

Knox County Planning Alliance
Statement to Knoxville-Knox County Planning Commission
on Zoning Ordinance Amendment to Change County Appeals of Use on Review ([6-K-22-OA](#))
June 5, 2022

Executive Summary

Knox County is considering a zoning ordinance proposal to change the appeals process for Uses on Review (“UoR”). The amendment would require appeals to be filed via lawsuits to Chancery Court, instead of the current process of first going through the Board of Zoning Appeals (“BZA”).

The Knox County Planning Alliance (“KCPA”) believes this proposed amendment is unnecessary, without a valid rationale, and a step backwards. We urge Planning Commission not to recommend County Commission approval of the proposed zoning amendment because:

1. Removing BZA from the appeals process denies the public - community *and applicants* - of a long-standing opportunity for review of important decisions made by the Planning Commission.
2. This will not streamline and shorten the process - it will lengthen it. The BZA appeals process takes only a few months, while an appeal to Chancery Court will take about a year to obtain a decision (longer if the case is further appealed). The quicker an issue can be resolved, the better it is for the applicant and the community.
3. The BZA operates with broader authority to re-weigh the factual evidence and arguments; court is very limited in review scope.
4. Courts may only affirm or reverse decisions. BZA has additional authority to make modifications or impose restrictions on Planning Commission actions.
5. Requiring UoR appeals to go to court will put appeals out of financial reach for many community members and organizations. BZA is much more financially accessible to planning applicants and community members than litigation in court, which can easily cost tens of thousands of dollars in attorney fees and court costs. While most parties at a BZA hearing choose to have counsel, representation costs are far less expensive at BZA than in courts.
6. UoR appeals are infrequent and not gumming up the development process. There have only been a modest number of appeals filed (16) in the last 15 years. Eleven of those (69%) were resolved at BZA within a few months, without going to court.
7. If the proposed amendment is to be considered at all, it should be considered not in isolation, but instead as one element of Knox County’s current comprehensive review of land use planning and processes - [Advance Knox](#).

KCPA supports initiatives that should reduce the number of appeals being filed. We recommend updating the two ordinances at cause for most of those appeals:

- a. [Planned Residential](#) (“PR”) The Planning Commission began a comprehensive review of the PR zoning ordinance in 2021, but those efforts were stopped due to the Advance Knox process

kicking off. This review should not be put on hold for the next year or longer. Updates should also clarify how development plans are reviewed, and if they are appeal-able to a local body.

- b. Requirements for treatment centers and related uses. Such uses could be codified as use-by-right. The City of Knoxville recently did this, adopting clear and prescriptive criteria for location and requirements. These facilities provide urgently needed services for our community.

The Planning Commission should also consider a process change - increasing the amount of time, currently 6 days, between publishing the Staff Report/Recommendation and the monthly Planning Commission meeting, to allow parties adequate time to fully understand and resolve issues raised.

Conclusion: Removing the BZA from the appeals process will lengthen the time to resolve many appeals (court is slower than BZA, and BZA decisions are final 69% of the time). Requiring an appellant to file with court will put the appeals process out of reach of many neighborhood and community organizations due to the financial costs.

A local appeals process needs to be kept in place for Use on Review matters before they are sent to Chancery Court. The local appeals process needs to have 'de novo' review authority to re-weigh all of the evidence and arguments, and authority to modify Planning Commission decisions - not just affirm or overturn. The Knox County Board of Zoning Appeals has been doing a good job for the community and applicants in resolving Use on Review appeals quickly and fairly for all parties. The current appeals process to BZA should be left in place, and the zoning ordinances (such as Planned Residential) should be updated and clarified.

Rationale Provided by Resolution Sponsors

Sponsors stated that eliminating BZA from the appeals structure removes an unnecessary step in the development approval process and is necessary to address the housing crisis. The sponsors claim that BZA has only overturned 1 or 2 Planning Commission decisions in the past 15 years.

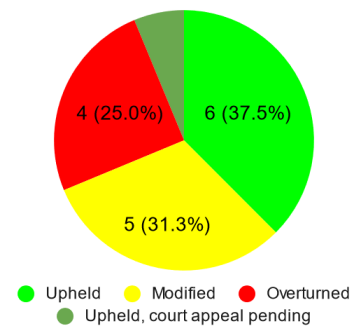
KCPA Position - the Benefit of Local ‘de novo’ Review

Sixteen (16) Use on Review appeals have been heard by BZA since 2008. (2 additional filings were withdrawn by the applicant before hearing, and one filing the County included in their data was an appeal of an administrative official’s decision, not an appeal of a Use on Review decision.)

KCPA asserts that sending Uses on Review appeals to a local board first, with ‘de novo’ hearing authority, benefits community *and applicants*. Removing this appeal authority deprives everybody of the opportunity to thoroughly examine our most complex and nuanced planning issues.

There is a need for some UoR matters to receive additional scrutiny available with appeals to BZA. Only 6 of the 16 Planning Commission decisions appealed to BZA (37.5%) have been fully affirmed by BZA and subsequent trial courts. Nine (56%) of appealed Planning Commission decisions have been modified or overturned by BZA or ultimately subsequent courts.

Final Results for Planning Commission Decisions After BZA and subsequent court appeals

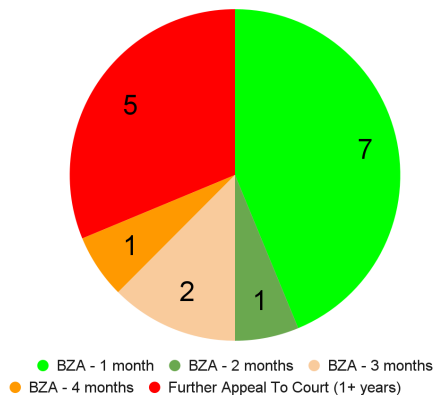


BZA made minor modifications on four appeals (25%) that improved the compatibility of the use - wins for applicants and community; a fifth modification was a significant change (denial of a marina use). **A court does not have authority to modify Planning Commission decisions.**

Speed

There have been 16 UoR appeals in 15 years - averaging about 1 per year. This is not clogging up the development pipeline when one considers that the Planning Commission considers 5+ UoR cases a month. Yes, six of the 16 appeals have occurred in the prior 24 months, but that’s statistically insignificant with the small data set of 16 cases. There were also five (5) appeals in the 24 months of 2014-2015.

Use on Review Appeal Speed



The BZA achieved a final resolution for 11 of the 16 appeals (69%), all within 4 months of first appearing on the BZA agenda. This is faster than going to court; any matter that has been further appealed to court has taken more than a year (1+ years).

If all appeals are filed directly with court, per the proposal, then it is likely most of these UoR appeals would drag on for more than a year. If it was in effect for the last 15 years, then 11 additional projects would have been subject to an additional 1+year delay. This proposal is a step backwards. This proposal does not “streamline” the process - it drags it out.

Scope of Review

Unmentioned in the proposal or case file is the standard of review of an appeal at BZA versus the standard of review at court.

The Board of Zoning Appeals holds a ‘de novo’ hearing - through fresh eyes. The BZA weighs all evidence and testimony, with latitude to determine if the use is compatible, if there are adverse impacts, if there are mitigations - the exact same criteria that the Planning Commission uses. Importantly - the board can consider additional evidence from all parties. Allowing additional evidence is necessary, because the requirement to refute an applicant's engineer is to retain another engineer and perform studies. There simply isn't sufficient time for opposition to complete that between the publishing of the case file / staff report / recommendation (with an engineer's studies) and the Planning Commission meeting six (6) calendar days later.

An appeal to court is through a writ of certiorari. The only issues raised in such a writ are whether the lower body (Planning Commission or BZA) exceeded its jurisdiction or acted illegally, arbitrarily, or fraudulently. The court determines if there is any material evidence in the record that supports the action of the administrative agency, and courts may not (1) inquire into the intrinsic correctness of the lower tribunal's decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the lower tribunal. In short - the court operates with reduced authority than BZA.

The proposed amendment eliminates the opportunity for a local board (BZA or County Commission) to further weigh the evidence under the Knox County Use on Review standards for approval. **A court has less authority to review** than a local board.

Available Actions for the Appeals Body

Courts may only affirm or reverse decisions. BZA has additional authority to make modifications or impose restrictions on Planning Commission actions, useful for quickly resolving issues. In 4 of the 16 appeals raised (25%), KCPA observed that *minor modifications* were made to applications that *improved the compatibility* of the proposed use with adjacent properties. Each of these four was resolved within 75 days of the Planning Commission hearing, a *desirable outcome* which provided a *speedier resolution than sending these to court* or filing a new Use on Review appeal:

1. 6-F-14-UR: modified setbacks to be more compatible with neighboring houses
2. 5-E-15-UR: modified how sidewalks were required to be constructed to better fit the slopes and terrain, requested by the development applicant
3. 8-D-20-UR: addressed a UoR that was approved without the required stormwater plan; added condition that stormwater plan would be provided to neighbors for comment and input
4. 12-A-20-UR: addressed access to an amenity area

Cost

Representation at BZA is less costly than at court because there are fewer filings and procedures to comply with.

The sponsors stated a position that anybody can file a writ of certiorari and would not need an attorney for appealing to court. That is true - representation is not required in Chancery Court. But the saying "A man who is his own lawyer has a fool for a client" rings true. In all but one of the UoR appeals to BZA, at least one, if not both, of the parties were represented professionally, and 100% of parties who appealed further to Chancery Court were represented. Sponsors can say representation isn't required, but historical evidence shows that parties will choose to be represented, at both BZA and Court. However, it is far less costly at BZA (anecdotally \$5K-10K) than in court (in the tens of thousands of dollars).

Fairness and Equity

The proposed change impacts community members far more than development applicants. Fourteen of the sixteen (14 of 16) appeals were filed by community members/groups.

KCPA's experience working with neighborhoods is that UoR appeals are often filed because the community doesn't have time to understand the proposal and engage with an applicant in the six calendar days between the Staff Recommendation and the monthly Planning Commission hearing. Applicants meanwhile have been working on the proposal for months, and only rarely reach out proactively to the community. Any neighborhood or community association that has participated in the Use on Review process will tell you that the short, compressed timeframe does not feel fair to them.

Filing appeals to the BZA gives applicants and community members a fast, fair and community-driven process to perform a deeper review on the most controversial of cases.

Elected Representation

The argument about BZA being unelected appointees making decisions, vs. elected judges also rings hollow. The initial application for a Use on Review is voted on at the Planning Commission by unelected individuals appointed by the Knoxville and Knox County mayors to 4 year terms. BZA members are appointed to 2 year terms by the County Commission, with 1 representative in each of the 9 commission districts. BZA members are actually more representative of the electorate and accountable to elected leaders than are members of the Planning Commission. Yes, judges are elected, but only every 8 years, and they operate with a more limited scope of authority for review than BZA or County Commission.

Addressing the Root Causes of Use on Reviews

Generally, KCPA believes the appeals process is working well. However, there is always room for improvement. Nobody wants to file an appeal - appeals are costly and result in delays and uncertainty for applicants, neighbors, community, everybody. The best way to do this is to empower the Planning Commission to make better rulings through updated, clearer, and more prescriptive zoning ordinances and preserve the existing appeal process to BZA.

How do we do that? KCPA has three proposals:

1. Resume the update to the [Planned Residential](#) zone, which generates the majority of Use on Review appeals. The Planning Commission began a comprehensive review on this zoning ordinance in 2021, but those efforts were tabled due to the Advance Knox kick off.
2. Update requirements for treatment centers and related uses. Such uses could be codified as use-by-right. The City of Knoxville recently did this, adopting clear and prescriptive criteria for location and requirements. These facilities provide urgently needed services for our community.
3. Provide more time for the community between publishing the Staff Report/Recommendation and the Planning Commission meeting. Use on Reviews are complex, dealing with traffic, landscaping, lighting, compatibility, adverse impact, and development plans from architects and engineers. The challenge for all parties - applicants, neighbors, and planning commissioners - is that there is little time to analyze those plans, raise issues, and suggest improvements. Reports and recommendations are published on Friday in the Staff Report, and the hearing is the following Thursday, which is too short a time for community members to identify and assess impacts, meet with the applicant, and then put items into writing for consideration by Planning Commissioners.

If reducing the number of Use on Review appeals filed, and the time to resolve them, is a priority, then KCPA asserts the above proposals are the ways to do that.

KCPA may be contacted at contact@kcpa.us

The Data

The below data is what KCPA could identify based on published agendas, records, recollections and minutes they could find for meetings. A complete archive of BZA minutes is not available online. KCPA and county staff exchanged lists and the data matches up.. [Website version of this list](#)

First Hearing	Final Hearing	Item	Case File	Appealed By	Request	Result	Appealed to Court	Zoning Ordinance
9-2008	-	411 Partnership / Shopping Center Norris Fwy	8-D-08-UR	Community	Retail shopping center, deny due to flooding	Overtured Planning Commission and denied Use on Review	Yes, upheld by Chancery Court	SC
10-2009		Expand driving range to 9 hole executive golf course 5125 W Beaver Creek Dr	9-C-09-UR	Community	Deny expansion of previous driving range UoR	Affirmed Planning Commission		AG
12-2009	-	411 Partnership / Shopping Center Norris Fwy	11-C-09-UR	Community	Retail shopping center, deny due to flooding	Affirmed Planning Commission which denied the Use on Review	Yes, BZA overturned at appeal <i>411 Partnership v. Knox County Nov 16, 2011</i>	SC
10-2010	-	Store school buses in Ag zone	8-B-10-UR	Development Applicant	Overturn planning commission and allow school buses parking storage use in Ag zone	Affirmed Planning Commission		AG
1-2014	2-2014	Westland Cove	9-B-13-UR	Community	apartments, marina, etc	Modified - denied the marina, upheld in court <i>Benson v. Knox County</i>	Yes, upheld by court of appeals <i>Benson, et al. v Knox County, et al. May 12, 2016</i>	PR
10-2014	-	Westland Woods Subdivision	6-F-14-UR	Community	Subdivision	Modified Planning Commission - changed setbacks	-	PR
3-2015	5-2015	Wallace Rd Apartments	1-D-15-UR	Community		Affirmed Planning Commission		
7-2015	8-2015	Lovell Crossing Apartments	5-E-15-UR	Development Applicant	Remove requirement of sidewalks to be constructed	Modified Planning Commission - updated sidewalk condition with options for implementation	-	CN

First Hearing	Final Hearing	Item	Case File	Appealed By	Request	Result	Appealed to Court	Zoning Ordinance
11-2015	-	Cambridge Shores Subdivision	10-G-15-UR	Community	Subdivision - concern with erosion and water damage	Affirmed Planning Commission	-	PR
11-2018	-	Post Oak Bend	8-A-18-UR	Community	Deny the use on review because of incompatible traffic	Affirmed Planning Commission	Yes, BZA overturned on appeal, <i>Northshore Corridor Association et al. v. Knox County</i> , ruled March 30, 2021	PR
9/2020	-	Bluegrass Road Subdivision	8-D-20-UR	Community	Question about determination of stream and buffers	Modified Planning Commission - conditioned approval on submitting stormwater plan	-	PR
10/2020	1/2021	Acadia	8-C-20-UR	Community	Residential Treatment Center	Overtaken Planning Commission and denied Use on Review	-	Various
12/2020	1/2021	Zion Lane	11-F-20-UR	Community	Boarding home for 12 residents + 2 staff	Affirmed Planning Commission	-	Various
1/2021	-	Woodbury Crossing	12-A-20-UR	Community	subdivision - request to include amenity area	Modified Planning Commission (slight - added 1 condition)	-	PR
1/2022	3/2022	Johnson Rd	12-D-21-UR	Community	Deny approved use of fueling station and drive-thru and restaurant	Ruled applicants did not have standing and file properly	Appeal Filed May 2022	CN
3/2022	-	Mission Hills Subdivision	1-G-22-UR	Community	Subdivision - deny access to street	Affirmed Planning Commission	-	PR

Total: 16

Others						
12/2010	-	T-Mobile	??	MPC Applicant	Appeal denial of use on review for telco tower	Withdrawn prior to hearing
7/2020	-	Knoxville Stone	6-F-20-UR	MPC Applicant	Appeal denial of use on review for mining and quarry	Withdrawn prior to hearing
7/2021	8/2021	Ancient Lore Village	-	Community	Appeal of building officials decision that was incorrectly coded as appeal of use on review	

Total: 3 cited by County but KCPA believes should not be included in analysis