

November 13, 2020

Historic Landmarks and Preservation Districts Commission

RE: Electronic Signature Questions

Dear Members of the Historic Landmarks and Preservation Districts Commission:

You asked the Jefferson County Attorney's Office to provide you some additional research concerning the use of a primarily electronic petition in the 100 Distillery Commons Drive case. Below I have provided citations to ordinances, statutes, case law, and other materials relevant to the question of whether accepting electronic signatures was appropriate in this matter.

LOUISVILLE METRO CODE OF ORDINANCES

LMCO § 32.260 deals with the Designation of Districts and Individual Landmarks. 32.260(I) provides, in relevant part, that

The Commission may designate a structure or site as an individual landmark if it receives ... **a petition requesting designation containing the verified signatures and addresses** of no fewer than 200 residents of Louisville Metro and provided that at least 101 of those verified signatures and addresses contained in the petition are residents or property owners within one of the following boundaries: (1) a one-mile radius surrounding the structure or site proposed for landmark designation, (2) the Council district in which the proposed landmark is located or (3) the cumulative area formed when the boundaries of (1) and (2) are combined. When verifying signatures for purposes of accepting a perfected petition to designate a structure or site as an individual landmark, **any resident or property owner whose address is located on property that touches one of the three boundaries as defined herein shall qualify and be counted** toward the aforementioned 101 signature threshold. (emphasis added)

The section defines neither the term 'signature' nor 'electronic signature', nor does it include identifiers such as 'hand-written'. It does speak to what is meant by 'verified signatures' in the final quoted sentence by explaining the verification process required for the 101 signature threshold. Landmarks Staff undertook the same verification process it has always used to verify the signatures on the electronic petition in this case, utilizing PVA records as primary evidence of residency. Importantly, the section does not require comparison of submitted signatures to, say, a driver's license or review by a handwriting expert. Instead it says only that "any resident or property" within the 101 signature criteria "shall qualify and be counted". Had Landmarks Staff rejected entries which fell within this 101 signature criteria, such a rejection would have been in direct contradiction to the mandate of the ordinance.

Looking to other portions of the LMCO, the term “signature” does appear in Chapter 10: General Provisions under § 10.06 Definitions. § 10.06(A) states the general rule that “Words and phrases shall be taken in their plain, or ordinary and usual sense. However, technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.” § 10.06(B) begins with a statement that “For the purpose of this Code, the following definitions shall apply unless the context clearly indicates or requires a different meaning.” The entry for signature under that section reads as follows: “**SIGNATURE** or **SUBSCRIPTION**. Includes a mark when the person cannot write.” This can hardly be considered a definition, despite § 10.06(B)’s introductory statement indicating otherwise. The question, then, is what *does* the term “signature” mean in the LMCO?

Taking the first portion of § 10.06(A), the “plain, or ordinary and usual” meaning of signature depends more on perspective than one might think. From a linguistic perspective, the phrase “electronic signature” contains an adjective (electronic) and a noun (signature). Just as all blue cars are cars, all electronic signatures are signatures. From a historical perspective, this section was created in 1994 and last modified in 2004. In 1994, “signature” almost certainly referred to pen-to-paper. By 2004, that may have shifted somewhat to consider whether electronic signatures are also signatures. In 2020 it is hard to imagine that electronic signatures are not encompassed by the term in its common usage. This is especially true in the context of COVID and mass work-from-home orders across the country. So, applying the “plain, or ordinary and usual” meaning standard of § 10.06(A), electronic signatures should be acceptable.

The second portion of § 10.06(A), however, clarifies that “technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import”. An analysis of this phrase will require additional references outside of the LMCO and be covered in the next section, but before leaving the LMCO behind, it is worth considering the implications of a strict, pen-to-paper definition of “signature”.

The term “electronic signature” does not appear in the LMCO, so an interpretation that electronic signatures are not covered by the term “signature” would lead to some serious consequences. Take, for example, the term’s appearance in Chapter 33: Elections. § 33.01 Definitions defines electioneering as “The display of signs, distribution of campaign literature, cards or handbills, **solicitation of signatures to a petition**, or solicitation of votes, as it relates to express advocacy for or against any particular candidate or question that appears on the ballot on election day” (emphasis added). Louisville Metro may experience much more crowded polling locations if seeking electronic signatures for digital petitions is not encompassed by this definition merely due to their virtual nature. Any of the other numerous appearances of the word “signature” throughout the LMCO, from residential parking programs to unionization, would render related actions void if signed electronically.

It is also worth mentioning the remedy provided by the LMCO should electronic signatures ultimately be deemed ineligible. Assuming, for sake of argument, that all of the arguments contained herein were to fail in a court of law, the question of proper remedy would arise. Per LMCO 32.260 (L)(1) regarding the Individual Landmark Technical Review and Hearing, “Should the subcommittee determine that the report and process do not meet the requirements, the subcommittee shall thus advise the petitioner(s), property owner(s), and staff.

As to the stated deficiency, the appropriate party may respond within one year of the date of the initial decision. After this time period the petition will be deemed void.” A year is a substantial period for correction and COVID-19 related restrictions may eventually be relaxed in mid to late 2021. If only the electronic signatures were to be deemed insufficient, then the petitioners should be given an opportunity to collect handwritten signatures from the electronic signatories to correct the issue. Given that such a judicial determination would occur months or years after the date of the TRC hearing, the Court may adjust the window for correction.

KENTUCKY REVISED STATUTES

Kentucky has adopted the Uniform Electronic Transactions Act, KRS § 369.101-369.120. The term “electronic signature” is defined in KRS § 369.102 as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” Per KRS § 369.107(4), “If a law requires a signature, an electronic signature satisfies the law”. It is important to note, however, that per KRS § 369.103(1), “KRS 369.101 to 369.120 applies to electronic records and electronic signatures relating to a transaction”. “Transaction” is defined in KRS § 369.102 as “an action or set of actions occurring between two (2) or more persons relating to the conduct of business, commercial, or governmental affairs.”

By the plain language of the statute, the Uniform Electronic Transactions Act would seem to apply the present situation and permit the electronic signing of Landmarks petitions. There is a potential wrinkle in the form of KRS § 369.118 titled “Acceptance and distribution of electronic records by governmental agencies”. Per KRS § 369.118(1),

Except as otherwise provided in KRS 369.112(6), each governmental agency of this state, in compliance with standards established by the Commonwealth Office of Technology, shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

It is contested that neither PDS nor the Commission adhered to such standards. But that argument misunderstands the nature of the petition process. The transaction is between the petition creator(s) and the signatories, not the petitioners and Louisville Metro. Neither PDS nor the Commission created the petition, signed the petition, hosted the petition on its website, or submitted the petition. This was a petition created by citizens, signed by citizens, and submitted by citizens to Louisville Metro after its execution. To the extent PDS and the Commission needed to determine whether the electronic signatures satisfied LMCO § 32.260, they needed only look to KRS § 369.107(4) which, again, reads “If a law requires a signature, an electronic signature satisfies the law.”

It must be admitted that there is scant case law covering the Uniform Electronics Transactions Act. A Westlaw search returned only 2 cases with citations to any of its sections,

and one was marked not to be published. But to the extent LMCO § 10.06(A) holds “signature” to be one of those “technical words and phrases having a peculiar and appropriate meaning in law (which) shall be understood according to their technical import”, the state government has made clear that an electronic signature is acceptable.

OTHER SOURCES OF DEFINITIONS

Assuming, again for sake of argument, both that the term “signature” falls under the “technical words and phrases” portions of LMCO § 10.06(A) and that the Uniform Electronic Transactions Act does not apply, there is an alternative source of legal definitions: case law. The property owner’s attorney pointed to *Barnard v. Stone*, 933 S.W.2d 394 (Ky. 1996) as standing for the proposition that “Kentucky courts have consistently held similar in contexts where the law requires a ‘signature’, it means a handwritten signature affixed by the signee.” September 28th letter from Dinsmore, page 2. There are two issues with this claim. First, the *Barnard* case did not represent a ‘similar context’. Not only was *Barnard* decided in 1996 with the internet in relative infancy, it concerned an election statute which as noted by the Supreme Court of Kentucky, “require strict compliance”. *Barnard* at 395. Furthermore, *Barnard* concerned facts where 4 individual signatories to a petition had authorized other individuals to sign for them. *Id.* at 394. These were held invalid under the strict compliance standard. *Id.* at 396. The question of electronic signatures was not at issue and likely not even within the realm of possibilities for the court at the time.

A much more recent and comparable case is *Wood Estate v. Young*, 590 S.W.3d 265 (2019). In that case, a judge’s order was challenged on allegation of lacking a signature. *Id.* at 266. Per Kentucky Rule of Civil Procedure 58(1), “Before a judgment or order may be entered in a trial court it shall be signed by the judge.” *Id.* at 267. The judge had included the phrase “Digitally signed by Timothy R Coleman” along with other identifying information in a signature block. *Id.* Far from the strict compliance of *Barnard*, the *Wood Estate* Court held that

As the word “signed” is not defined by the civil rule, and in light of McPherson, we interpret the signature requirement as general and inclusive rather than limiting and restrictive. The drafters of CR 58(1) could have required a particular type of signature, but they did not. The signature in question effectively represents the name and authority of the signatory, the court from which that authority derives, the reason for the signature, as well as its date and time.

Id. at 268. In the matter at hand, Metro Council could have explicitly required a particular type of signature, but it did not. The electronic signatures in question were accompanied by the names, addresses, and other relevant identifying information of the signatories. The signature requirement should therefore be interpreted “as general and inclusive rather than limiting and restrictive”, and the electronic signatures accepted.

PUBLIC POLICY AND COVID

It is important to note, of course, that this question did not arise in a vacuum. The driving force behind the electronic petition was COVID-19 along with the related states of emergency and CDC guidelines. On March 6, 2020, Kentucky Governor Andy Beshear signed Executive Order 2020-215 establishing a COVID-19 related State of Emergency throughout the Commonwealth. On April 8, 2020, Governor Beshear issued Executive Order 2020-275 which, among other things, required that “all uninvited, in-person solicitation for any purpose occurring at a residence or physical business location must cease”. This prohibition rendered the collection of physical signatures for a landmarks petition functionally impracticable. It was over two months later, on July 10, 2020, when Governor Beshear permitted such solicitation to resume in Executive Order 2020-582, provided any such solicitation complied with additional regulations contained therein.

The Kentucky State Legislature also passed Senate Bill 150, titled “AN ACT relating to the state of emergency in response to COVID-19 and declaring an emergency.” Among other important measures, SB 150 (8)(b) provided that “Notwithstanding KRS 61.826, a public agency may conduct any meeting, including its regular meeting, by live audio or live video teleconference during the period of the state of emergency.” This provision allowed the Historic Landmarks and Preservation Districts Commission to continue functioning in an electronic environment. SB 150 (9)(a), while primarily pertaining to KRS Chapter 100, included a provision clarifying that “Nothing in this paragraph shall be construed to prohibit provisions for continued service to the public in the area of land use, planning, or zoning that complies with social distancing guidance provided by the CDC or the Kentucky Department for Public Health, as determined by the executive authority of the relevant local government.” Landmarks certainly falls under the broad umbrella of “land use”, and PDS, as an executive branch department, undertook such a provision in its consideration of an electronic petition.

Taken together, had the prospect of electronic petitions not been reviewed and approved, there would have been months in the midst of a global pandemic with a veritable demolition free-for-all sans the regular scrutiny and process such actions might incur. The only safe and efficient way to ensure the clear intent of historic preservation codified in the Landmarks and Demolitions ordinances would proceed was to allow for electronic petitions. And although the April 8 outright ban on in-person solicitations was rolled back in favor of heightened restrictions months later, our city, state, and country are far from normal. CDC recommendations have remained stalwart as cases have steadily climbed. Hundreds of thousands of Americans have lost their lives and many more have suffered financial and health impacts. To ignore all the risks and recommendations and require landmarks petitions be signed in-person while Landmarks meetings themselves are conducted virtually would run against not only the public policy of historic preservation but the public health and safety concerns that lay at the very core of government.

CONCLUSION

There is adequate legal foundation and tremendous policy justification for accepting electronic signatures on a landmarks petition, particularly during the COVID-19 related States of Emergency. The ordinance should be updated for clarity, and the Commission itself should adopt emergency situation policies similar to those adopted by the Planning Commission and Board of Zoning Adjustment for such circumstances. But these recommendations are meant for purposes of public information and clarity, not legal requirement.

Respectfully,

/s/Travis Fiechter
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