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OWENSBORO METROPOLITAN BOARD OF ADJUSTMENT

NOVEMBER 1, 2012

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

* * * * *

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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1 Anybody have any additions?

2 (NO RESPONSE)

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

5 MS. MASON: Move for approval.

6 MR. REEVES: Second.

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

9 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

10 CHAIRMAN: Motion carries.

11 Next item, please.

12 ITEM 2

13 2306 Windhaven Drive, zoned I-1, Remanded by Daviess
14 Circuit Court, Division II

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

18 Reference: Zoning Ordinance, Article 8, Section
19 8.5.3(j), Article 17, Section 17.3114

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

22 MR. NOFFSINGER: Mr. Chairman, each member has
23 been mailed a copy of this transcript from the
24 previous meetings. You have also received a copy of
25 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

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

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

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

14 CHAIRMAN: I would say so.
15 Counselor, is that correct?

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

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

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

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

24 MR. HOLTREY: I think the record -- you want
25 me to come up there?

1 CHAIRMAN: Please. State your name so we'll
2 have record of it.

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

10 CHAIRMAN: Thank you.

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

15 MR. SILVERT: State your name, please.

16 MS. EVANS: Melissa Evans.

17 (MELISSA EVANS SWORN BY ATTORNEY.)

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

20 LACK OF QUORUM

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

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1 disqualification.

2 OTHER ISSUES TO CONSIDER

3 1. Storage Area Issues (Screening Requirement)

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

12 The Zoning Administrator and the Staff agree
13 that the use of the site for the display of the
14 equipment for sale or lease is indeed sales display
15 area. The variance requested resulted from the
16 applicants original site plan approved in December
17 2009 showing the area in gravel and screened as
18 required for outdoor storage. The applicants were
19 able to request a variance from the outdoor storage
20 screening requirement, which if granted would have
21 resulted in the area being able to remain gravel with
22 the screening requirement (a six foot high solid
23 fence, a dimensional variance from 6 feet to 0 feet)
24 waived, allowing the surface to remain gravel. There
25 is no specific definition within the Zoning Ordinance

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1 for outdoor storage, so the customary sense of outdoor
2 storage should be applied. However, in defining the
3 area as display area, the applicant loses the ability
4 to request a dimensional variance. If the OMBA agrees
5 with the Court decision, the Zoning Administrator and
6 the Staff that the use of this area is for the display
7 of construction vehicles and equipment, then the area
8 for display must be paved and there is not a variance
9 that the OMBA has the authority to grant relative to
10 pavement material requirements. A variance is defined
11 in KRS Section 100.111 as "a departure from the
12 dimensional terms of the zoning regulation pertaining
13 to the height, width, length or location of
14 structures, and the size of yards and open spaces
15 where such departure meets the requirements of KRS
16 100.241 to 100.247. The waiving of pavement material
17 is not a dimensional variance and KRS Chapter 100.237
18 through 100.257 limits the authority of the OMBA to
19 variances, conditional use permits, appeals from the
20 Zoning Administrators interpretation, and changes in
21 non-conforming uses. If the OMBA agrees that the area
22 is not outdoor storage, there is no screening
23 requirement and the variance request is not valid.
24 There is no variance to waive the requirement to
25 improve the display area using a hard surface base

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1 material such as asphalt, concrete, brick or other
2 properly bound surface, so as to be durable and
3 dustless. KRS Section 100.247 further states that
4 "The board shall not possess the power to grant a
5 variance to permit a use of any land, building or
6 structure which is not permitted by the zoning
7 regulation in the zone in question, or to alter
8 density requirements in the zone in question.

9 2. Sales/Rental Display Area

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

22 During the course of testimony, the area in
23 question was identified as a sales/display area by the
24 applicant. In the case of sales and display, the
25 Zoning Administrator, in applying the adopted

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

4 The definition of a vehicular use area in
5 Article 14 of the Zoning Ordinance is:
6 VEHICULAR USE AREA. A vehicular use area (VUA) is any
7 open or enclosed area used by vehicles of any type,
8 whether moving or at rest, including but not limited
9 to parking lots or areas, loading and unloading areas,
10 mobile home yards, sales and service areas, and
11 driveways.

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

15 13.12 Paving. Except for single-family residential
16 uses and A-U, A-R, and EX-1 zones, where parking areas
17 are provided, they shall be improved within six (6)
18 months of application of any base material with an
19 asphalt, concrete, brick or other properly bound
20 surface, so as to be durable and dustless, unless
21 otherwise specifically permitted in this Zoning
22 Ordinance.

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

1 shall meet those requirements.
2 13.51 Automobile, Manufactured Housing or Other
3 Vehicle Sales Lots, Automobile Service
4 Stations, and Farm Equipment Dealers. Every parcel of
5 land hereafter used to display, rent, sell, or service
6 automobiles, motorcycles, trucks, boats, recreational
7 vehicles, manufactured homes, farm equipment, or used
8 for the minor repair thereof, or used as an automobile
9 service station shall be subject to the requirements
10 of this Zoning Ordinance concerning paving, lighting
11 landscaping, drainage, and minimum yards and setbacks,
12 and shall be considered, in the application thereof,
13 as the equivalent of a parking area for more than six
14 (6) vehicles, regardless of size.

15 There is a limited exception to paving for
16 manufactured home sales and large farm equipment in
17 Article 13. This provision requires pavement between
18 display spaces and an approved development plan. This
19 provision was discussed at length in the OMBA meeting
20 and it was determined that the exception did not apply
21 as the product was not manufactured homes or large
22 farm vehicles. However, even if this exception could
23 be applied to the subject property, the proposal would
24 not meet the requirements. A development plan is
25 required designating the location of the parking

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1 spaces to contain the large vehicles on display;
2 showing the spaces surfaced in some manner so that the
3 equipment will not deform wet ground, and showing the
4 aisles that are used to access the spaces fully paved.
5 13.511 Paving Exception for Display of Manufactured
6 Homes and Large Farm Vehicles. As an exception to the
7 foregoing, the surface of parking spaces designated
8 for the display of manufactured homes or large farm
9 vehicles may be exempted from the full paving
10 specification, subject to the following conditions: A
11 development plan is approved by the OMPC; the plan
12 designates the location of parking spaces to contain
13 the large vehicles on display; the spaces are surfaced
14 in some manner so that the large vehicles to be
15 displayed thereon will not deform wet ground; and
16 aisles that are used to access the spaces are fully
17 paved.

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

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

24 The decision also states that there was no
25 evidence offered to the OMBA of the pavement of a

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1 "typical street". Pavement for a "typical" street
2 would be a street constructed in accordance with the
3 Public Improvement Specifications as adopted by the
4 OMPC. All public streets are required to be
5 constructed to the standard in the specifications for
6 the type of street. As stated in the meeting record,
7 this would mean installation of 6 inches of concrete
8 over the existing gravel base or 6 inches of dense
9 grade aggregate and a 3 inch asphalt binder coat as
10 required for typical local and minor collector streets
11 in the community. Estimates were included from active
12 concrete and asphalt installers. The Staff introduces
13 as an exhibit a copy of Section 3 of the Public
14 Improvement Specifications as evidence of a typical
15 street pavement construction.

16 The decision states that if the item returns
17 to court after being remanded to the OMBA, then the
18 OMBA should provide more evidence of the reason to
19 provide hard surface. The only evidence the Staff can
20 cite is that the zoning ordinance requires hard
21 surface material for display areas as already
22 described in this report. The Staff does not have
23 the authority to waive requirements of the Zoning
24 Ordinance and the Board of Adjustment authority is
25 limited to dimensional variances, conditional use

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1 permits and appeals to the Zoning Administrator's
2 interpretation of the ordinance requirements and does
3 not have the authority to waive the requirements
4 contained in the Zoning Ordinance specifying
5 acceptable hard surface materials, which consists of
6 any base material with an asphalt, concrete, brick or
7 other properly bound surface, so as to be durable and
8 dustless.

9 3. Staff's Conclusions

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

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

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

16 Findings

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

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

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

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

4 4. The Staff and the OMBA do not have the
5 legal authority to waive the paving material
6 requirement of the Zoning Ordinance (KRS Sections
7 100.237 through 100.257)

8 5. The OMBA is limited in its authority to
9 dimensional variances, conditional use permits,
10 limited changes in non-conforming uses and appeals to
11 interpretations of the Zoning Ordinance. (KRS Sections
12 100.237 through 100.257)

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

20 7. The applicant's avenue of administrative
21 appeal from the paving requirement would be to appeal
22 the Zoning Administrator's interpretation that
23 pavement with a hard surface material of the display
24 area is a requirement of the Zoning Ordinance. The
25 OMBA does not hold the authority to act in conflict

1 with a requirement, only to determine if the correct
2 interpretation was made. The applicant would have to
3 offer evidence that the ordinance does not require
4 pavement with hard surface material for display areas.

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

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

11 CHAIRMAN: Thank you.

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

14 MR. NOFFSINGER: No, sir.

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

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

22 (NO RESPONSE)

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

25 MR. HOLTREY: No.

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

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

13 MR. REEVES: Second.

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

16 MR. NOFFSINGER: Yes.

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

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

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

3 CHAIRMAN: Does the second approve that also?

4 MR. REEVES: Yes.

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

8 MR. NOFFSINGER: No, sir.

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

11 MR. SILVERT: No, sir.

12 CHAIRMAN: Board have any other questions?

13 (NO RESPONSE)

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

16 MR. HOLTREY: Not at this time.

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

19 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

20 CHAIRMAN: Motion carries.

21 One other motion.

22 MR. DYSINGER: Move to adjourn.

23 MS. MASON: Second.

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

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(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: We are adjourned.

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 20 typewritten pages; and that no signature
15 was requested to the foregoing transcript.

16 WITNESS my hand and notary seal on this the
17 25th day of November, 2012.

18

19

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

22

23 COMMISSION EXPIRES: DECEMBER 16, 2014

24 COUNTY OF RESIDENCE: DAVIESS COUNTY, KY

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