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

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
motion to dispose of the item.

MR. PEDLEY: Motion for approval.

MR. DYSINGER: Second.

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries.

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

Madison.

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

MR. REEVES: I certainly will.

(SWEARING IN OF FRED REEVES.)

MR. REEVES: I do.

MR. SILVERT: Welcome to the Board.

MR. REEVES: Thank you.

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

------------------------------------------

CONDITIONAL USE PERMITS

ITEM 2

1611 rear Frederica Street, zoned R-4DT
Consider a request for a Conditional Use Permit in order to 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, Secion 8.2F-11.
Applicant: Marcus W. Bosley.

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

MS. EVANS: Melissa Evans.

(MELISSA EVANS SWORN BY ATTORNEY.)

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

ZONING HISTORY

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

The applicant is wishing to amend conditions placed
on the previous Conditional Use Permit. The applicant is proposing to keep the existing six foot fence in place along the east property boundary and to install a three foot high continuous element inside the fence along the east and a three foot continuous element along the south property line.

LAND USES IN SURROUNDING AREA

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

ZONING ORDINANCE REQUIREMENTS

1. Parking -- no minimum parking is required.
   Eight spaces proposed as shown on the site plan submitted.
2. Landscaping -- Vehicular Use Area landscaping screening between the subject property and residentially-zoned property to the south and east consisting of a three-foot continuous element of one tree every 40 feet is required.

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

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

MR. HOWARD: I think we've had a couple of calls.

Nothing entered.

CHAIRMAN: Is the applicant here? Do you have any
comments you'd like to make at this time?

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

MR. BOSLEY: Mark Bosley.

(MARK BOSLEY SWORN BY ATTORNEY.)

MR. BOSLEY: You have some questions, sir?

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

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

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

MR. PEDLEY: I have some comments I'd like to make,
Mr. Bosley. I have toured your building --

MR. BOSLEY: Yes, sir.

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

MR. BOSLEY: Thank you.

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

MR. BOSLEY: Yes, sir.

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

MR. BOSLEY: Yes, sir.

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

MR. BOSLEY: Yes, sir.

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

CHAIRMAN: Does any other board member have any
other questions before we get a motion?

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

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

CHAIRMAN: That we put in the last.

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

MR. DYSINGER: I got you. Thank you, Mr. Chairman.

That's the only question I have.

CHAIRMAN: Any other questions from the Board?

(NO RESPONSE)

CHAIRMAN: Staff, you have any other comments?

MR. HOWARD: No.

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

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

(NO RESPONSE)

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

MR. PEDLEY: Mr. Chairman, I make a motion to
approve the Conditional Use Permit. Based on findings of
fact, it will not have an adverse influence on the
residential neighborhood or future development of any
structure, and the clean-up of the area is aesthetically
pleasing and is compatible in the residential neighborhood,
and the landscape that created by the parking will enhance
the area. And the six-foot pine tree condition may be
removed.

CHAIRMAN: Is there a second?

MR. DYSINGER: Second.

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

(NO RESPONSE)

CHAIRMAN: Staff, do you have any other comments?

MR. HOWARD: No, sir.

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

MR. BOSLEY: No, sir.

CHAIRMAN: All in favor, raise your right hand.

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries.

Next item.

ITEM 3

1600 rear River Road, zoned I-2
Consider request for a Conditional Use Permit in order to
operate a scrap iron, salvage storage yard and wrecking yard
to include sorting, bailing, shearing, and processing of scrap
metal.
Reference: Zoning Ordinance, Article 8, Section 8.2G4A/27
Applicant: Dixieland Properties, LLC, Owensboro Riverport
Authority
ZONING HISTORY

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

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

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

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

LAND USES IN THE SURROUNDING AREA
The properties to the north and west are zoned A-U Urban Agriculture. The properties to the south and east are zoned I-2 Heavy Industrial.

ZONING ORDINANCE REQUIREMENTS

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

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

SPECIAL CONDITIONS

Approval of a minor subdivision plat consolidating the subject property.

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

CHAIRMAN: Thank you.

Have we had any comments or questions at the office?

MR. HOWARD: No, sir.

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

(NO RESPONSE)

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

(NO RESPONSE)

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

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

    MR. PEDLEY: Second.

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

    (NO RESPONSE)

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

    MR. HOWARD: No, sir.

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

    (NO RESPONSE)

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

    (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

    CHAIRMAN: Motion carries.

    Next item, please.

22 RELATED ITEM 3a

23 1600 River Road, zoned I-2
Consider request for a Variance in order to eliminate the 100 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.
Reference: Zoning Ordinance, Articles 8 and 17, Sections 8.2G4A/27 and 17.311
Applicant: Dixieland Properties, LLC, Owensboro Riverport Authority

SPECIAL CIRCUMSTANCES

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

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

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

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

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

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

CHAIRMAN: Thank you.

Are there any comments filed in the office on this?

MR. HOWARD: No, sir.

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

(NO RESPONSE)

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

(NO RESPONSE)

CHAIRMAN: Board have any questions of the applicant?

(NO RESPONSE)

CHAIRMAN: Staff have anything else?

MR. HOWARD: No.
CHAIRMAN: Hearing none, I'll entertain a motion to dispose of the item, please.

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

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

MS. RAINES: Second.

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

(NO RESPONSE)

CHAIRMAN: Staff have anything else you'd like to
MR. HOWARD: No, sir.

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

(NO RESPONSE)

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries.

Next item.

ITEM 4

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

ZONING HISTORY

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

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

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

LAND USES IN THE SURROUNDING AREA

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

ZONING ORDINANCE REQUIREMENTS

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

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

SPECIAL CONDITIONS

1. All vehicular use areas shall be paved.

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

CHAIRMAN: Thank you.

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

MR. HOWARD: I don't believe so.

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

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

MR. KAMUF: Charles Kamuf.

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

MR. KAMUF: Thank you.

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

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

We filed a Conditional Use, and here's what it said. This is all I ask for. To construct a pavilion for
the church picnics and family functions that's shown on the site drawing. Said pavilion shall be 50 by 60 feet.

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

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

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

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

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

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

This area has been used for a parking lot since 1949. The zoning regulation came into effect in 1971, and it was amended, and the latest zoning regulation is 1979.
Since the parking lot was there prior to the zoning ordinance, it's our position that the parking lot is nonconforming and that we're exempt from the parking lot requirements of the ordinance.

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

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

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

MR. DYSINGER: Thank you, counsel.

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

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

Now, let's see what happens when we have a nonconforming use. The rest of that statute says "provides that the lawful use of a building or premises existing at the
time of the adoption of any zoning ordinance effecting, it
may be continued even though nonconforming." This is a
critical point that we have.

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

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

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

Not only do they use it at the time of the picnic,
they use this nonconforming use -- they use it every Sunday.
The parking lot has been used since 1949. This is the reason they bought this property from Posey Hancock is so they would have a parking area there for the church on Sundays and time of the picnic.

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

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

In any event, what will be required -- does this make sense: that we are required to take up the gravel, put
it back in grass, and leave it in grass as it's been since
1949? I don't think that makes much sense. But down the
road, we are willing to have a capital campaign and try to
raise the money to put in this parking lot.

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

MR. EBELHAR: My name's Danny Eblehar.

(DANNY EBELHAR SWORN BY ATTORNEY.)

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

MR. SILVERT: That's City Commission sign.

MR. EBELHAR: Anyway, you got it.

I've been a lifelong member of St. Mary Magdalene.

We bought this parking lot, this grassy area, this parking
lot that we're talking about right now, we bought that --
they bought that back in 1949, as Charlie said. And we
needed extra parking for bigger events like our annual
picnic; and as our church grows, we needed extra parking too.
It's been used all these years for a parking lot. It's just
never been graveled. It's just been in grass.

We've got plans to add on to our church, future
plans. When we add on to the church, we'll need more parking
area for parishioners then. And so we was trying to get ahead in the game. We had a little money. We want to build a space for more parking that will be paved. So that's the reason about two or three or four years ago -- I don't remember how long ago, but a few years ago we put down the rock as a base for a future parking lot to be paved.

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

Is there any questions?

CHAIRMAN: Any board member have any questions?

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

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

CHAIRMAN: Yes, Shannon.

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

They're using it for parking now?

MR. EBLEHAR: Yes.
MS. RAINES: On a weekly basis or just for, you know --

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

CHAIRMAN: Any other questions?

State your name.

MR. GILLIS: Jimmy Gillis.

(JIMMY GILLIS SWORN BY ATTORNEY.)

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

What's in question here is our grass parking lot
that has been parking forever. Like Danny stated, it was
overflow for our picnic, our four-wheeler raffle giveaway,
weddings and funerals. Two of the reasons that we graveled
it, as Danny stated, we want it to have a solid base for
future asphalting. Also, when we would park in this grass
area and it was wet outside, we were tracking mud onto our
existing asphalt and out onto the road. We thought this was
a logical solution to solve this problem.

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

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

CHAIRMAN: Any board members have any questions?

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

MR. HOWARD: It would certainly be up to -- well,
the Zoning Administrator would need to make a determination
that this is an existing use prior to the zoning ordinance
provided the documention that was given to them would reflect
that. Generally, if the plan comes in and there is an
existing use on the site that's not in compliance but it's not pre-existing prior to the zoning ordinance, we would look for that to be brought into compliance.

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

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

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

MR. KAMUF: Yes, sir?.

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

MR KAMUF: I received it five minutes before I came to this meeting.
MR. SILVERT: Do you know when your client did?

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

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

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

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

MR. KAMUF: I might take this up with you. The KRS 100.253 states that this Board -- and it specifically states this Board. It says, "The Board of Adjustment shall not allow for an enlargement or extension of a nonconforming use." And so it implies that you have the authority to do that.
And I found a landmark case, Franklin Planning and Zoning v. Simpson County; and it says this. There's no question that this board has that authority. It says this, and that was my analogy where I talked about if you had a commercial activity in a residential zone and then later you had a zoning ordinance and then they wanted to make some little change in the commercial activity.

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

You understand, we didn't come down here in bad faith. We just got caught in the areas, and we're willing to do this. But here I come to this meeting not knowing as a result of this they've already filed a violation -- you understand? -- as a result. But you have the authority to do that, and I would like for you all to find that this was an activity that was there prior to the zoning ordinance and that we can continue to have it. I can assure you down the
road that in the event that we keep winning prizes at the
picnic -- and money -- that we'll make it look good. Because
no neighbor has ever objected. And you can see, the little
red, all we did was ask for a 50 by 60 change.

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

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

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

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

Further, and on that same point, it has not been
the custom of this Board in the past, as a condition, to list
compliance as a condition, compliance with things that are
stated in the ordinance, meaning we don't restate that they
must comply with items of the ordinance. It's taken for
granted that they have to comply with the ordinance. I'm a
little hesitant to start listing things that the Staff
contends they must comply with regardless of what we do, that
they must do that as a condition. It seems to me we're
getting in a gray area there.

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

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

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

MR. KAMUF: Sure. Excuse me.

MR. PEDLEY: This is a pretty sensitive area. St.
Mary Magdalene Church has been there for over 100 years. My
wife went to church there when it was a wooden church with a
potbelly stove sitting in the middle of it. They lived
across the street. Her mother ran a grocery store across
from St. Mary Magdalene Church for 32 years. All of my four
children went to school there, went through the eighth grade
there. Myself and my family, we worked that picnic for over 25 years until we moved out of that area. And that picnic is why you see so many buildings down there. They built a new church. They built several sheds out there. Barbecue pits. They paved the front parking lot. And a lot of it came from hard work of that picnic. And most everything that's done down there came from hard work and dedication to the people in that community.

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

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

Then finally got enough money to put some rock on it. Basically, that rock parking lot is used for the picnic and occasional times church; and the rest of the area, they
have 70 paved parking, which far exceeds the requirement of
the zoning ordinance. So the hard work and dedication of
those people down there.

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

So you have two zones there. You have the A-U, R1A. They wrote the citation because you're in R1A zone
and it requires parking. So now then, really to solve this
problem -- and, Counsel, correct me if I'm wrong -- all you
have to do is put in an application for zoning change to A-U,
the entire property is A-U. It doesn't have to be paved.
It's fairly simple. We don't need to be going through all
this thing.

I don't understand why you, Mr. Kamuf, hasn't
looked at the ordinance. I don't understand why Staff hasn't
looked at this ordinance, and why we're here.
Now, have you read the ordinance, Counsel?

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

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

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

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

Well, here's one thing that could be done. Have an administrative appeal challenging the determination of the Zoning Administrator that this lot had to be paved and is nonconforming use, and then you're done. If you're
successful with that, then we know two things: This Board can't make you do something that otherwise is a legally nonconforming use. They also can't waive parking requirements. So if it isn't a legally nonconforming use, they can't waive that, can't seek a Variance for that.

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

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

MR. PEDLEY: I'm ready.

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

MR. DYSINGER: Mr. Chairman, I think it's even simpler than that; and it goes back to my very first point,
which I don't think was answered adequately. There's nothing
in this application about waiving parking. There's nothing
in this application about parking whatever. This application
is about continuing the use that Mary Magdalene has done
forever and whether or not they can build a picnic shelter.
And if a picnic shelter is not a reasonable adjoining use to
a church, Lord, I don't know what is.

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

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

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

MR. SILVERT: Correct.

MR. PEDLEY: But they can't issue a permit until
the violation is corrected, and they can't issue the permit
without the requirements of paved parking. They put that
condition in there. Now, we can approve this tonight and
put the condition on it. They make an application -- and I'm prepared to do this. That they make an application to Planning and Zoning for a zoning change and it be approved. They can move forward and go get the permit. They're done.

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

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

CHAIRMAN: Let's go.

MR. PEDLEY: Mr. Kamuf, you have any comments?

MR. KAMUF: I have no comments.

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

MR. KAMUF: Ward, the issue is -- the reason, you understand -- I asked for a pole barn. I had no idea that anybody was in violation. As a matter of fact, the truth of the matter is, if our surveyor -- and we didn't get a registered surveyor. We got somebody from the church. If he
hadn't put that gravel on there, you understand -- that's the
second site plan that I filed. All the other ones say
"gravel parking lot." If he hadn't put that gravel parking
lot on that site plan, nobody would be arguing this today.
It would go through just like that. That was a trigger where
we were honest and put something on there. So I had no idea
that we were going to get in any trouble until such time as I
filed this. This church didn't have any idea they were in
violation. But that's my answer, Ward.

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

MR. KAMUF: I agree with you.

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

Now, if they want to get started on their pole barn
and we approve this Conditional Use Permit with the condition
that they make the application for a zoning change and it be
approved, then they can bond their landscape and they're
ready to go to work.

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

CHAIRMAN:  I'll entertain a motion.

MR. PEDLEY:  Okay.

MR. KAMUF:  Thank you, Ward.

CHAIRMAN:  You got your motion?

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

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

MR. KAMUF:  You're welcome.

CHAIRMAN:  You ready?

MR. PEDLEY:  Are you --

CHAIRMAN:  I'm waiting for the motion.

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

The landscape requirements: A Variance can be
applied for the landscape requirements. We cannot approve it
here or waive it because it serves no purpose over what
exists.
The condition: The church may apply for a zoning change on the R-1A portion of the grounds to A-U Agriculture, same as the rest of the church property. If met with approval, it would eliminate the requirement to pave the gravel parking. Paving is not required in an A-U Agriculture zone.

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

MR. WARREN: Second.

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

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

CHAIRMAN: We can't change the zone.

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

MS. RAINES: Am I explaining myself right?

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

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

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

MS. RAINES: Appeal instead?

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

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

CHAIRMAN: Staff have any comments at this time?

MR. HOWARD: I have a question for Mr. Mischel. There is a Notice of Violation that's existing. If they were to apply for a zoning change and not immediately appeal the Notice of Violation through an administrative appeal process, when would -- in the event that the zoning change were approved, when would a building permit be issued for that structure?

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

MR. HOWARD: Typically, a zoning process takes -- best case scenario -- takes 42 days from the date of application until the appeal period ends, in which it would be appealed to the legislative body. So you're talking 42 days from the next filing deadline, which is, I believe, next
Thursday. If they did an administrative appeal and received a favorable decision by this Board next month. At that point the Notice of Violation would be eliminated or erased. Then they would be able to apply for the permit because they would not be in violation at that point. Is that a fair statement?

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

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

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

In the current GIS photo, aerial photo, shows the gravel. So we could see from that point it looked like a grass field, a grass lawn that was converted into a parking area. So this is the first we've heard about a nonconforming parking lot is tonight. That's the first time I've heard that. So as far as changing rezoning, we haven't really
talked to them. They haven't sat down and talked about using
gravel, about being nonconforming or whatever. I wish that
had been brought up, but it wasn't. Here we are. So I just
wanted to point that out.

CHAIRMAN: Anyone have any comments?

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

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

Come forward and state your name.

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

MR. KIRKLAND: I'm Drew Kirkland.

(DREW KIRKLAND SWORN BY ATTORNEY.)

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

Mr. Silvert?

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

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

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

MR. KIRKLAND: I was just making a suggestion.

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

MR. KIRKLAND: I agree. I was just trying to get
beyond and to try to compress their problem they had right
now so they could go ahead and proceed. I agree totally with
your assessment of changing --
MR. PEDLEY: They can have a zoning change in 30 days.

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

MR. PEDLEY: Administrative appeal is --

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

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

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

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

CHAIRMAN: Thank you.

MR. SILVERT: In 30 days -- let's say they did. In 30 days they could have an administrative appeal and also be simultaneously filing for a zoning change. In 30 days, if they win the administrative appeal, then they could get their building permit to put up this shelter. And then in 42 days they would have one zone on the property. It would be
absolutely clear that they wouldn't have to pave in the future. As they expand their campus, it would leave them more flexible options. So they could do both and still satisfy Mr. Pedley's motion.

MS. RAINES: Okay.

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

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

MR. PEDLEY: I just think the zoning change is a more permanent fix for future activities.
MR. KAMUF: Sometime down the road, going to have to do anyhow.

MR. CHAIRMAN: We've got a motion and a second.

Any other comments by the Board?

MR. KIRKLAND: I want to make just one correction. What Mr. Kamuf said, we will accept his application. The Staff will review it, and then we will vote upon it. Just a correction for the record. Mr. Kamuf sort of condensed his statement. I wanted to make sure the record was clear.

CHAIRMAN: Thank you. Hearing no other comments, all in favor, raise your right hand.

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion is unanimous.

Next item.

--------------

VARIANCE

ITEM 5

800 Crabtree Avenue, zoned I-1
Consider a request for a Variance in order to increase the total width of the driveway along Crabtree Avenue from 40 percent of the street frontage to 66 percent of the street frontage and to increase the maximum driveway width of a two-way industrial driveway along Crabree Avenue from 50 feet to 85 feet.

Reference: Zoning Ordinance, Article 13, Sections 13.22 and 13.231

Applicant: Murphy Investments, LLC

MR. WARREN: Mr. Chairman, I need to recuse myself from this item.
MR. CHAIRMAN: So noted.

SPECIAL CIRCUMSTANCES

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

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

In December 2011 a site plan was submitted to Mr. Mischel listing three options for an existing building, including remodeling, reconstructing, and removing the structure. The site plan submitted also showed the existing access along Crabtree Avenue being shortened to the required 50 foot maximum width with the required landscaping on either side of the access point. A mark-up was sent back to the applicant requesting the 10-foot alley to the south of the subject property be used as part of the 50-foot drive width. The access point would start at the south side of the alley.
and extend 40 feet into the subject property, creating a
50-foot wide access point. The remainder of the roadway
buffer on Crabtree Avenue will be landscaped with a 3-foot
high continuous element or one tree every 40 linear feet.
Mr. Mischel had no other correspondence with the applicant
regarding this project.

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

Staff would recommend denial.

MS. EVANS: We would like to enter the Staff Report
into the record as Exhibit E.
CHAIRMAN: Thank you.
Have we had any comments or questions in the
office?
MR. HOWARD: No.
CHAIRMAN: Is the applicant here and wish to have
any comments at this time?
State your name.
MR. RINEY: Jim Riney.
(JIM RINEY SWORN BY ATTORNEY.)
MR. RINEY: Yes. I'm here representing Murphy Excavating tonight, and Mr. Murphy and his wife are here as well.

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

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

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

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

MR. RINEY: Thank you. The applicant -- once we made the submittal, the applicant came back to us and indicated because his business was growing that he needed to be able to come through with his heavy equipment and big row tractors and that type of stuff. So that's why we came in -- asked us to come back in and file the application for the Variance.
The entrance that's there has existed there since the City reconstructed Crabtree Avenue. I think our research shows back in the mid '70s. I think I was employed with the City's Engineering Department at that time and worked on that. I do recall going to Southern States, facility that was there before Murphy's Excavating purchased that, when I was a kid -- I want to say at least 50 years ago -- with my grandfather, and I remember that it was all open access and it did not have curb and gutter, I think, when the City built the street or reconstructed Crabtree Avenue in the mid '70s. They actually closed up a little of the entrance by putting a curb up next to the railroad. CSX operates a railroad main line next to this property. That's part of the issue is the public safety that's there.

What I asked Mr. Murphy to do was to bring in his equipment and show us what was happening about the turning rays and so forth. And he did that. And we've got photos of that review and investigation in the application. It shows the row tractor with some of his equipment. He runs tractors, bulldozers, excavators, and other heavy equipment. And it takes the large trailers, the lowboys that are low to the ground, to get in there. When he was trying to maneuver in, he would have to use a good section of Crabtree Avenue to maneuver in. He did make it in with the existing entrance that's there now.
If he had to restrict the entrance, I'm not sure he would make it in, but he would certainly have to maneuver. It would mean that the lowboy and the row tractor would be out in the street. We did see traffic backing up across the railroad track as he was trying to maneuver in there under the existing conditions, but he was able to move on in. If the entrance is restricted, then he's certainly going to end up with some traffic at the railroad. The last thing you need is vehicular traffic, schoolbuses or whatever, on that railroad track and a train coming through.

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

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

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

I think Mr. Murphy has identified yet another location that folks have been allowed to have additional
driveway width in order to accommodate the type of business and big trucks and so forth this they use that's somewhere in the neighborhood.

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

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

Mr. Murphy.
CHAIRMAN: State your name, please.

MR. MURPHY: Gary Murphy.

(GARY MURPHY SWORN BY ATTORNEY.)

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

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

(NO RESPONSE)

CHAIRMAN: Staff have any comments?

MR. HOWARD: Not at this time.

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

(NO RESPONSE)

CHAIRMAN: Entertain a motion to --

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

Can the Staff Report -- it says that it may adversely affect the public health, safety, welfare, etc., etc. What Mr. Murphy's testimony seems to indicate is that by requiring compliance we're actually making a dangerous
situation. Is there any comment on that?

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

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

I don't know if that answers your question or not.

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

MR. MISCHEL: You don't want to try to get it too wide because then you sometimes you cause a problem where you have too many vehicles coming and going. It's a wide open space and it doesn't funnel the traffic down to an appropriate -- if it's too wide, then you just have everybody kind of turning in and coming out at the same time, which creates a hazard. Whenever Mr. Murphy came in, like I said, in 2010, he had told us what his business was and we,
you know, mentioned all those items; and at that time, it seemed to work for him. It seemed like he could live within those boundaries.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MURPHY: Yes. The smaller building and the
scales will stay

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

MR. MURPHY: Yes, sir.

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

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

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

MR. MURPHY: Yes, sir.

CHAIRMAN: Feed room where the seed was and over to the feed and grain and stuff, you're going to take that off?
MR. MURPHY: Yes, sir.

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

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

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

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

MR. MURPHY: Fifty-three foot.

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

MR. RINEY: That's right.

MR. HOWARD: So I guess my question would be, if in general a WV-53 truck can maneuver in with a larger radius --
I mean, you mentioned a ten-foot radius, but is there a reason you couldn't put a larger radius in there to allow that truck to maneuver onto the site?

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

MR. HOWARD: Right.

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

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

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

MR. HOWARD: And generally, as Mr. Mischel pointed out, it is preferable to utilize that existing alley. It
sounds as though -- and correct me if I'm wrong, but it
sounds as though if the driver were to scoot to the north and
utilize some of the opening to the north, you could probably
work within the 50-foot throw to put the radius on it and get
into the site, and then provide some landscaping between that
point and south to the alley. And you might even be
providing a little bit of additional landscape on the north
side of the driveway too. Am I hearing that, that you could
actually maneuver within a 50-foot with a radius if you
didn't push it all the way to the south of the property?

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

Mr. Howard: Right. I'm familiar with the site.

Mr. Riney: So I'm not sure if moving the entrance
to the north is going to allow you to get in there with the
lowboy. That's my issue.

Mr. Murphy: We could make it work, but it would
definitely --

Mr. Reeves: Approximately how many vehicles a day
would be going through this entrance and exit? A dozen, two?

Mr. Murphy: Five or six a day.
MR. HOWARD: Would they all come from the north, or would there be potential that they would be traveling northbound to turn in?

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

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

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

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

CHAIRMAN: Wait a minute, Ward.

Is there anyone else wishing to speak on this item? Ma'am, come forward state your name, please.

MS. CARDEN: My name is Sharon Carden.

(SHARON CARDEN SWORN BY ATTORNEY.)

MS. CARDEN: I had received a letter regarding this. And I'm one of the property owners there on Seventh Street. Property butts up against the railroad track in question, which is right there at their property. My concern is, how does that affect me as a property owner there?
MR. HOWARD: You were notified as an adjoining property owner?

MS. CARDEN: Uh-huh.

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

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

CHAIRMAN: Any other comments?

MS. CARDEN: Thank you.

CHAIRMAN: Thank you, ma'am.

Anyone else have any other comments?

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

CHAIRMAN: Thank you.
Entertain a motion.

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

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

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

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

At first he thought, yeah, it would cause a problem; but it has not. That's been twelve years ago, and I haven't heard him say it was a major problem. But he was very much like you. He was very concerned because he handled nothing but big rigs, as big as you have or bigger. So it is
not an issue to be able to get in a 50-foot access.

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

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

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

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

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

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

3. It will cause a hazard and nuisance to the public because vehicles entering and leaving at more than one point, multiple vehicles at the site and creating sight
blockage and confusion causing traffic hazards. When you got more than 50-feet wide, people coming and going in and out at any point they want to, might be three or four vehicles at one time. And you see that quite often.

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

MR. DYSINGER: Second.

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

CHAIRMAN: Staff have anything else, comments?

(NO RESPONSE)

MR. HOWARD: No, sir.

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

(NO RESPONSE)

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

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

CHAIRMAN: Motion passes.

Next item, please, sir.

ITEM 6

500 Frederica Street, zoned B-2 (Frederica Boulevard and Downtown Transition Overlay Districts)

Consider a request for a Variance in order to reduce the minimum building frontage requirement along a "Type B" street
in the Frederica Boulevard Overlay District from 50 percent to 39 percent along Frederica Street.

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

Applicant: GPD Group; Fifth Third Bank

SPECIAL CIRCUMSTANCES

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

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

FINDINGS

Granting this Variance:

1. Will not adversely affect the public health, safety, and welfare because the Historic Preservation Board found that the building as proposed increases the public welfare by promoting the development of a lot that has sat vacant for many years.
2. Will not alter the essential character of the
general vicinity because this is a redeveloping area where
the entire block front is being developed as one project.
3. Will not cause a hazard or nuisance to the
public because the proposed project will meet access
restrictions as determined on the consolidation plat.
4. Will not allow an unreasonable circumvention of
the requirements of the zoning regulations because the
Historic Preservation Board found that the design fits within
this area because there are larger building lots in the area
with larger walking spaces between buildings.

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

CHAIRMAN: Thank you.

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

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

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

MR. SILVERT: State your name, please.

MR. LANG: Eric Lang.

(ERIC LANG SWORN BY ATTORNEY.)

MR. LANG: I have no comments. I'm just here to
see if anyone else has questions.

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

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

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

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

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

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

CHAIRMAN: Any other questions of the applicant? That answer your question, Fred?

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

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

Come forward and state your name, please.
MS. GOODLETT-COLLINS: Donna Goodlett-Collins.

(DONNA GOODLETT-COLLINS SWORN BY ATTORNEY)

CHAIRMAN: State name again, please.

MS. GOODLETT-COLLINS: Donna Goodlett-Collins.

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

MS. GOODLETT-COLLINS: Got it.

MR. SILVERT: Thank you.

MS. GOODLETT-COLLINS: Donna Goodlett-Collins.

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

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

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

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

MS. GOODLETT-COLLINS: So we have an appeal that had to be made on a building that's based on a building that's based on a building that's based on a building. We are an historic district. I'm wondering if we are planning in good faith and if there will be other Variances that they will be requesting in this area. I'd ask you to remember
that this area includes the Campbell Club; Theatre Workshop of Owensboro; the Callis Building; the Callis House, which will sit directly posterier to this lot; Haley-McGinnis; and Saint Stephen's Cathedral. It does not fit within the character of our neighborhood, and I ask for adjacent expectations. I don't think that it does fit into the character of this neighborhood. I ask that you stay with the current rules and regulations as they are stated and vote no on this Variance. Thanks.

CHAIRMAN: Does anyone have any comments of this lady?

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

CHAIRMAN: Staff?

MR. HOWARD: That would be correct.

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

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

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

MR. LANG: Yes.

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

MR. LANG: Yes, sir.

MR. SILVERT: I will say that.

CHAIRMAN: Any other questions of the applicant?

Hearing no other --

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

CHAIRMAN: Staff answer that?
MR. HOWARD: Let me rephrase what you said. And correct if I'm wrong.

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

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

MR. DYSINGER: Sounds pretty good.

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

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

MR. SILVERT: I'm popular tonight.
MR. DYSINGER: We're not done with you yet, I expect.

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

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

MR. DYSINGER: I think it's a good representation of what I said, except I would say I have no issue whatever with what the applicant wants to do with the property. My
issue at this point is a Variance, as I understand them, can only be granted based on the given topography of a particular piece of property; and the Variance request is asking for things that are particular to the type of building that the applicant wants to build; and I am uncomfortable allowing -- using a Variance for that purpose.

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

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

MR. PEDLEY: Basically, this ordinance only applies to Article 21, the Downtown Overlay. They created this. This Variance does not apply in other areas of the city or
the county or wherever. It's strictly in the Article 21 Downtown Overlay. They made a lot of money for a company to come in here and create this. It doesn't mean it's right. But the Preservation Board has recommend that we approve this, and Preservation Board is strictly tied to Article 21, the Downtown Overlay. That's what they look at. They helped to create that. So if they recommend that we approve it, then I don't have any problem with approving it. It's strictly related to Article 21.

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

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

MR. WARREN: Mr. Pedley, that was going to be my comment. I put a lot of faith in the Historic Preservation Board. I mean, they're there for a particular reason and they found favorably on this. I put a lot of faith in that
CHAIRMAN: Any other comments from the Board?

(NO RESPONSE)

CHAIRMAN: Staff have anything else?

MR. HOWARD: No, sir.

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

MR. LANG: No, sir.

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

MR. WARREN: Mr. Chairman, I make a motion to grant the Variance based on the findings that it will not adversely affect the public health, safety, and welfare because the Health [sic] Preservation Board found that the building as proposed increases the public welfare by promoting the development of a lot that has set vacant for many years; it will not alter the essential character of the general vicinity because it's a redeveloping area where the entire block front is being developed as one project; it will not cause a hazard or nuisance to the public because the proposed project will need access restrictions as determined by the consolidated plat; it will not allow an unreasonable circumvention of the requirements of the zoning regulations because the Health [sic] Preservation Board has found that the design fits within the area because of their larger
1 building lots in the area with larger walking spaces between
2 buildings.
3
4 CHAIRMAN: Have a second?
5 MR. PEDLEY: Second.
6
7 CHAIRMAN: Motion's been made and seconded. Any
8 other comments or questions from the Board?
9 MR. WARREN: That is Historic Preservation Society,
10 not Health. I don't know why I said that.
11
12 CHAIRMAN: We'll ignore that. Staff have any other
13 comments?
14
15 (NO RESPONSE)
16 CHAIRMAN: Applicant have any other comments? e --
17
18 (NO RESPONSE)
19
20 CHAIRMAN: All in favor, raise your right hand.
21 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)
22
23 CHAIRMAN: Motion passes.
24
25 Next item, please.

26 ITEM 7
27
28 2400 West Fifth Street, zoned R-4DT
29 Consider a request for a Variance in order to reduce the side
30 street yard building setback line for back-to-back lots from
31 15 feet from the property line to 7 feet from the property
32 line.
33 Reference: Zoning Ordinance, Article 3, Section 3-5(a)(3)
34 Applicant: City of Owensboro Community Development; City of
35 Owensboro
36
37 SPECIAL CIRCUMSTANCES
38
39 The subject property is part of the Mechanicsville
redevelopment project by the City of Owensboro. The subject
property is a back-to-back corner lot. According to Article
3, Section 3-5(a)(3) of the Zoning Ordinance, side yard
building setback lines along local streets may be reduced to
15 feet where lots are back to back.

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

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

We would recommend the east side yard building
setback line be reduced from 15 feet from the property line
to 10 feet from the property line. This would allow the
applicant to construct the new home with a side porch in the
same building footprint as the old home and maintain the
10-foot separation as allowed elsewhere in the zoning
ordinance as a required minimum.

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

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

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

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

MR. HOWARD: No.
CHAIRMAN: Is the applicant here and ready to present?

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

MR. FREE: Keith Free.

(KEITH FREE SWORN BY ATTORNEY.)

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

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

We don't want to do that, but in order to -- as you're coming down that street off of Fifth Street onto Hocker, we're going to be doing some things with some fencing and a neighborhood sign on that corner. Having the ability to go up to seven foot from the right of way off of Hocker
would certainly give us the opportunity to put a more significant structure there that would be more attractive.

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

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

I'm available for any questions.

CHAIRMAN: Board members have any questions?

MR. DYSINGER: I have a question.

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

MR. FREE: I think ten foot, you know, could work right there, but the kind of house that we're wanting to put there, you know -- I'm wanting to do something that's a
little bit more significant because the way it's going to lay out is, right there at the corner of Fifth and Hocker, we're going to actually have our neighborhood sign. It's going to be a really, really nice sign that's going to have fencing and stone columns and everything around, you know, to border the whole property.

What we're going to do is we're going to set actually back, I think probably even further back than the 25-foot setback off of Fifth Street. So we're going to be coming back quite a bit off of there. And with the narrow as a lot -- the lot is, I think, 45 feet wide. And as narrow as it is, we we can build a narrower house on it, and we have. Actually, we did secure a ten-foot variance. It's not up here because I just did the 20 properties that are seven foot or less. But I think about a year ago we did get a Variance on a corner property that was somewhat similar to this, but it was actually a 40 foot, and that worked. But for where it was in the neighborhood, the scale of that and having that property just come to ten foot, you know, worked really well.

In this specific instance, we really need to be somewhere in between seven and ten feet. But securing the seven, you know, will give us the opportunity to go that far. It very well could be the house we end up designing once we secure the Variance. You know, it could be eight foot off of
it. It's not that we couldn't build a house ten foot off,
but it's just about the scale and just understanding, you
know, on the site how, you know, how the scale of the
building's going to be as you're coming down the street.

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

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

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

MR. HOWARD: I think when Ms. Evans got up and
introduced the first item for the record, she made a general
statement that just because a Conditional Use Permit or
Variance is approved, it doesn't give the applicant the right
to go on and start construction prior to obtaining permits.
It's just -- and I think this is something we've started
doing here recently, because we've had instances in the past
where it's been perceived that the approval of a Conditional
Use Permit means "I can go out and start building; I don't
need to get building permits first." So it's just to make
sure that they're aware of it. We know that they're aware --

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

MR. DYSINGER: Melissa, you have a comment?

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

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

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

(NO RESPONSE)

CHAIRMAN: Staff have anything else?

MR. HOWARD: No.

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

(NO RESPONSE)

CHAIRMAN: Entertain a motion to dispose of the item.

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

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

Ohio Valley Reporting
(270) 683-7383
house with a new one, enhancing the area.

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

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

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

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

MR CHAIRMAN: Second?

MR. PEDLEY: Second.

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

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

MR. WARREN: Yes. I'm sorry. Yes. I guess I
should have said that. To reduce the east side yard building
setback from 15 feet from the property line to 7.

CHAIRMAN: Any other questions or comments from the
Staff?

(NO RESPONSE)

CHAIRMAN: The applicant have any other comments?

MR. FREE: No, Mr. Chairman.

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries.

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

(THE BOARD RECESSSED AT 7:36 P.M.)

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

THE CHAIRMAN: We're back from a break.

Let's move to the next item.

--------------------

ADMINISTRATIVE APPEAL

ITEM 8

407 Stableford Circle, zoned R-1C
Consider a request for an Administrative Appeal concerning
the Zoning Administrator's interpretation of Article 3,
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

MR. SILVERT: State your name.

Ohio Valley Reporting
(270) 683-7383
MR. MISCHEL: Jim Mischel.

MR. SILVERT: You're sworn.

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

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

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

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

Just to make sure there's no confusion, this first sheet I have here, the first sheet of the packet, this is a survey prepared by HRG. The reason I put that in there is because it shows the building setback and public utility
easement. So I've highlighted that in yellow, and also I've
highlighted the public utilities just to kind show you where
the easement runs on that property.

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

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

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

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

Basically, this item comes before the Owensboro
Metropolitan Board of Adjustment in the form of an
Administrative Appeal filed by Mike Sullivan, Attorney at
Law, on behalf of the owners of the subject property. The appeal seeks to determine the correct interpretation of the Zoning Ordinance relative to a wall constructed within a public utility easement without the approval of the utilities occupying the easement. Owners were cited in violation of Section 3-6(e) of the Owensboro Metropolitan Zoning Ordinance upon request of the Owensboro Municipal Utilities.

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

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

¶ Matt Hoffman (the contractor hired to construct the wall) called Matt Warren, our staff person, to ask if a
permit would be required to construct a wall on the subject property. Matt Warren relayed to Mr. Hoffman that he had discussed this with Mr. Mountjoy and a permit would not be required.

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

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

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

¶ Matt Warren at that time returned to the OMPC
office and informed me, Jim Mischel, of everything that occurred.

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

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

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

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

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

The issue before the OMBA is to determine if the Zoning Administrator correctly interpreted Section 3-6(e) which states that "Accessory buildings, structures, and features shall not encroach upon or be located within public rights-of-way, public utility easements, or adjoining lots unless specifically permitted elsewhere in this article."

Section 3-7(g)6 states: "Walls and fences may be erected within public utility easements subject to the discretion and limitations of the agencies that maintain facilities in such
In this case, OMU has determined that the wall should not be located in the easement. The OMBA authority is limited to the interpretation of the ordinance, and the OMBA does not have the authority to require utilities to allow the encroachment. It can only act upon the language contained in the ordinance in determining if the Zoning Administrator correctly applied the ordinance requirement in his decision to issue a Notice of Violation to the owners of the subject property.

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

CHAIRMAN: Any board members have any questions?

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

MR. DYSINGER: Mr, Chairman, I do have a question. The statement indicates OMPC received complaints from neighbors. I was wondering if Mr. Mischel could characterize the nature of those complaints.

MR. MISCHEL: It seemed to me like we had three or four different calls, and it was concerning the location of the wall and the height of the wall. Now, at one time, there was a Variance that was asked for and granted for a lot of those lots concerning fences. There were some swimming pools going in. The state building code says a fence must be a certain height when you have a pool, which couldn't be
accommodated under this fence regulation. So at the time, the
developer asked and received some Variances for a lot of
these lots on these two streets here. But the complaints
were on the location of it.

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

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

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

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

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

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

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

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

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

CHAIRMAN: Staff have anything else to add right now?

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

CHAIRMAN: The Applicant ready to state?

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

MR. SILVERT: Are you an attorney?

MR. MOORMAN: I am an attorney.

MR. SILVERT: I do not.

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

MR. SILVERT: Correct.

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

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

Some of the things were just covered, so I won't waste your time by repeating them. Hopefully, I can get this
to work. I'll skip through some of these because it's been
covered. That's the notice of the violation. Here is -- and
you have got in front of the you -- I hope it's easier for
you to read -- but I did want to have it on Power Point for
the audience.

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

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

Under this statute, there is absolutely no
criteria, no criteria. It says if the easement owner, if the
utility wants it, you can have it. If they don't want it,
you don't get it. They don't have to say why. They don't
have to give an explanation. You don't know when you go and
ask whether they're going to approve it or why or what can
you do. So it's totally discretionary with the utility. But it's also under the force of government because they call -- OMU calls and says, "We want you to go write up Betty Bowles." And the Staff goes out and writes up Betty Bowles. Why? Because OMU said so. Why? We don't know. Their discretion. That's all the statute requires or the ordinance requires.

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

And the reason is clear: How do you comply with something that has no standard? What was Betty Bowles
supposed to do? What was she to ask for? What am I to ask you tonight to do? I don't even know why OMU denied this. I don't know why they wanted it enforced. We don't have -- we have some suggestions, but there's nothing in your ordinances to guide any citizen on what they should or shouldn't do.

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

MR. MOORMAN: Oh, sure.

CHAIRMAN: And then we'll proceed.

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

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

And on your screen now and in your folder -- and I skipped over a couple -- is a picture of the actual fence. Sometimes it's called a wall. It's actually a concrete footer with concrete block and brick decorative finish, pillars every so often. And the fence itself is made of
aluminum, and it's actually very light. It's a decorative fence. You can obviously see through it. The house is unusual in that it really has two back yards or two front yards, depending on how you look at it. I would say this is a fence around the back yard for decorative purposes.

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

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

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

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

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

MR. DYSINGER: Thank you.

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

The other steps she took, she told OMU that "if you
have to get in there and you do any damage, I will waive
that. And I will put it in my property description that any
future owners of the property will reimburse you or waive so
that you don't have any damages from knocking down my fence."
And she even went so far as to say that if OMU incurred any
additional costs -- instead of just digging up dirt, they had
to knock down the wall -- she would reimburse them for those
costs.

The point is she tried every means available to
accommodate what she thought might be their concerns: access,
additional costs. She was rejected on all of those.

Ultimately she asked: "What can I do? Is there any way I
can change this so that you will let me have the fence here?"
And she was told no. So the discretion is no discretion.

The answer is no, no matter what you do, you can't have it.

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

Here again is an aerial photo that shows
superimposed -- this here is -- the red lines are the public
utility easement. As you can see at the top of the picture, Houses 1 and 2, the easement goes right under those concrete driveways. In the subject property, which is Number 8 -- it's not pictured here as built because this is an older picture -- the public utilities would go under Betty Bowles's driveway. It goes under a lot of driveways.

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

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

Here are some more pictures of the wall. Unlike the fence that Betty Bowles has, it's not primarily metal.
It is solid block with a brick face. Four foot, five foot, six foot followed down, depending on where you're at along the line.

Another picture of the wall.

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

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

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

More examples. If you look at the red lines, it is going under a number of different concrete driveways. It's running along features, like retaining walls, and that has
apparently been permitted. The citation in this case is not
that Betty Bowles's fence is over an electric line. It's
that it encroaches on the utility easement. Here, that red
line's the utility easement, and it runs right up against a
number of features on these photos.

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

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

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

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

I've also put in an affidavit from Matt Hoffman. He was the man that built the fence. I don't know if his testimony's different from what the Staff said. He basically said that when he got asked by Betty to build this fence, he did call and wanted to find out "do I need a building permit?" He was told no. He started to build it, and he didn't encounter any line. The line's four foot deep. He didn't see warning flags. He didn't see any kind of conduit.
He built the fence. Yes, at some point, OMU came out and said, "You need to stop." At that point, though, the footer was already laid, the concrete block was already up, and about 30 percent of the brick was up. And I think within a few days it was finished. So, again, that was not an attempt to flaunt or flout to get around the ordinance. It was simply it had gone pretty far before it was built.

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

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

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

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

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

MR. MOORMAN: Yes.

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

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

MR. DYSINGER: His understanding, being the contractor?

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

MR. DYSINGER: Okay. Yeah.

MR. MOORMAN: -- and had gotten -- I don't want to use the word "authorization," but they had said, "yeah, as long as you're not" -- they asked him, "Are you going down more than two feet?" He said, "No." They said, "Well, as long as you're not going down more than two feet, we don't
see a problem." So he did make inquiries into -- he did make inquiries to try to make sure he complied with the law. He also spoke with the developers of the subdivision to make sure there were no problems, no restrictions there. The Home Owners' Association approved it. This was not in any way an attempt to try to build this fence under cover of darkness and then it was done. He thought he was complying. It was only after he was pretty well along that he found out.

MR. DYSINGER: At the point when the builder found this out, it was verbally and on-site? Let me rephrase it. Was your client notified in any other way, either by writing or given an opportunity to -- I'm unclear as to where an application happens to OMU saying, "Hey, can we do this?"

And at the very least, when it's discovered that you may be on an easement, how was your client notified? How was she -- That's not a good sign, by the way, when we start running out of batteries. I hope everybody brought a sandwich.

No pressure. Take your time.

MR. MOORMAN: I don't want to misrepresent. My understanding is that at some point OMU did talk to Betty Bowles about this fence and told her that it was in their easement and that she needed to stop. I understand that it was pretty far along when that happened. Betty did not make an application to OMU before she started construction because
she didn't know she had to. Once she found out that OMU was
complaining was when all these steps about making the fence
open up, signing the waivers. Those kinds of things came
about in an attempt to accommodate OMU. It was more a part of
a give and take after the fence was already built.

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

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

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

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

MR. DYSINGER: I'll make him testify to that
later.
MR. MOORMAN: I am not aware of anything that OMU asked for except take down the fence, and 'm not aware of anything that OMU was willing to consider except take down the fence.

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

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

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

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

MR. MOORMAN: According to his affidavit -- and I don't want to get crossways with what the Staff has already said. But his affidavit is that he contacted OMPC and spoke to Jim Mischel and Jim put him in contact with Matt Warren and that Matt Warren advised him there was no need for any
building permit or any other permit that OMPC could issue due
to the fact the fence was just a temporary structure.

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

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

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

CHAIRMAN: Yes, ma'am.

MS. RAINES: The affidavit from Matt Hoffman --

MR. MOORMAN: Yes, ma'am.

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

MR. MOORMAN: Tonight was the first I'd heard that
there had been any misunderstanding on there being a wall
between two houses and then a fence. I understood from Matt, the contractor, the fence was always where it was going to be and there was no misunderstanding.

MS. RAINES: About the easement?

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

CHAIRMAN: Jim, you can come forward.

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

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

CHAIRMAN: Come forward, Matt. State your name.

MR. SILVERT: State your name, please.

MR. WARREN: Matthew Warren.

(MATTHEW WARREN SWORN BY ATTORNEY.)

MR. WARREN: The initial contact was with Worth
Mountjoy. He called me at the office.

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

Melissa, can you hold that up?

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

Approximately two weeks later Matt Hoffman called me, asked the same questions. It jogged my memory whenever I pulled the GIS up, I told him that I had already discussed this with Worth Mountjoy. At that time we came into
conversation about, you know, was a permit required; and I
told him no again. Having already discussed with Worth
Mountjoy the scenario, we went on as though it was the same
fence in question. He did not express to me a difference in
the structure.

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

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

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

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

MR. DYSINGER: Okay. Okay. Thank you.

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

MR. PACE: Could the witness finish his statement
about when Austin called him and had him come to the site and
any discussion that he had with the contractor on the site?
MR. SILVERT: For the record, that's Pat Pace.

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

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

CHAIRMAN: Any other questions of Matt?

(NO RESPONSE)

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

MR. MOORMAN: Yes. Thanks. I hope these won't take very long. Charlie Hambley is going to speak briefly.
He's an excavator and will talk about access to the site.

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

MR. HAMBLEY: Charlie Hambley.

(CHARLIE HAMBLEY SWORN BY ATTORNEY.)

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

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

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

CHAIRMAN: Board members have any questions?

(NO RESPONSE)

CHAIRMAN: Staff?
1 (NO RESPONSE)

2 CHAIRMAN: Thank you.

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

4 MR. SILVERT: State your name, please.

5 MR. LAMB: David Lamb.

6 (DAVID LAMB SWORN BY ATTORNEY.)

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

8 I've done some work for Ms. Bowles before. And when this issue arose, she asked me to look into this and see if there were some accommodations that could be made. And it wasn't something that she had done that precluded the utilities from being able to access the easement. And when we looked at that and I looked at where the easement was located and how it was positioned, I told Ms. Bowles that, well, the fence as it was could provide, you know, provide an incumbrance of getting equipment in and out of her yard in the somewhat unlikely event you had to access it with equipment. I think that the line's in conduit and it's somewhat unlikely; but certainly for maintenance or some
other operation -- it could have some damage -- it could be necessary. So I recommended to Ms. Bowles that it would be in her best interest to make some modifications to provide ingress and egression for the utility easement.

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

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

I was later involved in conversations with OMU's representive -- I guess their counsel -- about what opportunities, you know, what could be done to rectify this.
What could Ms. Bowles do in order to make this situation acceptable? With all the things that we offered up, basically the last answer that I recall in the meeting I was in, that nothing short of complete removal of the fence inside of the utility easement would be really satisfactory. There was discussion about -- seemed like one of the conversations, the attorney mentioned that we had -- the footer might put too much weight on the conduit which was buried. But from an engineering perspective, that footer for that little -- underneath the fence probably puts less weight on that conduit that I do when I stand out there on it.

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

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

(NO RESPONSE)

CHAIRMAN: Okay. Thank you.

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

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

MR. SCALES: Tom Scales.

(TOM SCALES SWORN BY ATTORNEY.)

CHAIRMAN: Sir, which lot number is yours?
MR. SCALES: Lot number?

CHAIRMAN: Which one is yours?

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

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

CHAIRMAN: Appreciate it.

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

CHAIRMAN: Thank you.

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

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

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

Ohio Valley Reporting
(270) 683-7383
done with hers, so I cannot tell you exactly where they come
in under.

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

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

CHAIRMAN: Appreciate that.

MR. SCALES: Okay. Any other questions?

CHAIRMAN: Any other board members?

(NO RESPONSE)

CHAIRMAN: Thank you.

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

CHAIRMAN: Are you ready?

MR. PACE: Yes. Thank you, Mr. Chairman.
For the record, I'm Pat Pace. I'm the attorney for OMU. I filed the complaint on behalf of OMU, and I'm here to discuss this appeal.

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

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

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

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

Now, there's no place else in this ordinance that permits a structure in a public utilities. They want to call it a fence and say, well, they have the right to decide whether or not. But they've made their legal argument to you
that it's -- that's too much discretion and, you know, you ought to invalidate it. They'll have to take that argument to the court. I mean, in their appeal they tell you they're going to the court if they don't win, and that's where it belongs.

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

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

You will note, and as you've heard tonight, there is a concrete foundation, concrete block -- I think Mr. Warren says he put it two feet in the ground -- and then you have the brick on top of that, the brick columns and the brick arch. So this is a structure by the definition in the ordinance. It was so interpreted by the Zoning Administrator. There's really not any question. That's why they want to talk about a fence. They talked about Section 3-7. They talked about, well, we should be able to put it here; I mean, the utility's arbitrary; they should let us.
And I'll let you hear from utility. And there are other utilities here too that will tell you why they don't think structures should be in easements.

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

They want to talk about how easy it is to get in there, because after they're caught doing this, then they put in a gate at the other end and say, "See, you can get in."

Well, that's not the only problem. It's also over that portion you're looking at right there, because that's where it comes across the street from the transformer and runs through the easement. So it's on it there and its close to it as it angles through the easement.

Now, there's no question they hadn't noticed this. I mean, it's a recorded plat. The plat itself says this property is subject to all legal easements, including ones not shown on the plat. It also says in the notations that are included, "Public utility easements are for the joint use of power, telephone, gas, sanitary sewer, storm sewer, cable television, and water." So this is for all utilities, not
just now, but in the future. That's the reason it's a
problem to put a structure in a public utility easement.

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

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

I'd like to show you -- after this discussion
happened -- I'd like to show you the letter that Mr. Mountjoy
sent to Mr. Keller. He advises that he represents Betty
Bowles. If you look at the date, this is August 4th. This
is one day before OMU went out there and found this problem.
In the second paragraph it says that Mr. Keller was out there
on August 2nd and he talked to Matt Hoffman and he told him
you can't put that there, you have to talk to OMU. Then he
goes on to threaten him if he talks to the contractor. And
he doesn't say, "We're not violating an easement; we're not violating the ordinance." He says, "She's not in violation of any subdivision restriction." He goes on to say that you have no right to be interfering in this. And you'll see that all he was doing was trying to advise some people he thinks a lot of that he was afraid were getting into a financial bind putting this wall on a public utility easement. And in number three he orders him to cease talking to the contractor.

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

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

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

MR. PACE: Sure.

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

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

MR. PACE: He's not here either.

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

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

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

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

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

Now, her attorney, Mr. Mountjoy, he sent me a letter because, not only did I call him, I talked to him several times and wrote him, as far as correspondence, whenever you asked about correspondence. Here's a letter that he wrote to me which he said, "Our client has stopped."
Let's look at the date on that letter. See, this is right not long after it was discovered. And actually, if you go back to those pictures that are attached to the exhibits, that was three days after they first talked to her. And they had continued to work. But that shows you how much was not left to finish, and that she was going to finish it anyway.

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

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

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

On the screen now is their answer. Their answer was, as an affirmative defense, you shouldn't be here; you should be in front of the Board of Adjustment; you should
file a complaint and let them hear it and decide. So that's what we did. The suit's still pending. I'm sure there will be an appeal when the decision is made. But the Board has this now, and we're asking you to enforce the ordinance.

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

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

CHAIRMAN: Any questions of Mr. Pace?

(NO RESPONSE)
CHAIRMAN: Hearing none, let's hear the others.

MR. SILVERT: State your name please.

MR. LYONS: My name is Tim Lyons.

(TIM LYONS SWORN BY ATTORNEY.)

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

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

So at this point, you know, I would encourage the Board to enforce the ordinance and the Notice of Violation and keep the PUE, the public utility easements, and
right-of-ways free of structures.

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

At this point I'll entertain questions.

CHAIRMAN: Any questions of him?

MR. DYSINGER: Yes, Mr. Chairman.

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

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

MR. CHAIRMAN: Any other questions?

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

MR. DYSINGER: At the previous neighbor's?

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

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

MR. PACE: I do not.

MR. DYSINGER: Thank you.

CHAIRMAN: Thank you.

Next.

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

MR. SILVERT: State your name, please.

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

(DALE HARRIS SWORN BY ATTORNEY.)

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

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

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

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

Anyway, I incorporated the trip to visit Back Nine
Court for Mr. Brown with a trip to visit what would be the
next unit of the subdivision. And as soon as I drove in,
just as Mr. Keller had explained, there was a wall definitely
being built in the easement. I got out. I went up to the
fellow that was laying the bricks. And I recognized his
face, but I didn't remember his name. He called me by name, so I knew at some point in time I had met him. Turned out his name was Logan Ferguson. He is a masonry contractor. And I said, "You're building a wall in a public utility easement, and you can't do that." He said, "We were told by the property owner it was okay."

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

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

A few minutes later, as the conversation went on and she got more and more irritated, she basically said, "Oh, I was told by Thompson Homes that they had the easement
released before I bought the property, so there is no
easement." So I was kind of getting some conflicting stories
there.

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

At any rate, Matt Hoffman, Mr. Hoffman, kept making
the statement, "Well, how can we resolve this? You know, we
don't need to go to court. How can we resolve this? Must be
some way we can resolve this." Finally, we just decided
there wasn't going to be any way to resolve it on site, so we
left. But prior to that, because of the young man had known
me and I didn't recognize him or I didn't remember his name,
I went up to him to ask him who he was and how he knew who I
was. That's when he told me his name was Logan Ferguson, and
he reminded me that he had been a summer student, I think, at
OMU a while back, several years ago. And that was when
Mr. Bowles saw me talking to him, and she started screaming
that I wasn't to talk to her employees; she was paying his
salary; and that I was to leave the property and let him get
back to work. And that pretty much characterized the
meeting.

MR. CHAIRMAN: Any questions of Mr. Harris?
MR. DYSINGER: Mr. Harris, what is the process --
when you notified them they were in an easement, is that
official OMU notification, or does a letter go out to
someone?
MR. HARRIS: My verbal notification was simply to
suggest that they stop. And then a written warning or a
written notice would have been sent, maybe not that
afternoon, but the following Monday probably.

MR. DYSINGER: And that's the case? It was sent?
MR. HARRIS: Well, I don't know that it was. On
Monday, I think. Well, in fact, that afternoon Mr. Pace was
contacted, and so I'm not sure how that process all works.

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

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

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

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

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

MR. HARRIS: Can I make one additional statement?

CHAIRMAN: Come forward, please. State your name.

MR. HARRIS: Dale Harris again.

While I was in the truck waiting to hopefully hear back from Austin, I also called Thompson Homes. And I did get to speak with Tommy Thompson. And I explained that
Ms. Bowles was at least claiming that he or they had given
her permission, first of all, to build in the easement, and
then claiming that, oh, actually they had the easement
removed prior to her building the house of buying the
property. Of course, Tommy's response was that he had not
given her that permission, that obviously the developer
cannot just simply remove easements once they're granted.

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

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

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

MR. MCLIMORE: Austin McLimore.

(AUSTIN MCLIMORE SWORN BY ATTORNEY.)

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

As Dale described, he called me on the afternoon of
the occurrence. I left the office and went over there and
showed up. Dale kind of gave me a brief description of what
had been going on. At that time Matt Hoffman approached me
and Dale, and he said, "What's going on? What's the issue?"
We advised him that there was an issue with him building in
the easement. He said, "No. I was told I couldn't build in
the easement." He said, "The easement's a foot behind the sidewalk." I said, "No. The right-of-way is a foot behind the sidewalk. There's an additional ten foot public utility easement that takes place behind the driveway, which would essentially be 11, approximately 11 feet behind the sidewalk."

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

Continued to go back and forth over what was the issue. The issue becomes that they had encompassed the entire easement and that it was going to be an issue for OMU. Went back and forth a few more times. Matt Hoffman requested what could be done. We told him, "You just need to stop until we can figure something out." He said, "Well stopping's not an option. I won't get paid if I don't get this wall finished, and I'm not in the business of losing
money." I said, "Well, it doesn't sound like we're going to be able to resolve this issue at this point." Which I went back and then contacted our legal counsel about the next step that we should be taking, as Mr. Hoffman didn't go to stop the -- he performed in that manner. Which that's when Pat Pace, legal counsel, proceeded to investigate himself, gathering facts, and sent a letter to Ms. Bowles's attorney.

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

OMU, with their electric guides by the NESC, is required to keep certain separations from other utilities because of the hazards involved with our lines of the utilities possibly being in the easement, trying to keep safe, keeping people from getting into those lines. Row 320 B, Item 2 states that conduit systems to be occupied by communication conductors shall be separated from conduit systems to be used by the supply system by not less than 12 inches of well-tamped earth.
Item 3, with the sewer, it says, if conditions require a conduit to be installed parallel directly over a sanitary, it may be done provided both parties are in agreement as to the method. Obviously, there's not as much of a hazard with sewers other than just the excavating and digging.

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

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

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

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

With Sub Class C for the OSHA 1926 sub part rules
and regulations requires that excavated material stay two
feet from all edges of excavation. Additionally, Sub Part B
requires that Sub Class C soils at one and a half to one
excavation ratio. Because we look at this with the amount of
room that we actually have to work with the equipment that we
have reducing and restricting the easement, a lot of times
ten foot is the absolute bare minimum easement that we can
work out of. And because a lot of this stuff we're trying to
put by the new ordinance by the City of Owensboro requires
new development and ground fill to be placed underground with
utilities. We try to utilize the right-of-way so that we can
minimize how much easement we actually need to enter the
properties with. So in our rear lots, we try to typically
get anywhere between 12 to 16 foot. Front lots that are
beside of roads or alongside right-of-ways, we typically try
to get 10 foot for our easement.
OMU utilizes a few different pieces of equipment for our underground. We try to have a backhoe with its outriggers down approximately 13 foot, 2 inches. So without the use of a right-of-way in addition to the easement, we're not able to get our equipment into the area as specified that's encompassed by the wall without staying in the easement. If we get in the property of Ms. Bowles right now, our outriggers, our equipment will be outside of that easement. We also utilize a trencher equipment that with the outrigger out is just over 12 foot. And we also have a mini excavator. It's a six-foot track. But with the turning radius, we need that area to be able to maneuver.

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

CHAIRMAN: Questions from the board members?
(NO RESPONSE)
CHAIRMAN: Staff, any comments?
(NO RESPONSE)
CHAIRMAN: Thank you.

Anyone else, sir?

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

MR. SILVERT: State your name, please.

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

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

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

But the bottom line is, it's an impedence, and it
reduces the speed at which the utility can go in and fix a problem, and it creates a liability situation for the utility because if this utility is disrupted for a certain period of time, if our utility or their utility is disrupted, it may create a problem that created time and effort and money. We just would not agree that this is a good thing.

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

CHAIRMAN: Any question to Mr. Hawes?
(NO RESPONSE)

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

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

Mr. Chairman, I'll be very brief. To allow this structure to remain in this easement area, I think would be setting a terrible, perhaps even a dangerous, precedent. Atmos doesn't often have problems with its lines of a dangerous nature; but when it does, it can be really dangerous and they need to have no impediments in the way. We are totally supportive of the position of OMU here. This public utility easement needs to be -- the integrity of it needs to be maintained. The example that would be set by
allowing this structure to remain would be horrible and would obviously, in my opinion, not need to be over and over in our community and will affect the public safety as well as the services that are provided. So I would urge the Board to not allow this appeal and to uphold the ordinance and the position espoused by Pat Pace.

CHAIRMAN: Any questions of Mr. Wilson?

(NO RESPONSE)

CHAIRMAN: Thank you.

Next.

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

MR. SILVERT: State your name, please.

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

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

Do you have any questions?

CHAIRMAN: Any questions of her?

(NO RESPONSE)
CHAIRMAN: Thank you.

MS. DEMPS: Thank you.

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

Mr. Gary Keller

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

MR. KELLER: Gary Keller.

(GARY KELLER SWORN BY ATTORNEY.)

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

I guess I'm also troubled by some things that have been said tonight. First of all, Home Owners' Association did not approve this. And I don't care what's said by the lawyer or anybody else, the home owners did not approve that. First of all, it takes two-thirds votes of our Home Owners' Association, which is the home owners. I never voted on
anything, so I'm not sure where that came from, but that's just not so.

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

She has an attractive wall. I don't care whether she builds a wall or not. Doesn't make any difference to me. I've got a wall, so I can't even see the wall, so it doesn't make any difference. I feel like if other people -- and I've got a neighbor on the other side. Tom's on one side, then me, then another fellow. We've all adhered to the easement rules and laws. We just feel like if -- we've got another neighbor that just built a pool, and they had to abide by building their wall the same way. And I just feel like, you
know, if somebody wants to build a wall, great, great. But we are a community of laws, and I think we have to stay within that.

Any questions on where I am?

CHAIRMAN: Questions of Mr. Keller?

(NO RESPONSE)

CHAIRMAN: Thank you.

Anyone else?

(NO RESPONSE)

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

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

But if easements are good and you absolutely cannot have any impediment, then why do they have driveways? why do
they have brick walls? I'm sure it would be easier to dig through dirt. Let's just prohibit all driveways because they might get in the way of their easement. But that's not what you do. That's not what the law says.

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

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

This is a case of what is reasonable. I don't think all of this about who said what and when is relevant. Maybe I'm naive, but I think there was a misunderstanding and Betty Bowles and her contractor thought they could build
this, and then they got into it too far, and then it all blew up. There's no question about that. I don't see any bad faith here. I think Betty was trying to comply. And I have not heard anything tonight that explains why this fence is a greater impediment to getting into that line than a brick wall that's sunk with a deep footer or concrete driveway.

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

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

CHAIRMAN: Thank you.

Pat?

MR. PACE: Thank you.

As I said at the beginning with my earlier remarks, we have a lot of dissembling going on here. I think it's pretty clear now that you've heard these witnesses and seen these documents that there was an intention to do this wall and to avoid the law. And when they found out, when Worth Mountjoy called Matt Warren and talked to him, he told him
you cannot build it in the easement. You heard from him tonight. So what do they do? They get Hoffman to call and say it's okay now to build this wall. They knew it wasn't. The attorneys knew it. They knew it a long time ago. They built in anyway. They finished the wall and now come here and say, "Hey, we got this problem. We want you to help us."

I think the time to do it would have been a long time ago. The plat shows this easement, and there's not much backyard if you stay out of it. I agree. But she knew that when she bought the lot, and they knew it. She thought she could just do whatever she wants.

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

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

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

Now, they can talk about the common law, but we're
talking about the ordinance. We're not talking about correlative rights. We're talking about an outright prohibition. It says you cannot put this structure in this easement.

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

Thank you.

CHAIRMAN: Appreciate it. I think both sides have presented a good case. Let's proceed with the vote.

MR. DYSINGER: I have a question or two for Staff.

CHAIRMAN: Excuse me.

MR. DYSINGER: Thank you, Mr. Chairman. It's for Staff. And I want to be clear on exactly what we're doing. So, Madison, jump in if you feel like it's important that you do so.

What we're doing tonight is deciding whether or not the decision of the Zoning Administrator is correct or incorrect. To that end, I want to make sure that I understand what that determination was. Has there been a determination by the Staff whether this is a structure or a wall? Does the Staff have an opinion on that either way?

MR. MISCHEL: It's our opinion it is a structure and a wall.
MR. DYSINGER: It is a wall?

MR. MISCHEL: It has a permanent foundation. By definition -- and we've been over it tonight -- it's a structure.

MR. DYSINGER: So the opinion of the Staff, the part of the ordinance which states that fences, walls, and so forth can be built at the discretion of OMU does not even apply?

MR. MISCHEL: Yes, it does.

MR. DYSINGER: Okay. Let's try this again. If I'm reading this correctly, if we determine that this is a structure as being separate from a wall or a fence, then it has no business being in the easement under any circumstances. Whereas, if it is a fence, a structural fence, it can be in the easement at the discretion of OMU?

MR. MISCHEL: Yes.

MR. DYSINGER: And it's the opinion of the Staff that that latter part would apply. If OMU is okay with it, we would be okay with it, correct?

MR. MISCHEL: Yes. Well, not just OMU. It's a utility.

MR. DYSINGER: Okay. I'm sorry. To me that's an important issue, to determine what it is first and then go on from there.

Is there any other problem with the fence, from
OMPC's standpoint, other than the fact that it's in the easement? Is there any permit necessary? Is there any --

MR. MISCHEL: No.

MR. DYSINGER: Okay. Further, it's not up to us whether OMU should let them do it or should not let them do it. The only thing that matters to us -- and we're going to decide it -- is whether or not Jim's correct, that it is in fact a structure or a fence and it is in the easement. Is that a fair read of what we're asked to decide tonight? I'm ready to go, Mr. Chairman.

MR. CHAIRMAN: Any other board member have questions?

MS. RAINES: I have a point as well. I agree. I do feel like we're to decide tonight about the conversations that were made and, you know, based on that conversation, was the recommendation appropriate. So I want to go back to the first bullet point from the OMPC statement that was submitted where Matt Warren received a telephone call from Worth Mountjoy concerning the process for the construction along the north side of the subject property, which measured approximately 115 feet in length. Then Matt said, you know, according to that, the north side, that would be okay. Could it be possible that the attorney at that time had incorrectly asked about which piece of the property? Do you think maybe he could have been looking at the wrong
portion; or is that a possibility? Just miscommunication and
--

MR. MISCHEL: Well, I guess I should let Matt
Warren answer that. But in what he stated earlier, he said
he asked if it was on the north side, was it on the street
frontage side, or between the houses; and he said between the
houses, the north side. So that's where that blue line is.
MS. RAINES: Okay.
MR. PEDLEY: Can I say something?
I'm a foundation contractor, builder, and
subdivision developer. I've built five major subdivisions,
probably put in two or three thousand foundations, and I've
built a lot of homes.
My interpretation of a structure is anything that's
permanently attached to the ground with a concrete footer and
blocks and reinforced in steel or whatever. I have put major
walls in and across utility easements but never parallel and
over top of utility easements.
Now, my subdivision entrances, we always have our
walls and all of that. Lake Forest, Hunter's Ridge, Copper
Creek, brookhill -- I developed those subdivisions across the
utility easements, but I do not run with it with it.
We are not required to get a building permit to put
a wall in for our signage on a utility easement. I poured
one yesterday in Lake Forest. I will be putting a wall on
it. The wall will be 12 feet long and 6 feet high. That is a structure.

Also, all of our deed dedication and restrictions, usually -- we have restrictions in there about placing walls or fences in utility easements; but more than that, it has to be approved by the architectural control committee of that subdivision or the Homeowners' Association. Their committee has to approve it. We do not, in my subdivision, allow fences in the front yard. It might be a small ornamental-type fence but, no, not walls and fences. We do allow a wood fence or a vinyl fence in the rear yard in the utility easement, but that is not a structure.

My interpretation of what I've heard here tonight and what I've seen, that wall is a structure. So what I'm hearing tonight, we are to decide if the Zoning Administrator's interpretation of the structure and the violation of the zoning ordinance was the proper interpretation.

Am I correct, Mr. Silvert?

MR. DYSINGER: Mr. Chairman, I'm ready to make a motion.

CHAIRMAN: You got anything new there?

MR. DYSINGER: Beg your pardon, sir.

CHAIRMAN: Let's go.

MR. DYSINGER: Based on the evidence and testimony
we've heard tonight and given the findings that the wall is
in fact in the easement, I move that we uphold the decision
of the Zoning Administrator and deny the appeal.

MR. PEDLEY: I second that motion.

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

(NO RESPONSE)

CHAIRMAN: Staff have any other comments?

(NO RESPONSE)

CHAIRMAN: Hearing none, all in favor of the
motion, raise your right hand.

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries unanimously.

One final motion.

MR. WARREN: Move to adjourn

MR. DYSINGER: Second.

CHAIRMAN: All in favor, raise your right hand.

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: We are adjourned.

(Meeting adjourned 9:41 p.m.)

----------------------------------------
STATE OF KENTUCKY )
COUNTY OF DAVIESS )

I, RHONDA SIMPSON, Notary Public in and for the State of Kentucky at large, do hereby certify that the foregoing Owensboro Metropolitan Board of Adjustment meeting was held at the time and place as stated in the caption to the foregoing proceedings; that each person commenting on issues under discussion were duly sworn before testifying; that the Board members present were as stated in the caption; that said proceedings were taken by me in stenotype and electronically recorded and was thereafter, by me, accurately and correctly transcribed into the foregoing 161 typewritten pages; and that no signature was requested to the foregoing transcript.

WITNESS MY HAND and notary seal on this the 3rd day of July, 2012.

____________________________
RHONDA SIMPSON, NOTARY PUBLIC
STATE-AT-LARGE
OHIO VALLEY REPORTING SERVICE
202 WEST THIRD STREET, SUITE 12
OWENSBORO, KENTUCKY 42303

COMMISSION EXPIRES: AUGUST 17, 2015
COUNTY OF RESIDENCE: DAVIESS COUNTY, KENTUCKY

Ohio Valley Reporting
(270) 683-7383