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OWENSBORO METROPOLITAN BOARD OF ADJUSTMENT

JULY 3, 2008

The Owensboro Metropolitan Planning Commission met in regular session at 5:30 p.m. on Thursday, July 3, 2008, at City Hall, Commission Chambers, Owensboro, Kentucky, and the proceedings were as follows:

MEMBERS PRESENT: Ward Pedley, Chairman  
Judy Dixon, Vice Chairman  
Ruth Ann Mason, Secretary  
Gary Noffsinger, Director  
Madison Silvert, Attorney  
Marty Warren  
Sean Dysinger  
Clay Taylor

\* \* \* \* \*

CHAIRMAN: Call the Owensboro Metropolitan Board of Adjustment to order. We will begin our meeting with the prayer and pledge of allegiance to the flag.

(INVOCATION AND PLEDGE OF ALLEGIANCE.)

CHAIRMAN: I would like to welcome everyone. Anyone wishing to speak on any item tonight we welcome your questions and comments. We ask that you please do not speak from your seat.

First item on the agenda is to consider the minutes of the June 5, 2008 meeting. Are there any additions or corrections?

(NO RESPONSE)

1 CHAIRMAN: Chair is ready for a motion.

2 MR. PANTLE: Motion to approve.

3 MR. DYSINGER: Second.

4 CHAIRMAN: We have a motion and a second. All  
5 in favor raise your right hand.

6 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

7 CHAIRMAN: Motion carries unanimously.

8 Next item.

9 -----

10 CONDITIONAL USE PERMITS

11 ITEM 2

12 5281 Old Lyddane Bridge Road, zoned A-R  
13 Consider a request for a Conditional Use Permit to  
14 build, operate and maintain a dairy products and farm  
15 products sales facility with limited retail sales of  
16 merchandise.

Reference: Zoning Ordinance, Article 8, Section 8.2E1  
and 8.2E3/45

Applicant: Kuegel's Dairy Barn, LLC and John L.  
Kuegel, Sr.

17 MR. SILVERT: State your name, please.

18 MR. WILLIAMS: Zack Williams.

19 (ZACK WILLIAMS SWORN BY ATTORNEY.)

20 ZONING HISTORY

21 OMPC records indicate that no conditional use  
22 permits or variances have ben issued for this address.

23 The property is currently zoned and used for  
24 agricultural use.

25 LAND USES IN SURROUNDING AREA

1           The adjoining property on all boundaries is  
2           zoned A-U Agricultural and is used for agriculture  
3           uses.

4           ZONING ORDINANCE REQUIREMENTS

5           1. One parking space per 300 square feet of  
6           building space.

7           2. The two-way vehicular drive from Old  
8           Lyddane Bridge Road must be a minimum of 24 feet wide  
9           on the subject property.

10          SUGGESTED CONDITIONS

11          1. ADA Accessible parking spaces and  
12          offloading area must be paved.

13          2. The first 50 feet of driveway from Old  
14          Lyddane Bridge Road must be paved.

15          MR. WILLIAMS: I would like to enter the Staff  
16          Report in the record as Exhibit A.

17          CHAIRMAN: Anyone here representing the  
18          applicant?

19          APPLICANT REP: Yes.

20          CHAIRMAN: Anyone here have any questions or  
21          comments of the applicant?

22          (NO RESPONSE)

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

25          MR. DYSINGER: I do, Mr. Chairman.

1 I'm just wondering, is the applicant aware of  
2 the conditions that you mentioned? Were those  
3 discussed with the applicant?

4 MR. WILLIAMS: Yes, they were.

5 CHAIRMAN: Any other questions from any board  
6 members of the applicant?

7 (NO RESPONSE)

8 CHAIRMAN: Chair is ready for a motion.

9 MS. DIXON: Move to approve the Conditional  
10 Use Permit based upon Findings of Fact that it's  
11 compatible with surrounding agriculture uses and  
12 subject to the conditions: 1) ADA Accessible parking  
13 drives and offloading must be paved; and 2) The first  
14 50 feet of driveway of the Old Lyddane Bridge Road  
15 must be paved.

16 MR. DYSINGER: Second.

17 CHAIRMAN: We have a motion and a second. Any  
18 question or comments on the motion?

19 (NO RESPONSE)

20 CHAIRMAN: All in favor raise your right hand.

21 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

22 CHAIRMAN: Motion carries unanimous.

23 Next item, please.

24 ITEM 3

25 2241 East Parrish Avenue, zoned A-U  
Consider a request for a Conditional Use Permit to

1 replace a caretaker's home within an existing  
2 cemetery.  
3 Reference: Zoning Ordinance, Article 8, Section 8.2J1  
4 Applicant: Adath Israel Cemetery, Inc.

5 ZONING HISTORY

6 The subject property has been in use as a  
7 cemetery since before zoning regulation was enacted.  
8 OMPC records show no conditional use permits have been  
9 granted for the subject property.

10 LAND USES IN SURROUNDING AREA

11 The adjoining properties are zoned and used as  
12 follows:

13 To the north and east, I-1 Light Industrial  
14 zoning and it's used for Light Industrial;

15 To the west, B-1 General Business, used as a  
16 Medical Plaza;

17 To the south, P-1 Professional, Medical Plaza.

18 ZONING ORDINANCE REQUIREMENTS

19 1. Two parking spaces for the dwelling unit.

20 MR. WILLIAMS: We would like to enter the  
21 Staff Report into the record as Exhibit B.

22 CHAIRMAN: Anyone here representing the  
23 applicant?

24 MR. KAMUF: Yes, Mr. Chairman.

25 CHAIRMAN: Let's see if we have any questions  
or comments, Mr. Kamuf.

1           Anyone have any questions or comments on the  
2 application?

3           (NO RESPONSE)

4           CHAIRMAN: Board members have any questions of  
5 Mr. Kamuf?

6           MR. DYSINGER: Mr. Chairman, I have a  
7 question.

8           It says replace. I'm assuming there's an  
9 existing structure, and if so is it significantly  
10 different than the proposed use?

11          MR. KAMUF: It will be the same thing.  
12 There's a dilapidated house that's on the property.  
13 We have a picture of it that I can show you. The  
14 caretaker needs a new home.

15          CHAIRMAN: Any other question of Mr. Kamuf?

16          (NO RESPONSE)

17          CHAIRMAN: Chair is ready for a motion.

18          MS. MASON: Mr. Chairman, I move for approval.  
19 My Findings of Fact are it's compatible with the area  
20 and the existing use and it's the replacement of an  
21 existing caretaker home.

22          CHAIRMAN: We have a motion.

23          MR. DYSINGER: Second.

24          CHAIRMAN: We have a motion and a second. Any  
25 comments or questions on the motion?

1 (NO RESPONSE)

2 CHAIRMAN: All in favor raise your right hand.

3 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

4 CHAIRMAN: Motion carries unanimously.

5 Next item, please.

6 ITEM 4

7 2700 Rinaldo Road, zoned I-2  
8 Consider a request for a Conditional Use Permit to  
9 construct a 418' x 260' offload and storage facility  
10 for dry fertilizer.

11 Reference: Zoning Ordinance, Article 8, Section  
12 8.2G4/27

13 Applicant: Miles Farm Supply, LLC and Owensboro  
14 Riverport Authority

15

16 MR. DYSINGER: Mr. Chairman, before we get  
17 into that too much. For the record my wife works for  
18 Miles Farm Supply; however, I don't think that bother  
19 my decision one way or the other.

20 CHAIRMAN: So noted.

21 Counsel, do you have any comments on that?

22 MR. SILVERT: Is there any discussion from  
23 anyone here who might have an objection, or a question  
24 or a comment as to Mr. Dysinger's statement now would  
25 be the appropriate time to hear that.

(NO RESPONSE)

CHAIRMAN: With no opposition we'll go  
forward.

ZONING HISTORY

1           The subject property has been granted two (2)  
2           Conditional Use Permits for the storage and handling  
3           of coal in 1986 and 1983 respectively. The property  
4           is currently used for heavy industrial uses today.

5           LAND USES IN SURROUNDING AREA

6           The adjoining property is zoned and used as  
7           follows:

8           To the north, west and south I-2 Heavy  
9           Industrial Owensboro Riverport Authority. The  
10          property is bounded to the east by the Ohio River.

11          ZONING ORDINANCE REQUIREMENTS

12          1. One parking space per two employees on  
13          maximum shift (minimum 5).

14          2. All vehicle use areas must be paved.

15          MR. WILLIAMS: We would like to enter the  
16          Staff Report into the record as Exhibit C.

17          CHAIRMAN: Anyone here representing the  
18          applicant?

19          APPLICANT REP: Yes.

20          CHAIRMAN: Anyone here have any questions or  
21          comments of the applicant?

22          Please step the podium.

23          MR. SILVERT: State your name, please.

24          MR. WAITMAN: I'm Richard Waitman.

25          (RICHARD WAITMAN SWORN BY ATTORNEY.)



1           MR. WAITMAN: We have the property, which was  
2 unmentioned, to the west, which is down the river  
3 between this proposal and Hurrica Island. It's a  
4 farm.

5           I'd just like to say that it seems to me that  
6 the cost of our farm supplies and our ability to get  
7 our farm goods to other people, that is the logistic  
8 part of our business, is very significant. Anything  
9 that will increase the availability and reduce the  
10 price of the fertilizer and other goods we need is a  
11 good thing. Of course, would be good if it was moving  
12 our crops away. I support the idea as I've understood  
13 it to be presented. Thank you.

14           CHAIRMAN: Thank you very much.

15           Anyone else have any comments on the item?

16           (NO RESPONSE)

17           CHAIRMAN: Any board members have any  
18 questions?

19           (NO RESPONSE)

20           CHAIRMAN: Mr. Noffsinger.

21           MR. NOFFSINGER: I do have one question of, I  
22 guess, the applicant and Staff.

23           I just want to make sure that you make  
24 reference to the proper site plan in the application  
25 because there were two drawings. I want to make sure



1 2725 Frederica Street, zoned R-1A  
2 Consider a Variance to increase the allowed height of  
3 a fence in a residential side-yard from 6' to 8'.  
4 Reference: Zoning Ordinance, Article 3, Section  
5 3-7(g)(2)  
6 Applicant: Brenton L. and Tara S. Ford

7 MR. WILLIAMS: There are special circumstances  
8 with regards to this request.

9 The adjoining residential property to the east  
10 has an eight foot fence in their side and backyards  
11 that would abut the proposed fence.

12 Additionally the adjoining property to the  
13 north is a commercial bank which has been robbed  
14 recently and the applicants claim the robber fled  
15 through their property. The applicants desire the  
16 additional safety that an eight foot fence would  
17 provide for their young children.

18 The Staff does not believe it would cause a  
19 hardship if this variance were not granted because  
20 they would still have access and use of their yard.  
21 They could still have the six foot fence.

22 There are no circumstances. They haven't  
23 willfully done anything to take an action that would  
24 violate the zoning ordinance.

25 Staff finds that granting this variance will  
not adversely affect the public health, safety or  
welfare; will not alter the essential character of the

1 general vicinity; will not cause a hazard or nuisance  
2 to the public; and will not allow an unreasonable  
3 circumvention of the requirements of the zoning  
4 regulations. Therefore Staff recommends approval.

5 I would like to enter the Staff Report into  
6 the Record as Exhibit D.

7 CHAIRMAN: Anyone here representing the  
8 applicant?

9 APPLICANT REP: Yes.

10 CHAIRMAN: Anyone here like to speak in  
11 opposition or have any questions or comments of the  
12 this application?

13 (NO RESPONSE)

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

16 (NO RESPONSE)

17 CHAIRMAN: Chair is ready for a motion.

18 MS. DIXON: Move to approve the variance  
19 because it will not adversely affect the public's  
20 health, safety or welfare; will not alter the  
21 essentially character of the general vicinity; will  
22 not cause a hazard or a nuisance to the public; and  
23 will not allow an unreasonable circumvention of the  
24 requirements of the zoning regulations.

25 MR. DYSINGER: Second.

1           CHAIRMAN: We have a motion and a second. Any  
2 comments or questions on the motion?

3           (NO RESPONSE)

4           CHAIRMAN: All in favor raise your right hand.

5           (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

6           CHAIRMAN: Motion carries unanimously.

7           Next item.

8           ITEM 7

9           2106 Old Henderson Road, zoned I-1  
10          Consider a Variance to reduce the required setback  
11          from 50' to 35' from the right-of-way line of an  
12          intersecting street for a vehicle access point.  
13          Reference: Zoning Ordinance, Article 13, Section  
14          13.22  
15          Applicant: David and Ann Leonard

16                 MR. WILLIAMS: Staff finds that there are no  
17          special circumstances with regards to this case.

18                 The circumstances have arisen because the  
19          applicant has developed the property in a way that is  
20          not conducive to the equipment that they now utilize,  
21          specifically trailers of various lengths.

22                 In October of 2000 a minor subdivision was  
23          approved to consolidate 2106 and 2100 Old Henderson  
24          Road. This consolidation was for the purpose of  
25          constructing a building addition on the portion of the  
26          property for which the variance is now being  
27          requested.

28                 The applicant's desire to widen an access

1 point in front of the new construction so that it will  
2 be easier to back vehicles pulling trailers onto the  
3 property and into a building addition.

4 Article 13 of the zoning ordinance prohibits  
5 the development of property in such a way that it  
6 requires the backing onto and off of a public  
7 right-of-way. It is clear that by approving the minor  
8 subdivision in 2000 the intent was not for the  
9 applicant to utilize the property in such a way that  
10 hinders traffic or causes safety concerns, or to  
11 operate in violation of the zoning ordinance.

12 It is our understanding that the applicants  
13 are currently backing into the site from the public  
14 right-of-way, which is in conflict with zoning  
15 ordinance requirements.

16 The variance should not be approved that would  
17 legalize an illegal activity by promoting the backing  
18 from a public right-of-way into the site and the  
19 current occurring backing from the public  
20 right-of-way.

21 Not approving this Variance would not cause a  
22 hardship on the applicant because the applicants have  
23 two options by which they can utilize the property  
24 without a Variance and without causing a traffic  
25 hazard.

1           The access point for which the applicants  
2           request the Variance can be widened to a total 30 feet  
3           without encroaching upon the intersection setback.

4           A second alternative is to utilize another  
5           access point on the property that could easily be  
6           widened since the curb is already open in excess of 60  
7           feet. This access point currently has 19 feet of  
8           paved drive. In both cases the applicants should  
9           enter the property before backing their vehicles in  
10          order to avoid a traffic safety hazard.

11          Strict application of the regulations would  
12          not create an unnecessary hardship because the  
13          applicants have chosen to develop the property without  
14          accommodation for the equipment they now employ.  
15          Expansion of a commercial use should not come at the  
16          expense of public safety.

17          The circumstances are from the applicant's  
18          direct actions, but they're not willful actions in  
19          violating the zoning ordinance.

20          Granting this Variance will adversely affect  
21          the public health, safety or welfare; will not alter  
22          the essential character of the general vicinity; will  
23          cause a hazard or a nuisance to the public; and will  
24          allow an unreasonable circumvention of the  
25          requirements of the zoning regulations.

1                   For these reason Staff recommends denial.

2                   CHAIRMAN:  Anyone here representing the  
3 applicant?

4                   MR. DUTY:  Yes.

5                   CHAIRMAN:  Anyone here like to speak in  
6 opposition on this application or comments or  
7 questions?

8                   (NO RESPONSE)

9                   CHAIRMAN:  Would the applicant like to address  
10 the board?

11                   MR. DUTY:  Yes, Mr. Chairman.

12                   MR. SILVERT:  State your name, please.

13                   MR. DUTY:  Russell Duty.

14                   MR. SILVERT:  Mr. Duty, I recognize the oath  
15 you took as an attorney.

16                   MR. DUTY:  Chairman Pedley, Members of the  
17 Board, what I'd like to say is I'm here on behalf of  
18 David and Ann Leonard.  They own Leonard's Steamway  
19 Cleaning which is located on 2106 Old Henderson Road.

20                   The situation that they have is they have a 14  
21 foot entryway to their property.  Unfortunately the  
22 way the entryway is, is that it is not directly in  
23 front of the garage doors that open the access of  
24 their building.  So as a result of that they have to  
25 pull in to the side.  They have to back up and pull



1 their trailers into the opening. So what they're  
2 actually attempting to do here somewhat limit their  
3 problems with access to the road.

4 What they're proposing is basically a 31 foot  
5 entryway that is actually in front of their garage  
6 doors which would allow them to pull off of Old  
7 Henderson Road directly into their building. It will  
8 also give them ability to back out and pull on their  
9 actual lot more so and get out of traffic.

10 Now, Mr. Williams had indicated that part of  
11 the problem here is that they have grown as a business  
12 and that they have increased the length of their  
13 trailers to haul their equipment. Basically some of  
14 their trailers that they haul are 16 feet long. If  
15 you add that to the length of their truck, it's almost  
16 impossible for them to pull off of Old Henderson Road  
17 and pull into their garage without backing up. You  
18 just can't do it.

19 Really what they're requesting is is something  
20 that would help the safety of the road. Actually  
21 right now when they pull over and pull into their lot  
22 on that 14 foot right-of-way or entryway, what they  
23 have to do is they have to pull over into oncoming  
24 traffic and come into the lot so it square up. So  
25 this 31 foot length in front of their building would

1 prevent them from doing that.

2 In all due respect to Mr. Williams, we  
3 disagree. We think that this would certainly limit  
4 the safety issues on Old Henderson Road. It's clearly  
5 within the character of the property.

6 We have put some pictures in the application.  
7 Basically they are showing businesses that are across  
8 the street. They actually have access right on both  
9 corners of this particular lot. One is Acme Heating &  
10 Cooling. Their accesses are right on the corner.

11 Where we actually propose the entryway to be  
12 is before you get to the yellow line on the curb. It  
13 says you can't park there any more. So there's still  
14 substantial distance between the actual curb at the  
15 intersection and where the entryway will be.

16 So in essence we're actually -- our proposal  
17 is that this would assist us in limiting the safety  
18 and danger, to helping the safety of the public and  
19 any danger to oncoming motors. That's really the  
20 reason for the Variance at this point.

21 CHAIRMAN: Any board members have any  
22 questions?

23 MR. DYSINGER: Mr. Chairman.

24 The Staff indicates that they think that you  
25 can basically get what you are wanting. You know,

1 expanding this access point to get your trucks out of  
2 traffic, which I think we can all agree is what we all  
3 should be shooting for here, without this Variance.  
4 Can you speak to that at all?

5 MR. DUTY: My clients have told me that that's  
6 not possible because without the Variance being the  
7 way that we are requesting it, then we do not have an  
8 entrance directly in front of the doors that open to  
9 the building. They're still going to be offset, which  
10 there in lies and creates the problem. That's the  
11 response to that, sir.

12 CHAIRMAN: Any other questions of the  
13 applicant?

14 MR. WARREN: Your trucks back into this  
15 building?

16 MR. DUTY: They will either back in or pull  
17 into. One way or the other they either have to back  
18 out or back into it depending on how they come in  
19 during the day. It's not the ideal situation. If  
20 there was room, it would be best that they could come  
21 out the back of the building, but there would not be  
22 access available back there to do that.

23 CHAIRMAN: Any further questions?

24 (NO RESPONSE)

25 CHAIRMAN: Does the Staff have further

1 comments?

2 (NO RESPONSE)

3 CHAIRMAN: Does the board members have any  
4 questions of the Staff?

5 (NO RESPONSE)

6 CHAIRMAN: If not further questions, Chair is  
7 ready for a motion.

8 MR. DYSINGER: Mr. Chairman, I don't have a  
9 question necessarily, but it seems we have a  
10 discrepancy and that it makes it difficult for a  
11 decision to be made in that these folks deserve to be  
12 able to conduct their business.

13 I guess for me the question has not been  
14 answered. They can do what we want them to do without  
15 the variance. You see what I'm saying. These folks  
16 have to be able to get these trucks out of traffic.  
17 They have to be able to do that. It hasn't been  
18 answered to me yet. The Staff's contention that they  
19 can do that without the variance. So if the Staff  
20 could speak to that, respond to that in some way.

21 CHAIRMAN: Mr. Noffsinger, would you address  
22 that?

23 MR. NOFFSINGER: The zoning ordinance does not  
24 allow the backing of vehicles in a commercial or  
25 nonresidential area. What they're doing right now, as

1 indicated in the application as stated by the  
2 applicant, is that they're backing to or from the  
3 public right-of-way and this simply is not allowed.  
4 They need to find a way to maneuver on that site  
5 without backing to or from the public right-of-way.  
6 If they are, then they're using it for, the use is  
7 clearly in violation of the zoning ordinance.

8 The applicant is asking for a Variance to  
9 construct this access point closer to the property  
10 corner on the adjoining street intersection than is  
11 allowed.

12 I think the point that Staff is trying to make  
13 is that you could -- they could still widen their  
14 existing driveway and be 50 feet off of the corner  
15 without the variance. Now, that's not going to put  
16 them directly in line with the doors on the building,  
17 which I don't know how critical that is, but by  
18 granting -- the Board has to be cautious in that by  
19 granting a variance that you're not encouraging an  
20 illegal type of maneuvering in the public right-of-way  
21 to occur.

22 You can still widen that driveway without the  
23 variance, but you still have the issue of backing to  
24 and from the public right-of-way which is an issue  
25 that would not involve this board unless you approve

1       this variance.  Then you're actually, you know,  
2       perhaps making it easier for that to occur.

3               Staff was suggesting, they have two driveways  
4       now, that perhaps about both of them or one of them be  
5       widen so that you can pull in one and then go out the  
6       other one.  How it works on that site, it is a tight  
7       site if you're going to be using it for trailer  
8       maneuvering.?

9               MR. DYSINGER:  Mr. Chairman.

10              The applicant, you contend that you cannot do  
11       it the way the Staff recommends and still be able to  
12       do business or it would be inconvenient?

13              MR. DUTY:  Well, it's not only inconvenient it  
14       becomes hazardous to us too.  The problem -- what  
15       we're trying to eliminate is the backing in on the  
16       street.  Best way to do that is to have the access  
17       directly in front of the doors.  That is the best way  
18       to do that.

19              Now, what I could also do, what we could  
20       propose, if the board would want to table this matter,  
21       we could bring in maybe better site pictures and let  
22       the board see that and then show the board through  
23       those pictures and how it's done and how that the  
24       actual opening would actually work and how we could  
25       eliminate the backing in and off of Old Henderson

1 Road.

2 MR. WARREN: It appears to me, Mr. Duty, from  
3 looking at the pictures that you have today, that even  
4 if we put the driveway or the access right directly in  
5 front of the door so that you can pull into it, you're  
6 still going to have to back out into the street which  
7 is more dangerous.

8 MR. DUTY: It's dangerous, yes. I don't know  
9 that it's more dangerous because now they're back out,  
10 back in and back out both ways. At least if -- the  
11 door is wide, fairly wide on the building. So if they  
12 can come in, they could maneuver hopefully onto their  
13 property and pull out actually without having to back  
14 the trailers out on the street. That's what we're  
15 trying to do. I don't think or see how that could be  
16 done when you've got a driveway that's offset to the  
17 doors.

18 That's the real issue. The doors give you  
19 access and ability to move those trailers in and out  
20 if you come in straight. When you're already coming  
21 in at an angle, you're limited as to what you can do  
22 at that point.

23 MR. PANTLE: Mr. Chairman, I move that we  
24 table this until we get some design, a diagram that's  
25 a little better to understand before we make our

1 decision.

2 CHAIRMAN: Are you making a motion for  
3 postponement?

4 MR. PANTLE: Yes.

5 MS. DIXON: Second.

6 CHAIRMAN: We have a motion for a postponement  
7 and a second. All in favor raise your right hand.

8 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

9 CHAIRMAN: It will be postponed until the next  
10 meeting.

11 ITEM 8

12 815 Triplett Street, zoned P-1  
13 Consider a Variance to waive the roadway buffer along  
14 Triplett Street to accommodate an existing parking  
15 area, sign, and required landscaping.  
16 Reference: Zoning Ordinance, Article 13, Section  
17 13.622 and 13.6221  
18 Applicant: Wendell Foster's Campus for Developmental  
19 Disabilities, Inc.

20 MR. WILLIAMS: Staff finds that there are no  
21 special circumstances with regards to the general  
22 vicinity of this application.

23 A development plan was approved for this  
24 property on May 7, 2008 that complies with all zoning  
25 ordinance requirements.

The development plan specifically shows that  
an existing sign, pavement and landscaping at the  
intersection of Triplett Street and what was formerly



1 East Seventh Street would be relocated out of the  
2 roadway buffer along Triplett Street.

3 With this variance the applicant seeks to  
4 avoid moving the sign, pavement and required  
5 landscaping around a vehicle use area out of the  
6 required roadway buffer. The buffer is necessary and  
7 should be maintained to ensure that future road  
8 widening is possible.

9 Previous development plans for this property  
10 have been approved that did not address this  
11 nonconformity with the zoning ordinance (1998, 2001  
12 and 2002).

13 It is typical to address zoning ordinance  
14 requirements to the extent of the alteration or  
15 expansion of the property. Previous development plans  
16 focused on expansion or alterations on other areas of  
17 the campus.

18 This development plan includes the  
19 installation of a sensory park in the vicinity of the  
20 Seventh Street closure and the conversion of the  
21 intersection of Seventh Street to a private entrance  
22 with expansion of the existing subject parking lot.

23 A portion of East Seventh Street was closed by  
24 the city and reverted to the applicants for the  
25 installation of this park. Therefore, this is the

1 appropriate time to bring this portion of the property  
2 into conformance with the zoning ordinance.

3 If the board chooses not to approve this  
4 Variance, the Staff does not believe it will cause a  
5 hardship on the applicant because they can meet all  
6 zoning requirements as drawn in the development plan.

7 Denial of the Variance would require the  
8 applicant to comply with the approved development plan  
9 which involves moving the aforementioned sign,  
10 removing some of the established parking and the  
11 required landscaping out of the public right-of-way.

12 There appears to be no justification for this  
13 Variance beyond the expense of the project. All site  
14 development requirements can be met as evidenced by  
15 the approved developed plan. Because of this it would  
16 constitute an unreasonable circumvention of the  
17 requirements of the zoning ordinance.

18 The Applicant's Actions: Are the  
19 circumstances from which relief is sought a result of  
20 the applicant's actions? We say, yes, but not  
21 intentional or willful.

22 The Staff finds that granting this Variance  
23 may adversely affect the public health, safety or  
24 welfare; it will not alter the essential character of  
25 the general vicinity, because it's been there for some

1 time; it may cause a hazard or a nuisance to the  
2 public; and it will allow an unreasonable  
3 circumvention of the requirements of the zoning  
4 regulations.

5 Therefore Staff recommends denial.

6 CHAIRMAN: Anyone here representing the  
7 applicant?

8 MR. KAMUF: Yes.

9 MR. SILVERT: State your name, please.

10 MR. KAMUF: Charles Kamuf.

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

12 MR. KAMUF: As stated I represent the Wendell  
13 Foster Center.

14 As Zack said, as part of the Sensory Park  
15 Addition to the Wendell Foster Center, it's expanding  
16 the parking lot across old Seventh Street right-of-way  
17 of Triplett Street for additional parking.

18 The Wendell Foster Center does not propose any  
19 new construction within the requirements of the  
20 roadway buffer that Zack talked about.

21 The purpose of the Variance is to allow all  
22 existing features, including existing pavements,  
23 landscaping and signage to remain as it exist today.  
24 There will be no new construction. We do not intend  
25 to build anything within the roadway buffer. We will

1 keep the roadway buffer as it exist.

2 Just for your help, I have three blowups that  
3 I would like to show you and pass around.

4 First of all this shows the roadway buffer  
5 that we're talking about. It's the area between the  
6 street and the sidewalk.

7 The picture that you see is not a statute.  
8 That is Terry Brownson.

9 The next one shows also -- these pictures, all  
10 of them are the roadway buffer which is existing in  
11 front of the Wendell Foster Center that is part, that  
12 is existing at the present time.

13 This one here shows the picture from the other  
14 direction.

15 This one here shows the signage. I don't  
16 think the signage is in violation.

17 I would like to pass those around, if I could,  
18 before we go any further.

19 I'll proceed while the photos are going  
20 around. The photos I think are critical because I'm  
21 going to compare them to something else in just a  
22 minute.

23 Now, the purpose of the roadway buffer, we  
24 have to get the whole perspective here. The purpose  
25 of the roadway buffer is to maintain a corridor for

1 future roadway acquisition for street improvements and  
2 widening of streets.

3 Wendell Foster Center agrees not to build any  
4 structure within the buffer area and to leave the  
5 buffer area as is conditioned.

6 If there is any additional right-of-way needed  
7 for the widening of Triplett Street, we agree to  
8 remove at our expense all of the signage and the edge  
9 of the parking lot as well as anything around the  
10 perimeter of the roadway.

11 The whole idea of the buffer area is to have  
12 sufficient land for the widening of the road. We're  
13 asking you to allow us to leave the existing  
14 landscaping. I think the better policy would be that  
15 if you have something that is existing in the  
16 right-of-way of a roadway that is to be in the future  
17 or if you want to build a temporary structure in the  
18 roadway area, that there's no necessity to do that  
19 until such a time as there is a widening of Triplett  
20 Street. As far as I know, there are no plans  
21 whatsoever, it's a one-way street, to widen Triplett  
22 Street.

23 In contra to what Zack says, we think that it  
24 would be an unreasonable hardship. I think Zack says  
25 it would adversely affect . I don't know how leaving

1 the existing structures or the landscaping would  
2 adversely affect. Certainly it would not affect  
3 traffic because it doesn't block anything because it's  
4 a one-way street.

5 In any event the hardship, we'll lose parking  
6 places that are really important to the construction  
7 and the improvement of the Sensory Park. It will  
8 increase the project which is sponsored or the money  
9 we get is 100 percent from donations. We don't have  
10 enough money right at the present time to finish the  
11 Sensory Park, but if we're required to do this, we  
12 have an estimate that we will produce. It will cost  
13 us over \$36,000. At least that much. We have to  
14 replace the landscaping. We have to saw cut and  
15 remove five feet of the pavement and curb. We have to  
16 replace the curb with some asphalt and replace the  
17 concrete curb. We have to create an additional grass  
18 strip along Triplett Street.

19 Now, our argument and our concern is this:  
20 Right next-door we have the hospital. Here are some  
21 pictures of the hospital and what we have there.

22 This picture here is right across the street.  
23 As you can see this one here, this is looking in a  
24 southerly direction. That's the hospital property.

25 That's at the railroad track. You go just a

1        few feet down. This is another picture of the roadway  
2        buffer area and the hospital.

3                If you turn left and go up Ninth Street, this  
4        is the roadway buffer that you see on Ninth Street of  
5        the hospital.

6                I would like introduce all of them.

7                The reason we think those pictures are  
8        important, and our concern is why are we required to  
9        be or come in compliance with the zoning ordinance  
10       when you did not require the hospital.

11               Just next-door right across the street on  
12       October 11, 2001, the Planning & Zoning Board approved  
13       a revised development plan just exactly in the area  
14       that we're talking about ours but only one block up  
15       for the hospital which included converting the old  
16       emergency room into a material handling facility.  
17       This work involved the reconstruction of the parking  
18       lot and deliver area south of the roadway on Triplett  
19       Street.

20               All existing improvements within the roadway  
21       buffer, as you can see on those pictures, were allowed  
22       to remain. That's what we're asking you to do. I  
23       have reviewed the plans, the development plan, and  
24       I've had an engineer to look at it. That is my  
25       contention as to looking at it that we are not asking

1 for any more than what was allowed in that case.

2 We agree that the hospital should not have to  
3 comply with the roadway buffer. The hospital should  
4 not have to remove landscaping and pavement until  
5 Triplett Street is widen. We do not think that  
6 Triplett Street will be widen. There are no plans for  
7 that at this time.

8 We disagree with the Staff's position on the  
9 removal of the landscaping and the pavement for the  
10 Wendell Foster Center.

11 In looking at the pictures that you see there,  
12 the perimeter landscaping extends to the back of the  
13 sidewalk, which is located in the street right-of-way.  
14 Not only did they allow the roadway buffer, but it's  
15 in the right-of-way of the street.

16 What we're asking you to do, and we have some  
17 of the board members here, and Terry Brownson, he will  
18 give a little talk on the necessity to have this and  
19 the hardship that will be created.

20 Understand, no new construction. I understand  
21 previously you all have denied other cases where a  
22 requested new construction. No new construction. We  
23 agree to remove anything within that right-of-way.  
24 We'll sign a contract with you or agree to it, put it  
25 in their minutes. That in the event that Triplett



1 Street is widen that we will agree to remove at our  
2 expense any and all of the signage landscaping and  
3 pavement. In other words, we think that we're  
4 entitled to the same consideration that the hospital  
5 was. This is basically our concern.

6 If you have questions of me, you can ask them.  
7 If not, I would like to turn part of it over to Terry  
8 Brownson who can give you a better idea of the  
9 hardship that will be caused.

10 CHAIRMAN: Any board members have any  
11 questions of Mr. Kamuf?

12 MR. NOFFSINGER: I have a comment. If I may,  
13 I have a comment.

14 CHAIRMAN: Okay.

15 MR. NOFFSINGER: Mr. Kamuf, if this variance  
16 is approved tonight, you will be required to amend  
17 your final development plan which has already been  
18 approved. So the language you have discussed here  
19 that are in the minutes and the record would also  
20 appear on that development plan. So that would be the  
21 contract, the minutes we have of the transcript and  
22 the revised development plan.

23 MR. KAMUF: I have no problem with that. We  
24 kind of got the wagon in front of the horse. We  
25 should have done this before we did the development

1 plan. We agree to that.

2 CHAIRMAN: Thank you, Mr. Kamuf.

3 MR. BROWNSON: I'm Terry Brownson, CEO of  
4 Wendell Foster Campus.

5 (TERRY BROWNSON SWORN BY ATTORNEY.)

6 MR. BROWNSON: I've got a blown-up map, and  
7 I'll spend just a second talking about that. The key  
8 point that I want to make tonight is -- and I do  
9 appreciate the position you guys are in as volunteers.

10 We're concerned as to how Wendell Foster's  
11 Campus justifies spending about \$36,000 extra, which  
12 were unexpected costs on this project on something  
13 that we don't see how it benefits anyone nor does it  
14 benefit the public in any way in the foreseeable  
15 future.

16 We've spent over two years raising the funds  
17 that we got to get two of the three phases of the  
18 project done. It takes a long time to raise \$36,000  
19 in charitable dollars. That's our concern. How do we  
20 justify doing that.

21 Now, let me explain kind of in more detail  
22 exactly what's happening here. Kind of what happened  
23 to us in the development plan, because quite honestly  
24 I overlooked that little, that add on until we came  
25 back later and the contractor said, we're going to

1 have to do an add on to this.

2 This is Triplett street. This is what used to  
3 be Seventh Street. If you remember kind of Murphy's  
4 was in here. It's a little bit offset. This has been  
5 closed.

6 Back behind the administration building and  
7 down Seventh Street over here is this new Sensory Park  
8 and garden. As we closed down Seventh Street and we  
9 needed to add some new parking. So we own this little  
10 corner lot here. Adding Seventh Street to that corner  
11 lot, then we're adding a new parking plot which is  
12 actually lower. I guess we've been kind of calling it  
13 a lower parking lot and a new parking lot or an upper  
14 parking lot.

15 The only modification we were seeing doing to  
16 that it used to be that you would come in and this  
17 would be the entrance to the parking lot. We felt  
18 that it would just make some sense to help the flow in  
19 the upper parking lot to just add a little entryway in  
20 there. I guess by doing that suddenly that says,  
21 well, they're modifying the whole parking area. There  
22 was no intention to modify that. If they want us to  
23 take that back out and just have one lower thing, we  
24 can do that.

25 If you look, the new parking lot, it kind of

1 ends here and that's the 60 foot buffer. If you look  
2 at what happens on -- I guess you probably can't see  
3 these little pink dotted lines here, but that's  
4 basically what they're asking us to do. Is come back  
5 and cut off this to back this out.

6 Well, you see in the process we lose about a  
7 dozen parking spots here. The expenses he mentioned,  
8 and one of the things he didn't mention is we've got  
9 underground utilities in through here and there's a  
10 big pole here and lighting. So that's another  
11 expense. We're going to have to pull that stuff out.  
12 Great big beautiful Blue Spruce up there we're  
13 concerned about losing in the process. So that's the  
14 added cost. We're saying, well, if there's really no  
15 plans here, what's the purpose of tearing out  
16 perfectly good landscaping, losing parking spots and  
17 paying, like I said, a charitable dollars for an add  
18 on that we really didn't expect and we probably should  
19 have seen.

20 As Charlie said, we would promise not to build  
21 anything that could be permanent. We'd be happy if  
22 there was plans along Triplett Street to go along with  
23 that. We just can't see the justification at this  
24 point. Therefore we ask for the variance.

25 Anyone have any questions?

1           CHAIRMAN: Any board members have any  
2 questions?

3           (NO RESPONSE)

4           CHAIRMAN: Thank you very much.

5           Let's see if we have any opposition or anybody  
6 have any comments.

7           MR. KAMUF: Mr. Chairman, may I make one  
8 thing. Mr. Bryant told me I may not have made this  
9 clear.

10           All new construction complied with the roadway  
11 buffer. It's just the existing that does not.

12           CHAIRMAN: Anyone here that would like to  
13 speak in opposition or have any questions or comments  
14 on this item?

15           (NO RESPONSE)

16           CHAIRMAN: Any board members have any  
17 questions?

18           MR. DYSINGER: Mr. Chairman, I had another  
19 question for Mr. Kamuf.

20           Regarding how long has this area been like it  
21 is? You said it wasn't changed in any way when you  
22 did the new stuff. How long has it been like this?

23           MR. BROWNSON: The lot was built in 1986. The  
24 upper lot, when the Green Therapy Pavilion was built,  
25 all of that was put in in 1986.

1 MR. DYSINGER: And the shrubbery?

2 MR. BROWNSON: It's my understanding that all  
3 of that along there was put in at that time.

4 MR. DYSINGER: Thank you, sir.

5 CHAIRMAN: Mr. Noffsinger.

6 MR. NOFFSINGER: I have a few.

7 Mr. Brownson, I have a few questions. I just  
8 want to make sure that we're clear on that parking lot  
9 and what you're actually losing.

10 You're losing about seven feet going from  
11 Triplett Street say going toward the parking lot. So  
12 you're losing about seven feet. In your development  
13 plan, you still show the parking spaces running  
14 perpendicular to Triplett Street as you're showing  
15 here. You're not losing those spaces. What I'm  
16 wondering is by removing seven feet of pavement and  
17 moving those bushes back, how many parking spaces are  
18 you really losing? Because you're not losing those  
19 spaces. You're just moving them seven feet back.

20 MR. BROWNSON: Yes. We're having to move that  
21 back and I probably should have shown it. There's  
22 parking spaces in here and there's parking spaces in  
23 here. We could lose as few as four spaces.

24 The other piece, which we didn't realize, just  
25 in moving that back that much was that, we also had to

1       move back all the landscaping and all of that other  
2       kind of stuff, the way I read the ordinance. That the  
3       ordinance includes not only the parking lot, but any  
4       landscaping associated therewith. So it all has to be  
5       moved back.

6               MR. NOFFSINGER: Any required landscaping.  
7       It's not that you would have to necessarily remove  
8       that, but required landscaping is suppose to be out of  
9       the roadway buffer. If you left it, you would have to  
10      plant new. I'm not saying that that's what you would  
11      do.

12             It sounds like that \$36,000 to cut that  
13      pavement and plant some new bushes is quite excessive.  
14      I don't know what detail you're going to have to go  
15      through in terms of relocating utilities or why you  
16      would even have to do that.

17             MR. BROWNSON: There's a hole right there that  
18      obviously will have to be taken out if that moves  
19      back. I'm just going with what the contractor said we  
20      would have to do in terms of cutting and repaving and  
21      recurbing and all of those kind of things.

22             MR. NOFFSINGER: Mr. Chairman, I think we need  
23      to hear from Zack Williams. A statement that the  
24      hospital plans did not show or we did not require the  
25      hospital to meet the roadway buffer. I think Mr.

1 Williams might have some information contrary to that.

2 CHAIRMAN: Would you step up, Mr. Williams.

3 MR. WILLIAMS: There was no agreement made  
4 with the hospital with regards to leaving their  
5 landscaping. Any landscaping that's in the roadway  
6 buffer was done without our intention or knowledge, as  
7 I discussed before, areas of development in a full  
8 project or dealt with at the time. If there was  
9 landscaping there that was overlooked, it was not  
10 intentional.

11 MR. NOFFSINGER: I think too that we did  
12 review those hospital plans and it clearly indicates  
13 that the hospital was required to meet the roadway  
14 buffer on all of their construction. So it's not that  
15 we let the hospital out of anything. Their plans  
16 clearly show that they are to meet the roadway buffer.  
17 Now, I don't know in terms of the actual inspection,  
18 as to whether or not the inspectors missed the proper  
19 location of those plannings or if we're still holding  
20 surety to guarantee that they're going to be relocated  
21 or what the case is. We did make sure that the  
22 hospital, their plans showed that the roadway buffer  
23 would be respected.

24 MR. BROWNSON: I do have more detail on the  
25 cost here, if they would like to hear the cost.



1 MR. DYSINGER: I would, Mr. Chairman.

2 MR. BROWNSON: They were saying site  
3 demolition in that area would be 5,500. Tree  
4 protection, 500. Erosion control, 400. Earth work  
5 around there 1,145. New asphalt pavement, 3,030. New  
6 concrete curbs, there's currently concrete curbs all  
7 around that area, 6,000. Landscaping, 2,000. Then  
8 other costs in terms of moving light poles and all of  
9 this, and this may be where they have the swish in  
10 there, but they had 17,376 in there for the utilities  
11 work and moving light poles and all that kind of stuff  
12 around. So that came up to 35,951.

13 MR. DYSINGER: Thank you.

14 CHAIRMAN: Thank you.

15 Mr. Kamuf, I notice you jumping around. You  
16 have some more?

17 MR. KAMUF: I'm nervous watching him. I just  
18 would like to say this: I did review the plans, the  
19 preliminary plan. They did require the hospital on  
20 any new construction to comply. On nonconforming  
21 landscaping they weren't required to remove according  
22 to the preliminary development plan. The final -- I  
23 don't know. One of the development plans that I read.

24 MR. NOFFSINGER: We've got them all the way  
25 around there, Charlie. Even the existing and the new.

1 We did not let the hospital out of any of that.

2 I will not say that they're in compliance.  
3 They're probably in violation, but their plan show  
4 where the materials are being located. We'll have to  
5 address that with the hospital.

6 MR. KAMUF: I don't know how to read the plans  
7 anyhow. I had somebody else to look at them.

8 MR. NOFFSINGER: Charlie, when I drove by  
9 there, I anticipated what you would bring to the table  
10 tonight. I saw exactly what you're talking about. I  
11 reviewed those plans to make sure we didn't miss  
12 something in the plan review. We didn't miss it in  
13 the plan review. Something is not right in the field.

14 CHAIRMAN: Mr. Noffsinger, are you finished?

15 MR. NOFFSINGER: I think so.

16 CHAIRMAN: Staff, you have anything else?

17 MR. WILLIAMS: No, I do not.

18 CHAIRMAN: Any board members have any  
19 questions?

20 (NO RESPONSE).

21 CHAIRMAN: Chair is ready for a motion.

22 MS. MASON: Mr. Chairman, I move to grant this  
23 Variance. In my opinion, I think denying this  
24 Variance would deprive the applicant of reasonable use  
25 of the property and would create a hardship as the

1 applicant will lose some parking spaces and there  
2 would be an increase in the cost of the project which  
3 is funded by donations.

4 My findings of fact it will not adversely  
5 affect the public health, safety or welfare. As the  
6 features in the buffer area will remain as they exist.  
7 It will not alter the essential character of the  
8 vicinity, as the appearance will not be changed and it  
9 will retain it's well-kept appearance that I saw when  
10 I drove by today. It will not cause a hazard or a  
11 nuisance to the public in that it will not change the  
12 general appearance of the buffer and the features as  
13 they will still remain the same. It will not allow an  
14 unreasonable circumventions of the requirement of the  
15 zoning ordinance, as new construction will not be  
16 allowed. It's only the existing will stay there. The  
17 buffer area will remain the same as it exist today.

18 I want to do the following conditions: 1)  
19 Leave the roadway buffer as it exist today and do not  
20 build any new structures. 2) If additional  
21 right-of-way is needed for roadway purpose, then the  
22 signage will need to be removed, the parking lot edge  
23 will need to be moved back, and the perimeter  
24 landscaping will need to be moved back away from the  
25 buffer area. 3) Then also amend a final development

1 plan that we discussed.

2 CHAIRMAN: Is there a second?

3 MR. DYSINGER: Mr. Chairman, if possible, I  
4 would like to suggest an amendment to your second  
5 condition. It would be at the cost of the applicant.

6 MS. MASON: Okay. That's fine.

7 MR. DYSINGER: In that case a second, Mr.  
8 Chairman.

9 CHAIRMAN: We have a motion and a second. Any  
10 question or comments on the motion?

11 (NO RESPONSE)

12 CHAIRMAN: All in favor raise your right hand.

13 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

14 CHAIRMAN: Motion carries unanimously.

15 Next item.

16 ITEM 9

17 2853 Turfway Drive, zoned R-1C  
18 Consider a Variance to increase the allowed height of  
19 a fence in a residential street front-yard from 3' to  
20 6'.

19 Reference: Zoning Ordinance, Article 3,  
20 Section 3-7(g)(2)

20 Applicant: Stephen and Donna Conrad

21 MR. WILLIAMS: Special Circumstance: The  
22 Staff finds that there are special circumstances on  
23 the property.

24 This subject property has street frontage in  
25 the back of the property. The zoning ordinance limits

1 the height of a fence in a street yard to three feet.  
2 A three foot fence does not provide the privacy that  
3 homeowners expect in a rear yard. Additionally, the  
4 applicants have large dogs that they would like to  
5 keep in the back yard. A three foot fence is  
6 insufficient to restrain these animals. Several other  
7 properties in The Downs subdivision have similar  
8 circumstances and have been granted variances.  
9 Granting of this variance will not be out of character  
10 for the vicinity.

11 If you choose not to grant the Variance, it  
12 will cause a hardship being that the applicants would  
13 not be able to keep their dogs outside; would not be  
14 able to enjoy the privacy that is a reasonable  
15 expectation in a back yard.

16 The applicants have not done anything  
17 willfully to violate the zoning ordinance.

18 The Staff finds in granting this Variance will  
19 not adversely affect the public health, safety or  
20 welfare; will not alter the essential character of the  
21 general vicinity; will not cause a hazard or a  
22 nuisance to the public; and will not allow an  
23 unreasonable circumvention of the requirements of the  
24 zoning regulations.

25 Therefore, the Staff recommends approval.

1 I would like to enter the Staff Report into  
2 the record as Exhibit G.

3 CHAIRMAN: Anyone here representing the  
4 applicant?

5 APPLICANT REP: Yes.

6 CHAIRMAN: Anyone here have any questions or  
7 comments of the applicant?

8 (NO RESPONSE)

9 CHAIRMAN: Any board members have any  
10 questions?

11 MR. WARREN: This is a case where the back  
12 yard is actually up against the street? I was getting  
13 kind of turned around there.

14 MR. WILLIAMS: Yes. They have a street in the  
15 front and the rear yard.

16 MR. WARREN: Is this the only house on this  
17 street that's in this situation?

18 MR. WILLIAMS: There are several along this  
19 area of the subdivision that have similar  
20 circumstances. There are some neighbors that have  
21 fences. I don't know if it's adjacent, immediately  
22 adjacent, but down that road there are.

23 CHAIRMAN: Any other questions?

24 (NO RESPONSE).

25 CHAIRMAN: If not Chair is ready for a motion.

1           MR. DYSINGER: Mr. Chairman, move to approve  
2 the Variance request given the findings that it will  
3 not adversely affect the public health, safety or  
4 welfare, and it will not alter the essential character  
5 of the general vicinity.

6           MR. WARREN: I'll second that.

7           CHAIRMAN: We have a motion and a second. Any  
8 questions or comments on the motion?

9           (NO RESPONSE)

10          CHAIRMAN: All in favor raise your right hand.

11          (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

12          CHAIRMAN: Motion carries unanimously.

13          Next item.

14          ITEM 10

15          4439 Wilderness Trace, zoned R-1B  
16          Consider a Variance to reduce the required building  
17          setback from 75' to 60' from the centerline of  
18          Fairview Drive.

19          Reference: Zoning Ordinance, Article 8,  
20          Section 8.5.6(c)

21          Applicant: Joseph and Jo Anne Mason

22          MR. NOFFSINGER: Mr. Chairman, I understand  
23          that there is an issue regarding the deed of  
24          dedication on this property. That perhaps there's a  
25          deed restriction, a valid deed restriction that could  
26          prohibit the Board of Adjustment from granting this  
27          Variance.

28          The landowner is represented by counsel and

1       they are working to amend the deed of dedication;  
2       however, there's at least one family's signature that  
3       needs to be obtained, possibly two or three. So there  
4       needs to be some discussion on that prior to moving  
5       forward with this item.

6               CHAIRMAN: Counselor, you have any suggestions  
7       on the procedure in this?

8               MR. SILVERT: Procedurally they could choose  
9       to move forward. The applicant could choose to move  
10       forward. The opinion of counsel would be that we  
11       wouldn't at this point have the legal authority to  
12       override a deed restriction that hasn't otherwise been  
13       lifted.

14              If the applicant were to postpone rather than  
15       attempt something that may or may not be approved  
16       tonight, and they wouldn't incur another application  
17       fee certainly. We'd leave that to the applicant.

18              I've spoken to counsel and that would be my  
19       recommendation. It's just a 30 day delay while they  
20       try to remove this restriction, which I understand  
21       they're very well along in the process of doing.

22              CHAIRMAN: Could this be done subject to  
23       removal?

24              MR. SILVERT: I don't think that you'd have  
25       the authority to do that at this point.



1           CHAIRMAN: So you recommend postponement?

2           MR. SILVERT: That would be my recommendation.  
3 If the applicant wants to move forward, I think it's  
4 in the best interest of the applicant to postpone.  
5 I'm not their counsel.

6           CHAIRMAN: Is the applicant present?

7           MR. TAYLOR: Yes.

8           MR. SILVERT: State your name, please.

9           MR. TAYLOR: My name is Septtimous Taylor, II.  
10 I am here on behalf of the applicants.

11          MR. SILVERT: Mr. Taylor, I recognize the oath  
12 you took as an attorney.

13          MR. TAYLOR: Thank you.

14          Based upon legal counsel for the board's  
15 suggestion, we would be more than willing to postpone  
16 this to the August meeting. As it stands, we have  
17 prepared a consent to the variance and waiver of  
18 restrictions which we have obtained 19 of the 22 lots  
19 signatures on consenting to that. The remaining three  
20 have been on vacation. We would like to have an  
21 opportunity to get those signatures and have them  
22 waive any restrictions or right to enforce those  
23 restrictions from there and then we will seek this  
24 again in August.

25          CHAIRMAN: So you're requesting postponement?

1 MR. TAYLOR: Yes.

2 MR. WARREN: Motion to postpone the item.

3 MR. DYSINGER: Second.

4 CHAIRMAN: We have a motion and a second to  
5 postpone the item. All in favor raise your right  
6 hand.

7 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

8 CHAIRMAN: Motion carries unanimously.

9

10 ADMINISTRATIVE APPEAL

11 ITEM 11

12 7400 Highway 2830, zoned I-2  
13 Consider an Administrative Appeal of the Zoning  
14 Administrator's interpretation that there is  
15 insufficient evidence to determine that the roadway  
16 crossing over Pup Creek is legally nonconforming.  
17 Reference: Zoning Ordinance, Article 7, Section 7.35  
18 Applicant: Arlin Embry

19 MR. NOFFSINGER: Mr. Chairman, I think at this  
20 time you need to hear from the Zoning Administrator,  
21 Mr. Jim Mischel, as to why this is before you.

22 MR. SILVERT: State your name, please.

23 MR. MISCHEL: Jim Mischel.

24 (JIM MISCHEL SWORN BY ATTORNEY.)

25 MR. MISCHEL: I'll make this short.

Some time ago Mr. Riney came in, and he  
represents Mr. Embry, from HRG, site plan to develop  
an industrial building at this property. Pretty much

1 everything has been worked out, but at this site we  
2 noticed there's a bridge over the creek there. Right  
3 now it just services the farmland.

4 Our concerns lie that this property that's  
5 being farmed is zoned industrial. One time in the  
6 future, if this turns in to an industrial site too,  
7 that they use this road.

8 We're also charged with regulating the  
9 floodplain regulations for Owensboro and Daviess  
10 County. We cannot find any records where this bridge  
11 has been permitted through FEMA, through the Division  
12 of Water, State of Kentucky. We don't have any  
13 records of it.

14 At the time they didn't have any records.  
15 They have some other evidence, but seeing that  
16 Owensboro/Daviess County has adopted floodplain  
17 regulations in 1980. They were updated in 1997 and  
18 they're about to be done again in 2007 here, September  
19 or October.

20 We thought it would be the best interest if  
21 they through Administrative Appeal coming from this  
22 board and showing evidence so we have some record of  
23 it so in the future if this does development more  
24 industrial that we have their testimony on the record  
25 that this bridge was there prior to the 1980

1 floodplain maps, which would make it kind of  
2 grandfathered in.

3 We have to answer to FEMA and the Division of  
4 Water when these things occur.

5 CHAIRMAN: Any board members have any  
6 questions of Mr. Mischel?

7 (NO RESPONSE)

8 CHAIRMAN: Anyone here representing the  
9 applicant?

10 MR. SILVERT: State your name, please.

11 MR. KAMUF: Charles Kamuf.

12 MR. SILVERT: You're sworn.

13 MR. KAMUF: I represent Arlin Embry.

14 This case, this appeal concerns whether my  
15 client has to get a permit to construct a building on  
16 his own property without getting permission from the  
17 adjoining landowner or from the Board of Adjustment.  
18 The Staff has a couple of issues, as Jim pointed.

19 The one issue is whether the bridge over the  
20 adjoining property connecting the subject property is  
21 adequate for future development.

22 You understand, whether this bridge is  
23 adequate for the future development of the adjoining  
24 property.

25 Our position on that is that we have no

1 control over the bridge or the adjoining property. My  
2 client has no right to tell his neighbor how to use  
3 this property.

4 We say that the bridge crossing, that's the  
5 one that's in question, and the future development of  
6 the adjoining property is irrelevant when we're asking  
7 only to build a building on our tract. It's our  
8 position that if you want to put a restriction on the  
9 future development of the adjoining property, that  
10 it's a separate issue for a later date and it does not  
11 concern the issuing of a building permit on the  
12 subject property.

13 Secondly, we say that the issue of whether the  
14 bridge is inadequate, that it is grandfathered in.  
15 That it's nonconforming and it was there prior to the  
16 flood regulations of 1980.

17 Let me explain to you. I think it's a little  
18 difficult, but I think this will do it. It will help  
19 hopefully.

20 This area that you see along here is Old  
21 Highway 60. It has a different name, but you'll  
22 remember it as Old Highway 60. This property, it's up  
23 there near where there's a crossing that goes over to  
24 Hillbilly's and that other area. That's on the other  
25 side of the road. I'm just trying to direct your idea

1 as to where we are.

2 Mr. Embry paid a lot of money for this  
3 property because it was zoned heavy industrial. This  
4 property is 84 acres. This is 18 acres. This  
5 property here is owned by a different individual than  
6 owns this property. What brought it into effect is  
7 that my client goes, and where you see the green area,  
8 he tries to build a building. No more. No less. He  
9 wants to build a building on his 18 acre tract.

10 There is an easement that I have put in pink.  
11 It's of dedication. It's in the deeds. There's no  
12 question about this. The pink area is a roadway that  
13 goes over to the 84 acre tract. Right there where you  
14 see the X is a bridge.

15 The Staff required us to get approval from the  
16 Division of Water. I think at time that we had had  
17 this, Jim, you hadn't gotten that back, but you have  
18 the permit from the Division of Water, correct? Or I  
19 have it.

20 MR. MISCHEL: We do have a construction permit  
21 from the Division of Water to construct that building.

22 MR. KAMUF: Only for the construction of the  
23 building.

24 MR. MISCHEL: That's right.

25 MR. KAMUF: When we applied for this

1 construction permit for the building, we talked to  
2 Kerry Johnson, who is a FEMA coordinator for the  
3 Division of Water, and he could not understand why the  
4 bridge crossing was an issue. He could not understand  
5 why the bridge crossing would prevent the issue of a  
6 permit.

7 Now, this property was all zoned heavy  
8 industrial. This property is zoned heavy industrial.  
9 We paid a lot of money for the property. So what our  
10 position is that whenever -- along with Zac, I went  
11 over and looked at the old zoning case where it was  
12 rezoned. There are no restrictions in the rezoning  
13 case that would prevent the building of a building on  
14 the subject property.

15 The record, when it was zoned, if there were  
16 restrictions that would prevent the building of this  
17 building should have been in the zoning case. You  
18 don't raise that particular issue now after we paid  
19 the money.

20 The issue on the rezoning, and I bring it  
21 back. You have rezoned something for heavy  
22 industrial, but if we can't build a building on it,  
23 it's useless and we can't use it for what it was zoned  
24 for.

25 Now, the next issue is nonconforming. I have

1       some photos. Took some small ones and had them blown  
2       up.

3                   This is the bridge in question. You'll hear  
4       Mr. Mercer and some of them talk about this bridge.  
5       This is what it looks like for your convenience. It's  
6       a one horse bridge, but it's been there prior to 1969.  
7       We have the affidavits of Mr. Gaddis of record. Mr.  
8       Mercer will tell that you in 1969 he owned Daviess  
9       County Sand & Gravel and he hauled sand from this 84  
10      acre tract across this bridge up to the Falls of the  
11      Rough to build a dam up there.

12                   We have another one. Jim Riney has gone back  
13      to a 1972 aerial photo of the area. We've shown it to  
14      Jim. Jim can't see it on there, but Jim Riney says he  
15      can see it on there. We can see that back in 1972  
16      that this roadway was there that Lindy Mercer is  
17      talking about.

18                   So it's our further contention that the  
19      denying of a building permit because the bridge  
20      crossing referred to above is the center of attention  
21      that is a arbitrary situation.

22                   I have found a case out of Lexington, Kentucky  
23      which states, and I'll show this to Madison. It  
24      states this, in other words, it was a bridge case. It  
25      said that the requirement of a planning and zoning



1 board to require a bridge in a certain situation that  
2 it was arbitrary, that it was in violation of the  
3 federal and state constitution. Here is what it says,  
4 "While local governments barely have the funds for  
5 street maintenance, much less construction, they  
6 nevertheless may not put unreasonable burdens on  
7 development as a condition precedence to the approval  
8 of a subdivision."

9           So it's our contention that we have here today  
10 that this is a little far-stretched. Where you say, I  
11 want to build a building on my property. The board  
12 says, you can't build the building on your property  
13 until you get your neighbor to say that when he  
14 develops the 84 acre tract that he will abide by all  
15 floodplain regulations or that we have to get approval  
16 from the Board of Adjustment. I think that is pretty  
17 far-fetched.

18           In any event, we have witnesses here who will  
19 be inline with what Jim Mischel said. I think when  
20 you get through there's not going to be any evidence  
21 to disprove it.

22           We have the Affidavit of Mr. Gaddis. We'll  
23 have Jim Riney testifying from the '72 map. We'll  
24 have Lindy Mercer who in 1969 drove trucks across that  
25 hauling sand up to the Falls of the Rough.

1 I've got a copy of this case if you want to  
2 see it, Madison. You probably don't.

3 MR. SILVERT: Mr. Kamuf, what was the year on  
4 that case?

5 MR. KAMUF: 1993.

6 MR. SILVERT: I assume you've looked at that  
7 case and it's current?

8 MR. KAMUF: Not really. I remember when it  
9 came out. That's been years ago.

10 Here is the bridge that's in question of the  
11 controversy.

12 MR. MISCHER: I've just got a couple of  
13 things.

14 I'm not here to dispute any of their  
15 affidavits or any evidence they have to show when the  
16 bridge was constructed or anything. How we got to  
17 this point, there was a couple of items. That this  
18 bridge is not on the property from the plat I saw that  
19 Jim Riney turned in. I thought the property line was  
20 down the center of the ditch which makes that bridge  
21 on both pieces of the property.

22 Then the rezoning, the reason was probably not  
23 brought up, when I saw the site plan, I didn't see the  
24 bridge. Mr. Riney didn't show the bridge on that site  
25 plan.

1           The only thing that alerted me was that  
2           easement. I said, why is there an easement going  
3           across? That's what brought all of this on.

4           As far as Kerry Johnson, the time I talked to  
5           Kerry, he said if -- Kerry Johnson wears two hats. He  
6           represents FEMA and he represents the Division of  
7           Water. So he kind of has two jobs there.

8           He indicated if it was an old farm to service  
9           that farm, hey, don't worry about it. If there's  
10          potential for industrial development, maybe you ought  
11          to get something on the plat. We went down this road  
12          and we didn't get too far. We kind of backed up.  
13          That's what brought us here today. That was just a  
14          few comments I had.

15          MR. WARREN: I have a question of Mr. Mischel.

16          After listening to what Mr. Kamuf has said,  
17          what does that have to do with him building a building  
18          on this property?

19          MR. MISCHEL: Well, at one time that was one  
20          piece of property. It's been divided up. That bridge  
21          is on both pieces of property.

22          MR. WARREN: But what does the bridge have to  
23          do with building the building on this piece of  
24          property? Is it going to hinder where the -- there's  
25          a right-of-way, right?

1 MR. KAMUF: There's an easement.

2 MR. WARREN: Is building going right in the  
3 middle of the easement?

4 MR. MISCHEL: No. It's off the easement.

5 MR. WARREN: I'm just confused as why this is  
6 even before this board.

7 MR. NOFFSINGER: Jim, I think we're all  
8 confused. I think you need to talk about the site  
9 plan you saw. Was there some gravel? Why we got to  
10 this point. Why this bridge even comes to play here.

11 MR. MISCHEL: Because of that access easement.  
12 That platted easement.

13 MR. NOFFSINGER: That was shown on their site  
14 plan?

15 MR. MISCHEL: Yes, it's shown. That's what  
16 brought all of this up.

17 MR. WARREN: Does that easement have anything  
18 to do with where this building is going?

19 MR. MISCHEL: By us representing and enforcing  
20 the floodplain regulations, if we approve this, and I  
21 know there's a bridge there, it goes across the creek  
22 and there's no permit for it, where does that put  
23 Daviess County as far as enforcement. We're suppose  
24 to make sure that these permits are acquired for any  
25 type of bridge or anything like that. By proving it,

1 I can't back up and say, I wish hadn't asked that  
2 question. There is a bridge across there.

3 MR. WARREN: I still don't understand. So  
4 what the bridge is there. So what. They've gotten  
5 their permits, right, from FEMA? Are they building in  
6 a floodplain?

7 MR. MISCHEL: Yes. They have a permit to  
8 construct that building, but it does not address this  
9 bridge or anything.

10 MS. MASON: So you're saying there was never a  
11 permit issued for this bridge?

12 MR. MISCHEL: We couldn't find one.

13 MS. MASON: But the sworn affidavits in here  
14 say that it's been in existence since, one of them is  
15 59 years or something.

16 MR. MISCHEL: That's right.

17 MS. MASON: What we're trying to prove tonight  
18 is to whether that bridge had a permit or not?

19 MR. MISCHEL: Or if it was constructed prior  
20 to. If it was constructed prior to 1980's, it would  
21 be what we would call legally nonconforming,  
22 grandfathered or whatever.

23 MS. MASON: They cannot build this building  
24 without us determining that tonight because that  
25 bridge is access to the property?

1           MR. MISCHEL: No. The property on the other  
2 side, that's how they get their access.

3           MR. NOFFSINGER: We have to review a site plan  
4 in conjunction with the issuance of a building permit.  
5 This access easement was shown on the site plan. When  
6 we got to doing the research, we found that there is a  
7 major stream crossing there and there was a bridge.  
8 We thought based upon what was submitted to us that  
9 the bridge was on this property. We were inquiring as  
10 to when the bridge crossing went in because we're  
11 required by FEMA to do so. If we miss it and they  
12 find out about it, then it puts our community at  
13 jeopardy. We're trying to build that record to where  
14 there's enough evidence to show that, hey, this was  
15 pre-existing and we weren't overlooking anything. We  
16 made our best determination in terms of what was out  
17 there. We just didn't overlook it.

18           So that's what we're doing tonight is building  
19 that record with the evidence that Mr. Kamuf is going  
20 to give you.

21           MR. KAMUF: I'll make it real easy for you.

22           I've got two witnesses to put on. There won't  
23 be anything against it. I think that makes it  
24 uncontroverted. This bridge was there for years prior  
25 to the adoption of the floodplain regulation.

1           MR. PANTLE: Mr. Chairman, let me ask one  
2 question to the Staff.

3           To be grandfathered in before an ordinance,  
4 how old does it have to be?

5           MR. NOFFSINGER: It would to, I believe,  
6 predated the floodplain ordinance in 1980.

7           MR. MISCHEL: Yes. 1980.

8           MR. PANTLE: I can testify as a board member  
9 it was there before then because it's in my community.

10          MR. DYSINGER: I have a quick question.

11          Half of the bridge is on the applicant's  
12 property and the other half belongs to somebody else,  
13 the neighbor?

14          MR. MISCHEL: At one time I think Mr. Charlie  
15 Gaddis.

16          MR. KAMUF: That's right. Judd Gaddis. Judd  
17 Gaddis owned the whole thing. Sold part of it to --  
18 bought it at an auction. He bought 18 acres and Mr.  
19 Foster owns the other tract, the 84 acres.

20          If you just want something in the record, I  
21 think this is going to be enough.

22          MR. SILVERT: State your name, please.

23          MR. MERCER: Lindy Mercer.

24          (LINDY MERCER SWORN BY ATTORNEY.)

25          MR. MERCER: Now, I have crossed that bridge,

1 but they were single axle trucks and they were like  
2 weighted. I wouldn't attempt to cross it now with the  
3 trucks they have today. I've been out of business  
4 since '95.

5 The biggest problem you've got, in my opinion,  
6 is that planning and zoning made a mistake. They  
7 should have never zoned that property heavy  
8 industrial. Especially the one on the other side of  
9 Pub Creek. The problem is Pub Creek is controlled by  
10 the Corp of Engineers. You don't touch any part of  
11 Pub Creek or the Ohio River, bank, trees or anything  
12 else until you get a permit.

13 The bridge started out, like Autie said, it  
14 was one farm on both sides of the creek and they built  
15 a bridge. It's been remodeled several times.

16 MR. DYSINGER: Sir, did you say when the  
17 bridge to the best of your knowledge was originally  
18 built?

19 MR. MERCER: I would say Halloween this year  
20 to my knowledge it's been there 60 years because  
21 that's how long I've been there, and Autie has been  
22 longer than I have.

23 MR. DYSINGER: Thank you very much, sir.

24 MR. MERCER: The bridge that I'm talking about  
25 now was just a farm bridge going from one farm another



1 across Pub Creek. The truck that I took over that  
2 creek at that time I wouldn't take the trucks that's  
3 running today over that same bridge. It's been  
4 remodeled several times. I don't know the years on  
5 that.

6 I do know that planning and zoning, in my  
7 opinion, just made a mistake. They should have never  
8 zoned that heavy industrial. I'm talking about both  
9 sides.

10 I'm going to tell them to my knowledge.

11 You've got one farm and that farm over there  
12 has got to come across this farm and you've got to  
13 build a bridge to get over there. I think planning  
14 and zoning ought to just give Mr. Embry all his money  
15 back and get that thing back to agricultural like it  
16 ought to be.

17 Mr. Kamuf had me come down here, but I'm going  
18 to tell you the truth. If I was Mr. Embry, I would  
19 sue the planning and zoning for malpractice. Not this  
20 planning and zoning. The planning and zoning that  
21 zoned it and include them in it because you don't do  
22 things like that. You can't hide a mistake by turning  
23 something down. You've got a problem. You've either  
24 got to turn it down. You've got to prove it or you've  
25 got to go to court. That's the way I look at it.

1           CHAIRMAN: Mr. Mercer, thank you for your  
2           comments.

3           MR. PANTLE: Mr. Chairman, I don't know  
4           whether I ought to disqualify myself, but in the '70s  
5           I hunted along that property back there when Gaddis  
6           had it and there was a bridge there at that time.

7           MR. SILVERT: Mr. Pantle, you're allowed  
8           privilege of relying on your own experience and  
9           information.

10          MR. PANTLE: Yes, sir. If you think I should  
11          withdraw from voting, I'll do so.

12          MR. SILVERT: No, sir, I do not.

13          CHAIRMAN: The way I understand it, this  
14          board's job is to determine if it is in fact a  
15          conforming bridge. If it is a nonconforming bridge,  
16          we need to make that findings. If we can make that  
17          findings, we've done our job.

18          If the board members have any more questions  
19          of Mr. Kamuf, Mr. Mercer, Jim Riney, Staff, Mr.  
20          Noffsinger.

21          MR. NOFFSINGER: No, sir.

22          CHAIRMAN: Our job is to find, make findings  
23          whether it's nonconforming.

24          With that chair is ready for a motion.

25          MR. DYSINGER: Mr. Chairman, given the

1 findings that the denial would be an unreasonable  
2 burden on the property owner, and further that the  
3 bridge referenced in the application precedes the  
4 zoning in the floodplain ordinance, I move that we  
5 find for the applicant.

6 CHAIRMAN: You're finding in favor of the  
7 applicant that it is a nonconforming structure.

8 MR. DYSINGER: That is my motion, yes, sir.

9 MR. WARREN: Second.

10 CHAIRMAN: We have a motion and a second. Any  
11 questions or comments on the motion?

12 (NO RESPONSE).

13 CHAIRMAN: All in favor raise your right hand.

14 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

15 CHAIRMAN: Motion carries unanimous.

16 We need one more motion.

17 MS. DIXON: Move to adjourn.

18 MS. MASON: Second.

19 CHAIRMAN: All in favor raise your right hand.

20 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

21 CHAIRMAN: We are adjourned.

22 -----

23

24

25

1 STATE OF KENTUCKY )  
 )SS: REPORTER'S CERTIFICATE  
2 COUNTY OF DAVIESS )

3 I, LYNNETTE KOLLER FUCHS, Notary Public in and  
4 for the State of Kentucky at Large, do hereby certify  
5 that the foregoing Owensboro Metropolitan Board of  
6 Adjustment meeting was held at the time and place as  
7 stated in the caption to the foregoing proceedings;  
8 that each person commenting on issues under discussion  
9 were duly sworn before testifying; that the Board  
10 members present were as stated in the caption; that  
11 said proceedings were taken by me in stenotype and  
12 electronically recorded and was thereafter, by me,  
13 accurately and correctly transcribed into the  
14 foregoing 67 typewritten pages; and that no signature  
15 was requested to the foregoing transcript.

16 WITNESS my hand and notary seal on this the  
17 26th day of July, 2008.

18

19

\_\_\_\_\_  
LYNNETTE KOLLER FUCHS  
OHIO VALLEY REPORTING SERVICES  
202 WEST THIRD STREET, SUITE 12  
21 OWENSBORO, KENTUCKY 42303

22

COMMISSION EXPIRES: DECEMBER 19, 2010

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COUNTY OF RESIDENCE: DAVIESS COUNTY, KENTUCKY

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