



FAYETTE ALLIANCE

603 W. Short Street
Lexington, Kentucky 40508
info@fayettealliance.com
fayettealliance.com

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Susan B. Speckert, J.D.

February 16, 2017

Honorable Robert Stivers, President
Kentucky Senate
702 Capital Avenue
Frankfort, Kentucky 40601

Dear President Stivers,

Please accept this letter on behalf of the Fayette Alliance with respect to HB 72, An Act Relating to Planning and Zoning and Declaring an Emergency. Founded in 2006, the Fayette Alliance is a coalition of citizens dedicated to achieving sustainable growth in Lexington-Fayette County through land use advocacy, education, and promotion.

For the reasons that follow, we respectfully urge you to oppose HB 72 or, in the alternative, to amend the bill to protect the rights of landowners to access the courts as guaranteed in the Kentucky Constitution.

HB 72 would require the mandatory posting of an appeal bond as a condition to a non-governmental party appealing a rezoning decision from the Circuit Court to the Kentucky Court of Appeals. While we understand the need to try to curtail frivolous lawsuits, this bill goes too far, and places an unreasonable and likely unconstitutional burden on individuals, neighborhoods, and businesses with meritorious claims.

Under the bill, upon the filing of a Notice of Appeal, the appellee could request, and the Circuit Court would have to hold, a hearing on whether the appeal was "presumptively frivolous"—a term not fully defined. If the Circuit Court determined the appeal to be "presumptively frivolous," a bond would be required to cover lost profits, lost cash flow, costs, and attorney fees up to \$250,000.

Even if the Circuit Court found the appeal to be non-frivolous, a mandatory bond for interest, costs, and attorney fees would be required to be posted up to \$100,000.

The bond would be forfeited if the Court of Appeals affirmed the Circuit Court decision, even if the appeal raised meritorious arguments.



Fayette Alliance opposes HB 72 for several reasons, including the following:

- A mandatory appeal bond would place a financial hardship on many individuals, neighborhood associations, small businesses and other landowners, and would have a chilling effect on meritorious claims by pricing an appeal out of reach.
- The bill likely violates Kentucky Constitution Section 115, which provides that “in all cases ... there shall be allowed as a matter of right at least one appeal to another court.” Requiring a bond effectively denies parties who cannot afford to post a bond this right.
- Remedies already exist if the Court of Appeals determines an appeal to have been brought that was frivolous and in bad faith. Damages and 1 to 2 times costs can be assessed by the Court of Appeals under Civil Rules 73.02(4).
- The bill likely violates Section 116 of the Kentucky Constitution, which reserves matters related to appellate procedure to the judicial branch of government.
- The exemption of governmental entities from the obligation to file a bond raises equal protection issues since it treats similarly situated parties differently.

For the above reasons, we respectfully urge you to oppose the bill. In the alternative, we request an amendment that protects the constitutionally protected rights of landowners to access the courts. At a minimum, should the Circuit Court determine that an appeal is non-frivolous, then no bond should be required.

We understand the costs associated with delayed construction projects and agree that frivolous suits and appeals filed in bad faith should be deterred. However, this bill goes too far and off-loads the risks developers assume regarding receipt of zoning approvals onto individuals, neighborhoods, businesses, and other landowners.

Thank you for your attention and for your public service.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan B. Speckert". The signature is stylized and includes a long horizontal flourish extending to the right.

Susan B. Speckert, J.D.
Executive Director