

BZA MINUTES

JANUARY 28, 2008

Members present: James Trautman, Charles Addington, Roger Hoover, Gary Moore, Bill Davis.

Members absent: Christy Starbuck, Dale Clevenger.

Legal representation: Bob Oliver.

Staff present: Cathy Flatter, Executive Director, Jamie Stump, Recording Secretary.

Others present: See attached sheet.

The meeting was called to order by James Trautman at 7:00 PM.

J. Trautman: The first item on the agenda is the appointments of a new Chairman and Vice Chairman. Do I hear any nominations?

R. Hoover: I was going to say this is my first meeting and I am sort of a little leery about making any nominations but I will. I would nominate Jim Trautman for Chairman.

C. Addington: I second that.

J. Trautman: We have a nomination and a second. Do I hear any more?

R. Hoover: Close them.

G. Moore: Second.

J. Trautman: Alright it is closed. All in favor say aye. "Ayes". Opposed (none). It carries. Now I need a nomination for a vice chairman.

C. Flatter: Which that is currently Dale Clevenger.

G. Moore: I nominate Dale Clevenger for Vice Chairman.

C. Addington: Second.

R. Hoover: I move nominations be closed.

Chr. Trautman: We have a motion to close the nomination. All in favor say aye. "Ayes". Opposed (none).

C. Flatter: Most important though.

B. Oliver: You need to vote on Dale and you.

Chr. Trautman: Oh.

B. Oliver: You can't slide out of it like that. You have to vote.

Chr. Trautman: I just thought if we closed it then next week I wouldn't be here.

All those in favor of Jim Trautman for Chairman and Dale Clevenger for Vice Chairman signify by saying aye. "Ayes". Opposed (none).

C. Flatter: Now the BZA attorney.

Chr. Trautman: We have to nominate a BZA attorney.

R. Hoover: I can do that. I nominate Bob Oliver.

G. Moore: Second.

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Chr. Trautman: Bob Oliver has been nominated and seconded. Do I hear any more? No, I make a motion that we close the nominations. All in favor of closing the nominations signify by saying aye. "Ayes". Opposed (none). All those in favor of Mr. Oliver being the BZA Attorney signify by saying aye. "Ayes". Opposed (none). Can I have a motion to close the election procedures?

G. Moore: So moved.

R. Hoover: Second.

Chr. Trautman: All those in favor of closing the election procedures signify by saying aye. "Ayes". Opposed (none). Now we can move on to the business for the evening.

C. Flatter: Approve the minutes first.

Chr. Trautman: We have to approve the minutes of November 19th and December 3rd of 2007. I will entertain a motion to accept the minutes as written without reading.

B. Davis: So moved.

G. Moore: Second.

Chr. Trautman: It has been moved and seconded to approve the minutes as written without reading. All those in favor signify by saying aye. "Ayes". Opposed (none). Minutes are approved.

BZA 2008-2-V (Parker Health Care Management LLC)

Chr. Trautman: Next on the agenda will be an application for a variance. BZA 2008-2-V, Parker Health Care Management LLC. Is a representative here? Okay I have a procedure thing here. This is a recorded meeting so I will have you sit there at the table and please state your name.

R. Ott: My name is Randy Ott with TLC Management out of Marion, Indiana. Our address is 1800 N. Wabash Avenue, Marion, Indiana 46952. We are the owners of Parker Health Care.

Chr. Trautman: Okay, let me read this Conduct of Hearing. "At a public hearing before the Board, the petitioner(s) shall first present the facts and arguments in support of the case and those who oppose the Petitioner(s) shall follow. To maintain orderly procedure each side shall proceed without interruption by the other. In the presentation of a case the burden shall be upon the petitioner(s) to supply all information necessary for a clear understanding of the problem. The Board may continue the hearing when in its judgment the petitioner(s) has not provided sufficient evidence on which to make a determination. Every person appearing before the Board shall abide by the order and directions of the Chairman. Discourtesy, disorderly or contemptuous conduct shall be regarded as a breach of the privileges of the Board and shall be dealt with as the Board directs." It is a recorded meeting. If you present what you want to do....

R. Ott: What we are wanting to do is, of course we are a nursing home there in Parker City and

Chr. Trautman: Excuse me a minute. I have to ask those two questions right?

C. Flatter: Yes.

Chr. Trautman: Did you receive an Article V, Conduct of Hearing?

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R. Ott: Yes.

Chr. Trautman: Was everything sent out and returned properly?

J. Stump: Yes and the legal notice. Yes.

Chr. Trautman: Okay, now you can state your case.

R. Ott: Like I said, we are a nursing home. We are wanting to reapply to be able to make a certain section in our nursing home an assisted living, which will be as you know, it is a little cheaper housing for residence and it's kind of a door to be able to bring them on into the nursing home too. It will help our business quite a bit, I believe. We have, if you see this paper here, there are several wings, the long wing from the north, northeast all the way clear to the south. All of these rooms along here do not have showers in their resident rooms. In assisted living we need to have the actual showers in the resident rooms. There is one wing that has the showers in those rooms and that would be this wing that is kind of going northwest. I say northwest, I think that is correct. If we try to bring out an addition coming out the side, we lose our apartments and it is going to be more costly that way. So the cheapest way to do it would bring an add-on, an addition to the end of the building. Now in doing so, we found out that 5 feet of one corner and if you look here you will see the boundary line or the easement there for the alley way, is that dotted line that you see there and about 5 foot on one corner is over the line. That is why we are asking if we can have a variance to be able to construct this building.

C. Flatter: Now I want to go on and just clarify a little bit from what you just said, in the commercial zoning district, there normally is not a side or rear setback requirement unless, which this property is zoned C-2, unless you are abutting a residential zoning district and that is Article 5.07 – Transitional Yards and it says, "Side and rear transitional yard setback shall measure at least 20 feet in width" and that is from any residential zoning district, church, school or park and directly to the west across the alley all of that property in that area there is zoned residential. So it would be required to have a 20 foot yard setback. So when he says he is 5 feet into the alley right-of-way, it is actually 5 feet beyond that 20 foot setback requirement so he is not actually wanting to build in the right-of-way. The structure is out of the right-of-way but it is 15 feet rather than 20 feet from that residential zoning district.

R. Ott: Thank you. I appreciate that.

R. Hoover: This easement that they are asking, is that an alley?

C. Flatter: That is an alley. That is a 16 foot alley that belongs to Parker and they do use that as their main access to the nursing home. Isn't that right?

R. Ott: Yes.

C. Flatter: Alley that runs north and south on the west side.

R. Hoover: My concern from my experience, I see a line here that says there is a 6" sanitary sewer and that is going, according to this line, that is going under your building. Correct?

R. Ott: No.

R. Hoover: No, okay.

R. Ott: The sanitary sewer is out in the ...

R. Hoover: Alley, in the middle of the alley.

R. Ott: In the alley way. Well, it is underneath the asphalt.

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C. Flatter: Right at the edge of the alley, right?
R. Ott: It's over, I mean the man hole is about, the very edge of the man hole is right at the edge of the asphalt. Most of the manhole is on the asphalt.
R. Hoover: What you are telling me is this sanitary sewer doesn't actually go under what you are building?
R. Ott: No.
R. Hoover: That was a major concern for me because I know from being mayor in Union City, we have had some very....
C. Flatter: See he is talking about, Randy, this line right here and it looks like the addition is going right under there but is that going to be changed?
R. Hoover: That should be to the center of the alley, is that correct? Maybe you know on that Jim. Do you know where that sanitary sewer goes? Does that go to the center of the alley?
Chr. Trautman: It's in the center of the alley.
C. Flatter: This line....
R. Ott: We will change that.
R. Hoover: This line is not....
C. Flatter: There is no way that you would build over
R. Ott: No.
R. Hoover: That was going to be my concern. For your sake and the cities I would not want you to build over that.
C. Flatter: I was pretty sure the city wouldn't even consider you being able to do that.
R. Ott: No.
Chr. Trautman: Does the city know you are doing it?
R. Ott: Yes. They did send their utility people out there to check it all out and they said there was no utilities, and saw no reason to....
C. Flatter: Mr. Ott you have met with the Town Council, right?
R. Ott: Yes.
Chr. Trautman: Are there any other questions from the board? Is there anybody in opposition to this? Anybody else want to speak in behalf of the petitioner? I would entertain a motion to take action.
G. Moore: I make that motion.
B. Davis: Second.
Chr. Trautman: All in favor of taking action signify by saying aye. "Ayes".
Opposed (none). I need a motion to take a roll call vote.
B. Davis: So moved.
G. Moore: Second.
Chr. Trautman: All in favor of the motion signify by saying aye. "Ayes". Opposed (none). Jamie.

A roll call vote was taken: Charles Addington, yes; Roger Hoover, yes; Dale Clevenger, absent; Bill Davis, yes; Gary Moore, yes; Jim Trautman, yes; Christy Starbuck, absent.

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C. Flatter: Well you got approval so now all you have to do is come back into the office and file for your permits.

R. Ott: Okay, thank you very much.

Chr. Trautman: Anything else tonight?

C. Flatter: Yes.

Chr. Trautman: That other thing that you just handed us.

C. Flatter: Discuss application to appeal the Zoning Administrator's decision and set a date for hearing on appeal. I don't know if all the board members have been following the newspaper but the County Commissioner's enacted a moratorium on Confinement Operations on January 7th and on January 14th, I believe, I had 3 animal operators come in and file for permits, which they all 3 have existing buildings up and they want to build their second buildings and I had to deny their permits. Their next step in their procedure is to file an appeal on my decision. My decision was with guidance of our legal counsel was that I had to deny the permits because of the Commissioner's moratorium. They are appealing that decision and you can see the reasoning behind that appeal and so according to the appeals portion of our Rules of Procedure, it says that I need to bring it to your attention and we need to set it on the agenda and I really would like to get it set on the agenda for our very next meeting, which is February 25th.

G. Moore: So we just need to make a motion to do that?

C. Flatter: Yes.

G. Moore: So moved.

B. Davis: Second.

Chr. Trautman: Motion made and seconded to set up the meeting for February 25th.

R. Hoover: The 25th of February is that correct? That is what you put?

C. Flatter: Yes.

Chr. Trautman: All in favor signify by saying aye. "Ayes". (Opposed). We will have a meeting on February 25th.

B. Davis: Cathy if we wanted to read up on the red book for the....

C. Flatter: On this particular appeal? Well...

B. Davis: What should we look for in what section?

C. Flatter: Well Bob guide them could you please, because there really is nothing in the ordinance that would help them.

B. Oliver: Really there isn't from the standpoint of normally we are dealing with conditional uses, special exceptions of those things. Basically what this case grows out of is Cathy was explaining is the CFO's and CAFO's, the Area Planning Commission past an amendment to this text and it was several pages long and it talked about things such as setbacks and so forth that were going to be increased and that as a result of 4 years, not constant, but a good 13 or 14 months in the hiatus and then it was renewed again and we had the urban people, the rural non-farmers and the CAFO people and then as you may or may not know, we've had some people out of state moving in and these have primarily been hog operations as opposed to the dairy case which occurred some long time ago.

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B. Oliver: So what we had here, we present the amendment to the Area Planning commission and through working with kind of everyone's interests there, because it had started out as some real contentious meetings, ask Cathy, back 4 or 5 years ago....

C. Flatter: And multiple committees.

B. Oliver: Right. It all finally came together and basically what we have in here right now Bill as far as a CAFO is concerned is it has to be 300 feet from a residential unit. Am I saying that right Cathy?

C. Flatter: From a residence that sets on an acre or less.

B. Oliver: An acre or less of property. That is the only thing that guides the CAFO. We had moved it back from, for instance, examples would be schools would be ½ mile, homes, residential, not the property lines but the residence ¼ mile. There had been an area created around each incorporated town of one mile and then there were other areas that were selected because of, well unincorporated housing areas and so forth of a half mile.

C. Flatter: More heavily populated areas of the unincorporated part of the county at a half mile.

B. Oliver: That was passed here and then since we are just the Area Planning Commission as opposed to the BZA is only a recommending body. It left us and went to the commissioner's. The commissioner's then voted 2 to 1 and it is a little unclear what they actually did. We don't know that they made an ordinance against, they just said that they had voted our amendment to the amendments against that and then sort of out of the blue they created a moratorium against further development of CAFO's in Randolph County. We don't know that that is housed in the sense of an ordinance but if it isn't then it doesn't mean anything so therefore, it must be that they've set an ordinance...

C. Flatter: I don't have anything. I have nothing in writing in regards to a moratorium.

B. Oliver: Right. They just said they put a moratorium in so... Cathy and I were talking about this with Mike Wickersham who is the president of the Area Planning Commission, basically we determined that even though Cathy serves at the Area Planning Commission and not the Commissioner's, that if they have said there is a moratorium then another county body coming forth and saying, "Well we are going to ignore what they said and go ahead and issue permits for people to do things", decided we could not do that. People that these three individuals went to the Planning Office and said, "We want to now increase or start or grow our CAFO's and Cathy, to do that all you would need is an Improvement Location Permit, and the only requirements that they had to meet would have been the 300 feet again because

C. Flatter: Or 15 feet from the side property lines, which they are all much more than that.

B. Oliver: The major item is 300 feet where we had gone a mile plus ½ miles and whatever, when it came back to the APC the APC voted, 2 members absent and we have 13 members there, 5 saying they want to send it back exactly as it was to the commissioner's and 6 said they didn't want to send it back. So now there is no amendment that has been made to this ordinance and we are back to the language.

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C. Flatter: That we've worked diligently on for a year and a half. Over a year and a half because it had been a year in May.

C. Addington: Just like it was originally right?

B. Oliver: Exactly.

C. Addington: We sat in a meeting one time and I thought that I heard a moratorium was illegal.

B. Oliver: Well a moratorium is, and here is our point, well let me just go back and finish up the sentence here, the APC did not send anything back and then we were told that the commissioner's had put a moratorium in. Well in the course of the meetings, we had talked about that and there was a case in Jay County. The two leading cases in Indiana are Jay County case when they wanted to put a land fill in. Factually it is different because the Comprehensive Plan for their Zoning Ordinance had not yet been put in place but the commissioner's put a 3 year moratorium on landfills. They went to Federal Court and they said, "Wait a minute, you can not do that commissioner's because that is land use therefore, it is an issue of zoning"

C. Addington: That is what I heard.

B. Oliver: "And the zoning has to come out of the Area Planning Commission". There was another case in Indianapolis with the City Council did not want to issue any more permits for basically wagering sites on off track betting so they decided they were going to put a moratorium on any use that had to do with selling, gambling sites off premises, off gambling premises and the City Council passed the moratorium. That case I believe went to the Federal Court of Appeals in Chicago and the same ruling basically came down. They said, "Wait a minute City Council, you can't do that. That is a zoning matter and the City Council can't do it". So if we want to do something in Randolph County from a moratorium, it has to start with the Area Planning Commission and then it goes to the commissioner's again because it is still going to be a recommendation, it will be an amendment but the amendment would be there is a moratorium and it would be whatever word and verbiage and coverage, you know, hogs, horses, chickens or is it all of it? Which I think it would almost have to be otherwise it would be discriminatory. So nothing has been done except the commissioner's saying they have a moratorium. These three farmers then come up to Cathy and say, "We want our Improvement Location Permit" and Cathy says, "I can't issue it because the County Commissioner's have said there is a moratorium", so again, Mike's conversation with Cathy and me and this is not just one conversation nor is it all three of us at one time, but basically saying Cathy is not in a position to ignore what would look to be the law of the land so what they are going to do is come to the BZA, you all, and they are going to say, "We are appealing a denial of Cathy's refusal to issue us Improvement Location Permits". Then we need to decide then what is our course of action and I can't be discussing what, if I am asked at that meeting, I think it is pretty clear what it is going to be but I've got to hear whatever they want to present and then if you guys confirm that if there is an ordinance out here and we are not going to ignore an ordinance by the commissioner's, it is going to take a court to decide that then most if not all of you have been through one of our certiorari's by now where they sue the Board of Zoning Appeals and it is taken up on certiorari and then it is going to be up to a court to decide whether Cathy was right or wrong.

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B. Oliver: I am confident that if they find that Cathy was right that it is going to be appealed from the trial court on up to wherever court they want to take it.

C. Addington: Tell them what a certiorari is. I think I know but....

B. Oliver: It is called a writ of certiorari and what that is is that says that there was a non-judicial decision made by a quasi-judicial administrative agency, which is what you guys are because as opposed to the APC, they are not quasi-judicial except in areas of Planned Unit Development and Sub-Divisions, where their decisions are as final as yours. In other words if someone comes in here and wants to make a Sub-division and they say no, then they can take the APC up on cert but you guys, your decisions are always appealable. We went through years of land fill and the jail and trailer parks...

C. Addington: Library....

B. Oliver: Library, we went through all of those so that is what it is going to come down to. It will not, normally we have never, it will go to the Circuit or Superior Court in Randolph County and either one of those courts now have jurisdiction. It used to just be the Circuit Court but it is now either court and the judge will say back to us that either we were right or wrong in upholding Cathy and

C. Flatter: Then I am curious Bob, because we've never had anything like this happen before when we've been taken to court before it has been pretty cut and dry. It wasn't based on a moratorium. If the court comes back and says that I was correct in my decision, now does that leave the applicants open to be able to go after the commissioner's and their moratorium vote? I mean, where does that.....

B. Oliver: If you are correct they are going to go up and say you weren't correct.

C. Flatter: Right but I mean if the court, Circuit or Superior says that I was correct....

B. Oliver: They are going to appeal that decision to a higher court.

C. Flatter: But where does the moratorium come in? Are the commissioner's open for a law suit also?

B. Oliver: I would imagine they would be joined in.

C. Flatter: With this?

B. Oliver: They would probably be joined in.

C. Flatter: So it is not just going to be an appeal on

B. Oliver: No, now wait a minute, on trial level it would be just you if, I shouldn't say that, it would be you and everybody sitting in this room. I don't think the commissioners are going to be a party to the certiorari. The writ of certiorari is basically then just a fact finding as to whether or not....

C. Flatter: Just on the BZA decision on my decision.

B. Oliver: Right but if it goes beyond that decision then it will go to either, well first they would file probably a motion in the trial court for what they call a motion to correct errors and then that sets the ground for an appeal and it could be, I don't know this really, if there is diversity of citizenship they end up in Federal Court and that is why the other 2 cases ended up in Federal Court because the landfill company that wanted to put in that was not just an Indiana Corporation so you had what they call diversity of citizenship and amount in controversy is enough money, there are some requirements to keep petty little fence disputes out of the federal system....

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C. Flatter: So if it stays with the three appeals that I have currently, they are Randolph County citizens.

B. Oliver: Then they will probably go to the Indiana Court of Appeals because there is no diversity of citizen. That is not the only basis for a federal question. What they would probably try to do is say that it is an interference under the Commerce Clause or something that gets the Federal Court jurisdiction. The Commerce Clause is sort of like that wall between Flip and me. If they want to get through it, because it doesn't really exist and I don't know if as mayor, you ever ran into that but when they start talking about Commerce Clause it covers anything in the world. Because they say what doesn't touch commerce? When Indiana, a few years ago tried to put that, we are not taking New Jersey's toxic waste, and the governor and the legislature went through and all, the governor signed it, well they went to court and overnight it's turned over because that is interference under the Commerce Clause because you can't do that in Indiana. If they want to take it there and there is a place, you have to take it. That is what

C. Flatter: It most likely then that's the way they will end up handling it because it is going to effect, at this point, it is just the three that it is effecting but there is going to be more coming in and it is going to be a broad base of not just Randolph County.

C. Addington: Are we allowed to, just Aaron Chalfant is all that is mentioned here, who the other two are or are we allowed to know that?

C. Flatter: Gary Foulke and Greg Sickels.

C. Addington: Maybe they are on here and I didn't see it.

C. Flatter: No I just had Jamie make a copy of one because they are identical except the property owners are different.

B. Oliver: They are each separate.

G. Moore: Now that is who will be here in the February meeting?

C. Flatter: Attorneys representing.....

G. Moore: The remonstrator will be everybody that's against the CAFO's in the county. Is that what I understand?

B. Oliver: Or not from a standpoint of right now they have

C. Flatter: They've got exactly what they want. I mean,

C. Addington: What was Sickels first name?

C. Flatter: Greg.

G. Moore: You acted on what you thought was coming down from the commissioner's with the moratorium. If I am understanding Bill's question to Bob right, it will be our obligation to decide whether what's in that book right now and we should overturn you right? Am I understanding you correctly?

C. Flatter: Well that would put a real kink in the wheel wouldn't it if... I mean I thought about that myself personally. Can we talk about this, now that it is on the agenda?

B. Oliver: You can keep going. I may have to tell you to be quiet.

C. Flatter: I am just curious. I know what happens if the Board of Zoning Appeals says I acted correctly and that my denial of the permits was the proper thing to do.

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C. Flatter: But if the Board of Zoning Appeals says that the moratorium was not a legally enacted moratorium and they feel like I was wrong in my action of denying the permit and their vote is that I was wrong. What then? Where do I go then?

B. Oliver: Then you would look to see under the statute in the ordinance and probably more in the statute, who's an aggrieved party by that decision and then it is just going to be roll reversal. They are going to go to court and take the BZA up on certiorari because it was a wrong decision.

Chr. Trautman: So we're going up no matter what?

B. Oliver: Likely so.

C. Flatter: Unless the commissioner's would rescind their moratorium vote.

R. Hoover: That is what I was going to say. Where do the commissioner's fit in there? They are the ones that

C. Addington: They are the ones that muddied the water aren't they.

R. Hoover: They made this, where are we supposed to go?

B. Oliver: I saw where Tanner was quoted in the paper, I think, last week and said it was like a 9 month moratorium, am I remembering that right?

C. Addington: I thought it was 90 days.

B. Oliver: Yes 90 days, I am sorry.

C. Flatter: Kathy made the comment in the meeting on January 7th that it shouldn't take more than 90 days but I think you've all seen the list that they want me to do a study on water quantity, water quality, the effects of odor, land use values, multiple things that something that is not going to happen in the 90 day time frame unless well, it is not going to happen in a 90 day time frame. Now there is a lot of existing information, good information I have at hand right now and if they are willing to accept that information it is still going to take the Planning Commission longer than 90 days to rewrite the proposed amendments.

C. Addington: Nine months might be right after that.

B. Oliver: That is probably even really pushing it then from the standpoint of what public hearings.....

R. Hoover: I was going to say from the things that they asked, a lot of it is already done by the state but that is the state's information and I don't know how we get that information and

C. Flatter: I have studies from Purdue and studies from like Minnesota and Iowa that but I don't know, when it comes to water quantity we have to be talking about just Randolph County. The DNR does have some pretty good information on quantity. Quality, that is just a real, yeah.....

B. Oliver: I think probably something that now that I know when the meeting is, Cathy and I will discuss this, but I think a letter to the County Attorney or and I really think I have to go through the County Attorney since he represents the commissioner's, ask them to present to us if there is an ordinance that creates this moratorium to give us a copy of the moratorium and the ordinance number and everything. Otherwise what is this statement by Kathy Beumer saying that they voted 2-1 and they have a moratorium.

C. Addington: She just pulled it out of the air.

C. Flatter: Completely opened ended.

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B. Oliver: I think they need to be here to defend against the petitioners and if they don't or if they will not provide us some information about what it is and it is really strange because we don't know, it sounds stupid, I don't want to use the word stupid, it sounds incongruous to say, "Here is a moratorium. We don't know how it got there. We don't know if there is an ordinance underlining it, which is how they act." It is like a, it is just sort of, "Okay here is a piece of advice". I think they need to defend it and to tell you guys so when you are making up your mind if they say, "We", as the County Commissioner's, which you guys are not subject to, in that sense that you are your own administrative body then you make the decision off what evidence you hear in the hearing. It just seems like, what Cathy has just eluded to, there are two kinds of roads that are pretty clear. We know what could happen but there is also about 5 fingers out there of, it is almost like we can't say "what if", because we don't even know what the "What if" is. So Bill I guess I am telling you to come to the meeting with your ears open. That is about the only...

B. Davis: I was just looking at what was passed out here on page 2. It looks like it is giving examples of cases where the moratorium was....

C. Flatter: Those were the two case laws that Bob was quoting.

B. Davis: Yes.

C. Flatter: It's kind of the same but then it is kind of not the same either

B. Oliver: But definitely I can answer that Indiana has said it is a zoning issue as to whether or not there will be a moratorium. It has to come from the Area Planning Commission.

C. Addington: So if we vote with this thing then we vote against Cathy, is that right?

B. Oliver: If you vote that yes, Cathy was wrong.....

C. Addington: Well if we vote for these guys here.

B. Oliver: Yeah.

C. Addington: We are voting again what Cathy said, am I right?

B. Oliver: If you say to the petitioner, "We want Cathy to issue you an Improvement Location Permit", then you are going against what Cathy has done. If you say, "We think that Cathy was correct and our reason is because there is an ordinance that she is following as a county official and this county ordinance saying that you can't issue, we have a moratorium on CAFO's and before you can have a CAFO you have to have an Improvement Location Permit". So I think those basically are the only kind of two votes, right Cathy?

C. Flatter: Right.

B. Oliver: The net effect after that is where it could become very, and that is why I think if we get the commissioner's here and even before hand if we could attach to the packet that goes out, here is what the commissioner's say is, you know and it may just force them to, between now and then put, now that is going to be another, if they say the ordinance we just passed today, now we have these predated expos-facto potentials where what existed on a day to day petition? Cathy could be right then and wrong tomorrow.

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B. Oliver: But I think we just need to define what we have and boy that is why I would like to do it because I think both Cathy and I could give you a whole lot better per view on exactly what we are dealing with.

G. Moore: That will be done that meeting? I mean that can be done?

B. Oliver: If they will do it.

C. Flatter: Now I am on the agenda for the Commissioner's meeting this next Monday at 1:45, so I don't know what your schedule looks like on Monday but if you could come and just briefly address them about, I understand that you probably want to put it in writing to their attorney but here in there meeting let them know what is going to happen at our February Board of Zoning Appeals meeting since it was their vote of a moratorium.

R. Hoover: My question would be, Mr. Lenkensdofer, who is president of the County Commissioner's can he issue an executive order to her? To my understanding there is no ordinance to do what they did.

C. Flatter: Not that we've seen. We've not been presented an ordinance. There was a vote in the meeting.

R. Hoover: Do the commissioner's have some executive privilege where they told her, "We are not having any more?"

B. Oliver: She doesn't work for them. She works for the Area Planning. The Area Planning Commission hires her.

R. Hoover: Right you are exactly right. I forgot all about that.

B. Oliver: Otherwise they could be telling us how to make our decisions on every case.

C. Addington: They actually have no authority over it do they? That I can see. I don't know. You know more about it than I do.

B. Oliver: Well they have it because they've done it. Does that mean it's right? No. Something is out there in the water and I can't tell Cathy to say, "Okay ignore it and go ahead", because they have done something it's highly publicized but again we are back to the point, what was done? I think, be sure and call me tomorrow.

C. Flatter: I will.

B. Oliver: If I can make that meeting I would almost like to, if nothing else, tell John I am coming or am going to try to make it and then on that following Monday we would like to give him as much heads up at a time as I can.

C. Flatter: I will call you and then if you can be at that meeting then I can just call Dave Kelley and tell him that that is another thing that would be presented during my presentation Monday.

B. Oliver: Then I think again whatever result of that meeting plus the letter to Tanner, we will try to get out to you guys in a packet so you can see what they say exists because I think it would be good to either at the and maybe better at the public meeting to address the commissioner's that if there is not an ordinance here then anything that has occurred, of course they are going to argue as of the 7th, there was a moratorium. Again if that is going to be their position then again it's not up to us to say you are wrong, it is going to be a petitioner because you guys are not aggrieved parties. You are just stuck in the middle of the crossfire here, the hairs of the scope.

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C. Addington: But you are going to suggest that they offer proof of what they did was legal?

B. Oliver: Well they have to tell us, “What is this thing that you said is a moratorium?”

G. Moore: They will have to tell us it was an ordinance.

B. Oliver: Yes.

R. Hoover: And there is no such ordinance?

B. Oliver: Well I don’t know.

C. Flatter: I haven’t seen any proof of one.

G. Moore: Can they go back now and say that moratorium was an ordinance? Or would they have to say it from now forward?

B. Oliver: Well that is a real black hole because again these three guys might be in and everybody else be out, if there wasn’t anything that existed when they brought their papers up, yet they realize now.....

R. Hoover: That’s what I was going to say, if anybody else would apply between now and the time that they create this ordinance, they would be in.

B. Oliver: I mean this was discussed at least the last special meeting we had when we were deciding to send, when the APC was deciding to send it back, if it wasn’t the meeting even before. It had to be that meeting because they did it in between that time. That here is the likely result if you are going to do something, we have to know what you are going to do and how to label it and do you have an ordinance? Nobody ...

R. Hoover: Come up with the ordinance?

B. Oliver: Yeah but Kathy was here and Ron was sitting up here because he is a member of the Area Planning Commission and I don’t know that Dave Lenkensdofer was around at that time, but Kathy.....

C. Flatter: She offered nothing.

B. Oliver: Yeah and there was a invitation for public input which is another issue they’ve raised with, it’s not special council, what is it Cathy? Public access law as to whether the Area Planning Commission, they said they had 55 people outside the meeting room that couldn’t hear and they brought a piece of paper up said they couldn’t hear and Mike proceeded with the meeting and that is when we got our amendments passed and so forth and so on and gave the commissioner’s something actually and then they came back, the remonstrators came back and said, “Wait a minute we were denied due process and all of this because we couldn’t get in the meeting”, and basically the meeting was only to vote and have discussion among the members, which is exactly the procedure that was done 2 years ago or a year ago whenever we had the last vote. You can’t, it is time for the members to discuss it. All the public input but they went right ahead and did have public comment before they decided not to send it back to the commissioner’s.

C. Flatter: Basically what we thought was the majority of us anyway, the process is the commissioner’s rejected our amendments. We gave it a favorable recommendation on December the 27th. January 7th they were coming in and either voting for it or against it and obviously they voted, they rejected our amendments and voted for a moratorium.

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C. Flatter: Then the amendments come back to us, the APC, and we had 45 days to say we either accept their rejection or we deny their rejection and send it back to them and Bob and myself after all the work that we'd put into it, thought that it should be sent back to the commissioner's in case something happened with this moratorium vote at least they would be in affect rather than what we have like Bob was saying earlier the 300 feet from an acre or less. Some of the planning commission members were not happy with the 1,320 feet from a residence, they wanted the 750 feet, which is what we had addressed for a long time. On December the 27th was when it was changed to 1,320 feet and so that is how we got the majority shifted the other direction.

Chr. Trautman: When was the conflict of interest thing brought up? It was in the paper....

B. Oliver: It was brought up at the meeting as to whether it should go back, the Commissioner's had put on their moratorium and said that they weren't going to adopt and then a week ago tonight at the meeting for the APC to determine whether to send it back Bob McCoy raised the issue that Ron Chalfant had a conflict of interest although it was raised 3 or 4 years ago and at that time, I did a bunch of research and went and said no because he didn't have any direct or indirect interest, financial interest in it at that time and in addition to that then it was only a recommending body not a commissioner. He is wearing two hats. The answer to the question might be different depending on the hat but as an Area Planning Commission member the Indiana Courts have said, again except in our exclusive territory, which is the Area Plan on Sub-divisions and Planned Unit Developments is always recommendation so therefore they say, "Nobody is hurt by the recommendation", it is when the commissioner's act on it, which is again going back to where it started, you guys are....

C. Flatter: But then we have another commissioner where the same thing could apply to him also if they want to apply it to Ron Chalfant.

Chr. Trautman: What I was getting at is that it was done in an area of time that Chalfant should have known or could have known his son was going to apply for this and did they make this moratorium an ordinance or not? That's the question I have. It sounds a little bit shady to me because here the commissioner's say a moratorium. There are no ifs, ands or buts about it well then all of a sudden Chalfant comes up the next week...

C. Flatter: But he already has one up. Aaron Chalfant already has one confinement building up.

Chr. Trautman: I know but what I am saying is he came up and applied for it. It may be that neither one of us talked to each other or whatever but it just appears a little bit strange that here his dad would make a moratorium.....

C. Flatter: No.

B. Oliver: His dad refused it. He was against it. See the other commissioner had, well I don't think we need to get into that or not.....

C. Flatter: Well the other was brought up so it is not really, his wife's family sold, David Lenkensdofer's wife's family, sold her family farm to Maxwell Foods Incorporated. They were the first people in Randolph County to sell to Maxwell.

B. Oliver: Maxwell is one of the hog operations from North Carolina.

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C. Flatter: To build one of the largest operations that is up and running today down on 36. So when it comes to public official in the Indiana Code having a conflict of interest, it includes spouse also, even though the property wasn't in David's name, it was in Mary Ann's name so if Ron had a conflict then there is a definite conflict on David's interest too. I don't believe that either one of them do but.....

Chr. Trautman: We need to know if there is a "quote, unquote" ordinance for this moratorium. If there isn't then....

C. Addington: Offer proof.

B. Oliver: I don't think you guys can go to the point of, let me see Jim, just a second mine is in myI just want to see, how do you describe what we are doing here?

C. Flatter: Is the, what their decision would be is based on the information that I have provided the Board of Zoning Appeals on what I was told about the moratorium whether or not I acted correctly or incorrectly in denying the permits based on the fact that I was in the meeting that the commissioner's voted for a moratorium. Now whether I have it in writing or not, they enacted a moratorium so that tied my hands in being able to issue an Improvement Location Permit for any confinement.

R. Hoover: I totally agree that Cathy was exactly right in what she did even though she's not employed by the commissioner's. The commissioner's are still the executives over the county and they issued that. She had no choice but to do what she did.

B. Oliver: I think that is where we arrive at that decision that we may not, and I am not saying we agree or disagree, I am just saying it sure looks like it is a zoning matter and the road to get where they went or are is not the correct road. It should have been through the Area Planning Commission with the APC sending to the commissioners, a moratorium, and that if they want to approve it then, then we have our moratorium. But to come out in the end result and say, "Here is what....."

C. Addington: Off the top of their head.

C. Flatter: I think the way the applicants are looking at it, they feel that this is just a step in the process they have to take to further this appeal on. They have to exhaust all of their administrative reins.

B. Oliver: Administrative reins. They can't go to court right now. The petitioners or anyone else because the law says that, as you guys have been told many time, you are presumed to have special knowledge of the issues because that is what you do all the time so the court won't even take your decision unless it is so arbitrary and capricious that no reasonable man could come down based on the evidence and that is why sometimes when you see a crowd out there, and we've talked about this before, you need to get, if they want a special exception, get to your criteria for the special exception that is in the ordinance and ask some questions about land values and access roads and all those things, the same thing with a variance. I don't want to get into the big differences because we can discuss that some other time, but with a special exception if they need it then you don't have any discretion, you have to approve it. This guy tonight, you could have said, "Wait a minute, okay we have some discretion. We'll give you 16 feet but not 15. Or we will give you 4 feet not 5 feet."

C. Addington: We had no right to do that did we though?

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B. Oliver: Yes because with a variance, again I caution you, when you see there is a crowd out there and a crowd sometimes might just be 2 or 3 people and the petitioner is sitting over here, get your questions so we then have a record that says you guys found that the economic impact was discussed or asked about and you concluded because with your guys expertise in this and you don't have to be pre-appraisers, you just have to say this is going to have such a minimal impact then there is not going to be any issue or 3 more cars down the road to pick up the apple cider isn't going to be major traffic issue or anything. Those are the things that you need to get to in the normal hearings that you have. From the standpoint of what we have coming up it is just hopefully we are going to have as much information that what the commissioner's are saying or what their basis is, and then we just have to decide because as I say it is going to go up either way.

C. Flatter: It is one of those terrible positions because I don't agree with a moratorium. I think it was something that they shouldn't have been allowed to do and if they wanted to do something like that they could have done it a year ago or a year and a half ago or a long time ago before we put this much effort into the amendments that we've been working on. It was a real kick in the teeth actually is what it was.

C. Addington: Well after all the work you guys put into it.

B. Oliver: And not just Cathy and me. There were committees. Bill does that answer your question or anything?

B. Davis: Yes sir.

B. Oliver: Have I stirred it up enough for you?

C. Flatter: Sorry we didn't have an official introduction of "Flip" Roger Hoover but then you all know each other right now.

C. Addington: I wanted to ask one question when Jim gets done. I just wanted to ask if these petitioners have a legal advisor or anything?

C. Flatter: Oh yes.

C. Addington: Do you know who it is?

C. Flatter: I think you will see in some of that paperwork back in behind that front page that it has been prepared by a law firm.

B. Oliver: Big city. They are serious.

C. Flatter: Yes. This is not anything, this is something that everybody needs to stop and think about to, about how it is affecting other areas of Randolph County too. If you ever wanted to talk to a County Commissioner about an issue, this is probably one that needs to be talked about.

B. Oliver: Yes and even the public records shows that Beumer, he read his letter to the editor.

The meeting adjourned at 8:15 PM

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THE NEXT REGULARLY SCHEDULED MEETING IS FEBRUARY 25, 2008 AT 7:00 PM IN THE COMMISSIONERS CONFERENCE ROOM OF THE RANDOLPH CENTER FOR FAMILY OPPORTUNITY, WINCHESTER, INDIANA.

James Trautman, Chairman

Dale Clevenger, Vice Chairman

Jamie Stump, Recording Secretary