

BOARD OF ZONING ADJUSTMENT MINUTES

August 28, 2012

Regular meeting of the Clay County Board of Zoning Adjustment, Commission Hearing Room, 3rd Floor, County Administration Building, One Courthouse Square, Liberty, Missouri.

Call to Order

@ 5:30 pm: David Fulton, Chairman

Roll Call: Matthew Tapp, Director

Members Present: David Fulton, David Fricke, Brian Klopfenstein, and Vernon Reed

Members Absent: Mike Johnson

Staff Present: Matthew Tapp, Director
Debbie Viviano, Planner
Greg Canuteson, Assistant County Counselor
Angie Stokes, Secretary

Mr. Fulton: It's now 5:30 and time to open this meeting of the Clay County Board of Zoning Adjustment and I would first ask Matt to call the roll of attendance.

Mr. Tapp: Yes Mr. Chairman. Mike Johnson?

Mr. Johnson: No answer.

Mr. Tapp: Brian Klopfenstein?

Mr. Klopfenstein: Present.

Mr. Tapp: David Fricke?

Mr. Fricke: Here.

Mr. Tapp: David Fulton?

Mr. Fulton: Here.

Mr. Tapp: Vernon Reed?

Mr. Reed: Here.

Mr. Fulton: Okay this evening we're going to first start off by as we normally do at a meeting of a Board of Zoning Adjustment to swear in anyone that would like to make any kind of comments this evening in the public hearing. So with that would those, anyone that would like to make testimony this evening or think you may stand up and I'll swear each one these in individually so we have your name on the record. We'll start over here with Mr. O'Dell. Do you solemnly swear to tell the truth the whole truth and nothing but the truth so help you God?

Mr. O'Dell: Yes I do.

Mr. Fulton: And state your name would you please for the record.

Mr. O'Dell: Mark O'Dell.

Mr. Fulton: Okay and would you please the attorney for the O'Dell's please state your name and do you solemnly swear to tell the truth the whole truth and nothing but the truth so help you God?

Ms. Jensen: I do, Patricia Jensen with the White, Goss, Bowers Law Firm.

Mr. Fulton: So for the first action as I was saying the chair would entertain a motion to remove from the table case number 12-104BZA.

Mr. Reed: I so move.

Ms. Fulton: It's moved is there a second?

Mr. Klopfenstein: I will second.

Mr. Fulton: It's been moved and seconded all those in favor of removing from the table for our discussion tonight the continuation of case number 12-104BZA. All those in favor signify by raising your right hand. Let the record show it was unanimous.

Final Vote	4/0	Approved	To remove case 12-104BZA from the table
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Mr. Fulton: Okay how we're going to process tonight will be very similar with one major difference we're going to have the public hearing first then we will close the public hearing and the board will discuss the decision and we basically have a show of options which we will talk about in just a minute on that. But before we actually start the public hearing we need to, I like to include into the record everything that has been received by the board members prior to this meeting and that's number one a letter from the Flanery's attorney who is Mr. Petersen, a Finding of Facts and Conclusion of Law from the O'Dell's and the Finding of Facts and Conclusion of Law by the county. Now I would ask Matt has there been any other, has there been anything happen in this period other than these three things going out has there been any phone calls anything that the board needs to be aware of?

Mr. Tapp: None that I am aware of no, nothing for the record.

Mr. Fulton: So there has been no action that the board is unaware of since we put it on the table from last time.

Mr. Tapp: Except for those items that we just added, no.

Mr. Fulton: Okay so those let's mark those exhibits one, two and three. The Flanery letter, the O'Dell's finding and the county's finding of fact and one, two and three.

Mr. Canuteson: We have already had one, two and three.

Ms. Jensen: I didn't think you were going to mark the brief as exhibits but we have already got exhibits one through thirty-one.

Mr. Canuteson: Mark them A, B and C.

Mr. Fulton: Okay mark them appropriately then.

Ms. Jensen: I thought the staff report was A right?

Mr. Fulton: This is a different date though.

Ms. Jensen: Yeah but it is confusing if it's ever used in a court action. You can tack them on as 32, 33 and 34.

Mr. Canuteson: However you want to do it Mr. Chairman.

Ms. Jensen: How you want to do.

Mr. Canuteson: We need to tack it on as either a number or letter.

Mr. Fulton: Okay we will mark these Exhibits 101, 102 and 103.

Ms. Jensen: That is fine.

Mr. Tapp: So 101 is the Flanery.....

Mr. Fulton: Flanery, 102 is the O'Dell's finding of fact and 103 is the county's. Okay now to address before we open the public hearing the decision that we will make, the board will make tonight, we basically, I thought about the different options and one we could find in favor of the finding of fact of the O'Dell's, the finding of fact or the finding of fact of the county we could modify either one of those any way we please or we can draft up our own decision on this case. So those to me are the three options we will discuss after the public hearing. Now I said there is going to be one thing different about the public hearing this evening we have a lot of testimony on record and we will not duplicate any testimony that we have on the record from our first meeting of July the 24th, cause everyone has it we read the minutes we have these finding of facts so the only thing we're interested in tonight from anyone that is in favor of the request or those in opposition would be new testimony. So with that we'll open the public hearing and I first hear from anyone who would like to speak in favor of basically the finding of fact of the appellants or the request of the O'Dell's.

Ms. Jensen: Mr. Chairman, members of the board Patricia Jensen with the White, Goss, Bowers Law Firm here today on behalf of the appellant the O'Dell's and we certainly appreciate the time you spent with us last, four weeks ago now and then tonight. Briefly before I summarize the appeal and the issues I want Mark O'Dell to testify to you whether or not there have been any changes to the exterior of the building compared to the pictures that we entered into evidence in, at the last hearing in July. So Mr. O'Dell for the record have you seen any changes in terms of the exterior of the building compared to the photographs that are in the record of the building including any additional doors or oversized doors or anything like that that have been put on that building since July.

Mr. O'Dell: No I have not seen any changes at all, inside or out, but we can't we haven't been inside. The doors or opening are still there and everything on the outside pretty well looks abandoned.

Ms. Jensen: Okay, the pictures that we've entered into evidence are currently accurate as to what the building looks like from the exterior is that correct?

Mr. O'Dell: Yes that is correct.

Ms. Jensen: Okay thank you. And Mr. Chairman and members of the board we aren't going to belabor the point I do have an additional brief that was written in response to the letter that you received from Curtis Peterson on behalf of the Flanery's that I would like to admit into evidence now as Exhibit 104 I guess is how we're doing those. So if you would admit that exhibit then I will give you my argument and then I will let you decide the case.

Mr. Fulton: So would you mark this please as Exhibit 104 brief by the appellant.

Ms. Jensen: And really the supplemental brief highlights two areas that were discussed in Mr. Petersen's letter to you, Mr. Petersen stated for the first time we heard that this building is now used for hay production. I don't know if Mr. Flanery forgot in July that he's using his building for hay production but if you recall from the evidence that was in the record first he said he wanted to use it as a daycare facility and if that didn't work out then he was going to use it for his wood business and thirdly he would also use it for his dirt business. He made some reference in the record on page 85 of the record to storage of grain but storage of grain and storage of baled hay are not the same thing.

So suddenly we have really a new argument in the record that is not supported by any of the facts that were in front of you in July and not supported tonight. And then I also want

to highlight for you on Exhibit 12 and you have reduced copies in your books. But if you look at Exhibit 12 again the yellow is the 5.9 acres that was originally deeded over to Richard and Chala Flanery and the blue is this larger 43 acres that was now deeded over to the Flanery's in May of this year to correct I believe what they had was an illegal subdivision at the time of the property. But if you look at that exhibit there is nowhere on that exhibit where they're taking wood from that 43 acres, there's no trees on that property so that shows to you that that wood business is not a business supported by this 43 acres. I would also state that if you look at the pictures that were entered into evidence you don't see hay planted on this 43 acres all you see is corn. So I don't know what this new reference is to the production of hay and storage of hay but it's not occurring from the property, there is a little bit of hay immediately surrounding the building but it does not require that size of a building to store that hay. So I think it's really an example of the continued misleading of the county and the board as to the purpose of the building. The building was built to hold the daycare facility it was not built for farm purposes and it was only, they only used the words farm purposes because it was magic language to get them out of having to do any permitting requirements. We believe that is based upon the evidence that was in front of you this board should only get to one conclusion, which is this building was built for commercial purposes not for farm purposes. And the Director erred in failing to revoke the approval. And I know an issue was raised in the hearing as to why we didn't appeal when we initially found within 30 days of August or as soon after our investigation showed that there was a daycare facility. And as I've stated we had to wait for the facts to evolve as we dealt with Flanery's we sent them a letter in September it wasn't until February that they requested a meeting with us and then immediately after that is when they made that petition for annexation with Kearney. Based upon those facts I think it was fairly, it's fairly established that the intent of their use of that building was never for farm purposes. Once we had those facts, that is what we presented to the Director and asked him to revoke the approval of the Checklist for Farm Buildings. We're not appealing the initial Checklist for Farm Buildings we're appealing the failure to revoke and under the Missouri case law failure to revoke is an appealable decision that is what cited in the brief for you I've attached a copy of the Veal versus City of St. Louis case, which is a Missouri case decided in 1956 that continues to be good law and they'll clearly hold that a refusal to revoke a permit is an appealable decision and if it involves an issue regarding zoning the correct board to hear it is this board which is the Board of Zoning Adjustment. We filed that appeal timely within thirty days of the date of the decision that was made by the Director not to revoke the approval that was given. And then again just to summarize we believe that the Director erred in his conclusion number three that a farm structure does not need a principal structure because if you look at the code it clearly states and this is in the exhibit, in your Exhibit nine and that is the current code. We're not asking for an interpretation under the old code, we're asking for an interpretation under the current code and if you look at Section 151-6.3B it says all accessory structures shall be subordinate to the principal structure. If you interpret this provision or if you ignore this provision you're completely ignoring what the explicit language of the code is. With that I don't have anything additional, we're available to answer questions but we would respectfully request that you adopt the Findings of Fact and Conclusions of Law we submitted to you and that finds both that you need the principal structure in order to have an accessory structure and that the decision that was made that failed to revoke the

approval on the Checklist for Farm Buildings was made in error because the evidence that has evolved since that time clearly shows that this building was built for no other purpose other than to run the daycare operation not for any farm purposes. This property does not support any of the statements that Mr. Flanery has made to you and there is nothing in the record to show that that property or that building is being use for any hay storage or any crop production on that site.

Mr. Fulton: Thank you very much. Is there questions? Very good is there anyone else that would like to speak as a proponent? Hearing none I call for and see no one else in the room this evening. I see there is no one here that would, but I will ask anyway, is there anyone would like to speak in opposition to the request. Matt anything other? With that we'll close for now close the public hearing but reserve the right to call Ms. Jensen or anyone else to clarify the first questions of the Board. I'd first like to get clear in my mind and would ask Greg to define or Matt either one would like to speak and where it is in the code relative to what defines a farm structure.

Mr. Tapp: Chapter 15 Mr. Chairman.

Mr. Fulton: Okay.

Mr. Tapp: Under "structure, farm".

Mr. Fulton: Okay let's all.

Mr. Tapp: Would you like for me to quote verbatim Mr. Chairman?

Mr. Fulton: Yes please read it into the record.

Mr. Tapp: A definition of a structure, farm is any building used for the storage of agricultural or farm products, livestock or grain.

Mr. Fulton: Okay, now a question to our attorney is intent or purpose how does, where does that fit in to this definition of a farm structure?

Mr. Canuteson: Well I think on the checklist itself the; you can build a barn out of Styrofoam if you like to do so. You do not inquire as to what you are building it out of, what does it look like, how well it will be used for a farm structure, how good is it going to be as a barn. We don't talk about what it's going to look like, ultimately the use of it, whether it is for farm purposes or not will be looked at through the other provisions of the code. For instance if you have a barn that is being used for machine shop the proper recourse there is not to go back and to revoke the original checklist it would be to contact Matt Tapp ask him what's going on out there, go out and investigate, he would go out and investigate he would determine there is sufficient evidence to warrant a letter from him indicating that they are violating the Land Development Code if they don't comply with the Land Development Code then he will turn that over to Prosecuting Attorney's Office. So the intent at outset is a difficult one, it's not one that Matt Tapp would look at how it's actually used is very important and in that case that is where he would look into it, inquire as to what was actually being used for and then make a determination whether that complies with the Land Development Code.

Mr. Fulton: A follow up question, if a building is constructed and sits empty so the use is not determined until it's used. Is that right?

Mr. Canuteson: I think that is accurate.

Mr. Tapp: That is an accurate statement Mr. Chairman, yes. It's actual use you drive by it.

Mr. Fulton: So it's actual when the building, it's been empty any length of time with no frame work, it just sits there, but when it's put to use that's when it is determined if it's in compliance with and what happens if it's not?

Mr. Tapp: As Mr. Greg Canuteson implied we do code enforcement or code violation investigation to see if we can find evidence.

Mr. Fulton: So that's the next that would be the next step if a building is not used in accordance with the code.

Mr. Canuteson: Yes.

Mr. Tapp: With what is allowed, yes.

Mr. Fulton: With what's allowed. Okay you have a question.

Mr. Reed: Yes I have a question of Greg, you referred to a machine shop if the machine shop was used to take care of farm machinery does that differentiate between a machine shop say that's being offered to the public to repair cars and trucks and tractors and so forth.

Mr. Canuteson: I will refer to Matt Tapp. Matt Tapp would make that determination as to whether or not it's being used for farm purposes or commercial purposes.

Mr. Tapp: We could go into a thousand what if scenarios, literally. If it's used for ag equipment used on site that's one you kind of weigh in on for a little bit and contact legal counsel and try and figure it out. But there are certain grey areas there is never black and white. There's a thousand what if's scenarios, what if someone had a private air strip and had it for years and we no longer allow private strips well it's still okay but it's still considered an air strip so yeah we can speculate about that until we are blue in the face but I'd rather not. Either way it's one of those interpretation things you kind of have to weigh out. I couldn't give you an answer in a second. You know.

Mr. Reed: But presumably if the building is being used to support a farm operation dealing with legitimate farm enterprise that would be considered....

Mr. Tapp: If you look at the definition it's any building used for the storage of agricultural or farm products livestock or grain, so Greg would have to weigh in on this but I would believe that doesn't even mean that it has to be product from on site as long as its ag product then it's an ag building.

Ms. Reed: A dairy barn for example say is not storing anything but involves milking of cows that would still be qualified as a farm enterprise.

Mr. Tapp: Depends if the cows are in the confined area for their whole lives or a certain amount of time then it would be considered a concentrated animal feed operation that's a whole different deal. I get where you are going.

Mr. Fulton: I don't want to get too far off cause we

Mr. Reed: What I was a bit surprised that what appeared to be a legitimate farm enterprise might be questionable.

Mr. Canuteson: I think what Matt is saying is that determining whether a use is permitted under the code can be difficult and it can be easy depending on the situation. You have to look at the particular circumstances of any given situation and then you have to go to the code to determine whether it's an appropriate use or not. And that's very difficult for him to sit here and say anything conclusively at this point.

Mr. Reed: I understand that and I appreciate that.

Mr. Tapp: Right and in this particular case the building is as far as we can tell and Mr. Mark O'Dell's testimony here it sits vacant at this moment right now. That is the use.

Mr. Fulton: That's what will be my next question, is the building right at this present time any use going into it that you are aware of.

Mr. Tapp: I have not heard or received any evidence to the contrary so I would say it's a vacant building.

Mr. Fulton: At this time it's only appropriate to have, want to get a couple of those things out on the record first, so before we do any further discussion the chair will entertain a motion, as I said earlier, there's any number of possibilities we can find in favor or one, either the appellant or the county, we can amend either one, we can draft our own. What's your pleasure but I do need a motion on the floor.

Mr. Reed: I move we accept the position that is articulated by our counsel Greg Canuteson.

Mr. Fulton: Okay, motion has been made that we would support and sign in fact the Finding of Fact and Conclusion of Law of Clay County position. Okay is there a second?

Mr. Fricke: I'll second it.

Mr. Fulton: Okay for discussion it's been made and seconded now we're open for discussion on the and the we need to have a basis for our finding, if we go forward with the request we need to state as we do on all cases a basis for our actions.

Mr. Fricke: Are we still open for discussion?

Mr. Fulton: Absolutely, we are now open officially for discussion.

Mr. Fricke: I would go back to Matt Tapp with a question anything that the Flanery's wanted to do with this barn for here on there would have to apply to get permission to do it.

Mr. Tapp: There's no formal application.

Mr. Fricke: If they wanted to put in a childcare facility?

Mr. Tapp: Now that is whole different, yes if it's anything other than ag.

Mr. Fricke: If they wanted to do anything like that at all, they will likely be denied turned down.

Mr. Tapp: They just say you need to go through rezoning application which is through the Planning and Zoning Commission.

Ms. Fricke: They have to rezone it?

Mr. Tapp: Yes, the Planning and Zoning Commission and County Commission. More often than not what happens is someone approaches Debbie and /or I and we discuss with them their options. They say what if I can do this, this or this kind of what Mr. Flanery was doing earlier at the last meeting. And we just kind of look through the LDC and see to make sure it fits and we say well here's your option or here's how you need to go forth and do that.

Mr. Fricke: During this entire procedure what I'm hearing is that the O'Dell's object to this building because of its appearance and because of the potential that it brings into their close proximity of something that would not be desirable in their opinion that would be a daycare facility. I'm just wondering if we could ask Mr. O'Dell, can we still ask Mr. O'Dell?

Mr. Fulton: Absolutely.

Mr. Fricke: If there would be acceptable for any other thing except a childcare or childcare type facility in this building?

Mr. Fulton: You need to go to the mic Mr. O'Dell.

Mr. Fricke: I'm sorry to make you do this. My question is and I won't repeat it too much, what would be acceptable in your terms? The building is there.

Mr. O'Dell: Probably absolutely nothing and the reason of that is the way the Flanery's have gone about this we see this battle never ending. We see as soon as this is over they are going to apply for rezoning and if they don't get it from the county they are going to

go back to Kearney, we're going to be in this battle forever, because it's not a barn it's a commercial building.

Mr. Reed: But you understand that a commercial building has not been approved and he's not going to be enabled to operate a business without going through an approval process.

Mr. O'Dell: Like I said it looks like a commercial building it's not a barn you put your horses in and again I mean this battle is going to be going on next month, next month it's going to continue I don't think it's ever going to end.

Mr. Fricke: So you wouldn't favor any kind of business at all in this building?

Mr. O'Dell: No we would not. It's a rural area.

Mr. Fricke: Farming you wouldn't accept farming operation there?

Mr. O'Dell: Farming yes but not a business no.

Mr. Fricke: Only farming related.

Mr. O'Dell: Yes.

Mr. Fulton: Thank you Mr. O'Dell.

Mr. Fricke: That's what it's zoned for currently?

Mr. Tapp: It's zoned for higher density residential.

Mr. Fricke: Is it?

Mr. Tapp: Yes from the Barth brothers they rezoned it.

Ms. Jensen: It's rural residential.

Mr. Tapp: No that is R-1; R-1B is higher density.

Ms. Jensen: Well it's still; I mean it's relatively low density.

Mr. Tapp: But yeah relative to downtown Kansas City or something like that.

Mr. Fricke: Matt what is the exact zoning on this?

Mr. Tapp: Its R-1B and Debbie's going to give me; Residential Urban District.

Ms. Fricke: Residential Urban?

Mr. Tapp: Yeah so the minimum lot size is 12,000 square feet.

Mr. Fulton: Do you have any other questions for Mr. O'Dell.

Mr. Fricke: No, thank you Mr. O'Dell.

Ms. Fulton: Thank you Mr. O'Dell.

Mr. Reed: May I like to ask him another question, in accordance with present zoning I understand that you would prefer that kind of intents residential development to the agricultural use?

Mr. O'Dell: I don't think I understand your question I'm sorry.

Mr. Reed: Well as I understand it that property is zoned for residential development which would be streets and curbs and houses and a lot of traffic that that's going to generate. And I'd understood that you were in opposition to the commercial enterprise because of the traffic and the disruption of your tranquil rural life and yet the way it's presently zoned it could be a more intense development then what is being proposed.

Mr. O'Dell: It would fit more in the area then a commercial building in my opinion houses and streets.

Mr. Fricke: So you definitely prefer additional houses in there as neighbors?

Mr. O'Dell: Yes.

Mr. Fulton: Now is there any additional question for Mr. O'Dell before he sits down? Thank you very much. Matt I want to be sure I understand the checklist, tell me the purpose of the checklist.

Mr. Tapp: The sole purpose or the main purpose of the Farm Building Checklist is to make sure that the applicant is building a farm structure that is not in the floodplain and meets setbacks.

Mr. Fulton: Floodplain not in a floodplain, meets setbacks. I noticed the LDC states that it must be completed it doesn't say it has to be approved. So it's kind of, its information for the farmer that's building the structure, is that basically it? So he's not going to get in trouble down the road?

Mr. Tapp: Right, exactly, yes if you want to consider it approved the approval would be to make sure it's not in the floodplain and it meets setbacks. But it's not really, not necessarily approved. Not permitted per say.

Mr. Fulton: If it meets those two, there's as I see it, it's basically to prevent the person constructing it from down the road having a problem.

Mr. Tapp: Right, as Charles Adams had mentioned in previous testimony we are part of the National Flood Insurance program so Clay County can provide flood insurance and if FEMA or SEMA the State level comes back and we have a bunch of practices or paperwork that doesn't quite fit with what they are looking for then this goes right into that system. Got to make sure we're protecting the floodplain.

Mr. Fulton: Mr. Klopfenstein do you have any questions or comments about?

Mr. Klopfenstein: I won't agree with the sentiment of the motion however I would make some changes to the proposed Findings of Fact and Conclusions of Law.

Mr. Fulton: I just want to make one comment, if they're minor changes we could probably take care of them tonight, if they are major changes we may have to redraft it as you're, I'm sure, well aware of. Okay what category do they fall in?

Mr. Tapp: That is up for interpretation.

Mr. Klopfenstein: Yeah whether it's a farm structure or not. I assume the motion is to conclude that as to the review of the Director Mr. Tapp, we are denying the appeal and further with regard to the interpretation we're supporting or we're affirming the responses Mr. Tapp gave and we're also making the finding that the appeal was untimely or words to that effect. Am I...

Mr. Fulton: That is accurate.

Mr. Klopfenstein: I mean I think

Mr. Canuteson: For purposes of clarity I think the motion was to adopt what has been submitted.

Mr. Klopfenstein: Correct.

Mr. Canuteson: That has been seconded, so

Mr. Fulton: In essence that's what you said?

Mr. Canuteson: In essence but the specific thing that is under discussion is that particular document so if you want to change that particular document you can refer to that particular document to make your changes through motions.

Mr. Fulton: But in essence the motion is to sign and approve the finding of fact submitted by the county that's the motion.

Mr. Reed: But it's appropriate to amend the motion?

Mr. Fulton: Absolutely, modify it in any way and that's what I hear Brian saying.

Mr. Reed: Which is fine.

Mr. Fulton: So what specifically, everyone have that is in front of them?

Mr. Klopfenstein: I would include under the Findings of Facts and Conclusions of Law submitted by the O'Dell's, I would include paragraphs five and six, I would include

paragraphs eighteen, nineteen, twenty, twenty-one; nineteen, twenty and twenty-one. I would offer some further; if I don't identify them I am saying I would not include them. I would then add some additional language. For example under Exhibit 21 and they would have to renumber them obviously, the county's exhibits, Exhibits A-1 was submitted into evidence and the appellant's exhibits, Exhibits 1 through 31 were also admitted into evidence I would additionally include all offered exhibits were admitted into evidence and given the consideration the Board believed proper and appropriate. I would also add additional language after the hearing for the proposed Finding of Fact and Conclusion of Law which submitted by counsel for the Board, counsel for the O'Dell Trust further letter from Curtis Petersen was received on behalf of Rick and Chala Flanery all documents were reviewed and considered, additionally I'd add the supplemental brief was reviewed and considered as well. And then I'd go back to the Board's to Mr. Canuteson's Findings of Fact and Conclusion of Law here's a little bit of language I would perhaps change slightly not as a criticism, it's just I would change.

Mr. Canuteson: Can I interrupt? I think the way to do this would be to take these up in shorter versions and I think that we'll probably going to need to redraft it. But I think it would improve the language and then you agree to the language then I can make those changes for you.

Mr. Klopfenstein: And instruct the Director to sign or the Chairman sign it. Yeah I'm okay with that.

Mr. Fulton: So can take action tonight or delay until we see that additional?

Mr. Canuteson: I think if depending what is actual motion, if they are approved after the motions are approved or denied then the motion as amended, it can either be agreed to or not, and if it's agreed to you can wrap it up and you can sign it.

Mr. Fulton: Okay I hear then that there's an amendment to the motion been going to be made, for the record.

Mr. Klopfenstein: Yes.

Mr. Fulton: So would you please move your amendment for the record.

Mr. Klopfenstein: I would move that the paragraphs from the proposed Finding of Facts of the O'Dell's be added into the paragraphs submitted by counsel for the Board and those paragraphs are; paragraph five and six, paragraphs eighteen, nineteen, twenty and twenty-one.

Mr. Fulton: And you have some language?

Mr. Klopfenstein: Yes.

Mr. Fulton: That you would add also.

Mr. Klopfenstein: Yes, do you want me to continue to you want me to read the correction?

Mr. Canuteson: I think you should take those up separately (*inaudible*).

Mr. Fulton: Okay let's, okay we will, there's a motion to amend I need a second to that motion to amend to add the paragraphs so stated to the document of the county, is there a second?

Mr. Fricke: Second.

Mr. Fulton: Okay now we're going to vote on, is there any discussion on the motion to amend?

Mr. Reed: I still do not have a comprehensive understanding of what you are doing.

Mr. Klopfenstein: I'm adding part of the Findings of Facts offered by the O'Dell's into the proposed Findings of Facts from our attorney Mr. Canuteson. Those are five and six.

Mr. Fulton: Can you clarify yeah clarify that.

Mr. Klopfenstein: Paragraphs five and six provided some history that I think is appropriate.

Mr. Reed: Alright.

Mr. Klopfenstein: Paragraph eighteen spells out from the O'Dell's their bases for appeal, paragraphs nineteen, twenty and twenty-one.

Mr. Reed: Alright may I just take a moment to review these?

(Mr. and Mrs. Flanery enter the hearing room.)

Mr. Klopfenstein: Okay I want to go back to six; I want to add the O'Dell's are opposed to the building that they allege was constructed. Paragraph six the O'Dell's are opposed to the buildings that they allege is constructed for commercial purposes.

Mr. Reed: Paragraph twenty-six?

Mr. Klopfenstein: Paragraph six.

Mr. Fricke: You are just adding the word allege?

Mr. Klopfenstein: The allege.

Mr. Klopfenstein: Everybody got my correction on six? Then I got eighteen, nineteen, twenty and twenty-one.

Mr. Fulton: That's basically to include the exhibits.

Mr. Klopfenstein: Yes.

Mr. Reed: Okay you are just accepting these as facts?

Mr. Fricke: He had some language he wanted to add too.

Mr. Fulton: Well that's not in this amendment.

Mr. Reed: Okay I got it thanks.

Mr. Fulton: Okay is there other questions to Mr. Klopfenstein relative to his amendment? Because we're voting on, let's call this amendment number one. More amendments are coming which is fine. Is there other discussion, if not are you ready to vote on the question?

Mr. Fricke: On the amendment only.

Mr. Fulton: This is voting on, we'll vote on amendment one to modify the original motion with the first amendment. We still have not voted on the motion as amended so let's for the record call if we are ready to vote on the amendment only. Matt.

Mr. Tapp: Brian Klopfenstein?

Mr. Klopfenstein: Yes.

Mr. Tapp: David Fricke?

Mr. Fricke: Yes.

Mr. Tapp: David Fulton?

Mr. Fulton: Yes.

Mr. Tapp: Vernon Reed.

Mr. Reed: Yes.

Final Vote 4/0 Approved First Amendment of Motion

Mr. Fulton: Now is there an additional amendment you would propose?

Mr. Klopfenstein: I want to make sure our Findings of Fact indicate that, so the language would be after the hearing proposed Findings of Fact and Conclusions of Law were submitted by counsel for the Board, counsel for the O'Dell's, a supplemental brief of appellant Jane O'Dell Trust was submitted as well as a letter from Curtis Petersen on behalf of the Flanery's. Those additional documents were all reviewed and considered. And I think that's the only.

Mr. Fulton: Okay those three documents were read into the record as received by everyone on the first order of business. Is this in addition to that?

Mr. Klopfenstein: This is to make a Finding of Fact.

Mr. Fricke: These are a little history.

Mr. Fulton: Okay, even though it's in the record and they are recorded.

Mr. Klopfenstein: Right, what I think I would like the record to reflect is that we looked at the exhibits and read all the documents.

Mr. Fulton: Okay, you want to state that then specifically in your motion to amend the amended.

Mr. Canuteson: Where are you putting it at?

Ms. Klopfenstein: Where ever before the Conclusions of Law. Okay.

Mr. Canuteson: After number twenty-one.

Ms. Klopfenstein: Where ever yeah.

Mr. Fulton: This is a motion to amend the amended motion.

Mr. Klopfenstein: It's a second.

Mr. Fricke: It's a second, additional.

Mr. Klopfenstein: I want the Findings of Fact to include that after the hearing proposed Findings of Fact and Conclusions of Law were submitted by counsel for the Board, counsel for the O'Dell Trust, a letter from Curtis Petersen was received on behalf of the Flanery's and additionally a supplemental brief of the appellants was received by the board. All exhibits and further pleadings were reviewed and considered by the Board.

Mr. Fulton: Very good. You heard the second amendment; amendment number two is there a second to that amendment?

Mr. Fricke: I'll second that.

Mr. Fulton: Mr. Fricke seconded the second amendment to the amended motion. Is there any discussion on the second amendment? Hearing none, hearing no further discussion on the second amendment Matt would you call the roll?

Mr. Tapp: Brian Klopfenstein?

Mr. Klopfenstein: Yes.

Mr. Tapp: David Fricke?

Mr. Fricke: Yes.

Mr. Tapp: David Fulton?

Mr. Fulton: Yes.

Mr. Tapp: Vernon Reed?

Mr. Reed: Yes.

Final Vote **4/0** **Approved** **Second Amendment of the Original Motion**

Mr. Fulton: Now the motion has been amended twice so is there any discussion on the original motion which was to approve the county’s Finding of Fact and Conclusion of Law with these two amendments.

Mr. Klopfenstein: I also would move to add one more sentence to the Conclusion of Law submitted by our attorney.

Mr. Fulton: And Mr. Klopfenstein would like to make the third amendment to the two previous amendments to the original motion.

Mr. Klopfenstein: Add a sentence right before “it is so ordered” and the sentence I would suggest we add is “In all respects the appeal of the Jane H. O’Dell Trust filed through Jane H. O’Dell and Mark and Rhonda O’Dell Trust filed Mark and Rhonda O’Dell is here by over ruled and denied.”

Mr. Fulton: Okay, would you specifically where in the findings and conclusions of law did you say that was, what page and what paragraph first.

Mr. Klopfenstein: Right before “it is so ordered”.

Mr. Tapp: Page seven.

Mr. Klopfenstein: Page seven.

Mr. Fulton: Do you have that?

Mr. Tapp: It’s at the very end of the conclusions of law.

Mr. Fulton: Okay, do each of the other board members follow that proposed third amendment? Amendment number three. Is there any question to Mr. Klopfenstein about his third amendment? If there’s no further questions then Matt will call the roll for us to approve the third amendment to the original motion.

Mr. Tapp: Brain Klopfenstein?

Mr. Klopfenstein: Yes.

Mr. Tapp: David Fricke?

Mr. Fricke: Yes.

Mr. Tapp: David Fulton?

Mr. Fulton: Yes.

Mr. Tapp: Vernon Reed?

Mr. Reed: Yes.

Final Vote 4/0 Approved Third Amendment to the Original Motion

Mr. Fulton: Now does the Board have any further discussion on the original motion as amended three times?

Mr. Canuteson: Mr. Chairman may I make a suggestion we now amended this pretty thoroughly we have added quiet bit into the document and if the board would like to wait on voting on this until I’ve had an opportunity actually put in the language put into a document so that you all would be able to know specifically what we are voting on. I just offer that to you all so you are not voting on something at this point little bit

Mr. Fulton: Very good I would like to have a consensus of the board we don’t have to have a motion but would you like to wait and see the document or vote now; basically consensus.

Mr. Reed: Wait and see.

Mr. Fulton: Vernon? Wait. Dave?

Mr. Fricke: I would like to see what the language is.

Mr. Fulton: Wait? Brian, you're ready to go?

Mr. Klopfenstein: I could vote now.

Mr. Fricke: Well we don't have to wait an entire month do we?

Mr. Fulton: No, when.

Mr. Klopfenstein: Whoa, we have to wait until the next scheduled meeting.

Mr. Fulton: So the next scheduled meeting is?

Mr. Tapp: Fourth Tuesday of September.

Mr. Fricke: Or we could go into Executive Section.

Mr. Fulton: No not on this.

Mr. Tapp: You don't have to table it until the next schedule meeting but we have to have enough time for proper notice.

Mr. Fulton: Okay, what would?

Mr. Tapp: Twenty-four hours to post the agenda.

Mr. Fulton: Is that satisfactory council?

Mr. Canuteson: That is fine, it won't take me, I can do this Thursday so.

Mr. Fulton: Okay then we physically need to meet, is that right?

Mr. Canuteson: I believe so.

Mr. Tapp: We have to reserve this room to keep that in mine.

Mr. Fulton: Okay we will meet here in this room on what date then?

Mr. Canuteson: I'm sorry Mr. Chairman.

Mr. Fulton: I need a date to which we're going to again table the motion has now been amended three times until we can see the motion as amended in writing, I mean not the motion the document that we are going to vote on. On what date?

Mr. Tapp: I would recommend that we, because we don't have P & Z Commission on that night.

Ms. Viviano: Right but we have the room reserved for the September the 10th.

Mr. Tapp: So Tuesday September 10th at 5:30.

Ms. Viviano: 6:30. We might be able to do at 5:30. We can see if we can do it at 5:30.

Mr. Klopfenstein: The 10th is on a Monday.

Mr. Tapp: Eleventh, September 11th. The first Tuesday of September.

Mr. Fulton: At 5:30?

Ms. Viviano: That's the second Tuesday?

Mr. Tapp: It's the second because of Labor Day.

Ms. Viviano: Yeah it's the second Tuesday.

Mr. Tapp: So September 11th Mr. Chairman.

Mr. Fulton: At 5:30.

Mr. Canuteson: Matt are you doing the first Tuesday or the second Tuesday?

Ms. Viviano: It's the second Tuesday.

Mr. Tapp: Because normally it's the first but because of Labor Day.

Mr. Fulton: Okay, the Chair would entertain a motion to table the motion, to table action on the motion until we can see the document which has the amendments that were proposed is the amendments to the document of the county. And that date would be September, Tuesday, September the 11th at 5:30.

Mr. Fricke: So moved.

Mr. Fulton: It's been moved is there a second?

Mr. Reed: I second.

Mr. Fulton: Is there any discussion on the motion?

Mr. Klopfenstein: I have night court so I probably, on September the 11th at 6 but I can be a little bit late if it's an extended discussion I probable will be leaving early.

Mr. Fulton: The action on the 11th there will be no public hearing, there will be action on the, it was tabled to take action so that the Board could view the document that we will be voting on, so it will, now will the board before September the 11th, it will expedite the meeting, if the board could have that document before the 11th.

Mr. Canuteson: Mr. Chairman you will have that next week there will drafts as I have given you before.

Mr. Fulton: So Mr. Klopfenstein can meet his second engagement.

Mr. Fricke: It's not subject to amendment is it?

Mr. Fulton: Okay with that

Mr. Klopfenstein: Guys this is a serious matter so it's a long drawn out process so I understand but we want to do it right we got to do it this way.

Mr. Fricke: Exactly.

Mr. Fulton: We realize that and that is why we are doing it right. Exactly very good. Now is there a motion to adjourn?

Mr. Reed: So moved.

Mr. Fulton: We're adjourned until, is there a second to the motion?

Mr. Fricke: Second.

Mr. Canuteson: Mr. Chairman I don't think you voted on the motion to table that.

Mr. Fulton: Okay the motions been made to table and there is a second and we discussed the table, we will call the roll to Matt so we have the record.

Mr. Tapp: Who second the motion?

Mr. Fulton: Those in favor of tabling until September the 11th at 5:30.

Mr. Fricke: I made the motion.

Mr. Tapp: Table it and Reed made the second. Brian Klopfenstein?

Mr. Klopfenstein: Yes.

Mr. Tapp: David Fricke?

Mr. Fricke: Yes.

Mr. Tapp: David Fulton?

Mr. Fulton: Yes.

Mr. Tapp: Vernon Reed?

Mr. Reed: Yes.

Final Vote **4/0** **Approved** **To Table Action until September 11, 2012**

Mr. Fulton: Now I will entertain the motion to adjourn.

Mr. Reed: I move that we adjourn.

Mr. Fricke: Second.

Mr. Fulton: Moved, second all those in favor signify by saying "aye"

All: Aye.

Mr. Fulton: Thank you gentlemen. Thank you again the O'Dell's for coming this evening.

Meeting Adjourned

Chairman, Board of Zoning Adjustment

Secretary, Board of Zoning Adjustment

Recording Secretary