

STAFF REPORT FOR CONDITIONAL USE REQUESTED FROM PLANNING COMMISSION

PLN-MAR-16-00013: BOONE CREEK PROPERTIES, LLC, DBA BOONE CREEK OUTDOORS

REQUESTED CONDITIONAL USE

Ecotourism and Agritourism activities – including a tree canopy tour, guided hiking trails, equine trails, canoeing and kayaking launch sites with recreational outfitters, educational classes, farm tours and a farm gift shop.

ZONING ORDINANCE

Article 6-4(c) states: “The Planning Commission may hear and act upon requested conditional uses and variances associated with a zone change. If the Planning Commission should choose to hear a conditional use or variance request, the Planning Commission shall have all of the powers and responsibilities of the Board of Adjustment, as defined in Articles 7-6(a) and 7-6(b) of the Zoning Ordinance. All conditional use and variance applications shall be acted upon by the Planning Commission within ninety (90) days of the application, unless postponed further by the applicant.”

Article 1-11 defines a building as “any structure for the shelter or enclosure of persons, animals or property.”

Article 1-11 defines agritourism as “activities conducted on an active farm; or at an agricultural, horticultural or agribusiness operation that are offered to the public for the purpose of enjoyment, education or active involvement in the activities of the active farm or facility. These activities shall be integrated into, directly associated with, and incidental and subordinate to the principal agricultural production on the property.”

Article 1-11 defines ecotourism as “activities conducted in natural, greenspace, or environmentally sensitive areas that are offered to the public for the purpose of enjoyment, education, and active involvement in the activities of the site. These activities shall safeguard the integrity of a natural feature, habitat or ecosystem.”

Article 1-11 defines “farm gift shop” as “an accessory retail facility limited to a maximum of five hundred (500) square feet in size that offers for sale farm products grown or raised on the premises, and/or memorabilia representative of the farm products grown or raised on the premises, such as hats, shirts, and souvenirs.”

Article 1-11 defines “farm tour” as “an accessory use to a working or active farm or other agricultural use that permits visitors a way to see and experience on-going agricultural operations and facilities, but shall not include overnight accommodations.

Article 1-11 defines a private club as “buildings and facilities, the purpose of which is to render a social, educational, or recreational service to members and their guests; and not primarily to render a service customarily carried on as a business or to render a profit. Private club shall include country club.”

Article 1-11 defines “recreational outfitter” as “an establishment that provides equipment and supplies for the pursuit of recreational activities, such as canoeing, hiking, fishing or trail riding. Recreational outfitters may offer services for outdoor tourism including guide services and transportation services.”

Article 1-11 defines a structure as “anything constructed, the use of which requires permanent or continuous location on the ground, or attached to something having permanent location on the ground.”

Article 1-11 defines “tree canopy tour” as “a guided aerial exploration or transit of the forest canopy, most commonly by means of a series of zip lines or aerial walkways with platforms constructed within the trees generally for scenic views, education, interpretation and recreation.”

Article 1-11 defines “zip line” as “a cable or rope line suspended between support structures enabling a person attached to a pulley to traverse from one point to another.”

Article 8-3(d) states that “for any of the following conditional uses established after January 26, 1995, a total of 10,000 square feet shall be the maximum allowable for all structures proposed for such uses. Prior to the approval

of any conditional use containing environmentally sensitive land, such as flood hazard areas; areas of significant tree stands; sinkhole and karst areas; slopes exceeding 15%; 'special natural protection' areas, as designated in the Comprehensive Plan; and stone fences, the applicant must prove, and the Board of Adjustment must find, that adequate safeguards will be in place to ensure the least negative impact on the land. This proof and finding shall extend to uses accessory to permitted conditional uses.

In making its determination, the Board of Adjustment shall:

- require the submission of an environmental assessment prepared by a qualified professional.
- consider mitigation of environmental impacts over time.
- consider the operational plan of any proposed agritourism or ecotourism activities.
- consider requiring certification for any proposed ecotourism activities."

Article 8-3(d)9 states that "agritourism activities, to include corn mazes; farm gift shops (limited to 500 square feet); educational classes related to agricultural products and skills; horse shows involving more than 70 participants; and seasonal activities" are allowable conditional uses in the A-N zone.

Article 8-3(d)10 states that "ecotourism activities, to include commercial hiking and bicycling trails; equine trails; tree canopy tours; canoeing and kayaking launch sites; botanical gardens; nature preserves and recreational outfitters, limited to equipment rental only" are allowable conditional uses in the A-N zone.

Article 8-3(e)34 states that "zip line trials" are a prohibited use in the A-N zone.

Article 8-3(n) requires a minimum of five parking spaces plus one additional parking space for each employee for a commercial outdoor recreational facility, Fishing Lakes, Ecotourism and Agritourism activities. The Board of Adjustment (or in this case, the Planning Commission) may establish additional parking requirements as needed.

CASE REVIEW

Boone Creek Properties, LLC is requesting a conditional use permit for agritourism and ecotourism activities including: a tree canopy tour (with ziplines), guided hiking trails, equine trails, canoeing and kayaking launch sites with recreational outfitters, environmental and agricultural education classes, historic and active farm tours, and a farm gift shop (of 500 square feet in size). Previously, a commercial outdoor recreational facility had been requested in conjunction with a prior zone change request from an Agricultural Rural (A-R) zone to an Agricultural Natural (A-N) zone. The subject site comprises 41.74 net acres at 8291 and 8385 Old Richmond Road, and 8385 Durbin Lane. The property is situated between Old Richmond Road and Boone Creek (which forms the boundary with Clark County), just to the northeast of the Interstate 75 interchange at Exit 99 in southeastern Fayette County.

This outdoor use would encroach into Clark County "air space." With the tree platforms that have been installed on the subject property previously, there are apparently two zip line crossings of Boone Creek from different platforms that would take patrons and tour guides out of Fayette County and into Clark County, and back into Fayette County. Apparently, there are no structures or platforms located, or to be located, on any tree in Clark County. The appellant has informed the staff that they have permission from that Clark County landowner to traverse above their property with their zip lines. Likewise, the Clark County Planning Commission has been notified of this request for a rezoning and Conditional Use Permit.

BOARD OF ADJUSTMENT HISTORY

In 2000, Boone Creek Properties, LLC requested a conditional use for a Bed & Breakfast facility (C-2000-87), which was withdrawn by the applicant prior to a public hearing. Upon withdrawal, the applicant immediately replaced the request with a new application (ACV-2000-128) for a private angler's club, and requested a setback variance, along with a request to change one non-conforming use to another. Portions of this request were approved - primarily the private angler's club and the setback variance along Old Richmond Road. It was noted that there used to be a restaurant and truck stop/gas station on the property, which was the subject of the change of non-conforming use request; however, it was determined that the non-conforming use had been abandoned and that portion of the request was disapproved. The Board approved the conditional use permit for the private club subject to 9 conditions.

The angler's club has continually operated at this location since it was approved. In 2011, Boone Creek Adventures, LLC (C-2011-70) requested a second conditional use permit to operate an agricultural market and

outdoor recreational facility, which had a tree canopy tour as the central feature of the use. The request also included hiking trails and accessory camping facilities for the subject property and two other properties on a total of 167 acres. After much discussion, the applicant withdrew the agricultural market portion of the request; however, after a lengthy hearing on January 27, 2012, the Board disapproved the remaining portions of the application, denying the requested conditional use. The applicant filed a lawsuit against the Board in Fayette County Circuit Court challenging that disapproval, and to this date, that court case is still pending.

The Board was presented with an opportunity to consider a much smaller version of a recreational Conditional Use Permit application in 2012. A portion of the subject property was part of a second application for an outdoor recreational facility, once again involving the zip lines and tree canopy tours that have been at the heart of each Conditional Use request, but this time without the Snyder Family farm. The Board decided not to consider that request, also made by this current applicant. The still-pending litigation was a factor in their decision.

The applicant proceeded to construct and use the tree canopy tour (including zip lines) under the contention that they had the right to do so on the basis of the Board's 2000 approval of the angler's club. The Division of Planning disagreed and issued a Notice of Violation (NOV) on March 8, 2013, directing the removal of the zip lines and that the appellant cease the use of them. The applicant appealed the NOV to the Board of Adjustment (A-2013-26: Boone Creek Adventures). On May 31, 2013, the Board of Adjustment disapproved the appeal, thereby upholding the Division of Planning's Notice of Violation. The applicant also added this action to the pending lawsuit.

Because the applicant continued to utilize the zip lines and canopy tour in defiance of the Notice of Violation, the LFUCG sought an injunction against the applicant in Circuit Court. After the Court hearing, the injunction was granted, requiring the tree canopy tours to terminate. The applicant appealed the injunction action; however, that appeal was denied after review by the court system.

PLANNING COMMISSION HISTORY

Part of the subject property was previously proposed for an outdoor recreational use. A zone change from A-R to A-N was filed for the 8291 Old Richmond Road property in 2014, along with a request for a Conditional Use Permit to allow some of the uses now proposed. That request had a well attended public hearing that lasted several hours. Most of the testimony centered on the requested Conditional Use Permit, and not nearly as much about the proposed rezoning. While the Commission voted to recommend approval of the rezoning of the property from A-R to A-N, it deadlocked (voting 5-5) on the requested conditional use. Prior to the Commission's Final Report being sent to the Urban County Council, the applicant withdrew their applications for this location.

From 2012 until earlier this year, a major Zoning Ordinance text amendment (ZOTA 2014-4 and SRA 2014-1: Recreation and Tourism Land Uses) was developed and reviewed to expand and clarify the Zoning Ordinance for recreational uses. Many of the definitions and specific uses proposed in this application, including those for agritourism and ecotourism uses, are the result of that project. The Urban County Council adopted those provisions several months ago.

CURRENT REQUEST

The applicant is proposing a second commercial outdoor recreational facility on the subject property, to accompany the private fishing club. From the application, the specific uses requested are for "a tree canopy tour, guided hiking trails, equine trails, canoeing and kayaking launch sites with recreational outfitters, environmental and agricultural education classes, historic and active farm tours, and a farm gift shop (limited to 500 square feet)." The applicant hopes to provide historical and educational programs, and to conduct agricultural uses on the southern half of the subject property.

The tree canopy tour is to be located on the northern half of the subject property (on about 20 acres). The tree canopy tour portion of the request includes 7 zip lines, 3 sky bridges, 1 floating staircase, 1 rappel, 2 ladders, 15 tree platforms, 2 viewing platform/observation decks, a ropes challenge course, a natural/recreational activity area and a children's outdoor recreational area. The petitioner plans to use the former Jolly Roger Restaurant and Truck Stop building (a non-conforming structure) for a welcome center to site visitors. The applicant plans to operate tree canopy tours within the safety guidelines of the Association for Challenge Course Technology (ACCT), and in accord with new regulations approved earlier this year in the Commonwealth of Kentucky for such uses. Periodic inspection standards are part of those new regulations.

In the prior application for a conditional use, the petitioner estimated that between 15,000 and 25,000 visitors will utilize the proposed outdoor recreational facility annually. They had planned to be open to the public about 280 days per year, and hours of operation will vary based upon the time of year, generally from 10:00 AM daily, generally with the last tree canopy tour leaving the welcome center 2 hours before dusk. During peak times, tours are planned to occur every 30 minutes for groups of 8-10 people, plus 2 guides. This equates to an average of between 50 and 90 visitors per day.

The angler's club/lodge occupies 3,970 square feet, and an existing shed for the angler's club is 320 square feet in size. The welcome center is 1,500 square feet in size, and a "multi-use cabin of 1,200 square feet is also to be utilized as caretaker's quarters and as a base for site activities." Thus, a total of about 9,900 square feet of floor area is proposed for this conditional use, including the two observation decks, according to the preliminary development plan submitted with this request. Including the recently constructed deck on two sides of the welcome center structure will place this use at the 10,000 square-foot maximum permitted by Article 8-3(d) of the Zoning Ordinance.

The petitioner is proposing two separate access points from Old Richmond Road to an off-street parking area, and a third access point to another small parking area near the angler's club. The parking lot at the south entrance is slated to be dedicated to staff/employee parking and will provide limited/gated access to the angler's club. Members of the angler's club will continue to use the small parking area near the lodge. Visitors to the tree canopy tour and other activities on the site will utilize the north entrance in a one-way circulation and will exit further to the north onto Old Richmond Road. A total of 60 spaces are proposed on the development plan. The angler's club has 13 spaces, which equates to a membership of 52 according to Zoning Ordinance requirements. The tree canopy tour, welcome center (including the caretaker's dwelling) and other uses near Old Richmond Road will have 47 spaces available, 12 of which will be available for the employees for Boone Creek Outdoors. It is not clear as to the full nature of the paving areas proposed, as some of the main parking lot is indicated to be in graveled areas.

The applicant has submitted a draft Best Practices Management Plan for the proposed outdoor recreational facility. Tree canopy tours can change over with time, since the trees can sustain damage or die, thus requiring modifications to a particular tour or course. The applicant has also submitted a Preliminary Assessment of Environmental Features and Sensitivities, which is 45 pages in length. This is now required by Article 8-3(d) of the Zoning Ordinance. The staff believes that information will assist the Planning Commission in making an informed decision on this request.

The staff also expects the applicant to submit an updated version of their "rescue procedures" at the scheduled public hearing. In the past, Boone Creek Outdoors has provided copies of this information to the LFUCG Fire and Emergency Services personnel at Fire Station #18. The rescue procedures gave very detailed instructions for emergency situations for guides while on the course, but do not provide local emergency personnel with a plan of accessing the property/course at any given point. It is the staff's opinion that in some extreme situations, hiking, ATVs or even helicopters may be required in the event of an emergency on the more rugged portions of the subject property.

The applicant has submitted information about the platform trees and wildflowers in the Boone Creek area, as well as their plans and progress in terms of managing the wintercreeper and honeysuckle on the subject property (both of which are invasive species). The platforms are tree-friendly and will accommodate future growth of the trees. The tree canopy tour that already exists was installed by S.T.E.P.S., Inc. from Ann Arbor, Michigan.

There are some uncertainties about some of the activities planned for the subject property, and some of the site improvements planned to support those activities. For instance, the areas near the front of the property that are shown for a "ropes challenge course" and "children's outdoor educational area" are not detailed in any fashion. In addition, there is no indication that the 47 space parking lot is to be completely paved or landscaped. Such are typical requirements of most conditional uses that are ultimately approved. The staff believes that clarification of those activities should be discussed at the scheduled public hearing.

LEGAL ISSUE

In the past, there has have been several legal issues associated with the 8191 Old Richmond Road property. As of this 2016 date, the only outstanding litigation is for the original Board of Adjustment 2012 denial of a Conditional Use Permit for an outdoor recreational facility, involving some similar tree canopy tour equipment and

customer experiences that are now proposed for this Conditional Use Permit. The legal issue is whether or not the possibility of “differing outcomes” would result from the Planning Commission’s action on such a similar application to the one rejected by the Board, and now involved in separate litigation. The possibility of “differing outcomes” from actions of the Commission and the Courts could leave the applicant and the community uncertain of the status of this use at this location.

Given this legal question, the staff would recommend postponement of this request at the time of the Zoning Committee meeting, so that some discussions can be had with the Department of Law about this legal issue.

The Staff Recommends: **Postponement**, for the following reasons:

1. There is an unresolved legal issue associated with the current request for Planning Commission consideration of a Conditional Use Permit at this location. The staff would like to hold a discussion of this issue with the Department of Law prior to the Planning Commission’s public hearing for this application.
2. A postponement would allow time for the applicant to complete some site plan details about certain aspects of the proposed conditional use.

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