that the new non-conforming use generate less traffic and pollution, and be more in character with the existing neighborhood and comprehensive plan than the last previous non-conforming use.

property, i.e. must cause less disruption to the surrounding neighborhood, and must be more characteristic of the surrounding community and comprehensive plan. Although the owner may perform ordinary repairs on a non-conforming building, a non-conforming use cannot be expanded, enlarged, or extended. Further, the Board of Adjustment may terminate the right of a property owner to continue an otherwise legal non-conforming use in the event the structure is damaged and the cost of repair exceeds 50% of the market value of the structure, or the non-conforming structure is determined to be detrimental to the public health, safety, or general welfare.

Example – Y owns a property along KY-17 at 12198 Madison Pike which is used for a restaurant and was so used prior to the adoption of the zoning code. The current zoning map designates the location of Y’s property as residential, and the surrounding neighborhood is used as such. Y’s current use of the



property is a legal non-conforming use, and he may continue with the same use and physical space.

Later, in order to increase his business, Y wants to install an outdoor patio to expand the number of tables and to allow for bands and other entertainment during the warmer months. Without obtaining any zoning permits he proceeds to construct the concrete patio which expands the non-conforming structure, and places the building well past the minimum set back requirements from KY-17. PDS as the Zoning Administrator issues a stop-work order.

Y then submits new site plans to the Board of Adjustment requesting a change in non-conforming use and a variance from the set-back requirements to allow for the patio expansion. The Board of Adjustment denies the application for a change in the non-conforming use as “the Board of Adjustment shall not allow the enlargement or extension of a non-conforming use beyond the scope and area of its operation at which time its use became non-conforming.”⁷ Further, such a change in non-conforming use would not be more restrictive on the property as it would theoretically increase traffic and noise within the neighborhood. The Board of Adjustment also denies the application for a variance from the set back requirements as the property owner because the owner willfully violated the zoning ordinance in proceeding with construction without the proper permits.⁸ The property owner may then appeal the adverse decision of the Board of Adjustment to Circuit Court.

⁷ Kenton County Zoning Ordinance §18.6 (D)(1)(f) & §9.12(B)(1)

⁸ Kenton County Zoning Ordinance §18.6 (A)(3)

IV. Amending the Zoning Ordinance

When a property owner is unable to, or wishes not to use their property as provided within the bounds of the current zoning ordinance it may be necessary and appropriate for the Fiscal Court to amend the text of the zoning ordinance, or the official zoning map. Both types of amendments can have lasting effects on the community, and therefore any proposed amendment should be carefully scrutinized before adoption.

A. Text Amendment

An amendment of the zoning text which changes the written words of the zoning ordinance is a text amendment. While the definition seems elementary, in the parlance of planning and zoning the term “text amendment” usually involves a change to a permitted or conditional use within a particular zone or zones (i.e. adding “child care facilities” as a permitted use in the Rural Commercial (RC) Zone).

An application to amend the text of the zoning ordinance may be initiated by the Fiscal Court or the Kenton County Planning Commission. Regardless of which entity initiates that amendment, the Planning Commission must review the proposal and make a recommendation as to whether the amendment should be approved or disapproved prior to submission of the amendment to the Fiscal Court. At least one public hearing must be held by the Planning Commission within 45 days of the application, and when the Fiscal Court is the applicant, make a recommendation within 60 days of the application. The Fiscal Court may then adopt the proposed text amendment by simple majority.

B. Map Amendment

An amendment to the zoning map which changes the type of zone for a particular physical location is a map amendment (i.e. changing an area zoned as Residential One (R-1) to a Neighborhood Commercial (NC) zone). As a general rule, a zone within the zoning map may not be less than five acres, subject to certain exceptions. A map amendment may be initiated by the Fiscal Court, the Planning Commission, or with an owner of property within the area proposed to be amended. Because a map amendment may turn currently permitted uses into non-conforming uses and may drastically change the density and characteristics of the area, additional notice requirements are in place to ensure those directly impacted have an opportunity to be heard on the proposed amendment.

1. Notice Requirements

Like a text amendment, the Planning Commission must hold a public hearing on the proposed amendment within 45 days of the application. When the Fiscal Court or Planning Commission initiates the map amendment process, they are required to give at least 30 days written notice of the hearing to every property owner within the area proposed to be changed. When a property owner initiates the map amendment process, the Planning Commission must post a notice at the site of the property affected showing the current zoning classification of the property, the proposed classification, and the date, time, and location of the public hearing. Additionally the Planning Commission must give at least 14 days written notice to every property owner within the area proposed to be changed.

2. Approval Recommended by the Planning Commission

Within 60 days of the application, the Planning Commission shall make findings of fact and a recommendation of approval or disapproval of the proposed map amendment to the Fiscal Court. If the Planning Commission recommends approval of the amendment, they must find that the amendment is in agreement with the comprehensive plan, or make specific written findings that (1) the existing zone is

inappropriate and that the proposed zone is appropriate; and (2) there have been major economic, physical, or social changes within the area which were not anticipated at the time the comprehensive plan was adopted, and have substantially altered the basic character of the area.⁹ The Fiscal Court has 90 days in which to adopt or override the recommendation of the Planning Commission. Should the Fiscal Court take no action on a map amendment that has been recommended for approval by the Planning Commission the map amendment is deemed to have been passed by operation of law.

3. Disapproval Recommended by the Planning Commission

As set forth above the Fiscal Court has the final decision relative to the decision of adopting or rejecting a request for a map amendment. Should the Planning Commission find that the applicant failed to meet its burden under §17.0(E) of the Kenton County Zoning Ordinance, the Fiscal Court has 90 days in which to reject the recommendation of the Planning Commission, upon a majority vote of the Fiscal Court, and approve the request. The Fiscal Court may hold its own public hearing in order to obtain more direct input from all parties relative to the decision. Otherwise, the Fiscal Court must rely upon the record submitted by the Planning Commission to make its decision. In any event the Fiscal Court must find that the amendment is in agreement with the Comprehensive Plan, or make specific written findings that 1) the existing zone is inappropriate and that the proposed zone is appropriate; and (2) there have been major economic, physical, or social changes within the area which were not anticipated at the time the comprehensive plan was adopted, and have substantially altered the basic character of the area. Because there is some concern that the elected bodies deliberately fail to timely act upon request for map amendments, should the Fiscal Court fail to take action within 90 days of the recommendation, the recommendation of the Planning Commission becomes final.

Conclusion

Zoning issues are highly technical and the foregoing summary only begins to scratch the surface of the KRS Chapter 100, but should be a helpful starting point for any zoning issues that arise. All examples are purely for descriptive purposes and the properties used as the subjects in the examples are not currently the subject of zoning applications or enforcement proceedings as depicted. An attached chart lays out the process for a text or map amendment to the zoning ordinance for quick reference.

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⁹ Kenton County Zoning Ordinance §17.0(E)

