

BZA MINUTES

MARCH 17, 2020

Members present: Jon Peacock, Jason Hawley, Jim Hufford, Don Calhoun, Bill Davis

Absent: Kevin Carreno, Myron Cougill

Legal Representation: Jason Welch

Staff present: Randy Abel, Debra Johnting, Recording Secretary

Others present: Jon Orlosky, Gary Nale, Austin Smith, Mark Todd, Cheryl McKissick, Kent McKissick, Curtis Friend, Doyle Allen, Dean Edwards, Robert G. Cook, Nan E. Harris, David C. Harris, Wes Schemenauer, Orla and Linda Baldwin, Larry Mosier, Ed Thornburg, others

Chairman Hawley: Alright, looks like we've got 7 o'clock, I'd like to ask all board members if they've received the minutes from the last scheduled meeting? Can I have a motion to approve these minutes? We have a motion and a second, can I ask for a vote to approve minutes as they are? All in favor? Ok, we'll accept the minutes as they are. Alright, have all applicant's received a copy of Article V, Conduct of Hearing? Ok. We have I think one case on the docket tonight, BZA2020-7-A, is that correct for tonight? No, ohh, ok.

D. Johnting: BZA2020-6-V. And I just want to make a note that in the very beginning I put 7 as a variance and it's an appeal, so 7 is an A, 6 is V.

J. Hawley: Ok, sorry about that, so BZA2020-6-V, agent of owner, Mr. Robert G. Cook, attorney, if that applicant would like to come to the front and state your name and address for the record, and tell us about what you are requesting. And what we can do for you.

R. Cook: My name is Robert Cook, I am an attorney with an office in Winchester, Indiana. And I am representing Cheryl and Larry Kent McKissick in regard to two matters this evening. One is a request for a variance of seven feet from a rear yard setback, and the other is an appeal from a stop work order on construction at 535 Lissaaron Drive. The facts around both of these petitions are the same so it is my understanding that the hearings are consolidated.

J. Welch: That makes sense to me.

J. Hawley: Were notices mailed for this hearing mailed to the abutting property owners?

D. Johnting: Yes.

J. Hawley: And they did verify, ok?

D. Johnting: Yes.

J. Hawley: And there was public notification in the local newspaper?

D. Johnting: Yes.

J. Hawley: Ok, so there we go, so why don't we see what all you have?

B. Cook: Ok, so what I have prepared for you is our proposed Findings of Facts and several exhibits, and my purpose here this evening is to attempt to give you some historical perspective about this particular situation and why we think we are entitled to the variance, and why the ruling of the Administrator on the stop work order should be overruled. In the summer of 2019 Mr. McKissick, and at that time Cheryl Dunham, they weren't married yet, and they joined in the bonds of matrimony I believe in January or February of this year. In our discussions with Mark Todd and his wife in regard to the purchase of property at 535 Lissaaron Drive in Winchester. Their intent was to construct a single family residence on this property. The 535 Lissaaron Drive is located in an R-1 zoning district. Mr. and Mrs. Todd were wanting to sell the property to Kent and Cheryl. And so, Kent and Cheryl started entering discussions with TK Constructors regarding the construction of a single family residence on the real estate. Now, the petitioners were fully aware of the twenty foot setback on the rear yard, and they informed TK Constructors, Inc. of that fact. They entered an agreement, that would be the petitioners and TK Constructors, Inc., entered an agreement, dated August 21, 2019, and that is Exhibit 1 in your packet, regarding the construction of the single family residence. Then on September 19th, Mr. McKissick and Cheryl entered an agreement with Mr. and Mrs. Todd for the sale of purchase of the real estate located at 535 Lissaaron Drive, and that contract is Exhibit 2 of your packet. On September 24th, 2019 Tk Constructors employed the services of Ashton Surveying Inc. to create a drawing placing the proposed home on the real estate and to locate the boundary lines of the real estate. You'll find in your packet the affidavit of Ashton Surveying Inc., which is Exhibit 3. TK Constructors Inc. provided to Ashton Surveying a prior survey of the real estate and a drawing of the house and that is Exhibit 4. There was an addendum endorsement to the agreement with TK Constructors which was entered by between McKissicks and TK Constructors, a provision of which would be that TK Constructors would apply for the building and zoning permits. And that addendum is shown at Exhibit 5. The McKissicks paid as that addendum shows McKissicks paid \$500 for that service. Ashton Surveying did the field work for the request of TK Constructors on October 14, 2019, indicating the rear boundary line of the real estate and the four corner of the house to be constructed on the real estate. The rear boundary line was indicated with 5/8" (inch) rebar pounded into the ground with wood stakes, with flagging placed at four different points on the rear property line. Stakes were flagged indicating the four corners of the house. And this is established by the affidavit of Ashton Surveying Inc. Exhibit 6 and Exhibit 7 are photographs of the rear property line, Exhibit 7 indicates one of the corners of the house indicated by a stake. On Tuesday, October 15, 2019, Nan Harris emailed Randy Abel inquiring as to the minimum setback requirement for in town from the neighboring property line. That email was set forth at Exhibit 8. Randy emailed Nan Harris back on October 21st, informing her that the rear setback is twenty feet. And that email is set forth at Exhibit 9. The rear construction line for the house was located by Ashton Land Surveyors Inc. thirteen feet from the rear property line. That drawing is at Exhibit 10. That drawing was forwarded to TK Constructors on October 29, 2019. Mr. & Mrs. McKissick never saw that drawing until February 4, 2020. Petitioners were conveyed the real estate by Mr. and Mrs. Todd by a deed that was dated December 16, 2019 and that was recorded as instrument number 20195074 in the Records Office of Randolph County Indiana. That deed is at Exhibit 11 in your packet. Part of the recording of that instrument is a survey, that was a prior survey that was performed by Beals Moore, and Associates dated October 16, 2019 showing a distance of the boundary line dividing lots 25 and 26 to be 86.81 feet. Part of the recording of that instrument is the approval of the parcel split signed by Randy Abel, Administrator of the Area Planning Commission of Randolph County dated November 6, 2019 making reference to the

survey. Petitioners never saw this deed of conveyance as the same was not part of their closing of their loan on the construction of the residence which occurred on December 13, 2019. The loan closing was handled by a title company in Clearwater, Florida. The deed that was executed by Mark and Carrie Todd was December 16th, and was forwarded by Mr. Todd to the title company located in Clearwater, Florida on December 17th. TK Constructors Inc. pursuant to their agreement with Mr. and Mrs. McKissick applied for a building permit and an improvement location permit for the construction of the residence. That application was made December 13, 2019. And that is Exhibit 12, that fact is established by the affidavit of TK Constructors. At the time of the application for the building permit and the improvement location permit, my understanding is that the zoning staff stated that the drawing of Ashton Land Surveyor Inc., which was at Exhibit 10 was not part of the submission of the documents by TK Constructors. At the time of the application for those permits the zoning staff stated they informed TK Constructors Inc. of the twenty foot rear yard setback requirement in the Unified Zoning Ordinance. TK Constructors Inc. was issued the building permits and improvement location permit on December 13th that is set forth on Exhibit 13 and Exhibit 14. On December 16, 2019 an email was sent from the zoning staff to TK Constructors Inc. asking for the plans and to mark the setbacks for the placement of the residence on the property. And that was in the email from Debra Johnting and is set forth in Exhibit 15. TK Constructors Inc. sent another copy of the house plans on December 17, 2019 but did not send any drawing regarding the distance of the proposed residence from the boundary lines of the real estate. Because of illness within the zoning staff there was not a follow up in regards to the request for a drawing regarding the distance to the proposed residence from the boundary lines of the real estate. Construction was started on the real estate on January 2, 2020. The rebar for the foundation was laid on that date and was inspected and approved by Randy Abel on that date. The foundation was poured and laying block was started on January 9, 2020. By February 5, 2020, the framing of the home and the roof was installed but no shingles were installed on the roof. Prior to February 4, 2020, the Administrator did not measure the distance from the rear boundary line to the construction line of the residence. Nan Harris sent an email to the zoning office on Saturday, February 1, 2020, informing the zoning office that the foundation was thirteen feet from the property line. And that email is shown at Exhibit 16. The zoning staff called TK Constructors on February 3, 2020 for the site plan. That plan was sent on February 4, 2020. Randy Abel issued a stop work tag on the residence which was dated February 4, 2020. Upon learning of the stop work notice, the petitioners attempted to purchase seven feet from the adjoining property owners, David and Nan Harris. Mr. and Mrs. Harris were not willing to sell the seven feet but inquired as to the insurance carriers of the responsible parties. Prior to the start of construction, the petitioners obtained a construction loan for \$237,879. On February 4, they had paid TK Constructors \$67,903.63. TK Constructors Inc. estimates the cost of moving the residence forward on the lot in order to comply with the rear setback requirement would be \$40,000. TK Constructors Inc. estimates that the cost to tear down the present construction would be \$10,000, and that is, those figures are in the affidavit from TK Constructors at Exhibit 12. Tearing down the current construction and starting over on the construction would cost an additional \$77,903.63. Which represents the money which they have already spent this far plus the tear down cost. The residence as it stands is not fully protected against the weather. If it remains in this condition the OSB that's part of the roof could become delaminated, which I had to have that explained to me, it's the splitting apart, and various parts of the framing could be warped because of water damage. Delayed construction means increased future costs. Prior to, and knowing that they were going to build this residence, Cheryl owned real estate at 624 South Clem Street in Winchester,

and she entered into an agreement to sell that house on December 6, 2019. The real estate transaction closed on February 7, 2020 at the law office of Cockerill and Cockerill. The possession date for the buyer of this residence was June 1, 2020. That possession date was to coincide with the completion of the residence located at 535 Lissaaron Drive. Because of the stop work order issued upon the complaint of Nan Harris the residence being constructed at 535 Lissaaron Drive will not be completed by June 1, 2020, requiring petitioners to make other living arrangements for themselves, their children and their pets. Larry owned real estate at 925 Waterview Street, Winchester, and he closed that sale on December 6, 2019. That real estate transaction closed at the law office of Cockerill and Cockerill. Nan Harris is a legal assistant and is employed at that law office. The structure as it presently stands does not encroach upon the real estate of David C. Harris and Nan E. Harris. And that is shown by the photograph at Exhibit 6. The structure on the real estate as it is currently situated does not affect in a substantially adverse manner the adjoining properties, specifically the structure does not affect in a substantially adverse manner the real estate located at 558 South East Greenville Avenue, which is the Harris's real estate. These facts as set forth in the appraisal of Curtis Friend, which is attached at Exhibit 17. Except for Mr. and Mrs. Harris, all other abutting property owners are in favor of the variance. You can see the statement of the abutting landowners at Exhibit 18. Abutting property owners Dean E. Edwards and his wife Karen did not sign Exhibit 18 however Mr. Edwards is present this evening and is expected to speak in favor of the variance. The intended use of this real estate is for a single-family residence in a zoning district that allows that use. All abutting property to this real estate are used for single family residences. The pie shape lot on a cul-de-sac with the rear yard setback and the front yard setback has presented difficulties in the construction of a single-family residence on this real estate. The problems presented by this type of lot would not be applicable generally to other property in the same zoning classifications which are not located on a cul-de-sac. It is my understanding that the Area Planning Commission of Randolph County is reviewing pie shape lots on a cul-de-sac with a depth of one hundred feet or less to determine if the rear setback requirements for said lots should be 12 feet instead of 20 feet. Based on our evidence that we have presented we feel that you could grant this variance in that the approval would not be injurious to the public health, safety, morals or general welfare of the community. The use and value of the area adjacent to the real estate included in the variance will not be affected in a substantially adverse manner, and the strict applications and provisions of the Unified Zoning Ordinance for Randolph County will result in practical difficulties in the use of the property. In particular physical surrounding shape and topographical conditions of the specific property involved would result in a particular difficulty upon the owner as distinguished from a mere inconvenience if the strict regulations were carried out. The conditions upon which this requested variation variance is based would not be applicable generally to other property within the same zoning classification and the alleged difficulty has not been created by any person presently having an interest in the real estate. There are several different time periods when this problem could have been avoided. The first would have been if the Harris's had complained earlier, we might have been able to apply for a variance and not have been this financially involved. The second would have been when the foundation was laid, if the zoning Administrator had measured. The third would have been if the people who were hired by McKissicks would have obeyed the zoning ordinance or it would have at least informed the McKissicks that there was a problem with the rear setback. So, we are asking the Board of Zoning Appeals to grant the variance of the seven feet and to overturn the stop work order of the Zoning Administrator, and we are happy to take any questions at this point.

J. Welch: Mr. Cook, I had a question. On finding 16, this says that the petitioners informed TK Homes of the twenty foot rear setback?

B. Cook: Yes.

J. Welch: Do you know who they spoke with specifically at TK Homes to inform them of this setback?

K. McKissick: Mr. Gary Nale.

B. Cook: Gary Nale.

J. Welch: Gary Nale? And when did that meeting take place?

B. Cook: In August of 2019.

J. Welch: And who was present then when that happened?

K. McKissick: Myself, Cheryl, and Gary.

J. Welch: Do you know if the petitioners went out and looked at the home during the time that it was being built?

B. Cook: Yes.

J. Welch: Did they ever notice that it was closer than twenty feet to the flag?

B. Cook: No.

K. McKissick: No. Sir.

J. Peacock: Is there anything marking that property line, or was there then when construction started? Flags, or anything?

B. Cook: Yes, there were flags marking the rear property line. There were also flags marking the rear construction line.

J. Hufford: I have a question. You said that February 4th was the date that you got the site plan sent to the Area Planning?

B. Cook: Yes, that was sent by TK Constructors.

J. Hufford: Yes, why wasn't that before construction started, I mean usually that's when we see it. Usually these things are opposite of what we're doing now, after the place is up, it's usually when we get the site plan and they have a variance, because we....?

B. Cook: I do not know why TK Constructors Inc. did not include that plan, that drawing of Ashton's when they applied for the building permit.

J. Hufford: And did TK, do they have a copy of our ordinance or anything that shows the setback?

R. Abel: No, he came into the office and talked about it. What we do for Area Planning Permits is we do it on the GIS map, and so we print off a GIS map for everybody that comes in, and they take a felt

tip pen and draw on there where it's supposed to go. So, that is basically, as opposed to us having an actual surveyed drawing with dimensions on it, we do it on the GIS map. And we do that for every location for every permit. So, when they leave they are fully aware of what the setbacks are and where that building has to go. And it's drawn on that GIS map.

B. Cook: My understanding that the GIS map drawing with those setbacks were not done on December 13th.

R. Abel: On the day of the application is when we did that.

B. Cook: I wasn't given that document.

D. Jhnting: It doesn't have setbacks. It shows the box in the center.

R. Abel: It shows the box in the center.

B. Cook: But it does not show the setbacks.

R. Abel: The drawing is scaled.

B. Cook: Yes, but it does not show the setbacks, is that correct?

R. Abel: But if you don't understand the setbacks, anybody that doesn't understand, they are expected to call me, or call the office. He fully understood when he left that office it was 20 and 20, I guarantee you. I talked to him over and over and she did too.

J. Hufford: On cul-de-sacs, like this, I see they've got a setback here from the property line here in the front that says it's twenty-seven feet, which they only had to go twenty feet. Which would have given them twenty feet in the rear.

B. Cook: There are covenants on the subdivision of thirty feet.

J. Hufford: Do what now?

B. Cook: There are covenants on the subdivision of thirty feet. Which is different than the zoning requirements.

R. Abel: We do not enforce covenants.

J. Hufford: Yeah, I was going to say, we don't enforce covenants.

R. Abel: All we enforce is the Unified Zoning Ordinance.

J. Hufford: Right.

R. Abel: And then on every application...

B. Cook: But the problem with that is there are covenants. And, so when you buy a house in a subdivision, what are you going to do?

R. Abel: So, if the most restrictive is what the homeowner is supposed to follow. When they come into the office on an application, if you'll look on it there is a box to check that says you are aware you

have a covenant. And you are in a subdivision. And from then on it's their responsibility to determine...

J. Hufford: I understand that.

R. Abel: What restrictions there are from that covenant, it is not our responsibility to do that.

J. Hufford: But you know I feel sorry for them because of the thirteen feet, twelve feet of that is utility easement. They won't be able to do anything out the back door. And I feel sorry for them.

B. Cook: But the point of this is that this wasn't McKissicks doing. The owner, the people that have the interest in the property. They hired TK Constructors Inc. to do this work for them.

J. Hufford: Huh-uh.

B. Cook: And so, TK Constructors Inc. hired a surveyor, they placed the house on the property and McKissicks didn't have anything to do with that. They paid TK Constructors Inc. to do that.

J. Peacock: Question...

J. Hufford: Sounds like TK didn't do their job.

J. Peacock: So, what happens if someone doesn't follow that twenty-five foot front setback?

B. Cook: My understanding is that it's up to the homeowners in that subdivision to enforce those covenants.

J. Welch: Did TK Homes actually cause the house to be placed where it currently is?

B. Cook: Yes.

J. Hufford: Uh-huh.

J. Welch: And when TK Homes met with the petitioners, did they tell them that the home they selected would fit on this lot within the setbacks?

B. Cook: That was the idea, yes.

J. Welch: They specifically told the petitioners that.

B. Cook: Yes.

J. Welch: Have the other homes in the subdivision all complied with the setbacks that are required?

B. Cook: I cannot address that issue.

R. Abel: What I have looked at, many of them do not meet side setbacks, and there's a few that are really close, I mean unless you go out and actually measure and have someone put the lines on the ground, a lot of the rear setbacks are very close. But I can definitely say that there are a lot of side setbacks that are too close. They're not even six feet. And that's, a lot of difficulties because of the pie shape lots and the fact that they are so shallow.

B. Cook: If there's no other questions, I think there are other folks here...

J. Hufford: No other questions, I just really feel sorry for the two of you, because this is really not your fault.

B. Cook: I believe there's other folks here that would speak in favor of the variance. If you have no other questions from us.

J. Hawley: If there are any other further questions for these folks? Are there other persons or parties that have been sent notifications that would like to speak, that are present that would like to speak to facts here tonight? Please come forward and state your name and address for the record please.

G. Nale: I'm Gary Nale, and I'm with TK Constructors, my address is 8510 Celedon, Yorktown, Indiana. I was the one who applied for the permit, obtained the permit. I did not hear anything about the twenty feet, they're saying they said it, it didn't register with me if they said that. We had a drawing of the house on the property, the only thing that shows on that survey that was done was the twelve foot utility easement. We hired Ashton Survey Company, I have been part of one of these about seven or eight years ago and never wanted to go through another one again. So, every time that we are building in a subdivision we hire them to place the house and find the corners of the lot. We have done it every time in the last seven years. They did their job, we thought, they went to the plat, and the plat does not show, according to them, does not show the twenty foot rear yard setback. All it shows is the twelve foot utility easement. It also shows to scale the front yard setback, they placed it in between those two setbacks. We thought we were good, they issued the permit, you know opportunities to look at that, the foundation inspected, footer inspected, framing started and then we get the call in February. We had no idea it was twenty, Ashton evidently didn't know it was twenty, I feel like the only people who knew it was twenty, was probably Area Plan, and the Harris's at that point. And that's...

J. Hufford: So, don't you have somebody in your company that goes in and actually checks on this stuff? You know, because every jurisdiction is different.

G. Nale: No, that's why we hire a professional surveying company every time.

J. Hufford: They might be able to do the survey, but they don't know about the setbacks, wouldn't that be up to the builder?

G. Nale: No, the surveying company goes to the courthouses and does their research, when we hire them, we're just not having to go and find them, I mean they are going to the courthouses...

J. Hufford: It would be their job to find out about the setbacks and then inform you, right?

G. Nale: That's what I am hearing now. But, like I said, we've been doing this for seven years with them, and this is the first one that we've had that's ended up like this. I mean, that's just how it played out, so...

J. Welch: Why didn't you submit the plans with the application?

G. Nale: I did submit the plans with the applications.

R. Abel: Which plans?

J. Welch: With the setbacks, and the one with the house?

G. Nale: I had all that with me, I mean we're going back to December 13th now, but I had all that stuff with me. There was no GIS or whatever they're calling it, printed out and me marking where it was on the lot, not that I can remember.

D. Johnting: You didn't, I did it. I said this is exactly wide enough for the twenty, the twenty and the 46 foot house.

R. Abel: And we said it's got to go exactly in the center. We told you that more than once.

G. Nale: So you guys are saying that multiple times, but...

R. Abel: And you weren't there?

G. Nale: No, I'm saying you're telling me that you're saying this multiple times that you knew what it was, and...

R. Abel: No, we told you multiple times what it was.

D. Johnting: And then I followed up on Monday with an email, I asked you for plans--I didn't know you had given them to Randy. I don't normally get plans.

G. Nale: And again, we're going back over three months now.

D. Johnting: And we actually did have plans that I asked you for, a site plan, I was really was concerned about the sides, because we had already established that it was a narrow lot, wide house.

G. Nale: Right, we are closed on Mondays, we work Tuesday through Saturday, the office is closed on Sunday and Monday and on Tuesday I came in and I started looking at my emails and this and that, and before I got all the way through all those the lady that works with me, Jackie said that you had called and asked for prints to be sent to you, and she said hey, I have already done that. You don't remember that?

D. Johnting: Well, you got the permit on December 13th on a Friday.

G. Nale: Right,

D. Johnting: I emailed you on December 16th, on a Monday. We're not talking about February?

G. Nale: Right, and then on Tuesday when we got in the office on the 17th of December you know, I'm going through email and Jackie said you had called and asked for the prints to be sent and she had sent that. And I do have documentation of that. So, I mean that's, I thought ok, you know we've got this taken care of and it's all good.

D. Johnting: I don't have an email from that day.

R. Abel: We don't have that. We never got emailed that print, because I already had the prints that you handed to me.

G. Nale: But you called and asked for them?

D. Johnting: Well, I emailed you. And I have a copy of the email.

G. Nale: And you also called the office and talked to my assistant.

D. Johnting: That was three months later.

R. Abel: That was three months later.

J. Welch: Mr. Nale, I have a question for you...

J. Hufford: I can't understand why you didn't get a site plan, or they didn't get a site plan before the foundation was started? That's very unusual. It would have been a lot easier to settle this before than it is now.

G. Nale: Yeah, I agree.

J. Welch: Do you know how many of these improvement location permits you have applied for in Randolph County in the past six years?

G. Nale: A decent amount, I'd say probably two, three a year?

J. Welch: Probably fifteen?

G. Nale: Probably. And this is the first one in the city limits, I can't remember how many years it's been since, most of them three acres, five acres, we're 120 feet off the road, fifty plus on each side, that's the normal setbacks.

J. Welch: So you know, that on the bottom of the application it says that you hereby swear that you are complying with the restrictions, conditions, and limitations of the zoning district the land is located in? You swear to that each time you fill out one of these building permits, correct?

G. Nale: If that's what it says, I guess that's what I have agreed to.

J. Welch: That's what it says. You've signed it. And as a professional, isn't it important to look at those before you sign something like this?

G. Nale: It looks like it.

J. Welch: So, it probably should have been done in this case, is that a fair statement? You probably should have looked at the setbacks prior to placing the home, is that a fair statement?

G. Nale: That is a fair statement, but the setback that we have on the survey said 12 feet utility easement. That's the only thing that's mentioned on that survey on a rear yard setback is twelve feet utility easement. And we complied with that, we are thirteen feet off of that. That's what the survey...

J. Welch: Did you look at the Zoning Ordinance before you signed this?

G. Nale: Zoning Ordinance?

J. Welch: Yes.

G. Nale: No, I'm not sure where that would be and how I would find it.

R. Abel: Have you ever left our office not knowing what the setbacks were? That you have always asked us where the setbacks were? Every time you've come into our office? Isn't that true? Every time you come in you ask where the setbacks are and where the building has to be located?

G. Nale: And almost every time it's been an acreage situation.

R. Abel: Nobody leaves our office without knowing what the setbacks are. I guarantee you. That's why we look through the zoning ordinance, that's why people call us every day about what the setbacks are in the zoning ordinance, and if that's not enough it's on the internet and you can look it up.

G. Nale: So, the diagram that you had, that X marks the spot, there is no dimension on that?

D. Johnting: No, because I didn't know where it was going to go side to side...

R. Abel: Left and right, that's why we asked you for a site plan because we didn't know left and right.

G. Nale: Then why issue the permit? I guess I don't understand why you issued the permit?

R. Abel: Left and right didn't matter because you said it was going in the center.

G. Nale: For me, to issue the permit it's because you ok'd where it's going to be.

D. Johnting: Because we assumed you understood twenty and twenty feet. I mean, we talked about that, how narrow the lot was, and that it was just exactly wide enough for the house and the setbacks.

G. Nale: And again, I apologize to the McKissicks, I never heard, or it didn't register with me that it was twenty feet. I mean we wouldn't be here, nobody wants to do this, I would not have ok'd that if we knew it was twenty. We hired the surveying company to place it where it wasn't encroaching and that's what we thought we had done. That's all I got.

J. Hawley: Any other further questions?

J. Peacock: So sir, you hired the survey company?

G. Nale: Yes.

J. Peacock: To make sure that it was in the right spot?

G. Nale: Yes, yes. And no matter where we build, Tipton, Elwood, Marion, Muncie, that's what we do every time. Because we don't know that. That's not what we do. We hire the professionals for that. They go to the court house, do their research and from what I am hearing is almost always that information is on the plat. It was not on the plat. That twenty foot setback wasn't on the plat. Later we're hearing someone say we'll it's zoned on R-1, they should have known that. That's what I have heard. But it is not on that survey, and that's the only one I remember seeing that's is not on the survey and therefore not on the plat where they did their research.

R. Abel: That information **is** in the plat. You have to read it.

G. Nale: Ok.

J. Welch: I just have one other question.

G. Nale: Ok.

J. Welch: The McKissicks indicated that they told you that it was twenty feet when you had your initial meeting, do you recall that?

G. Nale: I do not, and I'm not sure how they would have known that, because the survey they brought in all it had was the twelve, and the survey that was done by Ashton's all it had on there was twelve.

J. Welch: Who was involved in the process of selecting which home to go on a particular lot? The size of the home in particular.

G. Nale: The customer comes in and tells us which plan that they are interested in and then we go through the exercise of is there structural changes you want to make, is there options and upgrades, that type of thing.

J. Welch: Do you look at the setbacks at the time the home is selected?

G. Nale: Very rarely do we have that information, but in this case they did have the survey done by Beals and somebody, and it had the twelve foot on the back and then it had an arch on the front that was not dimensioned, but we cut the house to scale, and put it on there it fit in between those two setbacks, the front setback and the utility easement in the back.

J. Hawley: Thank you. Is there any other interested person or parties who has been sent notice who would like to speak? Sir, would you like to state your name and address for the record, please?

J. Orlosky: My name is Jon Orlosky, my office address is 116 North Walnut Street, Muncie, Indiana, and I represent David and Nan Harris, who are the landowners directly in back of this property. Earlier, before we got started, I handed out some green folders that have some documents, a number of which are documents you've already seen from Mr. Cook's presentation. We are in support of the work stoppage order, and we are opposing the variance that's being requested. We feel that would be an undue encroachment on my client's property rights and there are a couple of points that I want to bring out to begin with. The case law is very clear, the owners of the property ultimately are responsible for what is built on their property. Now, if they have an action against somebody else, that's between them and that person, but they are ultimately responsible. And, it's clear from Mr. Cook's presentation, that from the beginning they were aware of the twenty foot setback. From what he has represented to this board, so, they should have been aware when the footers certainly went in that there was a problem. And as I will show in our presentation, Nan Harris was concerned about this almost two months before the McKissicks bought this property, she was expressing concerns about the buildability of this lot. So, going through the time line of exhibits that I have prepared for you, the Exhibit 1 again shows the outline of the McKissick property in yellow with the orange line showing my clients property line to the back. And then in Exhibit 2 is a series of emails between Nan Harris and Randy Abel. And these exhibits show the concern that she was expressing way back in October when it appeared that there was some activity on the lot as to whether or not it could be built. Mr. Todd thought the lot's depth was 83 feet, and that it was buildable, as long as the house was no deeper than 43 feet. Exhibit 3, of course as we've all talked about, this is an R-1 property that the combined City/County ordinance shows a ten foot setback in the rear that's required. However, even though it may not be enforceable by this group, by this board, I have attached a few pages of the Summerfield Subdivision recorded plat that clearly

shows on the green marked page, that actually to comply with the neighborhood recorded covenants, there is a thirty foot setback. So, one of the issues I think before the board today, there is a request for a seven foot variance, but even if you were to grant that it would still not bring this build project in compliance with the covenants of the neighborhood, and that alone is an issue, that raises an issue whether or not it would be proper to grant a variance that does not effectively solve the problem it's trying to solve. Exhibit 5 is a warranty deed, prepared by Mr. Cook, and the page that I have marked there should have informed the McKissicks that this deed is subject to restrictions, easements and covenants of record. That's on the next to the last page of the deed. So they were certainly aware that there were covenants that needed to be complied with. When I look at the application for improvement location permit there are a number of issues that are raised here as was brought up during the questioning, the box marked whether or not there were covenants, it's marked with an X yes, they were aware that there were covenants. The copy that I have does not have a signature on this document. I don't know if it was ever was signed, but again as was pointed out one of the main purposes of this document is to have somebody who is swearing, making a sworn statement that they are complying with the ordinances and the zoning ordinances that are in effect, when they are applying for this permit. I don't know why it wasn't signed, I don't know why it was accepted unsigned, but it is clearly unsigned. The building permit that was issued again shows this house 68 x 46 x 19 feet and I have marked that in a couple of places, and I think it's significant because Mr. Abel made it clear that he thought that this house could be built if it was 43 feet in depth, and no more than 43 feet. I would think that these documents that show a depth of 46 feet would have at least caused him or somebody to take a look at it and see how it would possibly fit. Now the drawing Exhibit A, I believe that you've seen that, where the box is drawn on the lot, that's just obviously a very rough estimate because it really doesn't come close to the proper scale that is shown by Exhibit 9, Ashton's drawing. And I want to make some comments about Ashton's drawing. Here's what concerns me about this project going forward. If you hire TK Construction to basically take over, you pay them \$500 to handle your permitting, you do all of that, according to this survey, it was completed on October 28, 2019. My client was inquiring about the buildability of this lot, a couple weeks before that. This information was known five or six weeks before the McKissicks even bought this lot. It was clear that this could not be built on this property where the picture has it located. And yet it went forward. Even in February after the footers had gone in and a lot of the construction had begun, February 1, my client once again contacted Mr. Abel about the concern that the house was clearly being built too close to the boundary line and complained about it, and then the work stoppage order eventually came about because of that. And Exhibit 11 and 7 part shows the number of photos. Now, some of the things that have developed through case law and there are a couple of cases here and I'm glad to get the board copies of or Jason or whoever wants to get these, but one of them, the town of Munster, Board of Zoning Appeals, this is a case that's kind of interesting, and I think has relevance here, because in this case we had a situation where a builder was simply trying to build a house that was too big for the lot. And the upshot from this case, that the court considered, is that if instead of building a 4,000 square foot house they could have built a 3,600 square foot house, if they could have done that it would have fit on the lot. And I think what the case stands for is if you have a buildable lot, and you build something that is too big for that lot, that's not a cause for a variance. If you could build a house that would fit the requirements of the neighborhood, and fit on that lot, then I don't believe it's proper to ask for a variance because you built a house that's too big. Again, in this case, as it should have been in this case as well, the building, uh, this came to a stop before the project was actually built. It was caught and they applied for a

variance and they said no. But some of the other interesting language I think in this case is when they talked about other considerations for a Board of Zoning Appeals to consider, is whether or not the injury was self-inflicted. My client has done nothing, or my clients have done nothing to create this problem. They have done nothing to encourage it by their silence to go forward, they were in the forefront of calling the problem to the attention, and why that wasn't sufficient I'm not sure. But, in any event, they did what they should do to try to draw attention. They did discover after the foundation was up, that the house as they suspected was too close to their property line, and they should not have their property value or the zoning that they depended on violated because of nothing that they did wrong. If there's an issue here between the builder and TK Construction, they need to deal with that, but that's, that would be between them. The, kind of circling back a little bit, they were aware of the setbacks before this house was ever built. I built a house, a lot of us have built houses, and the first day they put that foundation in, I would like to see the owner that doesn't get out and walk around their house. We all do, it's just human nature. And they should have noticed at that time that there was a real problem. This isn't a one or two foot mistake, this is a huge mistake. So, what we are asking, what we believe has to happen, is that the work order would stay in place. We believe that the house needs to be either moved or made smaller, in order to fit the space properly, and that my clients should not in effect be punished for having to have bought a house in 2005 behind a house that is now being built in violation of the very clear zoning ordinances. But again, beyond the zoning ordinances, we have the other problem of seven feet does not bring them into compliance with the recorded plat requirements. Even then somebody else from the neighborhood could file to stop this house from being completed tomorrow.

J. Welch: Mr. Orlosky, do you have evidence that the value of the Harris property is going to be diminished?

J. Orlosky: I don't have an appraisal, no. I mean the Harris's both are here and they would certainly testify that they feel that it diminishes their enjoyment of their back yard substantially.

J. Welch: Would it affect the use of the property if it were seven feet further back?

J. Orlosky: As far as the use of the property they would still be able to do the things that they're doing in their yard. But again...

J. Welch: What would the effect be upon them if it were moved seven feet back.

J. Orlosky: Well, if it was moved seven feet back they are essentially losing seven feet of their own yard.

J. Welch: No, excuse me, my question wasn't clear, I'm sorry.

J. Orlosky: Ok.

J. Welch: If the variance were to be granted, and the house is seven feet closer than it should be, how does that detrimentally effect the Harris's use of their property?

J. Orlosky: I don't think it effects the use, I mean for example , if they wanted to put up a volley ball net, or something like that, they could still do that type of thing, but it certainly diminishes the enjoyment I think of the privacy that you have in your own back yard. I mean if you look at some of

the pictures there are trees and where they're trying to have a little bit of seclusion back there. There's trees and plants and I think that having the house that close does affect their view and their, um, it would affect anybody's enjoyment of their yard.

J. Welch: Wouldn't the view be the same it would be just a little bit closer?

J. Orlosky: Maybe in ten years when the plants grow in.

J. Welch: Ok.

J. Orlosky: But not right now.

R. Abel: I guess my question is, according to the ordinance, if you put an accessory building back there, the same height as the house, and all but a little smaller than the house because it has to be incidental to the house, you could place that within five foot of the property line.

J. Orlosky: But, the way it is now, if the setback was correct it would be within fifteen feet.

R. Abel: No, if you put an accessory structure behind the house, wholly behind the house it can be five foot from the line. They could have a garage almost as big as that house, sitting right on the line, five foot from the line. Other than the fact that there is an easement in the subdivision. So, it could sit a foot closer because of the easement, but if the easement wasn't there in residential, residential allows a five foot setback in the back.

J. Orlosky: Ok, but, with the twelve foot easement it couldn't happen here?

R. Abel: No, but in any other lot you could have a structure sitting there five foot from the line. It would be the same height and whatever. So, I mean, that's just something else to consider.

J. Peacock: Question, we have a farm that had some construction going on next to it last summer sometime. I contacted Randy's office at that time because I wondered how close things, I mean I contacted them while the construction was going on also. But as soon as I saw that construction, my question is time frame. You mentioned a lot of knowledge on the part of your clients as to when they noticed closeness, ok, being too close. I'm kind of wondering why it was so long, how much of the house is up before it was really brought to a head?

N. Harris: Do you want me to answer that?

J. Orlosky: Yes, I can't so...

N. Harris: Do you want me to come up there?

J. Hawley: Please state your name and address for the record.

N. Harris: I'm Nan Harris, address is 558 East Greenville Avenue, so we are the property owner.

D. Harris: Dave Harris, same address.

N. Harris: So, when we bought our house in 2005.

D. Harris: Seven.

N. Harris: Seven, it's been a few years. We bought that house in town because we had a nice size lot. And at that time it was an empty lot behind us. Going forward, that lot has sold and there was another couple that had bought that lot and in essence they let it go back to the bank because they found out they can't build on it. A house of any size. And so, we thought well somebody's going to have to mow it, you know? So, it's just going to sit there unless someone builds a small house. So, when I heard that they were going to sell this lot, I didn't know who they were going to sell it to, but that's when I sent the first email to Randy and said, you know, what are the setbacks? And then I did hear back from Randy and there was a phone call with Randy. And I said you know there was just some concern about some buildability out there at one time, you know I just kind of questioned the setbacks and things and he was very clear on what those were, twenty feet and I kept telling David I said I remember something about thirty feet but I couldn't remember what it was. And so at that time when Randy and I spoke on the phone he said you know, they can build there, it might not be a very big house, but they can do it. Ok, and I trusted that Randy's doing what he needs to do. He was up front with me, and honest with me and we had a nice conversation. And so, as things progressed I didn't know who had bought the lot until actually December. And I know Kent, and I know Cheryl. And I thought well, you know surely they have done their homework and they have hired these folks to do what they need to do and it will be fine. And I think they broke ground sometime in December and we go on vacation the week after Christmas. And we come back and you know, visually from the driveway, we have the driveway, and then a shed and then we have a tree line, and we have a porch, you don't see a whole lot going on out there. So, then I believe it was on January 31st, I was at work, it was a Friday night I was at work, and David sent me a message and he said, they have a door to nowhere.

D. Harris: No, I said they put in what looks like French doors, and it seems like this is very, very close.

N. Harris: Very close. So, you know the foundation was in, yes, but the back wall went up. And David sent me a picture and said this looks really close. And I said, well, I'll look at it when I get home. So, you know, I work late, I got home about 8-8:30 it was dark, you know, that's kind of close but you know. I said we'll look at it in the morning when it's daylight. So we went out in the morning and I kind of walked out to the back tree line and thought wow, that's close. So, we went and got a tape measure and we measured it. And we measured twelve feet. And I thought, they've got a problem. And so that Saturday I went in to work, I emailed Randy on Saturday so I knew he would see it first thing Monday morning. Am I not understanding setbacks, you know am I wrong in this? And I didn't hear back from Randy, I called him after lunch. And he says no I went out there this morning, you're right, it's only twelve feet. And I said, what are you going to do about this Randy? Well, I'm going to wait til I hear from the contractor. Ok. And it didn't set overly well with me that nobody was going to tell the McKissicks, right? Like I said, I know Cheryl, I've known, I know Kent. So I called Kent myself, on that whatever Monday that would be, February...are we at the 3rd now? Whatever. And I said, Kent, we've got a problem. And he says what? And I tell him. And he said, well I'm out here now, talking to my contractor. Ok, and building continued for four more days. Day three I called Kent back and I said, what's going on? Well my builder says they're going to build until the Area Planning shuts us down. Well, ok, by that time, by that time, by the time the stop order comes out, you've got a house that's ready to roof. So, I'm not sure to answer your question how much sooner we could have interjected. When you say in October, are you sure? Yup, yup it's going to be a small house. And you look at the size of that house, a 2,500 square foot house, when the median house back there is 1,500 square foot. That's not a small house. The house does not fit on that lot. If you want to build a house, build it in the

parameters. I shouldn't have to, I can look out my back door and see through that house. I don't want to see my neighbors. I don't want to have to look out my back door and see what they're doing in their kitchen. On the same side, I wouldn't want to be them and have to look into my house. There's a sense of privacy there.

D. Harris: When the enjoyment part was asked, when you consider their house is that close to the property line, they've got French doors on the back of the house, or sliding doors, whatever, it looks like it's going to be double doored. If you put some sort of patio out there, say a 10 foot patio, you're only twelve foot from the property line, you've got a two foot strip of grass, you put a privacy fence up there, you've got this little narrow area to entertain people on, you've got dogs, teenagers, stuff like that, that are all the time out there, and you're going to end up with our dogs at the fence with your, their friends trying to entertain their friends, our dogs at the fence, nothing but just a few feet away. You know, so, then we've got to then put a fence to pull our dogs back so that, you know, it's not right up against the fence right up against their area if they want to entertain back there, so all of a sudden now we don't have as much area in our yard to be able to use...

N. Harris: Not that you feel like you can use anyway.

D. Harris: Yeah. And yes, we were approached to sell them seven feet. The big reason why we don't want to is that we already gave up a big chunk of the front yard, when they did all the work on Greenville Avenue. We had to sell off a big chunk of that, what'd we lose, like 10-12 feet there?

N. Harris: In the front yard, yes.

D. Harris: 10,12, 15 feet in the front, so they could put in the sidewalks and all that stuff. So that's already made our lot smaller. So, selling off another 7 feet just makes our lot that much smaller. And that's why we were out there, we put up the second set of stakes off of the surveyors stakes, I think they're seen in the pictures that Jon gave you, so that way we could get an idea, what would we be dealing with if we did decide to sell this, you know. And,

N. Harris: Or, if you did decide to not object to the variance, and I think that's very important. You know, and as we're out there and we're setting these stakes, and I'm thinking, you don't think about seven feet, but that is, seven feet is a lot. And then when you think about the actual requirement is not twenty feet from the property line, it's thirty feet from the property line. And that's just so their yard is enjoyable to them. You know, but it does have an effect on us. And we just had an appraisal, you know, mortgage rates are great, so we're going to lock in at that 3% and refinance for 15 years. And we just got our appraisal back and your appraisal is based upon your lot size too. You know, so I know what my appraisal is as I sit here today. But I don't know what it would be if I had that same appraiser come back and say, well, if that house is going to stay there, you know visually, if it's not meeting the requirements, and ok, even if we were ok with it which we're not, that's not to say in the future if we were to sell the next person would be. And to say that I could put a building up at the back of my lot, I don't want a building.

D. Harris: I understand Randy's point though, he's saying that if they wanted to put up a garage, the same size as their house...

N. Harris: Us.

D. Harris: No, no, well, either way, you could put a garage nearly the same size as your house 5 feet from the property line.

N. Harris: If it's directly behind.

D. Harris: That's a different ball game though because the garage sits there doing nothing.

N. Harris: And you're not seeing into it.

D. Harris: And generally you're not looking through windows, and you're not worried about if they've got a patio and they're having to entertain, whatever the case may be. It's just a building to store things in or a workshop, you know. When it's a house with windows, the potential for entertaining people in the back yard, whatever the case may be, that's a different ball game when you've got them closer than they need to be. And I think you know, there's a reason why these setbacks are put in place, to have some uniformity and to keep people from being on top of each other, I mean why else would they decide to put this twenty foot rule in there. You know, the McKissicks didn't do anything wrong in this really either, I would have thought the people involved in laying out the lot and deciding where the foundation's going to go, the whole nine yards, would be the ones checking to make sure that things are in the right place. You know this really isn't on the McKissicks, all they did was decide to build a home there. And it's unfortunate that it's gotten to this. You know, we don't want to have to be here tonight, but, here we are.

N. Harris: And I'm all for new neighbors, just build a house that fits. Don't build a 2,500 square foot house that doesn't fit. As a property owner I don't think that's too much to ask. Follow the setbacks. That's all I've got.

J. Hawley: Any other questions from the board. Well, thank you very much. Are there any other interested persons or parties that have been sent notices who would like to speak?

R. Abel: I would clarify on the Ashton Survey, it is 86 point something feet, and the house would fit with 20 feet and 20 feet. The 83 that I sent her, I just did it real quick, I mean, I'm emailing, middle of the day, I just did a quick measurement on it, telling her it's about 83 feet. Actually on the survey it's 86 feet and that size house by residential standards of the Unified Zoning Ordinance would fit.

J. Hufford: That's if it was moved up to the front, with setbacks of twenty in the front and twenty in the rear it would be ok.

R. Abel: And we don't address the covenant.

J. Hufford: We don't address the covenant.

R. Abel: I'm just telling you what the Unified Zoning Ordinance would be.

J. Hawley: Please state your name and address for the record, sir.

D. Edwards: Yes, my name is Dean Edwards, 544 Lissaaron Drive. Mr. Cook mentioned my name earlier, I did not sign the document, I was told if I'm planning to be here I didn't need to but I am certainly strongly in favor of recommending the variance. We would be neighbors, to the kind of southeast of the McKissicks. We've lived there twenty years, and where the house lays, I see certainly

no problem with it. I feel for the McKissicks in this, I think there's enough blame to go around but the fact is it is where it is and I certainly would hope that there's a way to work this out so they can get their house done. So I hope people will work through this. And I'm...

R. Abel: Do you know how far your house is away from theirs?

D. Edwards: Theirs? Well, we're, our house is probably twenty, to thirty feet from the line, and then their house is whatever the distance is. But, no it doesn't infringe on us at all. That's all I have to say.

J. Hawley: Is there anyone else who would care to speak?

M. Todd: My name is Mark Todd, I live at 531 Lissaaron Drive on the other side of Dean and this property. But, just real quick, I just thought it might help to let you know, and Debbie remembers this because before we ever decided to, my wife and I owned that lot for years and years, owned it twice actually. The story Nan was telling was true. Somebody bought it from us, they filed bankruptcy, we got the lot back and we had it for years and years and then Kent and Cheryl just purchased it from us. But we knew the house that Kent Cheryl wanted to build, we'd seen the plans. I have a TK house, so I'm not here to say anything bad about TK, we love our TK house. But, I went in to Debbie and she remembers this, before we ever even did this and double checked the actual setbacks and on that same screen with the little felt pen, we were told thirty feet in the front, and twenty feet in the back. Switch that over to Kent and Cheryl, as you heard Mr. Cook talk about, So, I just needed it to be known, that as the seller, we knew it, it came from this office, they knew it, and that is exactly what we were told. The house that they are trying to build is not 2,500 square feet, it's 1,800 square feet. I tried to build the very same house, eight years ago, it does fit on that lot, it will fit. But I just wanted to make sure that you guys are aware, that we as sellers, did, not to protect us at all, but, we did check those setbacks, and were given those setbacks from the office. Again, not to throw TK under the bus, but we were given those setbacks before the paperwork ever started on anything. Just by knowing the house that they wanted to build. So, I just wanted to make sure that everybody did know that. And I can take any questions if anybody has any. As the seller of the lot and as the property right beside it, we are certainly in favor of the variance being granted.

J. Peacock: Quick question, did you say thirty feet from the front.

M. Todd: Yup, thirty off the front, and twenty off the back.

J. Peacock: And you guys mentioned thirty feet also. Where is the thirty feet coming from?

M. Todd: It's the covenants. Their attorney's talking about bigger setbacks.

R. Abel: The Unified Zoning Ordinance says twenty in the front and twenty in the back on a cul-de-sac.

J. Peacock: But their covenant is twenty five, right?

R. Abel: Their covenant is twenty five and thirty.

N. Harris: And thirty.

J. Peacock: Twenty five and thirty, so...twenty five is...

M. Todd: Randy, you said twenty five off the front and thirty off the back, what do you mean by that?

R. Abel: That's what the covenant in that subdivision states.

M. Todd: Not to anybody who's ever built a house out there. It's thirty off the front and twenty off the back, is what they all say.

R. Abel: If you go and look at the actual, I think it's probably marked on there. It's actually marked...

M. Todd: Because every one of our houses out there is thirty off the front.

R. Abel: It's marked twenty five off the front, excuse me.

M. Todd: Ok.

R. Abel: Twenty five in the front, thirty in the back. But nobody knows that because it's not on the plat.

M. Todd: I think you'll find it's twenty five off the front and twenty off the back. It's not deeper in the back than it is off the front.

R. Abel: The back is not marked on the plat.

M. Todd: But it's in the covenant?

R. Abel: It's in the covenant.

M. Todd: Correct, but the front is always deeper than the back, always.

R. Abel: I can take you down there and let you read it.

M. Todd: It's not, I'm just...

R. Abel: I'm sure most people think that. I'm sure most people think that. And

M. Todd: Right.

R. Abel: And maybe because the actual Unified Zoning Ordinance says twenty.

M. Todd: Right.

J. Peacock: Ok, so, just trying to clarify, if someone wanted to build a house twenty feet from the front, how would they get that ok'd by that covenant?

M. Todd: Well, we have always gone with the thirty, that's what we transferred to them. I mean, the thirty foot setback is on the drawing, on the front.

R. Abel: Well, the twenty five is.

M. Todd: It's on there.

J. Hufford: You say the covenant even has a setback in the rear also?

R. Abel: Yes, it's in the written portion of the covenant. To find it I had to read and read.

J. Hufford: This house would be against that covenant in the rear now.

N. Harris: Yes.

R. Abel: Yes.

M. Todd: I think my point, if I may is, so when I went in and talked to Debbie and was given the twenty feet off the back and you've heard that, a lot of times. But when TK and this office has an issue, I mean I was given that before that discussion ever started. So, those numbers were out there to be found is all I'm trying to say, and we passed them on.

J. Orlosky: I don't know if this would be proper or not, but in Exhibit 4, in the green file shows the thirty foot setback.

R. Abel: This isn't the first time we've had conflict with the zoning ordinance and covenants. But we do not address that, that's up to the homeowner's association. Many of these subdivisions no longer have homeowner's associations and therefore I am not sure how valid those covenants really are because there is no homeowner's association to enforce it. And we did have one out on Indian Trail, and they still have a homeowners association. And the homeowners actually addressed them first, and they gave us their written approval and acceptance of that before we gave them, if you remember we gave them that setback on that curve.

J. Hufford: Right.

R. Abel: But there was an active homeowners association there at Indian Trail. I'm not aware if there's one here or not.

J. Peacock: So, really what you're saying is, the thirty foot, or the twenty five foot, doesn't matter, at all. It doesn't matter to this board.

J. Hufford: Not to us.

R. Abel: Not to this board.

J. Peacock: But even in that housing area, that doesn't hold any water at all either? Is that what...?

J. Orlosky: I would disagree with that. Anybody in that neighborhood could file an action to enforce the covenants, they are still of record and have not been modified as far as I can tell.

J. Peacock: So at what point can they file that? Does that mean that they can file that right now?

J. Orlosky: Yes, they could.

B. Cook: The covenants run with the homeowners in the subdivision. So, when you buy a lot, you buy it subject to those restrictions and enforcement of the covenant's restrictions are up to the owners of the lots in that subdivision, just like a contract. They can either enforce it or they can choose not to enforce it. That is up to the homeowners.

D. Harris: So, could they petition the surrounding homeowners then to build closer than to thirty feet to the back?

B. Cook: I'm not going to answer that question.

R. Abel: The point to be made here also is that there are numerous homes in violation of that covenant restriction, as far as side setbacks go and the rear setbacks. Numerous homes. So, if you go picking on one, there's going to be multiple homes in that subdivision that do not meet that covenant restriction.

J. Welch: Jon, to answer your question the enforceability is on page 6 of that, Mr. Orlosky, Enforceability, Article IV, it's on page 6 in the fine print section one if you have a question about that.

B. Davis: I make a motion we take a roll call vote then if there's no more questions.

J. Peacock: I have a question. In, under variances, Article V under this page that we are given, it says: In authorizing a variance the Board may attach thereto such conditions regarding...we can attach conditions. What types of conditions could we attach?

R. Abel: You could require landscaping, you could require fences, you could require something to not happen or if it does happen, anything you think would mitigate the situation that you could ask for.

J. Peacock: The reason I say that, I feel like there's, as several people have said, there's been several people that had the opportunity to head this off. Including each party. And that frustrates me, when each party. The homeowners are responsible, that's true, I think--in my book. So are you guys. As quickly as it started construction you guys should have brought it up then, instead of waiting. If you're a good neighbor, I think--you bring it up quickly, before money is laid out.

N. Harris: How much, I didn't know who was buying it. How much quicker...

J. Peacock: It doesn't matter who is buying it.

N. Harris: In October...

J. Peacock: If it's out of compliance, and you noticed it, it could have been done sooner?

D. Harris: But the thing is we didn't notice that it was too close until the back wall went up.

N. Harris: That was it.

D. Harris: The foundation and everything...

J. Peacock: The foundations are done. My point is...

D. Harris: So, I should have gone over there and measured?

N. Harris: I should have done Randy's job?

R. Abel: It's not my job.

N. Harris: Who's job is it? I should have done TK's job?

J. Peacock: My point is, I'm not trying to get you guys all frustrated at each other again. My point is, there's been lots of opportunities to head this off before it happened. And I don't think anybody's completely without some level of blame. If you want to call it that.

D. Harris: Our only question going into it, when Nan contacted Randy the first time was, we had heard that the lot was too small to build on. That was her question for Randy when she initially contacted him in October. Because we heard it was too small to build a family size house on. That's why she contacted him. Not a big deal. Now, they go through buying it, all this, they put the footer in, they put the foundation in, and unless I'm back there walking around on their property, I'm not really seeing, you know, from my yard with the dirt that's there, and where the sticks are, I can't tell what's twelve and what's twenty feet just laying there. But once that wall went up and I see those, that double door opening, and I'm like, that just seems really close from the back wall of that property to those sticks that indicate the property line. That's when I noticed that it was extremely narrow. And that's when, as soon as we measured it and contacted Randy and said hey, this is not seem to be in the right place.

N. Harris: And contacted the McKissicks.

R. Abel: I need a second to change the tape. Wait, I need a second to change the tape. Ok, we're on.

J. Hufford: The way I feel, is I don't believe the neighbors are responsible to make sure that the surveyor did his job, and that the company that's building the house did their job. That's not their job to do that. That's really not their job. I mean, they might see it, and complain about it but they can't do anything about it. Other than just complain about it to Randy or somebody. But, the surveyor, he should have known about it, and he should have told them. When they had that, we didn't get the site plans until after the walls went up, and they should have been here before hand. This is the first time I've ever done one of these on the Board of Zoning Appeals that wasn't done before the walls went up. That's a mistake on the builder's part, that's a mistake on the surveyor's part for putting it, and saying it will fit here and putting it that close to the property line. But he knew about the setbacks, and he knew about the covenants.

B. Davis: But still, at the end of the day, we need to answer these questions here, and I think we've had enough evidence, from both sides, I'm ready to move on. Let's vote.

J. Hawley: We have a motion to have a roll vote on this.

D. Calhoun: I think we need to go ahead and go where Jon was wanting to go, because I think I know where he's headed. And...

B. Davis: What do you suggest?

D. Calhoun: Well, I think we're talking about maybe a fence of some type.

J. Peacock: I'm thinking about, if we would approve this request for a variance, ok, if it would be approved, this party has been wronged, ok? That's my point. I don't want to see things have to be redone. But they have not, they didn't ask for it to be built there. You guys didn't ask for it to be built there, but there's lots of people who could have caught this, as Mr. Cook said. A lot of people could have caught this earlier. So I guess, my thought is, I don't know how you can do it, but I think it isn't wrong that they be compensated some, but I tell you what when I figured, when I figured what it

would be worth. Now this isn't going into what their property is worth because I hadn't thought about the front being affected, that's true. We can't argue that, but that not was something that you asked for, any of you guys, on Greenville Pike. It was for the good of the city, and the good of our area, but you didn't ask for it. And it did reduce your grass. I want grass too. You know, I couldn't stand if I had a choice in this world to live that close. But that's my choice. I'm an old farmer, I want my space. Ok, but at the same time, you've got a value--even if you're paid ten times what it's worth, it's not a ton of money.

J. Welch: Jon, we can't give compensation. No, that's not...

J. Peacock: We can't do that? Ok, that's my question.

R. Abel: But we can have them plant arborvitaes or pine trees, or have them screen it, you could do things like that, within the covenant.

J. Hufford: I've got a question then, on an easement are they allowed to build? Pour concrete? Anything on an easement?

R. Abel: No, nothing.

J. Hufford: I didn't think so, so they won't even be able to put a patio or anything out there.

R. Abel: No.

J. Welch: Or a fence.

R. Abel: Or a fence or anything.

J. Hufford: Yeah, that's what I said.

R. Abel: If you were to do landscaping, again it would have to go on Harris's property, because that easement's sitting there.

J. Peacock: Where were you thinking I was going Don, what would you suggest?

D. Calhoun: Oh, I was thinking some type of fence, landscaping, something that way, so that the Harris's are not going to see the back of the house, whether that's something can be agreed upon.

J. Welch: It's not really practical with this variance, for us, just because the easement's there and you can't really put anything on the easement, I think it's really got to be yes or no.

J. Hufford: Right.

D. Harris: So, what you guys are saying is, and it just hit me that because the foundation is basically right at the edge of that easement, there's nothing that they can actually do in that area behind their house?

N. Harris: Right.

D. Harris: Other than mow it, correct?

J. Peacock: Is that right Randy?

R. Abel: Pretty much, I mean, I don't know what, you can get "permission" if you want to say, from the easement holder to do whatever you want if they'll give you permission to do it. With the understanding that they would tear it out or whatever. But if there's actual electrical wires out there, they will not want you to build a building over electrical wires. That are servicing owners. Now they might allow you to put a deck over it, I don't know who the easement holder is actually. I'm assuming it's electrical easement.

[Unknown] Electric and fiber optic.

R. Abel: So that's up to the easement holder but I doubt that they would want you doing anything on it.

D. Harris: Because a fence...because there's also a box, right in the middle of that. One of the connection boxes, those little light green, gray colored connection boxes there's one of those sitting right in the middle of that also. Right on the property line. So you can't do anything on the easement that would hinder them from accessing that any time they need to, with a fence or anything like that, that would block it off.

R. Abel: Well, fences can go on the property line, they can't go on the easement.

N. Harris: Right.

R. Abel: But you can put a fence on the property line. That's why they do a twelve foot easement so they have room that they can access it.

J. Peacock: So the easement is only on their property?

R. Abel: Yes, it's in the subdivision.

J. Peacock: Does it have to be decided mutually between both parties? A fence?

R. Abel: No.

J. Peacock: A fence could just be put up just by one or either party?

R. Abel: As far as I know, but then again you have to go back to the covenant restrictions and see what it says. As far as ours goes, you can put a fence up if you want, six foot in the back of the house.

J. Peacock: Would a fence help?

N. Harris: No. It is close. You talk about liking grass, I like to not look in my neighbor's house.

J. Peacock: But a fence would keep that from happening.

N. Harris: But it's pretty tall, it's pretty tall. You put a six foot, you've got probably about three foot of foundation there, and there's dirt, I'm just trying to visualize, there's dirt that's build up, and then there's the foundation, and then there's walls. You've got...

D. Harris: And our property's lower than theirs.

N. Harris: Yeah.

J. Peacock: How tall can a fence be?

R. Abel: Six foot. Without a variance.

J. Peacock: Six foot.

N. Harris: So you're still looking right at a house.

J. Peacock: You're still looking at a house whether it's there or seven feet away too, so.

N. Harris: Seventeen feet.

R. Abel: Seven more feet.

N Harris: I'm saying by the zoning. It is twenty five in the front, twenty in the back, and that's forty-five feet. And the lot is eighty six foot deep, and the house shouldn't be any wider than forty one and it's forty six. [Inaudible] Unless they shaved five feet off their house. From where it sits.

J. Peacock: So, Don, if it's approved, can we ask that a fence be built? Is that something that we can ask?

J. Welch: You can require that, I don't know that, you'd have to get permission from other people.

J. Orlosky: The fence would be literally right up against the back of their house. Because they've got that twelve foot easement...

R. Abel: The fence would be on the property line.

J. Peacock: The fence can be on the property line.

J. Orlosky: It would be on your property.

R. Abel: No, on their property. The property line.

N. Harris: On the property line.

D. Harris: So, you've got utilities running right, pretty much dead on the property line. And that whole area's an easement you'd still have to get permission from the easement holder.

N. Harris: To do a fence?

D. Harris: Correct.

R. Abel: I'd assume somebody would have to look into that with the easement holder.

D. Harris: They're still going to want to go have access to their connection back there, so you can't put it right on the property line because you're going to block off their box and put a fence up next to the house. Or surrounds the house, whatever the case may be. Unless you just put some sort of wall, barrier back there like they do along the highways to block noise. But it doesn't get squared off with

anything and you block in the back yard. It's a really terrible situation and I feel for them and I hate it, I really do.

J. Hawley: Are there other further questions or comments from anyone? Alright, want to move for a motion to take a vote.

J. Hufford: We made the motion already, it just needs to be seconded.

R. Abel: Do we need a favorable or non-favorable motion?

J. Welch: This is actually just a yes or no vote to grant.

R. Abel: To grant, ok.

D. Johnting: And the appeal goes with it?

J. Welch: You can separate those two votes, but they should really be the same.

J. Hawley: Did we get a second?

[Unknown] Second.

D. Johnting: Kevin Carreno and Myron Cougill are absent, Bill Davis, yes, Jason Hawley, no, Jim Hufford, no, Don Calhoun, yes, Jon Peacock, yes. Variance denied.

J. Hawley: Moving on to the next one, next is BZA2020-7-A, petitioner is requesting an appeal from the decision of the Zoning Inspector to issue a stop work order on the new residence. Would the, have all petitioners received Article V, Conduct of Hearings?

J. Welch: This is the same evidence as we heard for the variance, unless there is something to add?

J. Hawley: Right, so we just want to do another vote, or do we want to petition, do you have anything else to add for the petition to stop work?

B. Cook: There will be nothing else, no other evidence.

J. Hawley: So we want to go ahead and just move for a yes or no vote on this?

J. Welch: Clarify what you are voting for.

J. Peacock: Can we just clarify the results of the first vote before we vote on this one?

J. Hawley: Sorry, so just go ahead and clarify the main petition?

J. Welch: The first vote was, the petition was denied because it takes four votes out of seven to approve the variance and there were three.

J. Hawley: Ok.

J. Peacock: So is there still a need to have this second vote?

J. Hawley: I guess that was kind of where I was at, do we actually need to proceed with the second petition tonight?

J. Welch: I think fairly moot but we can go ahead and proceed with the vote on it.

J. Hawley: Ok, so do we need another motion to vote on the second one?

J. Welch: Yes.

J. Peacock: But Jason, but if that was denied.

J. Welch: It's going to be an be an up or down vote.

J. Peacock: Ok.

J. Hawley: But I still need to have a motion, somebody motion, and somebody second, right?

B. Davis: So motion.

J. Hawley: We have a motion.

J. Hufford: Second.

D. Johnting: On the appeal...Don Calhoun, yes...

J. Welch: You need to clarify what you are in favor of. If you are voting in favor of the appeal on the stop work order then you're saying that the work should not stop. If you're voting no, then you're saying that the work should be stopped.

D. Johnting: Don Calhoun, yes, Jim Hufford, no, Jason Hawley, no, Bill Davis, yes, Jon Peacock, yes, and Kevin Carreno and Myron Cougill are absent. It does not pass to remove the stop work order.

J. Hawley: Alright, is there any other business coming before the board? Do I have a motion to adjourn tonight. And second? Motion carried. Thank you ladies and gentlemen.

Jason Hawley, Chairman

Debra Johnting, Recording Secretary

Bill Davis, Vice Chairman