

**BOARD OF ZONING APPEALS
MEETING MINUTES
February 9, 2021**

Chris Clark: The February 9, 2012 Board of Zoning Appeals meeting will come to order. Mr. Secretary, would you please call the roll?

Adam Rude: Of course. Ms. Terrell - present, Mr. Cassidy - here, Mr. Clark - here, Mr. Lisher - here, Mr. Lewis - here. For the, our alternate, Mr. Bradburn is here as well.

Clark: For start in our agenda, we will ask for approval of the meeting minutes from November, 2020, December, 2020 and January, 2021.

James Lisher: I would move to accept the minutes as presented.

(?): Second.

Clark: All in favor, signify by saying, "Aye".

In Unison: Aye.

Clark: Opposed, same sign.

No Reply.

Clark: The meeting minutes are approved. Now in Old Business, we move to Old Business and could you please bring us to speed on that, Adam?

Rude: Yes. I'll.....sorry, I'm gonna jump in front of the microphone in the front of the room. So the item under Old Business is BZA 2020-12. It's the Sumerford Administrative Appeal originally heard back in I believe October of last year and heard a majority of the content at January's meeting. I can run through the first page of the staff report. I don't know kind of format-wise if you'd like us to present, if you'd like the petitioner to present, how exactly you'd like to handle that.

Clark: I believe the we'll consult with counsel first.

Rude: 'Cause I know we've both submitted since then so I'll

Clark: So Jenny, should it go petitioner then Adam presenting new information or vice versa?

Jenny Meltzer: You continued the hearing last in January.

Clark: Yes.

Meltzer: You said in January you were continuing the hearing to allow the parties to submit Findings of Fact....(inaudible)...You did not state whether or not you were going to (?) additional evidence. It's up to you if you want to hear additional evidence or....(inaudible)....to make a ruling today on these are the violations that are before you, all the one through ten. So it's up to you. If you want to allow additional evidence, then same as last time....(inaudible)....the petitioner will be able to respond with any additional evidence that they have and then you can stop the hearing at that point or you can (?) closing arguments the same way that you did (?).

Clark: Okay.

Meltzer: But it's up to the board whether or not they want to go through that process or if they believe that they've heard everything....(inaudible)...

Clark: Prepared to move.....okay. Board members?

Lisher: I'm prepared to....

Clark: You're prepared to

Lisher: I don't know of any additional evidence. I've not seen any submissions....(inaudible)...either party.

Clark: Other than what's in the new Findings of Facts?

Lisher: Yes. So I guess I would move not to accept any additional evidence since none had been (?) before today and proceed accordingly.

Clark: Anyone else have an opinion on that?

Doug Cassidy: Inaudible comment.

Clark: Mr. Lewis?

No audible response.

Cassidy: I think we've one way or another we've carried it out long enough I think. We can decide on something.

Clark: I believe so as well. So

Lisher: You can hear argument if you'd like, but it's up to you.

Clark: So I guess a review of your Findings of Facts; first we'll have the director review his.

Lisher: Inaudible comment.

Rude: I'm gonna have our counsel, Tom (?) walk through our Findings of Fact that's been presented. Thank you.

Tom (?): Good evening, folks. Thank you for continuing into today and giving us an opportunity to present some Findings of Fact and Conclusions of Law based on the evidence that was presented at the January 12th hearing after two continuances. More or less the burden of proof, if I can speak in a little legalese, is on the petitioner, the person who appealed this determination of zoning violations, meaning the landowner. And we submitted Findings of Fact showing that the relevant evidence that they presented failed to carry their proof, their burden of proof. In their appeal they designated the issue as primarily the director's determination that there were flooding or drainage issues. Well that's not the essence of the notice for violations of the zoning ordinance. It had to do with land alterations, storage and waste. That was it. That's the essence of the director's violations for notice violations, not that there are drainage problems. We didn't, the director didn't cite 'em for violations of the portions of the ordinance that deal with drainage violations and in fact, that will come up if they ask for the land alteration provement and they ask for site plan development when it goes to the site plan review process. It's gonna be a tech committee that's gonna assess the drainage issues. That's something that occurs later. What we were here for on January 12th was whether drainage issues. That didn't matter for the purposes of the notice of violations. What mattered is were there land alterations. Undisputed, yes. Was there outdoor storage? Undisputed, yes. Was there waste? Undisputed, yes. Those facts are undisputed and we objected to it what the petitioner attempted to show was well this is a nonconforming use or there's promissory estoppel on behalf of the city. They base that on letter that's (?) Adam, I don't know. That's very vague and details not at all what use was being contemplated by anybody whether it was a former planning director, Mr. Toll or Mr. Sumerford. Or that happened a long time ago and it's not specific enough. To carry your burden on promissory estoppel, the first thing you have to do is to prove that it would be against the public interest to prevent the director from doing what he did. There is no public interest. The only interest here is a private interest based on a conversation that Mr. Sumerford claims he had with Mr. Toll that's memorialized in a letter but it's not memorialized. It's just a very vague reference to land activity. If you look at the evidence they submitted, you can't even tie it to anything more than the one pond. Not the E pond, the Burnside pond. No activities occurred on the E-shaped pond until 2007 if my recollection is correct. It was about ten years later. There is no public interest that will be violated by promissory estoppel. Then once you get past that initial burden, then you've gotta prove the elements and the one is, the one that they can't prove based on Mr. Toll's or excuse me Mr. Sumerford's extensive professional experience is that he didn't have knowledge that there's a zoning ordinance and it requires a property owner to seek permission for land alterations. In fact, he did it as his evidence showed for another pond that's a little north of the E shaped ponds. So as we've laid out in our proposed Findings of Fact and conclusions of law, he failed to meet that burden. Secondly, for a noncomforming use, if you look at the zoning ordinance, it has to be continuous.

There are, if you look at the pictures, the evidence shows there are long periods of non-activity with respect to the filling of the pond. If that's all that we're talking about from Mr. Toll's letter or any of the other various submissions that I contend are irrelevant to the various other jurisdictions - IDEM, INDOT, you know the state and federal agencies, they're intermittent activities. They're not a continuous operation and nonconforming uses are, under your ordinance, phased out after a period of years. In fact, Mr. Sumerford has indicated that nothing's happened on the Burnside pond for maybe depends on who's speaking, but more than ten years. Well, then it's no longer a nonconforming use and if you're storing materials there, if you've got waste going on that was even tied to the original permitted use by Mr. Toll, nonconforming use defenses is ineffective. So for those reasons, we're asking as the, the director is asking to deny the appeal except with respect to the outdoor storage that has been cleaned up with respect to the Burnside pond. Otherwise, the E shape pond still has the outdoor storage and the waste so for those 8 violations, we'd ask you to find in favor of the director, the both the applicable Indiana statute and your ordinance allows you to either affirm, reverse or modify the director's notice of violations. We're asking to affirm them in total. Again, thank you for your kind consideration and attention tonight. Any questions before I walk away from the podium?

Clark: Any questions from the board?

No reply.

Clark: Mr. Lisher?

Lisher: No, not as to director.

Clark: Mr. Lewis?

Lewis: No.

Clark: Mr. Cassidy?

Cassidy: None from me.

Clark: Miss Terrell?

Inaudible reply.

Tom (?): Thank you.

Clark: Now I ask the petitioner to please review their Findings of Fact.

(?): Inaudible comment.

Clark: Excuse me?

Robert Adams: Mr. Smith is the attorney.

Lisher: Well I think he meant....

Adams: Mr. Smith is going to be the attorney who's going to be making the major presentation. I might have a few comments. It's hard for me to sit here and not make some comments, but Mr. Smith is the primary counsel.

Clark: Thank you. Mr. Smith?

(?) Smith: Yes, thank you. Board members, I again appreciate your time here this evening and continuing to hear this matter. As a preliminary matter, Mr. Lisher pointed out at the beginning here that there had been no requests to add additional evidence prior to tonight's hearing. That's actually not quite accurate. We sent a letter to the board on February 3rd requesting that some additional that additional statement that we had received from the former assistant planning director be admitted so that statement is actually not accurate. I just wanted to make sure that everybody was aware of that. That was presented about a week ago. Moving on from that, as we discussed in the last hearing, we differ obviously with the director's position on this. As stated in our last hearing, Mr. Sumerford received approval for doing this work from Mr. Toll in his 1993 letter saying that there was no issues with the work that he proposed to do on his properties. That work commenced and I say it is important from the standpoint of arguing a nonconforming use at least as to the Burnside pond continued for the next 14 years unabated. If you look at the aerials of the Burnside pond from 1993 on until 2007, you will see very clearly that there was continuing work there. So the fact that today there has not been any continuing work meaning that the nonconforming use has been abandoned I don't think holds any water from the standpoint that the work on the Burnside pond again had been completed. There have been no land alterations to the Burnside pond in, as Mr. (?) said, at least a decade. As to the E shaped pond, again that was anticipated in Mr. Toll's letter from 1993 and although the work did not start until some time later, it was contemplated under that letter and continued under that letter throughout the entire time. So in both cases, those would be considered nonconforming uses. As the UDO was adopted in 2011 much later after that the later from Mr. Toll and the work on both of these properties had commenced. From the standpoint of of promissory estoppel, Mr. (?) correctly points out that Indiana law states that you need to show that there is some vital public interest that's being served and he would assert that this isn't a public interest but rather a private interest. To the contrary, Indiana courts have been very clear that the public has a very major interest in being able to rely on the decisions of governmental entities such as the planning department of the City of Shelbyville and so forth in being able to use their land. To allow otherwise would again effect an unlawful taking of their property and a unlawful use of the police power. You know, Mr. (?) says that you know we can't prove that Mr. Sumerford didn't have knowledge of the various requirements you know in fact that's not true and the fact that in 2016 when he decided to do some more land alterations on another pond that he owns in the

same area, he did specifically go forward to the plan commission and get the approvals and get the permits that were required because at that time, it was required. At the time that he received these approvals from Mr. Toll, it was not required to get an improvement location permit pursuant to the requirements at that time. So he can prove that he did have knowledge of these things because again, he did later comply with these obligations going forward. Having said all that, you know we feel that we have submitted evidence to show that there is a promissory estoppel argument that the city should be estopped from now 10, 12 years after work has been completed on the property that Mr. Sumerford should have to go back and go through the process of getting approvals to do work that's been done for 10, 12 years. We've also shown that these both are nonconforming uses because improvement location permits were not permitted, were not required, I'm sorry, at that time and therefore, Mr. Sumerford didn't get them. And the fact that he did later go get one for a different property goes to the point that he was aware that there had been changes in the zoning ordinances. There had been changes in the planning development requirements and that now he was required to go through the ILP process and the approval process with the planning department. Having said all that, again I appreciate everyone's time here this evening. Again we feel that all of the violations should be dismissed as to the petitioner and that as stated in our Findings of Fact and Conclusions of Law and would ask that the board rule accordingly and I'm available to answer any questions anyone may have. Thank you.

Clark: Thank you.

(?): I've got supplement here.

Clark: Yes, please.

(?): I'm

Clark: Yes, could you speak your name for the record please?

Bob Adams: I'm Bob Adams. I'm a lawyer in Shelbyville and I have practiced law here for over 40 years. I've been before the plan commission, board of zoning appeals, city, county and many other not only in Shelbyville, but other ones counties and cities. We have a situation here where a 2012 ordinance is being used here as the basically a means to go after somebody. And Mrs. Hansford(?), the planning director during the time it was, assistant planning director during the time it was adopted confirms this. There was no contact whatsoever of Mr. Sumerford before this August 18th fiat went out. It was just plain hit him with it and that was what happened at this point. She points out that Mr. Sumerford has been cooperative in the past. Has tried to has done whatever the planning department has called and that's the way planning goes in most communities including Shelbyville. You call them. If you're deficient, you correct it and that's the way we work.. It has been in almost all communities. Not in this case. Landfills by their very nature are messy. Right where you're filling in the landfill there's debris and concrete and things of that nature. That's the thing that they're jumping on right now. There were some problems which were corrected. There were some other materials that were

at the area but there's just no way of doing a deposit of debris and so on for fill and then you cover it with soil over the top. There's no way to deal with that situation. It does it is always a little messy until it gets covered up and that's usually big pieces of concrete, aggregate and so on. So that's the argument that's being used that somehow this does not comply. And the so it's so the thing is contrived. It's been brought up to please a developer to obtain basically an easement as I've testified to in my affidavit. And Mrs. Hansard also says in her testimony, she's on the zoom if you want to ask her the same thing that this is not what the planning department has ever done when she was serving. They didn't go out and seek a use on something that had gone on since 2003 with permission from the planning department. The second thing is even in the 2016 request that Mr. Sumerford made still would not comply with the way they're looking at now. He didn't apply for a permit. He walked into the planning department and the city engineer went over it. The planning department probably (?) it and they gave him a letter, no permit. So did he violate again? Is everybody getting violating when they're dealing with the city planning department 'cause they didn't go through this? Never happened before until now. Thank you very much.

Clark: Thank you.

Lisher: Inaudible comment.

Tom (?): I'd just like to say something in reference to the statement of a prior excuse me, a former planning director, deputy planning director submitted an objection. More or less the objection goes to we've already had an evidentiary hearing. We've already had Findings of Fact and Conclusions of Law. For that reason, her statement should be disregarded by the Board of Zoning Appeals. The other reason is it's irrelevant, immaterial and unduly repetitious. It already covers some of the same ground that Mr. Adams covered in his affidavit. More or less that between 2005 and 2015 when she was associated with the city, the planning director didn't notice them of any violations. We've already cited case law in our Findings of Fact that prior weak enforcement or prior non-enforcement is not binding on a future administration for the reason that a negligent planning director could wreak havoc on a planning department by not doing anything. In almost every jurisdiction that I've had experience with in 23 years, the planning director is reactive and that's what it was in this case. He received verbal complaints and he investigated them and he followed the zoning ordinance. At one time I would agree with Mr. Adams that yes, many planning directors called people and said hey, we've got a problem, can you fix it? But that's generally not the way it works anymore because communities are too big and planning departments have finite resources. They can't be everywhere at once. A planning department doesn't have omniscient, omnipresent, omnipotent employees. They generally react to violations or allegations of violations and generally speaking motive is not relevant at all in a zoning matter except when there's matters of due process and question and there's been no allegation in the appellate letter that there's a due process violation 'cause there isn't. Due process is more or less the opportunity to be heard, the opportunity to present evidence and redress have a redress of grievances and that's exactly what this process is. So the allegations of improper motive on the part of of the planning department's director or anybody else is just (?) bait(?). It doesn't have anything to do with the issues. Thank you.

Clark: Thank you.

Smith: It, excuse me if I may briefly respond to Mr. (?) comments there please?

Clark: Yes, please.

Smith: Okay thank you. I appreciate that. I guess first of all I would as I mentioned before, we raised this issue, raised the additional submission more than a week ago. I did note that it was present on the board's agenda website so I believe it had been made available to all of the board members. As far as Mr. (?) objections concern, I received it just a little after 6:00 this evening so I really didn't have a lot of time to review it but just to address a couple of his points; you know first of all, the information contained in that is actually relevant and it is actually material because it goes to the petitioner's overall argument that these permits were not required at the time. He received you know verbal and written approval from the then plan director to conduct this work and based on that, he relied on that and moved forward. So we do believe that it is material and relevant to these proceedings. Furthermore, Mr. (?) both at the January hearing and at this hearing brought up the concept of motive. You know I think it's important to note that you know the petitioner has not you know raised the issue of motive because as Mr. (?) pointed out in January, that's irrelevant except in a case of eminent domain or violation of due process which we have not alleged here. Mr. (?) also points out that waiver is not a defense and again I would point out that we haven't waived we have not raised I'm sorry, a waiver argument in this case. Instead we have raised is the fact that the use is permitted as a nonconforming use and that because it's a nonconforming and because Mr. Sumerford relied on statements of the prior plan director, he is entitled to rely on those statements in moving forward and the city is estopped from now requiring him to go back and get permits that weren't required 20+ years ago. Again, I would just point out as Mr. Adams also pointed out that Ms. Hansard is available should the board desire to question her or consider her evidence and we would appreciate it if they would consider that. Other than that, again I thank you all for your time and appreciate all your efforts on this.

Clark: I will turn to our counsel and ask if we should hear Ms. Hansard's remarks.

Lisher: Well I would move to object to that.

Meltzer: You have an affidavit in front of you and you have an objection to that affidavit being admitted into evidence.

Clark: Okay.

Meltzer: So now you have a motion from Mr. Lisher to grant that objection. So there either needs to be a second to grant that objection which would then remove Ms. Hansard's affidavit from evidence or if there's no second, that motion will die. Someone else would need to make a motion to overrule that object and then have a second, vote and it would come into evidence.

Clark: Okay.

Lisher: Inaudible comment.

Meltzer:(inaudible)...on Mr. Lisher's vote then.

Lisher: Yeah part of the reason for my objection is number one, she's not the director. She's an employee and working under the person and therefore doesn't have the power to speak for the planning department itself, I believe. It'd be like the deputy prosecutor being able to speak for the policy of a prosecutor as to whether or not to file a criminal charge or not number one. Number two, we don't have the ability to question her and therefore I believe it's self-serving from the point of the petitioners hearsay. For those reasons, I believe it should be objected to.

Clark: Is there a second?

Lewis: I'll second.

Clark: It's moved and seconded. I guess

Smith: If I may please, board members, as I mentioned Ms. Hansard is here to answer to answer a question. I know Mr. Lisher mentioned that she's not here to question. She is actually available. She is on the zoom so I would just point that out to the board members in considering this.

Lisher: Again, my point is she wasn't the director. The directors make decisions with or without consulting with their employees so I still stand by my objection. (?) but that's my response on that matter but I have some other questions for counsel if I may?

Clark: Yes, please.

(?): A vote?

Lisher: Oh I'm sorry, did we vote on the objection?

Lewis: I seconded.

Meltzer: You didn't vote.

Lisher: Huh?

Meltzer: You have a motion and a second. You didn't vote.

Lisher: I'm sorry.

Clark: Motion and a second, so voice vote is okay at this point for that objection. All in favor of the objection, signify by saying, "Aye".

Some members: Aye.

Clark: All opposed, same sign?

(?): Aye.

Clark: The objection carries, so Ms. Hansard's remarks will not be heard. So at this point we have the evidence or the Findings of Facts from both petitioner and the plan director so

Cassidy: Inaudible comment.

Clark: Oh yes. Jim, did you have a more questions for the....

Lisher: Well I had questions as relates to the arguments being made and this is directed to petitioner. In your final comments were right on line what I was gonna be asking and that seems to be your position overall, using your words, is based upon a letter of 1993 which is in my opinion way too broad. It doesn't even mention any words about Burnside or any other property matters and it may be common knowledge that Mr. Sumerford owns, I'm sure, more properties than the ones we are discussing. So in looking at the letter itself to me is undue reliance by Mr. Sumerford for (?) based on that overbroad letter that he submitted. And I guess my other question to you would be we as a board if Mr. Sumerford and his entities had applied for the UDO applications and had been denied as an example on the basis of drainage, then would could address that issue as we would on an appeal if the city had in fact denied the request based on drainage. But we're ahead of your wagon before the horse so to speak. You filed this appeal without having done an application. You say that you don't need one. We, I say you do, along with the city and you haven't been harmed yet, in my opinion because you haven't gone through the application process. So I think the petitioner's position is unfounded based solely on the letter of 1993 as it pertains to these properties. So that's what I have to say or question you about.

Adams: If I may (?) that....(inaudible)....the approval of, the planning director said that the approvals had to be obtained and the approvals, noting the location where of the Army Corps of Engineers, the Environmental Protection Agency and also there's another agency as well too were noted with that, were filed and referred to where it's located. So it's, it I think it was tied down. There's no indication that Mr. Sumerford has any other projects than right here and it's been quite evident that those are the ones that the and it's pretty hard to get those approvals. It's a very expensive process to get those.

Lisher: That's all I had.

Smith: If I may respond to Mr. Lisher very quickly.

Lisher: Yeah.

Smith: I don't I appreciate your comments, Mr. Lisher and appreciate your point on this. I will just state I don't believe, we don't believe...(inaudible)....that we are putting the cart before the horse here. You know these, again the work that was done and the approvals, or there were no approvals, sorry. You know there were no permits required at the time. I mean that's a fact. Mr. Sumerford's affidavit sets this out. The fact that the letter from Mr. Toll is vague doesn't change the fact that they weren't required at that time. So to and again, I reiterate my point, both in our Findings of Fact and also in the hearing in January, that to have to require Mr. Sumerford now 10, 15 years after work has been completed, specifically on the Burnside pond, to go back and go through the approval process, that would be like determining that the city hall in Shelbyville is actually not zoned for what it was zoned for even though it was built some time ago and now acquiring another approval process. I realize that's kind of a hyperbolic argument but I think it gets to the point. And the point is that you can't retroactively require someone to get permits for something when a permit wasn't required for it at the time they started that work. And that's really the crux of the argument that we have here. So in that respect, no I respectfully disagree with you that we're putting the cart before the horse. We don't feel that we should have to go through the approval process because that process was not, this process that's set out in the 2011 UDO was not required in 1993 and that's the crux of our argument here tonight.

Lisher: However, once the city brought things to your attention, your client didn't go ahead and remedy the matters that have been set out in violations 1, 2 & 3 so I think the point I would make is irrespective of whether what was in effect in 1993 and what's in effect now. Your client did(?) respond appropriately in our opinion to remedy the situation that was brought to his attention. So....that's all I have.

Smith: Well and again if I may really quickly just respond to that last comment there, Mr. Lisher. Yes, I mean you're absolutely right. Mr. Sumerford did respond to the complaints as far as they related to storage of waste of material. He did respond to those. And he did seek to correct and/or you know, begin correcting that but (?) there's still some material on E pond property that it's been, that process has begun as we mentioned in January. The bigger point is just the fact of the land alteration. The land had already been altered, it's the alteration had been stopped. And so the petitioner's point here again is that what purpose does it serve to have him go through the process to get an improvement location permits and to go through Tech committee and to get drainage approval and to get all those engineering reports that are required to go through that process, which is a very expensive process for work that was not, for no work to be done, for work that had already been done for more than a decade. And to the extent that no more work had been done on the pond, there'd even been a lot that had been subdivided off to put the realty office there on Riley Highway. So that work had been done and to again require the petitioner now, a bit more than a decade after the fact, to go back and get those permits is somewhat nonsensical in the sense that it's done. There's nothing new that's being proposed to be done there.

Cassidy: I have a question. On the one you just gave us here, we're not gonna talk about Burnside any more are we since all those were vacated? So really it's...

Several people speaking at once; no one is clearly audible.

Melter: So in when I was reviewing everything and looking through the case law to ... (inaudible) ... promised you I would. It is my legal opinion that the very short paragraph that I wrote in (?) document sums up Burnside. So if any of the ... (inaudible) ... UDO. Current UDO effective date is February 12, 2012. The reason that I believe Mr. Smith is referring to 2011 is because the ordinance started being passed in 2011, but by the time it finally got recorded, it was February 12th of 2012. Every single fact alleged with regards to the Burnside pond that is still being argued today, not the debris that is on the land, but the actual requirement of an ILP or a site development plan, the facts that would require them to get an ILP ... (inaudible) ... All of that ceased in approximately 2007 and I do not see anything in the record where the city has submitted additional evidence to contradict that finding. We can ask them if they have one, but I do not find one. And so you can't insist upon someone following an ordinance that didn't exist when they actively took the action that they were taking. I can't tell you to go back in time and build your house in compliance with the UDO in 2012 when your house was built in 2007. That doesn't make sense. So I would advise that we vacate the first three violations for Burnside and number 4 & 5 are moot and moot simply means that they went ahead and took the action to clean up (?) and the city has agreed. And so those are no longer violations that are at issue. The remaining point is to the E pond. That one's slightly more complicated, hence why it has several paragraphs of case law ... (inaudible) ... need to look at the dates. Pictures are gonna ... (inaudible) ... 1993 to begin action in 2009. Again, the current UDO did not take effect until 2012. More importantly than that though, we have zero allegations from the director that his current actions would not just be approved period if he applied for an ILP. If his current actions are conforming with the law, they're not a nonconforming use. Whether or not this is a nonconforming use isn't the issue. The issue is whether or not he needs to apply for an ILP which is a permit. So let's say that you're zoned R1. You're platted to build houses prior to 2012. You build some houses prior to 2012. After 2012 if you come in and pull a building permit, do you need to comply with the laws in 2012 for the rest of those lots or are you allowed to go back to the prior 2012 rules? Pulling that permit allows the city to make that determination of whether or not you need those vested rights and are a nonconforming use and whether or not ... (inaudible) ... 2012 forward or if he ... (inaudible) ... prior to 2012. I've not found anything in case law that says that he doesn't have to pull that permit. Counsel, we have two very intelligent counsel here, (?) intelligent more counsel here, they are welcome to tell me I am wrong but that's my advice is that as far as the Burnside's concerned, it's done. It's already finished. As far as the E pond's concerned, they need to pull an ILP and then they need to go through the site development plan process to determine whether or not they're in compliance with whichever set of laws is appropriate which can be determined through submissions to the director to determine whether or not they had done enough construction to meet the case law to then be a nonconforming use or not. But that is a lot of facts that we don't have before us.

Clark: Thank you.

Lisher: Counsel, does if we set aside the Burnside violations as such, the petitioner though would be put on notice that the UDO does exist and if any future work is done on that property, they would be required to do a permit process, correct?

Meltzer: Yes.

Lisher: Yeah, okay. That's all I had. That's the only question I have.

Clark: Does anyone else have any questions in their mind to.....go down the board. Mr. Lewis?

Lewis: No. Jim's question was one I had. You know I'm, you know it makes sense that the Burnside is...(inaudible)...going forward they would have to pull a permit. It makes sense you know thatI think I would agree should be vacated. I don't think the '93 letter would be applicable necessarily to the other.

Clark: Thank you. No further from you, Mr. Lisher?

Lisher: No.

Clark: Mr. Cassidy?

Cassidy: Nothing further from me. Thank you.

Clark: Ms. Terrell?

Inaudible reply.

Clark: And I don't believe I have anything further so I believe we are ready

Lisher: Motion.

Clark:for a motion.

Lisher: Chairman, I would move to adopt Findings of Facts and Conclusions of Law as submitted by our counsel which includes in relevant part the conclusion that a violation of 1, 2 & 3 be vacated, that 4 & 5 be declared moot and that violations 6, 7, 8, 9, & 10 as set forth by the city should be upheld and in support thereof would adopt the Findings of Fact and Conclusions of Law submitted along with that.

Lewis(?): Second.

Clark: So I guess we will cast vote for this would be BZA 2020-12, the administrative appeal.

Inaudible comment.

Clark: Yes.

Meltzer: Inaudible comment.

Clark: I would rather you read them.

Meltzer: Mr. Cassidy - yes, Ms. Terrell - yes, Mr. Clark - yes, Mr. Lisher - yes & Mr. Lewis - yes. The motion carried 5 - 0...(inaudible)...I will add signatures to that as well as fix my one typo I caught and get that to you.

Clark: Thank you.

Smith: I'd like, one just real quick. Just wanna thank the board for their consideration on this and a question for Jenny. I know you said you had prepared your own findings. I don't know if you had provided those to Tom or I ahead of time. I haven't seen 'em, but if you wouldn't mind sending me those when you get a chance, I would appreciate it.

Meltzer: I only provided them to the board as a legal....

Smith: Okay.

Meltzer:(inaudible)....legal analysis....(inaudible)....

Smith: Okay, that's fine. I just I wasn't sure so I just wanted to ask the question.

Meltzer: Okay.

Smith: Thank you.

Meltzer: And you'll get them here shortly.

Tom(?): Is that legal advice you gave to the board, Jenny which would be confidential?

Meltzer: Inaudible comment.

Tom (?): Okay....(inaudible)....thank you.

Adams: Thank you very much.

Clark: Thank you.

Lisher: That way you can decide later whether you wanna (?) to them or not....(inaudible)....

Rude: Do we wanna call maybe five minute....

Several people talking at once. No one is clearly audible.

Clark: Let's take a five minute recess.

Recess

Clark: Okay so we will continue the meeting.

Lisher: I would move to continue to allow the petitioner to address some issues.

Rude: I think it might still be helpful to hear the conversation. I think the last three variances might, they're a little bit disconnected from that density variance a little bit.

Lisher: Well it still has to do with the size.

Lewis: But the density's causing the changes in the class 3.

Rude: Yeah. Yes. I think just one thing, some of those variances might still be able to tonight. But also the petitioners are here. I think if we can work through some of those. 'Cause if we can all figure out what we'll feel more comfortable with I think that, it'll also help the staff a little bit.

(?): Yes.

Rude: If we can't come

(?): Gives us guidance and gives us information.

Rude: And if we can't come to some kind of terms tonight on something, I think....

Lisher: The landscaping....(inaudible)....

Clark: So if we could....

Lisher: Just let you know where I'm at.....(inaudible)....

Clark:continue with New Business.

Rude: Okay so first item under New or the only item under New Business tonight is BZA 2021-01, the Christian Investments, LLC development standards variance. The request consists of four different development standards variances. One from UDO 5.11 which is density and intensity standards. One variance from UDO 5.33 multi-family lot planting landscaping standards. One variance from UDO 5.36 buffer yard landscaping standards. And one variance from UDO 5.55 setback standards. The first variance tonight we're calling variance A. It's from, well let me actually read through the petitioner.....the petitioner's name and the owner's name is Christian Investment, LLC. The petitioner's representative is Prince Alexander Architecture, LLC whose partially in the room and partially virtual today. The address of the property is 1451 W. McKay Road. The current zoning classification is R2, but the petitioner has already filed for a rezone which will be heard by the Plan Commission and the city council to convert that to RM. And again the request tonight is four development standards variances. The first is from density and intensity standards, UDO 5.11. The current standard requires a minimum lot area of 4500 square foot per dwelling unit and a maximum lot coverage of 65%. This would limit the petitioner in the number of units that they can place on the lot because it is only 4.5 acres. They are requesting a variance to allow the construction of up to 96 new additional units on the property. As we go through these, I'll read into the other (?).

Clark: Okay so would the petitioner like to step up to the podium and state your name for the record and tell us about the project?

Crystal Kent: Good evening. My name is Crystal Kent, architect with Prince Alexander Architecture.

Lisher: Hard to hear, some kind of noise.

Kent: Can you hear me appropriately if I keep my mask on? Do you wish that I keep it on?

Inaudible mumbling.

Lisher: Yeah it would be better for you probably to take your mask off.

Kent: Alright.

Lisher: Now you can breathe.

Kent: It's pretty breathable, thank you. Well thank you for coming out in the snow tonight. I know you guys have had a bit of a marathon tonight so thank you for being troopers. It's an honor to work toward a project like this here in my hometown for a change. Company president, Steve Alexander is with us as well. He may be able to better answer some of your questions so I'll defer to him from time to time. Adam and Allan have been fantastic to work with. They've done a pretty thorough job of explaining what we're doing already so I don't need to rehash any of it. I do have a larger print of the site plan if it's useful for us if you have any questions and the design that you see comes from the utility of several things. So the basic premise here is

that to keep rents in a range that our market can support without sacrificing the quality of the building, of the aesthetics, we need to find efficiency in every way that we can. So construction costs, as you're well aware, have quickly outpaced wages and increases in people's income so this creates incredible pressure to dumb down design. We'd rather not do that so one rather green way of breaking that impasse is through density. So there's three main reasons that this works. So first, there's a sweet spot in property management of between 100 and 120 units that really maximizing efficiency of staff, maintenance and upkeep and sales and other resources like landscaping and all that. Second, it's widely accepted that higher concentration of dwellings is much more cost effective for cities to maintain and other cities of similar size to Shelbyville have, well as you were speaking on the break, many more types of dwelling districts than we have and they do allow for much more units per acre in those. And the third thing about this particular location is that it's ideal for families in its proximity to the schools. So that would shorter bus rides, if any, a lot of convenience for the residents. So all the variances that you see before you stem from that density requirement. We've had a lot of success with this in other projects so and it was cleverly mentioned that the 65% lot coverage may actually be a consideration depending on how much of the parking is considered. I'll have to, I apologize, we didn't talk with Adam specifically about that issue before this so if we need to follow up on that, that's no problem for us. Just let me know. If you agree with this in principle, we'll follow up with the appropriate paperwork. So finally, we're just excited to provided an exciting option for housing here and we hope to set the bar higher for others who might wanna come along and build here as well. Respectfully, thank you for your consideration of the petition and we're at your disposal for questions.

Clark: Alrighty, so we'll start with questions from the board. We'll start with Mr. Lisher.

Lisher: I have problems with the number of units with this small of a space and because of that, the variances you seek on the other things as far as B and C all deal with well basically in my mind how many units are necessary to be built. So explain to me why we should do away with the density standards as it applies to having to have 96 units.

Kent: Right so it's a great question and I should've brought some other ordinances from other towns like ours but basically our evolving zoning districts haven't arrived yet to that point that would allow for this kind of thing as is commonly done. But like it was mentioned, those three things, why the density is important, but perhaps Steve can talk about why it's successful in other places where we've done projects of similar size.

Steve Alexander(?): Sure, thank you. Can you hear me okay?

In Unison: Yes.

Alexander: I appreciate the opportunity to speak as well on representation of Christian Investments. I think in the sort of the approach to the project was understanding that height(?) and its proximity to the school and opportunities to increase a little bit of density in the this we refer to it as a landlocked piece of property because the original apartment project that fronts on

McKay Road essentially cuts off this back part of the property to the south. And so a way to accommodate what might be considered higher development costs as opposed to like say a green(?) field site as opposed to an infill site in the city has to speak to how does the developer get you know professionally managed project and the way to do that is to do that is to have that ideal density or number of units which is around 100 to 125 units. So when we set out to design the project, one of our objectives was to lay out the site so that the open space remained around the perimeter of the site to benefit the adjoining landowners and make the concentration of the development into the center of the property as you see in the site plan that is there. And so when we look at the comparison between the ordinance requirement of 65% site coverage and we're a bit I think we're 60 and 65, we're not a great variance away from the stated ordinance site coverage area and so with the two building and the quantity of by looking at the design of the site, we're meeting the intent of the zoning and density. It's really a rather narrow variation that we're asking for.

Clark: Does that answer your questions, Mr. Lisher?

Lisher: Well I would ask Adam what the what's the planning commission's response or the planning (?) response to how much more are they asking than what would be allowed currently under our ordinance? I see I can see 48 and 48. He talks about over a hundred, so I'm confused a little bit with that but....

Rude: And I think that also, sorry.....I think that also when they're talking about over a hundred, they're counting the existing units there which I believe....

Alexander: That's correct.

(?): 16 existing.

Rude: 16 existing, so when they're using a number just over a hundred, yeah that's why.

Lisher: Okay.

Rude: To the point about the zoning districts, I do think and we've noticed this in some other aspects of the ordinance over the year, since we adopted this ordinance in 2012, most of our multi-family residential standards have not been tested, if we wanna use that term. We haven't had new multi-family development of any serious scale since then. The only multi-family we've had come through are in planned unit developments which don't use any of these standards. So typically I don't think staff would love the thought of varying from a standard very far but the standards like we've stated tonight have not really been tested. The same, you know the same lot coverage is still being met but the actual density of units is being exceeded. You know certain aspects of the ordinance is being met while others are being exceeded.

Lisher: Well are you able to answer the question? He makes the statement that their request is small a small variance to what is would ordinarily be allowed and I was just asking well can you give me a clue as to what would be allowed under our ordinance versus what they're asking?

Rude: What would be allowed is

Lisher: I mean is it 60? It is 72?

(?):two family, isn't it?

Lisher: Yeah.

(?): It's already zoned two family, isn't it?

Rude: Yeah and under its current zoning district, it's a completely different set of standards because it's currently zoned for duplex style. We're looking at the multi-family but at that level of density, it's 46 units is what would be permitted, 43.56.

Lisher: And a unit is a unit. It could be a one bedroom or a two bedroom or a three bedroom or whatever. A unit is a unit, correct? Under the ordinance?

Rude: Yes. Yeah there's no there's a minimum unit size. I think it's 600 square foot but anything in excess of that, one, two, three units you know we don't dictate the number of bedrooms or (?).

Lisher: So and their requests deal with reduction of buffer zones as well and setbacks from so forth so in my view, ma'am, the my question is are you able to live with less than the 96 or the 48 and 48 units, the total of 96 units? I think that's how you're doing this, yes, but units or not because if you're not, then I have some problems and those problems also would affect whether how much setbacks and so forth are necessary in some lower number density is kind of where I'm coming from and I don't wanna necessarily put you in a position that if you fail in approving these variances that you have to wait a period of time in which construction otherwise could've been started when the weather's better. So there's a period of time. I don't know if it's six months or what, but.....I'm just asking and suggesting maybe that a continuance for one month if you're able to accommodate that to allow working with staff to note some of our some of the board's concerns. It might be in your best interests.

Alexander: I don't think we would have a problem with that, Mr. Chairman.

Kent: Absolutely. We are eager to resolve any concerns that you might have. In terms of the amount of density that we could do, if there's a number you're more comfortable with, we could float it past the proforma(?) and see if the numbers still work. It's tight. I would be loathe to go that route. I would much rather address the concerns that you do have with the proposal and see if we can find a better solution. But you know we're open to it.

Lisher: Well I don't wanna be in....I wanna give you the opportunity. I don't wanna knock the project out you know, so to speak. But in my mind, it's too much for that area. So some lower amount. I don't have any magic number in mind. That's why I wanted to know what is allowed. I think I'm willing to grant more than that, so you know whether that number's 72 or you know I don't know how you do your units. You know, 60? I don't know, 80? I don't. It's hard for me to understand that. I....

Kent: We can look at it.

Lisher:just to being able to work with you and talk to the other board members. I don't mean to be the only spokesperson here.

Rude: Well and....

Clark: Inaudible comment.

Rude: I guess a question for the board at large and the first thing that comes to mind, would it be helpful if staff prepared you know I know we I don't always love doing this, but trying to find comparable communities and just seeing what is typical? Trying to find examples of what this density actually looks like in person.

Lisher: And particularly if it's in our own city would be helpful.

Clark: Yes.

Rude: Yes, yes. And we can pull some of those density comparisons just to see. 'Cause a lot of times it's hard to look at numbers like a 196....(inaudible)...

Lisher: And I would further appreciate if the petitioner was able to provide as we've seen in other projects, I know there've been (?) commercial properties but they would show some idea where's the setback at that they're requesting. And if they plan fencing or trees or shrubs, where they what's it gonna, some idea of what they're asking for and how it would look versus having to rely on my imagination. And that would be helpful. We've seen that in other projects.

Rude: More like a kind of (?) model or?

Lisher: No it doesn't have to....you've seen it.

Rude: Uh huh.

Lisher: We just had one not too long ago. Landscaping, Casey andwhat?

Clark: Speedway.

Lisher: Speedway. That was helpful, very helpful to look at. If you remember that had to deal with how far back from the Michigan Road how far back from road, etc. This part....

Alexander: We can do that.

Lisher: I just need to see some idea of where this is gonna be with the neighbors and it is a tight spot, I know. It's like a trapezoid or something. I don't know what the geometric name for that is but.....

Lewis: Or if we could see what it would be like under our ordinances, how many units? 'Cause I'm still a little unclear on the units.

Kent: You have that.

Lewis: I don't know if it's just me or if it's.....

Kent:(inaudible)....Great question. This proposal shows three story buildings. We did do another study early on that we shared with planning staff that showed what it would look like if we were to stick with the original ordinances. (?) design. That's the one.

Several board members speaking at once; no one is clearly audible.

Rude: In your, in the paperwork on page 3 of their letter of intent, yeah there's a graphic here. That is designed to kind of our current standards.

Lisher: Here it is.

Kent: And in that one, those are two story buildings.

Clark: You're speaking of this page?

Several people speaking at once; no one is clearly audible.

Kent: Yes. Part of the efficiency I was talking about that really gets your

Inaudible mumbling.

Kent: You go two story, you end up with a lot more per unit. You have to start sacrificing the things that we'd rather keep for the (?).

Several board members speaking at once; no one is clearly audible.

Cassidy: Has he bought the front two buildings?

Kent: Yes. In fact, he

Cassidy: Or in the process of buying them?

Kent: He closed on them, I believe, last year. And he started renovating the front apartments already. But the idea there is to create a unified development by sharing some exterior materials. So he's doing some inside you know stripping paint and putting in new cabinets and carpet but the exterior's getting a touch as well as part of this.

Cassidy: Do you think with this development, maybe this'll come before us in the Plan Commission, one entrance or if you had 100 apartments, you're looking at 75 or 100-200 cars if you have two people in an apartment and each one of 'em have, you've got 2 cars with one entrance?

Lisher: But don't they have to have a second entrance for.....?

Cassidy: Well this only shows one.

Several board members speaking at once; no one is clearly audible.

Rude: There's a threshold in the standard. We've have to look that up. I don't think they hit the threshold to.....

Lisher: 'Cause that's why we required Twin Lakes and the others. You gotta have.....

Cassidy: Another entrance. School buses.....(inaudible)...

Lisher: 'Cause if there's a fire or something and blocks that one entrance, people have to get out.

Kent: We can answer that.

Rude: Yeah there's a standard in the....

Lisher: She can answer us.

Kent: The building code is sort of a specialty for me. So the issue is that fire trucks have to be able to come into a property, fight a fire and then exit the property without having to back up more than 150'. So those (?) are a little bit less strict for sprinklered buildings but not much. So basically the radii of the parking lot have to be designed such that the largest vehicle in the servicing firefighters department, it has to accommodate that. So if their biggest truck is 45' that's what we have to make our radius to turn. So it's in terms of fire safety, there's no requirement for a second entrance but maneuverability is key.

Lisher: I don't mean to argue our ordinance, but I thought our ordinance required well like in the Overlook, we have an emergency second exit, believe it or not, in the grass but

Clark: See I wonder if that's existing there.....(inaudible)....

Lisher: But it seems to me it was for emergency vehicles and that's what we required on all those developments off of McKay and Amos and.....

Rude: Yeah and there is a standard and we'll as it goes through Tech Review and everything, but....(inaudible)....

Lisher: It's not that we want anything bad to happen.

Rude: Yeah. We wanna be ready in case that happens, but

Lisher: Yes.

Rude:there is a standard and I can look into that. For, it's different for single family and multi-family and in commercial.

Lisher: Right.

Rude: Twin Lakes hit a threshold 'cause they had 50 single family homes and 100 apartments and 30 duplex. You know, when you start adding all that up, they start, you start to trigger it ... (inaudible)....

Lisher: Well I know they fought that a little bit but we insisted, so....

Rude: Yes.

Kent: These would also be fully sprinklered buildings by the way.

Alexander: I would also say that in the continuance period we will be able to a traffic flow in greater detail and give you more information on that as well.

Lisher: That'd be helpful.

Rude: Yeah.

Kent: We can do some details on the buffer yard. Show where the fence is, where the trees would go, what kind of trees. We have some ideas for what will work really well. So we'll have that for your edification and review.

Lisher: Yeah I'm sure you can have different species of trees that don't grow as high as....the canopy can be. The canopy you can have honey locust and they tend not to go very far.

Kent: We were thinking (?). He was a big fan of honey locust as well.

Clark: We have resources.

Lisher: Well we got a tree person.

Clark: Yes.

(?): ...(Inaudible)....focusing on developing a little bit more. And in concert with the need for a variety of price points in housing, that's a concern of mine where it kind of packs a lot of (?) in a small space like that, I would assume price points are not necessarily adding to the diversity of...(inaudible)....

Kent: The intention is to have market rate housing.

Inaudible mumbling among board members.

Rude: Well and I think taking in some of these comments, from the staff's standpoint, we're gonna take some time then and obviously working with the petitioner but I'd like to prepare some kind of report for you guys on an analysis of what density, what does density actually look like at these different points so we can start having that educated conversation rather than guessing what these numbers mean. And also working a little bit on what that buffer yard will look like specifically so we're talking in a little bit more detail. But aside from that, I also have you know we're gonna look into the city's standards on multiple entrance/exit points and then I believe the petitioner's gonna look into a little bit more traffic analysis kind of impacts very preliminarily. Are there any other.....

Several board members speaking at once; no one is clearly audible.

Clark: That's what I was going to do. I was gonna try to get us back on track and go through questions, any other questions. Mr. Lewis, do you have any questions?

Lewis: No.

Clark: Mr. Cassidy?

Cassidy: None for me, thank you.

Terrell: I would say mine are probably more of a concern than a question, I'm still just concerned about a three story dwelling in an area where there are no three stories. You're putting a three story apartment complex. You'll pretty much have one level and two level homes

in the middle of that. That's probably my biggest concern is having this massive apartment complex in the middle of an established subdivision.

Kent: That's a very fair point. One of the things Steve was speaking to was by pulling them to the middle, you really do create that distance and they diminish greatly with perspective when you have them farther away from everyone. And also their setback from the road 'cause those existing two story apartments, right now, they're kind of an eyesore.

Terrell: If you're the neighbor in the condos or on Berwick or even for that matter Countryside, that's now your view that you're looking at so it just kind of takes(inaudible)....concern as well as the entrance, especially with buses because buses will not be able to turn. Those families will have to walk those kids to the front of that subdivision 'cause they won't....(inaudible).....So you might wanna check into that as well.

Kent: Thank you for that tip. We will insure that that's, the maneuverability or operations can accommodate and that's also why it's important these are pretty buildings 'cause everyone's gonna see 'em.

Clark: I have no questions on this at this time so....

Lisher: I think there was a motion to continue.

Clark: Was there a motion?

Lisher: I thought. No?

Clark: No.

Lewis: I'll make a motion to continue 2021-01.

Lisher: I second. (?) suggested it.

Kent: We appreciate how hands on you guys have been with this. It's fantastic. Your interest and your comments are really helpful, so thank you.

Alexander: Thank you for that.

Rude: We can do....

Clark: Voice vote?

Rude: Yeah we can do a voice vote. I think it's gonna be unanimous.

Clark: All in favor of continuing?

In Unison: Aye.

Rude: So we'll work with the petitioner then and I've got a page here of notes and I'm gonna review this video tomorrow to make sure I capture anything else I might've missed so we can bring some more details back next month. Thank you.

Clark: Thank you.

Kent: Thank you very much.

Rude: Thank you, Crystal.

Clark: Thank you very much. Any items for Discussion?

Kent: I wish I brought everybody cocoa, a cup of something.

Rude: I do not have anything under Discussion except there's a handful of you that were recently sworn back in or sworn in for the first time. When we get done tonight, if you can follow me down to my office, I need to get you your copy of that certificate. But besides that, business as usual in the office.

Lisher: And do the new members have copies of the ordinance?

Rude: Yes andwell they've got, you two have hard copies of the comp plan, citizen planner's guide and we're ordering new copies of the UDO. Does anyone else need a new copy of it?

Clark: Have the....

Lisher: Inaudible comment.

Clark: Yeah what I need is the current, so....

Rude: I will, let me send out a link to all of 'em.

Lisher: Those don't work.

(?): Inaudible comment.

Clark: Yeah. I've got the citizens, both of those actually.

Lisher: Okay.

Rude: I'll send out a link to the UDO 'cause there's been, since it was adopted I think there's been three decent size amendments. If you, some of you might just need new pages replaced.

Lisher: Could you copy it for me?

Rude: Yes.

Lisher: My printer's black and white....

Rude: Yeah you probably don't wanna print 500 pages on it either.

Lisher: Well that's why I didn't get your email from yesterday until, I didn't get, I wasn't, I left the office at 3:00 yesterday and you were (?) p.m.

Rude: I apologize.

Lisher: I didn't get in the office today 'cause my driveway didn't get plowed, so....

Cassidy: Do we need a motion to adjourn?

Clark: Yes, I was just getting ready to ask.

Cassidy: Motion to adjourn.

Clark: Yeah.

Lewis: Second.

Meeting adjourned.