The Owensboro Metropolitan Board of Adjustment met in regular session at 5:30 p.m. on Thursday, November 1, 2012, at City Hall, Commission Chambers, Owensboro, Kentucky, and the proceedings were as follows:

MEMBERS PRESENT:  C.A. Pantle, Chairman  
Ruth Ann Mason, Secretary  
Gary Noffsinger, Director  
Madison Silvert, Attorney  
Shannon Raines  
Sean Dysinger  
Fred Reeves  

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CHAIRMAN:  I would like to call the meeting of the Owensboro Metropolitan Board of Adjustment at this time.  We start our program each month with a pledge to the flag and a prayer.  Ruth Ann is going to have the prayer first.

(INVOCATION AND PLEDGE OF ALLEGIANCE.)

CHAIRMAN:  At this time I want to welcome you to the Board of Adjustments.  If you have any comments or questions, please come to one of the podiums and state your name, please.

With that the first item we have is the minutes of the October 4th meeting.  They're on file in the office.  We haven't found any problems.

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Anybody have any additions?

(NO RESPONSE)

CHAIRMAN: If not, I'll entertain a motion to dispose of the item, please.

MS. MASON: Move for approval.

MR. REEVES: Second.

CHAIRMAN: A motion has been made and a second. All in favor raise your right hand.

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries.

Next item, please.

ITEM 2

2306 Windhaven Drive, zoned I-1, Remanded by Daviess Circuit Court, Division II

Consider a request for a Variance in order to waive the required six foot high solid wall or fence around an outdoor storage lot.

Reference: Zoning Ordinance, Article 8, Section 8.5.3(j), Article 17, Section 17.3114

Applicant: Mid-South Equipment, LLC, Chad Watts, Jim Watts

MR. NOFFSINGER: Mr. Chairman, each member has been mailed a copy of this transcript from the previous meetings. You have also received a copy of the Order from the judge remanding this item back to you for a number of reasons.

One was A lack of quorum; and, two, the judge wanted additional evidence submitted.

Each of you have received that. We have legal Ohio Valley Reporting

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counsel here. The applicant is represented by counsel. Will be happy to entertain any questions that you might have.

CHAIRMAN: Any board members have any questions at this time you would like to ask or comments?

MR. DYSINGER: Mr. Chairman, upon reviewing the Order and then reviewing previous testimony, the applicant seemed to make the case that their lot, the gravel lot was for display purposes. The judge seemed to echo that in the decision. I don't know if the applicant would like to comment on this, but is that a clear understanding of the evidence that we received?

CHAIRMAN: I would say so.

Counselor, is that correct?

MR. SILVERT: That was their previous testimony. Would need to ask them, I suppose.

MR. HOLTREY: We're not going to add or take away anything from the previous record at this time.

MR. DYSINGER: That's fine, Mr. Chairman. I'll go under that assumption.

CHAIRMAN: You have nothing else you want to add at this time or questions or anything, sir?

MR. HOLTREY: I think the record -- you want me to come up there?
CHAIRMAN: Please. State your name so we'll have record of it.

MR. HOLTREY: I think the record already reflects the only thing that we are interested in is that each board member has an opportunity to review the opinion from the Court. If each board member has reviewed the opinion of the Court prior to this evening, then that's all that we think is necessary for the record to reflect. Thanks.

CHAIRMAN: Thank you.

MR. NOFFSINGER: With that, Mr. Chairman, Melissa Evans is here to address the Order and findings and where we feel that Staff, what our recommendation would be at this point.

MR. SILVERT: State your name, please.

MS. EVANS: Melissa Evans.

(MELISSA EVANS SWORN BY ATTORNEY.)

MS. EVANS: We would like to enter this into the record as Exhibit A.

LACK OF QUORUM

Based upon the Order by Hon. Joe Castlen, Judge, Div II, there was not a quorum when the vote was taken on the variance request for Mid-South. The case is remanded to the OMBA. Ward Pedley will not be able to vote based on his previous self.
disqualification.

OTHER ISSUES TO CONSIDER

1. Storage Area Issues (Screening Requirement)

The decision by Judge Castlen states "The display by Mid-South is an active, ongoing, current usage of the inventory of their equipment." It also states, "Mid-South does not want to store its equipment; it wants to sell or lease it" and "The use to which Mid-South has put its property is not outdoor storage as that term is employed in its customary sense."

The Zoning Administrator and the Staff agree that the use of the site for the display of the equipment for sale or lease is indeed sales display area. The variance requested resulted from the applicants original site plan approved in December 2009 showing the area in gravel and screened as required for outdoor storage. The applicants were able to request a variance from the outdoor storage screening requirement, which if granted would have resulted in the area being able to remain gravel with the screening requirement (a six foot high solid fence, a dimensional variance from 6 feet to 0 feet) waived, allowing the surface to remain gravel. There is no specific definition within the Zoning Ordinance.
for outdoor storage, so the customary sense of outdoor storage should be applied. However, in defining the area as display area, the applicant loses the ability to request a dimensional variance. If the OMBA agrees with the Court decision, the Zoning Administrator and the Staff that the use of this area is for the display of construction vehicles and equipment, then the area for display must be paved and there is not a variance that the OMBA has the authority to grant relative to pavement material requirements. A variance is defined in KRS Section 100.111 as "a departure from the dimensional terms of the zoning regulation pertaining to the height, width, length or location of structures, and the size of yards and open spaces where such departure meets the requirements of KRS 100.241 to 100.247. The waiving of pavement material is not a dimensional variance and KRS Chapter 100.237 through 100.257 limits the authority of the OMBA to variances, conditional use permits, appeals from the Zoning Administrator's interpretation, and changes in non-conforming uses. If the OMBA agrees that the area is not outdoor storage, there is no screening requirement and the variance request is not valid. There is no variance to waive the requirement to improve the display area using a hard surface base.
material such as asphalt, concrete, brick or other properly bound surface, so as to be durable and dustless. KRS Section 100.247 further states that "The board shall not possess the power to grant a variance to permit a use of any land, building or structure which is not permitted by the zoning regulation in the zone in question, or to alter density requirements in the zone in question.

2. Sales/Rental Display Area

As noted above, the reasons that the area in question was considered an outdoor storage area requiring screening are two fold. First, the applicant's had submitted a site plan that was approved in December 2009 showing the area to be graveled with a six foot high solid screen around the perimeter meeting the Zoning Ordinance requirement for screening of an outdoor storage area. Secondly, if the area was display area, as well it may be, the Zoning Ordinance would require the surface to be paved and pavement was not proposed so the interpretation was that the area was "outdoor storage."

During the course of testimony, the area in question was identified as a sales/display area by the applicant. In the case of sales and display, the Zoning Administrator, in applying the adopted Ohio Valley Reporting

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regulations in the Zoning Ordinance would require the area to be paved with a hard surface material. The basis for that requirement is as follows:

The definition of a vehicular use area in Article 14 of the Zoning Ordinance is:

VEHICULAR USE AREA. A vehicular use area (VUA) is any open or enclosed area used by vehicles of any type, whether moving or at rest, including but not limited to parking lots or areas, loading and unloading areas, mobile home yards, sales and service areas, and driveways.

The zoning ordinance requires parking areas to be paved with the exception of parking areas in single family residential, agricultural and EX-1 zones:

13.12 Paving. Except for single-family residential uses and A-U, A-R, and EX-1 zones, where parking areas are provided, they shall be improved within six (6) months of application of any base material with an asphalt, concrete, brick or other properly bound surface, so as to be durable and dustless, unless otherwise specifically permitted in this Zoning Ordinance.

Article 13 further specifies that those areas identified for display for sale, rent or display for vehicles shall be equivalent to a parking area and

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shall meet those requirements.

13.51 Automobile, Manufactured Housing or Other Vehicle Sales Lots, Automobile Service Stations, and Farm Equipment Dealers. Every parcel of land hereafter used to display, rent, sell, or service automobiles, motorcycles, trucks, boats, recreational vehicles, manufactured homes, farm equipment, or used for the minor repair thereof, or used as an automobile service station shall be subject to the requirements of this Zoning Ordinance concerning paving, lighting landscaping, drainage, and minimum yards and setbacks, and shall be considered, in the application thereof, as the equivalent of a parking area for more than six (6) vehicles, regardless of size.

There is a limited exception to paving for manufactured home sales and large farm equipment in Article 13. This provision requires pavement between display spaces and an approved development plan. This provision was discussed at length in the OMBA meeting and it was determined that the exception did not apply as the product was not manufactured homes or large farm vehicles. However, even if this exception could be applied to the subject property, the proposal would not meet the requirements. A development plan is required designating the location of the parking area.
spaces to contain the large vehicles on display;
showing the spaces surfaced in some manner so that the
equipment will not deform wet ground, and showing the
aisles that are used to access the spaces fully paved.

13.511 Paving Exception for Display of Manufactured Homes and Large Farm Vehicles. As an exception to the
foregoing, the surface of parking spaces designated
for the display of manufactured homes or large farm
vehicles may be exempted from the full paving
specification, subject to the following conditions: A
development plan is approved by the OMPC; the plan
designates the location of parking spaces to contain
the large vehicles on display; the spaces are surfaced
in some manner so that the large vehicles to be
displayed thereon will not deform wet ground; and
aisles that are used to access the spaces are fully
paved.

The Zoning Administrator and the staff would
agree that the display of inventory by Mid-South is an
active, ongoing, current usage. In agreement with the
area as display area, the Zoning Administrator and
Staff would require the area to be paved in compliance
with the zoning ordinance. The Staff does not have
the authority to change, alter or ignore the
requirements of the Zoning Ordinance or to substitute

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their own judgment as to what may be reasonable in specific situations. They must enforce the requirements that are adopted in the Zoning Ordinance for the community. The only way for the applicants to get relief from the pavement requirements would be if they identified the area as outdoor storage and asked for a variance from the screening necessary to meet the ordinance requirement. Once the applicant was cited for non-compliance with the approved site plan which identified the area as outdoor storage with the required screening shown, they indicated a desire to eliminate screening requirements in order to avoid paving the display area and to avoid the screening requirement for the outdoor storage. The application was taken before the OMBA, action was taken and the decision was appealed. If a variance were granted to waive the outdoor screening by the board, the area would have to continue to be considered outdoor storage, because display/sales area would have to be paved. The Staff allowed the applicants to apply for the variance from the screening requirement as their only method to allow the gravel to remain and not pave the display area.

The decision also states that there was no evidence offered to the OMBA of the pavement of a
"typical street". Pavement for a "typical" street would be a street constructed in accordance with the Public Improvement Specifications as adopted by the OMPC. All public streets are required to be constructed to the standard in the specifications for the type of street. As stated in the meeting record, this would mean installation of 6 inches of concrete over the existing gravel base or 6 inches of dense grade aggregate and a 3 inch asphalt binder coat as required for typical local and minor collector streets in the community. Estimates were included from active concrete and asphalt installers. The Staff introduces as an exhibit a copy of Section 3 of the Public Improvement Specifications as evidence of a typical street pavement construction.

The decision states that if the item returns to court after being remanded to the OMBA, then the OMBA should provide more evidence of the reason to provide hard surface. The only evidence the Staff can cite is that the zoning ordinance requires hard surface material for display areas as already described in this report. The Staff does not have the authority to waive requirements of the Zoning Ordinance and the Board of Adjustment authority is limited to dimensional variances, conditional use.
permits and appeals to the Zoning Administrator's interpretation of the ordinance requirements and does not have the authority to waive the requirements contained in the Zoning Ordinance specifying acceptable hard surface materials, which consists of any base material with an asphalt, concrete, brick or other properly bound surface, so as to be durable and dustless.

3. Staff's Conclusions

The Order states that "Whether something is "unsightly" or aesthetically pleasing is quite subjective in many if not most situations." It requests that the OMBA provide more objective criteria and evidence to support the Staff's conclusions that the variance would adversely affect the public health, safety and welfare and pose a hazard to the public based on the protection of the aesthetics of the community.

The Staff offers the Zoning Ordinance requirements as evidence of the community's standards for aesthetics. There is a requirement for outdoor storage yards to be screened on all sides from the public with a six foot high solid element. This is an adopted standard of the community and one which the Staff enforces consistently for outdoor storage areas.

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The Staff is not substituting their opinion of what is unsightly; they were applying the community standard that has been adopted that outdoor storage should be screened. In fact, the Staff provided the evidence at the meeting to grant the variance on a portion of the perimeter where the topography and elevation serves as a natural screen from the storage yard and meets the intent of the ordinance to block the view of equipment on this portion of the property. However, the six foot high screening requirement does not exist for a display area. If the OMBA determines this to be a display area, there is not a six foot high screening requirement so no variance is required. There is a three foot high element along the front of the display area between the road and the pavement.

Findings

1. The use of the area in question is not an outdoor storage area and does not have a perimeter screening requirement of a six foot high solid fence.

2. The OMBA can not grant a variance for a requirement that does not apply to the site.

3. The use of the area in question is a sales and rental display area for construction vehicles and equipment and must be paved with an acceptable hard surface material in accordance with the Zoning

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Ordinance requirements as described in this report. (Zoning Ordinance Section 13.12, 13.51 and definition of Vehicular Use Area in Article 14)

4. The Staff and the OMBA do not have the legal authority to waive the paving material requirement of the Zoning Ordinance (KRS Sections 100.237 through 100.257)

5. The OMBA is limited in its authority to dimensional variances, conditional use permits, limited changes in non-conforming uses and appeals to interpretations of the Zoning Ordinance. (KRS Sections 100.237 through 100.257)

6. The applicant cannot request a waiver of pavement consisting of a base material with asphalt, concrete, brick, or other properly bound surface, so as to be durable and dustless as this is a requirement contained in the ordinance for a specific surface and would not constitute a dimensional variance. The OMBA can only act on dimensional variances.

7. The applicant's avenue of administrative appeal from the paving requirement would be to appeal the Zoning Administrator's interpretation that pavement with a hard surface material of the display area is a requirement of the Zoning Ordinance. The OMBA does not hold the authority to act in conflict
with a requirement, only to determine if the correct
interpretation was made. The applicant would have to
offer evidence that the ordinance does not require
pavement with hard surface material for display areas.

8. The applicant could request that the
planning commission or legislative body propose a text
amendment to the zoning ordinance relative to pavement
requirements for this specific type of business.

Again, we would like to enter this into the
record as Exhibit A.

CHAIRMAN: Thank you.

Does the Staff have anything else you'd like
to add at this time?

MR. NOFFSINGER: No, sir.

MR. SILVERT: Mr. Chairman, we'd also like to
submit into the record for this meeting the minutes of
the October 2011, the November 2011 and December, 2011
meetings of the Owensboro Metropolitan Board of
Adjustment.

CHAIRMAN: Any board member at this time have
any questions?

(NO RESPONSE)

CHAIRMAN: Does the applicant have anything
you would like to add at this time?

MR. HOLTREY: No.

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CHAIRMAN: Hearing no comments or questions, I'll entertain a motion to proceed with the item at this time.

MR. DYSINGER: Mr. Chairman, given the finding that the area described based on not only the judge's decision but previous testimony, the area described is a display area. Further given the finding that the appropriate paving is required of an area that is so defined, and further findings that this board lacks the authority to circumvent that on anything other than a dimensional variance, I move that we deny the Variance.

MR. REEVES: Second.

CHAIRMAN: A motion has been made and a second. Any comments from the Staff at this time?

MR. NOFFSINGER: Yes.

One thing Staff would recommend. Staff just read a number of findings into the record that would be in line with the statements and findings of fact Mr. Dysinger read. We had eight of those. We would certainly like to, if the Board would consider, amending, if Mr. Dysinger would and the second, to include those findings of fact into the record.

MR. DYSINGER: Mr. Chairman, there's nothing in those eight findings that would from preclude me

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from adding them to my motion. I would except them in my motion.

CHAIRMAN: Does the second approve that also?

MR. REEVES: Yes.

CHAIRMAN: A motion has been made and a second. Any other comments or questions from the Staff?

MR. NOFFSINGER: No, sir.

CHAIRMAN: Attorney have any advice or anything else to add?

MR. SILVERT: No, sir.

CHAIRMAN: Board have any other questions?

(NO RESPONSE)

CHAIRMAN: The applicant have anything else you would like to add? Give you a chance.

MR. HOLTREY: Not at this time.

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries.

One other motion.

MR. DYSINGER: Move to adjourn.

MS. MASON: Second.

CHAIRMAN: A motion has been made and a second. All in favor raise your right hand.

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(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: We are adjourned.

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STATE OF KENTUCKY

COUNTY OF DAVIESS

I, LYNNETTE KOLLER FUCHS, 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 20 typewritten pages; and that no signature was requested to the foregoing transcript.

WITNESS my hand and notary seal on this the 25th day of November, 2012.

LYNNETTE KOLLER FUCHS
NOTARY ID 433397
OHIO VALLEY REPORTING SERVICES
202 WEST THIRD STREET, SUITE 12
OWENSBORO, KENTUCKY 42303

COMMISSION EXPIRES: DECEMBER 16, 2014
COUNTY OF RESIDENCE: DAVIESS COUNTY, KY

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