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January 30, 2018
Via Email

Board of Zoning Adjustments
c/o Planning and Design
444 S. 5th Street, Ste. 300
Louisville, KY 40202
Christopher.French@louisville.gov

Re: *4301 Mud Lane, Case No. 18 Appeal 1006*

Dear Members of the Board:

The purpose of this letter is to respond to the appeal filed on behalf of Garry and Donna Doyle ("Doyle") in the above-captioned matter on December 19, 2018. As a preliminary matter this appeal should be dismissed as time barred because Doyle failed to file within thirty (30) days of receiving notice of Emily Liu's ("Director") determination that the accessory structure at 4301 Mud Lane (the "Property") was no longer in violation of the Land Development Code ("LDC"). Notwithstanding, as will be more fully explained below, none of Doyle's arguments for reversal are meritorious.

Factual Background

On April 13, 2018, Conley was issued a zoning violation with respect to the size of an accessory building located on the Property. Conley appealed (18Appeal1001) and on May 21, 2018, through counsel, appeared at a BOZA hearing before the Board. The hearing was postponed after counsel began questioning witnesses and it became apparent that the parties needed to engage in additional discussions before BOZA could be in a position to hear arguments.

On August 29, 2018, Rickey and Janice Conley ("Conley"), through counsel, submitted a request for an agricultural determination for an accessory structure that exceeded the maximum size restrictions of the LDC Section 5.4.2.C.1.

On September 14, 2018, the Director issued a Determination of Agricultural Use letter (the "Determination"), setting forth in great detail how and why the accessory structure qualified for Agricultural Use pursuant to KRS 100.111. On September 17, 2018, this letter was emailed to Conley's counsel.

On September 20, 2018, counsel for Conley was informed that additional information had been brought to the attention of Planning and Design which called into question whether the Property met the five (5) acre requirement of KRS 100.111.

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On November 12, 2018, Conley submitted a survey of the subject property to the Director, and this survey confirmed that the metes and bounds of Property exceeded five (5) acres, and was in fact 5.0021 acres.

On November 20, 2018, the Director issued a letter to Conley which stated that the September 14, 2018 Determination remained valid.

On December 19, 2018, ninety-three (93) days after the Director's September 14, 2018, Determination, Doyle filed the instant appeal.

I. This appeal should be dismissed as time barred.

"Appeals shall be taken within thirty (30) days after the appellant or his agent receives notice of the action of the official by filing an Application for appeal[.]"Land Development Code ("LDC") 11.7.3 (B): Likewise, appeals to the board "shall be taken within thirty (30) days after the appellant or his agent receives notice of the action of the official[.]" KRS 100.261,

Kentucky courts have "repeatedly emphasized that a party seeking review of administrative decisions must strictly follow the applicable procedures." *Godman v. City of Fort Wright*, 234 S.W.3d 362, 368–69 (Ky. Ct. App. 2007). "Since an appeal from an administrative decision is a matter of legislative grace and not a right, the failure to follow the statutory guidelines for an appeal is fatal." *Taylor v. Duke*, 896 S.W.2d 618, 620–21 (Ky.App.1995). *See also Burns v. Peavler*, 721 S.W.2d 715 (Ky.App.1986). In both *Taylor* and *Burns*, the Courts held that a party must file a statutory appeal within thirty days of receiving actual notice of the adverse action. The failure to do so will bar any subsequent challenge to the action. In *Allen v. Woodford Cty. Bd. of Adjustments*, 228 S.W.3d 573, 576 (Ky. Ct. App. 2007), the Kentucky Court of Appeals held that because an appeal was not timely, the BOZA officer's interpretation would stand allowing landowner's conditional use permit of a "tourist home" on his property.

Here, the Director issued the Determination on September 14, 2018, and Conley received it via email on September 17, 2018. On information and belief, Doyle received a copy of the Determination on or about September 17, 2018. As such, Doyle's appeal was filed long after expiration of the statutory and LDC time to appeal and should be dismissed as untimely.

II. The Director's Determination was a valid exercise of power, and was not arbitrary or capricious.

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Doyle argues that it was somehow improper for the Director to "intervene in the process and unilaterally state that" the Property was in compliance, and that the Director's Determination was "arbitrary and capricious as well as an error in judgment." Doyle further argues that the appeal should have moved forward to a public hearing with the members of the Board.

a. The Director's exercise of power.

Doyle's appeal cites to no authority in support of the argument that the Director did not have the power to issue the Determination and that is likely because LDC 11.1.1(A) states that, "[p]ursuant to KRS 100.271, the Director of Jefferson County Planning and Design Services (or successor agency) is designated as the principal administrative official for the **implementation and enforcement of regulations** contained in this Code. Unless specifically stated to the contrary, the term 'Director' or 'Planning Director' shall include his or her designees." (emphasis added).

Pursuant to KRS 100.271, "[a]n administrative official shall be designated by the city or county to administer the zoning regulation, and, if delegated, housing or building regulations. The administrative official may be designated to issue building permits or certificates of occupancy, or both, in accordance with the literal terms of the regulation, but may not have the power to permit any construction, or to permit any use **or any change of use which does not conform to the literal terms of the zoning regulation**."

The Kentucky Revised Statutes and the LDC vest the Director with the precise power she exercised, that is, the power to implement and enforce the regulations contained within the LCD. Moreover, the Director's determination letter sets forth a myriad of reasons for how and why Conley's use of the accessory structure conforms to the literal terms of the agricultural use regulation. In sum, the Director had the power to issue an agricultural use determination.

b. The Determination was not arbitrary and capricious, nor was it overly broad.

Again, Doyle cites to no authority and gives no reasons for the stated belief that the Director's Determination was arbitrary and capricious or overly broad. However, in this Commonwealth, "review of an administrative agency's decision focuses upon arbitrariness." *Com., Transportation Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. Ct. App. 2004). "Arbitrariness has many facets; most notable are whether the agency acted in excess of granted powers, whether procedural due process was afforded the parties, and whether the administrative agency's decision was supported by substantial evidence. *Id*. Moreover, "[i]f there is any substantial evidence to support the action of an administrative agency action, the action cannot be found to be arbitrary." *City of Lancaster v. Trumbo*, 660 S.W.2d 954, 955 (Ky. Ct. App. 1983) (emphasis added) (citing

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Taylor, 461 S.W.2d); *see also Commonwealth v. Miles*, No. 2017-CA-001289-MR, 2018 WL 3612757, at *4 (Ky. Ct. App. July 27, 2018).

Again, as stated above, the Director's issuance of an agricultural determination was a valid exercise of her powers. The determination was based on the substantial evidence of multiple inspections and reports that included numerous pictures and documentation that the use was agricultural. Indeed, the September 14, 2018 letter goes into painstaking detail, quotes KRS 100.111 in its entirety, and analyzes how Conley's use of the accessory building and Property conforms to the enumerated agricultural activities, including but not limited to: (1) the raising of livestock for sale; (2) the raising of chickens for sale of chickens and/or eggs; (3) the raising of fruit trees and plants for the sale of produce; and (4) the boarding of horses. In sum, the Determination was carefully crafted and, if anything, overly specific.

Thus, the Director's exercise of power was valid, it was supported by substantial evidence, and was in no way arbitrary or capricious, or overly broad.

III. The Property is more than five (5) acres and Doyle's argument is moot.

"The rule in Kentucky is that if there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record. *Kentucky Ret. Sys. v. Shumate*, No. 2015-CA-001907-MR, 2016 WL 6819740, at *9 (Ky. Ct. App. Nov. 18, 2016) (citing *Taylor*, 461 S.W.2d; and *Reeves v. Jefferson County*, 245 S.W.2d 606 (Ky. 1951)). A reviewing court may not substitute its own judgment on a factual issue "unless the agency's decision is arbitrary and capricious." *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003).

Here, Doyle presumably takes issue with a second land survey that was submitted to the Director stating that the metes and bounds of the Property are 5.0021 acres. The first survey also listed the property at "5.00 Acres" (but included square footage at 217,727 square feet). Pursuant to the caselaw cited above, this point is moot because there was substantial evidence to support the Determination, the Determination was not arbitrary and capricious, and as such, even if there is conflicting evidence in the record the Director's Determination should be upheld.

IV. Conley's agricultural use is bona fide.

Doyle takes issue with whether Conley's agricultural use is bona fide. However, again, Doyle cites no authority or lists no facts in support of this proposition. In this Commonwealth:

> There is no requirement that a person make the best agricultural use or be efficient in the operation of a farm. Some farmers don't like cattle, horses, or

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> any animals. Some ranchers don't like growing crops. Some people consider farming a career, while others treat it as a hobby or a second job. One owner may decide to bushhog the fields, while another may decide to allow nature to take its course and encourage gradual reforestation. Adjacent owners may have mixed uses on one tract, and a single crop may be produced on another. Some crops, like hay, may be harvested twice a year, while others, like some trees, may produce only one harvest per generation. None of these scenarios is less agricultural or silvicultural than another, although their intensity, efficiency, and profitability may all be different… **even if they decide to allow nature to reclaim all but an area immediately around the house, and six acres around the barn, it does not mean that the agricultural use is now incidental or subordinate to the home occupation**… the land may produce timber, firewood, flowers, ornamental plants, or wildlife habitats, which again may be a poor choice, but is undeniably an agricultural use. In a few years, the owner may decide to cut everything down and raise cattle or even ostriches. **The point is that a user of agricultural land can change one agricultural use to another with impunity."**

Grannis v. Schroder, 978 S.W.2d 328, 331 (Ky. Ct. App. 1997) (emphasis added).

In other words, how Conley uses the Property for agricultural purposes is up to Conley so long as the Property is being used for agricultural purposes; and, that Determination has been issued. Thus, Doyle's argument on this point is found wanting.

V. Doyle is the master of his appeal, not Conley's.

Doyle takes issue with the fact that Conley's appeal did not go before the Board on a full hearing. However, the appeal was Conley's to control, and the appeal was withdrawn. Doyle has no more right to determine whether Conley withdraws an appeal than Conley has to control whether Doyle withdraws the instant appeal.

Conclusion

Pursuant to the arguments herein, the Conleys respectfully request that the Board dismiss the Appeal as untimely; or in the alternative, deny the Appeal altogether.

Sincerely,

Bart L. Greenwald

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Ambrose K. O'Bryan