

April 10, 2018

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Louisville Metro Planning Commission
444 South 5th Street, Suite 300
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**Re: Case No. 17ZONE1031
Opposition to Application for Zone Change Amendment,
Variance, and Waiver at
1576 Cherokee Road, Louisville, Kentucky 40205**

Dear Louisville Metro Planning Commission Members and Planning Staff:

This firm represents Ed Henson, Tom Cooper, and Kevin Waldron (“Neighbors”), all residents of the Bonnycastle Neighborhood in Louisville, Kentucky, and who live adjacent to the proposed Cherokee Springs development located at 1576 Cherokee Road, Louisville, Kentucky 40205. The property owner and developer submitted applications for a zone map amendment, a variance, and a waiver, in order to construct a 76 ft. tall, six story, 40,250 square foot condominium building with a 1.9 Floor Area Ratio (FAR). There is significant opposition to the applications, from our clients and hundreds of Bonnycastle residents, because the development does not respect the comprehensive planning process and the developer is unwilling to provide any compromises that would validate that process and protect the historic integrity of the Cherokee Road Corridor.

For the following reasons, and for the reasons set forth in my clients’ previous correspondence and communications with the Planning Staff, which are incorporated by reference herein, the Neighbors oppose the applications.

SUMMARY OF OPPOSITION

- 1) The Neighbors Are Not Opposed to Redeveloping This Parcel; But Are Opposed to a Development with this Scale, Height and Bulk;
- 2) More than one hundred forty (140) Bonnycastle Neighborhood residents have signed petitions to oppose the applications;
- 3) The Bonnycastle Homestead Association (BHA) has adopted a resolution to oppose the applications;
- 4) The Neighbors are concerned that blasting will be required to excavate the bedrock from the basement level.
- 5) The variance application should be DENIED. A variance to allow the building to be three stories and thirty-one feet taller than the allowable limit (more 68% taller than what is currently allowed) is incompatible with the neighborhood and incompatible with the statutorily required factors required to grant a variance.
- 6) A 76-foot tall, 40,250 sq. ft., and 1.9 FAR building is incompatible with the neighborhood. Planning Staff's own Preliminary Report (Revised 8/3/17) states the development is "incompatible with the neighborhood";
- 7) A 76-foot tall, 40,250 sq. ft., and 1.9 FAR building is incompatible with Louisville's Cornerstone 2020 Comprehensive Plan ("Comp. Plan"), and is incompatible with the Bonnycastle Neighborhood Plan;
- 8) The scale and bulk, especially in the form of height and depth of the proposed building is unlike any other building in the vicinity;
- 9) The approval of the application for the zone map amendment would constitute unlawful "spot zoning";
- 10) Neighbors, the BHA, and others have met and are willing to meet with the developers; however, the developers insist on increasing the height and bulk of the building in a way that destroys the character of the neighborhood and far exceeds the allowable limits; and
- 11) The Planning Commission should postpone the scheduling of this proposal to be heard by the Planning Commission until the Bonnycastle Neighborhood Plan is updated.

NEIGHBORS' COMMENTS IN OPPOSITION

1) **The Neighbors Are Not Opposed to Redeveloping This Parcel; But Are Opposed to a Development with this Scale, Height and Bulk.**

The Neighbors want to be good and accommodating neighbors to everyone in their community. They understand that property owners may want to redevelop their property and profit from their property. However, Neighbors demand, as is their right and duty as citizens, any development that may impact their use and enjoyment of their own property be compliant with the law.

The Louisville Land Development Code (LDC) is “intended to be the minimum requirements to promote the public health, safety, comfort, good order, appearance, morals and general welfare...Among other purposes, this Code is intended...to avoid undue concentration of population by regulating and limiting the height and bulk of buildings.” LDC 1.1-1. Currently, the proposed development is zoned R-7, which requires a FAR of 1.0. The developers demand a FAR of 1.9, almost double the currently allowed FAR for this property. This means that this building will have much more bulk than any of the other buildings in Bonnycastle. This bulk manifests as disproportionate scale¹ in both height and depth as compared to other buildings in the vicinity. In addition, the property is located in the Traditional Neighborhood Form District, which allows for a building height to be no taller than 45 feet. The proposed development will have a height of 76 feet. The height and FAR are substantially different than the surrounding community. Such substantial changes would permanently denigrate the Olmsted Brothers' design of Cherokee Park and its tree-lined perimeter street, Cherokee Road.

Neighbors would be amenable to a development that decreases the height of the building and the FAR without the requirement of a zone map amendment or variance.

2) **More than one hundred forty (140) Bonnycastle Neighborhood residents have signed petitions to oppose the applications.**

This is not a Not In My Backyard (“NIMBY”) situation, whereby any and all development is opposed. In fact, the Neighbors are genuinely concerned with the appropriate development of their community, and are exercising their right and duty as citizens to ensure that land development complies with the law. They are not alone. More than one hundred and forty Bonnycastle residents have signed a petition opposing the applications. **Exhibit 1.** This constitutes substantial evidence

¹ “Scale” is defined as “[t]he height, size and bulk of a structure compared to the height of adjacent buildings and to the height of a human and/ or the apparent height, size and bulk of the components of the facade compared to the apparent

that the community does not want the development, as proposed, in their neighborhood, and that the proposed development is incompatible with the neighborhood.

3) The Bonnycastle Homestead Association (BHA) has adopted a resolution to oppose the applications.

After many discussions with stakeholders and planning staff, substantial information gathering and file review, a special meeting of the BHA Neighborhood Plan Committee was called by the BHA Board President for December 4, 2017. The BHA Neighborhood Plan Committee recommended to the full BHA Board to adopt a resolution opposing “any change in zoning, from R7 to R8a or other designation that would increase the density beyond the current R7 designation and we further oppose any height variance within the existing zoning for 1576 Cherokee Rd.” On December 12, 2017, the BHA voted to adopt the resolution. **Exhibit 2.** In support of the resolution to oppose the development, the BHA was concerned with the compatibility with the “core elements of the 2002 Bonnycastle Neighborhood Plan,” “the character of the residential and commercial aspects of the neighborhood,” the “preserv[ation of] the distinct characteristics of the diverse sub neighborhoods in Bonnycastle,” that “the development of Cherokee Park continues and it remains open, clean and safe,” and code enforcement is strictly monitored.

For the reasons above, the BHA opposition to the applications is further evidence that the proposal is incompatible with the Comp. Plan, BHA Neighborhood Plan, and the community.

4) The Neighbors are concerned that blasting will be required to excavate the bedrock from the basement level.

Based on information and belief and representations made by the developer in previous meetings, bedrock is present ten feet below ground on this site. Although elevations of the basement level are not present on the drawings provided to the Planning Staff, based on those previous representations, the basement level will impede on the bedrock. This will require either blasting or some other intensive mode of bedrock removal that has not been previously disclosed. If blasting or similar method is required, Neighbors vehemently object to such activity, as their homes and property can be substantially damaged as a result. The blasting would occur only feet (if not inches) from the Condominium building at 1578 Cherokee Road.

5) The variance application should be DENIED. A variance to allow the building to be three stories and thirty-one feet taller than the allowable limit (more 68% taller than what is currently allowed) is incompatible

with the neighborhood and incompatible with the statutorily required factors required to grant a variance.

KRS 100.243 outlines the factors considered when deciding whether to grant a variance. KRS 100.243 states:

(1) Before any variance is granted, the board must find that the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the board shall consider whether:

(a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;

(b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and

(c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

(2) The board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulation from which relief is sought.

The burden of proof rests with the party seeking the variance. *Bourbon County Bd. Adjustments v. Curran*, 873 S.W.2d 836, 837 (Ky. App 1994). A variance must meet the strict requirements of KRS 100.243:

“The legislative limits on the grant of variances are not mere technicalities. The system delineated sets forth specific factors that the Board must consider and findings that must be made. In doing so, the legislature recognized the very real tensions that necessarily exist between the interests of the landowner and society as a whole...Thus, the limitations imposed on the grant of variances protect the comprehensive plan from gradual erosion on a case by case basis.” *Id* at 454.

Louisville and Jefferson County Planning Commission v. Schmidt, 83 S.W.3d 449 (Ky. 2001). KRS 100.243 must also be satisfied with substantial findings of fact. *Id.*

Here, the applicant has requested a variance from the 45 foot height requirement in the Traditional Neighborhood From District for R-7 an R-8A zoning. However, the variance request does not satisfy any of the required factors.

- There are no special circumstances which do not generally apply to land in the general vicinity. KRS 100.243(1)(a). The special circumstance is that the developer wants to construct a building that is incompatible with the area. This property is not unique in any way and is similar to hundreds of other **mid-block** properties along Cherokee Road that are reasonable in height and bulk.
- The strict application of the provisions of the regulation would not deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant. KRS 100.243(1)(b). The applicant can still develop the land the same as any other property owner in the area as long as it is within the 45 foot limit, as is required of everyone else.
- The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought. KRS 100.243(1)(c). The specific provisions of the LDC related to high for this particular form district in this particular zoning have been well known long before this application was filed. There are no special circumstances associated with this particular property and this development that warrant a variance.

As a result, the proposed variance will allow an unreasonable circumvention of the requirements of the zoning regulations, will have a detrimental impact on the public health, safety or welfare, by altering the essential character of the general vicinity and by causing a nuisance to the public. KRS 100.243(1). The proposed development is incompatible with the neighborhood, requires too much bulk and height, and could potentially harm the surrounding neighbors and their properties from blasting, construction, and high bulk occupation that will diminish the fair market values of their properties, injure the viewshed of the area, and limit accessibility to the parkway and surrounding properties. There are no special circumstances associated with the property of the proposed development that warrants a 68% increase in the allowable height for a building in this area. The application for a height variance should be DENIED.

- 6) **A 76-foot tall, 40,250 sq. ft., and 1.9 FAR building is incompatible with the neighborhood. Planning Staff's own Preliminary Report (Revised 8/3/17) states the development is "incompatible with the neighborhood."**

As noted by Planning Staff, "the proposed density does not necessitate a need to change the zoning on the property and the bulk alone at this stage is incompatible with the neighborhood. The proposal as submitted is deficient in many aspects of the guidelines and policies of Cornerstone 2020 as demonstrated in the Staff Checklist of Attachment 3."² 8/3/17 Preliminary Staff report at 1. In addition, "The proposed development is incompatible with the scale and site design of the form district and nearby development." *Id.* at 4. The Neighbors agree. The development is not consistent with the neighborhood, Comp. Plan, and BHA Neighborhood Plan, and thus violates KRS 100.187. Likewise, the current zoning is APPROPRIATE and the proposed map amendment and variance is **NOT APPROPRIATE** and, there have been **NO** major changes of an economic, physical, or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area. *Id.* The property is currently zoned in a way that is compatible with the applicable plans and character of the neighborhood.

- 7) **A 76-foot tall, 40,250 sq. ft., and 1.9 FAR building is incompatible with Louisville's Cornerstone 2020 Comprehensive Plan ("Comp. Plan"), and is incompatible with the Bonnycastle Neighborhood Plan.**

The proposed development is inconsistent with multiple elements of Louisville's Comp. Plan. Community Form / Land Use Guideline 1: Community Form B.2 calls for a "lotting pattern" that "appropriately-integrate[s] higher density residential uses." The 76 ft. height of the building will eliminate sun access to multiple buildings in the area, including the Hensons' home at 2335 Bonnycastle Avenue, the home at 1572 Cherokee Road, the Condominium building at 1578 Cherokee Road, and other homes along Alta Avenue and Bonnycastle Avenue. A building of such a height and bulk should have for more setback on a .5 acre parcel.

B.2 of the Community Form section Louisville's Comp. Plan also requires that "[t]he proposal preserves public open spaces." The development is inconsistent with the two-story line of historic homes along the Cherokee Road Corridor. The Neighbors agree with the Planning Staff's Preliminary Report that the proposal "should respect the Cherokee Road corridor...in a manner that is compatible with the character of the public realm in the area." Report at 8.

² As of 8/3/17, the Staff Checklist consisted of 22 out of 46 deficiencies, including the incompatibility of the height and FAR with Community Form/Land Use Guidelines.

B.2 of the Community Form section requires that “[t]he proposal preserves and renovates existing buildings if the building design of these structures is consistent with the predominate neighborhood building design.” The Preliminary Report finds that the development proposal would destroy structures that are consistent with the neighborhood design. Report at 8. Note that Cherokee Road is one of the few remaining neighborhoods in Louisville that retains the original design tenets of its architects. See *Samuel Thomas, Cherokee Triangle: A History of the Heart of the Highlands* and *Samuel Thomas, Origins of Louisville’s Olmsted Parks and Parkways*.

A.2 of Community Form / Land Use Guideline 3: Compatibility requires that “[t]he proposal is generally compatible within the scale and site design of nearby existing development and with the form district’s pattern of development.” The Preliminary Report found that “[t]he proposed development is incompatible with the scale and site design of the form district and nearby development” because “the proposed structure has a scale that is much greater than properties within the block face...”. Report at 10. This is the crux of the problem with this development. The developer could build an approximately 22,000 square ft. building within the requirements of the R-7 zoning district. Anything bigger than that is simply out of character with the surrounding neighborhood and damages the historic design characteristics of the Bonnycastle Neighborhood.

Most importantly, the need to re-zone to R-8A is unnecessary and inconsistent with the Comp. Plan. A.3 of Community Form / Land Use Guideline 3: Compatibility which states that a proposal must be “compatible with adjacent residential areas, and if it introduces a new type of density, the proposal is designed to be compatible with surrounding land uses...”. The Preliminary Report found that “[w]hile R-8A would introduce a new type of density, the proposal does not provide such a density that would necessitate the need for R-8A. The proposal at-hand is a request to increase the permitted bulk (FAR) only and this is inconsistent with the pattern of development in the area.” Report at 10. Indeed, this is precisely where the neighbors are most in agreement with the Preliminary Report. The developer can build a large building that contributes to the neighborhood and historic fabric of the community within the R-7 zoning requirements. A building of the scale, height, depth and bulk proposed will dwarf surrounding homes, blight access to light and the park viewshed, and undermine the historic integrity and fabric of Cherokee Road.

This development is also inconsistent with the Bonnycastle Neighborhood Plan. The Neighborhood Plan emphasizes the Cherokee Road Corridor as a “one of a kind asset” and the balance of a variety of housing types. N’hood Plan at 7. “The corridor contains a variety of housing types that appears to be well balanced with the capabilities of services lanes and the number of residential units. This balance is also strengthened through common design elements *involving building*

mass, height and relationship to the Road.” Id. (emphasis added). In order to maintain this balance, the Neighborhood Plan implements several strategies and actions.

The Plan calls for a developer to maintain the existing façade, the characteristics of the building envelope for the principle structure should be maintained, the compatibility of the development should be evaluated in terms of the impact of additional units and automobiles to the capacity and condition of the rear service lane, a service lane with a LOS of C or below must be improved to at least a LOS of B, no driveway access to Cherokee Road is to be permitted, and a pedestrian walkway along the south side of the Corridor (the house side). *Id.* A development that has almost double the currently allowable bulk and is more than 30 feet taller than R-7 zoning allows, requires more than 30 parking spaces and access through an alley that was never designed for that substantial increase in usage and traffic, and is attempting to waive its obligation to build a sidewalk, is not implementing “common design elements involving building mass, height and relationship to the Road,” and is therefore inconsistent with the Neighborhood Plan. The proposed development and zone map amendment will cause a substantial unbalancing of this “one of a kind” asset, the Cherokee Road Corridor, and do so on a mid-block property, paving the way for massive development in the future.

The proposed development and zone map amendment are also incompatible with two Neighborhood Goals: (1) Limit or severely restrict the conversion of single family properties to multifamily use, and (2) Maintain the character of the residential and commercial aspects of the neighborhood as well as their balance and interdependence. N’hood Plan at 3. While the proposed development is not converting a single family home, it is demolishing a building with four units, and building a new building, more than 30 feet taller, with twelve units. Secondly, as stated above, the proposed development does not maintain the balance of the neighborhood. The historic character of Cherokee Road is the number one preservation priority of the Plan. N’hood Plan at 18. The proposal will be inconsistent with these priorities.

For these reasons, and those set forth by the Neighbors, others in the Bonnycastle neighborhood, the BHA, and Planning Staff, the applications should be denied because of the incompatibility with the Comp. Plan, the Neighborhood Plan, and the character of the neighborhood.

8) The scale and bulk, especially in the form of height and depth of the proposed building is unlike any other building in the vicinity.

The proposed building is massive, especially compared with almost all of the properties in the Bonnycastle neighborhood built in the modern era of

Euclidian Zoning in Jefferson County. It will tower over by more than thirty feet all but one building in the area. The building will have almost double the depth of most of the buildings in the area. The scale, bulk, height, and depth of the building is incompatible with the Comp Plan, the Neighborhood Plan, and the character of the neighborhood. To combat this incompatibility, the Developer included a list with their application titled "Multi-family Building Heights and Footprints in Bonnycastle and Cherokee Triangle." That list included seven buildings with heights ranging from 53 ft to 214 feet. All but three of these buildings are located outside of the Bonnycastle neighborhood. Those three are the Commodore Condominiums at 2140 Bonnycastle Avenue, 1611 Spring Drive, and Park Grande at 1604 Cherokee Road. The Commodore was built before Louisville adopted planning and zoning regulations. 1611 Spring Drive was built in 1972 and is only 54 feet tall. Park Grande, although somehow granted a variance to allow it height of 112 feet, is still zoned R-7 and still maintains a FAR equal to or less than 1.0. Still, because of the precarious history of that development, it should not be used as a precedent here. This list actually compounds and supports the Neighbors' concerns - that building of this scale, bulk, and height do not exist, and the buildings that are, within the neighborhood, were approved before planning and zoning regulations were adopted by the city.

The other four buildings cited by the Applicant are outside of the boundaries of the Bonnycastle neighborhood. Nevertheless, the development histories of those buildings speak for themselves, especially 1400 Willow, which was finally completed more than 20 years after it was initially proposed in 1958. Furthermore, all but two of these seven buildings are located on street corners, which are more conducive to high density and high bulk developments. However, the proposed development is located in the middle of the block squeezed between a much smaller single family and condominium building.

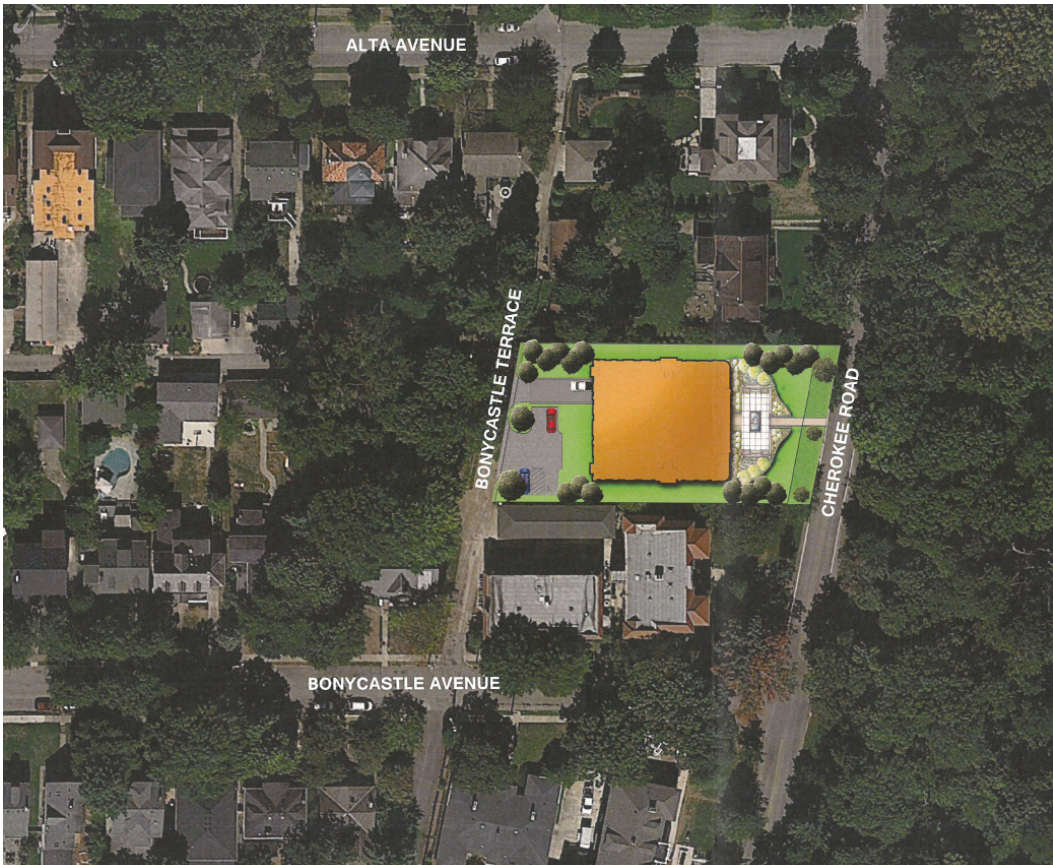


Figure 1 The Applicant's own drawings demonstrate the massive scale and bulk of the proposed building. For comparison, see the single-family home just North of the proposed building, and all the other homes in the area.

- 9) The approval of the application for the zone map amendment would constitute unlawful “spot zoning.”

Spot zoning is “generally frowned upon by the courts.” *Mathis v. Hannan*, 306 S.W.2d 278, 280 (Ky. 1957). If the zone map amendment is granted, this parcel will be the only R-8A zoned property in the area, and will be surrounded by R-5 zoning on all sides except for one. In fact, with the exception of the property to the Southeast, which is zoned R-7, the rest of the immediate area is zoned R-5. Moreover, the proposed development is not contiguous with any other property of this density, height, and bulk. Comprehensive Plans, neighborhood plans and zoning codes, including those that apply here, are designed to prevent this type of spot zoning. The applicant has set forth no reason to deviate from these requirements.

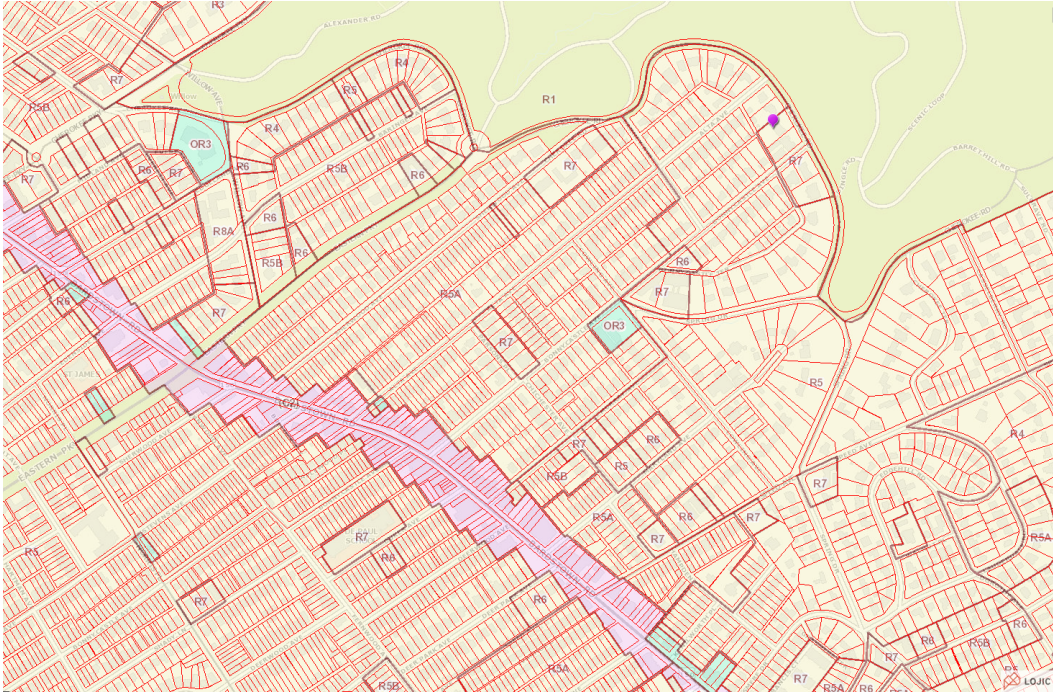


Figure 2. The proposed development would be the only R-8A zoning in the area, and would be surrounded by R-5 properties with the exception of the Southwest neighbor on Cherokee Road.

- 10) Neighbors, the BHA, and others have met and are willing to meet with the developers. However, the developers insist on increasing the height and bulk of the building in a way that destroys the character of the neighborhood and far exceeds the allowable limits.

The Neighbors, BHA, and others have dedicated substantial efforts to meet and negotiate with the developers, its counsel, and its representatives. This included a meeting between the BHA and the developer on December 21, 2017, and a meeting between Ed Henson and Jill Force March 14, 2018. Unfortunately, no resolution was reached. The developers have changed the height of the building from 100 feet to 76 feet by decreasing the floor height and removing a floor. However, the building was egregiously incompatible with the neighborhood to start with. Even with those changes, the development is still egregiously incompatible with the neighborhood.

- 11) The Planning Commission should postpone the scheduling of this proposal to be heard by the Planning Commission until the Bonnycastle Neighborhood Plan is updated.

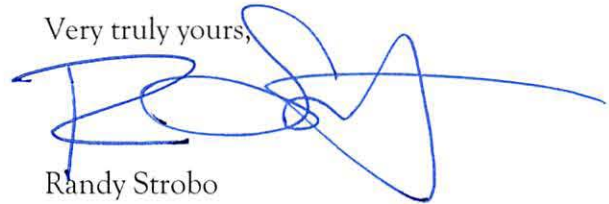
The Bonnycastle Neighborhood Plan was adopted in 2002. While this is not a Comprehensive Plan, the Neighborhood Plan is made part of the Comp. Plan at the time of adoption. KRS 100.197 requires “[a]t least once every five (5) years, the commission shall amend or readopt the plan elements.” Neighbors agree that

the Neighborhood is outdated. There have been many changes to the neighborhood that warrant the updating of the Neighborhood Plan, one of which is a better analysis of and strategy to address multi-unit buildings in the area. With a project of this magnitude including the many impacts to the character and balance of the neighborhood, the LDT Committee should postpone scheduling this proposal to be heard by the Planning Commission until an update Neighborhood Plan has been fully vetted and adopted. This will allow the Planning Commission to make a decision that reflects the current status and land use implications of the Bonnycastle Neighborhood and the wellbeing of its residents, and also incorporate portions of Plan 2040.

CONCLUSION

This proposed development is incompatible with both the letter and the spirit of the Comp. Plan, BHA Neighborhood Plan, and the LDC. We request that the Planning Commission recommend denial of the requested zone map amendment and variance at this time, and will supplement this letter as the proposal moves through the review process.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'Randy Strobo', with a long horizontal line extending to the right.

Randy Strobo
Clay Barkley

Enclosures: Exhibits