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OWENSBORO METROPOLITAN BOARD OF ADJUSTMENT

JUNE 7, 2012

The Owensboro Metropolitan Board of Adjustment met in regular session at 5:30 p.m. on Thursday, June 7, 2012, at City Hall, Commission Chambers, Owensboro, Kentucky; and the proceedings were as follows:

- MEMBERS PRESENT: C.A. Pantle, Chairman
- Ward Pedley, Vice Chairman
- Ann Mason, Secretary
- Madison Silvert, Attorney
- Marty Warren
- Sean Dysinger
- Brian Howard
- Fred Reeves
- Shannon Raines

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CHAIRMAN: Let me call this meeting of the Board of Adjustments to order and welcome you all. Briefly, we start our meetings, each meeting with the Pledge of Allegiance. We invite you to join with us. And Shannon will have our prayer this evening.

(INVOCATION AND PLEDGE OF ALLEGIANCE)

CHAIRMAN: Again, I want to welcome all of you this evening. If you have any comments on any of the items, please come to one of the podiums and state your name so we'll have record on it in the office.

The first item this evening, we'll consider the minutes of the May 3rd meeting. They're in the office. I don't think there's any problems with them. Entertain a

1 motion to dispose of the item.

2 MR. PEDLEY: Motion for approval.

3 MR. DYSINGER: Second.

4 CHAIRMAN: Motion's been made and seconded. All in  
5 favor, raise your right hand.

6 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

7 CHAIRMAN: Motion carries.

8 We need to this evening swear one of our new  
9 members-to-be at this time.

10 Madison.

11 MR. SILVERT: Dr. Reeves, will you stand up?

12 MR. REEVES: I certainly will.

13 (SWEARING IN OF FRED REEVES.)

14 MR. REEVES: I do.

15 MR. SILVERT: Welcome to the Board.

16 MR. REEVES: Thank you.

17 MR. CHAIRMAN: Welcome, Fred. It's good to have  
18 you on the Board with us. With that, we'll go to the first  
19 item.

20 -----

21 CONDITIONAL USE PERMITS

22 ITEM 2

23 1611 rear Frederica Street, zoned R-4DT  
24 Consider a request for a Conditional Use Permit in order to  
25 construct and operate a parking lot with revisions of the  
conditions placed upon the Conditional Use Permit approved  
September 1st, 2011.  
Reference: Zoning Ordinance, Article 8, Section 8.2F-11.

1 Applicant: Marcus W. Bosley.

2 MR. SILVERT: Would you state your name, please.

3 MS. EVANS: Melissa Evans.

4 (MELISSA EVANS SWORN BY ATTORNEY.)

5 MS. EVANS: First of all, the approval of any items  
6 here tonight does not allow the applicant or owner to  
7 construct, alter, modify, or occupy a building on the subject  
8 property. It is the applicant or owner's responsibility to  
9 obtain all approvals and inspections as necessary before  
10 occupancy of the building is allowed. Please contact the  
11 Building and Electrical Division of the OMPC prior to  
12 beginning any work on the subject property for the applicable  
13 requirements.

14 ZONING HISTORY

15 The subject property currently zoned R-4DT Inner  
16 City Residential, OMPC records indicate there have been no  
17 zoning map amendments for the subject property. There was a  
18 Conditional Use Permit approved in September of 2011 to  
19 construct and operate a parking lot with the conditions that  
20 there be a six foot high fence with a six foot tall pine tree  
21 every ten feet along the south and east property boundaries  
22 on the property owner's side of Pelphrey and Postlewaite with  
23 the fence lowered to three feet to ten feet off of the alley  
24 for sight vision.

25 The applicant is wishing to amend conditions placed

1 on the previous Conditional Use Permit. The applicant is  
2 proposing to keep the existing six foot fence in place along  
3 the east property boundary and to install a three foot high  
4 continuous element inside the fence along the east and a  
5 three foot continuous element along the south property line.

6 LAND USES IN SURROUNDING AREA

7 The properties to the north, south, and east are  
8 zoned R-4DT Inner City Residential. The property to the east  
9 is zoned P-1 Professional Service. The subject property is  
10 bordered to the north and west by existing alleys.

11 ZONING ORDINANCE REQUIREMENTS

12 1. Parking -- no minimum parking is required.

13 Eight spaces proposed as shown on the site plan submitted.

14 2. Landscaping -- Vehicular Use Area landscaping  
15 screening between the subject property and  
16 residentially-zoned property to the south and east consisting  
17 of a three-foot continuous element of one tree every 40 feet  
18 is required.

19 MS. EVANS: We would like to enter the Staff Report  
20 into THE record as Exhibit A.

21 CHAIRMAN: Thank you. Have we had any comments or  
22 questions at the office?

23 MR. HOWARD: I think we've had a couple of calls.  
24 Nothing entered.

25 CHAIRMAN: Is the applicant here? Do you have any

1 comments you'd like to make at this time?

2 MR. SILVERT: Would you state your name, please?

3 MR. BOSLEY: Mark Bosley.

4 (MARK BOSLEY SWORN BY ATTORNEY.)

5 MR. BOSLEY: You have some questions, sir?

6 CHAIRMAN: Does the Board have any questions, or do  
7 you have any comments you'd like to make first?

8 MR. BOSLEY: I guess the only thing, just as a  
9 point of clarification when we were here before, I don't  
10 think it was very clear about how the parking lot was bounded  
11 on the two sides -- Mr. Pelphrey's side and Mr. Postlewaite.  
12 There is a solid fence that's already there. And when we  
13 were here before, we were asked to, you know, put some trees  
14 in and then put a solid fence inside that, and we would have  
15 two solid fences with trees in between them, which -- unless  
16 you're a rabbit or a rat -- not a very good place to try to  
17 keep up. So we just thought we would come back and once  
18 again - now, understanding that there is a fence, a solid  
19 fence on one side -- to just say maybe we could be allowed to  
20 just do the regular landscaping that's required for the lot  
21 already. We're going to do more than that anyway. Is that  
22 helpful?

23 CHAIRMAN: Does any board member have any questions  
24 to ask him at this time?

25 MR. PEDLEY: I have some comments I'd like to make,

1 Mr. Bosley. I have toured your building --

2 MR. BOSLEY: Yes, sir.

3 MR. PEDLEY: -- your business, and the outside is  
4 absolutely amazing.

5 MR. BOSLEY: Thank you.

6 MR. PEDLEY: It's truly an asset to this city. It  
7 is truly an asset to Frederica Street. I want to clarify, I  
8 put the six foot pine trees on your condition. It is not a  
9 requirement of the zoning ordinance. I put it on. You did  
10 take down buildings, and you took down a lot of trees.

11 MR. BOSLEY: Yes, sir.

12 MR. PEDLEY: You exposed the residential area  
13 behind you to Frederica Street, to lights, noise, and  
14 everything. My purpose was to screen that, and pine trees is  
15 an excellent way to cut down noise and protect our  
16 environment. So I put that on there not realizing that there  
17 would be two fences and really no place to put it.

18 MR. BOSLEY: Yes, sir.

19 MR. PEDLEY: After I toured your property and looked  
20 at it, I realize the pine trees cannot be put there with any  
21 value, you know.

22 MR. BOSLEY: Yes, sir.

23 MR. PEDLEY: So with that, Mr. Chairman, I'm ready  
24 to make a motion whenever you're ready.

25 CHAIRMAN: Does any other board member have any

1 other questions before we get a motion?

2 MR. DYSINGER: I have a question, Mr. Chair. As is  
3 my custom, I'm confused. This is a new Conditional Use  
4 Permit. We're not amending anything. Is that correct?

5 MR. PEDLEY: He's asking to remove the condition of  
6 the six-foot pine trees.

7 CHAIRMAN: That we put in the last.

8 MR. PEDLEY: It is a Conditional Use Permit for a  
9 parking lot.

10 MR. DYSINGER: I got you. Thank you, Mr. Chairman.  
11 That's the only question I have.

12 CHAIRMAN: Any other questions from the Board?

13 (NO RESPONSE)

14 CHAIRMAN: Staff, you have any other comments?

15 MR. HOWARD: No.

16 MR. SILVERT: See if the audience has any  
17 questions.

18 CHAIRMAN: Does anyone in the audience have any  
19 comments or questions at this time?

20 (NO RESPONSE)

21 CHAIRMAN: Hearing none, I'll entertain a motion to  
22 dispose of the item, please.

23 MR. PEDLEY: Mr. Chairman, I make a motion to  
24 approve the Conditional Use Permit. Based on findings of  
25 fact, it will not have an adverse influence on the

1 residential neighborhood or future development of any  
2 structure, and the clean-up of the area is aesthetically  
3 pleasing and is compatible in the residential neighborhood,  
4 and the landscape that created by the parking will enhance  
5 the area. And the six-foot pine tree condition may be  
6 removed.

7 CHAIRMAN: Is there a second?

8 MR. DYSINGER: Second.

9 CHAIRMAN: Is there any other comments or questions  
10 from the Board?

11 (NO RESPONSE)

12 CHAIRMAN: Staff, do you have any other comments?

13 MR. HOWARD: No, sir.

14 CHAIRMAN: The applicant have any other comments at  
15 this time?

16 MR. BOSLEY: No, sir.

17 CHAIRMAN: All in favor, raise your right hand.

18 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

19 CHAIRMAN: Motion carries.

20 Next item.

21 ITEM 3

22 1600 rear River Road, zoned I-2  
23 Consider request for a Conditional Use Permit in order to  
24 operate a scrap iron, salvage sTorage yard and wrecking yard  
to include sorting, baling, shearing, and processing of scrap  
metal.

Reference: Zoning Ordinance, Article 8, Section 8.2G4A/27  
25 Applicant: Dixieland Properties, LLC, Owensboro Riverport  
Authority

## 1 ZONING HISTORY

2           The subject property is currently zoned I-2 Heavy  
3 Industrial. The subject property was rezoned in 1990 from  
4 I-1 Light Industrial and A-U Urban Agriculture to I-2 Heavy  
5 Industrial.

6           There was a Conditional Use Permit approved in  
7 June 2007 to operate a scrap iron, salvage storage yard, and  
8 wrecking yard to include sorting, baling, shearing, and  
9 processing of scrap metal, and a Variance approved in July of  
10 2007 to eliminate perimeter trees along the southern,  
11 western, and western 312 +/- feet of the northern property  
12 line and to eliminate the solid fence along the entire  
13 western limit of the working area.

14           The applicant has acquired an additional 0.3 acres  
15 to the rear of the original tract and is wishing to include  
16 the additional acreage in the existing scrap iron, salvage  
17 storage yard, and wrecking yard operation.

18           A minor subdivision plat has been submitted to  
19 consolidate the additional 0.3 acres with the larger tract.  
20 The 0.3 acre tract is currently outside of the corporate  
21 boundary, whereas the larger tract is inside the corporate  
22 boundary. The minor subdivision plat cannot be approved  
23 until the 0.3 acre tract is annexed into the City of  
24 Owensboro.

## 25 LAND USES IN THE SURROUNDING AREA

1           The properties to the north and west are zoned A-U  
2 Urban Agriculture. The properties to the south and east are  
3 zoned I-2 Heavy Industrial.

4 ZONING ORDINANCE REQUIREMENTS

5           1. Parking -- no extra parking is required with  
6 this expansion.

7           2. Landscaping -- eight-foot tall solid fence with  
8 one tree every 40 linear feet along the boundary of the  
9 salvage yard.

10 SPECIAL CONDITIONS

11           Approval of a minor subdivision plat consolidating  
12 the subject property.

13           MS. EVANS: We would like to enter into the Staff  
14 Report into the record as Exhibit B.

15           CHAIRMAN: Thank you.

16           Have we had any comments or questions at the  
17 office?

18           MR. HOWARD: No, sir.

19           CHAIRMAN: Is there anyone in the audience wishing  
20 to speak at this time on this item?

21           (NO RESPONSE)

22           CHAIRMAN: Anyone want to speak an objection to  
23 this item?

24           (NO RESPONSE)

25           CHAIRMAN: Hearing none, I'll entertain a motion to

1 dispose of the item.

2 MR. DYSINGER: Mr. Chairman, given the findings;  
3 that is, keeping with the use of adjacent property and is  
4 compatible with the area, and pending the approval of the  
5 minor subdivision plat consolidating with subject properties,  
6 I move that we approve this Conditional Use Permit.

7 MR. PEDLEY: Second.

8 CHAIRMAN: Motion has been made and seconded. Is  
9 there any other comments or questions from the Board?

10 (NO RESPONSE)

11 CHAIRMAN: Staff have anything else you want to add  
12 to it?

13 MR. HOWARD: No, sir.

14 CHAIRMAN: Does the applicant have any other  
15 comments you'd like to make at this time?

16 (NO RESPONSE)

17 CHAIRMAN: Hearing none, all in favor raise right  
18 hand.

19 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

20 CHAIRMAN: Motion carries.

21 Next item, please.

22 RELATED ITEM 3a

23 1600 River Road, zoned I-2  
24 Consider request for a Variance in order to eliminate the 100  
25 foot buffer from an A-U zone along the entire western  
boundary of the property and to eliminate the trees and  
eight-foot high solid wall or fence along the northern,  
southern, and western boundaries of the 0.3 acre expansion.

1 Reference: Zoning Ordinance, Articles 8 and 17, Sections  
2 8.2G4A/27 and 17.311  
3 Applicant: Dixieland Properties, LLC, Owensboro Riverport  
4 Authority  
5 SPECIAL CIRCUMSTANCES

6 The applicant is requesting a Variance for this  
7 expansion consistent with the previously approved Variance  
8 from July 2007 which eliminated the perimeter trees along the  
9 southern, western, and western 312 +/- feet of the northern  
10 property line and eliminated the solid fence along the entire  
11 western limit of the working area. They are also requesting  
12 to eliminate the 100-foot buffer required from an A-U zone  
13 along the entire western boundary of the property.

14 Along the western boundary of the property, the  
15 topography limits the effectiveness of the required screening  
16 and the 100-foot buffer. According to the applicant, the  
17 adjoining property owner to the west has waived any and all  
18 requirements for a buffer, fencing, and screening. And there  
19 is a signed waiver by the adjoining property owner  
20 acknowledging that waiver in the folder.

21 The portion of the northern, southern, and western  
22 boundaries where the Variance is requested to waive the  
23 eight-foot high fence and the installation of trees is also  
24 screened by existing trees and separated by topography.

25 There is an existing vehicle storage yard to the  
south that received a waiver from the requirement to install  
trees along the common boundary with the subject property.

1           Granting this Variance will not alter the essential  
2 character of the general vicinity because this is an existing  
3 use with a relatively small expansion. It will not allow an  
4 unreasonable curcumvention of the requirements of the zoning  
5 regulations based on the tree and fence waiver in the past  
6 and similar land used in the area.

7           MS. EVANS: Staff would recommend approval with one  
8 condition: Approval of the minor subdivision plat  
9 consolidating the subject properties.

10           We had like to enter the Staff Report into the  
11 record as Exhibit C.

12           CHAIRMAN: Thank you.

13           Are there any comments filed in the office on this?

14           MR. HOWARD: No, sir.

15           CHAIRMAN: Hearing none, does the applicant have  
16 any comments or questions at this time?

17           (NO RESPONSE)

18           CHAIRMAN: Is anyone wishing to speak in opposition  
19 of this item?

20           (NO RESPONSE)

21           CHAIRMAN: Board have any questions of the  
22 applicant?

23           (NO RESPONSE)

24           CHAIRMAN: Staff have anything else?

25           MR. HOWARD: No.

1           CHAIRMAN: Hearing none, I'll entertain a motion to  
2 dispose of the item, please.

3           MR. PEDLEY: Mr. Chairman, I make a motion for  
4 approval. Based on findings of fact, this Variance will not  
5 adversely affect the public health, safety, and welfare  
6 because this is existing ongoing use separated from  
7 neighboring properties by topography and existing screening.  
8 It will not alter the essential character of the general  
9 vicinity because this is an existing use with a relatively  
10 small expansion in an industrial area; it will not cause a  
11 hazard or a nuisance to the public because this is an  
12 existing industrial use with a small expansion in an  
13 industrial area with existing screening and topography  
14 separating the subject property from neighboring properties;  
15 it will not allow an unreasonable circumvention of the  
16 requirements of the zoning regulations because of the tree  
17 and fence waiver in the past and the similar land use in the  
18 area.

19           Conditions: Approval of a minor subdivision plat  
20 consolidating the subject properties.

21           MS. RAINES: Second.

22           CHAIRMAN: Motion has been made and seconded. Any  
23 other comments or questions from the Board?

24           (NO RESPONSE)

25           CHAIRMAN: Staff have anything else you'd like to

1 add?

2 MR. HOWARD: No, sir.

3 CHAIRMAN: The applicant have anything he'd like to  
4 add to it?

5 (NO RESPONSE)

6 CHAIRMAN: Hearing none, all in favor, raise your  
7 right hand.

8 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

9 CHAIRMAN: Motion carries.

10 Next item.

11 ITEM 4

12 7232, 7244 Highway 56, zoned R-1A, A-U  
13 Consider request for a Conditional Use Permit in order to  
14 operate an existing church and construct accessory  
15 structures.  
16 Reference: Zoning Ordinance, Article 8, Section 8.2B4  
17 Applicant: St. Mary Magdalene's Parish of Sorgo, Kentucky,  
18 Inc.

19 ZONING HISTORY

20 The subject property is currently zoned R1-A Single  
21 Family Residential and A-U Urban Agriculture. OMPC records  
22 indicate there have been no Zoning Map Amendments for the  
23 subject property.

24 This church has been in operation since before the  
25 current zoning regulations were established. The applicant  
is bringing the property into compliance by seeking this  
26 Condiional Use Permit to operate a church in an R-1A and A-U  
zone. In addition, they are requesting to build an open air

1 picnic shelter.

2           The site plan shows an existing gravel parking area  
3 that has been there for some time, located in the R-1A zoned  
4 portion of the lot. Although the applicant is seeking relief  
5 for this gravel parking area and asking for an extended time  
6 period in which to pave it, the Board does not have the  
7 authority to grant relief for the requirement that vehicular  
8 use areas be paved. The gravel area is in violation of the  
9 zoning ordinance and a violation notice has been sent to the  
10 applicant.

#### 11 LAND USES IN THE SURROUNDING AREA

12           The properties to the north are zoned B-4 General  
13 Business and R-1A Single Family Residential. The properties  
14 to the east, west, and south are zoned R-1A Single Family  
15 Residential and A-U Urban Agriculture.

#### 16 ZONING ORDINANCE REQUIREMENTS

17           1. Parking -- one space every five seats in the  
18 main auditorium.

19           2. Landscaping -- Vehicular Use Area landscaping  
20 screening consisting of a three-foot high continuous element  
21 with one tree every 40 feet of the vehicular use area along  
22 Highway 56.

#### 23 SPECIAL CONDITIONS

24           1. All vehicular use areas shall be paved.

25           MS. EVANS: We would like to enter the Staff Report

1 into the record as Exhibit D.

2 CHAIRMAN: Thank you.

3 Have we had any comments or questions in the office  
4 on this item?

5 MR. HOWARD: I don't believe so.

6 CHAIRMAN: Is anyone wishing to speak at this time,  
7 please?

8 MR. SILVERT: Could you state your name, please.

9 MR. KAMUF: Charles Kamuf.

10 MR. SILVERT: Mr. Kamuf, you're sworn.

11 MR. KAMUF: Thank you.

12 I represent St. Mary Magdalene's Church, and this  
13 is the church that many of you are familiar with because  
14 generally they win all the prizes at the Barbecue Festival.  
15 It's a small church at Sorgo. And like small churches, in  
16 the area that we have, they have a limited amount for their  
17 operation of the church.

18 We've never had any complaints down at Sorgo. Many  
19 of the neighbors are parishioners there at the church, and  
20 the other neighbors always come to the picnic. And this is  
21 the reason for the request for Conditional Use is to expand  
22 no more or no less than to build a little shelter 50 by 60  
23 foot for shade for the annual picnic.

24 We filed a Conditional Use, and here's what it  
25 said. This is all I ask for. To construct a pavilion for

1 the church picnics and family functions that's shown on the  
2 site drawing. Said pavilion shall be 50 by 60 feet.

3 Let me show you this so we can -- if I might. That  
4 plat is a little misleading, and I kind of colored it up for  
5 you.

6 As you can see, the little red area that we have is  
7 the shelter that I have in question. It'll be 60 by 50. The  
8 issue that we have, on the yellow as you drive in., it says,  
9 "Gravel parking to be paved with the expansion of the  
10 church." That is the issue that we'll be talking about  
11 tonight.

12 Evidently, I opened a can of worms when I asked for  
13 this 50 by 60 shelter. By filing this Conditional Use, I am  
14 required to do three things. Two, I have no issues with;  
15 one, I do. We had to have 45 parking places. All this is  
16 nonconforming, and I'll tell you in a few minutes.

17 Screening of the parking lot, we agree to. It all  
18 shows that on that little plat.

19 The gravel parking lot. We purchased this property  
20 in 1949 from the Poseleys.

21 A copy of that deed is in the record, Madison, if  
22 there's some question about the dates.

23 This area has been used for a parking lot since  
24 1949. The zoning regulation came into effect in 1971, and it  
25 was amended, and the latest zoning regulation is 1979.

1           Since the parking lot was there prior to the zoning  
2 ordinance, it's our position that the parking lot is  
3 nonconforming and that we're exempt from the parking lot  
4 requirements of the ordinance.

5           What we're saying is that we're grandfathered in.  
6 Here are the appropriate statutes. This is all that I'll  
7 bother you by passing out.

8           MR. DYSINGER: Anything else, sir? Some visual  
9 aids to look at?

10          MR. SILVERT: For the record, Board Member Dysinger  
11 was disappointed that there weren't any visual aids tonight  
12 other than these.

13          MR. DYSINGER: Thank you, counsel.

14          MR. SILVERT: Didn't think the court reporter  
15 picked that up.

16          MR. KAMUF: The question comes up is what is a  
17 nonconforming use. And if you look at the top that I have  
18 underlined in yellow, it said, "activity which lawfully  
19 existed before the adoption of the amendment of the zoning  
20 regulation but which does thought conform to all the  
21 regulations contained in the zoning regulations which pertain  
22 to the zone in the same location." That's KRS 100.1113.

23          Now, let's see what happens when we have a  
24 nonconforming use. The rest of that statute says "provides  
25 that the lawful use of a building or premises existing at the

1 time of the adoption of any zoning ordinance effecting, it  
2 may be continued even though nonconforming." This is a  
3 critical point that we have.

4           Several years ago -- I think the issue that  
5 planning and zoning will take -- several years ago we put  
6 some rock on there, a few loads of rock. Several loads of  
7 rock does not change a nonconforming use. We bought the  
8 parking lot. We bought this property in '49. It's always  
9 been used for a parking lot. And to say that we lost a  
10 nonconforming use because rock was put down is incorrect.

11           I use this analogy. If we had a beauty salon or  
12 some type of commercial activity in a residential area and  
13 then the zoning ordinance was changed, this does not mean  
14 that whoever owns that beauty salon couldn't put a new roof  
15 on or change the appearance as long as they didn't do two  
16 things: enlarge, or change the dimensions.

17           Now, we will have members from St. Mary Magdalene's  
18 Church who are parishioners; and the unusual thing about  
19 that, two of them have been former members of the Owensboro  
20 Metropolitan Planning Commission for a long time. One of  
21 them is Danny Eblehar, and the other one is Jimmy Gillis.  
22 Now, they'll give you the background so we can establish this  
23 nonconforming use.

24           Not only do they use it at the time of the picnic,  
25 they use this nonconforming use -- they use it every Sunday.

1 The parking lot has been used since 1949. This is the reason  
2 they bought this property from Posey Hancock is so they would  
3 have a parking area there for the church on Sundays and time  
4 of the picnic.

5 The other issue that we have: It was quite a shock  
6 for me to file this Conditional Use application and then find  
7 out that we might be required to spend \$30,000 that the  
8 church is not ready -- they don't have the money to do. But  
9 our issue in this case is that we were not required to put  
10 down the asphalt parking lot because this activity -- let me  
11 go over that one more time with you. If you read this little  
12 statute, an activity -- a parking lot is an activity under  
13 the statute. And what does it say with the next provision of  
14 the statute? It may be continued.

15 In other words, you understand what took place is  
16 that, by me filing for this Conditional Use to build a 50 by  
17 60, it triggered all of these activities that we're required  
18 to do. If we're denied a Conditional Use Permit, here's  
19 what'll take place. It doesn't make any sense. We'll be  
20 required -- and Father just gave it to me before the meeting  
21 -- they've already issued these people a violation. The  
22 violation was caused as a result of us filing this  
23 Conditional Use Permit.

24 In any event, what will be required -- does this  
25 make sense: that we are required to take up the gravel, put

1 it back in grass, and leave it in grass as it's been since  
2 1949? I don't think that makes much sense. But down the  
3 road, we are willing to have a capital campaign and try to  
4 raise the money to put in this parking lot.

5 We have a couple of members of the church that  
6 would like to talk just a little. Both of these guys have  
7 been former members of the Planning and Zoning Board for two  
8 or three terms.

9 MR. EBELHAR: My name's Danny Eblehar.

10 (DANNY EBELHAR SWORN BY ATTORNEY.)

11 MR. EBELHAR: My name's Danny Eblehar, and I live  
12 at -- supposed to give you address? You want that? 6230  
13 Stephens Road, Owensboro, Kentucky.

14 MR. SILVERT: That's City Commission sign.

15 MR. EBELHAR: Anyway, you got it.

16 I've been a lifelong member of St. Mary Magdalene.  
17 We bought this parking lot, this grassy area, this parking  
18 lot that we're talking about right now, we bought that --  
19 they bought that back in 1949, as Charlie said. And we  
20 needed extra parking for bigger events like our annual  
21 picnic; and as our church grows, we needed extra parking too.  
22 It's been used all these years for a parking lot. It's just  
23 never been graveled. It's just been in grass.

24 We've got plans to add on to our church, future  
25 plans. When we add on to the church, we'll need more parking

1 area for parishioners then. And so we was trying to get  
2 ahead in the game. We had a little money. We want to build  
3 a space for more parking that will be paved. So that's the  
4 reason about two or three or four years ago -- I don't  
5 remember how long ago, but a few years ago we put down the  
6 rock as a base for a future parking lot to be paved.

7 Our intentions are, when we redo the church and add  
8 on to it, we want to repave not only the existing parking  
9 lot, but this too. Instead of have a patch job where we're  
10 asphaltting this now, we want to do the whole job at one time.  
11 So we don't have any intention not to pave it, but we want to  
12 wait until everything is done and do it all at once and have  
13 a smooth job that'll be a continuous job. So, you know, we'd  
14 like to be able to -- this petition be denied and we're not  
15 having to do this as of now. Just wait until a later time.

16 Is there any questions?

17 CHAIRMAN: Any board member have any questions?

18 MR. PEDLEY: I don't have a question. I do have  
19 comments when they're through. Whenever they're through, I  
20 have some comments.

21 MS. RAINES: Mr. Chairman, may I ask a question?

22 CHAIRMAN: Yes, Shannon.

23 MS. RAINES: Just want to make sure I'm clear.

24 They're using it for parking now?

25 MR. EBLEHAR: Yes.

1 MS. RAINES: On a weekly basis or just for, you  
2 know - -

3 MR. EBLEHAR: Well, it's always used for spillover,  
4 and now even on Sundays. Our parish is growing, and it's  
5 being used as spillover even every Sunday now. Not at every  
6 mass. We have three masses. It may not be at every mass,  
7 but maybe two of the three there's people parked back there.  
8 We need that extra parking already. So, you know, we are  
9 using it now. As far as I know, there hasn't been any  
10 complaints from any of the neighbors on dirt or dust or  
11 anything like that. It's just that we want to get a good  
12 solid base that when we do asphalt it we have a good solid  
13 foundation for the remainder of the whole parking area.

14 CHAIRMAN: Any other questions?

15 State your name.

16 MR. GILLIS: Jimmy Gillis.

17 (JIMMY GILLIS SWORN BY ATTORNEY.)

18 MR. GILLIS: I guess I'm the one that kind of  
19 started this whole process. I suggested we put an open air  
20 shelter in for our '97 annual picnic. We lost a tremendous  
21 shade tree, and this was our next best option. What we were  
22 proposing to do is just build a pole barn; in other words,  
23 with a roof on it -- no concrete, no water, no electricity.  
24 I'm just trying to give you a little background.

25 What's in question here is our grass parking lot

1 that has been parking forever. Like Danny stated, it was  
2 overflow for our picnic, our four-wheeler raffle giveaway,  
3 weddings and funerals. Two of the reasons that we graveled  
4 it, as Danny stated, we want it to have a solid base for  
5 future asphaltting. Also, when we would park in this grass  
6 area and it was wet outside, we were tracking mud onto our  
7 existing asphalt and out onto the road. We thought this was  
8 a logical solution to solve this problem.

9 As Danny noted, we are going to expand the church  
10 at sometime, and we'd like to have a Variance on this  
11 ordinance to put off the asphaltting of this lot until  
12 expansion of our church is completed.

13 If there's any questions, I'd be glad to answer  
14 them.

15 CHAIRMAN: Any board members have any questions?

16 MS. RAINES: Can I ask the Staff, I guess, of some  
17 guidance. This is saying that it's grandfathered in, but is  
18 there any sort of regulation if you apply for, say, a  
19 Conditional Use Permit? Are you required at that point to  
20 comply with current rules, or is that not the way it works?

21 MR. HOWARD: It would certainly be up to -- well,  
22 the Zoning Administrator would need to make a determination  
23 that this is an existing use prior to the zoning ordinance  
24 provided the documentation that was given to them would reflect  
25 that. Generally, if the plan comes in and there is an

1 existing use on the site that's not in compliance but it's  
2 not pre-existing prior to the zoning ordinance, we would look  
3 for that to be brought into compliance.

4 But the question here is, is this an existing use  
5 that predates the zoning ordinance that has been there  
6 forever, since 1949 or sometime prior to the late 1970s. The  
7 notice of violaion was sent out due to the fact there was  
8 gravel placed on the property. But the Board of Adjustment  
9 doesn't specifically have the authority to waive a parking  
10 requirement.

11 They may wish -- I don't know if the correct avenue  
12 -- and Madison can chime in -- would be an adminisrative  
13 appeal to appeal the decision of the Zoning Administrator  
14 that they're required to pave that would, you know, come  
15 before the Board as an administrative appeal instead of the  
16 Board actually waiving or granting a waiver on the parking  
17 paving requirement.

18 MR. SILVERT: It's not typical that I have  
19 questions, but I do have a couple of questions for counsel.

20 MR. KAMUF: Yes, sir?.

21 MR. SILVERT: Counsel, when did you receive that  
22 Notice of Violation from the Zoning Administrator; do you  
23 know?

24 MR KAMUF: I received it five minutes before I came  
25 to this meeting.

1 MR. SILVERT: Do you know when your client did?

2 MR. KAMUF: Father has been on vacation, never got  
3 back in town until today, and I think it was mailed to him  
4 Tuesday. He said it was in his mailbox. You can ask him  
5 that.

6 MR. SILVERT: So it's just a couple of days. Have  
7 you filed an administrative appeal yet on this determination?

8 MR. KAMUF: I didn't find out about it until five  
9 minutes ago.

10 MR. SILVERT: So, no. That was my question. It's  
11 just that, typically, when there's a determination by the  
12 Zoning Administrator, we have that issue on administrative  
13 appeal. Now, if it's the Board's wish to move forward with  
14 the condition being that an administrative appeal be  
15 successful, then certainly that could be the Board's  
16 pleasure; but the determination of whether or not this was a  
17 nonconforming but allowable pre-existing use would have to be  
18 taken up as an appeal to the Zoning Administrator's  
19 determination, which apparently is just a couple of days old.

20 MR. KAMUF: I might take this up with you. The KRS  
21 100.253 states that this Board -- and it specifically states  
22 this Board. It says, "The Board of Adjustment shall not  
23 allow for an enlargement or extension of a nonconforming  
24 use." And so it implies that you have the authority to do  
25 that.

1           And I found a landmark case, Franklin Planning and  
2 Zoning v. Simpson County; and it says this. There's no  
3 question that this board has that authority. It says this,  
4 and that was my analogy where I talked about if you had a  
5 commercial activity in a residential zone and then later you  
6 had a zoning ordinance and then they wanted to make some  
7 little change in the commercial activity.

8           It says this: "A change from storing bricks to  
9 storing logs was not impermissible even though the logs were  
10 stacked eight feet higher and since the logs were not  
11 material different and did not obstruct the view and impede  
12 the flow of the air." In other words, I think you all have  
13 the authority to do that under that particular case, you  
14 understand. This activity -- we're not changing any activity  
15 under that KRS. I would like for you to find that this is an  
16 activity in there that was there prior to the zoning  
17 ordinance and we can continue.

18           You understand, we didn't come down here in bad  
19 faith. We just got caught in the areas, and we're willing to  
20 do this. But here I come to this meeting not knowing as a  
21 result of this they've already filed a violation -- you  
22 understand? -- as a result. But you have the authority to do  
23 that, and I would like for you all to find that this was an  
24 activity that was there prior to the zoning ordinance and  
25 that we can continue to have it. I can assure you down the

1 road that in the event that we keep winning prizes at the  
2 picnic -- and money -- that we'll make it look good. Because  
3 no neighbor has ever objected. And you can see, the little  
4 red, all we did was ask for a 50 by 60 change.

5           Anyway, I think you have that authority. I read  
6 that KRS 100.253 Subsection 2, and it pretty well lays it out  
7 that you have the authority. You can't enlarge. I didn't  
8 come down here and ask for a change of dimensions. But you  
9 have the authority to do that.

10           MR. DYSINGER: Mr. Chairman, I have a question and  
11 a couple of issues on this.

12           First off, the application as we have it does not  
13 reference the desire to waive the parking requirement. The  
14 only place we're getting that is from the Staff Report.  
15 That's issue number one. The application on its face is just  
16 about the picnic structure.

17           Number two, if we in fact do not have the authority  
18 to waive the parking pavement requirement, that issue is  
19 moot, it seems to me. Regardless of what we do, whether we  
20 put a condition in there that makes them do it or whether we  
21 don't, it's moot, it seems to me.

22           Further, and on that same point, it has not been  
23 the custom of this Board in the past, as a condition, to list  
24 compliance as a condition, compliance with things that are  
25 stated in the ordinance, meaning we don't restate that they

1 must comply with items of the ordinance. It's taken for  
2 granted that they have to comply with the ordinance. I'm a  
3 little hesitant to start listing things that the Staff  
4 contends they must comply with regardless of what we do, that  
5 they must do that as a condition. It seems to me we're  
6 getting in a gray area there.

7 My question is, Madison, is on the first issue.  
8 Can this Board not act on this condition, on this Conditional  
9 Use Permit specific to the picnic structure without dealing  
10 with the gravel issue at all?

11 MR. PEDLEY: They're asking -- if they're coming  
12 into compliance, you have to have a Conditional Use Permit in  
13 an A-U zone, R-1A zone for a church. Their Conditional Use  
14 Permit is to operate a church in A-U zone and R-1A zone,  
15 which is both of what they have.

16 You sit down a minute. I'm just going to take a  
17 few minutes.

18 MR. KAMUF: Sure. Excuse me.

19 MR. PEDLEY: This is a pretty sensitive area. St.  
20 Mary Magdalene Church has been there for over 100 years. My  
21 wife went to church there when it was a wooden church with a  
22 potbelly stove sitting in the middle of it. They lived  
23 across the street. Her mother ran a grocery store across  
24 from St. Mary Magdalene Church for 32 years. All of my four  
25 children went to school there, went through the eighth grade

1 there. Myself and my family, we worked that picnic for over  
2 25 years until we moved out of that area. And that picnic is  
3 why you see so many buildings down there. They built a new  
4 church. They built several sheds out there. Barbecue pits.  
5 They paved the front parking lot. And a lot of it came from  
6 hard work of that picnic. And most everything that's done  
7 down there came from hard work and dedication to the people  
8 in that community.

9           We got ready to do the front parking lot. It was  
10 gravel for many years. You couldn't hardly walk across it  
11 with heels. Didn't have hardly any money. We would just  
12 used the money we had. I put in the curb down there  
13 labor-free. So we had a parking lot. The parish hall,  
14 several of those floors. My brothers and I poured those  
15 floors labor-free. That's how that was built. That's how  
16 that church was built. Entire thing.

17           We don't need to be putting a 30 to \$40,000 burden  
18 on that church and that community just to pave that parking  
19 lot. That parking lot was put there -- used to we'd have the  
20 annual picnic. A lot of times we'd have heavy rains that  
21 we'd farm tractors our there pulling vehicles out through  
22 that fescue. That's how that all came about.

23           Then finally got enough money to put some rock on  
24 it. Basically, that rock parking lot is used for the picnic  
25 and occasional times church; and the rest of the area, they

1 have 70 paved parking, which far exceeds the requirement of  
2 the zoning ordinance. So the hard work and dedication of  
3 those people down there.

4 Now, that property has an A-U zone, and it has an  
5 R1-A zone. Back in 1996 the Planning Commission amended the  
6 zoning ordinance to allow no paving required for parking  
7 areas in an agricultural zone. That's what I'm reading here  
8 in the ordinance. This ordinance, Article 13, is parking:  
9 No paving required in parking areas in agricultural zones.  
10 Reference 13.12. 13.12. Paving except for single-family  
11 residential uses and A-U, A-R, and E-X zones where parking  
12 areas is provided, it shall be improved within six months  
13 with asphalt or hard surface. But it says, "except for  
14 single-family residential uses A-U, A-R, E-X1 zone."

15 So you have two zones there. You have the A-U,  
16 R-1A. They wrote the citation because you're in R-1A zone  
17 and it requires parking. So now then, really to solve this  
18 problem -- and, Counsel, correct me if I'm wrong -- all you  
19 have to do is put in an application for zoning change to A-U,  
20 the entire property is A-U. It doesn't have to be paved.  
21 It's fairly simple. We don't need to be going through all  
22 this thing.

23 I don't understand why you, Mr. Kamuf, hasn't  
24 looked at the ordinance. I don't understand why Staff hasn't  
25 looked at this ordinance, and why we're here.

1           Now, have you read the ordinance, Counsel?

2           MR. SILVERT: That's certainly one way to stir the  
3 burgoo. There's another way here to do it as well. The  
4 board chairman had asked to give an opinion on how to get  
5 through this.

6           If you look at 100.237 -- if they sought a change  
7 in the zone -- Staff, I think that's correct. There's not a  
8 paving requirement in that zone. Now, whether or not they'd  
9 get that zoning change, I can't answer that question. But if  
10 they were to be successful in that, maybe the requirement  
11 would go away.

12           Another way would be this. Here's what we know.  
13 100.237 -- I'm glad to see Mike Sullivan here because when I  
14 was a young attorney in this town, just out of law school a  
15 couple of years, he said, "If you don't know the answer, just  
16 go to the statute first." Plain good advice.

17           100.237 says that the Board can approve, modify, or  
18 deny any application for a Conditional Use Permit. If it  
19 approves such a permit, it may attach such necessary  
20 conditions, such as time limitations or requirements that one  
21 or more things be done.

22           Well, here's one thing that could be done. Have an  
23 administrative appeal challenging the determination of the  
24 Zoning Administrator that this lot had to be paved and is  
25 nonconforming use, and then you're done. If you're

1 successful with that, then we know two things: This Board  
2 can't make you do something that otherwise is a legally  
3 nonconforming use. They also can't waive parking  
4 requirements. So if it isn't a legally nonconforming use,  
5 they can't waive that, can't seek a Variance for that.

6 But the thing that concerns me is that we have a  
7 Notice of Violation that's been sent. And it's just a few  
8 days old; but if we just kind of leave this alone, we have no  
9 attempt on the part of the applicant here to try to rectify  
10 it. And there are two ways to rectify it: successfully get  
11 a zoning change to where it's not necessary, or challenge it  
12 through an administrative appeal to where it also may be  
13 determined as not necessary.

14 Now, you could pass this tonight with the condition  
15 that --

16 MR. PEDLEY: I'm ready.

17 You got a piece of property that has two different  
18 zones on it. The A-U zone is much more flexible than R-1A  
19 zone. So it's very simple for them to make an application to  
20 Planning and Zoning for a zoning change. And then whatever  
21 they want to do in the future, expand the gravel parking or  
22 whatever they want to do, it's not required. This is a very,  
23 very simple issue.

24 MR. DYSINGER: Mr. Chairman, I think it's even  
25 simpler than that; and it goes back to my very first point,

1 which I don't think was answered adequately. There's nothing  
2 in this application about waiving parking. There's nothing  
3 in this application about parking whatever. This application  
4 is about continuing the use that Mary Magdalene has done  
5 forever and whether or not they can build a picnic shelter.  
6 And if a picnic shelter is not a reasonable adjoining use to  
7 a church, Lord, I don't know what is.

8           If we approved -- and this is a legal question and  
9 a Staff question. Had we approved this before we knew about  
10 the parking issue and then at some point after that Staff  
11 went out there for whatever reason -- maybe to go to a  
12 barbecue -- saw he parking lot and cited them at that point,  
13 would this Conditional Use Permit then be void? And I do not  
14 believe that it would be.

15           MR. SILVERT: You have the authority to approve,  
16 deny, or modify the application. So the fact that the  
17 parking isn't in there to begin with doesn't mean that it  
18 can't be addressed by this Board.

19           MR. DYSINGER: It does not also require us to, does  
20 it?

21           MR. SILVERT: Correct.

22           MR. PEDLEY: But they can't issue a permit until  
23 the violation is corrected, and they can't issue the permit  
24 without the requirements of paved parking. They put that  
25 condition in there. Now, we can approve this tonight and

1 put the condition on it. They make an application -- and I'm  
2 prepared to do this. That they make an application to  
3 Planning and Zoning for a zoning change and it be approved.  
4 They can move forward and go get the permit. They're done.

5 CHAIRMAN: Let's see where we're going. Let's have  
6 your motion and then --

7 MR. PEDLEY: If everyone's finished, I'm ready to  
8 make a motion.

9 CHAIRMAN: Let's go.

10 MR. PEDLEY: Mr. Kamuf, you have any comments?  
11 This is fairly simple.

12 MR. KAMUF: I have no comments.

13 MR. PEDLEY: I don't understand why it hasn't been  
14 looked at before. The first thing I did when I got this  
15 application is I went to at the zoning ordinance. I didn't  
16 agree with being two zones down there, so I went to the A-U  
17 zone and I went to the amendments. First thing I did was  
18 look at the amendments. If you go to the amendments, it  
19 clearly states there. It was amended in 1996 that you don't  
20 have to pave parking in an A-U agricultural zone.

21 MR. KAMUF: Ward, the issue is -- the reason, you  
22 understand -- I asked for a pole barn. I had no idea that  
23 anybody was in violation. As a matter of fact, the truth of  
24 the matter is, if our surveyor -- and we didn't get a  
25 registered surveyor. We got somebody from the church. If he

1 hadn't put that gravel on there, you understand -- that's the  
2 second site plan that I filed. All the other ones say  
3 "gravel parking lot." If he hadn't put that gravel parking  
4 lot on that site plan, nobody would be arguing this today.  
5 It would go through just like that. That was a trigger where  
6 we were honest and put something on there. So I had no idea  
7 that we were going to get in any trouble until such time as I  
8 filed this. This church didn't have any idea they were in  
9 violation. But that's my answer, Ward.

10 MR. PEDLEY: But you have to look for a remedy.  
11 That's a process. You look for a remedy. That's what I did.  
12 I looked for a remedy, and I went to the zoning ordinance. I  
13 went down to Sorgo today. I wanted to see what the  
14 landscaping looked like. They're required to do landscaping  
15 now, and they have adequate landscaping. And their parking,  
16 none of their parking on asphalt parking faces the highway.  
17 None of it faces the highway. When you talk about  
18 landscaping, it's usually, for the headlights especially,  
19 facing the highway. None of the parking does.

20 MR. KAMUF: I agree with you.

21 MR. PEDLEY: We cannot waive that here tonight or I  
22 would because I don't believe they need it; but they can make  
23 the application to the Board of Adjustment for a landscaping  
24 Variance, or they can continue on and do the landscaping.

25 Now, if they want to get started on their pole barn

1 and we approve this Conditional Use Permit with the condition  
2 that they make the application for a zoning change and it be  
3 approved, then they can bond their landscape and they're  
4 ready to go to work.

5 MR. KAMUF: I have no problem with that, Ward.

6 CHAIRMAN: I'll entertain a motion.

7 MR. PEDLEY: Okay.

8 MR. KAMUF: Thank you, Ward.

9 CHAIRMAN: You got your motion?

10 MR. KAMUF: Ward, the reason that'll work good is  
11 the picnic's June 30th.

12 MR. PEDLEY: Yeah. I'm not working this time.

13 MR. KAMUF: You're welcome.

14 CHAIRMAN: You ready?

15 MR. PEDLEY: Are you --

16 CHAIRMAN: I'm waiting for the motion.

17 MR. PEDLEY: Mr. Chairman, I make a motion to  
18 approve the Conditional Use Permit based on findings of fact  
19 the church activities have been existing for over 100 years  
20 and the structures predate the zoning ordinance and it is  
21 very compatible in the neighborhood.

22 The landscape requirements: A Variance can be  
23 applied for the landscape requirements. We cannot approve it  
24 here or waive it because it serves no purpose over what  
25 exists.

1           The condition: The church may apply for a zoning  
2 change on the R-1A portion of the grounds to A-U Agriculture,  
3 same as the rest of the church property. If met with  
4 approval, it would eliminate the requirement to pave the  
5 gravel parking. Paving is not required in an A-U Agriculture  
6 zone.

7           So that's my motion. And the condition is that  
8 they make an application to Planning and Zoning for a zoning  
9 change and it be approved.

10           MR. WARREN: Second.

11           CHAIRMAN: We've got a motion. We've got it  
12 seconded. Now, any discussion? The board members have any  
13 other comments?

14           MS. RAINES: I have a question. Do we need to  
15 consider if they would also like to try the other avenue, you  
16 know, adding that to the condition, either change the zone or  
17 they can request an appeal?

18           CHAIRMAN: We can't change the zone.

19           MR. PEDLEY: My condition is it's approved on, you  
20 know, making the application for a zoning change --

21           MS. RAINES: Am I explaining myself right?

22           MR. PEDLEY: -- and it be approved. That's the  
23 only condition --

24           MS. RAINES: Yeah, but there are two ways to get  
25 around it. So if they don't want to go that route, can they

1 choose to --

2 MR. DYSINGER: They would not lose their ability to  
3 appeal regardless of how it turned out.

4 MS. RAINES: Appeal instead?

5 MR. DYSINGER: Unless Madison wants to correct me,  
6 they don't surrender their ability to --

7 MR. SILVERT: It would be incumbent upon them to  
8 appeal regardless of what you do tonight because there's an  
9 outstanding zoning violation out there and they've got to  
10 clear that up.

11 CHAIRMAN: Staff have any comments at this time?

12 MR. HOWARD: I have a question for Mr. Mischel.

13 There is a Notice of Violation that's existing. If  
14 they were to apply for a zoning change and not immediately  
15 appeal the Notice of Violation through an administrative  
16 appeal process, when would -- in the event that the zoning  
17 change were approved, when would a building permit be issued  
18 for that structure?

19 MR. MISCHEL: That sound like a legal question  
20 there.

21 MR. HOWARD: Typically, a zoning process takes --  
22 best case scenario -- takes 42 days from the date of  
23 application until the appeal period ends, in which it would  
24 be appealed to the legislative body. So you're talking 42  
25 days from the next filing deadline, which is, I believe, next

1 Thursday. If they did an administrative appeal and received  
2 a favorable decision by this Board next month. At that point  
3 the Notice of Violation would be eliminated or erased. Then  
4 they would be able to apply for the permit because they would  
5 not be in violation at that point. Is that a fair statement?

6 MR. MISCHEL: Typically, the permit is not issued  
7 until the zoning goes through. If the applicant chose to put  
8 in the parking, paving and everything, and then the property  
9 is rezoned, I guess that would take care of it. So that's  
10 the only way I know to do it.

11 Couple other things just to kind of clarify. I  
12 think there was a question about required parking. It would  
13 not violate that. They do have the amount of parking  
14 required, so that wouldn't be a question.

15 The other question about the nonconformity -- in  
16 Staff review, what we looked at is not the survey, but in the  
17 2000 aerial photos, the GIS, it showed grass. So it just  
18 looked like grass to the Staff, and that's why the  
19 interpretation was made.

20 In the current GIS photo, aerial photo, shows the  
21 gravel. So we could see from that point it looked like a  
22 grass field, a grass lawn that was converted into a parking  
23 area. So this is the first we've heard about a nonconforming  
24 parking lot is tonight. That's the first time I've heard  
25 that. So as far as changing rezoning, we haven't really

1 talked to them. They haven't sat down and talked about using  
2 gravel, about being nonconforming or whatever. I wish that  
3 had been brought up, but it wasn't. Here we are. So I just  
4 wanted to point that out.

5 CHAIRMAN: Anyone have any comments?

6 MR. SILVERT: There's a motion on the floor and  
7 seconded.

8 CHAIRMAN: Anyone in the audience have any comments  
9 before we proceed with the vote?

10 Come forward and state your name.

11 MR. SILVERT: Would you state your name, please?

12 MR. KIRKLAND: I'm Drew Kirkland.

13 (DREW KIRKLAND SWORN BY ATTORNEY.)

14 MR. KIRKLAND: With the situation they're faced  
15 here, and if I understood Mr. Kamuf correctly, the church in  
16 the future plans on having a capital campaign to pave this  
17 parking lot. If the board approved on conditions with a time  
18 limit to go ahead and allow the parking lot to be paved in  
19 the future on a condition, it seems like they could move  
20 forward on this whole issue. If that would be the plan of  
21 the church to go ahead and pave this in the future sometime  
22 anyway, then why would they not be able to take this with  
23 conditions based on a certain time limit agreeable to the  
24 Board and the applicant to go ahead and take that, go ahead  
25 and continue with their project, and go ahead and get it

1 passed based on conditions. And this hopefully would meet  
2 their violation also.

3 Mr. Silvert?

4 MR. PEDLEY: I don't think we have that authority  
5 to approve it on the condition of paving that parking lot at  
6 a future date.

7 MR. SILVERT: The ordinance requires that it be  
8 paved within six months.

9 MR. PEDLEY: If you do not change this zone, this  
10 is going to pop up and pop up and pop up every time that you  
11 decide to do something. They might want to put down more  
12 gravel. They might want to do something else.

13 MR. KIRKLAND: I was just making a suggestion.

14 MR. PEDLEY: We do not need a piece of property  
15 with two different zones on it. The A-U zone is the most  
16 flexible zone to allow them to do things in the future. If  
17 they want to put out more gravel, they can, and they don't  
18 have to pave it. Putting these condition on to pave in the  
19 future or any of that stuff just temporarily solve the  
20 problem, temporary fix it. With a zoning change, basically  
21 you can move forward.

22 MR. KIRKLAND: I agree. I was just trying to get  
23 beyond and to try to compress their problem they had right  
24 now so they could go ahead and proceed. I agree totally with  
25 your assessment of changing --

1           MR. PEDLEY:    They can have a zoning change in 30  
2 days.

3           MS. RAINES:   My concern, I guess, is if they choose  
4 to do this administrative appeal, do they still have to do  
5 the zoning change?

6           MR. PEDLEY:   Administrative appeal is --

7           MS. RAINES:   Based on our vote.  I don't want them  
8 to have to go through the zoning change if they choose to do  
9 the administrative appeal and get it approved.  They may not  
10 have to do it.  So I'm afraid if we vote on that, are they  
11 going to be required to do that?

12          MR. SILVERT:  Let me put it this way:  They want to  
13 put up a shelter before the picnic.  Right?  Picnic is June  
14 30.

15                  You don't care about it?  Well, I'm trying to help  
16 you out.

17          MR. KAMUF:   I know you are.  Forget about having  
18 the shelter for this year.

19          CHAIRMAN:    Thank you.

20          MR. SILVERT:  In 30 days -- let's say they did.  In  
21 30 days they could have an administrative appeal and also be  
22 simultaneously filing for a zoning change.  In 30 days, if  
23 they win the administrative appeal, then they could get their  
24 building permit to put up this shelter.  And then in 42 days  
25 they would have one zone on the property.  It would be

1 absolutely clear that they wouldn't have to pave in the  
2 future. As they expand their campus, it would leave them  
3 more flexible options. So they could do both and still  
4 satisfy Mr. Pedley's motion.

5 MS. RAINES: Okay.

6 MR. SILVERT: My concern continues to be them  
7 having an outstanding determination of the Zoning  
8 Administrator that they're in violation. My obligation to  
9 this Board is to make sure that we don't give an applicant  
10 advice that's going to leave them vulnerable, and I don't  
11 want them to walk away thinking we've said, "You don't have  
12 to, you don't need to address this zoning violation that's  
13 out there." Just want to make sure that that's absolutely  
14 clear.

15 MR. KAMUF: Ward, we can live with your motion, and  
16 we'll come back. The chairman of the Planning and Zoning  
17 Board is here, and he said he would look into it. I'll put  
18 him on the spot. So we can live with your -- let's try your  
19 motion and see where we are. We got problems, we'll make  
20 some correctionss or whatever it is. And we can live with  
21 the motion to come back and get the property rezoned. That's  
22 a lot of extra expense, and that's one reason we didn't do  
23 it, but we want to get it over with too.

24 MR. PEDLEY: I just think the zoning change is a  
25 more permanent fix for future activities.



1 MR. CHAIRMAN: So noted.

2 SPECIAL CIRCUMSTANCES

3 The applicant is requesting to utilize an existing  
4 access point that does not conform to the current zoning  
5 regulations. Access points in Industrial zones throughout  
6 the City are required to be not more than 50 feet wide or  
7 exceed 40 percent of the lot width.

8 In March 2010 the applicant contacted Jim Mischel  
9 in regards to redeveloping the subject property. In a letter  
10 dated March 11, 2010, Mr. Mischel informed the applicant that  
11 any future changes to the site, including, but not limited  
12 to, building removal, building addition, or new construction  
13 would require the site to be brought into compliance with the  
14 current standards of the zoning ordinance. Site improvements  
15 may include changes to access, landscaping, screening, etc.

16 In December 2011 a site plan was submitted to  
17 Mr. Mischel listing three options for an existing building,  
18 including remodeling, reconstructing, and removing the  
19 structure. The site plan submitted also showed the existing  
20 access along Crabtree Avenue being shortened to the required  
21 50 foot maximum width with the required landscaping on either  
22 side of the access point. A mark-up was sent back to the  
23 applicant requesting the 10-foot alley to the south of the  
24 subject property be used as part of the 50-foot drive width.  
25 The access point would start at the south side of the alley

1 and extend 40 feet into the subject property, creating a  
2 50-foot wide access point. The remainder of the roadway  
3 buffer on Crabtree Avenue will be landscaped with a 3-foot  
4 high continuous element or one tree every 40 linear feet.  
5 Mr. Mischel had no other correspondence with the applicant  
6 regarding this project.

7           Granting this Variance will alter the essential  
8 character of the general vicinity because the assess point  
9 would be wider than typically allowed in an Industrial zones.  
10 It will allow an unreasonable circumvention of the  
11 requirements of the zoning regulations because the access  
12 points in Industrial zones are required to be not more than  
13 50 feet wide throughout the City.

14           Staff would recommend denial.

15           MS. EVANS: We would like to enter the Staff Report  
16 into the record as Exhibit E.

17           CHAIRMAN: Thank you.

18           Have we had any comments or questions in the  
19 office?

20           MR. HOWARD: No.

21           CHAIRMAN: Is the applicant here and wish to have  
22 any comments at this time?

23           State your name.

24           MR. RINEY: Jim Riney.

25           (JIM RINEY SWORN BY ATTORNEY.)

1           MR. RINEY: Yes. I'm here representing Murphy  
2 Excavating tonight, and Mr. Murphy and his wife are here as  
3 well.

4           The applicant, Murphy Excavating, does this type of  
5 work, excavating. When they first bought this property, they  
6 were not anticipating some of the growth of their business  
7 relating to the excavating and heavy equipment business.

8           MR. SILVERT: Jim, I want to caution you before you  
9 go too far. You've heard me say this before. I'm admonished  
10 by State Bar Association. You're not an attorney. You need  
11 to limit your statements to not be representation of a client  
12 in a legal matter, but as the statements of your expertise.  
13 I just want to make sure that we're getting there.

14           MR. RINEY: That's what I'm attempting to do,  
15 Counselor. I understand my license. I'm here to state the  
16 facts and make statements. I'm not here --

17           MR. SILVERT: Yeah. I have to say -- you  
18 understand that I just have to say it. Okay.

19           MR. RINEY: Thank you. The applicant -- once we  
20 made the submittal, the applicant came back to us and  
21 indicated because his business was growing that he needed to  
22 be able to come through with his heavy equipment and big row  
23 tractors and that type of stuff. So that's why we came in --  
24 asked us to come back in and file the application for the  
25 Variance.

1           The entrance that's there has existed there since  
2 the City reconstructed Crabtree Avenue. I think our research  
3 shows back in the mid '70s. I think I was employed with the  
4 City's Engineering Department at that time and worked on  
5 that. I do recall going to Southern States, facility that  
6 was there before Murphy's Excavating purchased that, when I  
7 was a kid -- I want to say at least 50 years ago -- with my  
8 grandfather, and I remember that it was all open access and  
9 it did not have curb and gutter, I think, when the City built  
10 the street or reconstructed Crabtree Avenue in the mid '70s.  
11 They actually closed up a little of the entrance by putting a  
12 curb up next to the railroad. CSX operates a railroad main  
13 line next to this property. That's part of the issue is the  
14 public safety that's there.

15           What I asked Mr. Murphy to do was to bring in his  
16 equipment and show us what was happening about the turning  
17 rays and so forth. And he did that. And we've got photos of  
18 that review and investigation in the application. It shows  
19 the row tractor with some of his equipment. He runs  
20 tractors, bulldozers, excavators, and other heavy equipment.  
21 And it takes the large trailers, the lowboys that are low to  
22 the ground, to get in there. When he was trying to maneuver  
23 in, he would have to use a good section of Crabtree Avenue to  
24 maneuver in. He did make it in with the existing entrance  
25 that's there now.

1           If he had to restrict the entrance, I'm not sure he  
2 would make it in, but he would certainly have to maneuver.  
3 It would mean that the lowboy and the row tractor would be  
4 out in the street. We did see traffic backing up across the  
5 railroad track as he was trying to maneuver in there under  
6 the existing conditions, but he was able to move on in. If  
7 the entrance is restricted, then he's certainly going to end  
8 up with some traffic at the railroad. The last thing you  
9 need is vehicular traffic, schoolbuses or whatever, on that  
10 railroad track and a train coming through.

11           So in the interest of public safety, we felt like  
12 maintaining the entrance that's there now was the prudent  
13 thing to do. That's the entrance that was built when the  
14 City reconstructed Crabtree Avenue.

15           Now, we know that there are mitigating  
16 circumstances -- and that's why we're here tonight -- to the  
17 regulation.

18           A similar situation, we worked with an  
19 agricultural-related business on West Second Street; and they  
20 had lowboys and road -- heavy equipment, different types of a  
21 heavy equipment; and they were granted allowance for an  
22 entrance so they could go ahead and maneuver their equipment  
23 into their site.

24           I think Mr. Murphy has identified yet another  
25 location that folks have been allowed to have additional

1 driveway width in order to accomdate the type of business and  
2 big trucks and so forth this they use that's somewhere in the  
3 neighborhood.

4           The other thing that we've noticed -- and I've got  
5 Google Earth images if anybody wants to look at them -- there  
6 are numerous -- I'm going to say 18 or 20 or more --  
7 driveways along Crabtree Avenue -- Crabtree Avenue/Bosley  
8 Road, I guess, technically, to be correct -- between West  
9 Second Street and West Parish Avenue that are in excess of  
10 the 50-foot specified driveway dimension, and they allow  
11 traffic to come across the curb at wider widths. It's the  
12 nature of that neighborhood. So maintaining this entrance in  
13 the size that it is and has been since back in the '70s is  
14 consistent with the character of the neighborhood and; in  
15 fact, blends in with immediate neighborhood around the 800  
16 Crabtree Avenue site.

17           I would ask that Mr. Murphy describe to you what he  
18 has and what he does with his business in terms of the  
19 equipment. I'm not a truck driver. I don't do that kind of  
20 work. But he can explain to you what he has to do to be able  
21 to get in there with his equipment and to be able to use the  
22 rest of his property, his access to the property. If I  
23 understand correctly, this is the only practical method he's  
24 got to get into the site with his large equipment.

25           Mr. Murphy.

1           CHAIRMAN: State your name, please.

2           MR. MURPHY: Gary Murphy.

3           (GARY MURPHY SWORN BY ATTORNEY.)

4           MR. MURPHY: We're heading across the railroad  
5 tracks -- I'm a little hoarse today -- we set up a barrier  
6 where the 50 foot would be. We got a 52-foot lowboy. When  
7 I'm coming across the railroad tracks, the way it is now, I  
8 don't have to swing out in the traffic. I can pull straight  
9 into my parking lot. But if we had to -- where that barrier  
10 was, I had to get out well before I crossed the railroad  
11 tracks to swing to make my driveway.

12           CHAIRMAN: Any board members have any questions of  
13 Mr. Murphy right now?

14           (NO RESPONSE)

15           CHAIRMAN: Staff have any comments?

16           MR. HOWARD: Not at this time.

17           CHAIRMAN: Anyone else have any comments for or  
18 against this item?

19           (NO RESPONSE)

20           CHAIRMAN: Entertain a motion to --

21           MR. DYSINGER: I'm sorry, Mr. Chairman.

22           Can the Staff Report -- it says that it may  
23 adversely affect the public health, safety, welfare, etc.,  
24 etc. What Mr. Murphy's testimony seems to indicate is that  
25 by requiring compliance we're actually making a dangerous

1 situation. Is there any comment on that?

2 MR. MISCHEL: Typically, throughout the years, in  
3 an Industrial zone -- Commercial zone was limited to 40 feet,  
4 and Industrial 50 feet in width. And over the years that has  
5 proven to be adequate width on a driveway. We have a lot of  
6 industrial uses in Daviess County, City of Owensboro and  
7 Daviess County; and seems like it's working for those uses.

8 I know Mr. Riney had mentioned a few sites, but I'm  
9 not familiar with that. I wish they had brought that to our  
10 attention here in the office so we could look those up. Off  
11 the top of my head, I'm not familiar with those. Typically,  
12 we limit to 50 feet, and we haven't had a problem with that  
13 in the past, in a lot of different industrial applications.  
14 I don't know if that answers your question or not.

15 MR. DYSINGER: In most places, the nature of a  
16 Variance, by the very nature of a Variance, it relates to a  
17 particular piece of property where it may be a problem.

18 MR. MISCHEL: You don't want to try to get it too  
19 wide because then you sometimes you cause a problem where you  
20 have too many vehicles coming and going. It's a wide open  
21 space and it doesn't funnel the traffic down to an  
22 appropriate - - if it's too wide, then you just have  
23 everybody kind of turning in and coming out at the same time,  
24 which creates a hazard. Whenever Mr. Murphy came in, like I  
25 said, in 2010, he had told us what his business was and we,

1 you know, mentioned all those items; and at that time, it  
2 seemed to work for him. It seemed like he could live within  
3 those boundaries.

4 MR. REEVES: My question is for Jim and maybe to  
5 Mr. Murphy also. Is there any restrictions on where he takes  
6 this 50 feet? Can he take this 50 feet as far south as  
7 possible so that when he comes across the railroad track he  
8 has more room to go down before he has to wheel out?

9 MR. MISCHEL: Well, you have access standards as  
10 far as the distance from other assess points. Typically, if  
11 you have an alley, which there is an alley there, typically,  
12 you combine with that to limit, again, traffic coming and  
13 going, too many people coming and going. That could cause a  
14 hazard itself.

15 MR. REEVES: What would be the limit that he would  
16 have to have as far as curbage between an alley and the edge  
17 of his --

18 MR. MISCHEL: You can have a 50-foot entrance and  
19 then it could flare out to the curb line.

20 MR. HOWARD: If I could interject. When you flare  
21 out, you could put a larger radius on that access point to  
22 allow room for the truck to start maneuvering through the  
23 curve to turn before they get onto the site. If you have a  
24 square there, you can't make a sharp enough turn. But with a  
25 large enough radius, I think what Jim's saying, that might

1 allow them more room to get in there.

2           The question I'm going to have is: What is the  
3 limiting factor, when you're coming from the north, getting  
4 into the site? Is it the width itself? Is it the location  
5 of the existing building on the site that you can't cut it  
6 hard enough to get in before you get to that building?

7           MR. MURPHY: Yeah. That's the only way we can get  
8 into our back lot. We can't get our big, long trailer into  
9 the back. We're going to tear down the main building, but  
10 we're going to leave the little side building. And it's  
11 sitting right on the alley as well. I guess the main thing,  
12 coming from the north, is the railroad tracks that we're  
13 sitting on.

14           MR. MISCHEL: I guess be for the Board maybe to ask  
15 Mr. Riney. I don't know if he suggested that to them, to  
16 maybe flare it out, if that would take care of the issue  
17 maybe; or he's already thought of that?

18           MR. MURPHY: You know, we can do it. We can get in  
19 there if we shorten it down. Still wouldn't be no problem.  
20 The fact is now, when we're headed across the railroad  
21 tracks, I can turn in and not take in the left lane of  
22 traffic. But otherwise, if I'm trying to get to that back  
23 lot and miss my building that's right on the alley, it's a  
24 little tough. I have to get in the other lane of traffic.  
25 When we took these photos, I stayed in my lane of traffic

1 come straight in. I had plenty of room and didn't have to  
2 cross traffic.

3 CHAIRMAN: Mr. Murphy, when you come across the  
4 railroad track and flare entrance, could you comply with  
5 that? On the south where the small building is, have a flare  
6 there, but have 50 foot on it?

7 MR. MURPHY: Yeah. We can make anything work, so  
8 whatever. The way it is now, we absolutely don't have to  
9 cross traffic from the north.

10 MR. DYSINGER: Mr. Chairman, so I understand what  
11 Staff said, as long as the bulk of the lane is 50 feet, then  
12 the property owner can flare the entrance so that it is safe,  
13 correct?

14 MR. HOWARD: The driveway, the width is measured at  
15 the throat of the driveway. That does not include the  
16 radius. When you're looking at, say, a WV-53 type semi  
17 truck, if you put a 50-foot radius on that type of driveway,  
18 typically that's enough room for the truck to maneuver  
19 through the radius and get onto the site.

20 If I understood what you were saying correctly, on  
21 the site plan you have two smaller one-story buildings and  
22 then there's a covered scales and hopper, then there's a  
23 larger building to the north. Are you saying that larger  
24 building would be eliminated?

25 MR. MURPHY: Yes. The smaller building and the

1 scales will stay

2 MR HOWARD: Okay. So the limiting factor right now  
3 turning in, based on the photos that were provided, say, in  
4 Exhibit E where the truck's not, it's not beginning its  
5 turning movement until actually you get close to the alley.  
6 The limiting factor there is, when you start turning in at  
7 that point, if you don't wheel out into the opposing lane of  
8 traffice, you're going to hit your small buildings.

9 MR. MURPHY: Yes, sir.

10 MR. HOWARD: But if the 50 feet were, say -- if the  
11 50-foot opening was further to the north, then you could turn  
12 in with a large enough radius. And that larger building  
13 gone, you could turn in within a 50-foot driveway and  
14 maneuver within your lane without getting into opposing  
15 traffic; is that a fair statement?

16 MR. MURPHY: I believe we could. We probably  
17 could, but we would probably still be up on the curb and  
18 landscaping as well.

19 CHAIRMAN: Mr. Murphy, did I understand you're  
20 going to take the old building, Southern States, where the  
21 office was?

22 MR. MURPHY: Yes, sir.

23 CHAIRMAN: Feed room where the seed was and over  
24 to the feed and grain and stuff, you're going to take that  
25 off?

1 MR. MURPHY: Yes, sir.

2 CHAIRMAN: Jim, you think you all can work this out  
3 with the Staff where we can comply with the 50-foot width  
4 with the flaring on it?

5 MR. RINEY: I'm not the driver. What we understood  
6 is, it wasn't the road getting in. It was the trailer coming  
7 behind. Because that was what was going to get in the  
8 landscaping.

9 The radius, as you talked about, yeah, we would  
10 have a ten-foot radius. We always do have a radius or an  
11 apron flare, but that's -- I'm not understanding that the  
12 trailer's going to come in, but maybe --

13 MR. HOWARD: If I could ask a question. Say a  
14 WV-53. That's a semi truck with a 53-foot trailer on it. I  
15 don't have turning templates with me. I have some in the  
16 office. If you apply a 50-foot radius, that WV-53 truck can  
17 get into a standard size opening without getting into  
18 opposing traffic. Is the turning -- what's the length of the  
19 trailer on this lowboy?

20 MR. MURPHY: Fifty-three foot.

21 MR. HOWARD: So basically it would have the same  
22 maneuvering capability of a 53-foot semi.

23 MR. RINEY: That's right.

24 MR. HOWARD: So I guess my question would be, if in  
25 general a WV-53 truck can maneuver in with a larger radius --

1 I mean, you mentioned a ten-foot radius, but is there a  
2 reason you couldn't put a larger radius in there to allow  
3 that truck to maneuver onto the site?

4 MR. RINEY: What I say speaking of, Brian, if you  
5 look on the drawing of that landscape area --

6 MR. HOWARD: Right.

7 MR. RINEY: -- that's roughly 20 feet. So I'm  
8 talking about a ten-foot radius around there, as long as you  
9 just swing around, because you've got the parking in there.  
10 They've got the parking. Once he gets in there, he showed me  
11 when we were out there, you've got to maneuver around to get  
12 back out. You can't -- you don't want to -- I guess you can  
13 back out into Crabtree, but you don't want --

14 MR. HOWARD: Zoning ordinance doesn't permit  
15 backing onto the street.

16 MR. RINEY: I wouldn't recommend it. So to try to  
17 maneuver is what part of that limiting -- that turning radius  
18 is the problem. And the trailer was going to drag over the  
19 landscaping. If we slid the driveway, extended it to 50 feet  
20 all the way down the alley, then the lowboy was going to drag  
21 over the median even with the radius. The radius would work  
22 better than just a flare. It would drag over the curb, over  
23 the landscaping area.

24 MR. HOWARD: And generally, as Mr. Mischel pointed  
25 out, it is preferable to utilize that existing alley. It

1 sounds as though -- and correct me if I'm wrong, but it  
2 sounds as though if the driver were to scoot to the north and  
3 utilize some of the opening to the north, you could probably  
4 work within the 50-foot throw to put the radius on it and get  
5 into the site, and then provide some landscaping between that  
6 point and south to the alley. And you might even be  
7 providing a little bit of additional landscape on the north  
8 side of the driveway too. Am I hearing that, that you could  
9 actually maneuver within a 50-foot with a radius if you  
10 didn't push it all the way to the south of the property?

11 MR. RINEY: I didn't think, based on the templates  
12 that we had, that the 50-foot would work, but what I'm not  
13 sure of is, if you're talking about moving the entrance  
14 opening, keeping part of it to the north, is the grade  
15 elevation. It gets higher as you get to the railroad track.  
16 The railroad's elevated.

17 MR. HOWARD: Right. I'm familiar with the site.

18 MR. RINEY: So I'm not sure if moving the entrance  
19 to the north is going to allow you to get in there with the  
20 lowboy. That's my issue.

21 MR. MURPHY: We could make it work, but it would  
22 definitely --

23 MR. REEVES: Approximately how many vehicles a day  
24 would be going through this entrance and exit? A dozen, two?

25 MR. MURPHY: Five or six a day.

1           MR. HOWARD:  Would they all come from the north, or  
2 would there be potential that they would be traveling  
3 northbound to turn in?

4           MR. RINEY:  I think it'd be a mixture, yeah.

5           MR. HOWARD:  Because you could certainly make it  
6 within the given radius area if you're northbound on  
7 Crabtree?

8           MR. RINEY:  The north was issue that we were  
9 looking at, and that was scary at the railroad tracks and  
10 backing up traffic.  A train coming through there, he's not  
11 going to stop.  The south, because of where you are, didn't  
12 seem like that was going to be so much of an issue.  The  
13 southbound traffic coming from the north would be the issue.  
14 That's what we looked at on the turning route.

15          MR. PEDLEY:  Mr. Chairman, if I may.

16          CHAIRMAN:  Wait a minute, Ward.

17                 Is there anyone else wishing to speak on this item?

18                 Ma'am, come forward state your name, please.

19          MS. CARDEN:  My name is Sharon Carden.

20                 (SHARON CARDEN SWORN BY ATTORNEY.)

21          MS. CARDEN:  I had received a letter regarding  
22 this.  And I'm one of the property owners there on Seventh  
23 Street.  Property butts up against the railroad track in  
24 question, which is right there at their property.  My concern  
25 is, how does that affect me as a property owner there?

1           MR. HOWARD: You were notified as an adjoining  
2 property owner?

3           MS. CARDEN: Uh-huh.

4           MR. HOWARD: As far as the physical nature of what  
5 they would be doing on their site will not have -- they  
6 cannot alter your property. They cannot have a direct impact  
7 on your property, or they can't make any changes on your  
8 property. You're notified as an adjoiner to give you the  
9 opportunity to speak, you know, if you had concerns about how  
10 it might impact where you live. But they couldn't make any  
11 changes or do anything to your property without your consent  
12 or without applying for who knows what. You're across the  
13 railroad track, things like that.

14           MS. CARDEN: Okay. Of course, I don't live there.  
15 Willing to sell it. If they want to buy it, that's fine.  
16 Whatever you want to do.

17           CHAIRMAN: Any other comments?

18           MS. CARDEN: Thank you.

19           CHAIRMAN: Thank you, ma'am.

20           Anyone else have any other comments?

21           MR. MURPHY: I have one thing to add. When I said  
22 we can make anything work, and we can and will, but, you  
23 know, just the safety thing, coming across the railroad  
24 track, we would like to keep it.

25           CHAIRMAN: Thank you.

1           Entertain a motion.

2           MR. PEDLEY:  You haven't given me an opportunity to  
3 make my comments, Mr. Chairman.

4           CHAIRMAN:  Okay.  Make your comments, and we'll  
5 entertain a motion.

6           MR. PEDLEY:  There's been a lot of questions about  
7 the semi that size being able to enter 50 feet.  I have a  
8 brother that has a major truck shop on Main Street just west  
9 of Crabtree, and he's been there 33 years, and he handles  
10 every big rig all the way across the country, hundreds of  
11 them.  Twelve years ago I put two bay addition on his shop,  
12 and he had 120 feet on Main Street access point.  It was  
13 easy.  But when we did the addition, Planning and Zoning made  
14 us come into compliance.  They closed it up to 50 feet.

15           Now, we did that; and he's had no problem getting  
16 those big, long semis in and out and getting in his shop in  
17 that 50-foot entrance.  West Second Street is not that wide,  
18 so he's had no problem.  Then the rest of Main Street -- he  
19 did his landscaping in the front of his office.  He did his  
20 landscaping.  So he did come in compliance.

21           At first he thought, yeah, it would cause a  
22 problem; but it has not.  That's been twelve years ago, and I  
23 haven't heard him say it was a major problem.  But he was  
24 very much like you.  He was very concerned because he handled  
25 nothing but big rigs, as big as you have or bigger.  So it is

1 not an issue to be able to get in a 50-foot access.

2 MR. MURPHY: May I say something? West Second  
3 Street is a one-way traffic. You're not crossing oncoming  
4 traffic. And, you know, the railroad is what scares us too.  
5 And it's a hill. And sight of vision coming from the north

6 MR. PEDLEY: Most of our streets are 30, 40 feet  
7 wide. Most of our highways are 40 and 50 feet wide. If  
8 you're able to travel our streets and highways and make the  
9 turns at the stoplights and whatever, I know you can do it.

10 CHAIRMAN: I'll entertain a motion now that you've  
11 commented.

12 MR. PEDLEY: I'm going to make a motion,  
13 Mr. Chairman, to deny the Variance request based on the  
14 findings of fact:

15 1. It will adversely affect the public health,  
16 safety, and welfare because pedestrians who are walking or  
17 bikers or anyone going through an 80-foot wide access point  
18 or 85-foot wide access point, they have no protected area to  
19 get into with multiple vehicles going in and out.

20 2. It will not alter the essential character of  
21 the vicinity because access points are typically up and down  
22 Crabtree Avenue in major areas.

23 3. It will cause a hazard and nuisance to the  
24 public because vehicles entering and leaving at more than one  
25 point, multiple vehicles at the site and creating sight

1 blockage and confusion causing traffic hazards. When you got  
2 more than 50-feet wide, people coming and going in and out at  
3 any point they want to, might be three or four vehicles at  
4 one time. And you see that quite often.

5 4. Granting this Variance will circumvent  
6 requirements of the zoning ordinance by setting a precedent  
7 and encouraging others to seek Variances on the same issue.

8 MR. DYSINGER: Second.

9 CHAIRMAN: Motion has been made and seconded. Any  
10 other comments or questions from the Board?

11 CHAIRMAN: Staff have anything else, comments?

12 (NO RESPONSE)

13 MR. HOWARD: No, sir.

14 CHAIRMAN: The applicant have anything else you'd  
15 like to add?

16 (NO RESPONSE)

17 CHAIRMAN: Hearing none, all in favor, raise your  
18 right hand.

19 (ALL BOARD MEMBERS PRESENT -- WITH MR. WARREN  
20 RECUSING HIMSELF -- RESPONDED AYE.)

21 CHAIRMAN: Motion passes.

22 Next item, please, sir.

23 ITEM 6

24 500 Frederica Street, zoned B-2 (Frederica Boulevard and  
Downtown Transition Overlay Districts)  
25 Consider a request for a Variance in order to reduce the  
minimum building frontage requirement along a "Type B" street

1 in the Frederica Boulevard Overlay District from 50 percent  
2 to 39 percent along Frederica Street.

3 Reference: Zoning Ordinance, Article 21, Section  
4 21.87(a)(iii)

5 Applicant: GPD Group; Fifth Third Bank

#### 6 SPECIAL CIRCUMSTANCES

7 The subject property is located within the  
8 Frederica Boulevard and Downtown Transition Overlay  
9 Districts. Article 21 of the Zoning Ordinance establishes  
10 minimum building frontage requirements for buildings in the  
11 Downtown Overlay Districts. The purpose of this requirement  
12 is to insure infill development would be in character with  
13 existing buildings and allow for walkability within the  
14 downtown area.

15 The applicant must receive a recommendation from  
16 the Historic Preservation Board to alter the minimum building  
17 frontage required along a "Type B" street before the OMBA can  
18 act. The Historic Preservation Board met on May 2nd, 2012,  
19 and made a favorable recommendation to approve the  
20 dimensional Variance.

#### 21 FINDINGS

22 Granting this Variance:

23 1. Will not adversely affect the public health,  
24 safety, and welfare because the Historic Preservation Board  
25 found that the building as proposed increases the public  
welfare by promoting the development of a lot that has sat  
vacant for many years.

1           2. Will not alter the essential character of the  
2 general vicinity because this is a redeveloping area where  
3 the entire block front is being developed as one project.

4           3. Will not cause a hazard or nuisance to the  
5 public because the proposed project will meet access  
6 restrictions as determined on the consolidation plat.

7           4. Will not allow an unreasonable circumvention of  
8 the requirements of the zoning regulations because the  
9 Historic Preservation Board found that the design fits within  
10 this area because there are larger building lots in the area  
11 with larger walking spaces between buldings.

12           MS. EVANS: Staff recommends approval. We would  
13 like the enter the Staff Report into the record as Exhibit F.

14           CHAIRMAN: Thank you.

15           Have we had any comments in the office for or  
16 against?

17           MR. HOWARD: We've had a couple of calls, yes. No  
18 comments in the office.

19           CHAIRMAN: Is the applicant here? You have  
20 anything you'd like to present at this time? Come forward,  
21 please.

22           MR. SILVERT: State your name, please.

23           MR. LANG: Eric Lang.

24           (ERIC LANG SWORN BY ATTORNEY.)

25           MR. LANG: I have no comments. I'm just here to

1 see if anyone else has questions.

2 CHAIRMAN: Any board members have any questions of  
3 the applicant?

4 MR. DYSINGER: Mr. Lang, who are you with?

5 MR. LANG: Oh, I'm sorry. I am with GPD. I  
6 represent Fifth Third Bank.

7 CHAIRMAN: Staff have any comments or questions at  
8 this time?

9 MR. REEVES: When you designed the building,  
10 knowing what the requirements of Article 21 were, why did you  
11 not just decide to build it within compliance?

12 MR. LANG: Fifth Third Bank has a set of  
13 standardized buildings; and they try to follow economic  
14 requirements, I guess, with the site. They didn't want to  
15 design a larger building than what was proposed due to the  
16 amount of people that will be going to this building. They  
17 didn't want to propose a larger one because it wouldn't have  
18 been economical for Fifth Third Bank.

19 CHAIRMAN: Any other questions of the applicant?

20 That answer your question, Fred?

21 MR. REEVES: It's an answer. It's not the answer  
22 I'm looking for, but it's an answer.

23 CHAIRMAN: Does anyone in the audience have any  
24 comments or questions on this item?

25 Come forward and state your name, please.

1 MS. GOODLETT-COLLINS: Donna Goodlett-Collins.

2 (DONNA GOODLETT-COLLINS SWORN BY ATTORNEY)

3 CHAIRMAN: State name again, please.

4 MS. GOODLETT-COLLINS: Donna Goodlett-Collins.

5 MR. SILVERT: Could you move the microphone toward  
6 you? I want to make sure we get you on the record.

7 MS. GOODLETT-COLLINS: Got it.

8 MR. SILVERT: Thank you.

9 MS. GOODLETT-COLLINS: Donna Goodlett-Collins.

10 We are in a protected area part of the historic  
11 district. I ask that you take that into consideration. I  
12 also ask, was GPD Group -- have they asked for previous  
13 Variances?

14 MR. HOWARD: I'm not aware of any requests.

15 MS. GOODLETT-COLLINS: I believe there was one.  
16 Perhaps there was a conflict with the size of the windows  
17 which had to be changed, but I'm not for sure.

18 MR. HOWARD: I believe that was an appeal to the  
19 Historic Preservation Board.

20 MS. GOODLETT-COLLINS: So we have an appeal that  
21 had to be made on a building that's based on a building  
22 that's based on a building that's based on a building. We  
23 are an historic district. I'm wondering if we are planning  
24 in good faith and if there will be other Variances that they  
25 will be requesting in this area. I'd ask you to remember

1 that this area includes the Campbell Club; Theatre Workshop  
2 of Owensboro; the Callis Building; the Callis House, which  
3 will sit directly posterier to this lot; Haley-McGinnis; and  
4 Saint Stephen's Cathedral. It does not fit within the  
5 character of our neighborhood, and I ask for adjacent  
6 expectations. I don't think that it does fit into the  
7 character of this neighborhood. I ask that you stay with the  
8 current rules and regulations as they are stated and vote no  
9 on this Variance. Thanks.

10 CHAIRMAN: Does anyone have any comments of this  
11 lady?

12 MR. LANG: I'd like to comment. When Fifth Third  
13 Bank purchased this site originally in 2003, the Article 21  
14 was actually not in effect to have this 50 percent -- is that  
15 not correct? I'm sorry.

16 CHAIRMAN: Staff?

17 MR. HOWARD: That would be correct.

18 MR. LANG: They are wanting to approve, have this  
19 Variance be approved due to the fact that when they  
20 originally purchased this property, it was not that.

21 MR. HOWARD: I want to comment that you are correct  
22 that when this property was purchased, Article 21 was not in  
23 effect. However, no plans were submitted and the site was  
24 not developed and nothing was submitted until Article 21 went  
25 into effect. So at the face of it, your statement is

1 correct, but Article 21 came into effect before anything was  
2 submitted, so it is applicable.

3 MR. SILVERT: Are you from the design group? Is  
4 that GPD?

5 MR. LANG: Yes.

6 MR. SILVERT: So I need to give you the same  
7 admonition I gave the engineer on the previous item, that  
8 I've been admonished by the Kentucky Bar Association. If you  
9 are not an attorney, you can't represent and make legal  
10 arguments on behalf of a client.

11 MR. LANG: Yes, sir.

12 MR. SILVERT: I will say that.

13 CHAIRMAN: Any other questions of the applicant?

14 Hearing no other --

15 MR. DYSINGER: Mr. Chairman, I have another  
16 question for the Staff; I guess clarification maybe. It's my  
17 understanding Variances can only be granted based on the  
18 nature of a particular piece of property; not with regards to  
19 a particular applicant; not with regards to a particular, for  
20 instance, design of a building. How is the nature of this  
21 lot requiring the applicant -- making so the applicant cannot  
22 comply? Doesn't seem to be the nature of the lot. Seems to  
23 be the design, the desired design of the structure which is  
24 causing the problem. Is that not correct?

25 CHAIRMAN: Staff answer that?

1           MR. HOWARD: Let me rephrase what you said. And  
2 correct if I'm wrong.

3           MR. DYSINGER: Please do, because I phrased it  
4 awfully.

5           MR. HOWARD: It seemed as though what you were  
6 saying is that the nature of this lot, the size and shape of  
7 it, is not driving the need for the Variance. What's driving  
8 the need for the Variance is the fact that to make the  
9 building economical, it has to be smaller than what can meet  
10 the zoning ordinance requirements in Article 21. Is that a  
11 fair summary of your statement?

12           MR. DYSINGER: Sounds pretty good.

13           MR. HOWARD: So, you know, it's mentioned in their  
14 information and the Staff Report that what they're requesting  
15 is -- for that purpose, it's not economical for that type of  
16 building to fit on the lot and it still need to meet those  
17 requirements in Article 21. But you could certainly make  
18 findings that -- or entertain the discussion that there's not  
19 characteristics on the lot other than the size of the  
20 building that would drive the need for a Variance. I think  
21 it's a fair question.

22           MR. DYSINGER: Well, I mean, maybe I misunderstand  
23 Variances. And maybe this is a legal thing, Madison. A  
24 Variance?

25           MR. SILVERT: I'm popular tonight.

1           MR. DYSINGER: We're not done with you yet, I  
2 expect.

3           Variances, granting a Variance must be based on the  
4 nature of the lot itself, irrespective of the applicant.  
5 This applicant is asking for a Variance that another property  
6 owner would not have to necessarily ask for because the  
7 nature of the request has nothing to do with the lot itself,  
8 because of what they want to do on it. Variances  
9 traditionally, if I understand -- and if I'm wrong, by all  
10 means, educate me. But traditionally they're based on  
11 geology, topography, the shape of the lot. That seems to be  
12 completely lacking in this application.

13           MR. REEVES: Mr Chairman, I'd like to go on what  
14 Mr. Dysinger said. Seemed like the application's driven by  
15 economics, not by the nature of the lot. They purchased the  
16 lot, and they intend to put a -- I hate to use the term --  
17 cookie-cutter building, because they build buildings across  
18 the country. This is the building that fits that lot  
19 according to their economic use as opposed to "if we looked  
20 at the lot we purchased and there is some compliance issues  
21 here, then we could make our building fit the compliance  
22 issues." That's kind of where I am.

23           MR. DYSINGER: I think it's a good representation  
24 of what I said, except I would say I have no issue whatever  
25 with what the applicant wants to do with the property. My

1 issue at this point is a Variance, as I understand them, can  
2 only be granted based on the given topography of a particular  
3 piece of property; and the Variance request is asking for  
4 things that are particular to the type of building that the  
5 applicant wants to build; and I am uncomfortable allowing --  
6 using a Variance for that purpose.

7 MR. SILVERT: I would say that that interpretation  
8 of KRS 100 is pretty near. I think it's broader than that.  
9 I'll just read to you the statute itself: "The Board shall  
10 consider whether (a) the requested variance arises from  
11 special circumstances which do not generally apply with land  
12 in the general vicinity, or in the same zone; (b) the strict  
13 application of the provisions of the regulation would deprive  
14 the applicant of reasonable use of the land or would create  
15 an unnecessary hardship on the applicant."

16 So one of the things that's been represented here  
17 tonight, just for your edification, is that "we bought it,  
18 the rules changed, this is the type of building on it." Not  
19 saying whether it's right, but there are other considerations  
20 here other than what the land looks like. So I think the  
21 statute is broader than what you're saying. Not to color  
22 your opinion.

23 MR. PEDLEY: Basically, this ordinance only applies  
24 to Article 21, the Downtown Overlay. They created this.  
25 This Variance does not apply in other areas of the city or

1 the county or wherever. It's strictly in the Article 21  
2 Downtown Overlay. They made a lot of money for a company to  
3 come in here and create this. It doesn't mean it's right.  
4 But the Preservation Board has recommend that we approve  
5 this, and Preservation Board is strictly tied to Article 21,  
6 the Downtown Overlay. That's what they look at. They helped  
7 to create that. So if they recommend that we approve it,  
8 then I don't have any problem with approving it. It's  
9 strictly related to Article 21.

10 MR. DYSINGER: Mr. Chairman, if I understand  
11 Mr. Pedley, he's saying that we're in a Variance situation  
12 somewhat artificially because it's created strictly by Article  
13 21, whereas most of the Variances that we deal with are more  
14 related to law side of it.

15 MR. PEDLEY: The Preservation Board has recommended  
16 we approve it, so we should not have a problem approving it  
17 unless it conflicts with the ordinance that applies all over  
18 the county or city or whatever, if it's in conflict with the  
19 ordinance. But this Preservation Board -- it is an ordinance  
20 of Article 21. So if the Preservation Board is okay with it,  
21 then I don't have a problem with it.

22 MR. WARREN: Mr. Pedley, that was going to be my  
23 comment. I put a lot of faith in the Historic Preservation  
24 Board. I mean, they're there for a particular reason and  
25 they found favorably on this. I put a lot of faith in that

1 as well.

2 CHAIRMAN: Any other comments from the Board?

3 (NO RESPONSE)

4 CHAIRMAN: Staff have anything else?

5 MR. HOWARD: No, sir.

6 CHAIRMAN: Applicant have anything else you'd like  
7 to say?

8 MR. LANG: No, sir.

9 CHAIRMAN: Hearing none, I entertain a motion to  
10 dispose of the item.

11 MR. WARREN: Mr. Chairman, I make a motion to grant  
12 the Variance based on the findings that it will not adversely  
13 affect the public health, safety, and welfare because the  
14 Health [sic] Preservation Board found that the building as  
15 proposed increases the public welfare by promoting the  
16 development of a lot that has set vacant for many years; it  
17 will not alter the essential character of the general  
18 vicinity because it's a redeveloping area where the entire  
19 block front is being developed as one project; it will not  
20 cause a hazard or nuisance to the public because the proposed  
21 project will need access restrictions as determined by the  
22 consolidated plat; it will not allow an unresonable  
23 circumvention of the requirements of the zoning regulations  
24 because the Health [sic] Preservation Board has found that  
25 the design fits within the area because of their larger

1 building lots in the area with larger walking spaces between  
2 buildings.

3 CHAIRMAN: Have a second?

4 MR. PEDLEY: Second.

5 CHAIRMAN: Motion's been made and seconded. Any  
6 other comments or questions from the Board?

7 MR. WARREN: That is Historic Preservation Society,  
8 not Health. I don't know why I said that.

9 CHAIRMAN: We'll ignore that. Staff have any other  
10 comments?

11 (NO RESPONSE)

12 CHAIRMAN: Applicant have any other comments? e --

13 (NO RESPONSE)

14 CHAIRMAN: All in favor, raise your right hand.

15 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

16 CHAIRMAN: Motion passes.

17 Next item, please.

18 ITEM 7

19 2400 West Fifth Street, zoned R-4DT  
20 Consider a request for a Variance in order to reduce the side  
21 street yard building setback line for back-to-back lots from  
22 15 feet from the property line to 7 feet from the property  
23 line.

Reference: Zoning Ordinance, Article 3, Section 3-5(a)(3)  
22 Applicant: City of Owensboro Community Development; City of  
23 Owensboro

24 SPECIAL CIRCUMSTANCES

25 The subject property is part of the Mechanicsville

1 redevelopment project by the City of Owensboro. The subject  
2 property is a back-to-back corner lot. According to Article  
3 3, Section 3-5(a)(3) of the Zoning Ordinance, side yard  
4 building setback lines along local streets may be reduced to  
5 15 feet where lots are back to back.

6 The applicant is requesting that the east side yard  
7 setback along Hocker Street be reduced from 15 feet from the  
8 property line to 7 feet from the property line to construct a  
9 new home with a side porch.

10 While we do find it appropriate to reduce the east  
11 side yard building setback line, we do not feel reducing the  
12 setbacks to 7 feet would be necessary. The zoning ordinance  
13 allows setback reductions in specific situations, such as  
14 when setbacks are allowed to be averaged in residential  
15 development projects and in Residential Townhouse zones.  
16 However, in each of these situations where setbacks may be  
17 reduced without a Variance, a minimum of ten feet from the  
18 property line is required to be maintained. Maintaining a  
19 10-foot minimum setback would help to ensure the public  
20 safety by requiring separation from the roadway as prescribed  
21 elsewhere in the ordinance.

22 We would recommend the east side yard building  
23 setback line be reduced from 15 feet from the property line  
24 to 10 feet from the property line. This would allow the  
25 applicant to construct the new home with a side porch in the

1 same building footprint as the old home and maintain the  
2 10-foot separation as allowed elsewhere in the zoning  
3 ordinance as a required minimum.

4           Granting this Variance to reduce the east side yard  
5 building setback line from 15 feet from the property line to  
6 10 feet from the property line will not alter the essential  
7 character of the general vicinity because there appear to be  
8 other encroachments into the building setback lines within  
9 the Mechanicsville neighborhood. It will not adversely  
10 affect the public health, safety, or welfare because this  
11 will be a new home as part of a new subdivision that will  
12 create affordable housing for the community and will help  
13 enhance the health, safety, and welfare of the public in this  
14 area.

15           Staff would recommend approval to reduce the east  
16 side yard building setback line from 15 feet from the  
17 property line to 10 feet from the property line. with the  
18 condition that they obtain all the necessary building  
19 electrical and mechanical permits, inspections, and  
20 certificates of occupancy and compliance as required.

21           MS. EVANS: We would like to enter the Staff Report  
22 into the record as Exhibit G.

23           CHAIRMAN: Have we had any comments or questions in  
24 the office that we need to bring out?

25           MR. HOWARD: No.

1           CHAIRMAN:  Is the applicant here and ready to  
2 present?

3           MR. SILVERT:  Will you state your name, please.

4           MR. FREE:  Keith Free.

5           (KETH FREE SWORN BY ATTORNEY.)

6           MR. FREE:  Thank you.  I had gotten -- Mike Volk  
7 was going to be here this evening, but he was unable to  
8 attend, so I'm going to kind of speak on his behalf.

9           I have a letter here to Melissa.  I'll give you a  
10 copy of it.  If I can put that into the report.  Basically  
11 what this document is is just a -- we looked at within a two  
12 to three block radius of the site at 2400 West Fifth to see  
13 how many structures were located seven foot or closer in the  
14 front yard setback.  And actually there's about 20 examples  
15 within this particular neighborhood.  Within this  
16 neighborhood there's a lot of different -- you know, it isn't  
17 like a 20-foot setback or 15-foot setback, you know, on all  
18 the homes.  It's kind of here and there.  At this particular  
19 site, where the house that was there, it was actually all the  
20 way up to the property line.

21           We don't want to do that, but in order to -- as  
22 you're coming down that street off of Fifth Street onto  
23 Hocker, we're going to be doing some things with some fencing  
24 and a neighborhood sign on that corner.  Having the ability  
25 to go up to seven foot from the right of way off of Hocker

1 would certainly give us the opportunity to put a more  
2 significant structure there that would be more attractive.

3           The thing about it too is right there in that right  
4 of way, there's quite a bit of right of way from where the  
5 edge of the curb is up into the lot. So there's actually a  
6 little -- there's a lot more on that side than there is on  
7 the other side of the street, so that kind creates a little  
8 bit different situation as well.

9           You know, one of the things we're looking at is not  
10 just building houses in a neighborhood. We're looking at  
11 everything on, you know, the scale of all the different homes  
12 that we're doing and the different public improvements that  
13 we're doing within that neighborhood to make sure that it's  
14 well balanced. You know, having this particular home, you  
15 know, designed to where it could go out to seven foot on that  
16 side would certainly not be a detriment in this particular  
17 neighborhood.

18           I'm available for any questions.

19           CHAIRMAN: Board members have any questions?

20           MR. DYSINGER: I have a question.

21           Mr. Free, you may have addressed this. Would the  
22 ten feet not be adequate?

23           MR. FREE: I think ten foot, you know, could work  
24 right there, but the kind of house that we're wanting to put  
25 there, you know -- I'm wanting to do something that's a

1 little bit more significant because the way it's going to lay  
2 out is, right there at the corner of Fifth and Hocker, we're  
3 going to actually have our neighborhood sign. It's going to  
4 be a really, really nice sign that's going to have fencing  
5 and stone columns and everything around, you know, to border  
6 the whole property.

7           What we're going to do is we're going to set  
8 actually back, I think probably even further back than the  
9 25-foot setback off of Fifth Street. So we're going to be  
10 coming back quite a bit off of there. And with the narrow as  
11 a lot -- the lot is, I think, 45 feet wide. And as narrow as  
12 it is, we we can build a narrower house on it, and we have.

13           Actually, we did secure a ten-foot variance. It's  
14 not up here because I just did the 20 properties that are  
15 seven foot or less. But I think about a year ago we did get  
16 a Variance on a corner property that was somewhat similar to  
17 this, but it was actually a 40 foot, and that worked. But  
18 for where it was in the neighborhood, the scale of that and  
19 having that property just come to ten foot, you know, worked  
20 really well.

21           In this specific instance, we really need to be  
22 somewhere in between seven and ten feet. But securing the  
23 seven, you know, will give us the opportunity to go that far.  
24 It very well could be the house we end up designing once we  
25 secure the Variance. You know, it could be eight foot off of

1 it. It's not that we couldn't build a house ten foot off,  
2 but it's just about the scale and just understanding, you  
3 know, on the site how, you know, how the scale of the  
4 building's going to be as you're coming down the street.

5 MR. DYSINGER: Is that due to the narrowness? Did  
6 I hear you say the narrowness of the lot?

7 MR. FREE: Yeah. The lot is 45 foot wide. And  
8 we're wanting to do something, you know, not just  
9 shotgunning, but, you know, it's going to be somewhat  
10 shotgunning, but, you know, we're coming off the middle of  
11 it, you know, coming out to get more of a feature on the  
12 building. And to do that, that's why we've got to come a  
13 little bit closer to that. But I can assure you we're  
14 looking at all of the scale of the whole neighborhood and we  
15 certainly wouldn't do anything that would, you know, be  
16 something that would not, you know, look correct or look odd  
17 or be way too close to the street or anything.

18 MR. DYSINGER: And a question for the Staff. In  
19 the approval you've placed the condition or you're suggesting  
20 the condition be to obtain necessary building, electrical,  
21 mechanical permits, etc., etc. Is there something about this  
22 particular applicant's shiftiness or something? We don't  
23 usually require that as a condition.

24 MR. HOWARD: I think when Ms. Evans got up and  
25 introduced the first item for the record, she made a general

1 statement that just because a Conditional Use Permit or  
2 Variance is approved, it doesn't give the applicant the right  
3 to go on and start construction prior to obtaining permits.  
4 It's just -- and I think this is something we've started  
5 doing here recently, because we've had instances in the past  
6 where it's been perceived that the approval of a Conditional  
7 Use Permit means "I can go out and start building; I don't  
8 need to get building permits first." So it's just to make  
9 sure that they're aware of it. We know that they're aware --

10 MR. DYSINGER: It doesn't necessarily have to make  
11 it in as a condition; it's just so that we get it out there  
12 in the record?

13 MR. DYSINGER: Melissa, you have a comment?

14 MS. EVANS: Yeah. We had had a few issues with  
15 that in the past, and we made a special signature block on  
16 the application that now applicants have to sign that they  
17 acknowledge that they have to get those building permits and  
18 electrical permits and such. We also read that into the  
19 record before each meeting. And we have on permits,  
20 Conditional Use Permits that are for new construction,  
21 whether it be a garage or house or whatever, we have started  
22 adding that as a condition just to make sure that everyone is  
23 aware that that does have to be done. And it doesn't really  
24 matter who the applicant is.

25 MR. FREE: In this particular home on this site,

1 it's a part of our greater emphasis of our Mechanicsville  
2 neighborhood redevelopment plan, which is about \$8.8 million  
3 public and private investment over four years within this  
4 particular neighborhood that involves a lot of public  
5 facilites improvements and new street construction and then  
6 also the construction of about 40 to 42 new homes that are  
7 going to be built. This particular house, actually probably  
8 it'll end up construction costs on just the home will  
9 probably be about a \$140,000; probably about what the cost is  
10 to get the, you know, for that particular site and to get  
11 that look as we're coming into the neighborhood.

12 CHAIRMAN: Any other questions from the Board of  
13 the applicant?

14 (NO RESPONSE)

15 CHAIRMAN: Staff have anything else?

16 MR. HOWARD: No.

17 CHAIRMAN: Anyone in the audience have any  
18 comments, questions?

19 (NO RESPONSE)

20 CHAIRMAN: Entertain a motion to dispose of the  
21 item.

22 MR. WARREN: Mr. Chairman, I make motion to grant  
23 Variance based on the findings that:

24 1. It will not adversely affect the public health,  
25 safety and welfare. They are replacing a dilapidated old

1 house with a new one, enhancing the area.

2           2. It will not alter the essential character of  
3 the general vicinity because the area was developed before  
4 the establishment of the Zoning Ordinance and there does  
5 appear to be other -- obviously, there are other  
6 encroachments in the area.

7           3. It will not cause a hazard or nuisance to the  
8 public because this will be a new home as part of the City of  
9 Owensboro's Community Development Project to create  
10 affordable housing.

11           4. It will not allow an unreasonable circumvention  
12 of the requirements of the zoning regulations because there  
13 appear to be several other encroachments in the building  
14 setback lines in the area.

15           And I will go ahead and throw the condition on  
16 there that the applicant obtain the necessary building,  
17 electrical, and mechanical permits; inspection; and  
18 certificates of occupancy and compliance.

19           MR CHAIRMAN: Second?

20           MR. PEDLEY: Second.

21           CHAIRMAN: Motion has been made and seconded. Any  
22 other questions or comments from the Board?

23           MR. REEVES: Just to clarify, this was for the  
24 seven-foot variance?

25           MR. WARREN: Yes. I'm sorry. Yes. I guess I

1 should have said that. To reduce the east side yard building  
2 setback from 15 feet from the property line to 7.

3 CHAIRMAN: Any other questions or comments from the  
4 Staff?

5 (NO RESPONSE)

6 CHAIRMAN: The applicant have any other comments?

7 MR. FREE: No, Mr. Chairman.

8 CHAIRMAN: Hearing none, all in favor, raise your  
9 right hand.

10 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

11 CHAIRMAN: Motion carries.

12 Let's take a ten-minute break until 45 minutes  
13 after seven, and we'll go from there.

14 (THE BOARD RECESSED AT 7:36 P.M.)

15 (THE MEETING RESUMED AT 7:45 P.M.)

16 THE CHAIRMAN: We're back from a break.

17 Let's move to the next item.

18 -----

19 ADMINISTRATIVE APPEAL

20 ITEM 8

21 407 Stableford Circle, zoned R-1C  
22 Consider a request for an Administrative Appeal concerning  
23 the Zoning Administrator's interpretation of Article 3,  
24 Sections 3-6(e) and 3-7(g)(6) regarding the placement of a  
brick wall within a public utility easement.

Reference: Zoning Ordinance, Article 7, Section 7.35

Applicant: Betty Bowles

25 MR. SILVERT: State your name.

1 MR. MISCHEL: Jim Mischel.

2 MR. SILVERT: You're sworn.

3 MR. MISCHEL: I've got a few handouts first. But I  
4 would like to put some information into the record. This  
5 information contains my statements and some correspondence  
6 from Mr. Sullivan and from OMU dealing with this. The only  
7 thing I haven't included would be an affidavit that  
8 Mr. Sullivan gave us tonight. I think that Mr. Silvert has  
9 the original, and it was asked for him to put that into the  
10 record.

11 MR. SILVERT: That can be submitted at this time.

12 A copy of those items, for the record, was provided  
13 to the board members just prior to this meeting, as well as a  
14 statement from Owensboro Municipal Utilities for their  
15 review. That statement from Owensboro Municipal Utilities  
16 was just submitted into the record, I believe, as well. You  
17 should have that.

18 MR. MISCHEL: I just have a handout here. Some of  
19 it's in the presentation. I'd like for everybody to have a  
20 copy of it. I'll go over this in just a minute. It's in the  
21 record.

22 Just to make sure there's no confusion, this first  
23 sheet I have here, the first sheet of the packet, this is a  
24 survey prepared by HRG. The reason I put that in there is  
25 because it shows the building setback and public utility

1 easement. So I've highlighted that in yellow, and also I've  
2 highlighted the public utilities just to kind show you where  
3 the easement runs on that property.

4           The second page I put in your handout is just an  
5 aerial photo of what you see up on the screen, but it hasn't  
6 been highlighted. It just shows the property where the fence  
7 is. That page up on the screen is highlighted just so people  
8 can see it better, and I'll kind of go over that.

9           The blue area that you see, which I'll describe in  
10 a minute, that is the area that -- I think the first person  
11 that called our office was Mr. Worth Mountjoy, an attorney.  
12 He was representing the owner. He called and talked to one  
13 of the staff members, Matt Warren, in the office. My  
14 understanding was that the wall that he asked about, had  
15 inquiries about, was in that blue area. And I'll go over  
16 that a little bit in a minute.

17           The pink area is actually what has been  
18 constructed, so I thought it'd be easier if I just point that  
19 highlighted point out.

20           I've got a little statement I'd like to go over  
21 explaining what brought us here, kind of the history of this  
22 case and everything else.

23           Basically, this item comes before the Owensboro  
24 Metropolitan Board of Adjustment in the form of an  
25 Administrative Appeal filed by Mike Sullivan, Attorney at

1 Law, on behalf of the owners of the subject property. The  
2 appeal seeks to determine the correct interpretation of the  
3 Zoning Ordinance relative to a wall constructed within a  
4 public utility easement without the approval of the utilities  
5 occupying the easement. Owners were cited in violation of  
6 Section 3-6(e) of the Owensboro Metropolitan Zoning Ordinance  
7 upon request of the Owensboro Municipal Utilities.

8           The history of this complaint and the subsequent  
9 Notice of Violation is as follows:

10           ¶ Matt Warren, employee of the OMPC, received a  
11 telephone call from Worth Mountjoy, attorney representing  
12 Mr. And Mrs. Bowles, concerning the process for the  
13 construction of the wall along the north side of the subject  
14 property, which measures approximately 115 feet in length.  
15 Matt informed Mr. Mountjoy that there would not be a problem  
16 with the construction of the wall at that location along the  
17 north side of the subject property, with the exception of the  
18 frontages of both Caddie Cove and Stableford Circle where  
19 easements were likely in place along those frontages. By  
20 looking at that first map, that would leave a total length of  
21 the area where a wall could be constructed at 95 feet. Matt  
22 also informed Mr. Mountjoy that a permit would not be  
23 required.

24           ¶ Matt Hoffman (the contractor hired to construct  
25 the wall) called Matt Warren, our staff person, to ask if a

1 permit would be required to construct a wall on the subject  
2 property. Matt Warren relayed to Mr. Hoffman that he had  
3 discussed this with Mr. Mountjoy and a permit would not be  
4 required.

5 ¶ Matt Warren then received a telephone call from  
6 Austin McLimore of OMU (Owensboro Municipal Utilities)  
7 inquiring about the wall being constructed on the subject  
8 property and requested that Matt Warren meet him on the site.  
9 Matt Warren observed the following upon arrival at the site:

- 10 1. The scope of the work had been extended  
11 beyond the project as described to Matt Warren  
12 by Worth Mountjoy.
- 13 2. Matt Hoffman, the contractor, was present  
14 at the site.
- 15 3. The wall project that was now proposed on  
16 the subject property was well under  
17 construction but not yet completed.
- 18 4. The wall was started at the northern  
19 corner of the subject property, continued down  
20 Cattie Cove and then turned and continued  
21 along Stableford Circle ending into the house.

22 ¶ Matt Warren informed Matt Hoffman that it would  
23 be in his best interest to stop all work until everything  
24 could be sorted out.

25 ¶ Matt Warren at that time returned to the OMPC

1 office and informed me, Jim Mischel, of everything that  
2 occurred.

3 ¶ Austin McLimore of OMU contacted Matt Warren a  
4 few days after their visit to the site to inform him that the  
5 wall had been completed.

6 ¶ The OMPC had received some complaints from  
7 neighbors at that time.

8 ¶ The OMPC received a letter from OMU dated  
9 February 28, 2012, stating that Section 3-6(e) of the  
10 Owensboro Metropolitan Zoning Ordinance had been violated and  
11 asked the Zoning Administrator to cite the owner as per  
12 Section 5.12.

13 ¶ A letter of violation was issued March 1st,  
14 2012.

15 ¶ An Administrative Appeal was prepared and filed  
16 by Mike Sullivan on behalf of the property owners.

17 The issue before the OMBA is to determine if the  
18 Zoning Administrator correctly interpreted Section 3-6(e)  
19 which states that "Accessory buildings, structures, and  
20 features shall not encroach upon or be located within public  
21 rights-of-way, public utility easements, or adjoining lots  
22 unless specifically permitted elsewhere in this article."  
23 Section 3-7(g)6 states: "Walls and fences may be erected  
24 within public utility easements subject to the discretion and  
25 limitations of the agencies that maintain facilities in such

1 easements."

2           In this case, OMU has determined that the wall  
3 should not be located in the easement. The OMBA authority is  
4 limited to the interpretation of the ordinance, and the OMBA  
5 does not have the authority to require utilities to allow the  
6 encroachment. It can only act upon the language contained in  
7 the ordinance in determining if the Zoning Administrator  
8 correctly applied the ordinance requirement in his decision  
9 to issue a Notice of Violation to the owners of the subject  
10 property.

11           That's what I have at this time. I don't know if  
12 there's any questions now or if you have questions later.

13           CHAIRMAN: Any board members have any questions?

14           MR. MISCHEL: And we have some of the staff here.

15           MR. DYSINGER: Mr, Chairman, I do have a question.

16 The statement indicates OMPC received complaints from  
17 neighbors. I was wondering if Mr. Mischel could characterize  
18 the nature of those complaints.

19           MR. MISCHEL: It seemed to me like we had three or  
20 four different calls, and it was concerning the location of  
21 the wall and the height of the wall. Now, at one time, there  
22 was a Variance that was asked for and granted for a lot of  
23 those lots concerning fences. There were some swimming pools  
24 going in. The state building code says a fence must be a  
25 certain height when you have a pool, which couldn't be

1 accomodated under this fence regulation. So at the time, the  
2 developer asked and received some Variances for a lot of  
3 these lots on these two streets here. But the complaints  
4 were on the location of it.

5 MR. REEVES: Question for Mr. Silvert, please.

6 Mr. Silvert, would you concur that Mr. Mischel's  
7 statement starting about five lines from the bottom of his  
8 written statement here -- do you have that? "The OMBA's  
9 authority is limited to the interpretation of the ordinance."  
10 Would you read the rest of that and tell me whether or not  
11 you concur that would be accurate as far as our role?

12 MR. SILVERT: I think what he's trying to say there  
13 is OMBA's authority isn't to determine whether or not the  
14 ordinance itself is valid; but is to, in fact, enforce the  
15 ordinance is written.

16 MR. REEVES: Is that a generality rather than this  
17 specific case that he's speaking to? And does OMBA include  
18 Staff or just this board when he's speaking here?

19 MR. SILVERT: Well, the Zoning Administrator is  
20 under the same, and he makes zoning violation determination  
21 based upon the ordinance as it's given to him.

22 MR. REEVES: I know it's a question for --

23 MR. SILVERT: Yeah. And that's why we have these  
24 zoning appeals -- this Board of Appeal, rather -- is so that  
25 you can determine whether or not his interpretation was

1 accurate.

2 MR. REEVES: I just wanted to clarify what that  
3 meant. This is my very first meeting here.

4 MR. DYSINGER: Don't use that excuse, Fred. Come  
5 on. You're in this with the rest of us.

6 CHAIRMAN: Staff have anything else to add right  
7 now?

8 MR. MISCHEL: That would be it for right now.

9 CHAIRMAN: The Applicant ready to state?

10 MR. MOORMAN: Yes, sir. My name's Keith Moorman.  
11 Do you need to swear me in?

12 MR. SILVERT: Are you an attorney?

13 MR. MOORMAN: I am an attorney.

14 MR. SILVERT: I do not.

15 MR. MOORMAN: So you don't need to warn me either?

16 MR. SILVERT: Correct.

17 MR. MOORMAN: I'm Keith Moorman. I am an attorney,  
18 and I represent Betty Bowles.

19 I've got a Power Point presentation here. I hope  
20 it's up on your screens. I also distributed the hard copy,  
21 so you may have both. A little bit of overkill. It's in a  
22 binder, if you want to follow along with that. It should be  
23 behind the affidavit.

24 Some of the things were just covered, so I won't  
25 waste your time by repeating them. Hopefully, I can get this

1 to work. I'll skip through some of these because it's been  
2 covered. That's the notice of the violation. Here is -- and  
3 you have got in front of the you -- I hope it's easier for  
4 you to read -- but I did want to have it on Power Point for  
5 the audience.

6           This we've gone over as well about you can't have a  
7 wall or fence in the easement unless it's permitted somewhere  
8 else. Then you go to the next section, and that is where it  
9 says it will be permitted. Walls and fences may be erected  
10 within public utility easements subject to the discretions  
11 and limitations of the agencies that maintain facilities in  
12 such easements.

13           The interesting thing about this -- I've enjoyed  
14 the night here listening to the other cases come up, and its  
15 always a case where there's a 50-foot opening. That's all  
16 you can have. Everybody knows that. You look at the  
17 ordinance, I can have a 50-foot opening. I can have a  
18 15-foot setback. People can then come in here and say, "I'd  
19 like a Variance, and here's why."

20           Under this statute, there is absolutely no  
21 criteria, no criteria. It says if the easement owner, if the  
22 utility wants it, you can have it. If they don't want it,  
23 you don't get it. They don't have to say why. They don't  
24 have to give an explanation. You don't know when you go and  
25 ask whether they're going to approve it or why or what can

1 you do. So it's totally discretionary with the utility.

2           But it's also under the force of government because  
3 they call -- OMU calls and says, "We want you to go write up  
4 Betty Bowles." And the Staff goes out and writes up Betty  
5 Bowles. Why? Because OMU said so. Why? We don't know.  
6 Their discretion. That's all the statute requires or the  
7 ordinance requires.

8           The next is a case -- and I realize this is not a  
9 court of law, but I think it's important for you to  
10 understand where we're coming from. In this case, Colyer vs.  
11 City of Somerset involved a situation where the zoning  
12 officials were authorizing or denying building setbacks  
13 basically at their own discretion. And you guys know that  
14 you can have a building setback. That's not  
15 unconstitutional. But again, you have limitations in your  
16 ordinances. It's 30 feet, it's 50 feet, whatever. It's 20  
17 percent of this or 30 percent of that. Here in this case of  
18 the City of Somerset was saying, "Yes, you can; no, you  
19 can't. Yours is 20 feet; yours is 12 feet." And what the  
20 Court said here is that's unconstitutional. When you have a  
21 governing ordinance that sets out no standards and gives  
22 total discretion to the governing authority, that is  
23 unconstitutional.

24           And the reason is clear: How do you comply with  
25 something that has no standard? What was Betty Bowles

1 supposed to do? What was she to ask for? What am I to ask  
2 you tonight to do? I don't even know why OMU denied this. I  
3 don't know why they wanted it enforced. We don't have -- we  
4 have some suggestions, but there's nothing in your ordinances  
5 to guide any citizen on what they should or shouldn't do.

6 CHAIRMAN: Sir, let me interrupt you and let the  
7 attorney make one statement, please.

8 MR. MOORMAN: Oh, sure.

9 CHAIRMAN: And then we'll proceed.

10 MR. SILVERT: Really, it's a statement to the Board  
11 and relative to the attorney as well. The determination on  
12 the validity of the ordinances that they have isn't a  
13 question that this board can answer as an -- and you know  
14 this -- as an extension of the legislative branch, which they  
15 are. So legal determinations aren't going to be made by this  
16 Board. Out of judicial economy, we can say that argument's  
17 noted and preserved if you need it, but --

18 MR. MOORMAN: No. I realize that. And my point is  
19 to set this up so that you can see what happens when you  
20 don't have any standards.

21 And on your screen now and in your folder -- and I  
22 skipped over a couple -- is a picture of the actual fence.  
23 Sometimes it's called a wall. It's actually a concrete  
24 footer with concrete block and brick decorative finish,  
25 pillars every so often. And the fence itself is made of

1 aluminum, and it's actually very light. It's a decorative  
2 fence. You can obviously see through it. The house is  
3 unusual in that it really has two back yards or two front  
4 yards, depending on how you look at it. I would say this is  
5 a fence around the back yard for decorative purposes.

6           Just to give you a suggestion of scale, we've got  
7 someone standing there. She's probably 5'5". The fence at  
8 that point is maybe three feet. You can use your own  
9 judgment on that. It's probably four foot in some places  
10 because of the soil. I just wanted you to get a feel. This  
11 is not a monster ten-foot gothic fence around a house. It's  
12 a fairly small fence.

13           These orange markings show the location of the  
14 utility easement that we're dealing with. This is outside  
15 the fence. It's on the property. It's heading in the  
16 direction with the line, and we'll follow through to show you  
17 how it goes.

18           It's a little bit harder to see there. But my  
19 point here is that the easement is not under the main part of  
20 the fence. It runs parallel to it, several feet away from  
21 it, and right down through the back yard there. It crosses  
22 that sidewalk. There is an easement, but here's an actual  
23 electric line that's been laid in the easement. That appears  
24 where those markings are. It tails off there, as you can see  
25 at the bottom of the picture, and goes under the wall,

1 crosses the sidewalk, crosses the street, and goes to a  
2 transformer. So it does --

3 MR. DYSINGER: I'm sorry to interrupt. Just for  
4 clarity, those lines do not indicate the edge or the sides of  
5 the easement; they indicate a power line?

6 MR. MOORMAN: They indicate where the power line  
7 is, which is presumably in the middle of this ten-foot  
8 easement. And it's my understanding that this power line at  
9 this location would be buried about 48 inches.

10 MR. DYSINGER: Thank you.

11 MR. MOORMAN: This is a shot to show you the  
12 efforts that Ms. Bowles has made to comply, because she  
13 understood that one of the concerns OMU had was how do we get  
14 our equipment in there if we have to dig up the line. And  
15 she accomodated them by fixing kind of a quick release. The  
16 post that falls down. The two sections of the gate swing  
17 open. It's as easy to do and undo as kind of a farm gate.  
18 You just pull the pin, it opens right up. You can get in  
19 there in just a minute.

20 The other steps she took, she told OMU that "if you  
21 have to get in there and you do any damage, I will waive  
22 that. And I will put it in my property description that any  
23 future owners of the property will reimburse you or waive so  
24 that you don't have any damages from knocking down my fence."  
25 And she even went so far as to say that if OMU incurred any

1 additional costs -- instead of just digging up dirt, they had  
2 to knock down the wall -- she would reimburse them for those  
3 costs.

4           The point is she tried every means available to  
5 accomodate what she thought might be their concerns: access,  
6 additional costs. She was rejected on all of those.  
7 Ultimately she asked: "What can I do? Is there any way I  
8 can change this so that you will let me have the fence here?"  
9 And she was told no. So the discretion is no discretion.  
10 The answer is no, no matter what you do, you can't have it.

11           This is a plat that shows the electric lines that  
12 are actually in her subdivision. The red lines are the  
13 larger lines that go to transformers. The blue lines are  
14 distribution lines into the house. I know it's a little hard  
15 to see on the screen. But what I'm going to suggest to you  
16 in the coming slides is that these electric lines run under a  
17 lot of things. They run under sidewalks. They run under  
18 concrete driveways. They run under solid brick walls. They  
19 run under your streets. And OMU has apparently allowed that  
20 or not objected to it or not called the Staff and said,  
21 "Please go out and write somebody up because we don't think  
22 their driveway should be there." So these things exist in  
23 the neighborhood.

24           Here again is an aerial photo that shows  
25 superimposed -- this here is -- the red lines are the public

1 utility easement. As you can see at the top of the picture,  
2 Houses 1 and 2, the easement goes right under those concrete  
3 driveways. In the subject property, which is Number 8 --  
4 it's not pictured here as built because this is an older  
5 picture -- the public utilities would go under Betty Bowles's  
6 driveway. It goes under a lot of driveways.

7           We have an excavator who will speak tonight who  
8 would say he would rather go through a fence that opens and  
9 maybe have to dig up a brick footer and a concrete footer  
10 with a brick face than dig up a concrete driveway. It makes  
11 no sense in terms of cost or access or getting into the  
12 utility easement that you would allow a line to go under a  
13 concrete driveway but not let it go under a one-foot footer  
14 on a fence.

15           More of the same here, although on this picture at  
16 the top you can see the island there. That's the entrance to  
17 the subdivision. The shadow that goes out parallel to J.R.  
18 Miller Road, that is a solid brick wall. And I've got some  
19 pictures for you to look at as we come up. The pole on the  
20 right side of the road as you're looking down that is where  
21 the overland line comes into a fold, comes down through the  
22 conduit, and then passes under that street and over to the  
23 wall.

24           Here are some more pictures of the wall. Unlike  
25 the fence that Betty Bowles has, it's not primarily metal.

1 It is solid block with a brick face. Four foot, five foot,  
2 six foot followed down, depending on where you're at along  
3 the line.

4 Another picture of the wall.

5 Here is that pole from the backside from inside  
6 Betty Bowles's subdivision where you can see that the line  
7 comes down from the overhead line and then goes underground  
8 and comes across the road. I'm not suggesting it crosses the  
9 fence right there, but it does come across the road and cross  
10 under that concrete block fence.

11 You can see there from that transformer, that is  
12 right along the road into the property. It runs out. You  
13 can see the brick fence. The point is that the line runs  
14 either right under that brick wall or very close to it,  
15 certainly closer to it than Betty Bowles's fence that we  
16 showed you in those earlier pictures where you could get in  
17 with a backhoe and dig that up. Here, you're right on that  
18 fence. You're right on the road. You would not be able to  
19 get in there without doing serious damage to that wall.

20 Again, that's the wall going the other direction.  
21 I put it in there because it demonstrates the massive nature  
22 of this wall compared to the fence that Betty Bowles has.

23 More examples. If you look at the red lines, it is  
24 going under a number of different concrete driveways. It's  
25 running along features, like retaining walls, and that has

1   apparently been permitted. The citation in this case is not  
2   that Betty Bowles's fence is over an electric line. It's  
3   that it encroaches on the utility easement. Here, that red  
4   line's the utility easement, and it runs right up against a  
5   number of features on these photos.

6           That's one. The previous picture, 19, is the  
7   house. That's a fairly substantial wall that is right on  
8   that public utilities easement. So if OMU had to get in  
9   there and dig that easement up, it would be very difficult.  
10   There's no way to drop that wall to allow access by heavy  
11   equipment. There's a hill that goes off to the side. It  
12   would be difficult to have a piece of heavy equipment there.  
13   You would have to tear down that whole solid wall in order to  
14   access the conduit.

15           That is the presentation. I've got some witnesses  
16   here who will testify. I want to also note that Betty Bowles  
17   couldn't be here tonight. She did put in an affidavit. She  
18   wanted the Board to know she is not trying to cause a  
19   problem. She just wants to be treated fairly. And it's  
20   difficult for her to understand why is it not okay for her to  
21   have a fence when it only crosses this -- it's on top of this  
22   electric line in two places about a foot, but these other  
23   situtations exist where the line has been allowed to run  
24   under concrete driveways and under brick walls and right next  
25   to brick walls. She just wants to be treated fairly. I

1 suspect this Board deals with that every month. People just  
2 want "he got it; I want it; I want to be treated fairly."

3           And that's, again, the problem with an ordinance  
4 that says OMU has total discretion. They call up the Staff.  
5 The Staff goes out to write them up. End of story. Doesn't  
6 matter why. No, you can't make any changes. No, we're not  
7 going to accomodate. Yes, you can make that fence drop down.  
8 Yes, you can agree to waive. We're still not going to let  
9 you have your fence.

10           Betty Bowles just wants to be treated fairly. She  
11 would like to have her fence. She has made tremendous  
12 accommodations to allow that to happen. And I've got people  
13 here that will testify that the difficulty of accessing this  
14 line on Betty's property is much less than assessing it on  
15 these other properties. So where is the discretion here?  
16 What standard was used by OMU to say "no, Betty" and "yes" on  
17 these others?

18           I've also put in an affidavit from Matt Hoffman.  
19 He was the man that built the fence. I don't know if his  
20 testimony's different from what the Staff said. He basically  
21 said that when he got asked by Betty to build this fence, he  
22 did call and wanted to find out "do I need a building  
23 permit?" He was told no. He started to build it, and he  
24 didn't encounter any line. The line's four foot deep. He  
25 didn't see warning flags. He didn't see any kind of conduit.

1 He built the fence. Yes, at some point, OMU came out and  
2 said, "You need to stop." At that point, though, the footer  
3 was already laid, the concrete block was already up, and  
4 about 30 percent of the brick was up. And I think within a  
5 few days it was finished. So, again, that was not an attempt  
6 to flaunt or flout to get around the ordinance. It was  
7 simply it had gone pretty far before it was built.

8           And ever since then, Betty Bowles has done  
9 everything she can to try to work the situation out, to try  
10 to find a way to let this fence exist without interfering  
11 with OMU, and -- believe it or not -- without making it any  
12 bigger a deal than anybody has to.

13           And that's why we're here tonight, is simply to ask  
14 that you to reverse this Notice of Violation and permit Betty  
15 to have this fence, subject to her agreeing that she'll sign  
16 a waiver. There won't be any cost to OMU. There won't be  
17 any damage to OMU. And they can have full access to Betty's  
18 yard to get to that conduit.

19           I'm happy to answer questions. I do have an  
20 excavator here who'll talk briefly about his ability to get  
21 in. I've got a neighbor who would like to briefly comment.  
22 And I've got an engineer who might briefly comment. But  
23 that's basically our presentation. If it hasn't been done  
24 already, I would ask that the folder that I gave you and the  
25 two affidavits be made part of the record.

1 Any questions before I turn it over?

2 MR. DYSINGER: Mr. Chairman. I have a couple of  
3 questions.

4 You may have answered the first one. Your client  
5 found out that OMU did not want them to construct on the  
6 easement after construction had already begun; is that  
7 correct?

8 MR. MOORMAN: Yes.

9 MR. DYSINGER: And did your client, the excavator,  
10 anybody make any attempt to contact OMU beforehand to --

11 MR. MOORMAN: It's in the affidavit. My  
12 understanding from the contractor is that when he talked to  
13 the Staff at Planning they said no building permit was needed  
14 and his understanding was no permit was needed.

15 MR. DYSINGER: His understanding, being the  
16 contractor?

17 MR. MOORMAN: Yes. That he didn't need to get any  
18 further approval. And the fact that he had spoken -- he also  
19 -- he had called the BUD line, Before You Dig.

20 MR. DYSINGER: Okay. Yeah.

21 MR. MOORMAN: -- and had gotten -- I don't want to  
22 use the word "authorization," but they had said, "yeah, as  
23 long as you're not" -- they asked him, "Are you going down  
24 more than two feet?" He said, "No." They said, "Well, as  
25 long as you're not going down more than two feet, we don't

1 see a problem." So he did make inquiries into -- he did make  
2 inquiries to try to make sure he complied with the law. He  
3 also spoke with the developers of the subdivision to make  
4 sure there were no problems, no restrictions there. The Home  
5 Owners' Association approved it. This was not in any way an  
6 attempt to try to build this fence under cover of darkness  
7 and then it was done. He thought he was complying. It was  
8 only after he was pretty well along that he found out.

9 MR. DYSINGER: At the point when the builder found  
10 this out, it was verbally and on-site? Let me rephrase it.  
11 Was your client notified in any other way, either by writing  
12 or given an opportunity to -- I'm unclear as to where an  
13 application happens to OMU saying, "Hey, can we do this?"  
14 And at the very least, when it's discovered that you may be  
15 on an easement, how was your client notified? How was she --

16 That's not a good sign, by the way, when we start  
17 running out of batteries. I hope everybody brought a  
18 sandwich.

19 No pressure. Take your time.

20 MR. MOORMAN: I don't want to misrepresent. My  
21 understanding is that at some point OMU did talk to Betty  
22 Bowles about this fence and told her that it was in their  
23 easement and that she needed to stop. I understand that it  
24 was pretty far along when that happened. Betty did not make  
25 an application to OMU before she started construction because

1 she didn't know she had to. Once she found out that OMU was  
2 complaining was when all these steps about making the fence  
3 open up, signing the waivers. Those kinds of things came  
4 about in an attempt to accomodate OMU. It was more a part of  
5 a give and take after the fence was already built.

6 MR. DYSINGER: And when you say "give and take,"  
7 that was with OMU.

8 MR. MOORMAN: Yes, it was with OMU. I believe it  
9 was also with the Planning Staff on what can we do here, how  
10 can we deal with this situation so that whatever concerns OMU  
11 has we can address. And that's where the problem occurred is  
12 they would say, "We need access"; and we would fix it so the  
13 gates would open; and they would still say, "No." Or they  
14 would say, "We might have more costs." And Betty would say,  
15 "Well, I'll reimburse you." And they'd still say, "No." So  
16 maybe "give and take" is the wrong word. It was more give.  
17 I don't think that OMU ever said, "If you do this, Betty,  
18 it'll be okay." I don't think they ever gave any option for  
19 her to comply with that would allow her to keep the fence.

20 MR. DYSINGER: And, for instance, the breakaway  
21 gate, which is pretty sophisticated actually, where did that  
22 idea come from? Did that come from OMU, or did that -- okay.

23 MR. MOORMAN: It came from Betty's engineer.

24 MR. DYSINGER: I'll make him testify to that  
25 later.

1           MR. MOORMAN: I am not aware of anything that OMU  
2 asked for except take down the fence, and 'm not aware of  
3 anything that OMU was willing to consider except take down  
4 the fence.

5           MR. DYSINGER: Did any of that communication -- if  
6 you can't answer that, that's fine. Maybe somebody here  
7 tonight can. Did any of that communication, was it all  
8 verbal? Was it just a gentleman in a hard hat comes out to  
9 the yard and tells you to quit? I mean, what is the nature  
10 of this communication?

11          MR. MOORMAN: It started that way. After the fence  
12 was constructed, various people got involved -- an engineer,  
13 a lawyer. So there is correspondence later in the process  
14 where we're trying to "what can we do?" and they're saying  
15 basically nothing. I'm not aware of any correspondence from  
16 OMU that says, if you do one, two --

17          MR. DYSINGER: Okay. Thank you. That's all I have  
18 at this time.

19          CHAIRMAN: You stated that the contractor talked to  
20 the Owensboro Planning. Who did he talk to there, please?

21          MR. MOORMAN: According to his affidavit -- and I  
22 don't want to get crossways with what the Staff has already  
23 said. But his affidavit is that he contacted OMPC and spoke  
24 to Jim Mischel and Jim put him in contact with Matt Warren  
25 and that Matt Warren advised him there was no need for any

1 building permit or any other permit that OMPC could issue due  
2 to the fact the fence was just a temporary structure.

3 After the fence was under construction, Matt got a  
4 call from Betty that OMU was there and they were saying the  
5 fence was wrong and needed to be taken down. And according  
6 to Matt, he then went back and talked to Matt and said, "I  
7 thought you told me this was okay."

8 Again, it's here on the paper. But said that it  
9 was okay with Planning but not with OMU and that was out of  
10 Planning's hands. So that's kind of -- again, it all comes  
11 down to it's OMU that's saying you can't have this here, but  
12 they're using the Planning Staff and this Board to enforce  
13 what they want without any standards.

14 MS. RAINES: Mr. Chairman, may I ask a question?

15 CHAIRMAN: Yes, ma'am.

16 MS. RAINES: The affidavit from Matt Hoffman --

17 MR. MOORMAN: Yes, ma'am.

18 MS. RAINES: -- it states that he made several  
19 phones calls to OMPC, contacted BUD, the developer of the  
20 subdivision, etc. It seems -- and maybe you can clarify --  
21 he was just asking, "Can I build a fence?" but maybe not  
22 being specific it's on an easement; or did he specifically  
23 say there's an easement? I think that might make a --

24 MR. MOORMAN: Tonight was the first I'd heard that  
25 there had been any misunderstanding on there being a wall

1 between two houses and then a fence. I understood from Matt,  
2 the contractor, the fence was always where it was going to be  
3 and there was no misunderstanding.

4 MS. RAINES: About the easement?

5 MR. MOORMAN: About where it was going to be  
6 located. Again, I'm not trying to get crossways with  
7 Planning. I wasn't there. But it wasn't until tonight that  
8 I heard it started off with Planning thinking it was a wall  
9 between two houses and only found out later that it was a  
10 fence that was over the easement.

11 CHAIRMAN: Jim, you can come forward.

12 MR. MISCHEL: I think it would be important when I  
13 stated at the beginning that the first contact was Worth  
14 Mountjoy, an attorney, with Matt Warren in our office. I  
15 think it would probably be important for Matt Warren to state  
16 what he talked about to Worth Mountjoy and then when he  
17 talked to Matt Hoffman, the contractor.

18 MR. DYSINGER: Mr. Chairman, actually, I would like  
19 that. There's a point between the two statements that I'd  
20 like to clarify, and I think Matt probably - -

21 CHAIRMAN: Come forward, Matt. State your name.

22 MR. SILVERT: State your name, please.

23 MR. WARREN: Matthew Warren.

24 (MATTHEW WARREN SWORN BY ATTORNEY.)

25 MR. WARREN: The initial contact was with Worth

1 Mountjoy. He called me at the office.

2 MR. SILVERT: Can you speak in the mic? I know  
3 it's hard.

4 Melissa, can you hold that up?

5 MR. WARREN: He called me at the office and  
6 mentioned that he had a client that would like to construct a  
7 wall. I asked him what the address of the property was. He  
8 instructed me that it was 407 Stableford, and I pulled it up  
9 on GIS system. I had a conversation with him, trying to  
10 determine over the phone which property line he was talking  
11 about. I asked him if it was the line to the north that was  
12 adjacent to the other property or if it was one of the two  
13 that had road frontage. He acknowledged that it was the line  
14 to the north. So in talking to him, I stated that a building  
15 permit is not required to construct a wall or fence; and that  
16 on that northern property line, as long as he kept the entire  
17 structure of the fence on private property, he could erect it  
18 without a permit. I then stated that there should be utility  
19 easements on either end of that line adjacent to the road  
20 frontage that he should check on. And then our conversation  
21 was over.

22 Approximately two weeks later Matt Hoffman called  
23 me, asked the same questions. It jogged my memory whenever I  
24 pulled the GIS up, I told him that I had already discussed  
25 this with Worth Mountjoy. At that time we came into

1 conversation about, you know, was a permit required; and I  
2 told him no again. Having already discussed with Worth  
3 Mountjoy the scenario, we went on as though it was the same  
4 fence in question. He did not express to me a difference in  
5 the structure.

6 The next conversation I had was with Austin  
7 McLimore when he called me and asked me to come to the site.

8 MR. DYSINGER: Mr. Chairman, in the statement that  
9 Jim read, it says Matt Warren informed Matt Hoffman it would  
10 be in his best interest to stop all work until everything  
11 could be sorted out. And in Mr. Hoffman's statement, he  
12 states that neither OMU nor OMPC ever told him to stop work  
13 on the fence.

14 I don't want to make too big a deal out of this. I  
15 just want to make sure I understand the nature of your  
16 conversation on-site. Did you just suggest that it would be  
17 best to stop, or did you direct him to stop?

18 MR. WARREN: I did not direct him to stop. I did  
19 not issue an official stop working order.

20 MR. DYSINGER: Okay. Okay. Thank you.

21 CHAIRMAN: Any other questions from the Staff or  
22 board members?

23 MR. PACE: Could the witness finish his statement  
24 about when Austin called him and had him come to the site and  
25 any discussion that he had with the contractor on the site?

1 MR. SILVERT: For the record, that's Pat Pace.

2 MR. WARREN: When I showed up on the site, there  
3 were several -- the contractor and his employees were there.  
4 They were still working. Austin was there, and I believe the  
5 gentleman in the yellow shirt -- I can't -- Dale? -- was  
6 there. As soon as I got out of the car, I recognized that  
7 the fence was not as I had discussed with Worth Mountjoy. I  
8 didn't even make it across the street.

9 Betty Bowles apparently had already been talking to  
10 somebody. She was not present when I got there. I had a  
11 conversation with Matt Hoffman about the construction; and I  
12 told him that the fence was located in a utility easement,  
13 it's not allowed to be constructed in a utility easement  
14 without consent of those utilities. I told him that it would  
15 be in his best interest to stop construction right then and  
16 not take a chance on wasting his time and money and materials  
17 to finish the wall, and be in his best interest to stop. He  
18 told me that he could not stop at that time, Ms. Bowles told  
19 him to continue.

20 CHAIRMAN: Any other questions of Matt?

21 (NO RESPONSE)

22 CHAIRMAN: You want to present your other couple  
23 people real quickly? Then we'll give it to the other side.

24 MR. MOORMAN: Yes. Thanks. I hope these won't  
25 take very long. Charlie Hambley is going to speak briefly.

1 He's an excavator and will talk about access to the site.

2 MR. SILVERT: Will you state your name, please.

3 MR. HAMBLEY: Charlie Hambley.

4 (CHARLIE HAMBLEY SWORN BY ATTORNEY.)

5 MR. HAMBLEY: I own and operate Hambley  
6 Construction, Incorporated, located in Dawson Springs,  
7 Kentucky. I have owned and operated this company for 15  
8 years. I have operated excavating equipment for 40 years. I  
9 started when I was 12 years old. My dad started this  
10 company. We are involved in municipal and residential  
11 development.

12 I have visited this site. I see no problem with  
13 accessing, accessing the utility to dig or excavate, anything  
14 that needs to be addressed. As he said, Ms. Bowles has  
15 agreed to, if it's an emergency, tear the wall out and we'll  
16 put it back later. I see no problem. My opinion, the wall  
17 would be as easy to work around as would be tearing up a  
18 driveway. This one-foot wide footer that the wall is sitting  
19 on would be just as easy to take out as some of the driveways  
20 that are adjoining this property.

21 That's basically all I've got to say unless  
22 anybody's got any questions.

23 CHAIRMAN: Board members have any questions?

24 (NO RESPONSE)

25 CHAIRMAN: Staff?

1 (NO RESPONSE)

2 CHAIRMAN: Thank you.

3 MR. MOORMAN: The next person is David Lamb. He's  
4 an engineer. He is familiar with the site, but he's also  
5 familiar with the discussions that occurred with OMU and  
6 others about how can we fix this, if at all.

7 MR. SILVERT: State your name, please.

8 MR. LAMB: David Lamb.

9 (DAVID LAMB SWORN BY ATTORNEY.)

10 MR. LAMB: I'm a professional engineer. I've  
11 practiced civil engineering for about 24 years now. I've  
12 been extensively involved with commercial and residential  
13 development all over areas of Kentucky.

14 I've done some work for Ms. Bowles before. And  
15 when this issue arose, she asked me to look into this and see  
16 if there were some accommodations that could be made. And it  
17 wasn't something that she had done that precluded the  
18 utilities from being able to access the easement. And when  
19 we looked at that and I looked at where the easement was  
20 located and how it was positioned, I told Ms. Bowles that,  
21 well, the fence as it was could provide, you know, provide an  
22 incumbrance of getting equipment in and out of her yard in  
23 the somewhat unlikely event you had to access it with  
24 equipment. I think that the line's in conduit and it's  
25 somewhat unlikely; but certainly for maintenance or some

1 other operation -- it could have some damage -- it could be  
2 necessary. So I recommended to Ms. Bowles that it would be  
3 in her best interest to make some modifications to provide  
4 ingress and egression for the utility easement.

5           That's when we came up with a scenario to make two  
6 panels of the fence a wide gate which opened up over the  
7 entire easement. And actually had to think a little further  
8 because there was a post in the middle. You had to have a  
9 post to connect. So we doveled the post to the brick so that  
10 you could pull the whole post out so you could open it up.  
11 And she made sure with her landscaping and grading that it  
12 was where any piece of equipment could readily access to get  
13 ingress and egress to do any work on the facility.

14           Having been involved with utility construction and  
15 design over the years, I looked at the location of these  
16 electric lines as they were marked by the utility, and I  
17 couldn't come up with a scenario where the fence Ms. Bowles  
18 had constructed could impede the maintenance or operation of  
19 the utility because we provided access for the equipment and,  
20 you know, a one-foot wide footer a few inches deep is  
21 certainly less of an impediment than a 40-foot wide concrete  
22 slab.

23           I was later involved in conversations with OMU's  
24 representative -- I guess their counsel -- about what  
25 opportunities, you know, what could be done to rectify this.

1 What could Ms. Bowles do in order to make this situation  
2 acceptable? With all the things that we offered up,  
3 basically the last answer that I recall in the meeting I was  
4 in, that nothing short of complete removal of the fence  
5 inside of the utility easement would be really satisfactory.  
6 There was discussion about -- seemed like one of the  
7 conversations, the attorney mentioned that we had -- the  
8 footer might put too much weight on the conduit which was  
9 buried. But from an engineering perspective, that footer for  
10 that little -- underneath the fence probably puts less weight  
11 on that conduit that I do when I stand out there on it.

12 But that's really, in essence -- we came on board  
13 with Ms. Bowles to try to help make accommodations that would  
14 reasonably allow the utility to access and maintain the  
15 facility, and we feel that we've offered that.

16 CHAIRMAN: Any questions of this gentleman, board  
17 member or Staff?

18 (NO RESPONSE)

19 CHAIRMAN: Okay. Thank you.

20 MR. MOORMAN: My final presenter is Tom Scales,  
21 who's a neighbor in the same subdivision.

22 MR. SILVERT: Can you state your name, please.

23 MR. SCALES: Tom Scales.

24 (TOM SCALES SWORN BY ATTORNEY.)

25 CHAIRMAN: Sir, which lot number is yours?

1 MR. SCALES: Lot number?

2 CHAIRMAN: Which one is yours?

3 MR. SCALES: I honestly don't know. I'm at 300  
4 Chip Shot Cove.

5 MR. MOORMAN: Pardon me, Mr. Chairman. We will  
6 find it for you.

7 CHAIRMAN: Appreciate it.

8 MR. MOORMAN: In the aerial photo, his house is the  
9 one that's in the top right-hand corner. It's lot six. 300  
10 Chip Shot Cove.

11 CHAIRMAN: Thank you.

12 MR. SCALES: I'm here tonight as basically a  
13 neighbor of Betty. I can look out my backyard, view the  
14 fence. I can assure you I am not one that called to complain  
15 about this, because it does enhance the neighborhood. I have  
16 a brick wall of my own. When I was ready to build it, I was  
17 told that I needed no approval, to go ahead, just stay off of  
18 the property line, which is exactly what I did. Basically,  
19 that is all I have to say on that. If anyone has any  
20 questions, I would be happy to answer those.

21 CHAIRMAN: You're saying OMU's lines and stuff are  
22 outside of your lot, correct? I mean your wall.

23 MR. SCALES: They've got to come under the wall  
24 somewhere to get to my house. Now, where they're at -- I  
25 have not done all the engineering work that Ms. Bowles has

1 done with hers, so I cannot tell you exactly where they come  
2 in under.

3 CHAIRMAN: In other words, just the entrance goes  
4 under the wall and the rest of it is on the outside of your  
5 wall, correct?

6 MR. SCALES: Yes. I can say that, yes.

7 CHAIRMAN: Appreciate that.

8 MR. SCALES: Okay. Any other questions?

9 CHAIRMAN: Any other board members?

10 (NO RESPONSE)

11 CHAIRMAN: Thank you.

12 MR. MOORMAN: That's my presentation. There may be  
13 some rebuttal; but just to summarize, Ms. Bowles doesn't want  
14 to cause a problem. She thinks she has an attractive fence.  
15 She doesn't think it is any more of a problem than all these  
16 other walls. In fact, she thinks it's less of a problem. I  
17 don't think allowing her to keep this fence creates any kind  
18 of precedence or damages OMU's ability to protect itself.  
19 Ms. Bowles amazing efforts to accommodate by creating this  
20 swing-out fence and by agreeing to reimburse OMU. I doubt  
21 that you would find ever a similar circumstance, and so I  
22 think in this case her efforts make this a unique situation  
23 that would justify allowing her to keep the fence.

24 CHAIRMAN: Are you ready?

25 MR. PACE: Yes. Thank you, Mr. Chairman.

1           For the record, I'm Pat Pace. I'm the attorney for  
2 OMU. I filed the complaint on behalf of OMU, and I'm here to  
3 discuss this appeal.

4           I think you've heard a lot of dissembling here  
5 about what's occurred. I think you should note that these  
6 witnesses didn't come -- they sent an affidavit -- because I  
7 don't think their testimony, if you will, would withstand  
8 scrutiny. I'd like to demonstrate some of that to you. But  
9 let's talk about -- let's talk first about --

10           MR. SILVERT: Could you bring the mic down a little  
11 bit?

12           MR PACE: Can't hear? I was afraid I'd be too  
13 loud. Sorry.

14           First, let's talk about this fence. This fence is  
15 a wall. It's a structure, more importantly. It's a  
16 structure. And what Ordinance 3(6)(e) prohibits is the  
17 placement of a structure in a public utility easement. What  
18 it says, if you heard it, "structures and features shall not  
19 encroach upon or be located within public rights-of-way,  
20 public utilities easements, or adjoining lots unless  
21 specifically permitted elsewhere."

22           Now, there's no place else in this ordinance that  
23 permits a structure in a public utilities. They want to call  
24 it a fence and say, well, they have the right to decide  
25 whether or not. But they've made their legal argument to you

1 that it's -- that's too much discretion and, you know, you  
2 ought to invalidate it. They'll have to take that argument  
3 to the court. I mean, in their appeal they tell you they're  
4 going to the court if they don't win, and that's where it  
5 belongs.

6           Now, structure is also defined in the ordinance.  
7 It's in Article 14. And it says, "Anything constructed, the  
8 use of which requires permanent location on the ground or  
9 attached to something having permanent location on the  
10 ground."

11           Now, I understand that you have a copy of our  
12 response to the appeal, and I attached two photographs to  
13 that. They were Exhibits A and B. And we also put them on  
14 the overhead. Right now the definition of structure is up  
15 for you.

16           You will note, and as you've heard tonight, there  
17 is a concrete foundation, concrete block -- I think  
18 Mr. Warren says he put it two feet in the ground -- and then  
19 you have the brick on top of that, the brick columns and the  
20 brick arch. So this is a structure by the definition in the  
21 ordinance. It was so interpreted by the Zoning  
22 Administrator. There's really not any question. That's why  
23 they want to talk about a fence. They talked about Section  
24 3-7. They talked about, well, we should be able to put it  
25 here; I mean, the utility's arbitrary; they should let us.

1 And I'll let you hear from utility. And there are other  
2 utilities here too that will tell you why they don't think  
3 structures should be in easements.

4 Now, Mr. Mischel explained to you there is a  
5 ten-foot public utility easement, and you've seen it. This  
6 is in the public utility easement. In fact, it encompasses  
7 it. It comes out from the house and goes all the way out to  
8 almost to the sidewalk. So it's ten feet; but actually, by  
9 the time you put this footer and brick wall in there, you've  
10 reduced it to eight feet already.

11 They want to talk about how easy it is to get in  
12 there, because after they're caught doing this, then they put  
13 in a gate at the other end and say, "See, you can get in."  
14 Well, that's not the only problem. It's also over that  
15 portion you're looking at right there, because that's where  
16 it comes across the street from the transformer and runs  
17 through the easement. So it's on it there and its close to  
18 it as it angles through the easement.

19 Now, there's no question they hadn't noticed this.  
20 I mean, it's a recorded plat. The plat itself says this  
21 property is subject to all legal easements, including ones  
22 not shown on the plat. It also says in the notations that  
23 are included, "Public utility easements are for the joint use  
24 of power, telephone, gas, sanitary sewer, storm sewer, cable  
25 television, and water." So this is for all utilities, not

1 just now, but in the future. That's the reason it's a  
2 problem to put a structure in a public utility easement.

3 Now, Ms. Bowles raced to have this wall built. And  
4 as I've said, there's been some dissembling about just what  
5 came about as that progressed, and so I'd like to kind of  
6 fill you in on what happened early on.

7 Mr. Mischel told you there were complaints, and one  
8 of the complaints was by a neighbor, Gary Keller. Mr. Keller  
9 knew these contractors. They used to be students of his. He  
10 used to coach them. He saw them doing this. He knew that  
11 he'd already been told by OMU that you cannot put a brick  
12 wall on the easement, you need to back off it. And he  
13 complied. He did that. Now, you've heard them say, "We just  
14 want to be treated like everyone else." No, they don't.  
15 They want to be treated differently. They want this  
16 exception for them.

17 I'd like to show you -- after this discussion  
18 happened -- I'd like to show you the letter that Mr. Mountjoy  
19 sent to Mr. Keller. He advises that he represents Betty  
20 Bowles. If you look at the date, this is August 4th. This  
21 is one day before OMU went out there and found this problem.  
22 In the second paragraph it says that Mr. Keller was out there  
23 on August 2nd and he talked to Matt Hoffman and he told him  
24 you can't put that there, you have to talk to OMU. Then he  
25 goes on to threaten him if he talks to the contractor. And

1 he doesn't say, "We're not violating an easement; we're not  
2 violating the ordinance." He says, "She's not in violation  
3 of any subdivision restriction." He goes on to say that you  
4 have no right to be interfering in this. And you'll see that  
5 all he was doing was trying to advise some people he thinks a  
6 lot of that he was afraid were getting into a financial bind  
7 putting this wall on a public utility easement. And in  
8 number three he orders him to cease talking to the  
9 contractor.

10 Now, you've already heard that his son, Worth  
11 Mountjoy, in the same firm called Matt Warren and talked  
12 about this. I guess they didn't like the information they  
13 got because then they had Matt Hoffman call and act like "We  
14 have permission to do this, right?" Obviously, talking about  
15 something completely different from what Mountjoy had  
16 discussed with Matt Warren.

17 And to let you know exactly what was discussed  
18 between Mr. Keller and Mr. Hoffman, I'd like to show you the  
19 letter that he sent to Mr. Mountjoy.

20 MS. RAINES: May I ask a question just to clarify?

21 MR. PACE: Sure.

22 MS. RAINES: This letter is from Jesse Mountjoy,  
23 right? But the original conversation was not with Jesse?

24 MR. PACE: Yeah. They're both attorneys in that  
25 firm. They both represent Ms. Bowles.

1 MS. RAINES: Okay. Just making sure.

2 MR. PACE: He's not here either.

3 In the second paragraph he tells exactly what he  
4 discussed with Mr. Hoffman. "I suggested they check with  
5 utilities and City of Owensboro before they got too far. I  
6 had a similar situation with my home and had to honor the  
7 easement." And I believe Mr. Keller's here too.

8 As you've seen on an earlier plat, there's no  
9 question that OMU has a primary electric line in this  
10 easement. It's there to service lots in Fiddlesticks  
11 subdivision, not just Ms. Bowles, but many other lots. It is  
12 important that they have not only access to it but that they  
13 can get to it and repair it if there's a problem. And you  
14 can hear from one of the engineers about that from OMU in a  
15 little bit.

16 But, you know, opening the south end with this gate  
17 -- first of all, that came after the fact that she was told  
18 to stop and finished the wall and then said, "Oh, what can I  
19 do now to make this work for you?" There's no gate or any  
20 provision for the other end where it comes across the street  
21 right under that wall and then, you know, follows it rather  
22 closely until it exits out the other side of the easement and  
23 the wall. More important, the equipment that you would put  
24 in there is wider than the eight feet they've even left. And  
25 that's not even talking about being able, you know, having to

1 dig this out, knock down this wall.

2 Well, she'll give you an indemnification. Well, is  
3 that what every property owner is going to do, just say, "You  
4 do whatever you want to my wall; I'll pay you back." You  
5 think OMU ought to go through all that trouble, all that  
6 administrative headache? Because if the property owners  
7 decide, if you're not going to enforce this, we're all going  
8 to put our walls up, then we're going to put structures up.  
9 That's the most important thing: They are structures;  
10 they're not fences.

11 Now, you can hear from Dale Harris because he's the  
12 one that went out and talked to Ms. Bowles. She said she'll  
13 let you use this easement. She's going to shrink it two  
14 feet. She was trying to keep people off her property and not  
15 outside that easement. And I don't think, from the dealings  
16 they've had with her, they could count on using an inadequate  
17 easement, because she's not cutting any slack. In no  
18 uncertain terms, she said, "I've looked into this, and I'm  
19 building this wall, and I'm going to finish it." And she  
20 did.

21 Now, her attorney, Mr. Mountjoy, he sent me a  
22 letter because, not only did I call him, I talked to him  
23 several times and wrote him, as far as correspondence,  
24 whenever you asked about correspondence. Here's a letter  
25 that he wrote to me which he said, "Our client has stopped."

1 Let's look at the date on that letter. See, this is right  
2 not long after it was discovered. And actually, if you go  
3 back to those pictures that are attached to the exhibits,  
4 that was three days after they first talked to her. And they  
5 had continued to work. But that shows you how much was not  
6 left to finish, and that she was going to finish it anyway.

7 I'd like to show you another letter from  
8 Mr. Mountjoy, which was in September, after he told me they  
9 were going to stop. He sends a letter on September 12th in  
10 which he says, "Well this ornamental fence is finished now  
11 because it happened a couple of weeks ago. Now, what can we  
12 do to work this out?"

13 The fact of the matter is, they didn't care what  
14 ordinance said. They didn't what OMU said. Ms. Bowles  
15 wanted to build this, and she did.

16 Now, why are we here? You know, we filed this  
17 under Section 5.4, which is a complaint there's a violation  
18 of the ordinance. There's a structure in the easement; it's  
19 a violation of the ordinance. Also, Ms. Bowles's attorney  
20 said we should be here. We filed a suit in Daviess Circuit  
21 Court to enforce this easement. We raised several questions;  
22 among them, that they violated the ordinance.

23 On the screen now is their answer. Their answer  
24 was, as an affirmative defense, you shouldn't be here; you  
25 should be in front of the Board of Adjustment; you should

1 file a complaint and let them hear it and decide. So that's  
2 what we did. The suit's still pending. I'm sure there will  
3 be an appeal when the decision is made. But the Board has  
4 this now, and we're asking you to enforce the ordinance.

5 Now, I don't want to spend too much of your time,  
6 but I do have people with OMU that can discuss this. There  
7 are also representatives of the utilities here. We have  
8 Mr. David Hawes from RWRA. We have counsel from Atmos  
9 Energy, counsel for AT&T. And they'll tell you that these  
10 are important to utilities. I mean, it's the only easement  
11 they have in these subdivisions. That's why the plats are  
12 dedicated. That's why we need to protect them. It's not  
13 just today, as I told you. It's for anytime. Anytime  
14 there's a change, they need to be in here. And when you put  
15 a structure in there that totally encompassed the easement  
16 that is on top of your facilities, you need to have it moved.  
17 They're right. We can't just say, "Oh, here's something else  
18 you can do." It just didn't need to be there. They knew  
19 that at the beginning, and she just defied the ordinance and  
20 constructed it.

21 I'll let Mr. Lyons from OMU discuss why this is  
22 important to OMU, if that's okay. Unless you have any  
23 questions of me.

24 CHAIRMAN: Any questions of Mr. Pace?

25 (NO RESPONSE)

1           CHAIRMAN: Hearing none, let's hear the others.

2           MR. SILVERT: State your name please.

3           MR. LYONS: My name is Tim Lyons.

4           (TIM LYONS SWORN BY ATTORNEY.)

5           MR. LYONS: As mentioned, I'm Tim Lyons. I'm the  
6 director of engineering and operations with Owensboro  
7 Municipal Utilities. I've been with OMU for approximately  
8 five years. Before that I served about 14 years with  
9 Kentucky Utilities Company.

10           One thing that is very important in the utility  
11 industry is the protection of easements. They are vital for  
12 the reliability of service to a utilities customer.  
13 Easements, right-of-ways provide access, provide clearance  
14 for the safety of our employees and the public. Easements,  
15 right-of-ways which are clear of structures are needed to  
16 provide the most economical means for maintenance and  
17 operations of our equipment. Of course, this equipment and  
18 maintenance cost is funded by our rate payers. This  
19 condition is not only an obstacle for OMU, but for all  
20 utilities. If OMU do not utilize the PUE that is provided by  
21 OMPC, OMU's stand-alone easements would not allow structures  
22 to be placed within an easement.

23           So at this point, you know, I would encourage the  
24 Board to enforce the ordinance and the Notice of Violation  
25 and keep the PUE, the public utility easements, and

1 right-of-ways free of structures.

2           Our biggest concern is going in and excavating  
3 within that facility and the shoring that would be required  
4 for our employees to get down in a ditch by the way that that  
5 wall or that structure has been placed within that easement.  
6 We feel like that it's going to be too much of a danger to  
7 our employees. And the crossing we're very concerned with  
8 because of the load-bearing characteristics that that line  
9 was not designed with.

10           At this point I'll entertain questions.

11           CHAIRMAN: Any questions of him?

12           MR. DYSINGER: Yes, Mr. Chairman.

13           There appear to be a number of structures,  
14 features, walls -- whatever you want to call them -- in the  
15 area that cross the easement in the nature of driveways.  
16 We've already got testimony from a neighbor who himself has a  
17 wall; in fact, looks like the northwest corner of his house,  
18 for instance. What makes this wall or structure different  
19 from the driveways that are next door or across the street?

20           MR. LYONS: The wall itself has a footer in excess  
21 of 18 to 24 inches, so it's getting closer to our primary  
22 underground cable. Driveway would be no more than probably  
23 eight inches to one foot. Also, we have what we call  
24 concrete saws. We have concrete saws that we have utilized  
25 where we can go in and cut driveways fairly quickly in those

1 types of situations should we ever have a failing to occur.

2 MR. CHAIRMAN: Any other questions?

3 MR. PACE: If I might also add, the developer built  
4 the wall that's along the road before they even submitted a  
5 plat of this unit. He already had that wall there. And  
6 Mr. Scales mentioned that, you know, he had a wall, but he  
7 didn't say that it was in the easement. That was a different  
8 wall, I guess; and they actually -- that line comes over and  
9 then goes underground there at his lot.

10 MR. DYSINGER: At the previous neighbor's?

11 MR. PACE: Yeah. At Mr. Scales's lot.

12 MR. DYSINGER: Do you know how big the footer is on  
13 the wall that surrounds the entire subdivision?

14 MR. PACE: I do not.

15 MR. DYSINGER: Thank you.

16 CHAIRMAN: Thank you.

17 Next.

18 MR. PACE: I'd like Dale Harris to describe his  
19 discussions with both Ms. Bowles and contractors.

20 MR. SILVERT: State your name, please.

21 MR. HARRIS: I'm Dale Harris. I'm an engineer and  
22 technician with OMU.

23 (DALE HARRIS SWORN BY ATTORNEY.)

24 MR. HARRIS: Sometime during the day on -- I think  
25 it was Friday, August 5th. I got a call from a property

1 owner. Well, earlier in the week actually I got a call from  
2 a different property owner, Mr. Brown, that lives on Back  
3 Nine Court, I guess. He was asking about what problems might  
4 be caused if he were to expand his garage, and he was afraid  
5 he might be building over OMU's underground lines. So I told  
6 him, based on what we discussed, I didn't think he was  
7 talking about OMU lines; it was probably his service line,  
8 which belongs to him, coming from our facility out of the  
9 easement back to his house. But I told him I'd come out and  
10 take a look and make sure that we were all on the same page  
11 as to what was being discussed. Intended to do it that day.  
12 Didn't get a chance. Things kept me from going out on Monday  
13 or Tuesday, I guess it was.

14 Got a call from Mr. Keller, that's been described  
15 previously, on Friday; and he explained that he was pretty  
16 sure there was a wall being built in the easement. And he  
17 reminded -- Mr. Keller reminded me of our discussion that we  
18 had a couple, three years prior to that when he did call and  
19 asked about being able to build a wall out to the sidewalk;  
20 he'd like to put a pool in his backyard; and that he'd been  
21 told by Thompson Homes, somebody at Thompson Homes -- I don't  
22 think he mentioned a name at that time. He'd been told by  
23 somebody at Thompson Homes that it would be fine to build  
24 right out to the edge of the back sidewalk.

25 I explained to Mr. Keller that was not the case,

1 that there was a public utility easement there that could not  
2 be encroached by his wall. I apologized because I understand  
3 his desire to fully utilize his backyard, but at the same  
4 time we had underground facilities buried at that point and  
5 he could not build over them. Well, Mr. Keller honored our  
6 decision and reduced the wall, moved the wall back off the  
7 easement, built a smaller pool.

8           So, anyway, I think he was concerned, as he was  
9 mentioned, he was concerned not only about the financial  
10 ramifications for the two former students, athletes that he  
11 coached, but also the fact that everybody be treated fairly.  
12 So I told him that I would go -- and I was going out to the  
13 subdivision anyway to look at the other property, 3910 Back  
14 Nine Court, I think. Also to check and see if Mr. Thompson  
15 and the Thompson Homes people had started another unit.  
16 They're not real good about notifying us ahead of time. They  
17 just all of a sudden -- we happen to drive by, there's a new  
18 house constructed and there's no streets or curbs or gutters  
19 or anything.

20           Anyway, I incorporated the trip to visit Back Nine  
21 Court for Mr. Brown with a trip to visit what would be the  
22 next unit of the subdivision. And as soon as I drove in,  
23 just as Mr. Keller had explained, there was a wall definitely  
24 being built in the easement. I got out. I went up to the  
25 fellow that was laying the bricks. And I recognized his

1 face, but I didn't remember his name. He called me by name,  
2 so I knew at some point in time I had met him. Turned out  
3 his name was Logan Ferguson. He is a masonry contractor.  
4 And I said, "You're building a wall in a public utility  
5 easement, and you can't do that." He said, "We were told by  
6 the property owner it was okay."

7           And so I then proceeded to go back to my truck, and  
8 I called Austin, my boss, explained what was going on. I  
9 think at that time I also maybe called Jim Mischel, asked him  
10 about a building permit for the wall; and he informed me that  
11 a wall was not required -- I mean, a building permit was not  
12 required for the wall. And I wasn't able to get ahold of  
13 Austin, but I left a voice mail on his cell phone.

14           In the meantime, Ms. Bowles came out of the house,  
15 so I decided I would go talk with her about who she contacted  
16 about getting permission to build a wall in the easement.  
17 And she pretty much started screaming right off the bat that  
18 she didn't have to have my permission, that Mr. Mountjoy had  
19 researched it and had determined that she was fine to go  
20 ahead. I asked her if she talked to anybody in the  
21 subdivision. She said, yes, Thompson Homes had also given  
22 her permission to build in the easement.

23           A few minutes later, as the conversation went on  
24 and she got more and more irritated, she basically said, "Oh,  
25 I was told by Thompson Homes that they had the easement

1 released before I bought the property, so there is no  
2 easement." So I was kind of getting some conflicting stories  
3 there.

4           In the meantime, I think Matt Hoffman had been  
5 called, and he came eventually. I guess -- I hadn't gotten  
6 ahold of Austin, so I was about to leave when Austin called  
7 me back. When he said he would be there in a few minutes, I  
8 just was a block or two away, so I turned around and went  
9 back. By that time, Matt Warren, I think, was about to show  
10 up. Matt Hoffman had showed up, so I discussed it with him.  
11 He made the comment -- he said, "Oh, I didn't realize that  
12 there was an easement separate from the right-of-way. I  
13 thought when we built off the back of the sidewalk, I assumed  
14 we were building out of the easement." And I don't know that  
15 that's necessarily the case because I'm sure, based on what  
16 Mr. Keller explained in his letter, that both he and Matt  
17 Hoffman should have been well aware that there was an  
18 easement that existed behind the sidewalk and not the fact  
19 that the right-of-way and the easement were the same thing.

20           At any rate, Matt Hoffman, Mr. Hoffman, kept making  
21 the statement, "Well, how can we resolve this? You know, we  
22 don't need to go to court. How can we resolve this? Must be  
23 some way we can resolve this." Finally, we just decided  
24 there wasn't going to be any way to resolve it on site, so we  
25 left. But prior to that, because of the young man had known

1 me and I didn't recognize him or I didn't remember his name,  
2 I went up to him to ask him who he was and how he knew who I  
3 was. That's when he told me his name was Logan Ferguson, and  
4 he reminded me that he had been a summer student, I think, at  
5 OMU a while back, several years ago. And that was when  
6 Mr. Bowles saw me talking to him, and she started screaming  
7 that I wasn't to talk to her employees; she was paying his  
8 salary; and that I was to leave the property and let him get  
9 back to work. And that pretty much characterized the  
10 meeting.

11 MR. CHAIRMAN: Any questions of Mr. Harris?

12 MR. DYSINGER: Mr. Harris, what is the process --  
13 when you notified them they were in an easement, is that  
14 official OMU notification, or does a letter go out to  
15 someone?

16 MR. HARRIS: My verbal notification was simply to  
17 suggest that they stop. And then a written warning or a  
18 written notice would have been sent, maybe not that  
19 afternoon, but the following Monday probably.

20 MR. DYSINGER: And that's the case? It was sent?

21 MR. HARRIS: Well, I don't know that it was. On  
22 Monday, I think. Well, in fact, that afternoon Mr. Pace was  
23 contacted, and so I'm not sure how that process all works.

24 MR. DYSINGER: Counselor, do you want to address  
25 that?

1           MR. PACE: Not only did I contact Jesse Mountjoy --  
2 and you saw the letter where he told me they were going to  
3 stop -- but there was a letter from Tim Lyons, who you just  
4 heard from, on August 12th confirming that.

5           CHAIRMAN: Come to the podium because we can get  
6 your statement in the record, please.

7           MR. PACE: I said not only did I talk to Jesse  
8 Mountjoy, who, as you saw in that earlier exhibit, agreed  
9 that they would stop work and then later told me the wall was  
10 finished, but Mr. Lyons, who you heard from earlier, the  
11 director of OMU, he sent him a letter on August 12th. And he  
12 can tell you that.

13          MR. DYSINGER: That was sent August 12th, and you  
14 became aware of the wall -- and forgive me; it's getting late  
15 -- you became aware of the wall on what date?

16          MR. PACE: August 5th was the first day that Mr.  
17 Harris went out there and saw it and talked to Ms. Bowles and  
18 was told, "I can put it there, and I'm putting it there."

19          MR. HARRIS: Can I make one additional statement?

20          CHAIRMAN: Come forward, please. State your  
21 name.

22          MR. HARRIS: Dale Harris again.

23                 While I was in the truck waiting to hopefully hear  
24 back from Austin, I also called Thompson Homes. And I did  
25 get to speak with Tommy Thompson. And I explained that

1 Ms. Bowles was at least claiming that he or they had given  
2 her permission, first of all, to build in the easement, and  
3 then claiming that, oh, actually they had the easement  
4 removed prior to her building the house of buying the  
5 property. Of course, Tommy's response was that he had not  
6 given her that permission, that obviously the developer  
7 cannot just simply remove easements once they're granted.

8 CHAIRMAN: Thank you. You have somebody else now,  
9 please, sir?

10 MR. PACE: Yes. I just have one more OMU employee  
11 I'd like you to hear from. That's Austin McLimore, another  
12 engineer from OMU. He can tell you about his discussions and  
13 also about the line itself.

14 MR. SILVERT: Would you state your name, please.

15 MR. MCLIMORE: Austin McLimore.

16 (AUSTIN MCLIMORE SWORN BY ATTORNEY.)

17 MR. MCLIMORE: My name's Austin McLimore. I'm the  
18 engineering manager at OMU.

19 As Dale described, he called me on the afternoon of  
20 the occurrence. I left the office and went over there and  
21 showed up. Dale kind of gave me a brief description of what  
22 had been going on. At that time Matt Hoffman approached me  
23 and Dale, and he said, "What's going on? What's the issue?"  
24 We advised him that there was an issue with him building in  
25 the easement. He said, "No. I was told I couldn't build in

1 the easement." He said, "The easement's a foot behind the  
2 sidewalk." I said, "No. The right-of-way is a foot behind  
3 the sidewalk. There's an additional ten foot public utility  
4 easement that takes place behind the driveway, which would  
5 essentially be 11, approximately 11 feet behind the  
6 sidewalk."

7           Yeah. It's shown on the plat on the outside of the  
8 right-of-way. He said, "Well, I talked to Matt Warren at  
9 OMPC; and he told me that I didn't need a permit, that I  
10 could build right here as long as I stayed out of the  
11 right-of-way; and I stayed out of the right-of-way." I said,  
12 "Well, let's just call Matt Warren and see if he can come  
13 over here and advise us to your conversation," in which you  
14 heard earlier Matt Warren, his comment about he come over  
15 there, and Matt sat down in the vehicle and said, "This isn't  
16 what I gave you guys permission to build. The wall you asked  
17 for was the one here on the north side of the property

18           Continued to go back and forth over what was the  
19 issue. The issue becomes that they had encompassed the  
20 entire easement and that it was going to be an issue for OMU.  
21 Went back and forth a few more times. Matt Hoffman requested  
22 what could be done. We told him, "You just need to stop  
23 until we can figure something out." He said, "Well  
24 stopping's not an option. I won't get paid if I don't get  
25 this wall finished, and I'm not in the business of losing

1 money." I said, "Well, it doesn't sound like we're going to  
2 be able to resolve this issue at this point." Which I went  
3 back and then contacted our legal counsel about the next step  
4 that we should be taking, as Mr. Hoffman didn't go to stop  
5 the -- he performed in that manner. Which that's when Pat  
6 Pace, legal counsel, proceeded to investigate himself,  
7 gathering facts, and sent a letter to Ms. Bowles's attorney.

8           One thing that I wanted to hit on, OMU's concern  
9 with the easement is the code requirements. OMU, by their  
10 standards and guidelines, is governed by the IEEE National  
11 Electric Safety Code. At this point, the most common edition  
12 is C2 2012 that went into effect January 1st, 2012. As  
13 you're aware, this easement is called a public utility  
14 easement and therefore is able for occupancy by, in the  
15 Owensboro area, six different utilities. That would include  
16 OMU electric, OMU water, Atmos, Time-Warner, AT&T, and RWRA.

17           OMU, with their electric guides by the NESC, is  
18 required to keep certain separations from other utilities  
19 because of the hazards involved with our lines of the  
20 utilities possibly being in the easement, trying to keep  
21 safe, keeping people from getting into those lines. Row 320  
22 B, Item 2 states that conduit systems to be occupied by  
23 communication conductors shall be separated from conduit  
24 systems to be used by the supply system by not less than 12  
25 inches of well-tamped earth.

1           Item 3, with the sewer, it says, if conditions  
2 require a conduit to be installed parallel directly over a  
3 sanitary, it may be done provided both parties are in  
4 agreement as to the method. Obviously, there's not as much  
5 of a hazard with sewers other than just the excavating and  
6 digging.

7           With regard to Item 4, water lines, conduit shall  
8 be installed as far as is practical from a water main in  
9 order to protect it from being undermined if the main breaks.  
10 Conduits that cross over a water main shall be designed to  
11 have a suitable support on each side as required to limit the  
12 likelihood of transferring any direct loads over the main.

13           Gas. Separation of conduit systems from gas and  
14 other lines transport material should not be less than 12  
15 inches and should have sufficient separation from gas and  
16 other lines of transport of flammable material.

17           Essentially, if we take the ten-foot easement and we're  
18 separated by the six utilities, that gives us approximately  
19 two foot a piece to work in. If we take into account the  
20 footer that was in, we've lost another approximately 18  
21 inches. So now we've reduced that to almost eight feet for  
22 six utilities. As you can see, each utility, we're required  
23 to have a foot of separation between, which creates one of  
24 the issues in preserving the easement.

25           Additionally, OMU's criterias [sic] for excavation

1 were governed by OSHA in 1926, Sub Part D; and according to  
2 that, with ours, OMU classifies all soils in the city limits  
3 of Owensboro as a Class C soil. Everybody is pretty much  
4 aware Owensboro has a lot of sandy conditions that are  
5 throughout the area. We do not go out and geotechnical  
6 investigate every area of which we're going to be supplying  
7 underground facilities. Therefore, we criteria all of them  
8 as a worst case scenario to be Sub Class C.

9           With Sub Class C for the OSHA 1926 sub part rules  
10 and regulations requires that excavated material stay two  
11 feet from all edges of excavation. Additionally, Sub Part B  
12 requires that Sub Class C soils at one and a half to one  
13 excavation ratio. Because we look at this with the amount of  
14 room that we actually have to work with the equipment that we  
15 have reducing and restricting the easement, a lot of times  
16 ten foot is the absolute bare minimum easement that we can  
17 work out of. And because a lot of this stuff we're trying to  
18 put by the new ordinance by the City of Owensboro requires  
19 new development and ground fill to be placed underground with  
20 utilities. We try to utilize the right-of-way so that we can  
21 minimize how much easement we actually need to enter the  
22 properties with. So in our rear lots, we try to typically  
23 get anywhere between 12 to 16 foot. Front lots that are  
24 beside of roads or alongside right-of-ways, we typically try  
25 to get 10 foot for our easement.

1                   OMU utilizes a few different pieces of  
2 equipment for our underground. We try to have a backhoe with  
3 it's outriggers down approximately 13 foot, 2 inches. So  
4 without the use of a right-of-way in addition to the  
5 easement, we're not able to get our equipment into the area  
6 as specified that's encompassed by the wall without staying  
7 in the easement. If we get in the property of Ms. Bowles  
8 right now, our outriggers, our equipment will be outside of  
9 that easement. We also utilize a trencher equipment that  
10 with the outrigger out is just over 12 foot. And we also  
11 have a mini excavator. It's a six-foot track. But with the  
12 turning radius, we need that area to be able to maneuver.

13                   So there's the importance of the easement to OMU  
14 from our engineering, operations, and design standpoints. We  
15 respectfully request that they be protected.

16                   CHAIRMAN: Questions from the board members?

17                   (NO RESPONSE)

18                   CHAIRMAN: Staff, any comments?

19                   (NO RESPONSE)

20                   CHAIRMAN: Thank you.

21                   Anyone else, sir?

22                   MR. PACE: Yes, Mr. Chairman. I believe that David  
23 Hawes from RWRA would like to address this matter.

24                   MR. SILVERT: State your name, please.

25                   MR. HAWES: David Hawes.

1 (DAVID HAWES SWORN BY ATTORNEY.)

2 MR. HAWES: As another utility in the Owensboro  
3 region and as a situation similar, we deal with these kinds  
4 of situations as well. We concur -- I concur with OMU's  
5 opinion on this. We also agree that the integrity of the  
6 easement needs to be protected.

7 Trying to address a couple of situations or a  
8 couple of questions that was brought up. It was mentioned  
9 another wall that may have already been there prior to the  
10 existence of some of the utilities. As these things are  
11 developed, as subdivisions are developed -- for instance, the  
12 sewer lines or the other utilities that go in -- there's  
13 things there are done to design around those things. And  
14 whenever the subdivision is platted and we meet with  
15 engineers, part of the development for the developer, these  
16 types of public utility easements are laid out and they're  
17 designed to be protected so that as new development and as  
18 these lines are put in the ground, they are protected against  
19 such things as what occurred here.

20 For instance, this engineer has been hired. He's  
21 been hired after the fact, and he's been told, how do you  
22 make an impedance or something that creates a burden, how do  
23 you make it less burdensome and less of an impedance. And  
24 that's what he's done.

25 But the bottom line is, it's an impedance, and it

1 reduces the speed at which the utility can go in and fix a  
2 problem, and it creates a liability situation for the utility  
3 because if this utility is disrupted for a certain period of  
4 time, if our utility or their utility is disrupted, it may  
5 create a problem that created time and effort and money. We  
6 just would not agree that this is a good thing.

7           So as another utility, I'd like to plead to the  
8 Board that you not agree to make a change here and that this  
9 is upheld, that the integrity of this easement is protected  
10 and it is not changed.

11           CHAIRMAN: Any question to Mr. Hawes?

12           (NO RESPONSE) .

13           MR. PACE: Also, I'd like to allow you, if you  
14 would, to have Mr. Wilson address this for Atmos.

15           MR. WILSON: Bill Wilson speaking on behalf of  
16 Atmos Energy.

17           Mr. Chairman, I'll be very brief. To allow this  
18 structure to remain in this easement area, I think would be  
19 setting a terrible, perhaps even a dangerous, precedent.  
20 Atmos doesn't often have problems with its lines of a  
21 dangerous nature; but when it does, it can be really  
22 dangerous and they need to have no impediments in the way.  
23 We are totally supportive of the position of OMU here. This  
24 public utility easement needs to be -- the integrity of it  
25 needs to be maintained. The example that would be set by

1 allowing this structure to remain would be horrible and would  
2 obviously, in my opinion, not need to be over and over in our  
3 community and will affect the public safety as well as the  
4 services that are provided. So I would urge the Board to  
5 not allow this appeal and to uphold the ordinance and the  
6 position espoused by Pat Pace.

7 CHAIRMAN: Any questions of Mr. Wilson?

8 (NO RESPONSE)

9 CHAIRMAN: Thank you.

10 Next.

11 MR. PACE: Also, Ms. Demps is here to address you  
12 on behalf of AT&T, the attorney for them.

13 MR. SILVERT: State your name, please.

14 MS. DEMPS: Katherine Demps on behalf of AT&T Bell  
15 South Telecommunications.

16 I'm not going to beat a dead horse. I believe they  
17 adequately covered our position. The utilities need to be --  
18 the easements need to be preserved. We think that the  
19 violation was properly issued. The appeal should be denied.  
20 As they have indicated, any structure in the easement impedes  
21 the access and impedes the access of all utilities. We would  
22 ask, like I said, that you uphold the violation.

23 Do you have any questions?

24 CHAIRMAN: Any questions of her?

25 (NO RESPONSE)

1 CHAIRMAN: Thank you.

2 MS. DEMPS: Thank you.

3 MR. PACE: Finally, I understand that Mr. Keller  
4 would like to address you.

5 Mr. Gary Keller

6 MR. SILVERT: Can you state your name, please.

7 MR. KELLER: Gary Keller.

8 (GARY KELLER SWORN BY ATTORNEY.)

9 MR. KELLER: First of all, I'm a whole lot bigger  
10 player in this than I ever intended to be. I built a wall  
11 about five years ago, much the same thing. Dale Harris and I  
12 at that time were not real good friends because I had the  
13 same situation. I lost a lot of my land. Tom Scales, who is  
14 my next-door neighbor built a wall. He also had to stay  
15 within that easement. And I guess probably, as an educator  
16 for 33 years, we teach children that we are a land and a  
17 community of laws; and hopefully we all abide by them.  
18 Which, after I understood what Mr. Harris told me, I said,  
19 okay, it is the way it is, so we'll continue to do that.

20 I guess I'm also troubled by some things that have  
21 been said tonight. First of all, Home Owners' Association  
22 did not approve this. And I don't care what's said by the  
23 lawyer or anybody else, the home owners did not approve that.  
24 First of all, it takes two-thirds votes of our Home Owners'  
25 Association, which is the home owners. I never voted on

1 anything, so I'm not sure where that came from, but that's  
2 just not so.

3 I did talk to those two young men, and both of them  
4 -- one was a football player for me when I coached football;  
5 another was a student at Daviess County High School. And I  
6 talked to both of them in terms of, "Guys, I don't want to  
7 see you get caught financially." They're both young  
8 entrepreneurs. They've work very hard, both of them.  
9 They're good, good young men. And they were told they --  
10 what Matt told me was Calvin Bailey, who was superintendent  
11 from Thompson Homes, told him it was okay to build this. And  
12 that's the thing that he told me. I said, "Matt," I said,  
13 "You need to check." I said, "You're going to get hung  
14 here." That's all I said. I never talked to Ms. Bowles. I  
15 never talked to anybody. I was more worried about those  
16 young men than anybody else.

17 She has an attractive wall. I don't care whether  
18 she builds a wall or not. Doesn't make any difference to me.  
19 I've got a wall, so I can't even see the wall, so it doesn't  
20 make any difference. I feel like if other people -- and I've  
21 got a neighbor on the other side. Tom's on one side, then  
22 me, then another fellow. We've all adhered to the easement  
23 rules and laws. We just feel like if -- we've got another  
24 neighbor that just built a pool, and they had to abide by  
25 building their wall the same way. And I just feel like, you

1 know, if somebody wants to build a wall, great, great. But  
2 we are a community of laws, and I think we have to stay  
3 within that.

4 Any questions on where I am?

5 CHAIRMAN: Questions of Mr. Keller?

6 (NO RESPONSE)

7 CHAIRMAN: Thank you.

8 Anyone else?

9 (NO RESPONSE)

10 CHAIRMAN: Okay. Each one of you can have a few  
11 minutes to make a summary -- summarize or bring anything new  
12 up. Briefly please.

13 MR. MOORMAN: I will be quick. What I heard was  
14 easements are good and don't impede any easement. But that's  
15 not what the law provides. Easements coexist with the land  
16 that they sit on. Both owners have rights. Again, I know  
17 this is not a court of law. But no utility has the right,  
18 because they have an easement, to say "you cannot walk here;  
19 you cannot drive here; you cannot build here" unless they can  
20 show it interferes with their use of that easement. I really  
21 didn't hear that. All I heard was this general statement  
22 that easements are good and we would like to have nothing on  
23 it. I'm sure they would.

24 But if easements are good and you absolutely cannot  
25 have any impediment, then why do they have driveways? why do

1 they have brick walls? I'm sure it would be easier to dig  
2 through dirt. Let's just prohibit all driveways because they  
3 might get in the way of their easement. But that's not what  
4 you do. That's not what the law says.

5           The question of structure, that's just playing  
6 games with words. If this is not a fence, then what is? If  
7 this is a structure, then a driveway is a structure, a wall  
8 is a structure. Nothing can be built in the easement under  
9 their interpretation. Clearly, this is a fence. Clearly.

10           The ordinances allow these fences at the discretion  
11 of the easement holder. And what they've told you tonight,  
12 that under no set of circumstances were they going to approve  
13 this. It cannot be build. The one gentlemen said, well,  
14 what's the problem? I think the question was: How does this  
15 compare to a driveway? Well, a driveway's not as deep, and  
16 here you've got a footer. You know what? They never said,  
17 "You can keep the fence if you take the footer our. You can  
18 keep the post and run the metal railing and get rid of the  
19 footer." If the footer is the only problem, why didn't they  
20 suggest removing the footer? Because they don't want the  
21 fence there at all.

22           This is a case of what is reasonable. I don't  
23 think all of this about who said what and when is relevant.  
24 Maybe I'm naive, but I think there was a misunderstanding and  
25 Betty Bowles and her contractor thought they could build

1 this, and then they got into it too far, and then it all blew  
2 up. There's no question about that. I don't see any bad  
3 faith here. I think Betty was trying to comply. And I have  
4 not heard anything tonight that explains why this fence is a  
5 greater impediment to getting into that line than a brick  
6 wall that's sunk with a deep footer or concrete driveway.

7 Fairness requires -- I agree whole-heartedly that  
8 the law has to be followed. But the law has to be enforced  
9 in a rational, reasonable, consistent way or its arbitrary.  
10 And that's what that case that I cited said. If you just  
11 make it up as you go, it's arbitrary. Here it's fair, if  
12 you're going to let a concrete driveway and a brick wall, to  
13 let Betty have this fence with all the arrangements she's  
14 made to accommodate them.

15 Thank you very much for your attention. I know  
16 it's been a long night.

17 CHAIRMAN: Thank you.

18 Pat?

19 MR. PACE: Thank you.

20 As I said at the beginning with my earlier remarks,  
21 we have a lot of dissembling going on here. I think it's  
22 pretty clear now that you've heard these witnesses and seen  
23 these documents that there was an intention to do this wall  
24 and to avoid the law. And when they found out, when Worth  
25 Mountjoy called Matt Warren and talked to him, he told him

1 you cannot build it in the easement. You heard from him  
2 tonight. So what do they do? They get Hoffman to call and  
3 say it's okay now to build this wall. They knew it wasn't.  
4 The attorneys knew it. They knew it a long time ago. They  
5 built in anyway. They finished the wall and now come here  
6 and say, "Hey, we got this problem. We want you to help us."  
7 I think the time to do it would have been a long time ago.

8           The plat shows this easement, and there's not much  
9 backyard if you stay out of it. I agree. But she knew that  
10 when she bought the lot, and they knew it. She thought she  
11 could just do whatever she wants.

12           Now, they want to call this a fence. There's no  
13 question it's a structure. You've read the ordinance. This  
14 is a concrete foundation with a block foundation on top of it  
15 and bricks. It's permanently attached to the ground.

16           Now, there are driveways. I mean, these people  
17 couldn't get to their houses if they didn't have driveways.  
18 Does that mean that everybody now can build brick walls all  
19 around the easement and prevent your getting into it.

20           I submit to you they say that all this testimony is  
21 really not relevant. I think it's very relevant. It's very  
22 relevant to demonstrate to you that this was a deliberate act  
23 with the idea that, you know, we'll appeal it or just do  
24 whatever we have to to keep it there as long as we can.

25           Now, they can talk about the common law, but we're

1 talking about the ordinance. We're not talking about  
2 correlative rights. We're talking about an outright  
3 prohibition. It says you cannot put this structure in this  
4 easement.

5 So we ask you to please uphold the Notice of  
6 Violation and to order them to remove this wall. And I have  
7 proposed findings of fact, if that's appropriate to tender.  
8 Thank you.

9 CHAIRMAN: Appreciate it. I think both sides have  
10 presented a good case. Let's proceed with the vote.

11 MR. DYSINGER: I have a question or two for  
12 Staff.

13 CHAIRMAN: Excuse me.

14 MR. DYSINGER: Thank you, Mr. Chairman. It's for  
15 Staff. And I want to be clear on exactly what we're doing.

16 So, Madison, jump in if you feel like it's  
17 important that you do so.

18 What we're doing tonight is deciding whether or not  
19 the decision of the Zoning Administrator is correct or  
20 incorrect. To that end, I want to make sure that I  
21 understand what that determination was. Has there been a  
22 determination by the Staff whether this is a structure or a  
23 wall? Does the Staff have an opinion on that either way?

24 MR. MISCHER: It's our opinion it is a structure  
25 and a wall.

1 MR. DYSINGER: It is a wall?

2 MR. MISCHEL: It has a permanent foundation. By  
3 definition -- and we've been over it tonight -- it's a  
4 structure.

5 MR. DYSINGER: So the opinion of the Staff, the  
6 part of the ordinance which states that fences, walls, and so  
7 forth can be built at the discretion of OMU does not even  
8 apply?

9 MR. MISCHEL: Yes, it does.

10 MR. DYSINGER: Okay. Let's try this again. If I'm  
11 reading this correctly, if we determine that this is a  
12 structure as being separate from a wall or a fence, then it  
13 has no business being in the easement under any  
14 circumstances. Whereas, if it is a fence, a structural  
15 fence, it can be in the easement at the discretion of OMU?

16 MR. MISCHEL: Yes.

17 MR. DYSINGER: And it's the opinion of the Staff  
18 that that latter part would apply. If OMU is okay with it,  
19 we would be okay with it, correct?

20 MR. MISCHEL: Yes. Well, not just OMU. It's a  
21 utility.

22 MR. DYSINGER: Okay. I'm sorry. To me that's an  
23 important issue, to determine what it is first and then go on  
24 from there.

25 Is there any other problem with the fence, from

1 OMPC's standpoint, other than the fact that it's in the  
2 easement? Is there any permit necessary? Is there any --

3 MR. MISCHEL: No.

4 MR. DYSINGER: Okay. Further, it's not up to us  
5 whether OMU should let them do it or should not let them do  
6 it. The only thing that matters to us -- and we're going to  
7 decide it -- is whether or not Jim's correct, that it is in  
8 fact a structure or a fence and it is in the easement. Is  
9 that a fair read of what we're asked to decide tonight? I'm  
10 ready to go, Mr. Chairman.

11 MR. CHAIRMAN: Any other board member have  
12 questions?

13 MS. RAINES: I have a point as well. I agree. I  
14 do feel like we're to decide tonight about the conversations  
15 that were made and, you know, based on that conversation, was  
16 the recommendation appropriate. So I want to go back to the  
17 first bullet point from the OMPC statement that was submitted  
18 where Matt Warren received a telephone call from Worth  
19 Mountjoy concerning the process for the construction along  
20 the north side of the subject property, which measured  
21 approximately 115 feet in length. Then Matt said, you know,  
22 according to that, the north side, that would be okay.

23 Could it be possible that the attorney at that time  
24 had incorrectly asked about which piece of the property? Do  
25 you think maybe he could have been looking at the wrong

1 portion; or is that a possibility? Just miscommunication and  
2 --

3 MR. MISCHEL: Well, I guess I should let Matt  
4 Warren answer that. But in what he stated earlier, he said  
5 he asked if it was on the north side, was it on the street  
6 frontage side, or between the houses; and he said between the  
7 houses, the north side. So that's where that blue line is.

8 MS. RAINES: Okay.

9 MR. PEDLEY: Can I say something?

10 I'm a foundation contractor, builder, and  
11 subdivision developer. I've built five major subdivisions,  
12 probably put in two or three thousand foundations, and I've  
13 built a lot of homes.

14 My interpretation of a structure is anything that's  
15 permanently attached to the ground with a concrete footer and  
16 blocks and reinforced in steel or whatever. I have put major  
17 walls in and across utility easements but never parallel and  
18 over top of utility easements.

19 Now, my subdivision entrances, we always have our  
20 walls and all of that. Lake Forest, Hunter's Ridge, Copper  
21 Creek, brookhill -- I developed those subdivisions across the  
22 utility easements, but I do not run with it with it.

23 We are not required to get a building permit to put  
24 a wall in for our signage on a utility easement. I poured  
25 one yesterday in Lake Forest. I will be putting a wall on

1 it. The wall will be 12 feet long and 6 feet high. That is  
2 a structure.

3           Also, all of our deed dedication and restrictions,  
4 usually -- we have restrictions in there about placing walls  
5 or fences in utility easements; but more than that, it has to  
6 be approved by the architectural control committee of that  
7 subdivision or the Homeowners' Association. Their committee  
8 has to approve it. We do not, in my subdivision, allow  
9 fences in the front yard. It might be a small  
10 ornamental-type fence but, no, not walls and fences. We do  
11 allow a wood fence or a vinyl fence in the rear yard in the  
12 utility easement, but that is not a structure.

13           My interpretation of what I've heard here tonight  
14 and what I've seen, that wall is a structure. So what I'm  
15 hearing tonight, we are to decide if the Zoning  
16 Administrator's interpretation of the structure and the  
17 violation of the zoning ordinance was the proper  
18 interpretation.

19           Am I correct, Mr. Silvert?

20           MR. DYSINGER: Mr. Chairman, I'm ready to make a  
21 motion.

22           CHAIRMAN: You got anything new there?

23           MR. DYSINGER: Beg your pardon, sir.

24           CHAIRMAN: Let's go.

25           MR. DYSINGER: Based on the evidence and testimony

1 we've heard tonight and given the findings that the wall is  
2 in fact in the easement, I move that we uphold the decision  
3 of the Zoning Administrator and deny the appeal.

4 MR. PEDLEY: I second that motion.

5 CHAIRMAN: Motion has been made and seconded. Any  
6 other comments or questions from the Board?

7 (NO RESPONSE)

8 CHAIRMAN: Staff have any other comments?

9 (NO RESPONSE)

10 CHAIRMAN: Hearing none, all in favor of the  
11 motion, raise your right hand.

12 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

13 CHAIRMAN: Motion carries unanimously.

14 One final motion.

15 MR. WARREN: Move to adjourn

16 MR. DYSINGER: Second.

17 CHAIRMAN: All in favor, raise your right hand.

18 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

19 CHAIRMAN: We are adjourned.

20 (Meeting adjourned 9:41 p.m.)

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1 STATE OF KENTUCKY )  
 )SS: REPORTER'S CERTIFICATE.  
2 COUNTY OF DAVIESS )

3 .

4 I, RHONDA SIMPSON, Notary Public in and for the  
5 State of Kentucky at large, do hereby certify that the  
6 foregoing Owensboro Metropolitan Board of Adjustment meeting  
7 was held at the time and place as stated in the caption to  
8 the foregoing proceedings; that each person commenting on  
9 issues under discussion were duly sworn before testifying;  
10 that the Board members present were as stated in the caption;  
11 that said proceedings were taken by me in stenotype and  
12 electronically recorded and was thereafter, by me, accurately  
13 and correctly transcribed into the foregoing 161 typewritten  
14 pages; and that no signature was requested to the foregoing  
15 transcript.

16 WITNESS MY HAND and notary seal on this the 3rd day  
17 of July, 2012.

18

19

\_\_\_\_\_  
RHONDA SIMPSON, NOTARY PUBLIC  
STATE-AT-LARGE  
OHIO VALLEY REPORTING SERVICE  
202 WEST THIRD STREET, SUITE 12  
OWENSBORO, KENTUCKY 42303

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COMMISSION EXPIRES: AUGUST 17, 2015

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COUNTY OF RESIDENCE: DAVIESS COUNTY, KENTUCKY

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