

**MURRAY BOARD OF ZONING ADJUSTMENTS  
REGULAR MEETING  
WEDNESDAY, MARCH 20, 2013  
4:30 P.M.**

The Murray Board of Zoning Adjustments met in regular session on Wednesday, March 20, 2013 at 4:30 p.m. in the council chambers of City Hall located at 104 North 5<sup>th</sup> Street.

**Board Members Present:** Brad Darnall, John Krieb, Mary Anne Medlock, Josh Vernon, and Mike Faihst

**Board Members Absent:** Justin Pounds and Scott Seiber

**Also Present:** Candace Dowdy, Justin Crice, Reta Gray, David Roberts, Jennifer Tolley, Mike Pitman, Officer Kendra Clere, Officer Scott Svebakken, Tammy Rogers, Tung Dinh, Joey Allen, Dale Campbell, Jim Tate, Butch Sergeant, Hawkins Teague and public audience

Chairman Krieb called the meeting to order and welcomed all guests and applicants. Candace Dowdy administered the oath of office to the BZA's newest member Michael Faihst.

Chairman Krieb asked if there were any changes, additions or deletions to the February 20, 2013 regular meeting. Changes were noted.

**Mary Anne Medlock made a motion to approve the amended BZA minutes from February 20, 2013 regular meeting. Josh Vernon seconded the motion and the motion carried unanimously.**

**Public Hearing: Review of Conditional Use Permit for the Night Owl – 1413 Olive Boulevard – Tung Dinh:** Candace Dowdy used a Power Point presentation to show Mr. Tung Dinh's business, The Night Owl, located at 1413 Olive Boulevard which is located in B-1 zoning district. Ms. Dowdy reviewed the history of Mr. Dinh's conditional use permit for the new BZA members. On September 22, 2010 the board approved a conditional use permit to allow Tung Dinh to operate a recreational facility at 1413 Olive Boulevard. The BZA also approved a parking variance at that time. Prior to the permit being reviewed in May 2011 there were some issues brought to the attention of the Planning Department and the Board of Zoning Adjustments that Mr. Dinh was not using the property as he originally requested. After reviewing all the additional information the BZA moved to allow the conditional use permit to remain in effect, with the notation that it was to be reviewed again in six months and that strict compliance be adhered to regarding the use of the property as outlined in the original application. The board again reviewed the permit in November 2011 and approved the continued use of the property since Mr. Dinh had made an attempt to keep his business in compliance with the initial conditions and that it was to be reviewed again in one year. At the November 14, 2012 BZA meeting Planning Staff noted that they had recently contacted Murray State University to see if there had been any issues with parking or other disturbances from Mr. Dinh's business in the last year. They indicated that there had been no issues that they were aware of. Staff also attempted to contact Tammy Rogers that owns the building just to the east of Mr. Dinh's business and had no response from her. Mr. Dinh told staff that the nature of his business was still the same in that he had a coffee shop up front with a hookah lounge in the back. Mr. Dinh indicated that they still play music and have an area for students to dance if they choose to and that they have pool tables for their use. Their hours of operation remain from 8 a.m. to 2 p.m. during the day and then they close until 8 p.m. and remain open until 2 a.m. six days a week. The board moved to allow the Night Owl to continue their business since they were currently in compliance with the conditions placed on the conditional use permit. The board directed staff to monitor the situation to see if any additional review of this permit was needed by the board. In early February of this year Chief Liles with

Murray Police Department made David Roberts, Dir. Of Planning and Engineering aware of some issues that the police department was having with the Night Owl and asked if there was any assistance the Planning Department could give them in trying to resolve these issues. Chief Liles supplied the Planning Department with copies of the recent police reports filed from calls made to the Night Owl. (*Ms. Dowdy passed out copies of the police reports to the Board that had been obtained from Chief Liles. These reports were entered as Exhibit A.*) Dickie Walls, Fire Marshal has also been informed of the information provided on the police reports for possible fire code violations concerning occupancy load of the building. Ms. Dowdy referred to the police reports and said that it was noted in the report that the occupancy load was 165 and there were many more people there. Ms. Dowdy added that she had tried to contact Dickie Walls, Fire Marshal before the meeting to see if he had made any inspections of Mr. Dinh's property or written any citations involving any violations. She was unable to reach him. She stated that Mr. Dinh was in attendance if the Board had any questions. Based on the information provided to the Planning Department from MPD, Planning Staff conferred with their attorney, Mike Pitman. Attorney Pitman indicated that the information was sufficient cause to inform the BZA of possible non-compliance of the original permit issued on September 22, 2010. Brad Darnall asked if the original motion granting Mr. Dinh a conditional use permit could be read. Ms. Dowdy read that motion and defined a conditional use.

Chairman Krieb opened the public hearing and asked if the police representative would come forward.

Sergeant Scott Svebakken, 507 Meadow Lane, Murray was sworn in. Sgt. Svebakken stated that MPD had responded to a couple of calls; one in January and the other in February. Sgt. Svebakken answered the first call at the Night Owl concerning a fight that had broken out. When they arrived there was no one that had been injured from a fight. There was an extremely large crowd and a gathering out front. There were a lot of people involved with threatening each other and hollering and screaming at each other. MPD tried to disperse the crowd. When Sgt. Svebakken entered the building, it was so full he couldn't really move because it was so jammed with people. He added that it took quite a while to get everyone cleared out of the building. A couple of weeks later, Sgt. Svebakken noticed a large crowd gathering there again. He stopped and went in to see how many people were inside. It looked like there were far more than the capacity on the inside so he advised the management of that. The staff at The Night Owl made the decision that they were going to allow one person in as one person left; thus, a line formed outside. The Night Owl had a band playing that night and the security was having some difficulty with the people wanting to come in so Sgt. Svebakken stuck around for a while to help them enforce their one-in, one-out policy. While he was there, he heard there was a fight that had broken out inside the building. He really couldn't get to the fight because there were so many people inside. Sgt. Svebakken said the altercation involved a couple of females. When the lights were turned on, one of the females was being dragged away. Sgt. Svebakken decided to close the Night Owl that night because there were so many people. It was becoming a dangerous situation. There is one single door that exits from the dance floor and Sgt. Svebakken started counting the heads as the individuals left. He counted over 200 people plus there were additional people that left (that were not counted) while the officers were breaking up the fight. Before he closed the facility for the night, he made the owner of the establishment aware that there were too many people in the building. He also informed the owner that in the future he needed to have some type of system where he could keep up with the number of people that were in the building. The owner agreed that would be a good idea and since that night, Sgt. Svebakken said that there had not been any other reports. Sgt. Svebakken stated that he did return another night to see how things were going and Mr. Dinh showed him wrist bands that he was issuing to keep count on the occupancy. Sgt. Svebakken said there were not that many individuals there that night and everything seemed orderly and improved. Ms. Dowdy asked Sgt. Svebakken if he recalled any vehicles parked along Olive Boulevard on the nights that he was called. Sergeant Svebakken said there were not any. He said that MSU has parking available at that time of the day because classes are not in session; therefore, the ones that drive have parking available in the MSU parking lots. Ms. Dowdy said that she had contacted the MPD

dispatch and asked if they could pull a report to see if there were any other instances at this site. The dispatch had indicated that there was one other report where a girl had reported her purse stolen while she was at the Night Owl around the 23<sup>rd</sup> of February. The girl's father advised her to file a report with the police department approximately a week after the purse was stolen.

Tammy Rogers, 273 Pottertown Road, Murray was sworn in. Ms. Rogers owns the building that adjoins Mr. Dinh's establishment to the east. She rents the apartment in the back of her building and a hair salon operates in the front. Ms. Rogers said that she had asked her renter to inform her of any complaints. Her renter indicated that there was still a problem with trash being left around, broken glass in the graveled area and beer bottles left in their mailbox. There is extremely loud music throughout the day beginning as early as 6:30 a.m. and lasting sometimes until 3:00 a.m. The tenant has called the police several times and was told that the band or music had to be loud enough to be heard 50 feet away before they could issue a citation.

Tung Dinh, 808 Coldwater Road, Murray was sworn in. Mr. Dinh said that a band was practicing once at 6:30 a.m. and he would make sure that would never happen again. Addressing the fights, Mr. Dinh said that one of his staff members, Sarah had called the police when a fight broke out between a Murray State football and basketball player. He said on the second incident two ladies were arguing and he was glad it was stopped before it turned into something more. They have welcomed the police to help them out with these two incidents. Mr. Dinh stated that the Fire Marshal had stopped by last year to check to see if everything was compliant with the fire codes and he also made suggestions on what needed to be done to be compliant with the fire extinguisher and emergency lighting. Mr. Dinh apologized that the occupancy load had been exceeded and he said that instead of the 165 count that he is allowed, he is trying to keep it at 150. Brad Darnall asked if alcohol was allowed in the Night Owl. Mr. Dinh said that it was not. Mr. Dinh has a sign posted stating that no alcohol is allowed and the staff enforces that. Mr. Darnall asked how many staff members Mr. Dinh had. Mr. Dinh replied there were five staff and two security guards. Mr. Darnall asked if Mr. Dinh knew about the band coming in at 6:30 a.m. to practice. Mr. Dinh replied that he did not; his manager failed to tell him that. Ms. Medlock stated that it was his business and he should have known what was going on. She then questioned the 300 individuals that were let in to the establishment which was almost double what the occupancy load was. Mr. Dinh said that the money that he received that night from cover charges did not show that 300 people were admitted into the building. He continued that with 150 people, they are quite full and he did not think that they had actually doubled the occupancy load. He thought it was more like 210. Chairman Krieb told Mr. Dinh that according to Sgt. Svebakken, he had personally counted over 200 individuals; therefore, the manager must have been ignoring the amount of people that were coming in. Mary Anne Medlock stated that when Chief Liles addressed the Planning Staff to see if there was anything that could be done concerning this situation that spoke in volumes. Ms. Medlock continued that she was concerned with the number of individuals in the facility. When Mr. Dinh was issued the conditional use permit, they had talked a lot about a recreational facility. At this point Ms. Medlock feels that the business is not operating as a recreational facility, but a club/tavern instead because of the large numbers of individuals in attendance. Mr. Dinh stated that he is not operating a tavern at this location because he does not serve alcohol. He said that others may drink somewhere else and come to his place afterwards. Mr. Dinh said that he would increase his security and would do better. Ms. Medlock said that the board wants to help Mr. Dinh meet the conditional use permit and in turn be a good neighbor. Brad Darnall said it seems like the board is getting apologies, but they are not getting changes. He added that that they would like to establish some guidelines to see that these types of non-compliant acts do not continue to happen. Mr. Darnall said that "recreational facility" is a vague term and he does not know the exact meaning of it. The last line of the motion granting the conditional use permit stated that the facility not be a nuisance to the surrounding area. Mr. Darnall asked Mr. Dinh if he felt like he had become a nuisance to the surrounding area. Mr. Dinh said that in the two years that he has had this operation, the police have only been called twice. Both instances were because

of a conflict between individuals. He added that there had been no arrests made at any time at his facility. Mr. Dinh replied that he is sorry for the things that have gone wrong and he will comply with the conditional use permit; however, he is located in a business zoned district and it is hard to have a resident next door. Josh Vernon said that he was correct; he is permitted to operate a business in a business district. Mr. Vernon added that Mr. Dinh does seem to have come into compliance with the conditional use permit; however, Mr. Vernon wanted to know what Mr. Dinh planned to do in order to prevent these types of things from happening in the future. He also asked Mr. Dinh how he planned to avoid becoming a nuisance to the neighborhood with regards to fights, drinking alcohol inside of the building and the overcrowding both inside and outside the building. Mr. Dinh asked if they wanted him to pay a penalty. Brad Darnall replied that they did not, they simply want him to come up with a business plan that addresses the situations that were discussed where he won't have to continue coming before the board every year. The following suggestions were made for Mr. Dinh to include in his business plan:

- Establish hours of operation.
- See that staff is properly trained and that everyone knows their role.
- How is security going to handle the special functions?
- How will the number of people that show up at the door be handled?
- Do you have the appropriate amount of trash containers?
- Who is responsible for taking care of the trash on the inside and outside of the building?

Mr. Darnall said that these were the type of things that were going to have to be established so that Mr. Dinh can take charge of the situation. Ms. Dowdy said that as far as trash goes, Mr. Dinh has one dumpster in the front of Burrito Shack and three garbage cans in back of the Night Owl. If trash continues to be an issue, that can be addressed by Property Maintenance. The noise can be handled by the MPD. Ms. Rogers has the right to continue the use of renting an apartment in the business zone because that apartment is actually "grandfathered in". As long as the use is not changed in any way, that use can continue. Ms. Dowdy said that the board should keep in mind the initial issue of the conditional use permit and decide if the nature of the business is still a recreational facility. Chairman Krieb asked Attorney Pitman if it would be appropriate for the board to ask Mr. Dinh to come up with a list of hours and procedures for his business and present them back to the board for review within a certain time frame. Attorney Pitman said that it would. He said it should also be determined if Mr. Dinh still continues to operate as a "recreational facility" and if the operation is a nuisance to the neighborhood or hazard to the community. He added that the capacity occupancy should be strictly enforced because that could be disastrous if something should happen. Attorney Pitman continued that the board will have to determine if Mr. Dinh is in compliance or not. If he is found not to be in compliance the conditional use permit could be revoked, extended, continued with specifications or the matter could be tabled. Attorney Pitman stated that when he received the call from the Planning Staff, they were concerned with being approached by the Chief of Police over the matter. Chairman Krieb noted that it is also important to note that these incidents have occurred within the last six to eight weeks and not over the two year span that Mr. Dinh has been operating his business.

Chairman Krieb closed the public hearing and turned it over to the board for discussion and a motion.

Josh Vernon said that he was not on the board when the initial conditional use permit was granted, but it appears that the Night Owl is being used as a club at this time. Mike Faihst added that the occupancy is a big problem. When there are that many people in a building and something happens, there just isn't any way to get them all out safely. The crowd outside is another concern. At this point Mr. Dinh does not seem to have the crowds on the inside or outside under control. Chairman Krieb stated that Mr. Dinh seemed to be making improvements since the police reports were filed. He then reiterated that Attorney Pitman had given three possible options for the Board's consideration.

- 1) Revoke the Conditional Use Permit
- 2) Extend/Continue the Conditional Use Permit

- 3) Extend/Continue the Conditional Use Permit with specifications in regards to the issues that were identified

Mary Anne Medlock said that she would like to table the matter and give Mr. Dinh the next month to come up with a business plan and a list of ways that he plans to bring his recreational facility into compliance. At that time he can present those to the board for review. She does not feel that it is the board's place to come up with those specifications to operate Mr. Dinh's business. She said that it is the board's responsibility to place the conditions on the conditional use permit and they have already done that. Brad Darnall agreed with Ms. Medlock. Chairman Krieb asked Attorney Pitman if it would be appropriate to give Mr. Dinh two weeks to establish a plan and have the plan reviewed by the Police Department and the Planning Staff. Attorney Pitman said that would be reasonable. Mike Faihst asked if they would be able to get a report from the Fire Marshal as well. Ms. Dowdy stated that they would be able to find out what steps the Fire Marshal has taken in reference to Mr. Dinh not being in compliance with the Fire Code as far as his occupant load.

**Brad Darnall made a motion to table the review of the conditional use permit for the Night Owl, 1413 Olive Boulevard until the April meeting pending the submission of a business plan by Mr. Tung Dinh on how the business plan will meet the conditional use permit and meet the definition of a recreational facility. The business plan should include actions that will take care of issues that have been addressed. This plan should be submitted within two weeks to allow time for review by the Planning Staff, Board of Zoning Adjustments and someone from the Police Department to make sure that the plan is efficient. Mike Faihst seconded the motion and the motion carried with a 5-0 voice vote.**

**Public Hearing: Conditional Use Permit request to allow outdoor storage of merchandise at 401 Sycamore Street – Friendly's Liquor Wine & Beer – Joey Allen:** Justin Crice used a Power Point presentation to show pictures of Friendly's Liquor Wine & Beer location at 401 Sycamore Street. Mr. Joey Allen was issued a business license for this location in February to operate a liquor store. This property has previously been used as a carry out food facility as well as a convenience store. Staff noticed that Mr. Allen had placed an ice box outside the establishment after opening and informed him that in the B-2 zoning district any outdoor storage of merchandise required a conditional use permit. Mr. Allen said he would like to apply for the conditional use permit because his building is very small and has limited storage space inside. The building is approximately 900 square feet. Mr. Allen is requesting to have a 6 foot x 3 foot outdoor icebox at this time. He indicated he may eventually expand his building to the south because he would like to add some indoor storage. There is a drive-thru lane that goes from the north to south. The facility is located on a corner lot with no sidewalks. Screening has been added around the dumpster in the rear of the facility and Mr. Allen has striped the parking lot as the Planning Staff had requested.

Chairman Krieb opened the public hearing and asked if there was anyone that wished to speak in favor of the application.

Joey Allen, 10800 Tobacco Road, Gracey, Kentucky was sworn in. Mr. Allen stated that he called the local ice company and told them that he would need an ice merchandiser. The company delivered the ice merchandiser and they put it in front of the store as he had requested. Mr. Allen apologized and said that he didn't realize that he was in any violation until he received a visit from Justin Crice who informed him that he would need a conditional use permit to be able to have outdoor storage of merchandise. Mr. Allen stated that he just doesn't have room inside his store for an ice machine and he said that if it is possible he would like to leave it where it is now. Mr. Allen continued that he had made several improvements around the building. He put up a light on the north side facing Sycamore Street and also lights around the building. He striped the parking lot as Mr. Crice had stated earlier and he is now in the process of painting

concrete stop blocks that the State has requested on the northeast corner of the property. Josh Vernon asked if Mr. Allen anticipated having any additional outdoor storage in the future. Mr. Allen replied that he did not. Mr. Allen stated that he had talked to the Planning Staff to see the procedure for adding on to the building. He continued that he spoke to a contractor about an addition to the south side of the building. The contractor is going to draft something to present to the Building Department and if it's approved, he will add 15 feet to the back of the building that will be an indoor storage area.

Chairman Krieb asked if there was anyone that wished to speak in opposition to the application. There was no one. Chairman Krieb closed the public hearing and turned it over to the board for discussion and a motion.

**Mary Anne Medlock made a motion to approve the conditional use permit for Friendly's Liquor Wine & Beer, located at 401 Sycamore Street to allow outdoor storage of merchandise as requested. This approval is for the ice box on the north side of the building. The motion is issued on the fact there is a lack of space inside the building for storage and that the request is similar to other businesses with outdoor storage. Josh Vernon seconded the motion and the motion carried with a 5-0 voice vote. Butch Sergeant left the meeting at 5:55 p.m.**

**Compatibility Hearing: Proposed residential PDP east of 1300 North 16<sup>th</sup> Street – Dale Campbell:** Candace Dowdy used a Power Point presentation to show the property owned by Dale Campbell located at 1300 North 16<sup>th</sup> Street (tract of land behind former Murray Moose Lodge property). The property was subdivided in 1999 into two tracts of land with the back tract (east side) having a restricted approval because it had no road frontage. The front tract (west side) where the building is located has been sold and Mr. Campbell retained the back tract for future development. The property was re-zoned from R-4 to B-2 (Highway Commercial) in May of 2004. This property is surrounded by R-4 (Multi Family Residential) to the West and East, and B-2 (Highway Commercial) to the South and East. In a B-2 zoning district, residential housing is allowed as a conditional use. Ms. Dowdy stated that the property was recently re-platted and the Planning Commission approved the minor subdivision plat last month. The new plat created a 40 foot access easement on the front tract allowing access to the back tract that Mr. Campbell is proposing to develop. The site plan shows 70 one bedroom apartments on the remaining 3.38 acre tract of land. The development would be accessed by a 28 foot wide private drive located within the 40 foot access easement. The drive aisles within the development are 25 feet wide with parking spaces that are 9 feet x 20 feet. The required parking for this development would be 210 parking spaces with the site plan showing 125 parking spaces which is a little over 1.5 parking spaces per dwelling unit. The buildings along the east side are shown as being 15 feet off the property line with the one building at the northeast corner of the property being ten feet off the north property line. Sanitation is addressed with a dumpster location shown in the northwest corner of the development. Emergency fire vehicle access has been determined as being sufficient. Josh Vernon asked if the Fire Marshal required a second means of ingress/egress for a development as this. Ms. Dowdy replied that during the Planning Commission meetings, this item is a real concern with some of the commissioners; however, that is something that the Planning Commission and BZA have to look at (in each individual case) to determine if the second entry is necessary. Chairman Krieb added that the layout of this development's drive aisles (in comparison to a straight in and out drive) is somewhat of a circular motion for traffic to flow. This layout would prevent blockage to the entire development should an emergency or disastrous situation occur. Chairman Krieb reviewed that when the former proposal for the property in July of 2012 was presented, there were 147 bed units to the development and now there are only 70 bed units which is significant in the amount of traffic. Stormwater detention plans will be required through the PDP process as well as a landscaping plan. Ms. Dowdy stated that Mr. Campbell and Mr. Tate were in attendance if the Board should have any questions for them.

Jim Tate, 16 Gil Lane, Murray was sworn in. Mr. Tate stated that he had met with Fire Marshal Dickie Walls on three different occasions and Mr. Walls indicated that the proposal is very sufficient with the way it is set up and the layout is perfect as long as there are loops and sufficient width in the ingress/egress to accommodate emergency vehicles. Mr. Tate stated that they initially looked at a 50 foot easement for the access road and then decided on a 40 foot easement because they wanted to leave 10 feet for better access to the door on the south side of the former Murray Moose Lodge. Mr. Tate added that they are trying to leave as much green space as possible; thus, the green space along the entire front of the proposed project. Mr. Campbell met with the engineer and they are going to try to give them three feet in front of all the buildings for shrubbery. The developers are hoping that this will be a sought after location with its proximity to MSU, Walmart, restaurants, and retail stores; therefore, alleviating some vehicle traffic and encouraging foot traffic. Mary Anne Medlock said that she had some concerns with the alley that is between the center buildings. She added that there is not really enough room there for a recreation or play area; however, if the buildings were connected, there might be more space available in the front of the buildings. Mr. Tate said that the plan may still be modified somewhat; they are currently trying to tweak it so they can make everything as attractive as possible. Josh Vernon said that the board is not there to tell the developer how to layout his proposal, but he wondered if the layout could be changed to two or three story units. Mr. Tate said that they have found that stacked housing is not as cost effective to them. Ms. Medlock asked if it was possible to place a trash container at both ends of the development. Mr. Tate replied that they had spoken to the Hall's that own the property to the west about combining the sanitation pick-up for the two properties and they are trying to work out something with them.

Dale Campbell, 2213 Traci Drive, Murray was sworn in. Mr. Campbell stated that they had only presented a preliminary site plan and he suspected there would be some changes made. On the west side (front) of the property there is a 45 foot green space. Mr. Campbell is going to suggest to his engineer Kim Oatman that he put 10 feet of the front yard green space on the back yard of the development leaving the front at 35 feet and the back yard at 25 feet.

**Brad Darnall made a motion that the proposed residential PDP at 1300 North 16<sup>th</sup> Street by Dale Campbell is compatible to the surrounding area. Mary Anne Medlock seconded the motion and the motion carried with a 5-0 voice vote.**

**QUESTIONS AND COMMENTS:** Justin Crice informed the commissioners of a workshop on April 9<sup>th</sup> and 10<sup>th</sup> that will be sponsored by the city. Dinner will be served on the 9th. The EPA will be coming in to help look at issues with the Zoning Ordinance and the possibility for changes.

Josh Vernon asked what would be the proper procedure in solving the traffic issues in regards to the Jimmy John's proposal that was denied at North 12<sup>th</sup> Street and Olive. Mr. Vernon said that he had some suggestions. Mr. Roberts replied that Mr. Vernon could contact him. Ms. Dowdy informed the BZA the reason that they were not reviewing the Jimmy John's proposal was because the Planning Commission had denied the Preliminary Plat the previous night. Chairman Krieb added that unless Jimmy John's made a substantial change to their plat or presented a different location that they would not be locating in Murray. Mr. Roberts said that Murray welcomes businesses and they hoped to see Jimmy John's present a new proposal in the near future.

**ADJOURNMENT: Josh Vernon made a motion to adjourn. Mary Anne Medlock seconded the motion and the motion carried unanimously. The meeting adjourned at 6:20 p.m.**

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Chairman, John Krieb

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Recording Secretary, Reta Gray