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June 1, 2023

HAND DELIVERED

Tracy Jones, Esq.
LFUCG
Department of Law
200 E. Main Street
Lexington, Kentucky 40507

Re: *Proposed Comprehensive Land Use Plan ("CLUP")*

Dear Ms. Jones:

I am representing Fayette Alliance and several property owners in close proximity to the 5,000 acres that may be added to the Urban Services Boundary ("USB") according to information we have received (and we are getting conflicting reports on what different Council Members may be proposed today). I am writing to you, as counsel to the Planning Commission and the Council. I believe it to be highly inappropriate for interested parties to be providing to Council members legal analyses of the issues before it rather than going through you, their attorney. My clients and I find it very troubling that those entities and individuals favoring an expansion of the USB have been giving to Council members a Memorandum prepared by an attorney who represents a number of developers and home builders, attempting to circumvent your legal advice to your clients.

More specifically, we believe that the rumored proposal of Council Members to amend the Planning Commission's recommendations on the CLUP to amend the Goals and Recommendations and to potentially add up to 5,000 acres is not legally permissible. To be very clear, if there is a violation of law that occurs during the vote of the Council today, my clients have authorized the immediate filing of a legal proceeding in which we will challenge the decision. Because of the intense lobbying of the Council members and the providing of legal advice to them by third parties (with which we disagree), it will likely be necessary during that litigation we depose each of the Council members to determine whether they have a conflict of interest, what representations or promises were made to them prior to the vote and whether the Open Meetings Act was violated. As is legally necessary, we will be making all Council members parties to the action.

In the "Imagine Lexington" presentation you made with Chris Woodall, you have made several of the same points as we are making here. For instance, in one of your slides headed "Comprehensive Plan & the Urban Services Area", you note "all decisions to expand the Urban Service boundary have been made by the Planning Commission". You have included under "Key Takeaways": "The Planning Commission makes decisions regarding the USB location and size to

the land use element of the Comprehensive Plan. All expansions and contractions have been decided by the Planning Commission through the Comprehensive Plan.” It is my understanding that the Planning Commission was very thorough in its analysis and study of land use in Fayette County and whether there is a need to expand the USB. Of course, any time one wants to argue for rezoning where it is not consistent with the existing CLUP, there is an intensive analysis related to traffic, sanitary sewer availability, compliance with the agreed order regarding storm water; water runoff, environmental issues, adjacent land use and soil studies. My understanding is the Planning Commission and its staff did such an intensive analysis. The final conclusion of the Planning Commission resulted in the proposed CLUP that has been recommended to the Council. On the other hand, the Council Members have done none of that intense analysis prior to certain Council Members making recommendations to revise the draft. In fact, due to lack of transparency, we have no idea what information (or disinformation) has been provided to the Council and upon which its members may be relying.

To get to the specific areas of concern:

A. Authority of City Council to Amend Goals and Objectives of Comprehensive Plan

KRS Chapter 100 addresses the establishment and revision of the CLUP. Here, the Planning Commission provided a draft statement of Goals and Objectives for the Comprehensive Plan. The Planning Commission’s draft did not include an expansion of the USB. When the Goals and Objectives went to the Council for review, Council member, Preston Worley, chopped up the proposal and has proposed an amendment that would have the practical effect of expanding the USB by 5,000 acres (and we hear others may be seeking to add a different number of acres). We do not believe the Council can amend the Goals and Objectives in this way.

KRS 100.183 states, “The planning commission of each unit shall prepare a comprehensive plan....” KRS 100.191 states “All elements of the comprehensive plan shall be based upon but not limited to, the following research, analysis, and projections....” KRS 100.191 then requires four types of research and analysis serve as the basis for all elements of the comprehensive plan.

KRS 100.193 outlines the basic responsibilities of the Planning Commission and the City Council. It reads, in part, “The planning commission of each planning unit shall prepare and adopt the statement of goals and objectives to act as a guide for the preparation of the remaining elements and the aids to implementing the plans. The statement shall be presented for consideration, *amendment*, and adoption by each legislative body and fiscal court in the planning unit.” (emphasis added). The statute continues, “Each legislative body and fiscal court in the planning unit may develop goals and objectives for the area within its jurisdiction which the planning commission shall consider when preparing or amending the comprehensive plan.” KRS 100.193(2).

We object to what we have heard about some of the Council Member’s amendments to the Goals and Objectives of the Comprehensive Plan due to the failure of the Council to base all elements of the Comprehensive Plan upon the research and analysis required by KRS 100.191. In this case, it appears that the Planning Commission is the party that did the research and it concluded

that the text we gather Councilman Worley has suggested to expand the USB (if true) was not justified or warranted and directly conflicts with the Planning Commission recommendation that the USB not be expanded. We are assuming Mr. Worley has provided no independent data or analysis to support his position.

Mr. Lear's memorandum distributed to the Council Members emphasized the word "element" throughout. It appears that he may be attempting to distinguish the Goals and Objectives from the "elements" of the Comprehensive Plan. This distinction is not justified. The term "element" is not defined in the applicable definition section of KRS Chapter 100. Therefore, the word "elements" should be given its everyday meaning. This interpretation is corroborated by the statute. KRS 100.193 states, "The planning commission of each planning unit shall prepare and adopt the statement of goals and objectives to act as a guide for the preparation of the *remaining* elements and the aids to implementing the plans." (emphasis added). The use of the word "remaining" means that the statute considers the statement of goals and objectives to be one element of the Comprehensive Plan, which shall be used as a guide for the remaining elements. Since all elements of the Comprehensive Plan must be prepared after gathering the required research and analysis set forth in KRS 100.191, it is clear that if a Council member suggests amending the Goals and Objectives, he or she must provide the research and analysis to justify his or her decision.

Further, the relevant statute provides that a comprehensive plan must consist of a number of "elements, of which Goals and Objectives is only one. A comprehensive plan must include, at a minimum:

- (1) A statement of goals and objectives, which shall serve as a guide for the physical development and economic and social well-being of the planning unit;
- (2) A land use plan element
- (3) A transportation plan element
- (4) A community facilities plan element
- (5) (a) Provisions for the accommodation of all military installations greater than or equal in area to three hundred (300) acres that are:
- (6) **The comprehensive plan may include any additional elements such as, without being limited to, community renewal, housing, flood control, pollution, conservation, natural resources, regional impact, historic preservation, and other programs which in the judgment of the planning commission will further serve the purposes of the comprehensive plan.**

KRS 100.187.

The procedure for adopting a comprehensive plan is as follows:

All elements of the comprehensive plan shall be prepared with a view towards carrying out the statement of goals and objectives. The various elements may be adopted as they are completed, or as a whole when all have been completed. **The planning commission shall hold a public hearing and adopt the elements.** The comprehensive plan elements, and their research basis, shall be reviewed from time to time in light of social, economic, technical, and physical advancements or changes. At least once every five (5) years, the commission shall amend or readopt the plan elements. It shall not be necessary to conduct a comprehensive review of the research done at the time of the original adoption pursuant to KRS 100.191, when the commission finds that the original research is still valid. The amendment or readoption shall occur only after a public hearing before the planning commission.

KRS 100.197(1) (emphasis added).

With regard to amending a comprehensive plan:

A comprehensive plan cannot be adopted by the Planning Commission without compliance with the research requirements of KRS 100.191 and the holding of a public hearing as required by KRS 100.197. The procedure for amendment of the comprehensive plan is the same as for the adoption of the original plan. KRS 100.197.

Hines v. Pinchback-Halloran Volkswagen, Inc., 513 S.W.2d 492, 493 (Ky. 1974) (emphasis added).

The “statutory scheme set out in KRS 100.197 **requires the planning commission to hold a public hearing before adoption of the comprehensive plan.**” Creative Displays, Inc. v. City of Florence, 602 S.W.2d 682, 683 (Ky. 1980) (emphasis added).

There must be **strict compliance** with the statutory scheme set forth in KRS Chapter 100, and substantial compliance is not enough to create a comprehensive plan. Id.

For example, in Gramex Corp. v. Lexington-Fayette Urban Cnty. Government, 973 S.W.2d 75, 78 (Ky. App. 1998), the Court of Appeals found that because the aggrieved property owner failed to file suit in the Fayette Circuit Court challenging the current validity and lack of update to the 1988 Lexington-Fayette County comprehensive plan as required by the terms of KRS 100.197(2), the property owner was prohibited from challenging the validity of the comprehensive plan in the current suit appealing the denial of landowner’s request for a zone change.

B. Amendment of a Zoning Map.

KRS 100.211 sets forth the procedure to amend a zoning map. It provides in relevant part:

(2) (a) **A proposal for a zoning map amendment may originate with the planning commission of the unit, with any fiscal court or legislative body which is a member of the unit, or with an owner of the property in question.**

(b) The proposed amendment shall be referred to the planning commission before adoption. The planning commission shall:

1. Hold at least one (1) public hearing after notice as required by this chapter; and

2. Make findings of fact and a recommendation of approval or disapproval of the proposed map amendment to the various legislative bodies or fiscal courts involved.

(c) 1. The planning commission shall make its recommendation within sixty (60) days of the date of the receipt of the administratively complete proposed amendment.

2. The originator of the proposed map amendment may waive the sixty (60) day requirement for the recommendation.

3. If the planning commission fails to make a recommendation upon the proposal within sixty (60) days of its receipt of the administratively complete proposed amendment and the time has not been waived by the originator, the application shall be forwarded to the fiscal court or legislative body without a recommendation of approval or disapproval.

(d) Notwithstanding the provisions of paragraph (c) of this subsection:

1. The planning commission of a consolidated local government shall make its recommendation within one hundred twenty (120) days of the date of the receipt of the administratively complete proposed amendment;

2. The originator of the proposed map amendment may waive the one hundred twenty (120) day requirement for the recommendation; and

3. If the planning commission of a consolidated local government fails to make a recommendation upon the proposal within one hundred twenty (120) days of its receipt of the administratively complete proposed amendment, and the time has not been waived by the originator, the application shall be forwarded to the legislative body of the consolidated local government without a recommendation of approval or disapproval.

KRS 100.211(2) (emphasis added).

We are not certain of the effect of placing additional acres within the USB. It may effectively change its zone from A-R to A-U. Of course, with a change in zone, comes expanded primary and conditional uses, such as radio or television studios and offices; funeral homes; commercial outdoor recreational facilities; hospitals and nursing homes; and schools. We understand the proposal from Lexington for Everyone/Chamber of Commerce would effectively permit immediate applications for zone changes in the new USB addition, which is clearly objectionable.

Therefore, there may be an effective rezoning which has occurred without any consideration of the agricultural soils; the presence of scenic byways; historical districts; conservation easements; the expense of sewerage; and the agricultural viability of our part.


The area that is apparently proposed to be added to the USB on Winchester Road could not be at a worse location in Fayette County. In this and the surrounding area are some of the most productive and valuable soils in the Country. Much of the land in the area is being used for very productive agricultural purposes. It is in an area with scenic byways, historic districts, conservation easements, and is beyond beautiful. There has not been any consideration as to why, if the USB needs to be expanded (which we dispute) it is in this particular location. Again, the lack of transparency as to how this tract was selected and what studies were undertaken to pick it, raises innumerable questions that will need to be addressed with the public before a vote is taken.

CONCLUSION

If the Council intends to modify the Planning Commission's Recommendations amending the CLUP and then to expand the USB, it must follow the legal limitations imposed, send this back to the Planning Commission to do the appropriate studies to determine whether the USB should be expanded and, if yes, the number of acres and then the appropriate location. We hope the Council will follow the law when it votes today, but if it does not, we will be prepared to take the necessary action to challenge the decision.

To the extent you believe it to be appropriate, please share our concerns with Members of the Council before they vote.

Sincerely,



THOMAS W. MILLER