

BOARD OF ZONING APPEALS
MEETING MINUTES
January 12, 2021

Chris Clark: Good evening. The January 12, 2021 Board of Zoning Appeals meeting will come to order. Would you please call roll, Mr. Secretary?

Adam Rude: Yes. Mr. Cassidy - here, Mr. Clark - here, Mr. Lewis - here, Mr. Lisher - here, Miss Terrell - here and Mr. Bradburn - here.

Clark: One of the items for our consideration tonight is the election of officers. Being a new year, we will entertain any motions to nominate for the vice chairman and the chairman for the Board of Zoning Appeals.

Doug Cassidy: Nominate Chris Clark for the chairman of the Board of Zoning.

Wade Lewis: Second.

Clark: Have a nomination for the chairman's seat and a second, how will this...

Rude: We can just do a voice vote.

Clark: Okay so we will do this by voice vote and who are all active tonight? Since we have the quorum, would it just be Mr. Lisher?

James Lisher: I'm here.

Rude: Yeah we have, I believe we have a quorum here tonight.

Clark: Okay so we will do a voice vote for the chairman position. Mr. Lisher, how do you vote?

Lisher: Yes.

Clark: Mr. Lewis, how do you vote?

Lewis: Yes.

Clark: Mr. Cassidy?

Cassidy: Yes.

Clark: And our permanent member will be?

Rude: Ms. Terrell.

Clark: Ms. Terrell, how would you vote?

Nicole Terrell: Yes.

Clark: This is unanimous and I will now accept motions for the vice chair position.

Wade Lewis: I'll make a motion for Jim Lisher as vice chairman.

Clark: There is a motion. Is there a second?

Cassidy: Second.

Clark: Mr. Lisher, how do you feel about this?

Lisher: I'll give it my best shot.

Clark: Thank you. And Mr. Lisher, since we will be doing this by a voice vote again, would you please vote?

Lisher: I'll abstain.

Clark: Thank you. Mr. Lewis?

Lewis: Yes.

Clark: Mr. Cassidy?

Cassidy: Yes.

Clark: Miss Terrell?

Terrell: Yes.

Clark: And I also vote yes.

Rude: Thank you very much.

Clark: So with that out of the way, we are moving to approval of minutes of the last month's meeting, of which there are none. They are not yet prepared, so we will do that at a later date. And beyond that, we are moving into Old Business which it has been advised that we need to streamline this meeting and make this meeting more timely, move the Old Business to the end

of the meeting before Discussion and that we move directly into New Business. Can I get a voice agreement?

Rude: I need a motion on this.

Clark: Oh can I get a motion to move this to the end of the meeting before Discussion?

Lisher: Have some high-paying attorneys that'll have to be waiting for awhile.

Lewis: Motion to approve the change.

Cassidy: Second.

Clark: I have a motion to approve and a second so we will move this to the end of the meeting and we will get into New Business. Mr. Secretary, would you please go over the first petition?

Rude: Yes. So the first petition tonight is all three petitions that are New Business share the same project information but the first petition tonight is BZA 2020-12. It's a special exception use. The petitioner's name is Speedway, LLC. The owner's name is Exit 109, LLC. The petitioner's representative tonight is Eric Carter but I believe there's a few representatives on the call tonight. The address is 3877-3977 N. Michigan Road Shelbyville, Indiana. The subject property zoning classification is BH, business highway with a race track overlay district and the comprehensive future land use is gateway mixed use. The action requested tonight is approval of one special exception use to allow for fuel sales in conjunction with a convenience store/restaurant. Staff's recommendation on this is approval with four conditions. The first is to limit the number of fuel pumps designed for larger vehicles to five. To limit the number of parking spaces for larger trucks to five. Prohibit long-term or overnight parking on the site and require signage placed throughout indicating the prohibition of long-term and overnight parking.

Clark: Thank you. Mr. Carter, I believe you are listed as the representative, would you please tell us about this project and what your expectations are?

Eric Carter: Yeah I'll share my screen here. Sorry. Can everybody see my screen okay?

Lisher: Yes.

Rude: Yes.

Carter: Should have the Speedway Store 10958(?). Okay good evening, my name is Eric Carter with Wye(?) Engineers and also online is Jennifer High, Adam Forrester and Roy Chamberlain with Speedway. Our proposed site is the southwest corner of Michigan Road and Fairland Road which is northwest of the city there. And here's our proposed site plan. So what we're looking at is for the convenience store, a 4608 square foot building with grab and go food items. There will not be a shower or a restaurant like you'd see in a typical truck stop.

Speedway operates on a fuel and go operation. Our fueling for the auto canopy is 8 dispensers, which is 16 fueling positions and we are proposing three commercial fueling lanes. Now you'll see four dispensers there but truck fuels on both sides so there will only be three fueling lanes. There is no fueling outside of that on either side. And we're proposing 25 auto parking spaces and 5 truck parking spaces which will be signed for no overnight parking as staff indicated. Underground storage tanks are over here on the left side and a dumpster enclosure which matches the building material (?) of the store. For signage, we'd have one ground-mount sign up on the intersection here and then a high rise sign in the back, kind of the west side of the site. North is to the right on this drawing. We do have a variance request for the square footage of that. We have four auto directional signs. There'll be one at each drive here and then one on the access drive and then two directional signs for trucks will be at the CFL entrance for ingress and egress and again a variance request for the size and height for that. And then our access points - we have no access on Fairland Road. We have one full access for auto and one full access for trucks and auto and that is a variance request as well. Just to give you an example of what our site elevations will look like of the building, our canopy will be full brick wrap, stone base, matches the building. We've got the stone and then the extended windowsill, the brick on top and then the added (?) glass around the building elevations give a little bit more character as we have three frontages. Stone columns an additional brick column. This is an upgrade from their standard prototype. The building or the dumpster will match the building materials. And here's a side elevation showing this is the standard here with the side door and the see-through glass into the building and then the (?) glass on the other sides and then another view of the canopy. Ground sign will have a brick base, LED pricers with the (?) running logo and the Speedway channel letters. The high rise sign, which we're asking for a variance of total square foot. The running(?) S, a logo would be 142 square feet and the pricer would be a total of 356 square feet. The two of those together is 498 square feet which is 200 is allowed by ordinance so there's a variance. And we are, special exception here for fuel cells, special exception for the pole sign as indicated by staff and three development standards - the driveway width, pole sign and the (?) sign, height and square foot. I'll go into a little bit more detail here next slide. Special use fuel sales - fuel sales are regulated via special exception in this zoning district. Convenience store with proposed fueling complements the casino and race track operations with potential future retail, hotel, restaurants for both entertainment and gateway mixed use. We feel that's compatible with the adjoining use which is also a fueling station. All tanks/dispensers and piping will meet current federal and state rules for regulations for underground storage tanks for health, safety and welfare. Convenience store with fueling intended use to service travelers along the interstate corridor and local businesses and we do agree to limit the amount of truck parking spaces. No overnight parking and the number of commercial fueling lanes from what is shown on our proposed plan which is a five truck bases and three CFL. That's staff's recommendations one and two and we agree to the conditions three and four limiting long term overnight parking and no overnight parking signage. Regarding the special use of the tall sign, Speedway proposes the high rise to provide adequate identification for fueling decisions for interstate travelers. Business highway zoning and general use in the area of both commercial and entertainment rely on signage to track potential customers to the area. This will be consistent with surrounding properties' use of high rise signage to attract business both similar in size and height and taller signs are considered in

special exception process to support interstate (?) businesses they're both considered in the comprehensive plan....(inaudible)...Regarding variance number one, driveway width; this shows that our truck path going in ingress and then the egress. And then Speedway has with their standards that we have to design to is a five foot buffer from that travel path, so actually we're showing a little bit less than the 76' that we initially proposed. It's currently around 73' but this shows that the truck safely enters the site and exits the site and then the same thing if by chance a truck would be coming from the south and then exiting to the south. So we feel that the safe ingress and egress of the trucks entering the site validates this variance request. In regards to variance number two, (?) signs 8 square foot and 3.75 feet. Speedway standard actually across their fleet is to use a 32 square foot option. They do have a few other options and their lowest for their trucks are 8 square foot and we've picked that one to try to be as close to the city code as possible. Still asking for a variance. We feel that the additional size is adequate for the trucks the drivers that sit higher than you would be in a car and this also keeps with Speedway safety standards that they've set up. And then the variance number three, the interstate sign square footage; to alert interstate 74 drivers to the presence of the Speedway store at a distance allowing the drivers time to make safe lane changes and exit the highway, Speedway is proposing their high rise sign of 200 square feet which would just not be enough that have us for the highway speed including the pricer sign and the identification sign. So we are over that 200 square feet. And again, the high rise is located kind of on the west side of the site away from Fairland Road and Michigan as it's geared towards 74 traffic and then the two incidental signs are at the commercial fueling lane, ingress/egress and then the driveway width. And then I've got a short video, if it plays. Can everybody see this?

Clark: Yes.

Carter: It kinda ties everything together here with our proposal.

Video plays.

Carter: The building is just a stock 3D rendering from the program.

Video continues to play.

Carter: So you've got your incidental signs, the truck entrance, high rise sign.

Video plays.

Carter: Lots of trees.

Video plays.

Carter: There's another view of the high rise from Fairland.

Video plays.

Carter: Truck parking in the back there.

Video plays.

Carter: And that's it. If you've got any questions, please let us know. We've got, like I said, Speedway members on the phone here.

Clark: Thank you, sir. One of the things that I didn't do was I didn't stop you and break up, normally we would break up the variances and do them one at a time but I didn't want to break the flow of your presentation. Your presentation was well put together and it was well thought out. Thank you. I will take questions from the board and I will start with Mr. Lisher.

Rude: Mr. Lisher, you're muted still.

Lisher: There. I don't have any really questions about vehicle fuel cells.

Clark: Thank you. Mr. Lewis?

Lewis: No questions at this time.

Clark: Mr. Cassidy? Doug, you're muted.

Cassidy: There we go, sorry. My one question is is it safe to have cars going in and out of the same place your trucks are? I think on GetGo, we had a truck entrance, an exit for the trucks only and then had the main entrance for cars. Is it safe to be mixing both of those together?

Carter: Speedway prefers in most cases to have them separated but in some cases where the city would limit the access, like we had actually initially proposed, get my screen back up here, initially proposed a access for the auto off of Fairland Road and that was vetted through a traffic impact study through INDOT and the city and eventually it was requested that we remove that. So once we did that, we added that access drive from the auto just to give customers another point of exit onto Michigan Road...(inaudible)...have the driveway width as it is also is for the trucks and the cars.

Cassidy: Okay, thank you. That was my only question. Nice presentation.

Carter: Thank you.

Clark: Miss Terrell, do you have any questions?

Terrell: No questions at this time. Thank you.

Clark: Thank you. Are has that raised any other questions with the board?

No reply.

Clark: Okay I will close comments from the or questions from the board and open it to the public. Do we have any public online?

Rude: Any members of the public that have joined us through Zoom.....(inaudible)....let us know you'd like to speak. (?) members that have joined us. We'll give them a few minutes to consider whether or not they'd like to raise their hand.

Clark: Okay, there are no questions from the public so I will close public questions and comments and I can now ask for a motion on BZA 2020-12.

Rude: Dash 17.

Lisher: Dash 17.

Clark: Dash 17, thank you.

Lisher: I would move to approve vehicle fuel sales exceptions due to the Findings of Facts submitted.

Clark: I have a motion. Is there a second?

Cassidy: Second.

Rude: Okay. I'll call the roll then. A motion to approve for BZA 2020-17. Mr. Cassidy - yes, Mr. Clark - yes, Mr. Lewis - yes, Mr. Lisher - yes, Miss Terrell - yes. Motion carries.

Clark: Thank you very much for that. Now since the if any additional information needs to be added about the next variance, which would be....

Rude: 2020-18.

Clark:2020-18.

Rude: I can, and again, I'll just introduce the petition. Again it's the same petitioner, same project. This is the special exception for the use of a pole sign in the interstate corridor. Again, staff is recommending approval with no conditions. This falls right in line with the character of the rest of the area that it's in as well as recent approvals of the board, GetGo being the most recent.

Clark: So does the petitioner have anything to add before we take questions from the board on this matter?

Carter: No, I do, not at this time.

Clark: Alright we'll start with questions from the board and this time I'll start with Mr. Lewis.

Lewis: Adam, any difference from the previous approval with GetGo?

Rude: No the sign's in about the same location. It's in the same corner at the, let me get my bearings, in the northwest corner of the site. Kind of near the peak of the ramp coming into Fairland Road. It's, the way the elevation changes there, you can't really use that corner of the site for much. It comes to a really thin point so that's where they're putting the sign, in that corner and I believe that's where GetGo was putting the sign as well.

Lewis: Okay, thank you. That's all.

Clark: Mr. Cassidy?

Cassidy: No questions.

Clark: Miss Terrell?

Terrell: No questions.

Clark: No questions from the board so I will open it up to public questions, public comment.

Rude: Again, anyone on the call that would like to make a comment, there's a raise hand feature.

No reply.

Clark: No questions or comments from the public so I will close public commentary. I guess we're ready to move to a motion on BZA 2020-18.

Lewis: Make a motion to approve the requested special exception to allow a pole sign in business highway pursuant to Findings of Fact presented in the staff's report.

Lisher: Second.

Clark: I have a motion and a second. Can we move to a vote?

Rude: Yes. Who was that second? Was that you, Jim?

(?): Lisher.

Rude: Okay. I just wanted to make sure I had that for the record. Motion to approve for BZA 2020-18; Mr. Cassidy - yes, Mr. Lisher - yes, Mr. Lewis - yes, Mr. Clark - yes, Miss Terrell - yes. Motion carries.

Clark: So at this point, we will give the petitioner another opportunity to add any information on the last petition which is BZA 2020-19.

Rude: Inaudible comment.

Carter: I do not at this time. Thank you.

Clark: Thank you.

Rude: On this, this is three separate variances. Just procedurally we'll take 'em one at a time, 2020-19A, B & C. The first one is for, make sure I have this right, is for the size of that pole sign. So increasing that from 200 square foot to 500 square foot. We're recommending approval on that. I'll wait until we get through that and then I'll discuss the other ones.

Clark: Okay so I guess we can.....

Rude: If the board has any comments.

Clark:ask the board for any comments or questions. Mr. Lisher?

Lisher: I have no questions.

Clark: Mr. Lewis?

Lewis: No questions.

Clark: Mr. Cassidy?

Cassidy: No questions. Thank you.

Clark: Miss Terrell?

Terrell: No questions.

Clark: So

Rude: On each one of these we'll just open 'em up to the public.

Clark: Open to the public? Okay so at this point, we'll open that particular request open to the public for any questions or comments. You didn't specify a length of time?

Rude: No and no one is rung in yet, so you can close it.

Clark: Okay. Okay so I'm going to close the questions and comments to the public and move to a ask for a motion to approve BZA 2020-19A.

Cassidy: Make a motion to approve the size of the sign to 468 square foot I believe it was.

Rude: 498, Doug.

Cassidy: 498, sorry 498 square foot.

Lewis: Second.

Clark: I have a motion and a second. Would you please (?) the vote?

Rude: Vote for BZA 2020-19A: Mr. Cassidy - yes, Mr. Clark - yes, Mr. Lewis - yes, Mr. Lisher? Mr. Lisher, you're muted. Mr. Lisher - yes. Thank you. And Miss Terrell - yes. Thank you. Motion carries.

Clark: Thank you. So now I guess we will open to questions and comments from the board on B, which is the, what is B?

Rude: Yeah....

Clark: Which one was B?

Rude: So 2020-19B is the incidental free standing sign that's increasing those truck signs from 6 square foot to 8 square foot. Again, we're recommending approval with no further conditions.

Clark: And we will start with questions from the board with Mr. Cassidy.

Cassidy: Were there just signs at the truck entrance and not the main entrance? Is that right, Mr. Carter?

Carter: Just at the truck entrance, yeah.

Cassidy: Okay. Alright, thank you. That's all I had.

Carter: At the Michigan Road right of way.

Cassidy: Sure, sure. Thank you.

Clark: Miss Terrell?

Terrell: No questions at this time. Thank you.

Clark: Mr. Lisher?

Lisher: No questions.

Clark: And Mr. Lewis?

Lewis: No questions.

Clark: I will open, I will close commentary from the board as I have no questions and open it to the public.

No reply.

Clark: It looks like we have no comments from the public. It looks like we have no comments from the public, so I will close public commentary and move to ask for a motion.

Lewis: Make a motion to approve the requested development standard variance from UDO 5.62 to allow for an increase in incidental free standing signs with an area of up to 8 square feet pursuant to the Findings of Fact and the staff's report.

Lisher: Second.

Clark: Have a motion and a second. Mr. Rude, would you please take a vote?

Rude: BZA 2020-19B, a motion to approve: Mr. Cassidy - yes, Mr. Clark - yes, Mr. Lewis - yes, Mr. Lisher - yes and Miss Terrell - yes. Thank you. Okay.....

Clark: Motion carries, thank you. And now talk to us about the....

Rude: The last variance is on the it's UDO or it's from UDO 5.15B. It's the non residential driveway standards, increasing that maximum driveway width up to the request in the application is 76', but it looks like from Mr. Carter's presentation that's actually closer to 73'. Again, due to the conditions of the site and just the need to safely move trucks through that turn, we are recommending approval with no conditions.

Clark: Okay so I will take questions from the board. Miss Terrell, I will start with you this time.

Terrell: No questions. Thank you.

Clark: Thank you. Mr. Cassidy?

Cassidy: No questions.

Clark: Mr. Lewis?

Lewis: No questions.

Clark: And Mr. Lisher?

Lisher: No questions.

Clark: I also have no questions so I will open commentary to the public. I see no indication that the public is asking any questions so I will now close comment and questions from the public and move to a motion on BZA 2020-19C.

Cassidy: I'll make a motion to approve the variance to extend the entrance to up to 76'.

Lisher: Second.

Clark: I have a motion and a second.

(?): Inaudible comment.

Rude: BZA 2020-19C, a motion to approve: Mr. Cassidy - yes, Mr. Clark - yes, Mr. Lewis - yes, Mr. Lisher - yes and Miss Terrell - yes. Motion carries.

Clark: Motion carries. Thank you folks and thank you for the completeness of the presentation and good luck with your project.

Carter: Thank you. Have a good night.

Clark: Thank you. Now we will move on to Old Business and as we have encountered this before, I am going to ask our counsel to please read the information as you have given it.

Jenny Meltzer: Yep. So we wanna thank our board members for being flexible in the format in which we meet and conduct the city's business but more importantly we want to thank the public for joining us online rather than in person. Also the departments, boards and commissions are taking this health emergency very seriously and following all precautions recommended by federal, state and local health officials including the practice of social distancing which is why we've elected to meet in this format tonight. You're utilizing Zoom today to stream this meeting live with the public and we'll be utilizing the raise hand feature to take comments and questions during the public hearing portion of the meeting. If you would like to speak during the public

hearing portions of the meeting, you'll need to join by the Zoom information posted on the agenda. That information can be found on the city's website at www.cityofshelbyvillein.com/BZA. When we enter the public hearing portion and you would like to speak, you will click the raise hand button. This will alert our staff that you would like to speak. Our staff will then allow you to unmute yourself and you may address the board. We will begin with those people of the public who are speaking in support and then we will move on to people who are speaking against the petition. We will unmute members of the public in order that they raise their hands. Even though we are also live streaming on Facebook, we will not be monitoring or accepting comments through Facebook. If you'd like to make a comment, you need to follow the Zoom link on the city's website. Please expect some delays that might seem awkward. Since the applicant's are also working remotely, the discussion will not flow as smoothly as an actual meeting. Thank you for your patience in advance. We can now begin the meeting. We are here today in the matter of the administrative appeal of Burnside, LLC and Sumerford Land Trust I city of Shelbyville Board of Zoning Appeals case number BZA 2020-12. Let the record reflect that Burnside, LLC and Sumerford Land Trust appear virtually by Mr. Taylor Sumerford and by counsel Mr. Donald Smith, Mr. Kyle Chambers and Mr. Robert Adams. The City of Shelbyville appears in person by Mr. Adam Rude and by counsel Mr. Tom (?) and Mrs. Jennifer Meltzer, present and representing the Board of Zoning Appeals. We'll be following the procedure laid out in Section 9 of the Board of Zoning Appeals Rules & Procedures for a public hearing.....(inaudible)....executive order in the interest of public health, this hearing's being conducted primarily virtually and therefore the parties have submitted documentary(?) evidence prior to this hearing. The board will now take the staff report consisting of 78 pages including exhibits, the drainage study dated December 7, 2020 prepared by John Stoltz, PE consisting of 13 pages, a letter dated August 4, 1993 consisting of one page, an affidavit of Robert Adams (?) dated January 12, 2021 consisting of 10 pages including exhibits, and an affidavit of W. Taylor Sumerford, Jr. consisting of 26 pages including exhibits into the record. I will now lend the chair to the chairman.

Clark: Thank you. At this point, I believe the flow should go to whom?

Meltzer: Adam or his counsel.

Lisher: Excuse me, Mr. Chairman, would it be possible to have a five minute restroom break?

Clark: Yes, Mr. Lisher.

Rude: We'll return back at 7:50 then.

Short break.

Lisher: Thank you. I appreciate your indulgence of both parties.

Clark: You're welcome, Mr. Lisher. As soon as we get everybody else in here, we'll resume the meeting. Thank you.

Lisher: Sure, yeah.

Clark: It looks like everyone's back so we will continue with this meeting. The next item on the agenda is the Old Business which is the administrative appeal, BZA 2020-12. At this point, we will ask Mr. Rude and his counsel to please give their information and we will go from that point. Thank you.

Rude: In accordance with the board's rules, we'll give the just the secretary's report so I'll read through the front page of the staff report and then as Miss Meltzer had suggested, we'll turn it over to the petitioner for their opportunity to present to the board and then come back to ourselves. So this is case number BZA 2020-12 Sumerford Administrative Appeal. The petitioner's name is Burnside, LLC and Sumerford Land Trust 1. The petitioner is also the owner of the property. The petitioner's representative on record is Donald J. Smith (?) Cunningham but also present tonight I believe is Robert Adams. The address of the properties, there's 2 parcels in there are two subject properties tonight. One being referred to as the Burnside property. The address is 1011 N. Riley Highway. The other being referred to as the northern pond 1568 N. Riley Highway. Both properties are zoned BH, business highway. The Burnside property, the comprehensive future land use is commercial and the northern pond comprehensive future land use is gateway mixed use. And then the action tonight is an administrative appeal on a on numerous zoning violations associated with the two properties, the two separate properties tonight and I'll turn it to my counsel briefly.

Tom (?): So I can get a little closer, the screens are a little further away....(inaudible)...My name is Tom (?)...(inaudible)...Van Valer law firm in Greenwood, Indiana. I'm here to represent the planning department and director, Adam Rude as Mr. Rude indicated. In today's day and age of COVID19 and the unusual formats we've had and ...(inaudible)...expedite matters and cooperate.....(inaudible)...our legal objections to the record that was submitted.....(inaudible)...I would humbly suggest that the BZA take these objections under advisement and rule on them as part of their Findings of Fact....(inaudible)... Which will also give the petitioner an opportunity to elaborate on those legal issues in their Findings, in their proposed Findings of Fact (?) which will also probably keep us from being here until midnight which I'm sure nobody wants to do. The outset, the administrative appeals are governed by state statute largely(?) 36-7-4-19a as in apple states that the petitioner "must specify the grounds of the appeal". That's a portion of subsection a and subsection f it also states that the BZA will consider relative evidence, quote relative evidence. The....(inaudible)... staff report contains the administrative appeal and supporting documents. It states that the appeal "largely related to" the director's determination that drainage issues exist with respect to the use of the two subject properties. In Mr. Adams' affidavit that was submitted to us today in paragraphs 2 - 9, he covers conversations that he had with a individual named Paul Munaz(?) at Arbor Homes in connection with an Arbor Homes property. Those paragraphs have no relevance to the stated issue in this administrative appeal. Moreover, to the extent that paragraphs 2 - 9 and 11 of Mr. Adam's affidavit (?) an improper motive on the part of the city, the planning department or its director. It is also (?) the Indiana Supreme Court has stated more than once that improper motive is irrelevant to a zoning matter

unless the petitioner has raised equal protection or due process issues. They haven't. Their administrative appeal does not raise any issues of equal protection or due process. With respect to Mr. Sumerford's affidavit, also submitted to us today, paragraphs 6-9 deal with communications Mr. Sumerford had with federal, state or county entities or agencies in 1993, 2009, 2010. Whether Mr. Sumerford complied with the EPA's rule 5 doesn't have anything to do with the determination of whether there's a violation of the city's Unified Development Ordinance. The exhibits that are attached in Mr. Sumerford's affidavit that concern communications from the various agencies or entities are written by people who aren't witnesses. We're therefore unable to cross examine them. Those are so there's two problems with those affidavits. They're irrelevant and we're unable to cross examine and as a result, they should(?) be given much weight if they're ever considered by BZA. Those exhibits in Mr. Sumerford's affidavit are a, as in apple, 2 through a3, b1 through b as in boy 11, d as in david 1-df(?). Also in paragraph 19, Mr. Sumerford covers the use of another property by another party, Shelby Materials which again is irrelevant to the determination of (?) issues. It also... (inaudible)...related to other parties isn't binding on the Planning Commission, the BZA or the director, future zoning maps. Also paragraph 5 from Mr. Sumerford's affidavit references a 1993 letter from a prior director of the city of Shelbyville, not relevant to the appeal. It writes in defense of a non-conforming use....(inaudible)...administrative appeal....(inaudible)...again, nothing in the appeal raises a defense of a non-conforming use and that applies to c as in Charlie c1 through c3. Again, I thank you for your attention to this matter and hope that.... (inaudible)...those matters now rather than later helps the orderly disposition of the hearing.

Clark: Thank you. Now I believe that it is now the petitioner's time to address the board.

Don Smith: Thank you very much, members of the board. Appreciate your time here this evening. Also Mr. Rude and Mr. (?), I appreciate you being here as well. My name is Don Smith. I'm attorney with (?) & Cunningham in Indianapolis. Along with me this evening is Kyle Chambers also from our office, Bob Adams, who is the Sumerford's personal attorney. Taylor Sumerford is also with him via Zoom and Andy Sumerford actually called me during our break. He is online, but I don't know if he is in the I think the participants, not the panelists section of this but he just wanted me to at least let everybody know that he is also here and taking an interest as the trustee of the Sumerford Land Trust. Excuse me. Again, we are here on 2020 or BZA 2020-12 which has been noted as the Sumerford Administrative Appeal. This relates to a notice of alleged violations received by Mr. Sumerford on August 18th of this past year relating to both the Burnside parcel and the northern parcel as they've been referred to in various documents that have been circulated here amongst the parties. Although there are several alleged violations noted in the notice, really this boils down to 2 issues that I think are important for us here tonight. The first of these is or I should say are the violations relating to the outdoor storage of construction debris and whatnot on both of these parcels. We would ask that the board dismiss these violations as they have been substantially complied with. The majority of the debris has been cleaned up, has been removed from the site. The remaining items that are on the site, a couple of them are concrete slabs that are intended to be placed in the pond as part of the filling process and then there are a couple of bridge trusses and structures that Mr. Sumerford proposes to use when he finally gets around to developing the northern parcel once

they're filled. It is complete. The bigger issue and the majority of the violations relate to they're all kind of similar in a sense in that they relate to the failure to have obtained the proper permits and approvals for conducting the landfill operations on these two parcels. And the reason why these permits and approvals were not obtained is because of the, specifically the letter dated August 4, 1993 from David Toll. Once Mr. Sumerford took title of the properties and intended to do the fill work that he has done, he spoke with Mr. Toll. Mr. Toll advised him that the city did not have any issues with the dumping, I'm taking this directly from the letter, of concrete, dirt and gravel on the property so long as it doesn't violate and state or federal dumping or drainage laws. In reliance on this letter, Mr. Sumerford then proceeded to obtain permits from the Army Corps of Engineers as well as to obtain approval from other relevant state and local agencies which have been provided in his and Mr. Adams' affidavits. Again, in reliance on this then once all these were obtained, Mr. Sumerford proceeded to proceed with the work for filling the Burnside pond and then later the northern pond. And for over 27, for over 27 years, this work continued on there again in reliance on Mr. Toll's letter, Mr. Toll's statement that there were no issues that the city had with this. Mr. Sumerford did not seek any approvals 'cause again he had been told that he did not need any approvals from the city. I think it's important to note by the way before I continue that when, the only property that is currently, that had currently had any work being done on it when the notice was issued was the northern pond and as soon as practical after receipt of the notice, Mr. Sumerford did stop all work on that property. We have committed I've spoken with Mr. Rude regarding this that to the extent that it is found that there needs to be permits and approvals relating to that property that Mr. Sumerford will not conduct any work until those have been received but again assuming that those are actually required. Our position on this is the fact that again, there are no permits and approvals required because based on Mr. Toll's letter, this was a pre-existing non-conforming use. Non-conforming use has been defined by the courts in Indiana as a use that was lawfully permitted or existed prior to the enactment of a zoning ordinance and is allowed to continue despite noncompliance with the existing ordinance. Courts have gone on to continue to hold that generally these nonconforming uses are exempt from the new ordinance because the municipality's right to enact this ordinance is specifically subject to the vested property rights that (?) prior to this act(?). In other words, if Mr. Sumerford was permitted to (?)fill activities on the properties prior to the enactment of the former zoning ordinance which was 2004 and then the UDO which was enacted in 2012 and I do believe was last revised in 2018, that those property rights, his rights to conduct that work on those parcels had already approved by that point in time and had already vested in so he would be exempt from any new requirements. I would also point out as well that the requested remedy from the Plan Commission is to have both of these properties go through the planning and approval process in order to obtain permits to do the work. Again, as I stated before, with the northern pond, all work on that is currently stopped. There is not work until this has been resolved and we know what we need to do going forward. But as to the Burnside pond, there hasn't been any work done on that property since at least the early 2000s so to now require Mr. Sumerford to go back and obtain approvals and permits and Improvement Location Permit for work that's already been completed is in a sense nonsensical and would effect, as courts in Indiana have also held, to be an unconstitutional taking of property without any due process. It would also be a unreasonable use of the city's police power which again is why we're appealing this and why we're objecting to this. It's important to know as well that like I

said before Mr. Sumerford had spent 27 years believing that he had all the approvals, or there were no approvals that he needed, I'm sorry, and that he was operating under the prior existing nonconforming use as approved by Mr. Toll in 1993. And during that 23 years, the city of Shelbyville did actually benefit from the use as much of the fill material that has been placed in both of these ponds has come from the city of Shelbyville itself. And on top of that, Mr. Sumerford never charged the city anything for this and all of the work to then move this into the ponds, to process it was all at his own cost and expense. Therefore, the city received quite the benefit from that work. Excuse me. As noted in Mr. Sumerford's affidavit, he by trade is an engineer. He has been an engineer for 50 years and for 20 of the years that he's been in his professional life, he was a member of the Plan Commission for the city of Shelbyville. So he is very well aware of requirements for planning, for permitting, for land use in not just Shelby County but the city of Shelbyville as well. We in, let me stop for a second and just say both Mr. Adams and Mr. Sumerford are they are hear to answer any questions you guys have but are relying primarily on their affidavits for their testimony in this matter. Excuse me. So again, I'm sorry, I just lost my train of thought there. Again as I was saying, Mr. Sumerford's knowledge of the process and procedures that are required for land development in this area, when he purchased another parcel of land north of the north pond, I'm sorry we're getting into so many directions, it probably gets a little bit confusing. He purchased this property in 2016. It's a small pond just off of Rampart Road and Riley Highway. I believe it's adjacent to the Waffle House that's there. He desired to go through the filling process with that pond as well and knowing that there hadn't been any kind of approvals or any kind of plan development plans done, went through the process, got it approved. The city engineer also approved it and he went through and did the fill. He's since then sold this parcel, but again that was that was all done pursuant to the city's rules and procedures. Again, like I said, since this is a prior existing nonconforming use, there were no that there are no permits or approvals that are required under the UDO to be obtained and therefore we would ask that these purported violations be dismissed along with the other violations relating to the storage of debris and construction materials on these sites. I am happy to take any questions that the board might have. I know again Mr. Adams and Mr. Sumerford are available to answer any questions that you have. We appreciate again your time here this evening and I thank you for your consideration.

Clark: Thank you. So at this point, we will ask for questions from the board members so I will start with Mr. Cassidy.

Cassidy: Well in Mr. Adams' affidavit today, the one that listed Mr. Munoz, I believe that was his name is, who at the city gave him permission to be the voice of the city in talking or is that even relevant in this? Or is that even relevant?

Smith: Bob, do you wanna answer that question?

Rude: Are these questions for the petitioner or for staff?

Cassidy: A little of both. In well then I don't have it in front of me, but the affidavit that Mr. Adams submitted said that he met with Mr. Munoz from Arbor Homes and that he was being the voice of the city . Who at the city gave him, Munoz, the authority to do that?

Rude: I'll respond to that question then. From the city's standpoint, nobody did and we feel that those comments on Mr. Adams' affidavit are a mischaracterization of whatever conversations he might have had with Mr. Munoz. Nobody from the city would have authorized him to speak on our behalf.

Cassidy: Okay. Was, and then Mr. Smith, was....

Smith: Well I think Bob was trying to talk there. I think you're muted, Bob.

Cassidy: Oh, I'm sorry.

Smith: No, that's okay. I apologize. You've gotta love this technology.

Cassidy: You betcha.

Bob Adams: Yeah I'd fallen asleep here. Yeah the conversation took place in which Mr., the housing developers' representative, Munoz who's been working on this project did actually say those things. And he said that the Shelbyville, city of Shelbyville would be bringing these actions against Mr. Sumerford if we did not give the easement to the developer and that that was in July of last year. That actually occurred and (?) like conversations set forth in the affidavit are true. You can see the emails on my affidavit where in July we had been conversing on the same subject matter, the drainage for the project.

Cassidy: Okay. Mr. Smith, was that still, when Mr. Sumerford was filling that in in the early 90s was that county? That wasn't in the city yet, was it? That was still county, wasn't it?

Smith: I believe that was still in the county, yes.

Cassidy: Okay.

Smith: I don't believe it had been annexed into the city yet.

Cassidy: Okay. Okay that's all I have for right now. That's it.

Clark: Thank you, Mr. Cassidy. Mr. Lewis, do you have any questions?

Lewis: We're referring to the last communication or the very first communication in 1993 with Dave Toll and is there no other documented correspondence regarding this since '93? I guess...

Smith: Well I'll start off with this and Bob, if you wanna jump in, feel free to. You know again this letter from Mr. Toll was, as far as Mr. Sumerford was concerned that was the approval or that was the green light for him to go ahead and do this. There is other communication that is attached to the affidavits although primarily relates to the permits from the Corps of Engineers that approve the filling of these properties as well as others that Mr. Sumerford had reached out to and communicated with regarding this project at that time.

Lewis: But none other with any plan commission or city official?

Smith: That is correct. And I it's and I think it's important to note as well that Mr. Sumerford never received any other communication with any city official or the plan commission up until the time that the notice of violations was received.

Adams: There were other conversations...well actually nobody's asking questions so I guess I shouldn't speak up here but I'd be glad to do that to respond to Mr. Lewis' (?). Mr. Sumerford was requested by the city on several occasions to grant easements over the subject of the north tract and also to work on the south tract and he always cooperated with the city in granting the easements and allowing them to have access to the property. So they were on the property. He let them put lines in for drainage lines. They were reviewing it and also buildings that were being built on this property, they he facilitated that. So there were communications. Not directly on this because this was decided back 17 years ago, many years ago but there were a lot of conversations in the interim.

Lewis: Okay. Thank you. That's all for now.

Clark: Mr. Lisher, do you have any questions?

Lisher: Did you say my name?

Clark: Yes, sir.

Lisher: Okay yes. Mr. Smith, it's my understanding then that your client is relying upon a letter from a David Toll dated August 4, 1993 from the Shelby County Plan Commission for his operation of what he did with Burnside pit as well as northside pit. That's the way I'm gonna phrase 'em 'cause it seems to be

Smith: Sure.

Lisher:that's what you're talking about, Burnside and then north.

Smith: That's correct.

Adams: It's Shelbyville Plan Commission.

Smith: And it was, yeah I was gonna point out, it is actually from the Shelbyville Plan Commission not the Shelby County Plan Commission.

Lisher: Alright. Somebody said Shelby County or yeah, alright, Shelbyville. But in any event, as I read it and I know Mr. Sumerford. He's a very smart and able man. Been county surveyor for decades. It speaks of also except for drainage problems or drainage laws that may apply first of all. Secondly, more importantly, there's been substantial changes in the Burnside pit dimensions through fill and otherwise as well as development which you've just mentioned easements being granted and so forth. It would seem to me wise to approach the city at some time in the past to see whether or not any site permits needed to be made. That's my first question. My second question is have any site permits been applied for as you've set forth that you would do in your letter of September 17, 2020?

Smith: First of all, you know, the work that was done on the Burnside pit you know resulting in the substantial changes was related to the letter from Mr. Toll in 1993. You know again, fill causes the substantial changes and again, Mr. Sumerford was acting in reliance on that letter to do that work and therefore didn't feel that there was any necessary there was no necessity to go and get any or inquire as to any additional permits or approvals because again, based on this letter, he was under the operation or under the impression that this had been approved and there was nothing else that he needed to get. As to your second question, I don't know that anything as far as the north pond has been applied for. Again, we are we've been waiting to see how this all shakes out. But again, Mr. Sumerford has committed to not doing any further work on the north pond until such permits are received, assuming that they are actually required.

Lisher: I assume you and your client understand the reason for site permits is so that the city can take and review the application of the use of the property. You've denied the city the ability to do so and have made some substantial changes it appears to me from the evidence I've seen. What's your response to that?

Smith: Would you mind repeating that? It kind of...out there a little bit. I apologize.

Lisher: I have a raspy voice. It's a consequence of some treatment. I guess basically I wanted to know why no site application has been applied for after you received notice from the city of these alleged violations. Why didn't any site application be made irregardless of whether you do an appeal or not so as a backup, we may not be here today if you'd done a site plan and the city had approved the same. Am I correct?

Smith: And I appreciate that question. I think it's an excellent question. I would say as far as the Burnside pit is concerned, we don't feel that there is any need at this point to do any site plans or any approvals because that work is already been completed. It's been completed for at least 10-15 years. There's nothing at this point to approve. As far as the north pond is concerned; again, you know we've committed to doing that if required but again and we've

decided that we wanted to wait and see how this plays out before submitting anything for the north pond.

Lisher: So let me review the notice of zoning violation with you for just a moment.

Smith: Certainly.

Lisher: Under zoning violation number one, that relates to a permanent alteration of land. They indicated that no site plan had been submitted and that appears to be true. Is that correct?

Smith: That is correct. Again, at the time that Mr. Toll approved this work, there was no requirement for that. There were no other requirements for any other approvals. That's why nothing was submitted at the time.

Lisher: And zoning violation number two dealt with improvement location permits and I assume that no location permit has been submitted for the Burnside pond?

Smith: Well again, as I said before, there is no more work being done there so that hasn't been obviously requested. And again, it was not indicated as a requirement.

Lisher: So zoning violation number four had to deal with environmental standards, outdoor storage and I think that's what you referenced at you say substantial compliance has been made to remedy that but apparently that has not been completed to the satisfaction of the city, is that fair to say?

Smith: I don't know to be honest. When we first received the notice and we first filed the appeal, I did talk to Mr. Rude about having these things, that we would have these things removed. Mr. Sumerford did take action to have these items removed from the properties. I have not heard from the city whether or not it's been removed to their satisfaction or not. So I can't honestly answer that question.

Lisher: So the answer kind of would be some has been removed and in your words, I think, was substantial.

Smith: Well yes. I mean again like as I said before, the pieces that are left are quite large. You know it takes a little bit more than just a dump truck to get them out of there and there are other pieces that again are intended for use in the eventual development of these parcels.

Lisher: Okay and then skipping to the north pond, I think....

Smith: Oh I'm sorry, let me interrupt you for one second, Mr. Lisher. I thought you were referring, I didn't realize you were just referring to the Burnside property. That has been, to my knowledge, that has been cleaned up. I was referring, the large items I was referring to are on the north pond. My apologies.

Lisher: That'd be my next question. I was going through the violations.....

Smith: I apologize.

Lisher: Okay so bear with me if you.....

Smith: Not a problem.

Lisher: So you're saying that the Burnside pond environmental outside storage waste has been remedied?

Smith: To my knowledge it has, yes. Bob, I don't know if you or Taylor wanna speak to that?

Lisher: Well, I'll ask the city about that. And to the north pond now, it also had to deal with let's see, what are they alleging here? That no permits were submitted for the northern pond and I, is that fair to say?

Smith: Correct.

Lisher: Okay. Now as I'm dealing with the north pond, as to Mr. Sanderford's(?) affidavit relating to Daniel Bird's exhibit, that dealt specifically with that one piece of that northside pond that are sometimes referred to as the E pond, I guess.

Smith: Correct.

Lisher: And that's been done and to the city's approval so that's not part of this violation by the city, I believe, and so I'm not sure what the reference to that serves other than perhaps clutter the already extensive evidence that we have before us.

Smith: Well I think Mr. Lisher, if I can, I think I mean the point of that was to point out that again Mr. Sumerford having extensive experience with the plan commission, extensive experience with building and development in the city, when he purchased that, call it remnant pond. It's not the same as the E pond. The E pond is the north pond and then there's another one that's north of that on Rampart Street. That's the one that we talked about with 2016 approval. I you know that was to say that Mr. Sumerford you know is aware of the requirements currently under the development ordinance and in that situation did come forward, did go and do, get the proper approvals and do the work in accordance with the city's requirements.

Lisher: So it certainly sounds like your client's familiar with why and how to do permits, site permits, is that fair to say?

Smith: I would say 20 years on the plan commission would give you that, yes.

Lisher: Then we get to zoning violation number six, alleged, permanent alteration with the land. That deals with the northern pond, referred to as the northern pond anyway and that was done without a permit, correct?

Smith: Again, it was done in reliance on the 1993 letter from Mr. Toll.

Lisher: Well I thought the '93 letter dealt with the Burnside pit.

Smith: It dealt with both properties.

Lisher: It doesn't say that.

Smith: That was, well as Mr. Sumerford said in his affidavit, the conversation related to both properties and it did relate to both properties.

Lisher: But the problem with some hearsay statement by Mr. Sumerford or whatever Mr. Toll conversations doesn't appear to be very reliable in that we can't question Mr. Toll about his letter so I find that not substantial or not substantive in regards to this appeal. Sorry, Mr. Smith. So the response is no permit was obtained, correct?

Smith: Based on reliance of the '93 letter, correct, it was not obtained, yes sir.

Lisher: And the same is true or maybe, I don't know, zoning violation number eight, site development plan. Talks about the applicability of that, particularly in a business highway district and now it's referring to the northern pond property. I assume then again, what's your response, has any site plan been submitted?

Smith: Again, based on the '93 letter, no, nothing was submitted because it was not believed to have been required based on Mr. Toll's letter.

Lisher: So zoning violation number nine dealt with outdoor storage as it relates to the northern pond and I have information from your letter of September 17, 2020 that that would be resolved. Has that part been resolved about the garbage and rubbish?

Smith: Other than the pieces that I mentioned, the large concrete slabs that are intended to be part of the fill and the bridge pieces that I mentioned earlier. Again, I thought you were I didn't realized you were just talking about the Burnside pond before when I mentioned that so that's why....

Lisher: Inaudible comment.

Smith: So yes, other than that, my understanding from my client is that other than those things, those that has been substantially remediated.

Lisher: So no permit or site plan on that, correct?

Smith: Right.

Lisher: And it's not been.....although I assume you've stopped, all these I assume your client has stopped placing any garbage or....

Smith: He has stopped. He has stopped all fill work that was complained of in notice of violation since that time and he has cleaned up both of these properties.

Lisher: And then violation ten refers to prohibited outside storage. Again, this is on the northern pond.

Smith: Correct.

Lisher: And my note indicates that that's one of the ones you mentioned in your letter September 17, 2020 would be remedied. Has that been remedied or resolved?

Smith: Again well since that's a similar violation to number ten or number nine, I'm sorry, yes. As I said before, that has been, other than a couple of specific items, that has been remedied to the best of my knowledge.

Lisher: I made some notes so give me just a moment. So to kind of summarize maybe, you're indicating that your client is relying solely, basically on the August 4, 1993 letter submitted by David Toll of the Shelbyville Plan Commission?

Smith: That is correct, yes sir. And he's relied on that for the last 27 years in conducting this work.

Lisher: And after having received notice of violation by the city of Shelbyville, had you submitted site plans and they had been denied then this appeal would be premature, would it not?

Smith: I would believe so, yes.

Lisher: Now as to Mr. Adams' affidavit, he states therein that he that although Mr. Munoz, or Mr. (?), is that how you pronounce it, may have been stating that he has authority from the city of shelbyville that he was suspicious and thought that, had disbelief, I guess and you have no other, do you have any submission, affidavit from the city saying whether or not anything had been granted to Mr. Munoz, authority as it relates to the Burnside or north zoning property?

Smith: Bob, why don't you go ahead and answer that since it relates to your affidavit.

Adams: Well it would be clearly illegal, maybe even stronger than that for the city to do that type of thing. It's just not done. It may, if it was factually(?) done, we're not alleging the city did it. The fact is the city did file this notice, the planning director filed this notice within a few weeks after the conversation with Mr. Munoz when he pointed that out. I don't know if there was a violation of, de facto violation of the law by doing that. Typically by saying that somebody had the authority to make these representations.

Lisher: And council, is it appropriate to question Adam Rude at this moment or finish my questioning as to the appellant?

Meltzer: Either is fine.

Lisher: Pardon?

Meltzer: Either is fine, Jim. You can ask Adam a, you can pop back and forth if you want to.

Lisher: Well it would, the flow of things would be better if I was able to ask Adam Rude a question at this time. Adam?

Rude: Yes?

Lisher: Did you have conversations granting Mr. Munoz any authority to act on behalf of the city of Shelbyville as it relates to Burnside pond or the northern pond in 2020 or any other year.

Rude: No. No, we did not.

Lisher: Now there's some, while I'm dealing with you, Mr. Rude, is it appears to me from Mr. Adams some Qanon or otherwise aspiration that you may have been acting on behalf of Arbor Homes or something by way of showing bringing up of violation, the timing of it. Is that true?

Rude: No. We were working on a complaint that was filed with our office. The whatever timeline was happening between Mr. Adams, Mr. Sumerford and Arbor Homes was happening independently to our investigation and then citing of these violations.

Lisher: That would conclude my questions, Mr. Chairman.

Clark: Thank you. Miss Terrell, do you have any questions at this time?

Terrell: No, I do not. Thank you.

Clark: Thank you. One question that I have, it's just a curiosity. At what point did the parcels that contain these ponds, at what point did that go from city to county?

(?): Inaudible comment.

Smith: Yeah actually I was gonna correct something on this. I actually got a text from Andy Sumerford 'cause he just texted me this. He said his belief was that the Burnside pond was in '93 actually part of, inside the city limits so I apologize for that. I do not know exactly when it was that the northern pond came under the city's jurisdiction. I cannot(inaudible)....I apologize. Bob, I don't know if you

Adams: I don't wanna make that representation but I think they were both in the city in '93 when Mr. Sumerford requested the city plan commission to give him an opinion on that whether he needed to file anything but I can check.

Rude: Mr. Clark, we did in our investigation we looked it up. I don't have the exact date. It was in the 80s is when both of those parcels were brought into the city but I don't have exact dates (?).

Clark: Okay, thank you. That concludes my questions. Does anyone have anything to ask that has been sparked by these conversations?

No reply.

Clark: I take that as a no so I will close those questions to the board and open questions from the public. Anyone from the public would like to make question or a statement, you can use the raise hand?

Rude: Yes, raise hand.

Clark: Raise hand. Mr. Rude, if they do use the raise hand, what does it show up as?

Meltzer: A hand.

Clark: On the, okay instead of their icon or where?

Rude: Yes.

Clark: Okay.

Rude: Yeah no one has indicated that they'd like to speak.

Clark: No one has indicated that they would like to speak so I would like to from this point move to

Meltzer: The applicant has an opportunity for a rebuttal and so if Mr. Smith, it's your floor if you'd like to make a rebuttal or any statement.

Smith: Thank you. I'll try and be very brief here. As stated before, Mr. Sumerford proceeded with his work based on 27 years of reliance on a letter from the former plan commission director of the city of Shelbyville. There was never any complaints raised by the city for any work that was going on throughout that time and again, as I mentioned before, the city benefited from the work that he was doing there as he allowed the city to provide fill material at no cost to the city. I would point out as well that the Indiana Court of Appeals in a case that is very similar on a lot of fronts. It was called Brown County vs. Booe and for the lawyers in the room, the citation's 798 NE 2nd page 1. In this case and again, very similar facts to this one in that it was a case where the appellate had relied on the county's representations for use of this property for some time and the county had also benefited from that use and in that case, the court of appeals found that the county was....(inaudible)....from later saying that the uses that he was that had been prior, that had been approved previously were no longer allowed. So in large part, a lot of our appeal is based on the fact that, based on that case, we feel that the city should be (?) from being able to claim that these are now non-permitted uses. And with that again, I thank you all for your time. Appreciate the very insightful questions from all the board members and appreciate your consideration as well. Thank you.

Clark: Now at this point, would I....

Meltzer: At this point you're going to close the public hearing and then there is an opportunity for discussion and deliberation by the board.

Clark: So at this point, the questions are closed and deliberation by the board will follow.

Meltzer: I apologize; you need a motion to close the public hearing.

Clark: Okay, so....

Lisher: Motion to close the hearing to public hearing.

Carter(?): Mr. Clark?

Clark: Yes?

Rude: When are we, are we after the deliberation are we getting our chance to speak?

Meltzer: If the board would like to have closing arguments from the parties, they're welcome to do that or they can close the public hearing. It's up to the board.

Rude: We haven't had a chance yet to address the board.

Lisher: Does the city want to make a response to anything further?

Rude: Yes. Yes, we would.

Clark: Inaudible comment.

Rude: Yep, thank you, Mr. Clark. I'll try to keep it fairly brief. I'd like to walk through a little bit the staff report. The facts that we laid out back in October when we prepared this staff report, they're all still true and there's a few items we'd like to address beyond that and then I'll let our counsel speak a little bit past that. So let me get that staff report. So just as a little I guess, refresher on the timeline of the process because with some of the affidavits filed today, there's some confusion as to what exactly was happening when. I'd like to walk through the timeline. Back in April of this year, we received a complaint from and it was it was Arbor Homes who was engineering and designing a development to the north of this property. We received a complaint from them in regard to they thought that drainage standards were not being met on this property and they were asking how this property, the Burnside property that is, was able to be developed the way it was and that complaint was filed with our office back in April. In May of 2020, our office began investigating that complaint. We reviewed previous case files, department files and we discovered that no formal reviews, approvals or permits had been issued in association with that Burnside pond. Later in as we continued that process and that review in working with our counsel, later in June, similar questions were brought up and complaints filed with developments to the north of the northern pond. Those were Zaxby and Casey's to be specific. Their engineering teams had similar questions in regard to essentially how the northern pond, the (?) pond was able to be filled. The way it was, they didn't think it was meeting our standards and they were raising complaints and concerns. So just as we did with the Burnside pond, we began investigating laying out a timeline, looking through department files and we discovered or we didn't discover that any reviews had occurred, any permits were issued, any permits or applications were applied for for that property. So on August 18, 2020, our office issued the notice of violation, sorry the notice of zoning violations which is attached in the staff report and you all should have a copy of that. On August 25th, Mr. Sumerford visited our office to discuss the violations and at that time, we explained the process of applying for permits and reviews and we gave all those documents to Mr. Sumerford and then on September 9th, the administrative appeal was filed by Mr. Sumerford's representation which you have in front of you. And then leading up to the staff report being written, Mr. Adams had provided some letters and some other documentation to our office. Since then a number of other documents and affidavits have been filed with our office that aren't included with this original staff report. Let's see, the specific violations and the portions of the ordinance that we feel are in violation are violations 1 & 6 in the notice of violations. This has to do with permit alterations to land without review or approval. Both of these properties, and Mr. Smith had claimed it even in his testimony, both of these properties had permit alterations occur to them and the city was not given a chance to review that and insure compliance with all of our standards. Along those same lines, violations number 2 & 7 both properties again, alterations occurred and no improvement location permits were applied for or issued for the work that occurred. Again, the city did not have any ability to review and insure compliance with any of our regulations. And then violations 3 & 8, this has to do with the site development plan process. Because both of these parcels are zoned business highway, there's an added level of

review that they're subject to referred to as a site development plan approval process and that requires review by the city's technical review committee as well as a review and approval by the city's plan commission in a public hearing. That entire process was not undertaken because permits were not applied for. The site development plan process was not applied for. And because that entire process was not undertaken, both the city was deprived of an opportunity to review and insure compliance but the public was also deprived their opportunity to hear the project, voice any concerns as you would in any other public hearing. And then violations 4, 5, 9 & 10 all relate to essentially just construction debris and any other debris on the property. It's our understanding that violations 4 & 5 have been addressed. Those are in relation to the Burnside pond. So the debris on the Burnside pond it's our understanding that's been addressed. After visiting the northern pond and traveling by it many times, violations 9 & 10 are not in our opinion not have not been cured yet. The same construction debris that was out there originally is still there. It's been pushed into other piles and other areas on the site but all of it is still present. It's the construction debris that was being delivered and then dumped into the pond. When they ceased dumping it into the pond, it just piled up on site so it still is there. So in the city's opinion, violations 9 & 10 have not yet been addressed. And then just walking through the conclusion portion of our staff report. We feel that because there was never a formal review process, nothing was ever applied for and a site development plan was never applied for, not only was the city deprived their chance to insure compliance but also the public was deprived their chance. That is why we interpreted the ordinance the way that we did with the facts that we were given. We also just to reiterate a point that was brought up earlier, the applicant states in their administrative appeal that was filed a number of months ago that they had already applied for permits for these alterations. That did not occur at the time and it still has not occurred. We don't have any permit applications or site development plan applications filed with our office. And I'm gonna try to address some of the points that were brought up in the documents that were submitted to our office in the last week or so before I turn it over to my counsel. The drainage report that was filed with our office as part of the record, we've tried to state in our staff report that we do not, we're not trying to claim that there are drainage related zoning violations out at the property. We don't know if the drainage on the property meets any of our standards or the standards applicable at the time again because there was no review undertaken. So we feel that that drainage report that was prepared and submitted doesn't have doesn't serve any purpose to the case. Again, because we are not claiming that the drainage itself is in violation. The letter dated August 4, 1993 from Mr. Toll, some of our concerns with this letter; first and foremost it addresses a conversation between Mr. Toll and Mr. Sumerford that's not summarized in the letter. Because of that, we don't know what scope of work was discussed, what timeline was discussed, what site was even discussed. The petitioner has used this, the vague nature of this letter to serve as a kind of a free pass to alter land up and down that corridor over the years without any you know any restraint from you know time or the need to apply for any variances or sorry, any permits or any reviews through the city and we feel that this is an incorrect interpretation of what Mr. Toll had stated in this letter and again, because of its vague nature, I think it's hard to use this as rationale as to why large portions of huge, you know multiple acre size ponds can be filled in without any proper review from a planning and zoning body like the city's plan commission. To address briefly the Mr. Adams' affidavit that was filed earlier today, as I had stated earlier, I think a lot of the points in this letter

are just a you know I guess I would just dispute the characterization that Mr. Adams has put into these points. A lot of them, most of them actually, don't pertain to this case itself. They pertain to other matters with a development on an adjacent property and actually matters that don't even involve the city. A lot of this is just correspondence between Mr. Adams and the developer for that adjoining property. I will address the final point in here, number 11 where Mr. Adams states that we, myself I changed my response when asked about where the complaints came from for this property. I've been very forthcoming with whomever asked where the complaints came from and that we did receive complaints on these that led to the zoning violations. With that, I will go to Mr. Sumerford's affidavit he had filed. Just to address a few of these points because again, I believe most of this affidavit does not directly pertain to this case and I don't think it's relevant and I don't wanna take your time this evening going through these. Paragraph number three in this, the our department has followed the exact same process for every zoning violation we've dealt with. This is a zoning violation of a little bit different scale but the process is outlined in the UDO. Mr. Sumerford has issue with the process that we went through. It's prescribed to us in the UDO and that's what we followed. And then I'll also just state here the petitioner has stated many times that they used the 1993 letter from Mr. Toll as justification that no permits or reviews or approvals were needed to fill in ponds along this corridor. Again I disagree with that interpretation but I believe the petitioner also has concerns with that because in 2016 they used or they approached the city to seek a permit to fill in another pond that had been acquired. If the petitioner truly you know truly believed that that interpretation from 1993 stood, then they would've continued filling in ponds without seeking approval from the city. So it's kind of a far stretch to say that an almost 30 year old letter still holds true today and that letter having other concerns I've addressed. In my notes here, to address another point that was brought up about whether or not fill that went into these ponds came from the city, we have recently through the you know investigating these claims, we have found that some city projects over the years that have been contracted out might have used Mr. Sumerford as a site to dump their debris. From the city's standpoint, when we hire contractors to do you know whatever kind of public works project that might be, we have to assume that they are taking every precaution on their end to make sure they are legally dumping the debris on a legal dump site. We hired that work out because we don't have the capacity to provide that level of oversight. Since learning earlier this year that some city projects might have utilized Mr. Sumerford's ponds, we've since changed policies to make sure that's not the case moving forward, that those no illegal dump sites can be used for that but again I think it's a mischaracterization that the city put fill into these ponds. I think that's all the points I have. I'd like to turn it over to my counsel to address a few other items that we'd like to cover.

Carter: Yeah(inaudible)...mindful of the statement made at the beginning of this administrative appeal that the issues that are relevant to this appeal are framed in the administrative appeal file by the petitioner and they say nothing with respect to a nonconforming use or raise issues like Brown County vs. Booe case....(inaudible)...which is an exception to the (?) rule....(inaudible)....doesn't apply to city entities such as the BZA or the plan commission....(inaudible)....cases. But the(inaudible)....but I'd just add that really we're not disputing any of the activities that occurred on the property including the construction of berms and swales. We're not there isn't much dispute about the fact that these plans are pretty

extensive including the use and construction of bridges. Just a couple of comments....
(inaudible)....again thank everyone for participating.....(inaudible).....

Meltzer: Mr. Smith, do you have any final comments?

Smith: Yeah just a couple of things in response to some of the things that Mr. Rude brought up. You know first of all as it relates to the approvals that Mr. Sumerford obtained in 2016 on the again it's confusing when you refer to the north pond and then the northern pond. This would be the northernmost one like I said adjacent to or close to Rampart Road. You know that there had to be a new approval for that one because that one wasn't one of the properties that Mr. Sumerford felt that he had approval for in 2016 or not 2016. I'm sorry in 1993. So obviously since there had been no approvals as it relates to that property, that's why he came at that point in time to get that. You know I think to say that the public was denied the ability to speak out as to the modifications to the Burnside pond, granted because you know the requirements in 1993 were different than they are in 2020. I don't know what purpose it serves to have public comment on a project and on modifications that have been completed for 15+ years. I don't know what purpose that serves in requiring those things. Additionally, I would point out that Mr. Rude said that the drainage report that was provided doesn't provide doesn't serve any purpose on his estimation. We would disagree with that because the complaints that were raised, which by the way I will say when I asked Mr. Rude for details on these complaints, he informed me that he didn't have much detail on them and he sent me a couple of environmental reports from Zaxbys and the Casey's General Store as well as a couple of files relating to Arbor but that was all the detail that we ever got on that. When we, the complaints were relating to the fact that the modifications that have been done specifically to the Burnside pond and also to the E(?) ponds had affected the drainage and so the fact that the drainage report that Mr. Stoltz performed on this showed that the fill had caused minimal at best or at worst I guess is a better way to put this, changes to the water elevations. I think that is actually relevant and it does serve a purpose as it relates to those complaints that were made. You know, hold on a second, one more thing. Actually you know, I think that's all I've got actually now that I look back at my notes. Again, thank you all for your time and your consideration on this.

Meltzer: A motion to close public hearing.

Clark: May I ask for a motion to close public hearing?

Cassidy: Motion to close public comments on this hearing.

Lewis: Second.

Clark: Okay the hearing is now closed. So at this point, if we are to as you have advised move this into February. Is this where we would

Lisher: Mr. Chairman, if I may?

Clark: Yes, Mr. Lisher?

Lisher: I would move that this hearing be taken under advisement and ask that each of the parties submit Findings of Fact and conclusions of law within 2 weeks of today's date for the board's review and that the hearing will be reconvened at the next regularly scheduled meeting where the board will make its final decision and issue its Finding of Fact and conclusions of law. This date would then be January 26th for submission of Findings of Fact and conclusions of law by the parties and I believe the next scheduled board meeting of the Board of Zoning Appeals is February 9th at 7:00 p.m. with a pre-meeting of 6:30. That's a long motion but that's my motion.

Cassidy: Second.

Clark: So we can take a vote from the board for this motion.

Rude: A motion for BZA 2020-12; Mr. Cassidy - yes, Mr. Clark - yes, Mr. Lewis - yes, Mr. Lisher - yes, Miss Terrell - yes. Motion carries.

Clark: So the that is now over. Do we have any items for Discussion?

Rude: The only item for Discussion and you'll be getting an email this week about it, our annual joint meeting between the Plan Commission and BZA is gonna be January 25th and it'll be just prior to the Plan Commission's regularly scheduled January meeting. I believe, Allan is that at 5:00 p.m., that joint meeting?

No audible reply.

Rude: Well we'll follow up with you guys with that time. Aside from that, I don't have any other points of discussion.

Clark: One point of Discussion is I would like to welcome Miss Terrell to the board and....

Terrell: Thank you.

Clark:Mr. Bradburn as an alternate. Thank you very much.

Allan Henderson: Correct; yes 5:00 p.m.

Rude: Thank you, Allan.

Lisher: Mr. Smith, do you have any problems with us not making our announcing our decision until the next scheduled meeting, February 9th even though that may be past the five days?

Smith: No, I don't have, I don't think we have any problems with that, Mr. Lisher. I'm happy to supply our Findings of Fact for the board's consideration then.

Lisher: Thank you.

Smith: Of course.

Clark: Are there any other items for Discussion?

Rude: Nope, nothing else.

Clark: Motion to adjourn.

Lewis: So moved.

Cassidy: Second.

Rude: Adjourned; thank you.

Meeting adjourned.