

McBRAYER, McGINNIS, LESLIE & KIRKLAND, PLLC

ATTORNEYS-AT-LAW

T. BRUCE SIMPSON, JR.
bsimpson@mmlk.com

201 East Main Street, Suite 1000
Lexington, Kentucky 40507
(859) 231-8780
FAX (859) 253-0706

June 8, 2009

Mayor Jim Newberry
Lexington-Fayette Urban County Government
200 E. Main Street, 12th Floor
Lexington, KY 40507

Re: Proposed Tates Creek Road Sidewalks

Dear Mayor Newberry,

I represent the Tates Creek Road Preservation Association, Inc., which is comprised of property owners and other Lexington citizens who oppose the construction of 3.2 miles of sidewalks between Montclair/Lakewood Drive and Dove Run Road/Lansdowne Shopping Center. This matter is scheduled for a second reading at the Urban County Council's June 11, 2009 meeting. On behalf of the members of this Association, I respectfully request that further consideration and action on this project be postponed until several critically important threshold issues are thoroughly researched to determine whether the project is feasible from a legal, timing, policy and cost perspective. Once this necessary research is concluded, I respectfully request a public hearing on this matter so that all interested citizens can be heard and the Urban County Council can make an informed decision as to whether to proceed with this project. As it stands right now, the Urban County Council has insufficient information upon which to base a reasoned decision on Thursday night.

There are many reasons to re-evaluate the propriety of spending no less than \$200,000 in LFUCG funds to construct sidewalks on Tates Creek Road, separate and apart from the strong opposition of affected property owners who would be burdened by the removal of longstanding but important screening buffers as well as destruction of well-maintained and landscaped front yards. The reasons to reassess the feasibility of this project are as follows:

I. THE TATES CREEK ROAD SIDEWALK PROPOSAL IS NOT AMONG THE TOP PRIORITY PROJECTS RECOMMENDED IN THE LEXINGTON AREA MPO BICYCLE AND PEDESTRIAN MASTER PLAN.

The Lexington Area MPO Bicycle and Pedestrian Master Plan is the principal research document and proposed plan which recommends and prioritizes pedestrian/bike improvements for Fayette County. The Urban County Council, acting in its capacity as a member of the Lexington Area MPO, voted to approve this plan in 2007., after countless hours of LFUCG

employee time were spent in its development. Additionally, consultants were paid \$155,000 to assist in the preparation of this plan, which took two years to complete.

This Master Plan provides that pedestrian/bike projects are classified and prioritized based upon their "feasibility" of being implemented. The Master Plan recommends that all "feasible" projects be implemented within a five-year time frame" (p.60). The Master Plan defines "feasible projects" as being those which have few constraints and which are recommended for short-term completion (one to five years). The Plan then identifies the top 49 "feasible" projects which can be implemented within a five-year time frame. The sidewalk project for this part of Tates Creek Road is not one of them. The Master Plan then discusses the next level of feasible projects and classifies the Tates Creek proposed sidewalks as a "moderately constrained" project. "Moderately constrained" projects, according to page 60 of the Master Plan, "are more challenging and are recommended for completion on a mid-term basis (one to ten years)." Attached hereto as Exhibit 1 are pertinent pages of the Lexington Area MPO Bicycle and Pedestrian Master Plan, which documents Fayette County's priorities for bike/pedestrian improvements.

The Tates Creek project, between Montclair/Lakewood Drive and Dove Run Road/Lansdowne Shopping Center, ranks 52nd. Thus, should the Council proceed with this \$200,000+ funding of the Tates Creek Road project, it will be leaping over the recommended priority list for bike/pedestrian improvement projects located in other parts of Lexington.
Question: Is this appropriate?

II. THE FULL COST OF CONSTRUCTING 3.2 MILES OF SIDEWALKS, SIX FEET WIDE, ON EACH SIDE OF TATES CREEK ROAD HAS BEEN NEITHER FULLY ASSESSED NOR BUDGETED.

The grant submitted to the Commonwealth of Kentucky on an 80%-20% match basis, with the LFUCG being required to pay \$200,000+ for its 20% share, does not request any funds for the relocation of utilities or the possible purchase of any necessary right-of-way. (See Exhibit 2.) Yet, the Preliminary Implementation Schedule, included in the grant application under "Attachment A," states that right-of-way acquisition and utility relocation are to be completed by September 2009 and December 2009, respectively. (See Exhibit 3.)

Local utility companies, also corporate citizens of Lexington, to wit: Kentucky American Water Company, Columbia Gas Company, Kentucky Utilities Company, Insight Cable, and Windstream have not been contacted by the Lexington-Fayette Urban County Government relative to the potential impact that constructing 3.2 miles of six-foot-wide sidewalk may have on their utilities. Some utilities will likely be impacted more than others. Attached hereto as Exhibit 4 are photographs depicting the various utilities currently in the area of the proposed 3.2-mile sidewalk. As can be seen from the attached photographs, it appears that Kentucky Utilities Company will have to relocate either some of its transmission lines and/or light poles to

accommodate the proposed sidewalks. How much will this cost? Who will pay these utility relocation expenses? We have been informed that if utilities are in the right-of way, these utility companies will have to bear all of the expense. It only seems fair that these relocation costs be determined before the Urban County Council votes to fund construction of these sidewalks.

III. THE GRANT PROPOSAL FOR THE TATES CREEK SIDEWALK PROJECT IS ERRONEOUS.

A. Grant failed to disclose a historic property.

The grant application, which will be subject to the Urban County Council's vote on the second reading, presently scheduled for June 11, 2009, is erroneous. The grant application associated with the Tates Creek sidewalk project failed to disclose the fact that a National Register historic property will be impacted by the construction of a six-foot-wide sidewalk on Tates Creek Road. Attached hereto is **Exhibit 5**, which identifies the Joshua Brown House as a historic house on the National Register of Historic Places. On page 9 of the grant application, the response to the question as to the project's impact on National Register properties is incorrectly marked, "No." (See **Exhibit 6**). However, a **six-foot-wide** sidewalk is proposed to be constructed across this historic property located at 2705 Tates Creek Road.

The Joshua Brown House was constructed in 1798 and is notable historically for two reasons, its architecture and the family which owned it and resided there. (See photograph, **Exhibit 7**). John Hunt Morgan's grandfather, John Wesley Hunt, purchased this house from Joshua Brown and maintained it as a country house in addition to his city residence on Gratz Park. John Hunt Morgan's father, Calvin Morgan, managed the farm and, according to the Nomination Form, "lived the life of a country gentleman" there. John Hunt Morgan spent his boyhood on this farm.

As you are probably aware, Section 106 of the federal National Historic Preservation Act of 1966 (NHPA), as codified in Title 16, Chapter IA, subchapter II(A)470(f), and the regulations promulgated pursuant thereto (36 CFR, Part 800, Subpart B) provide that there must be a comprehensive review of the impact that any federally funded construction project may have on historic properties such as the Joshua Brown House. This Tates Creek sidewalk grant will be funded by federal dollars. Additionally, on the tract of land adjacent to the Joshua Brown House owned by John and Jill McCarty, to wit: 2709 Tates Creek Road, is the historic springhouse which was originally part of Joshua Brown's farm. This is an eligible historic property, and the same Section 106 review under the National Historic Preservation Act must also be performed prior to the disbursement of any federal funds. This review mandated by federal law has not been performed.

B. There are no “worn footpaths along many sections” of the corridor,” as stated in the grant application.

Although it is stated on page 3 of the grant application (see Exhibit 8) that there is a “worn footpath along many sections of the corridor,” this is simply not the case. As reflected in the photographs attached hereto as Exhibit 9, there is a stormwater drainage swale along a brief segment of Tates Creek Road, but there is no footpath. Obviously, any member of the Council can view this for themselves.

IV. PROPERTY OWNERS ON TATES CREEK ROAD WHO WILL BE DIRECTLY IMPACTED BY THE SIX-FOOT-WIDE SIDEWALKS HAVE RECEIVED LITTLE INFORMATION ABOUT THIS PROJECT OR ITS IMPACT.

The only meeting which has been held to date to inform the property owners on Tates Creek Road about the proposed sidewalk project was held six months ago in November 2008. Since that time, there have been no follow-up meetings where the residents have been invited to learn about any conceptual plans, proposed design alternatives or the potential impact that removal of significant tree buffers and relocation of utilities may have on their home life. The proposal to construct 3.2 miles of sidewalks across the front yards of homes on Tates Creek Road will be a major land use change.

Generally, land use changes of this magnitude are filtered through a number of public meetings where the merits of the proposed land use change can be carefully scrutinized and evaluated before it receives governmental approval. There also are usually multiple opportunities for citizen comment. In this land use change, however, where there is the real prospect of significant aesthetic landscaping being lost, trees being removed and screening buffers being destroyed, there has been no opportunity for affected residents to review anything. This is wrong. Further, if the sidewalks are constructed, the property owners themselves, many of whom are elderly widows, will be responsible for maintaining the sidewalks and could be subject to liability if someone trips or is otherwise injured on them. It is not fair to force these unsought improvements on owners of these properties and ignore their reasonable concerns.

V. INSTALLATION OF THE SIDEWALKS ON THE WEST SIDE OF TATES CREEK ROAD WILL REMOVE SIGNIFICANT AND IMPORTANT SCREENING BUFFERS FOR MANY RESIDENTS, PARTICULARLY HOMES IN THE GLENDOVER NEIGHBORHOOD.

Mayor and Councilmembers
June 8, 2009
Page 5

McBRAYER, McGINNIS, LESLIE & KIRKLAND, ^{PLLC}

As reflected by photographs in **Exhibit 10**, there currently exists approximately 2,300 feet of significant tree stands and other landscape vegetation buffers on the west side of Tates Creek Road and between Alumni Drive and Rebecca Road. In particular, there is approximately 600 feet of existing dense vegetation and tall trees which protect the rear yards of homes in the Glendover Road Subdivision from the nuisances associated with the four-lane traffic along Tates Creek Road and the lights from the convenience store and gas station across the road. Because the right-of-way is very limited at this particular location, it is almost a given that the vast majority, if not all, of this screening buffer will have to be removed if sidewalks are constructed.

Based on the foregoing reasons, and on behalf of the Tates Creek Road Preservation Association and the majority of property owners who will be adversely impacted by the construction of these six-foot-wide sidewalks, I urge you to table this matter until these and other neighborhood concerns can satisfactorily be addressed. Surely, it would be prudent to make sure of all relevant facts and impacts before committing scarce taxpayer funds for such an expensive project, especially one that does not follow the priority list this Council approved less than two years ago.

Thank you for your consideration of this matter. I will be present at the next appropriate meeting of the Urban County Council to formally make this request and to respond to any questions.

Very truly yours,



T. Bruce Simpson, Jr.

TBS/emr

cc: Members of Tates Creek Road Preservation Association, Inc.