

MINUTES
ELKHART COUNTY BOARD OF ZONING APPEALS MEETING
HELD ON THE 15TH DAY OF SEPTEMBER 2011 AT 8:30 A.M.
MEETING ROOM – DEPARTMENT OF PUBLIC SERVICES BUILDING
4230 ELKHART ROAD, GOSHEN, INDIANA

1. The regular meeting of the Elkhart County Board of Zoning Appeals was called to order by the Vice Chairperson, Doug Miller, with the following board members present: Meg Wolgamood, Robert Homan, and Doug Miller. Staff members present were: Chris Godlewski, Plan Director; Ann Prough, Zoning Administrator; Robert Nemeth, Planner; Kathy Wilson, Office Administrator, and James W. Kolbus, Attorney for the Board.

2. The minutes of the regular meeting of the Board of Zoning Appeals held on the 18th day of August 2011 were not completed for review.

3. A motion was made and seconded (*Wolgamood/Homan*) that the legal advertisements, having been published on the 3rd day of September 2011 in the Goshen News and on the 4th day September 2011 in The Elkhart Truth, be approved as read. A roll call vote was taken, and with a unanimous vote, the motion was carried.

4. A motion was made and seconded (*Wolgamood/Homan*) that the Board accepts the Zoning Ordinance, Subdivision Control Ordinance and Staff Reports as evidence into the record and the motion was carried with a unanimous roll call vote.

5. There were no postponements of business items.

6. The application of ***Johnny W. & Corinne R. Linton*** for a 23 ft. Developmental Variance to allow for the construction of a garage 27 ft. from centerline of the right-of-way of 'B' Street on property located on the Northwest corner of Lakewood Drive and 'B' Street, being Lots 108, 109, and South 20 feet of Lot 107 of Lakeside Place, common address of 26225 Lakewood Dr. in Osolo Township, zoned R-2, came on to be heard.

Photos of the property were submitted to the Board by the staff [*attached to file as Staff Exhibit #1*].

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #26225LakewoodDr-110819-1*.

There were eight (8) neighboring property owners notified of this request.

Appearing on behalf of this Petition was Johnny W. Linton who resides at 26225 Lakewood Drive in Elkhart.

Mrs. Wolgamood asked the Petitioner where the privacy fence is located. Mr. Linton pointed out the north and east outline of the privacy fence on the aerial map and also showed the Board where he intends to build the garage.

Mrs. Wolgamood asked if the fence comes all the way down to the corner of Lakewood and B Street. Mr. Linton confirmed that it does not and it is not in front of his house.

His proposal is to build a garage 28 ft. x 24 ft. with access off of B Street and the fence and gates will stay intact. The reason is that the present shed is deteriorating and he currently has a temporary shed for his extra antique car and he needs a permanent place to store it. He will

use the upstairs for storage purposes as they have no basement in their residence. He clarified for Mrs. Wolgamood that it will be one story with an upstairs attic. They already have a garage for the storage of their personal vehicles.

Mrs. Wolgamood asked Mr. Linton about the landowner to the north who is most affected by this Petition. He confirmed that the landowner's name is on the Developmental Variance Petition that was submitted. He also confirmed that it is a rental property and the owner does not live there.

When Mrs. Wolgamood also asked if this property is in the conservancy district, the Petitioner confirmed that it is not. The previous residents pushed to not have this street in the conservancy district and that is why he cannot build a garage that is attached to the house.

Mr. Homan asked if he has highway approval for the curb cut on B Street? The Petitioner said he has a contact with JJamco Construction Inc. in Elkhart and he will use them for this project. Mrs. Wolgamood informed the Petitioner that it is a requirement that he get this approval.

There were no remonstrators present.

The public hearing was closed at this time.

The Board examined said request, and after due consideration and deliberation, a motion was made and seconded (*Wolgamood/Homan*) that the Board adopt the Staff Analysis as the Findings of the Board, and based upon these Findings, this request for a 23 ft. Developmental Variance to allow for the construction of a garage 27 ft. from centerline of the right-of-way of 'B' Street be approved in accordance with the Staff Analysis and as represented by the Petitioner with the following conditions imposed:

1. Approved in accordance with the site plan submitted and as represented in the Petitioner's application.
2. The two (2) existing accessory structures to be removed within thirty (30) days of the completion of the new garage.
3. The new curb cut to be approved by the Elkhart County Highway Department.

A roll call vote was taken and the motion carried unanimously.

7. The application of **Shawn P. Nolke** for a Developmental Variance to allow for the total square footage of accessory structures to exceed the total square footage in the primary structure on property located on the East side of Winding Waters Lane, 1100 ft. South of CR 4, being Lot 17 of Winding Waters South, common address of 52176 Winding Waters Lane in Osolo Township, zoned R-1, came on to be heard.

There were five (5) neighboring property owners notified of this request.

Photos of the property were submitted to the Board by the staff *[attached to file as Staff Exhibit #1]*.

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #52176Winding WatersLn-110722-1*.

Appearing on behalf of this Petition was Shawn Nolke of 52176 Winding Waters Lane in Elkhart.

Mrs. Wolgamood informed the Board members that she was the Hearing Officer who denied this request and she feels that it is more fair that the Board wait to hear this matter once Mr. Hesser arrives.

* *(It is noted that Randy Hesser arrived for the meeting at this time).*

Mrs. Wolgamood asked Mr. Hesser if he has had a chance to review the Staff Report and he confirmed that he has done so.

Mr. Nolke informed the Board that his lot is 219 feet long and 85 feet wide. The Health Department has already approved the septic and the location of the proposed 40 ft. x 40 ft. building where he will store three Chevilles and two jeeps. The upstairs would be used for weight lifting and an area for martial arts. If he built a smaller building with a 24 ft. x 24 ft. upstairs, Mr. Nolke said he would not need a variance.

However, he wants to build the larger size garage and thinks he can still build two stories and maintain the 25 ft. height limitation.

Mr. Homan questioned the access to the building. Mr. Nolke responds that there is 13 feet on the north side of the house with a double gate and that is where he will drive in and out.

Mr. Miller asked about the pitch of the roof. Mr. Nolke thinks it is 4/5, but the Board members think that it is probably 4/12.

Mr. Hesser asked Mr. Nolke if he is planning on putting in a driveway around the existing house or going through the garage. Mr. Nolke used the aerial map to point out to the Board where the garage is and said if anything, he will put concrete in that area.

Mr. Miller asked if he is planning on having 10 foot sidewalls. Mr. Nolke said that is what he wants.

The Board discussed the 25 ft. height limitation without a variance and they informed the Petitioner that he will have to adjust his wall height.

Present in opposition to this Petition was Wesley Johnson, 52145 Winding Waters Lane in Elkhart. He used the large aerial map to point out where he lives. He appeared at the last hearing when the Petition was denied by the Hearing Officer and he said that the original application said the property is over 1/3 of an acre. His reason for being here today is due to the size of the proposed structure. His property is across the street and he said that he will have to look at it every day and it will look out of place. He does realize that both sides of the street are different. The houses on one side of the street were built in the 60's and 70's and houses on the other side were built in the 90's and early 2000's. As demographics in the neighborhood change, the neighbors are beginning to see more rental houses and more trash on some of the properties.

During the first hearing, Mr. Nolke had proposed that the height of this structure would be 20 ft. and did not allow for the roof elevation. He had also mentioned the need for a three foot floor joist. Also during that hearing, Mr. Johnson presented a copy of a website that indicated that the Petitioner might be running a business and Mr. Nolke rebutted that the business had been closed down and he was not aware that the website was still up and running. Mr. Johnson informed the Board that as of 7:30 A.M. this morning, that same website mentioned at the first hearing is up and running and the Petitioner's name appears on it. Mr. Johnson still feels that Mr. Nolke is running a business here and this area is zoned residential and not for operating a business.

Mr. Johnson said that he and his wife's main concern is that when they retire, they plan on selling their home and it will be difficult to sell if this Variance is approved. He understands that Mr. Nolke wants to work on cars, but he is concerned with what the next person may do with the property.

Mr. Johnson feels that there are other options, which he said he pointed out at the last hearing. Five years ago, he did something similar to what the petitioner is requesting when he

purchased property from a local developer. The property is 1 ½ miles from his home and he said that he still owns property located on CR 9. The developer of the area where he purchased this property will build whatever you want and this area is zoned appropriately. Mr. Johnson takes exception to the Staff Report which states that granting this Developmental Variance will not cause an adverse affect on the neighboring properties as he feels that this will affect all property values in the area and especially his, if there is a non-conforming use across the street.

Also speaking in opposition to this request was Attorney Rebecca Butler Power, 221 W. Lexington, Elkhart. She points out on the aerial of the Staff's map where Mrs. Virginia Rush lived prior to passing away last month. She represents the children of Mrs. Rush and her clients plan on selling the property which is currently in trust, and they have concerns with the type of structure being proposed.

Attorney Butler Powers presented photos to the Board. The first photo group *[attached to file as Remonstrator Exhibit #1]* is that of Mr. Nolke's property and it is a split level home with an old car in the driveway. She informs the Board that the car had been there since 2000 and the car was just towed away last Sunday morning. There are other cars in the backyard that Mr. Nolke is talking about storing inside. Her clients feel that a 40 ft. x 40 ft. building is more commercial in nature and not consistent with the residential nature of the neighborhood. The two-story building is a special concern as they estimate it to be close to the 30-foot height given the three-foot floor joists, the pitch of the roof, the elevation of the foundation, and the two 10-foot floors that Mr. Nolke is proposing. She is sure that from behind Mrs. Rush's property, you will be able to see a 30-foot tall building.

A larger concern for her clients is if Mr. Nolke will use this martial arts gym only for family as he states. Attorney Butler Powers knows how difficult it can be to enforce these Variances after they are granted as she served as Attorney for the Elkhart City BZA and Plan Commission from 1985 until approximately 1992. Even if Mr. Nolke uses this as he says, her clients and neighbors are concerned with future owners using this property for a business.

The second photo group *[attached to file as Remonstrator Exhibit #2]* is that of Wesley Johnson's residence located at 52145 Winding Waters Lane, Elkhart. His property is on the creek side and Attorney Butler Powers pointed out the difference in architecture of the homes on the creek and non-creek side of the road.

The third photo group *[attached to file as Remonstrator Exhibit #3]* is that of Virginia Rush's home which is located at 52179 Winding Waters Lane, Elkhart.

The fourth photo group *[attached to file as Remonstrator Exhibit #4]* is Anna Gentzorn's home which is located at 52160 Winding Waters Lane, Elkhart. According to Attorney Butler Powers, Mrs. Gentzorn recently passed away and her house will be listed for sale also.

The fifth photo group *[attached to file as Remonstrator Exhibit #5]* is that of Linda Sissom's residence, 52221 Winding Waters Lane, Elkhart.

Linda is the daughter of Virginia Rush appeared and informed the Board that she built her house to be near her parents who have since passed away. This is a nice neighborhood and she is concerned about the value of her property going down. There are houses in foreclosure on the opposite side of the creek and the neighboring property owners work hard and pay taxes to keep the neighborhood up but this proposed building would be too tall and really stand out.

Mr. Nolke tells the Board in rebuttal that if he builds a structure, his taxes will go up. If his taxes go up, his property value must go up. His property value has dropped just as everyone else's and he feels that property values are the same on both sides of the street.

Mr. Nolke did not know anything about this process when he started, but he informed the Board that the structure will be only 25 feet high and everything will be up to codes. As for the martial arts gym upstairs, he clarified that the business has been closed down for three years. A student of his created the website, but the student moved away and Mr. Nolke said he does not know how to remove it from the internet. He has three months of paystubs with him which shows that he works at least 10 to 30 hours per week of overtime with his employer, Amtrak. Last week he worked 90 hours total and he does not have time to teach martial arts to anyone else besides family members. He then acknowledged that this property is zoned residential and said he would not try to run a business at that location.

Mr. Nolke submitted pictures to the Board *[attached to file as Petitioner Exhibit #1]* of his house as seen from the residence of Mr. Johnson. Other pictures included views from the sidewalk and road in front of his house and a neighbor's view of his backyard which were all taken using a zoom lens. He also informed the Board members that he is not trying to do anything wrong or make the neighborhood any less than what it is, but he feels that he has just as many rights as the neighbors do even though his home is not a new one. Mr. Nolke reiterated that he can build a 40 ft. x 40 ft. garage, with a room on top and only the size of the room will vary as the building will be 25 feet high.

The public hearing was closed at this time.

During discussion, it was clarified that the Developmental Variance being requested is 1109 square feet encompassing both floors of the structure.

Mrs. Wolgamood said that Mr. Nolke has indicated he wishes to build a 40 ft. x 40 ft. structure. She asked the staff if he can build a two story, and Staff responded affirmatively, as long he Mr. Nolke complies with the setbacks.

Mr. Homan appreciates the opinion of the remonstrators and he understands that activity in the neighborhood does impact the value of properties and how it is controlled.

The Board examined said request, and after due consideration and deliberation, a motion was made by Mrs. Wolgamood that this request for the Developmental Variance to allow for the total square footage of accessory structures to exceed the total square footage of the primary structure be denied based on the following findings: 1) It will be injurious to the public health, safety, morals and general welfare, 2) The proposed construction is in excess of what should be permitted in a R-1 single family residential area, 3) It will cause substantial adverse affect on the neighboring property, and 4) It will not result in a unnecessary hardship in the use of the property through the strict application of the zoning ordinance because Mr. Nolke can construct a two-story building as indicated, not this particular size, but he can construct one.

Motion dies for lack of a second.

Mr. Miller has an issue which results in Mr. Homan's comments. The new construction on the west side of the road had the opportunity to see what was on the east side of the road.

Mr. Miller then moved that the Board adopt the Staff Analysis as the findings of the Board and move for Approval of this Variance, however the setback and height restrictions as required by the ordinance have to be met. Mr. Kolbus asks the Board if there are conditions such as the curb cut, while Mrs. Wolgamood questioned the business. Mr. Miller then amended his motion to include the testimony of the Petitioner this morning in which he represented that there would be no business at this location. Mr. Hesser clarified that anything represented at this hearing is part of the record and can be enforced pursuant to the Board rules.

Mr. Homan asked the Petitioner if he will be within ordinance with 40 ft. x 40 ft. garage with a 24 ft. x 24 ft. room above it? He calculates that a 30 ft. x 30 ft. two-story building would probably work for him and he wonders why that larger size is so critical to him. Mr. Nolke responds that he has three 1966 Chevilles and two jeeps and he wants a place to store them and work on them. Mr. Homan asks what the total number of vehicles will be and Mr. Nolke responded that there will be seven and that is why he wants the larger size garage.

The motion was seconded by Mr. Homan.

A roll call vote was taken and the motion was approved with Mrs. Wolgamood voting in opposition.

8. The application of **Gene Crusie** for a Special Use for a wireless communications facility (Specifications F - #31.50) on property located on the West side of SR 15, 1,850 ft. South of CR 14, common address of 56603 SR 15 in Jefferson Township, zoned A-1, came on to be heard.

Photos of the property were submitted to the Board by the staff *[attached to file as Staff Exhibit #1]*.

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #56603SR 15-110726-1*.

There were nine (9) neighboring property owners notified of this request.

Pat McCauley of 11824 Sandbrook Drive, Millersburg, appeared on behalf of this Petition and as a representative of Maplenet Wireless.

Mrs. Wolgamood asked Mr. McCauley to point out on the aerial photo where the existing tower is. He points out that the current tower sits right in the corner close to the house and the new one will be closer to the pole barn.

Gene Crusie was approached by the owner of Precision Audio who assists with the Jefferson Township Fire Department and the Elkhart Amateur Radio Association to build a new tower on his property on higher ground. The Fire Department was having trouble with coverage hindrance to the north because of the elevation differences. Mr. McCauley tells the Board that this will also help close the loop to bring this service to Middlebury and Bristol and to relocate MapleNet Broadband in order to provide local wireless high speed internet access to the surrounding community.

There were no remonstrators present.

The public hearing was closed at this time.

The Board examined said request, and after due consideration and deliberation, a motion was made and seconded (*Wolgamood/Miller*) that the Board adopt the Staff Analysis as the Findings of the Board, and based upon these Findings, this request for a Special Use for a wireless communications facility (Specifications F - #31.50) be approved with the following conditions imposed:

1. Approved in accordance with the site plan submitted and as represented in the Petitioner's application.
2. The existing 80 ft. tower to be removed within thirty (30) days of completion of the new tower.

A roll call vote was taken and the motion was approved unanimously.

9. The application of **Lavern & Kathryn Whetstone** for a Special Use renewal for an existing kennel with indoor pens and/or runs (Specifications F - #15.00) and outdoor pens and/or runs in an A-1 district (Specifications F - #15.10) on property located on the South side of CR

22, 200 ft. West of CR 35 to the North, common address of 14304 CR 22 in Middlebury Township, came on to be heard.

Photos of the property were submitted to the Board by the staff *[attached to file as Staff Exhibit #1]*.

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #14304CR 22-110801-1*.

There were nine (9) neighboring property owners notified of this request.

Attorney Theora O'Haneson, P.O. Box 58, Middlebury, appeared on behalf of the Petitioners. They are asking that this Special Use be continued as Mr. Whetstone has a real passion for animals, especially dogs. He loves to watch the animals as they grow and always makes sure that the animals are of a good breed. The other reason that they appear today is they have complied with everything required of them since last year but he currently has less dogs than he did last year. Unless there has been a violation, she is requesting that the permit be continued and that they do not have to appear on a yearly basis as it costs the County money each time they have to do so.

Mr. Homan asked if there is currently a limitation on the number of dogs and Mrs. Prough informed the Board that she has had no complaints on this property and Attorney Kolbus said that there is not a limitation on the number of dogs at this time.

In support of this Petition was Hillary Reinhold who is a veterinarian from LaGrange. She requests that the permit be granted as she feels that the Petitioners do an excellent job with these puppies. They go above and beyond normal care by including genetic testing to see that the puppies are of good stock. If these Petitioners do not provide puppies to potential buyers, someone else will.

Next appearing in support of this Petition was Marcus Yoder, a neighboring property owner, who resides at 58305 CR 35 in Middlebury. He does not hear the dogs as Mr. Whetstone installed a fence for a sound barrier during the last year.

First to appear in remonstrance was Kim Evans of 10730 N. Brown St., Syracuse. She is here on behalf of herself and a group of people in Kosciusko County. She questioned the care of the animals and submitted USDA reports *[attached to file as Remonstrator Exhibit #1]*.

There are many complaints found on these reports. She noted that the USDA requirements are bare boned and list minimum requirements. An example of a minimum requirement would be that a beagle sized dog being kept in a dishwasher crate for their entire life. She does not believe that the average citizen would consider this as being acceptable. The Whetstones have a history of non-compliance with the USDA inspections. She speaks of the report of the bulldog that has severe cherry eye in both eyes and it is a very painful condition. The attending veterinarian examined the animal in April and recommended that the eyes be surgically corrected. According to that same report, the dog was still not treated in June of 2010.

The report states that the failure to follow the veterinarian's guidance leaves the animal to suffer. Instead, the bulldog was treated by a non-professional who sedated the animal and removed the excess eye membrane from the medial corner of the eye which she feels is not adequate. It is also stated in the report that surgical procedures undertaken on a dog by a non-professional is a violation of 2.40(b)(2) which requires appropriate methods of care. The procedure should have been done only by a licensed veterinarian so she does not see the passion that the Petitioners' attorney spoke of.

The next page of the USDA report talks about a negative report on a floor where one of the beagle puppies is kept. The report states that the licensee was cited for a violation of the

flooring and was supposed to be corrected by July 1, 2010. No action had been taken on this as of June 29, 2010. There are also sanitation issues mentioned on this report.

Mrs. Evans reported that LaGrange County has the highest number of puppy mills in Northern Indiana and Elkhart County is right behind them. She does not think that the average resident in Elkhart County wants this kind of reputation for their county. According to the shipping records of the licensee, they send puppies to Detroit and most are small breeds that have been bred to be companion dogs. These dogs are being confined for their entire life and being bred time and time again. She feels that dogs are not cash crops and they are not agricultural animals. It was her understanding that these owners had not complied with all of the conditions set by the Board last year.

Mr. Homan asked if she is a kennel owner. She said she is not, but she has worked with rescue dogs for ten years. She knows conditions of dogs that came from puppy mills and she is now part of a group called "Pet Shop Puppies."

Kermit Troyer of 58565 CR 35 in Middlebury was next to speak in opposition. His home is 1100 feet due south of where the dogs are housed. He attended the hearing last year and complained about the noise. Since then, Mr. Whetstone has put up a fence that has helped some and he also stopped at Mr. Troyer's home to check to see what he is hearing now. Mr. Troyer said that it is quiet when the winds come from the north. He feels that the fence has alleviated about 30 percent of the noise, but he still hears the dogs loud and clear when sitting by his pool. He said that the owners were supposed to modify the kennel area one year ago and it has not been done. He recalled that a Mr. Graber from Grabill, Indiana, attended the hearing last year and indicated that they would be installing a fence with a 45 degree angle on the top to try to lessen the noise coming from the kennel. He asked Mr. Whetstone about it and his answer was that he did not think that he had to do that.

Mr. Troyer informed the Board that Mr. Yoder, who previously spoke in favor of this Special Use lives about ½ mile away from CR 35. The elevation of his property versus the Petitioner's property is 25 feet higher and that is why he hears the noise. He said he considered filing a complaint, but he decided to appear today instead. He does not want to continue to hear these dogs barking.

Carol Mitchell of 61239 CR 21 in Goshen is also against this Special Use being granted. She is totally against another puppy mill in the area and as Ms. Evans previously stated, there are already several in Elkhart County. She said she has viewed the reports on the conditions of the kennel. She has been to other puppy mills in this area and she would love to see the Whetstone kennel to point out any flaws that she sees. She also works for a rescue and said most of these dogs come from puppy mills. It sometimes takes one year to get a rescue dog back to normal. Some of the dogs have medical conditions such as breast tumors and the cherry eyes as previously talked about.

In rebuttal, Attorney O'Haneson said she spoke to two persons who did work at the Troyer residence recently and they told her that they never heard the dogs while working outside there. She has been told that there are a lot of coyotes around the county and they appear to be the size of a german shepherd. She asked the Petitioners if they have seen the coyotes and they verify that they have seen them running through their property and they do a lot of barking. She herself has visited the kennel during the day and has not heard any barking until actually approaching the pens. Mrs. O'Haneson said that there are no kennels near her home but she still hears barking so there will always be noise.

In conclusion, Mrs. O'Haneson said that the Petitioners' children take care of these dogs and they are very trustworthy. She believes that anyone purchasing these dogs would be receiving a good dog. She noted that the violations have been taken care of as has the cherry eyed condition of the bulldog.

Mrs. Reinhold added that they are very friendly dogs and are used to being handled. They are with the kids and on the ground inside the fenced area. She acknowledged that the Petitioners' made a mistake with the bulldog and they took it for medical treatment by an ophthalmologist. She said they still have the dog. She reported that the rusted wire pens are not in existence and have been replaced with new pens. She also reported that the USDA does allow beagles in a small pen; however, she said that Mr. Whetstone's beagles have a large run area and are in and out at their leisure. They are not kept in minimum requirements of caging that the USDA allows.

Mr. Homan asked the Veterinarian what she knows of the USDA inspections timeframe and their enforcement procedures. Mrs. Reinhold told the Board that the USDA has to inspect once a year and they follow-up with the owner if there are problems and an inspector will come back to re-inspect. Mr. Homan asked if the USDA has the authority to close the kennel. Her answer is that they can revoke a license and if they do, it would mean that the kennel owner would not be meeting the requirements. He asked if her clinic is the provider for these Petitioners and she said yes.

Attorney O'Haneson informed the Board that someone from the USDA was to be here today for this hearing but could not attend. She confirmed that they have just re-inspected the kennel and everything is in compliance.

Mr. Homan asked if the Petitioners complied with the results of initial hearing.

Mrs. Prough reviewed the minutes of the hearing held on September 16, 2010 and they read as follows: "Mr. Lantz asked if the fence wasn't good enough at ten feet tall, then what are the other alternatives? Mr. Graber, the representative, said the next alternative would be having an angle brace coming up off the fence. Mr. Lantz also asked how long they have been using the material and Mr. Graber said about six years."

Mr. Homan and Mrs. Prough confirmed that there was not a condition regarding this angle brace coming up off the fence.

The public hearing was closed at this time.

Mrs. Wolgamood asked if the original questionnaire for Special Use allows Petitioners to indicate the number of dogs they intend to kennel. She went on to explain that she asked because question #2 asks about number of dogs and the Petitioner indicated that they have downsized their operations and therefore need no new buildings. The petitioners mentioned kenneling 31 dogs.

Mrs. Prough said that the number of dogs was not listed on the original application, but was mentioned by the Petitioner through testimony at the original hearing.

Mr. Homan asked about the testimony which states number of dogs is limited by current economic or family situation. He inquired if the Petitioner was saying that they are downsizing and staying downsized, or just saying that they are downsized for now. Mr. Hesser responded that it can be limited by the site plan.

Mrs. Wolgamood also reminded Board members that everything that is submitted is a portion of the record and a portion of what they are representing. She asked the Board, if the application states 31 dogs, what does it mean if they do not want more than or less than 31 dogs.

Mr. Miller asked if they approve, are they approving for an indefinite time. Mr. Kolbus noted that the Board has the option to limit and Staff did not make recommendations for this.

Mr. Hesser did not feel that the Board needed to do anything with respect to these issues.

Mr. Homan read criteria #2 which stated "will not cause substantial and permanent injury to the appropriate use of neighboring property." He felt that the number of dogs should be limited based on circumstances. He felt this kennel is supervised by a veterinarian and also by the USDA and would have a hard time turning this Special Use down. He would like to add that the Board limit the number to 40 dogs.

Mrs. Prough believes that the petitioners are representing the number to be 40 adult dogs.

Mr. Miller was not comfortable with giving the Petitioner an indefinite time period. Mr. Hesser was not opposed to a limit on the size or the time.

The Board examined said request, and after due consideration and deliberation, a motion was made and seconded (*Miller/Homan*) that the Board adopt the Staff Analysis as the Findings of the Board, and based upon these Findings, this request for a Special Use renewal for an existing kennel with indoor pens and/or runs (Specifications F - #15.00) and outdoor pens and/or runs in an A-1 district (Specifications F - #15.10) be approved with the following conditions imposed:

1. Approved for the owner/occupant of the residence on site.
2. Approved in accordance with the site plan submitted, as represented in the Petitioner's application and the testimony given this morning.
3. The kennel operation is to operate in accordance with state and local laws.
4. The number of dogs is limited to 35 adult dogs.
5. Approved for a period of three (3) years with renewal before the Board.

Mr. Kolbus asks about the possibility of addressing the angle raised roofing that was previously discussed and the Board agreed that it was not committed to on the first application so it will not be added.

A roll call vote was taken and the motion was carried with a unanimous vote.

10. The application of **Brian Blanda** for a Special Use for warehousing and storing of vehicles, trailer and equipment for a lawn service business (Specifications F - #44), and for a Developmental Variance to allow the total square footage of accessory structures to exceed the total square footage in the primary structure on property located on the Southwest corner of CR 24 and CR 1 South, common address of 30036 CR 24 in Baugo Township, zoned A-1, came on to be heard.

Photos of the property were submitted to the Board by the staff *[attached to file as Staff Exhibit #1]*.

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #30036CR 24-110722-1*.

There were thirteen (13) neighboring property owners notified of this request.

The County Highway Department had asked Mr. Blanda to relocate his driveway and requested a revised site plan which was submitted to the Staff on 9-9-2011. Mrs. Prough then submitted the revised site plan to the Board on today's date *[attached to file as Staff Exhibit #2]*. An additional condition that is requested is that Mr. Blanda remove two existing structures by October 1, 2012.

Brian Blanda of 30036 CR 24, Elkhart, appeared on behalf of this request. He informs the Board that he moved to Elkhart County last year and is trying to run a business from this

property. He has been working with the Staff on cleaning up the property and last week he revised the driveway due to safety concerns. The County Highway Department had suggested that he move the driveway 35 feet to the east so that the driveway lines up and he can pull in or back in. The other driveway was put in as a temporary one near a culvert and he has since taken that out. He did not want to disturb the property and/or the water drainage as he is located on a hill. When he purchased the house, there were two existing driveways and he has agreed to remove the other two driveways and the one added last year after this project is complete. With the new building, he will still need one of the driveways.

Mr. Miller asked Mr. Blanda about the vehicles currently stored outside and the stockpiles of dirt and bark and Mr. Blanda said the fuel tanks are gone, all of the wood has been moved, and the pile of supplies is no longer there as he has been slowing trying to clean up the property. He has set up safety barrels at the end of the road as he has been working on digging up a tree stump which is 10 to 12 feet under the ground. He also told the Board that he is planning on downsizing from two trailers to one and the trailer will be able to be parked in the new building.

There were no remonstrators present.

The public hearing was closed at this time.

Mr. Hesser questions if this parcel was two separate tracts at one time. Mr. Blanda informed the Board that twelve years ago when the neighbors to the west wanted to build a house, the property was split up and it was acquired by the previous owner of his house. According to Mr. Blanda, the property was combined into one parcel in June 2011.

With respect to the Special Use, Mr. Miller moves that the Board adopt the Staff Analysis as the findings of the Board and that it will be consistent with the spirit, purpose, and intent of the Zoning Ordinance, that it will not cause substantial and permanent injury to the appropriate use of neighboring property, and that it will substantially serve the public convenience and welfare by allowing the Petitioner to operate a lawn business from this property. He would also include conditions that Staff has on the approval for the owner/occupant of the residence on site, approved in accordance with the revised site plan submitted on 9/9/11, and as represented in the Petitioner's application. There will be no outside storage of vehicles, trailers, equipment, or materials related and that the Petitioner abide by his new driveway permit and meet those guidelines and that his testimony be included.

. Mrs. Wolgamood asked for no backing of vehicles off of the County Road as the Petitioner had indicated that he occasionally does this. For clarification, this condition of not backing from the County Road into the driveway is added.

The Petitioner asked the Board where he is supposed to turn around with this added condition. His vehicle is almost 60 feet long and he needs 100 feet to turn around.

Mr. Blanda tells the Board that if he pulls in, his house will blindside him to oncoming traffic. He is a sole proprietor and has no other employees that work with the business to assist him in backing out.

Mr. Miller explained that the Board tries to watch out for situations like this as they do not want to see people backing in and out of County Roads.

Mr. Blanda explained to the Board how he currently backs up. He pulls up to the road to the middle of the center line and he can back in on his driver's side which allows him to make the swing quickly. The County informed him that he is allowed 34 feet and he currently has 20.

Mr. Hesser asked if the Staff has any concern with this issue. Mrs. Prough informs the Board that the Petitioner is working with the Highway Department and if they feel that this is a better set up than what he currently has, she recommends that the Board go along with the expertise of that department.

Mrs. Wolgamood explained that the Petitioner is asking for a 40 ft. x 80 ft. building on 1 ¼ acres and he also has a 60 foot rig that he needs to back in. She knows that the County Engineering Department will make him put in a driveway, but the Board still needs to consider the safety aspect of this.

Based on the Staff recommendation, Mr. Miller will withdraw that portion of his motion.

Mr. Blanda informed the Board that the existing building and garage is longer than what the proposed new building will be. He is basically decreasing the size of the building.

Mrs. Wolgamood asks if he is removing the second building and he stated that they will both be taken down. Mr. Hesser reminds everyone that this is one of the conditions.

The Petitioner also belongs to the Baugo Volunteer Fire Department and has blue lights on his truck which he uses. If anyone sees them, they should immediately stop.

Mr. Homan seconds the motion. Mrs. Wolgamood voted in opposition.

Mr. Miller now moves on to the Developmental Variance and he makes the motion that the Board adopt the Staff Analysis as their findings, that it will not be injurious to the public health, safety, morals, or general welfare, provided the two accessory structures on site are removed from the property by October 1, 2012, that it will not cause substantial adverse affect to the neighboring property and that it will not result in an unnecessary hardship of the use of the property through the strict application and the terms of the Zoning Ordinance. This is approved in accordance with the revised site plan submitted dated September 9, 2011; the two conditions that the Staff recommended and an additional condition that the Improvement Location Permit be taken out within ninety (90) calendars days from today's date.

Mr. Homan seconds this motion. A roll call vote was taken and the motion was carried with Mrs. Wolgamood voting in opposition.

11. The application of **Mervin D. Hostetler** for a Special Use for a home workshop/business for a woodworking business (Specifications F - #45), and for a Developmental Variance to allow for the total square footage of accessory structures to exceed the total square footage in the primary structure on property located on the North side of CR 30, 850 ft. West of CR 41, 1,800 ft. East of SR 13, common address of 11641 CR 30 in Clinton Township, zoned A-1, came on to be heard.

Photos of the property were submitted to the Board by the staff *[attached to file as Staff Exhibit #1]*.

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #11641County Road 30-110822-1*.

There were 10 (ten) neighboring property owners notified of this request.

Attorney Loren Sloat, 102 Heritage Parkway in Nappanee appeared on behalf of the Petitioner. He noted that Mr. Hostetler and his son have twenty-five years experience in the RV business. Mr. Hostetler is currently a plant manager with a local manufacturer. He is very familiar with woodworking and woodworking products and sees a need for a five axis CNC router in his business. Mr. Sloat utilized a Power Point presentation to show the Board a picture of the machine *[attached to file as Staff Exhibit #1]*. He explained that it does more than a three axis router as it works on multiple planes. It makes products that are curved, which he shows to the Board

using the Power Point presentation. He explains that things such as table legs require a five axis router. Mr. Hostetler would like to provide this service to a local manufacturer as they currently ship in all of their chair bottoms from Ohio. In order to provide this service, Mr. Hostetler will need the machine and someone to oversee it. He will sub-contract with a consultant in the Michigan area and can program the router on line.

In 2002, Mr. Hostetler was able to raise hay on his 32 acres after some construction was done to an agriculture building. In 2005 or 2006, Mr. Hostetler built a home on the property. Mr. Sloat showed the Board pictures of the home, barn, and accessory building where his wife does cooking. He also indicated that they sometimes hold church functions in this 48 ft. x 80 ft. building constructed in 2002, and noted that he wants to move his CNC router to this building. If the building is not fully insulated, he indicated that he intends to insulate the building. The sidewalls are six inches and the door is insulated. It was noted that all operations will take place inside.

One of the main concerns of this operation is that of noise. The Petitioner has been told by the CNC people that the decibel rating for this machine will be 40, which is less than half of the decibel rating required to wear ear protection. The noise will be buffered by woods in front of the building and the Petitioner will plant trees between the buildings to help buffer any other noise. Plastic, heavy vinyl strips will also be installed so that a forklift can be driven through the opening. This will aid in blocking the noise of air conditioning and heating. There will also be a dust collector on the CNC router.

The parking area will be west of the shop, as noted by Mr. Sloat who pointed out the location to the Board. He explained that Mr. Hostetler will remove the sod and put in crushed stone. Access to the property is from CR 30 and on the aerial he pointed out the lane that is used for this access. Mr. Hostetler will have to hire sub-contractors to transport the material produced. He anticipated the need for approximately two trucks coming to the site per month.

Mr. Hesser asked if the trucks will have room to turn around on the property and Mr. Sloat answered yes.

Mr. Sloat noted that it is a well groomed property and Mr. Hostetler desires to maintain that appearance. There is a 90 degree curve toward LaGrange County and it is not a heavily traveled road; therefore, the impact on traffic will be minimal. He has checked with neighbors surrounding this property and feels that any questions they had have been answered. They are currently using an existing building on site. Should the business thrive and grows, as they hope it will, they may need to move the business to another location. Mr. Sloat submitted a list of nine conditions with the application. The Staff added another condition in their recommendation and they feel that the conditions are reasonable. With regard to the Developmental Variance, they are requesting a 930 square foot variance to allow for the square footage of the accessory structures to exceed the square footage of the residence.

Mr. Homan asked what other operations will be occurring in the building; specifically asking about the glued up wood. He inquired about the waste that will be put out by the machine. Specifically, he wanted to know if it would be collected in the building, but Mr. Sloat could not answer how it will be disposed of.

Mervin Hostetler of 11641 CR 30 in Goshen informed the Board that there will be a vacuum system for shavings. They will clean up the shavings on a daily basis as the product will need to be stained after it leaves the business. He knows that they will need a vacuum and he acknowledged concern about the shavings. He said he will have a better idea of what type of

vacuum to purchase once they are able to determine the amount of business. the amount of business.

Mr. Homan explained that a home workshop business has specific criteria that everything must be contained in the building including waste hoppers. Mr. Hostetler said he is also concerned about fire hazards. He indicated that he would have no problem abiding by rules, since the Amish have regular rules and he understands that rules must be followed.

Verlin Chupp of 64804 McIntosh in Goshen was the first to speak in opposition to this request. He owns the adjoining property to Mr. Hostetler located off SR 13. He has been in the cabinet business for 38 years and he knows CNC's create a lot of dust. He is concerned with adding home workshops as there are eight (8) empty buildings on US 33 across from his establishment. He feels that it is unusual to grant this request with so many empty buildings available. He knows that the Petitioner has to have certain permits before he can operate legally. He has pictures of many home workshops that are not in compliance and he feels it is unfair that he, as a businessman, has to comply while others do not. He asked if the Petitioner will be taxed as a commercial property or an agricultural property. He pays a very healthy sum in property taxes and environmental permits and he is opposed to home workshops as it is an unfair advantage to established businesses in Elkhart County.

In response, Mr. Sloat informed the Board that they are talking about land use of this particular parcel and this building is also empty and owned by the Petitioner. It will be a small business operated by family members at home. If the business grows, their next move would be to rent an empty building elsewhere.

If Mr. Chupp has concerns about home workshops in general, it is not something that should be brought to the attention of this Board, but needs to be done elsewhere. Elkhart County encourages home workshops and the Petitioner only intends to comply with any requirements, whether they are state or local.

Mr. Hesser commented that he was concerned about a conditions #7 and #8. Mr. Kolbus explained that the petitioner proposed conditions #7 and #8 and the Staff just re-wrote them. He suggested that they delete #7 and #8, and impose a condition of approval for the owner/occupant of the residence on site might be more appropriate.

Mrs. Wolgamood felt that condition #5 is included in condition #10. It was clarified that condition #5 would be deleted as it was redundant.

Mr. Hesser felt that Mr. Sloat had addressed the concerns of the remonstrator and that those concerns are outside the Board's jurisdiction.

The public hearing was closed at this time.

After due consideration and deliberation, a motion was made and seconded (*Hesser/Miller*) that the Board adopt the Staff Analysis, as amended by the Board, as the findings of the Board, with the exceptions of deleting condition # 5 because it is included within condition #10 and deleting condition #7 and condition #8 and restating in place of those, "*that it is approved for the owner/occupant of the residence*" and an additional condition of a "*renewal before the BZA in two years.*" A roll call vote was taken and the motion was carried with a unanimous vote.

A motion was then made and seconded (*Hesser/Wolgamood*) that the Board adopt the Staff Analysis as the findings of the Board and based upon these findings, approve the Developmental Variance as submitted in the site plan.

Both this request for a Special Use for a home workshop/business (Specifications F - #45), and for a Developmental Variance to allow for the total square footage of accessory structures to exceed the total square footage in the primary structure be approved. A roll call was taken and the motion was carried unanimously.

12. The application of *Elcona Country Club, Inc. (lessor) and Verizon Wireless (lessee) c/o Insite RE, Inc.* for a Special Use for a wireless communications facility (Specifications F - #31.50) and an 8 ft. Developmental Variance to allow for the placement of an equipment shelter 112 ft. from centerline of the right-of-way of US 20 (Ordinance requires 120 ft.) on property located on the Northeast corner of CR 21 and US 20, common address of 56784 CR 21 in Jefferson Township, zoned A-1, came on to be heard.

* *(It is noted that Mr. Hesser stepped down from the Board for this public hearing due to a potential conflict of interest.)*

Photos of the property were submitted to the Board by the staff *[attached to file as Staff Exhibit #1]*.

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #56784CR 21-110715-1*.

There were three (3) neighboring property owners notified of this request.

Ray Shinkle of 1089 Owancia Court in Naperville, Illinois, appeared on behalf of this Petition. He is with InSite Re Inc. and is representing Verizon Wireless. He explained that over half of 911 calls are made by cell phones and Verizon is constantly trying to make improvements to keep up with this demand. Verizon evaluates the market to see where there is spotty coverage which results in dropped calls, while also working with sales and marketing to determine the origin of customer complaints.

Mr. Shinkle submitted two (2) coverage maps in color *[attached to file as Petitioner Exhibit #1]* to illustrate current coverage and proposed coverage in this area. The blue area contained on the map represented building coverage. He noted that more and more people are demanding coverage where they live to eliminate land lines. The reason for the request is to improve coverage. Mr. Shinkle explained that these two locations could not be covered by one site. They needed two sites for more adequate coverage. He stated that Verizon looks for existing places to co-locate and there is nothing in the area that meets that objective. Therefore, they need to build a new tower and the Elcona Country Club meets their needs. Verizon has worked tirelessly with the Country Club to do this, noting that there was a representative from Elcona Country Club in attendance at the hearing.

Verizon is proposing a 130 ft. galvanized steel monopole tower that will be located behind a maintenance shack for their golf carts. There is a thick tree line surrounding the site. It would be necessary to drive to the maintenance shack in order to see the base of the tower. Mr. Shinkle noted that the site will hold co-location for future carriers and will be used for predominantly residential areas.

When Mrs. Wolgamood asked Mr. Shinkle if he was able to justify why a developmental variance was needed, other than the desire to hide it, he responded that this was the only location the Country Club would consider as it would blend in best with their property. Mr. Shinkle went on to say that he has worked for Verizon for two years and has never heard of a tower falling over, but he is not a structural engineer. Verizon asked Sabre Towers and Poles, the designer for this tower, to address safety issues. Sabre responded that they do not expect the tower to fail, but

if it should, the tower is designed to fold in half, which would keep it from falling onto Highway 20.

Mrs. Wolgamood asked if the Country Club Board was aware of the 120 foot setback requirement. Mr. Shinkle said that he had previously discussed this with Robert Nemeth and asked for his input. He also spoke with Greg, who is the superintendent for the Country Club, regarding this. He was told that the Country Club would not consider moving the tower and that only the top portion of the tower would be visible.

There were no remonstrators present.

The public hearing was closed at this time.

The Board examined said request, and after due consideration and deliberation, a motion was made and seconded (*Homan/Wolgamood*) that the Board adopt the Staff Analysis as the Findings of the Board, and based upon these Findings, this request for a Special Use for a wireless communications facility (Specifications F - #31.50) and an 8 ft. Developmental Variance to allow for the placement of an equipment shelter 112 feet from centerline of the right-of-way of US 20 (Ordinance requires 120 ft.) be approved in accordance with the Staff Analysis with the following condition imposed:

- 1) Approved in accordance with the site plan submitted and as represented in the Petitioner's application.

A roll call vote was taken and the motion was carried unanimously.

* (*It is noted that Mr. Hesser returned to the Board at this time.*)

13. The application of **Ronald & Esperanza Wilcox** for a Use Variance to allow for utilities (electric, gas and water) in an existing non-conforming accessory building on property located on the North side of CR 16 (Indiana Avenue), 1,030 ft. West of Nappanee Street (SR 19), being Lot 1 of C.R. Bash Subdivision, in Baugo Township, zoned R-1, came on to be heard.

One (1) photo of the property was submitted to the Board by the staff *[attached to file as Staff Exhibit #1]*.

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #OCR 16-110822-1*. There were twenty-four (24) neighboring property owners notified of this request.

Mrs. Prough submitted two letters in opposition to the Board. *[attached to file as Staff Exhibit #2]*. The first letter was received on September 8, 2011 from Vicki Fore who lives adjacent to the property to the east. Mrs. Fore wanted to make a statement regarding this request and provide the Board with information regarding the history with previous owners, which included legal history of a Judgment being issued and the Court imposing a condition that there would be no repairs of any kind at this property and no monetary gain could ever be received from this property. The second letter was received on September 9, 2011 from Doris Barfell who lives on the south side of CR 16, just south and east of this structure. Mrs. Barfell wanted the Board to know that if the petition is granted, she is concerned that the property could easily become a junkyard and bring down the surrounding property values.

Ronald Wilcox and his wife Esperanza Wilcox of 29645 River Shore Lane in Elkhart appeared on behalf of this Petition. They bought their home in 1997 and this storage facility was for sale at that time, but they could not afford to make an offer on it. The storage facility was listed for sale again last October and they made an offer which was accepted. Their full

intentions were to have power on the property, but they were told the power came from the adjoining property to the rear. The original owners were divorced and one party got the building and the other got the house.

They closed in late October or early November of 2010, moved their vehicles into the building, and did not pursue this issue until the spring of 2011. At that time, they contacted the engineer, who met Mr. Wilcox at the property. Mr. Wilcox was told that there would never be power there. Meridian Title did a second and third title search on the property and found no restrictions.

In May of this year, Mr. Wilcox as Mr. Wilcox prepared his boats, he proceeded to get a transformer installed; however, when it was time for the inspection, Mr. Wilcox was told that it was an illegal hookup. Dennis Cox, the electrical inspector for the County, gave them permission to hook up the generator. Mr. Wilcox said he thought he was to install and then get a permit. He acknowledged that it was a misunderstanding on his part about if and when to do the install. With the assistance of Staff at the Planning Department, Mr. Wilcox filed this Petition. He and his wife own eight cars and three boats, which are never stored outside. They stated that they plan to do landscaping to make the property more respectable.

Mr. Hesser asked if Mr. Wilcox needed to hook up to city sewer and water. He responded that he only needed to hook up to water. He explained that they will use the city water to wash cars and will not need city sewer.

Victoria Fore, 28177 CR 16 West, Elkhart, appears in opposition to this Petition. Her property is on the east side of this building. She submitted pictures of the storage building which reflects the distance from the neighboring property *[attached to file as Remonstrator Exhibit #1]*. As Mrs. Fore began to read her letter, Mr. Hesser inquired if the letter she was reading was the same letter already submitted to the Board. She responded affirmatively while noting the following: "The size of the building is 30 ft. x 60 ft. and is located in an R-1 zoning area. The building was built in 1986 and it was red tagged by County personnel. Three neighbors spent \$22,000, and after five years, a County judge issued a Decision and Judgment that there were to be no repairs of any kind in the building and no monetary gain could be received from this building use. It was also to be used for storage by the owner of the house." Mrs. Fore also referenced the County Ordinance (Article 4- Page 2 Section 5) which talks about alterations. She felt that adding electricity and gas would make this building non-compliant. The electric was run originally from the house on the lot behind this building and they were always two (2) separate lots. The previous owners were using this electric which was not in compliance with County rules. The most recent owner, prior to Mr. and Mrs. Wilcox, were not permitted to use the electric accessed by the previous owners. Mrs. Fore noted that three out of the previous five owners were using this property for car repairs.

Mrs. Fore added that the garage sits less than 20 feet from the neighboring house on the west side. She does not feel that the Wilcox's will own this building for long. Every time a realtor sign goes up in front of the building, it causes her family and other neighbors much stress. She said there is no landscaping currently there. She spoke to a person who was called to give estimates on electric and gas for this property. She informed him of the previous Board decisions in which owners were told that no electric or gas would be allowed at this property. She does not feel that this type of building has any place in a residential neighborhood.

Mr. Hesser asked how far west of Nappanee Street her property is located and what the closest commercial property to her is. Mrs. Fore said McDonald's and Burger King are located

at the nearest intersection and estimated that to be 1/8 of a mile from her property. She stated that the building is an eyesore and that the neighbors had wanted it removed. According to Mrs. Fore, the court process took five years and she is concerned about what will be going on in the building if these utilities are permitted.

Also present in opposition was Lee Ann Pettit of 28216 CR 16, Elkhart. She stated that she lives just west and across the street from this building. She shared with the Board that it is a large pole building and the neighbors were told it could be put up since it was part of the adjoining parcel. The neighbors were also told that the garage could not be separated and had to be sold as one unit. As time went by, the property was separated and the pole barn was sold to a separate owner. She explained that they have had problems with all subsequent owners trying to run a business at this location and most of the residents in this area are retired and have quiet lives. She is not concerned with the issue of power going in this building, but is more concerned with the non-compliance with the zoning laws. Over the last 25 years, each owner tries to get the rules adjusted to suit themselves.

Doris Schrad, 28273 CR 16, Elkhart also appeared in opposition to this request. She lives in the original house at that tract of land and has been there for about 40 years. She stated that as far as they are concerned, the building has always been an eyesore. When it was first constructed, it was red tagged, as Mrs. Fore previously stated, as it was not in compliance with the ordinances of the subdivision. Mrs. Schrad objects to having electricity or gas brought to the building to use it for the storing and washing of cars. She expressed concern that there is no sewer connected to the building to allow for this activity.

In rebuttal, Mr. Wilcox confirmed that nothing will be stored outside and the property will be improved and painted. He stated that he only visits the site once a week to cut the grass. He noted that there is a septic and a drain inside the building, and that the doors are never left open. Mrs. Wilcox told the Board that they do not plan on having a business at this location as they both have full time jobs and do not have time to run a business.

Mr. Wilcox thinks that the building is 20 feet in height with 16 sixteen foot overhead doors; however, the Board members believe the building to be over 21 feet high.

The public hearing was closed at this time.

Mr. Hesser questioned the need for the use variance. Mrs. Prough said the Staff determined in 1998 that it would be intensifying the use by installing utilities.

Mr. Hesser feels that the Petitioners are well intentioned, but might be hindered by previous owners attempted use of the property. This Board cannot overrule any subdivision restrictions, and although he appreciates the Petitioners wanting to improve the property, he still has concerns about intensifying a non-conforming use.

Mrs. Wolgamood also expressed concern and agrees with Mrs. Pettit's comment that this is just another erosion of the law because the property was split. She does not agree with the Staff's comments that strict enforcement of the terms of the Ordinance would constitute an unnecessary hardship if applied to the property. She also does not agree that the large overhead garage doors require power to be operational.

Mr. Miller feels that the Wilcox's are victims of the history that exists and they were sold this property by a realtor who made certain representations. As much as he does not like the circumstances that have developed, he prefers that the property be upgraded rather than leaving it in a state of disrepair. Mr. Homan agreed. Mr. Hesser commented that both could be improved without electricity, acknowledging that it would be at a much lesser level, but could still be done.

Mr. Homan commented that the Board realizes that the neighbors want the building gone, but the reality is that it is there. The owners bought the building for what it is, for a non-conforming use with the restrictions that are in place.

The Board examined said request, and after due consideration and deliberation, a motion was made and seconded (*Hesser/Wolgamood*) that this request for a Use Variance to allow for utilities (electric, gas and water) in an existing non-conforming accessory building be denied. A roll call vote was taken and the motion carried with Mr. Miller voting in opposition.

14. The application of **Square 1 Builders** for a 5 ft. Developmental Variance to allow for the construction of a residence 25 ft. from the front property line (Plat requires 30 ft.) on property located on the Southeast end of Moonstone Lane cul-de-sac, 349 ft. East of Garnet Lane, East side of CR 21, being Lot 36 of Emerald Chase Section Three, common address of 20024 Moonstone Lane in Jefferson Township, zoned A-1, came on to be heard.

One (1) photo of the property was submitted to the Board by the staff *[attached to file as Staff Exhibit #1]*.

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #20024MoonstoneLn-110621-1*.

There were five (5) neighboring property owners notified of this request.

Marv Schmucker of 56199 Parkway Avenue, Suite #1, in Elkhart appeared on behalf of Square 1 Builders. He stated the reason for the variance was due to a 75 foot pipe line easement going through the back yard. Square 1 Builders designed a very unique home especially for this site, and when they tried to fit the residence on the site with a mound system, it only allowed for a five (5) foot patio on the back. Mr. Schmucker did not feel a five (5) foot patio would make the site marketable, so he was asking for a five (5) foot variance to the front. The property is on a cul-de-sac, and he said it will not be out of line with any other homes. The property line and the reason for previous denial, July 20, 2011, were due to water table issues. He mentioned they are currently building a house on lot #35, but there were no water table issues on that lot. Proper drainage was installed, so the basement is dry.

When Mr. Homan asked Mr. Schmucker about the water table issues, Mr. Schmucker explained that the neighbors on Lot #34 had water in their basement and came to the last meeting to remonstrate because of the water table.

Mr. Hesser inquired whether Mr. Schmucker's representation was that his construction will not affect that issue. Mr. Schmucker replied that what he is doing would not affect the water table.

Mrs. Wolgamood asked if Mr. Schmucker was the developer of this subdivision. He stated that Pheasant Ridge was the developer; however, he currently owns the lots. She asked for the number of houses in that immediate area he constructed. He said that he had built four (4) or five (5) houses which he pointed out on the aerial map, but none of them had any water issues with the basements. He explained that these houses had to be set on eight (8) inches of pea gravel to get it out of the water, but he did not feel that had anything to do with the 5 foot setback variance.

Mrs. Wolgamood inquired if he was aware of the easement on this property when he purchased it. Mr. Schmucker stated that it was represented to be a 50 foot easement and not the 75 foot easement he had seen on the recorded paperwork. He also said that it was represented as

a conventional field system, but if he had a conventional field system, this would not be an issue because he could set the house and put the field system in different areas.

Mrs. Wolgamood asked if he had soil borings done prior to purchasing the property. He replied that Jeff Chupp of Pheasant Ridge had the soil borings done and at that time it was a conventional system; however, now it requires a mound system because the septic regulations changed over the last 10 years. He mentioned that this lot is the only one that had a 75 foot easement with a mound system. When she asked about a mound system on the property to the north, he told her it was a much larger lot so they were able to put the mound system in the northwest corner.

Mr. Homan asked why the mound and the septic system had anything to do with this request because it appeared from the site plan that the structure encroachment on the easement was the issue. Mrs. Wolgamood agreed, but she said they had to fit both the house and mound system on the property. Mr. Schmucker reiterated in order to fit the 1400 square foot house on the property, the mound system had to go in the northwest corner due to the setback regulations; otherwise, the residence would have to be rotated.

There were no remonstrators present.

The public hearing was closed at this time.

For clarification, Mr. Miller stated that when Mr. Schmucker bought the property, it was reported to be a 50 foot easement for a high pressure pipeline. He lost 12 ½ feet to work with for a backyard setback. When the septic regulations changed and the borings were done, it went from a conventional to a mound system which has a different set of regulations, and there were only two places on the property where a mound could go. He feels this is the best solution to meet the scenario of making an unbuildable lot into one that is buildable. He feels the five (5) foot difference would not be noticeable when driving around the cul-de-sac.

Mrs. Wolgamood felt there was the option of choosing a house plan to fit on the property, but Mr. Miller said from the builder's point of view, they had to go with what the market will bear.

The Board examined said request, and after due consideration and deliberation, a motion was made and seconded (*Homan/Miller*) that the Board adopt the Staff Analysis as the Findings of the Board, and based upon these Findings, this request for a 5 ft. Developmental Variance to allow for the construction of a residence 25 ft. from the front property line (Plat requires 30 ft.) be approved in accordance with the Staff Analysis, the site plan submitted, and as represented in the Petitioner's application. A roll call vote was taken and the motion was granted unanimously.

15. The application of ***John & Tammy Moore*** for a Special Use for warehousing and storing of trucks, trailers and machinery for a snow plowing, property maintenance and light excavating service business in an A-1 district (Specifications F - #44) on property located on the East side of Ash Road, 530 ft. North of CR 28, common address of 60904 Ash Road in Baugo Township, was to be heard. Mr. Homan noted the public hearing was to be closed and there were conditions to be submitted by the representative.

Photos of the property were submitted to the Board by the staff *[attached to file as Staff Exhibit #1]*. Mrs. Prough stated photos were taken after the last meeting, because they received a call that things were cleaned up.

Mrs. Prough presented the Staff Report/Staff Analysis, which is attached for review as *Case #60904AshRd-110621-1*.

There were six (6) neighboring property owners notified of this request.

A motion was made and seconded (*Hesser/Homan*) that the public hearing be reopened, but the comments are limited to the issue of the proposed conditions. After a unanimous roll call vote was taken, the motion was carried.

Mrs. Prough submitted the site plan *[attached to file as Staff Exhibit #2]* and the conditions that were received from the petitioner August 26, 2011.

The staff received two letters; one on August 30th and the other September 9th *[attached to file as Staff Exhibit #3]* from property owner Karen Bake, 60872 Ash Road, Osceola, who resides to the north. Mr. Kolbus reviewed the letters and determined that only portions of the letters would need to be considered for this hearing. Mr. Kolbus noted the first page of the August 30th letter from Karen Bake did address the site plan and conditions. The second and third pages give a history of the home and should be disregarded. There was another document dated September 8, 2011 received September 12, 2011 regarding a telephone advertisement and he recommended that the Board disregard that as well.

Attorney Kolbus commented on condition #11 which read, “per site plan submitted on August 29th” and he indicated it should have read August 26th. Also condition #9, “review before the BZA in twelve months”, he stated that BZA no longer does reviews; they do renewals.

Blake Doriot of B. Doriot & Associates, P.O. Box 465, New Paris, was presented presenting the petitioners. Mr. Doriot stated that he did not have an opportunity to review the letters. He reviewed the site plan restrictions with the Board at this time.

Mr. Homan inquired about the two backup snow plow trucks. He asked how many vehicles would be involved in that.

John Moore, 60904 Ash Road, Osceola, was present to address that issue. Mr. Moore stated he has approximately ten plow trucks and his drivers pick them up at the beginning of the season and keep them at their property unless they break down. He usually has two to three spare trucks at his site in case of breakdown. Mr. Homan asked for clarification if during the off season he may have 10 or 12 trucks parked on the property, but Mr. Moore stated they would be stored at another facility during the summer months.

Mr. Hesser asked that the woodpile locations be pointed out on the aerial map. He noted to satisfy past concerns, they would have a privacy fence and that the piles would not exceed two tri-axle loads each.

When Mr. Hesser questioned how it would compare to the height of the fence, Mr. Doriot said that he rarely saw piles more than eight feet and the fence is a little over six feet, and the pile would be toward the back.

Mr. Hesser asked if the wood pile is used to heat this facility, Mr. Doriot noted at this time it was not. However, he verified that Mr. Moore would not be selling wood from this site.

Mr. Hesser was concerned about the wood pile being less appealing to the property, so Mr. Doriot suggested it could be moved further back on the property.

Mrs. Wolgamood had questions pertaining to the gravel brought on site and read from the minutes that Mr. Doriot had indicated an area of approximately 15 ft. x 15 ft. with the fencing being 6.5 ft. high.

Mrs. Wolgamood mentioned he indicated in the restrictions that they would be limited to two piles and not to exceed two tri-axle loads each. He defined ‘tri-axle loads’ as being a normal dump truck load at approximately twenty tons of gravel on average. She asked if the gravel would exceed eight feet and Mr. Doriot thought they would only exceed the fence by two feet.

Mr. Hesser asked about unlicensed vehicles being kept for parts on the premises. Mr. Doriot confirmed Mr. Moore was not doing that anymore and that he would not be storing any vehicles or any scraping; however, he was going to do a personal restoration. Mr. Doriot assured the Board there would not any be unlicensed vehicles stored on the property.

Mrs. Wolgamood noted that one of the conditions for the equipment listed indicated "may vary slightly" and suggested a limit, such as "no more than 13 pieces of equipment" needed to be placed on the number of vehicles allowed. Mrs. Prough agreed that the Board should place a limit on the equipment.

Mr. Miller asked whether Mr. Moore was an occupant in the area before his neighboring property owners to the north and the south. Mr. Doriot stated that the Bakes were in the northeast and had been there 30-35 years. Mr. Moore's business has been there 22 years.

Mr. Homan asked for additional questions or comments from the audience in support of this request that had not been heard previously and to limit comments to the site plan and conditions.

Mark Dawson, 56679 SR 15, Bristol, was present in support of this request. Mr. Dawson stated he does the books for Mr. Moore. He felt there were a lot of issues brought up about the gravel being delivered, but this year there had only been two loads of gravel delivered. Last year there were two loads of gravel delivered as well, so he did not think it was a big issue and he had copies of invoices from Elkhart County Gravel. Mr. Dawson clarified that there were not trucks going in and out of the property all of the time.

Sue Cook, formerly of 59542 County Road 1 South, Elkhart, was present in favor of the request. Ms. Cook no longer resides at that location, however; her son-in-law has taken over the property. She had noticed around her the last 25 years, that the Zoning Board had been trying to work with people and allowed many changes in the community. She felt there was only one way to attract younger people into the neighborhoods and that would be to give them a chance to have a business or find a way to make use of the land in addition to living there.

Mr. Homan asked if anyone wanted to comment pertaining to conditions of the site plan as a concern or remonstrance.

George Bake, 60872 Ash Road, Osceola, was present in opposition to the request. Mr. Bake asked why 15 vehicles would be needed if there were only two or three employees. It was mentioned that there were only two loads of gravel delivered, so how many did Mr. Moore haul in after hours/after dark. He expressed that the Board members would have to be there and he did not think they would want this activity in their backyard. He feels it is an eyesore and has an issue with the noise. Mr. Baker stated when Mr. Moore first began, he wanted the building for storage, but now there were mechanics working in it. He noted that air tools were loud at night. He does his work inside with the doors open and Mr. Bake is the only one affected because all the doors open to his backyard.

Mr. Bake took satellite pictures and submitted them for the record [*Remonstrator's Exhibit#1*]. He said even though he cleaned up the property, it did not help.

Mr. Homan asked when the pictures were taken and Mr. Bake did not know because his son got them from the internet. He stated it was annoying listening to air tools in an empty building.

Mr. Hesser asked Mr. Bake if he had seen a copy of the proposed conditions and was aware that the conditions prohibit any work being done after 5:00 p.m. Mr. Bake said it would become a he said/he said situation and by the time he would call the authorities, it would be over.

Pertaining to the wood pile, the Bakes live in a bi-level and when they look out of their windows, they see that mess.

Carrie Whitteberry, 60901 Ash Road, Elkhart, was also present in opposition to this request. She lives right across the street from Mr. Moore. Her grandfather, Martin Raab, signed a petition from Mr. Moore and he is the landowner, but she is the renter. She stated many times she would hear loud noises after 10:00 p.m., but lately she has not heard them. The vehicles that were in front of the house that were used as parts have been moved and she felt things have improved in the front. She has nothing against the neighbors, but objected to loud noises as they are awakened in the night quite often and it awoke her small child. Even though things have improved she wanted to be sure that wouldn't continue.

Mr. Homan asked how long she has lived at that location and she indicated she has lived there for 12 years. Mr. Homan pointed out the first condition presented talked about hours of operation for the business and at the end of that, it stated that the property owner would be exempt from the hours during snow plowing season. She felt it was very loud early in the morning. One thing that had upset her in the past was that there was a semi picking something up in front of the house that blocked her way and the driver did get snotty with her. After she got home she thought she should have discussed this with Mr. Moore because she was trying to get to work, but she did not want to cause any problems between neighbors.

Mr. Hesser questioned whether it was a one-time incident, but she stated that it had happened two or three times. She said there is a turnaround at the end of the road and the driver did get snotty with her. She was aware that other things have been dropped off for the farmers behind her and the farmers that rent her house have used that turnaround, however big trucks on that road were her main concern.

In rebuttal, Mr. Moore commented pertaining to the semi that he dug a pond last year and the semi was there to pick up equipment used to dig his pond. However, he was unaware of any other times the driveway was blocked. He said his father does own a semi and he thought it was his excavator, but he rarely comes there. As far as the woodpile is concerned, the reason it was as big as it was this year is because it was the last year of school for the part-time summer help he usually hired, and they did not work for him on the woodpile this year. Therefore, the pile of wood did not get cut up. He absorbs the majority of the wood every year because it is used for heating purposes.

Mr. Doriot said an approval today would give them a benchmark. He informed the Board that he would not be back to represent Mr. Moore if he did not comply with the conditions. The business had been there for 20 years and up until recently there had not been a complaint, however; if there were issues, perhaps someone should have spoken up before this time. He did feel that the proposed restrictions were extensive. He said they would be cleaning it up and, hopefully, the all the neighbors would be able to get along.

The public hearing was closed.

Mr. Homan read this case over and over and the conditions were fine. With the number of operations between landscaping, snow removal, etc., it is an intensely used piece of property and he supported the staff's recommendation. Mr. Homan did not think they could solve the neighbors' issues no matter what the decision was and that was not the Board's job. The business has been there for 22 years and this is the first complaint that they have had. He agreed with Mr. Doriot that perhaps it should have been brought to their attention years ago. The business had grown intensely and had become disturbing to the immediate neighbors, yet the

property is as clean as the Board will see it. He feels that the conditions imposed will curb this intensity. There is a lot going on at this property and a lot of great strides have been made. It is a good argument that the business has been there for 20 years, so why not give it 12 more months? However, it could not be denied that there was a lot happening on this property and they may not be able to contain it and keep it cleaned the way the BZA would like to see it contained and cleaned up moving forward. He asked for feedback from the Board.

Mr. Miller said he would support this petition for 12 months to see what happens. However, he agreed there was a lot going on, and a lot of great strides had been made in the last four months.

Mr. Homan questioned the staff pertaining to one of the conditions regarding hours of operation from 7:00 a.m. to 5:00 p.m. If a complaint was filed at 7:00 p.m. at night, then he questioned how the incident would be confirmed. He stated the comment was made that it would create a he said/he said type of situation.

Mrs. Prough informed the Board that that Code Enforcement would investigate it, talk to both Mr. Moore and the complainant, and contact Mr. Doriot to get him involved as a representative. Her staff listens to each individual's issues and she indicated it would be difficult to enforce, but it would be treated the same as any other complaint.

Mr. Homan was concerned about condition #3, specifically, the hauling of debris from the job site with the exception of firewood. He wanted it to specifically say within the condition, "the use of firewood on the property is for the petitioner's heating purposes only and not for sale."

Mrs. Wolgamood suggested changing the wording on condition #13 to "total of thirteen pieces of equipment, such as dump trucks, trailers, etc." with consideration similar to what was presented in testimony.

Mr. Homan said there was previous testimony regarding scrap metal, junk vehicles, etc., and he recommended saying "no scrap metal stored on site, including no scrap vehicles for parts or salvage purposes related to the business." This means basically no junk cars or spare parts. All vehicles must be operational, plated and no grinding of debris or shredding is allowed on site, whether it is wood, brush, concrete, etc.

Mrs. Wolgamood pointed out condition #10 regarding "no outdoor repair", Mr. Doriot indicated, "unless unable to repair inside due to height and weight restrictions of the building" and then he offered that would be conducted only on the east side of the building.

Mr. Doriot also indicated that the stockpiles would be limited to a 15 ft. x 15 ft. area and no more than three feet above the 6 ½ foot fence.

He also offered in condition #7 that they would provide a 6 foot wooden fence. She said that was verified by the photographs and on the site plan.

Mrs. Wolgamood said the only way she would vote yes for this is petition is with all of these restrictions, along with the petitioner coming back before this Board for a renewal in twelve (12) months.

Mr. Homan stated that due to the nature of the business, intensive use of the property and the existing impact to adjacent neighbors, even if he voted for approval of this petition, he would want to see it back before the Board frequently and there would never be a indefinite approval on it.

A motion was made and seconded (*Homan/Miller*) that this Special Use for warehousing and storing of trucks, trailers and machinery for a snow plowing, property maintenance and light

excavating service business in an A-1 district (Specifications F - #44) be approved as represented by the petitioner and as amended by the Board with the following conditions imposed:

1. Days and hours of operation Monday through Friday from 7:00 a.m. to 5:00 p.m. and Saturday from 7:00 a.m. to 12:00 p.m. The property owner is exempt from these hours due to snow-plowing and non-production work.
2. Number of outside employees will be limited to two (2).
3. No burning of off-site debris.
4. No hauling in debris from job sites with the exception of firewood to be used by the Petitioner for personal use.
5. No loading of trucks before 7:00 a.m.
6. Stockpiles limited to two (2) piles, not to exceed two (2) tri-axle loads into approximately 15 ft. x 15 ft. areas, and not to be more than three (3) ft. above the existing six and one half (6 ½) foot privacy fence.
7. No parking of vehicles along the north driveway property lines.
8. Six and one half (6 ½) foot privacy fence to be maintained in good repair (obscured wood fence).
9. Approved for the owner/occupant of the residence on site.
10. Approved for a period of twelve (12) months with renewal before the BZA. If valid complaints are received by Code Enforcement, the Special Use will be returned to the Board for review.
11. All repair on equipment to be done inside the building unless unable to repair inside due to height and weight restrictions of the building; outdoor repair to only occur on the east side of the building.
12. Approved in accordance with the revised site plan submitted dated August 26, 2011.
13. Thirteen (13) pieces of equipment to include dump trucks, bailers, bobcats, back-up snow-plows, backhoe and excavator as represented by the Petitioner.
14. No signs.
15. No scrap metal or scrap vehicles related to the business on site.
16. All vehicles must be operational and plated.
17. No sale of firewood.
18. No grinding of debris on site.

After a unanimous roll call vote was taken, the motion was carried.

Mrs. Wolgamood asked if Mr. Homan's motion included the thirteen total pieces of equipment on condition #12, as amended by the Board, and Mr. Homan said it did. For clarification purposes, Mr. Homan stated it would include dump trucks, trailers, bobcats, backhoe excavators, and snow plow trucks. The Board requested that the conditions be read for the record as proposed by the Petitioner.

Mr. Doriot indicated he had a concern about the burning of firewood because the petitioner has a pond and may have an occasional campfire. Mr. Homan explained that would not be related to business. He clarified that there should be no burning of wood related to the business, other than for heating purposes and there is to be no trash burning.

George Bake, 60872 Ash Road, Osceola, asked about the number of vehicles. Mr. Hesser told him 13 pieces of equipment would be allowed. Mr. Bake stated with fall coming he would be getting rid of the dump trucks and skid loaders, and would be bringing the snow plows back in and sit them out. Mr. Hesser stated that Mr. Moore made representations at this Hearing,

so if Mr. Bake would felt there was violation of the conditions or a misrepresentation of something that was presented at the Hearing he would need to call the Staff. Mr. Bake asked for a revised copy of the conditions. Staff member, Mr. Nemeth, informed him that he would be receiving a result letter listing all of the conditions.

16. There were no items transferred from the Hearing Officer.

17. There were no audience items.

18. ***Rules of Procedure/Commitment*** – Mr. Kolbus explained to the Board that there was a change to the Rules of Procedure and a change to the commitment form. He prefaced that by saying when the staff originally made the changes, they said it would evolve over time as we got information about jurisdictions, etc. and we would work it into the staff process. What was provided to the Board today was just for comment and consideration. They are trying to streamline the process because when the commitments are done, imposed and are brought back to the Board of Zoning Appeals the following month for approval, at least thirty days have elapsed. Mr. Kolbus suggested combining the current result letter with the commitment form and he indicated he had already discussed this with staff and had received their comments. He asked for comments from the Board either today or within the next two weeks so they could bring back a final recommendation next month. He stated that the result letter is sent out with conditions similar to those of today. The staff presented proposed changes to the order of approval.

The staff and/or Board attorney would prepare the commitments, send them out for signature and have the signed commitments returned and as one of the conditions of approval, which would be noted on the form, the approval would not be valid until the signed commitment form had been received. Mr. Kolbus reiterated they were trying to streamline the process and those basic changes would be combining the result letter into the commitment form, preparing it at the staff level, having it reviewed or executed by the Board, and imposing it as a condition of approval for the validity of the permit until its return to the staff. Mr. Kolbus asked if the Board had any comments and if not at this time, he requested that the BZA Board get their comments to the Staff in the next couple of weeks.

Mr. Homan asked if the County took responsibility for preparing the commitments, then would there be a fee. Mr. Kolbus replied that the fee would be currently what is charged for the permit. He already informed staff that once the process had begun and they were actually using the form, he would review the procedure with them. Mr. Kolbus would then look it over after the staff prepared the commitment forms. He thought they would have to factor in the additional fees the next time the fee schedule was revisited.

Mr. Hesser asked Mr. Kolbus if the commitment form was currently part of the rules and Mr. Kolbus answered that was correct. That is why Mr. Kolbus thought it would be fairly simple. He stated that a lot of times when there are complex conditions the Staff will give him the minutes to review for accuracy. Also, the other part of the form adheres to the new law that separate conditions from restrictions, because conditions are more short term and restrictions are long term.

Mr. Hesser also was not clear why staff and/or the Board attorney would prepare the commitments and the owner was omitted, because if the owner wanted to offer the commitments

it seemed they should be able to do that. The owner could offer his packet and his own proposed commitment letter. Mr. Kolbus agreed it was a good point and they would leave it in.

Mrs. Wolgamood asked if this process would be used for every Petition and Mr. Kolbus responded if it had long term restrictions it is required by the new law so it needed to be in place. She asked if a long term commitment would be approved in accordance with the site plan submitted or approved in accordance with two existing accessory structures being removed by a certain date. Mr. Kolbus did not think a certain date would apply; however, site plan submitted would be a long term restriction. Mr. Hesser felt it made sense to him, because they are already doing it with the conditions now anyway. He said if you change the rule they could say the commitment letter would have to come back for approval. Mrs. Wolgamood pointed out that it also indicated that the commitment *may* be recorded vs. *shall* be recorded, so who determines whether it is going to be or not going to be. Mr. Kolbus stated that was one of the things they wanted to discuss with the Board.

Mr. Hesser asked if it was enforceable if it was not recorded and Mr. Kolbus told him it stated it was enforceable against the owner who signed it and to any subsequent owner who had actual knowledge of it, so it would be recorded for the future property owners. Mr. Kolbus said the staff had discussed this, but on one had they rarely get second or third generations of them, so do they want to record them all, including the routine ones. He thought it could be by recommendation by the Staff or Board. He agreed that would be a risk if later on it had not been recorded the restrictions may not be enforceable.

Mr. Hesser stated that there are still comments about the Petitions granted to the land; not to the person. People still come to the BZA thinking it is to the person, but it is not.

Mr. Miller learned from real estate class that it had to run with the deed if it was suppose to be enforceable. Mr. Kolbus said these have not been, but what they are trying to do is anticipate a legal challenge along those lines, so that is why they put it in the statute. He said there was a case they challenged that was not recorded, but it was a PUD with conditions. A PUD is technically part of the zoning ordinance, so they said they had implied knowledge of the ordinance so it did not need to be recorded. As a result of that case there was discussion whether it would apply to conditions on variances and special uses. He noted that was the impetuous to change the law.

Mr. Kolbus stated that staff had a few more changes, so they wanted to get it finalized for next month. He reiterated that the issue would be recording the document, but that would be up to the Board. If they wanted it recorded, Mr. Kolbus would then tell him to put it in the Rules of Procedure and he would follow through with that. Mr. Homan stated that would close some of the loopholes, so that is what they would have to do. Mr. Hesser said the only reason it would not necessarily have to be recorded is because, if the Board was involved it had to be because there was a deviation from zoning; therefore, if it was not recorded, the person would still have documentation on file.

Mrs. Wolgamood said all of the commitments they had to this date had been recorded. The reason for recording it is so the next owner would be aware of it. If she was interested in buying a property they could be told what it was zoned, but they may not be aware of the past activity on the property.

Mr. Miller said even though he would like to let property owners do what they want, they appear before the Board to ask for Special Uses and Variances, so he felt that should be recorded with that specific property as it is a commitment on their part.

Mrs. Wolgamood appreciated that Mr. Hesser reiterated that everything they submitted, with the documentation and the minutes they represented it and it is a part of the Rules of Procedure that the Board accepted it. She also felt in certain circumstances if the Board makes the petitioner give them a commitment, it would need to be recorded somewhere. Mr. Hesser stated they would have to prove to the Board that it was actually recorded.

Mr. Kolbus referenced the back side of the commitment form where they thought about moving the statement concerning staff recommendations to a 'condition of approval'. The approval by the Board will not be valid until the recorded commitment is returned to the staff. The dates also might be changed to 60 or 90 days, because it will be up to them to get the recorded commitment form back to the staff.

Mr. Kolbus asked that if the Board members thought of anything else, to email it to either him or the staff.

19. The meeting was adjourned at 12:55 p.m.

Respectfully submitted,

Kate A. Keil, co-transcriber

Jane M. Yoder, Recording Secretary

Randy Hesser, Chairman

Robert Homan, Secretary