

TO: Knoxville-Knox County Planning Commission
FROM: Amy Brooks, AICP, Executive Director
DATE: 6/02/2022
SUBJECT: 6-K-22-OA Agenda Item #51

The Knox County Commission has requested that the Knoxville-Knox County Planning Commission consider and make recommendations on certain amendments to the Knox County Zoning Ordinance, as specifically set out in Exhibit 1, to provide for use on review appeals to a court of competent jurisdiction. The following sections were included in the proposed amendment requests.

Section 6.50.07 and 6.60.03(C) currently provide those decisions of the Planning Commission regarding uses on review may be appealed to the Board of Zoning Appeals (“BZA”)

In summary form, Tennessee Code Annotated § 13-7-109 sets forth the following powers granted to a Board of Zoning Appeals:

- (1) Hear and decide appeals claiming error in any order, requirement, permit, decision, or refusal by any zoning enforcement official.
- (2) Hear and decide (in accordance with the zoning or other ordinance) requests for:
 - (a) special exceptions
 - (b) interpretation of the zoning map
 - (c) decisions on other questions
- (3) Hear and decide appeals for variances from the strict application of the zoning ordinance on the grounds that the strict application would be by reason of
 - (a) Exceptional narrowness, shallowness or shape of a specific piece of property at the time of the enactment of the zoning regulation, or

(b) other extraordinary and exceptional situation or condition of such piece of property, the strict application of the zoning regulation would result in

(1) Peculiar and exceptional practical difficulties, or

(2) Exceptional or undue hardship, upon the owner of the property.

(4) Such relief must be given without substantial detriment to the public good and without substantially impairing the intent and purpose of the zoning plan and zoning ordinance.

A copy of the full text of the statute is attached hereto.

A commonly accepted principle is that the chief legislative body cannot give the Board of Zoning Appeals more power than it is given under the enabling statute governing the BZA.

The Knox County Law Director's office has analyzed the application of the relevant legal authorities to the current operations of the BZA in a memorandum dated May 20, 2022. The Law Director's position, as stated in the memorandum, is that the terms "use on review" and "development plan" have been conflated for the purposes of review of applications over the years. Accordingly, per the memorandum, this conflation of the two terms has created a scenario in which BZA has been hearing appeals regarding both uses on review *and* development plans, though the authorizing provision in the Knox County Zoning Code at § 6.60.03 only contemplates uses on review.

Accordingly, this interpretation of the relevant provisions will likely require changes to the application process for matters considered by Planning. Any changes necessary to align administrative practices with the code, such as how the application process should be revised, will occur over the next couple of months in consultation with the County's Zoning Administrator and legal counsel.

The proposed ordinance change also includes amendments to SECTION 1. Appendix A, entitled "Zoning," Article 6, Section 6.40 –repealing in their entirety Subsections 6.40.01, 6.40.02 and 6.40.03.



This proposed deletion would remove the County Commission’s authority to review on appeal decisions made by Knox Planning.

Per the Knox County Law Director’s memorandum (Exhibit 2, page 4), if the County Commission wishes to foreclose the possibility that it would be called upon to hear appeals of uses on review and/or development plans, the language of §6.40.01-.03 should be deleted as contemplated in the proposed ordinance.

- Exhibit 1: County Commission Resolution
- Exhibit 2: Knox County Law Director’s Memorandum dated May 20, 2022
- Exhibit 3: Tennessee Code Annotated § 13-7-109



RESOLUTION

A RESOLUTION OF THE COMMISSION OF KNOX COUNTY, TENNESSEE, REQUESTING THE KNOXVILLE-KNOX COUNTY PLANNING COMMISSION TO RECOMMEND AMENDMENTS TO THE KNOX COUNTY ZONING ORDINANCE TO PROVIDE FOR USE ON REVIEW APPEALS TO A COURT OF COMPETENT JURISDICTION.

RESOLUTION: R-22-5-903

REQUESTED BY: COUNTY MAYOR AND COMMISSIONER SMITH

PREPARED BY: KNOX COUNTY LAW DIRECTOR'S OFFICE

**APPROVED AS TO FORM AND CORRECTNESS: _____
DIRECTOR OF LAW**

**APPROVED: _____
DATE**

**VETOED: _____
DATE**

**VETO OVERRIDE: _____
DATE**

MINUTE BOOK _____ PAGE _____

WHEREAS, the zoning ordinances for Knox County are codified at Appendix A of the Knox County Code (the "Zoning Ordinance"); and

WHEREAS, Article 4, Section 4.10, Section 2 of the Zoning Ordinance provides for Standards for Uses on Review; and

WHEREAS, Section 6.50 of the Zoning Ordinance provides procedures for authorizing uses on review; and

WHEREAS, under these provisions uses on review are reviewed and approved by the Knoxville-Knox County Planning Commission; and

WHEREAS, Section 6.50.07 and 6.60.03(C) currently provide that decisions of the Planning Commission regarding uses on review may be appealed to the Board of Zoning Appeals (the “BZA”); and

WHEREAS, Section 6.40.01 through 6.40.03 additionally grant authority to the County Commission to engage in appellate review of Planning Commission decisions; and

WHEREAS, the Planning Commission has full time staff and expertise in applying the rules and regulations regarding uses on review not shared by the BZA or County Commission; and

WHEREAS, it is in the public interest that any appeal of these actions by the Planning Commission be to a Court of competent jurisdiction rather than to another county governmental entity; and

WHEREAS, the Knox County Commission desires to request the Knoxville-Knox County Planning Commission to recommend amendments to the Zoning Ordinance for this purpose.

NOW THEREFORE BE IT RESOLVED BY THE COMMISSION OF KNOX COUNTY AS FOLLOWS:

The Knox County Commission hereby requests that the Knoxville-Knox County Planning Commission consider and make recommendations on certain amendments to the Knox County Zoning Ordinance, as specifically set out in Exhibit A, to provide for use on review appeals to a court of competent jurisdiction.

BE IT FURTHER RESOLVED, that the County Clerk is hereby requested to forward a copy of this Resolution to the Executive Director of Knoxville-Knox County Planning to make her aware of the Commission’s request with respect to this matter.

BE IT FURTHER RESOLVED, that if any other notifications are to be made to effectuate this Resolution, then the County Clerk is hereby requested to forward a copy of this Resolution to the proper authority.

BE IT FURTHER RESOLVED, that this Resolution is to take effect from and after its passage, as provided by the Charter of Knox County, Tennessee, the public welfare requiring it.

Presiding Officer of the Commission Date

County Clerk Date

Approved: _____
County Mayor Date

Vetoed: _____
County Mayor Date

MEMORANDUM

**TO: ANDREW DAVIS, POLICIES AND STRATEGIC PLANNING
COORDINATOR**

**FROM: DAVID BUUCK, KNOX COUNTY LAW DIRECTOR
MIKE MOYERS, SENIOR DEPUTY LAW DIRECTOR**

DATE: MAY 20, 2022

**RE: BZA JURISDICTION REGARDING “USES ON REVIEW” VS.
“DEVELOPMENT PLANS”**

Recently the Mayor has proposed an Ordinance removing from the Board of Zoning Appeals (hereinafter, “BZA”) the power to hear appeals from Knoxville-Knox County Planning (hereinafter “the Planning Commission”) on uses on review. In discussions of the proposed Ordinance at the County Commission work session, it became clear that the concern which the Mayor seeks to address is appeals to the BZA of what are essentially subdivision concept plans. As will be detailed below, over time there has apparently been an unfortunate conflation of the terms “use on review” and “development plan” which has resulted in an assumption that the BZA has authority to hear appeals regarding both. As this Memo will conclude, this is not the case.

“USE AS OF RIGHT” vs. “USE ON REVIEW”

To begin, we should first examine the question of “uses as of right” vs. “uses on review.” For this purpose, we will take as an example the § 5.11, the RA zone, a very common residential zone within the County. §5.11.02 lists “Uses Permitted.” These uses in an RA zone do not require any review or approval from any administrative body, so long as they meet the other general requirements of the code, such as setbacks, etc. These include houses, mobile homes, day care homes and others. In contrast, §5.11.03 lists “uses on review.” These uses in the RA zone, including group homes, duplexes, golf courses and others, require review and approval by the Planning Commission before they may be permitted in the zone, pursuant to Article 4, §2 of the Zoning Code, “Development Standards for uses permitted on review.”

It is important to note that with few exceptions, every zone in the Zoning Code has certain uses that are permitted as of right and uses that are permitted on review.

“USES ON REVIEW” vs. “DEVELOPMENT PLANS”

Making matters more complicated, Knox County has created certain zones that require Planning Commission review before any development is allowed within them. To illustrate, we will examine §5.13, the PR or “Planned Residential” zone, an increasingly common residential zone within Knox County. §5.13.15 (B) provides that:

No building permit shall be issued for the development of any property within a PR Planned Residential Zone until a written application for review and approval of **the development plan** (emphasis added) has been filed with the planning commission.

It is vital to point out here that within the PR zone, like most other zones in the Zoning Code, there are “permitted uses” (§5.13.02) and “uses permitted on review” (§5.13.03). Thus, we can see that within the PR zone, there are two kinds of review the Planning Commission may be engaged to consider: “uses permitted on review” and/or “development plans.” This same situation may be found in other “planned zones” in Knox County, such as §5.34 “Shopping Center,” §5.50 “Business and Technology Park,” and §5.51 “Employment Center,” among others. In these zones, building permits may not be issued until an application and **development plan** are submitted for review by the Planning Commission. Also, in most of these zones, some uses are permitted as of right, while others must be separately approved by the Planning Commission as a “use on review.”

BZA AUTHORITY AND JURISDICTION

The Board of Zoning Appeals is mandated by Tennessee statute in Chapter 7 of Title 13 regarding county zoning. Its powers are set forth at §13-7-109, to wit:

The board of appeals has the power to:

- (1) Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by the county building commissioner or any other administrative official in the carrying out or enforcement of any ordinance enacted pursuant to this part;
- (2) Hear and decide, in accordance with the provisions of any such ordinance, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such board is authorized by any such ordinance to pass; and
- (3) Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the regulation or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under such sections would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property,

authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship; provided, that such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinances.

Tenn. Code Ann. § 13-7-109. These powers are reflected in the Knox County Zoning Code at §6.60.03, with an important addition: §6.60.03(C), which reads as follows:

C. To hear and decide in accordance with the provisions of Article 4 “Supplementary regulations,” Section 2 “Development standards for uses permitted on review” and Article 6. “Administration, enforcement and interpretation,” section 6.50, “Procedure for authorizing uses permitted on review” of this ordinance, appeals from the [planning commission] of decisions regarding **use-on-reviews.**”

It is important to note that nowhere in this section is the BZA empowered to hear appeals of **development plans**. The BZA jurisdiction is limited to “uses-on-review.”

Now turning to §6.50 “Procedure for authorizing uses permitted on review,” we see in Paragraph 2 the following: “These **development plans and uses permitted on review** shall be reviewed by the planning commission and approved, approved with conditions or denied...” Turning to §6.50.06, “Approval or Denial,” we read the following: “The planning commission may approve a development plan **or** use permitted on review where it can be shown that the proposed use is in harmony with the general purpose and intent of the zoning ordinance...”

Here, as with the various planned zones in the zoning ordinance, we see a distinction drawn between “development plans” and “uses permitted on review.” Clearly, they are not contemplated to be the same thing. It is axiomatic in statutory construction that the legislature is presumed to have used its language purposefully and with intent, and that the words and language used means what they say. Here the drafters of the zoning ordinance purposefully and with intent drew a distinction between “development plans” and “uses on review.”

Now let us turn to §6.50.07, “Board of Zoning Appeals review of action of commission.” Here we find the following language:

Any person, firm or corporation aggrieved by any decision of the [planning commission] **relative to uses permitted on review** may petition the board of zoning appeals to consider the same.

Again, as we saw in §6.60.03(C), while the BZA is given authority to hear and decide appeals of Planning Commission decisions regarding uses on review, the ordinance is silent on BZA having any authority to review Planning Commission review of development plans. Under ordinary rules of statutory construction, this cannot be presumed to be an accident or oversight. We must presume that the drafters of the Ordinance intended that the BZA have the right to review one type of Planning Commission action and not the other.

COUNTY COMMISSION REVIEW

As a side matter, the proposed ordinance also would repeal the provisions of §6.40.01 through .03, which purport to grant appellate power to the County Commission. The relevant language of this section is as follows:

Any person, firm or corporation aggrieved by any decision of the [planning commission] that would not normally be considered by the county commission may petition the county commission to consider the same.

Importantly, and unlike the language regarding the BZA, no distinction is drawn in this section between uses on review and development plans; the language appears broad enough to allow the Commission to consider appeals of ANY action by the Planning Commission insofar as it falls within the ambit of the zoning ordinance.

In 1990, the Tennessee Court of Appeals decided the case of *Browning-Ferris Industries, Inc. v. Board of Commissioners*, 806 S.W.2d 181. In that case, the Court of Appeals found that the Knox County Commission had no statutory authority to reserve to itself appellate powers over decisions of the Planning Commission. This case was decided in 1990, just as the County Charter was going into effect, and it is unclear whether the change in status of Knox County to a home rule county would result in a different outcome.

Nonetheless, if the Commission wishes to foreclose the possibility that it would be called upon to hear appeals of uses on review and/or development plans, the language of §6.40.01-.03 should be deleted as contemplated in the proposed ordinance.

CONCLUSION

It would appear that over the years the distinction between uses on review and development plans has been ignored or glossed over, so that it has been presumed that BZA has appellate authority over both. As the above careful reading of the actual ordinance language demonstrates, this is simply not the case. BZA has authority to hear appeals of Planning Commission action of uses on review. These uses are set forth in Article 4, “Supplemental Regulations,” Section 2, “Performance Standards for uses permitted on review,” and within the “uses permitted on review” sections of the various zones within the zoning ordinance. The BZA does NOT have authority to review development plans, which would include any review of plans submitted within planned zones like PR outside of the review of specific uses within those zones that are denominated as “uses permitted on review.”

Thus, to the extent that the proposed ordinance which would remove from BZA the authority to hear use on review appeals is designed to streamline the process of developing residential subdivisions within Knox County, it is unnecessary, as the current language of the subdivision regulations, properly read, does not give to the BZA the authority to review subdivision development plans. Any appeal of such development plans would be to a court of competent jurisdiction under current law.

13-7-109. Powers of board of appeals.

The board of appeals has the power to:

- (1)** Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by the county building commissioner or any other administrative official in the carrying out or enforcement of any ordinance enacted pursuant to this part;
- (2)** Hear and decide, in accordance with the provisions of any such ordinance, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such board is authorized by any such ordinance to pass; and
- (3)** Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the regulation or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under such sections would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship; provided, that such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinances.