

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS  
CIVIL DIVISION

CROSS HOLLOWES PRESERVATION ASSOCIATION;  
BRIAN McFARLAND; CYNTHIA McFARLAND;  
JOHN EDSTER; and SANDRA EDSTER ..... PLAINTIFFS/APPELLANTS

v. Case No.: 04CV-20-\_\_\_\_\_

BENTON COUNTY BOARD OF APPEALS; and  
BENTON COUNTY, ARKANSAS ..... DEFENDANTS/APPELLEES

**NOTICE OF APPEAL AND COMPLAINT FOR DECLARATORY JUDGMENT**

1. Notice is hereby given that Plaintiffs appeal *de novo* from a final administrative decision of Defendant, Benton County Board of Appeals (“Board of Appeals”).

2. Cross Hollows Preservation Association is an unincorporated association with its principal location in Benton County. Brian McFarland, Cynthia McFarland, John Edster, and Sandra Edster reside in Benton County in close proximity to the Site (hereafter defined) and they are members of Cross Hollows Preservation Association.

3. The final administrative decision at issue is the decision of the Board of Appeals to deny the Plaintiffs an appeal of the Benton County Planning Board’s decision of December 18, 2019 approving a site plan review application with respect to the development of a limestone quarry at Benton County Parcel No.:18-04070-0011 (“Site”).

4. The final administrative decision was made on January 28, 2020, and this appeal is timely.

5. Venue is proper in this Court as the parties reside in Benton County.

6. This Court has subject matter jurisdiction pursuant to Ark. Code Ann. § 14-17-211, Ark. Code Ann. § 16-111-102, and Ark. Code Ann. § 16-13-201.

7. “Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.” Ark. Code Ann. § 16-111-102.

8. Section 2.2 of the Planning and Development Regulations of Benton County (“Ordinance”) provides in relevant part:

“A Board of Appeals is hereby established to provide applicants the opportunity to appeal any administrative or Planning Board Decision on matters pertaining to this Ordinance. For the purposes of this section, ‘applicants’ means the person or persons making an application to the County for approval of any type of review subject to the Ordinance . . . .”

A copy of the pertinent sections of the Ordinance is attached hereto as Exhibit A.

9. On or about October 3, 2018, the David Covington Trust, the Joanne M. Covington Trust, and Anchor Stone Company submitted to the Benton County Planning Board a site plan review application (“Site Plan Review Application”) for authority to operate a limestone quarry at the Site. A quarry operation at the Site will change the Site activity by adding a rock crusher and dynamite blasting, among other things, and will severely affect the quality of life for the Plaintiffs and members of the Association.

10. The Plaintiffs actively opposed the Site Plan Application when it was before the Benton County Planning Board. On December 18, 2019, the Benton County Planning

Board granted its approval of the Site Plan Review Application and the Plaintiffs were aggrieved thereby.

11. Within 30 days of the date of such approval by the Benton County Planning Board, Plaintiffs filed an appeal of the decision with the Board of Appeals. The Board of Appeals summarily denied the Plaintiffs appeal by letter to Plaintiffs dated January 28, 2020. A copy of the letter is attached hereto as Exhibit B.

12. The Board of Appeals stated: “. . . the Board of Appeals is established to provide *applicants* the opportunity to appeal any administrative or Planning Board decision on matters pertaining to this Ordinance. . . . Given the contents of the appeal documentation and the individuals you represent, the Board of Appeals is not an option for administrative appeal for the individuals you represent.” (emphasis added).

13. The Defendants’ denial of Plaintiffs’ right to appeal—while maintaining a right to appeal for the applicant—violates the equal protection clauses of the United State Constitution and the Arkansas Constitution. *U.S. Const. amend. XIV, § 1.*; *Ark. Const. art. II, § 3.*

14. “When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin v. Illinois, supra*; *Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 788, 9 L.Ed.2d 892 (1963); *Long v. District Court of Iowa*, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969). Cf. *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); *Ellis v. United States*, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958).” *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

15. “To the extent that a right of appeal is granted, equal protection applies.”  
*White v. State*, 373 Ark. 415, 417 (2008); see also, *Gilliam v. State*, 305 Ark. 438 (1993).

16. The Ordinance should be declared unconstitutional to the extent it provides a right of appeal to “applicants” but denies the right of appeal to other persons who have been, or claim to be, aggrieved by decisions of the Benton County Planning Board.

17. The Plaintiffs should be afforded an opportunity to be heard by the Board of Appeals.

WHEREFORE, the Plaintiffs pray that the Ordinance be declared unconstitutional as set forth herein and that this Court remand this matter to the Benton County Board of Appeals.

CROSS HOLLOWS PRESERVATION  
ASSOCIATION; BRIAN MCFARLAND;  
CYNTHIA MCFARLAND; JOHN EDSTER;  
and SANDRA EDSTER,  
Plaintiffs/Appellants

By: /s/ Richard H. Mays  
Richard H. Mays, Their Attorney  
Arkansas Bar #61043  
RICHARD MAYS LAW FIRM PLLC  
2226 Cottdale Lane – Suite 100  
Little Rock, Arkansas 72756

By: /s/ Edmond Joseph McGehee  
Edmond Joseph McGehee, Their Attorney  
Arkansas Bar #2015185  
MATTHEWS, CAMPBELL, RHOADS,  
McCLURE & THOMPSON, P.A.  
119 South 2nd Street  
Rogers, AR 72756-4525  
(479) 636-0875 (479) 636-8150-Fax  
ejm@mcrmt.com

# **Exhibit A**



# PLANNING AND DEVELOPMENT REGULATIONS OF BENTON COUNTY

**April 1998**

Ordinance No. O-98-53

**REVISED March 2014**

Ordinance No. O-2014-06

**REVISED October  
2014**

Ordinance No. O-2014-60

**REVISED October  
2018**

Ordinance No. O-2018-42

**PLANNING DEPARTMENT**  
1204 SW 14<sup>th</sup>  
Street, Suite 6  
Bentonville, AR 72712

## **B. Enforcement**

It shall be the duty of the County Judge to enforce this Ordinance and address any violations of the Ordinance and/or the rules established by this Ordinance or otherwise adopted or established pursuant thereto. The enforcement by the County Judge may be carried out by the County Judge, by any County employee acting on his behalf or on behalf of the County, or by any other governmental official, employee or agent acting on his behalf or on behalf of the County. Actions for enforcement are valid if brought in the name of the County Judge, the County Planning Board, or the County, and no proof of specific authorization to bring an enforcement action shall be required. Enforcement actions may also be brought in the name of the State of Arkansas where appropriate by the Prosecuting Attorney (or his or his deputy) having authority in Benton County and no specific authorization for such shall be required.

The enforcement authorized herein may be pursued in the civil courts, through injunction or otherwise; or through the criminal courts, including, but not limited to such enforcement being based on the provisions of this Ordinance providing that a violation thereof shall subject the violator to punishment under the provisions of § 1-9 of the Code of Ordinances of Benton County.

Additionally, in accordance with §14-17-207(f) of the Arkansas Code any individual aggrieved by a violation of this Ordinance and/or the rules established by this Ordinance or otherwise adopted or established pursuant thereto may request an injunction against any individual or property owner in violation or may mandamus any official to enforce the provisions of the Ordinance.

The County Judge and/or those persons, employees, or agents acting on his behalf shall have the authority to issue a document stating that a person or entity is in violation of the Ordinance and/or the rules established by this Ordinance or otherwise adopted or established pursuant thereto (a "Notice of Violation"). Such document may be by letter or otherwise and may be delivered personally or by mail, electronic or otherwise. Such notices are only tools to be used in encouraging compliance and it is not a requirement that a Notice of Violation be given before an enforcement action provided for herein can commence or otherwise.

## **§2.2 – BOARD OF APPEALS**

A Board of Appeals is hereby established to provide applicants the opportunity to appeal any administrative or Planning Board decision on matters pertaining to this Ordinance. For the purposes of this section, 'applicant(s)' mean the person or persons making an application to the County for approval of any type of review subject to this Ordinance (see definition for APPLICANT, Chapter 3, Sec. 3.4). The Board of Appeals shall have such powers and duties as are provided by law or Ordinance. The Board of Appeals shall have the following functions:

### **1. Appeals of Interpretations**

To hear appeals from administrative decisions with respect to the enforcement and application of the Ordinance and affirm or reverse, in whole or part, the administrative decision. This may include alleged error, misinterpretation, oversight, or other means of incorrectly applying the provisions of

this Ordinance including the provisions of the Flood Damage Prevention program and the provisions of the International Building Code (IBC) as determined by their respective chapters.

## **2. Land Use Determinations**

To determine, in cases of uncertainty, the classification of any land use not specifically enumerated in this Ordinance.

### **A. Membership and Terms**

The Board shall consist of seven (7) members who shall be residents of Benton County, appointed by the County Judge, and confirmed by the Quorum Court for a term of two years, where four (4) members shall initially be appointed for the full two (2) years and the remaining three (3) members shall initially be appointed for one (1) year. Thereafter all members shall be appointed by the County Judge and confirmed by the Quorum Court for terms of four (4) years each. No member shall serve more than two (2) consecutive full terms.

To the extent practicable and feasible, the Board shall include members with the following background and experience:

- i. One (1) Quorum Court member
- ii. One (1) attorney
- iii. One (1) professional engineer licensed in Arkansas
- iv. One (1) professional architect or landscape architect
- v. One (1) city, county or regional planner vi. One (1) realtor or developer, and
- vii. One (1) master builder or a person with ten (10) or more years of experience in construction or supervision of construction of buildings.

#### **1. Alternate Members**

Three (3) alternate members, who shall be residents of the County, shall be appointed by the County Judge and confirmed by the Quorum Court to serve in the absence of, or disqualification of, the regular members. The first two (2) alternates appointed shall serve for terms of two (2) years and the third for one (1) year. Thereafter, all alternates shall be appointed for four-year terms.

#### **2. Removal and Vacancies**

All members and alternates may be removed for cause by the County Judge, upon written charges after public hearing. The vacancy of any member or alternate member shall be filled by appointment of the County Judge and confirmation by the Quorum Court for the unexpired term only.

### **B. Organization**

#### **1. Officers and Duties**

The Board of Appeals shall elect a Chair and Vice-Chair from among its membership. The



Chairperson, or in his/her absence, the Vice Chairperson, shall preside at all meetings.

## 2. Meetings

Meetings of the Board of Appeals shall be held on a regular schedule. The Chair, or in his absence, the Vice-Chair, may administer oaths and compel the attendance of witnesses. All meetings of the Board of Appeals shall be open to the public. Agenda items requiring a public hearing shall require sufficient notice as required by law.

## 3. Required Attendance

If a member fails to attend three (3) consecutive meetings or misses 20 percent (20%) or more of the meetings held during a calendar year, the County Judge, upon recommendation by the Chair, may declare the position vacant.

## 4. Quorum

A quorum of the Board of Appeals shall consist of four (4) members. The concurring vote of four (4) members of the Board of Appeals shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant on any matter before the Board of Appeals.

## 5. Office, Staffing, and Records

- i. Office – The office of the Board of Appeals shall be the Planning Department or as may be otherwise designated by the County Judge.
- ii. Staffing – The Planning Division must provide the Board of Appeals with staff assistance necessary to enable it to discharge its duties including arrange for its meetings, and perform such other duties, consistent with the provisions of this chapter, as the adopted rules of the Board of Appeals require.
- iii. Records – The Planning Division shall be the custodian of the records of the Board of Appeals including all agendas, minutes, and other documents pertaining to the business of the Board.

### §2.3 – BOARD OF APPEALS PROCEDURES

#### A. Board of Appeals Application

A written appeal must be filed by the applicant within thirty (30) calendar days of the decision sought to be appealed. For the purposes of this section, ‘applicant(s)’ means the person or persons making an application to the County for approval of any type of review subject to this Ordinance (see definition for APPLICANT, Chapter 3, Sec. 3.4). The appeal must include the following materials:

1. A completed copy of a Board of Appeals application, including;
  - a. Notarized Owners affidavit (Owner, lessee, prospective purchase or legal representation must sign the application.
  - b. A letter from the legal property owner giving permission to the applicant to represent the property, if applicable.

2. Cover letter addressed to the Board of Appeals explaining and justifying the request.
3. Fifteen (15) sets of survey plans / site plans as submitted for the Planning Board Public Hearing should one have been required.
4. Photos of property and area of concern (as applicable) and other supplemental information as required.

**B. Appeals Procedures**

1. Setting a Date – Upon filing of an appeal, the Planning staff shall schedule a hearing date, which shall be held within thirty (30) calendar days of the application filing date. If the thirty (30) calendar day scheduling period ends on a day when County Offices are closed, then the deadline for scheduling the requisite hearing date shall be end-of-business the next day County Offices are open.
2. Notice – Public notice shall be served at least fifteen (15) calendar days prior to the scheduled hearing date. Notice shall be served via USPS certified mail by the applicant, and at the applicant’s expense, to all property owners within 500 feet of the property line, based on current records of the Assessor’s database. calendar. If the fifteen (15) calendar day noticing period ends on a day when County Offices are closed, then the deadline for public noticing being served shall be end-of-business the next day County Offices are open.
3. Public Hearing Sign: Public Hearing Sign shall comply with §4.8 of this ordinance.
4. The Board’s decision shall be final, administratively.

**§2.4 – APPEALS TO THE DECISION OF THE BOARD OF APPEALS**

1. County Quorum Court – A decision of the Board of Appeals may be appealed to the County Quorum Court prior to an appeal to a court of record. The County Judge shall be the chair of the Board of Administrative Appeals but shall vote only in the event of a tie. The County Quorum Court shall determine the number of Quorum Court members who shall sit on such an Appeal.
2. Court of Record – All appeals to the decision of the Board of Appeals shall be subject to appeal to a court of record having jurisdiction.

**§2.5 – COMPLIANCE AND INSPECTIONS**

- A. **Compliance: Conditions Met as Precursor to certificate of occupancy** – No certificate of occupancy (CO) shall be issued for any development unless all conditions of approval have been met.
- B. **Inspection** – The enforcement entity and/or members of the Benton County Planning Board shall have the right to enter any development for purposes of examination in order to enforce the letter and spirit of this Ordinance. The right to enter extends from the applicant’s authorization agreed to by making an application which shall be in effect through confirmation of compliance with any conditions so applied by decision or with this Ordinance.

# **Exhibit B**



**Benton County, Arkansas  
Planning Department**

1204 SW 14<sup>th</sup> Street, STE. 6 ♦ Bentonville, AR 72712 ♦  
479.464.6166 <http://www.bentoncountyar.gov>

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**To:** Mr. Edmond Joseph McGehee and Mr. Richard H. Mays  
**From:** Planning Director – Taylor Reamer  
**Date:** January 28, 2020  
**Re:** Benton County Board of Appeals – Planning Board decision of December 18, 2019

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To Whom It May Concern:

The intent of this letter is to respond to the appeal letter dated January 15, 2020 addressed to the Benton County Board of Appeals. The letter will not result in a hearing being scheduled.

Based on the current Planning and Development Regulations (Ord.: 2018-42), the Board of Appeals is established to provide applicants the opportunity to appeal any administrative or Planning Board decision on matters pertaining to this Ordinance. As outlined in the Ordinance, ‘applicants’ mean the person or persons making an application to the County for approval of any type of review.

Given the contents of the appeal documentation and the individuals you represent, the Board of Appeals is not an option for administrative appeal for the individuals you represent.

Sincerely,

Taylor Reamer  
Planning Director  
1204 SW 14<sup>th</sup> Street, Suite 6  
Bentonville, AR 72712  
479-464-6166  
[Taylor.Reamer@bentoncountyar.gov](mailto:Taylor.Reamer@bentoncountyar.gov)

Cc: County Judge – Barry Moehring  
Mr. George Spence – County Legal Counsel  
Benton County Planning Board  
Benton County Board of Appeals