

**City of Leawood
Board of Zoning Appeals Minutes
September 25, 2019 – 5:30 p.m.
Leawood City Hall Council Chambers
4800 Town Center Drive
Leawood, KS 66211**

CALL TO ORDER/ROLL CALL:

Chairman Hawk: I'd like to call to order the September 25, 2019 Board of Zoning Appeals Meeting. Could I have roll call, please?

MEMBERS PRESENT: Munson, Dunn, Dr. Peppes, Hawk, Bussing

MEMBERS ABSENT: Clawson and Farrington

STAFF PRESENT: Thompson, Tomasic

APPROVAL OF MINUTES: Approval of the minutes from the August 28 2019 Board of Zoning Appeals meeting

A motion to approve the minutes from the Board of Zoning August 28, 2019 Board of Zoning Appeals meeting was made by Munson; seconded by Bussing. Motion carried with a unanimous vote of 4-0. For: Munson, Dr. Peppes, Dunn, and Bussing.

Chairman Hawk: We have one case tonight in Old Business that has been continued and another case that has been withdrawn.

OLD BUSINESS:

Case 35-2019 Benjamin & Leslie Favier/Owner - ****CONTINUED**** Request for a Variance to the front build line for the placement of a fence on a corner lot in accordance with the LDO, Section 16-4-9.3(A) in an RP-1 District for property commonly known as 13802 Manor Road.

NEW BUSINESS:

Case 37-2019 Matthew & Larkin Walsh and Ed and Gayle Evans/Owners VARIANCE Request for a Variance to the required side yard setback in accordance with the LDO, Section 16-2-5.3(D) in an R-1 District for property commonly known as 9219 High Drive.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The property owners would like to construct a new garage on the north side of the existing home and convert the existing garage into a den. As shown on the

plan, the new addition would be 7 feet, 9 inches from the property line and would require approval of a variance to the side yard setback for 7 feet, 3 inches.

Chairman Hawk: Are there any questions for staff?

Mr. Munson: How close will that make this to the property adjacent to it?

Mr. Thompson: That is hard to estimate. I would guess 40 feet.

Chairman Hawk: Are there any other questions? Would the applicant come forward, please?

Applicant Presentation:

Larkin and Matthew Walsh, 9219 High Drive, appeared before the Board of Zoning Appeals with a PowerPoint presentation and made the following comments:

Ms. Walsh: *(Refers to the PowerPoint)* As Mr. Thompson said, we are requesting a variance from the side yard setback. We have a beautiful property on High Drive, and we have a couple goals with this renovation. We are seeking to create a safe space for our family. Our house is built on a slab, so there's no safe room or tornado shelter. We are also seeking to create some more functional space for our family to include living space and garage space. We are trying to accomplish these goals while preserving the character of the house. Our proposed solution for dealing with the challenges of the property (being on a slab and Johnson County Wastewater sanitary sewer running right behind it) is limited in the direction we can go. The proposed garage addition and our current garage-to-den conversion will allow us to put in a FEMA-rated box, basically, in the new garage space that will serve as a tornado shelter. It will give us space for our vehicles, mower, and trash receptacles. Turning the current small garage into a den will give us the additional living space we're looking for. I think this project allows us to accomplish all those goals in a way that preserves the character of the house and avoids obstructing or removing the utility and other cost-prohibitive designs. *(Shows pictures of the property)* The lot is very deep and narrow. You can see the sewer line running right behind the house.

Mr. Dunn: For clarity's sake, what is the proposed addition?

Ms. Walsh: The proposed addition is in black. What is currently there is in blue. On the side where the sewer runs in blue is an open porch slab area and a screened-in porch. Really, the blue living space toward the front is the existing house.

Mr. Dunn: What is the existing garage?

Ms. Walsh: The existing garage is the space just above the stairs. It's the northwest corner of the house. As I said, the property is unique because of the placement of the utility and the fact that it's a slab. We have no option to finish out below. We have no safe space below. We have an attic, but it is partially finished by a previous owner with a

bedroom suite, and the rest of it houses the mechanicals and is our only storage space. Although I said we're on this very deep, beautiful lot, with the sewer main, we are significantly limited on how we can use the space. Denial of our application for a variance will result in us having no storm shelter or safe room, and I would say that every house along High Drive on our side of the street that has been updated has had to request a variance to the side yard setback, front yard setback, or both. This board has pretty consistently found the criteria to be met. My final point would be that strict adherence to the Leawood Development Ordinance (LDO) in our case would either destroy the functionality that we're going for or would destroy the character of the home or both. We would request your consideration of our application, and I'm happy to answer any questions.

Chairman Hawk: Questions from the board?

Mr. Bussing: Would you put the diagram that you requested earlier up? (*Placed on monitor*)

Ms. Walsh: This shows a standard-width, two-car garage that is deep but is not tandem. You can see in the back we're planning a back garage door so we have access to the back yard. Then, the safe room box will be in that other space right above the proposed garage door.

Dr. Peppes: Is the garage and driveway of the property to the north the first thing you see, or is it on the other side?

Ms. Walsh: It's on the other side of the house. I think almost all of the homes have the drive and garage on the north side right up on the property line.

Mr. Walsh: The house is about 15 feet north of the property line, so there would be a gap of 30-40 feet between the structure we would like to build and where their home picks up.

Ms. Walsh: We have a picture that shows the side of the next house over if that would be helpful. Our proposed addition would come not quite as far as where the van is.

Mr. Bussing: You're not removing any of the trees?

Ms. Walsh: No, we're not planning on removing any trees. There are some shrubs in the back that will be impacted but not any trees.

Chairman Hawk: Have the neighbors and other residents been notified of the proposed changes?

Mr. Thompson: Yes, all notifications were made, and the one letter that was in the packet was the only person who responded in writing.

Chairman Hawk: Is there anyone here who would like to speak for or against the proposal? This is a variance, which means the board has to consider five factors. If all factors are approved, we can accept a motion to allow this to be accepted. If any are not approved, we have to vote for denial. The first is Uniqueness.

Mr. Munson: It seems to have the same characteristics of others along there. In other words, it's got a sewer line running across the back, but then the other properties also have that. Although it does affect what they can do with it, it doesn't affect it as far as being unique.

Mr. Dunn: Without starting a squabble over this, I think we have found that the utility line being close makes the properties in this area. I don't remember the exact property, but we have determined previously that the closeness of the utility creates a unique factor.

Chairman Hawk: Could staff comment on their other options if we were not to accept this?

Mr. Thompson: They would have to redesign. They could turn the garage sideways. They have a little bit of room, so they could go out to the 35' build line and then go back fairly close to the sewer line. The design shows it being 8 feet away. It looks like the sanitary line moves farther away as it heads north.

Uniqueness of the Property criterion satisfied with a vote of 3-1. For: Dr. Peppes, Bussing, and Dunn. Opposed: Munson.

Chairman Hawk: Rights of Adjacent Property Owners. Staff has indicated we've received no calls.

Mr. Bussing: I noticed in the letter in the packet that Mr. Thomas pointed out granting the variance will affect the amount of sunlight he will receive on the south side of the yard. That was the basis of my question about the trees. It would seem that the big tree there would eliminate sunlight. I don't see that the rights of adjacent homeowners are adversely affected.

Mr. Munson: Is the tree on your property or on the other property?

Mr. Walsh: It's on our property.

Mr. Munson: Would you be willing to cut it down?

Mr. Walsh: *Inaudible comments* If you look above, you'll see a big oak tree there as well that will create more shade than the structure. That's on their property in the corner.

Mr. Munson: Where is their property line in relation to the vehicle?

Mr. Walsh: It's roughly where the fence begins, and it abuts up to the drive.

Mr. Munson: It's hard to see on this illustration. Is that a back fence or a side fence?

Mr. Walsh: The wooden fence runs along the drive, and then there's a wrought iron back fence that would be removed as the structure was built.

Rights of Adjacent Property Owners criterion satisfied with a unanimous vote of 4-0. For: Munson, Dr. Peppes, Dunn, and Bussing.

Chairman Hawk: Hardship.

Mr. Munson: Wade, would you repeat what you said previously about their ability to do something and still adhere to the side yard setbacks?

Mr. Thompson: They could do a redesign. They've got several feet before they get to the 35' build line.

Mr. Munson: Are you talking about the front build line?

Mr. Thompson: No, the side. It may not create the space they want, but it's possible that it could be done.

Mr. Walsh: I'm not tracking on that. Could you help me?

Inaudible comments

Chairman Hawk: Have you considered other configurations?

Mr. Walsh: We have. We've considered one to find the living space to go off the southeast corner of the back of the house, but that's too close to the sewer. Then, going off the front, as Wade said, we would effectively kill off the access to the front of the house, and it would look odd. Then, just the overall appearance of the house wouldn't be great. I don't know how close it gets to that tree that's in the front of the yard, but we would want to maintain that. The other thought is we would only get a garage, and there would be substantial reconfiguration of the interior footprint, which would make it cost-prohibitive. We have looked at several designs, and this is the one that allows us to accomplish what we're trying to do within the parameters.

Dr. Peppes: Hardship is probably one of the hardest things for us to satisfy because there are other ways that the residents can go. In certain situations, there are parameters and barriers that prohibit a lot of what can be done. Right now, that is the sewer line up against the house. I go on record of not really supporting Hardship very often, but in a situation like this, I will support it.

Chairman Hawk: We have had houses with these sewer lines before.

Mr. Dunn: I'll say for the record that this is the most difficult factor we always deal with. As in many cases, we could make an argument to justify it either way. I look at this picture and see folks that want to keep the existing structure and character of the neighborhood; they can't go south. The property on that side is too close. They can't go back because of the sewer line. If they come forward, they will likely get into the trees in the front yard. That's enough for me to satisfy the Hardship requirement.

Hardship criterion satisfied with a vote of 3-1. For: Dr. Peppes, Dunn, and Bussing. Opposed: Munson.

Chairman Hawk: Public Safety and General Welfare. Staff indicates that approval of the request would greatly reduce the area between the homes and would place the structure very close to the north property line. Any other comments?

Mr. Munson: The neighbor north is concerned about his sunlight, according to his letter.

Mr. Dunn: I don't think there are any public safety issues. I don't think it's going to change the character of the neighborhood.

Chairman Hawk: Is this the one that had a problem with access to power lines in the back?

Mr. Dunn: That's not this one; it's just that the sewer lines are so close to the back of the house.

Public Safety and General Welfare criterion satisfied carried with a unanimous vote of 4-0. For: Munson, Dr. Peppes, Dunn, and Bussing.

Chairman Hawk: Spirit and Intent.

Mr. Bussing: I think Mr. Dunn adequately stated that it's clear these homeowners are trying to maintain the character of the house and the neighborhood with this addition. I think I has been satisfied.

Mr. Dunn: I agree.

Spirit and Intent criterion carried with a unanimous vote of 4-0. For: Munson, Dr. Peppes, Dunn, and Bussing.

A motion to approve Case 37-2019 Matthew & Larkin Walsh and Ed and Gayle Evans/Owners - Request for a Variance to the required side yard setback in accordance with the LDO, Section 16-2-5.3(D) in an R-1 District for property commonly known as 9219 High Drive – was made by Bussing; seconded by Dr. Peppes. Motion carried carried with a unanimous vote of 4-0. For: Munson, Dr. Peppes, Dunn, and Bussing.

Mr. Munson: I opposed the two criteria because I sided with staff on those two, but I will comment to the applicant that I am happy that what you are doing is just a tad bit better than some of the rehabs that are going on in Leawood.

Case 38-2019 Thi Nghiem/Owner - Request for a Variance to the front build line for the placement of a fence on a corner lot in accordance with the LDO, Section 16-4-9.3(A) in an R-1 District for property commonly known as 3900 W. 120th Terrace.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The property owner has installed a 55.5” tall wooden privacy fence on top of an existing 4’ retaining wall, which extends 6 feet past the 35’ build line, without a permit. A variance of 6 feet will be required to allow a 4’ tall fence on the wall.

Chairman Hawk: Are there any questions for staff?

Applicant Presentation:

Thi and Chris Nghiem, 3900 W. 120th Terrace, appeared before the Board of Zoning Appeals and made the following comments:

Ms. Nghiem: We’re on the corner of 120th Terrace and Mission. (*Refers to photos*) When we purchased the home, the retaining wall was already there. I had an evergreen in the corner of the fence, and it had a mulberry growing out of it. When we removed it, the last section of the retaining wall was open. We had a coyote jump into our yard, and we have little dogs. That’s why we’re asking for this variance. The purpose is to keep the dogs safe. As you can see from that picture, the retaining wall on one side is equal to the land; on the other side, it drops off into our yard. What we’re asking for is to keep the barrier up on the last section of the concrete.

Dr. Peppes: Did you do the construction work with this?

Ms. Nghiem: Yes.

Dr. Peppes: No permit was pulled for it?

Ms. Nghiem: No.

Dr. Peppes: How long have you lived in this house?

Ms. Nghiem: 20 years.

Dr. Peppes: You’ve lived in Leawood for 20 years, wanted to do something to your structure, and didn’t figure you would need a permit?

Ms. Nghiem: I didn't think of it.

Dr. Peppes: I think it's beautiful, but it's not what the ordinance is allowed.

Ms. Nghiem: Yes; it's the last section we added. We didn't think it was that big a deal.

Dr. Peppes: Do you have a swimming pool?

Ms. Nghiem: No.

Chairman Hawk: So, we're only talking about this last section? The rest of the sections had already been in place?

Ms. Nghiem: Yes. They look so different because this section was added because the tree was removed. Everything else has been there.

Mr. Dunn: Are the other sections compliant?

Mr. Thompson: They are not, but that will be the next variance. This variance only applies to this section. (*Refers to photo*) This is what was there before and what caught the attention of the code enforcement officer in the area. They have since removed those panels, so it is just the section that is on top of the rock wall that is remaining. The posts are still there, but I'm sure they'll come down.

Dr. Peppes: With the retaining wall that's there, they can put a 4' fence on top of it?

Ms. Nghiem: That's what this is measuring out to be. It's about 55 inches, to be exact.

Chairman Hawk: We're looking for permission to retain a 4' wood section on top of the retaining wall.

Mr. Dunn: This is more than 48 inches.

Ms. Nghiem: It's a little bit more than 4 feet.

Mr. Thompson: That's why the next variance is involved. Anything over 4 feet would require the variance. That's why it's a fence height variance instead of the usual exception.

Chairman Hawk: Would they have to come before the board to put a 4' fence on top of the retaining wall?

Mr. Thompson: No, sir. They would have to get a permit, but they wouldn't have to go before the board. As you can tell, the support structure of the current fence is on the wrong side. The support structure has to be on the inside with the good side facing out. They would have to do something, regardless, even if both variances are approved.

Ms. Nghiem: What does that mean?

Mr. Thompson: The support system for the fence has to face your house, not your neighbor's house.

Ms. Nghiem: That can be removed; that is decorative. These are the supports.

Mr. Thompson: It's all part of the fence. The contraption attached to the fence would have to be removed as well.

Chairman Hawk: If they would agree to reduce the size from 55.5 inches to 48 inches and turn the fence around for this section, it would be satisfactory?

Mr. Thompson: Yes, sir.

Dr. Peppes: This variance is for the front build line, though.

Mr. Thompson: Yes, for the wooden portion on the wall beyond the 35' build line.

Mr. Dunn: Does the retaining wall go beyond the 35' build line?

Mr. Thompson: It does. That would be considered legal, nonconforming because it's been there for 20-plus years.

Chairman Hawk: Are there any other questions? Have there been any more comments other than the letter from the homes' association (HOA)?

Mr. Thompson: No calls or emails.

Chairman Hawk: Is there anyone here who would like to speak for or against the proposal?

Robert Conway, 12012 Mission Road, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Conway: My home faces Mission road, and we are the home directly north of this home. We sit at a higher level than they do. Currently, we're probably the only people who can see this back fence on the retaining wall. We can see it clearly from our home. It's a beautifully made fence. My understanding is that all they want to do is replace the current metal fence that is only 4' high with something slightly taller. I think it's perfectly justified. I think the fence they have now looks good, and it actually looked more finished if they were allowed to do what they want to do. We have pets, also. I personally haven't seen a coyote in my yard, but I've been told by several neighbors that before we moved in, it was a common thing. We almost back up to Tomahawk Creek. I had a residence in the desert in Arizona, and I've personally seen a coyote go from a standing 6' wall

without a running start. With their three little dogs, I think it's perfectly appropriate that they have as tall a wall as the city will allow to prevent that tragedy from happening.

Chairman Hawk: Does anyone else wish to speak for or against this proposal?

Mr. Dunn: To start the discussion, the factor I'm struggling with is Hardship. Uniqueness has been met. Staff even suggests that it's been met due to the size of this property.

Mr. Thompson: That is correct.

Dr. Peppes: And we've got a legal, nonconforming wall. If the fence was at the right height, we wouldn't be going through any of this.

Chairman Hawk: If the fence was 5-6 inches less, we wouldn't be talking about it.

Mr. Thompson: That is correct, but as far as meeting Uniqueness, I feel that it does meet it.

Chairman Hawk: We'll go ahead and look at the five criteria. The first is Uniqueness.

Mr. Dunn: I have no reason to disagree with staff.

Uniqueness criterion satisfied with a vote of 3-1. For: Dr. Peppes, Dunn, and Bussing. Opposed: Munson.

Chairman Hawk: Rights of Adjacent Property Owners.

Mr. Bussing: I'm going to take a wide angle on this. I think they have been affected because this was built without a permit. I think the fact that there was no permit issued for the construction of anything in the City of Leawood violates the rights of all the property owners in Leawood. I'm not going to support this, given that a permit was not issued for the original construction or for this additional construction. That's that the codes are for: protect the property owners. Failure to get a permit violates that trust.

Mr. Dunn: I would say for the record that I think the best judge of whether the rights of property owners have been affected is in the HOA, and the HOA objects to this. I have a hard time finding that they have not been negatively impacted when the HOA tells me they have been.

Chairman Hawk: I'm not voting, but I think if the fence they are proposing was 5-6 inches less, we wouldn't have a chance to look at it.

Mr. Dunn: But we don't have that in front of us.

Mr. Conway: This conversation about the HOA has always concerned me because we don't have one. I've been there for two years. These folks have been there for 20 years. The people we bought the home from in 2017 had lived there since it was constructed. They had been there for 29 years. On the declaration form they filled out, it said there was no HOA. We have no HOA dues. There's never been an HOA meeting. In the two years I've been there, there has never been an election of officers. There are no minutes of a meeting. When one homeowner found that I didn't receive any HOA documents in closing, they sent me something that had no mention of an HOA. It was from the original builders. Benchmark Property is the only name mentioned as someone to get permission from to build a fence. We only have ten homes, and nobody in there is affiliated with Benchmark Property to my knowledge. If you look at Kansas statute and what is required for HOAs, we simply don't have one.

Chairman Hawk: We have something that says it is signed by the president of the Tomahawk Farms HOA.

Mr. Conway: I believe I know who that individual is, and if he were here, I would probably contest the fact that he is president of anything. Kansas statute requires at least two meetings a year. I've been there for two years, and we have had zero. I just wanted you to be aware of that.

Chris Benson, 3900 W. 120th Terrace, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Benson: I thought you said there was no opposition or record of anyone.

Mr. Thompson: Other than the record that was in the packet.

Mr. Benson: That's interesting, but we don't have an HOA.

Ms. Nghiem: We have the document that Robert received.

Mr. Benson: I don't know if you'd like to trust that document.

Dr. Peppes: The issue still is the ordinance in the City of Leawood is not being followed. That is the determining factor for us. The HOA was a supporting structure. What is before us now is what's going on here. The way we're answering the questions is what the ordinance allows.

Mr. Dunn: I'll state for the record that I stand corrected. If there is no HOA, then my concerns regarding this are not well placed.

Rights of Adjacent Property Owners criterion not satisfied with a vote of 1-3. For: Dunn. Opposed: Munson, Dr. Peppes, and Bussing.

Chairman Hawk: Hardship.

Dr. Peppes: I'll tackle this. As Mr. Dunn has remarked, this is a tough one to support because something can be done that could follow the ordinance. I can't support it.

Hardship criterion not satisfied with a unanimous vote of 0-4. Opposed: Munson, Dr. Peppes, Dunn, and Bussing.

Chairman Hawk: Public Safety and General Welfare.

Mr. Bussing: I don't believe there's any impact.

Public Safety and General Welfare criterion satisfied with a unanimous vote of 4-0. For: Munson, Dr. Peppes, Dunn, and Bussing.

Chairman Hawk: Spirit and Intent.

Mr. Munson: To me, it violates the openness that is supposed to be a goal of the city, but it doesn't seem to bother anybody who lives there. It still is not consistent by what we are supposed to abide by.

Spirit and Intent criterion not satisfied with a unanimous vote of 0-4. Opposed: Munson, Dr. Peppes, Dunn, and Bussing.

Chairman Hawk: Since several of these factors have been determined unacceptable based on our discussion, we would entertain a motion for denial.

A motion to deny Case 38-2019 Thi Nghiem/Owner - Request for a Variance to the front build line for the placement of a fence on a corner lot in accordance with the LDO, Section 16-4-9.3(A) in an R-1 District for property commonly known as 3900 W. 120th Terrace – was made by Munson; seconded by Dunn. Motion carried with a unanimous vote of 4-0. For: Munson, Dr. Peppes, Dunn, and Bussing.

Mr. Conway: I appreciate what you're saying; I just don't know if the council is ever going to follow up. I know they got a letter saying they were not comfortable with what the neighbors were proposing, and it was signed president of the HOA. That is an incorrect statement. That is a created title by the person who wrote that. I think it probably carried more weight because the person put it on there, but it was incorrect. It's like somebody putting a title behind their name that they didn't earn.

Mr. Munson: Sir, the HOAs normally are not part of our decision making. We might hear what they have to say, but the issue here wasn't that. The issue had already been brought out by Mr. Bussing. That is not an issue.

Mr. Conway: I appreciate that. I didn't know how much weight that carried. I wanted to make sure everyone was clear on that.

Chairman Hawk: We have five factors, and we have to approve each one of them to support a motion for approval.

Ms. Nghiem: At this point, do we need to remove the fence totally, or are we trying to get it down to 4 feet? I'm trying to understand.

Chairman Hawk: Wade, why don't you comment because staff would be involved?

Mr. Thompson: They can put a 4' fence on top of the wall. They can comply, or they can remove all of the wooden fence in front of the build line. This variance was for the build line, so everything in front of the build line has to be removed.

Chairman Hawk: If they do it with a shorter fence, the good side still has to be out.

Mr. Thompson: All of that still applies, but everything beyond the build line has to be removed other than the retaining wall. All the wood fence behind the 35' build line has to be removed. The next variance will apply to the remainder of the fence that is even taller on top of the retaining wall.

Ms. Nghiem: If we did remove that fence, do you see any safety issues with one side being 4 feet higher than the other? I don't want to argue the point; I just want to know from your consideration.

Mr. Dunn: We're entirely into speculative areas here, but you said before that the retaining wall that already exceeds the build line is grandfathered in. They wouldn't need to ask for a variance to put a 4' fence on top up to the build line; they simply need to ask for a variance to continue on the existing grandfathered retaining wall for that additional area that extends beyond the build line.

Mr. Thompson: That's correct. They could put the 4' fence behind the front build line, and that's what the next variance is going to be for. This variance was for the 4' fence to be on the concrete wall beyond the front build line.

Mr. Dunn: Obviously no decisions can be made on that because it's not before us, but if we were dealing with this for a 4' fence, would we be asked to decide if allowing them to extend the 4' fence beyond the build line on a grandfathered retaining wall would be a proper variance or not.

Mr. Thompson: Yes, sir.

Chairman Hawk: Can they handle this by going through you, or would they need to come before the board again?

Mr. Thompson: You've already denied it. They can put a 4' fence behind the 35' build line, but you already denied a 4' fence in front of the 35' build line.

Ms. Nghiem: My question to the council is do you see any safety issues with having a retaining wall without a fence on top of it since on one side, it's 4 feet high, and the other is none.

Ms. Tomasic: I don't think this is within the purview of the Board of Zoning Appeals. It needs to stick to whether we are granting or denying the variance. The first variance was denied, and so we need to move on to the next one. I'm not sure that safety outside of the scope of determining the five factors is an appropriate consideration.

Chairman Hawk: We have to address the factors that are before us. We're not making decisions on speculative situations.

Case 39-2019 Thi Nghiem/Owner - Request for a variance to the maximum allowable fence height in accordance with the LDO, Section 16-4-9.3(b)1 in an R-1 District for property commonly known as 3900 W. 120th Terrace.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The applicant has constructed a fence without a permit on top of an existing concrete wall that ranges in height from 55.5 inches to 73 inches. To keep the fence as constructed, a variance for 25 inches will be necessary.

Applicant Presentation:

Thi Nghiem, 3900 W. 120th Terrace, appeared before the Board of Zoning Appeals and made the following comments:

Ms. Nghiem: The variance is for the wrought iron fence, which is at 42 inches right now. We would like to have it at 6 feet.

Mr. Thompson: That's not what the variance is for.

Ms. Nghiem: I thought we could ask for a 6' variance, and that's what we requested in the application.

Mr. Thompson: This variance applies to the remainder of the wood fence that is on top of the wall. The wrought iron has been allowed.

Ms. Nghiem: We would like to make that wrought iron wood to make it consistent.

Mr. Thompson: It's beyond the 35' build line, which has been denied.

Ms. Nghiem: We would cut that corner off. *Inaudible comments* Now that the corner side has been denied, we would have to take the fence out toward the wrought iron, and the variance is to ask for a 6' fence. It's about the coyote. We saw the coyote jump over the fence, so we're trying to make it higher.

Mr. Thompson: That's not what the application was filled out for.

Dr. Peppes: What do we do in this situation? Do we withdraw this, and then they have to come back with another?

Mr. Thompson: They have to get a variance to keep the fence that's there. If they want to do that one, they can come back, but you've already denied a fence beyond the build line.

Chairman Hawk: This is an existing fence.

Mr. Thompson: That fence can remain; they just can't make any changes to it. If they want to build a 6' privacy fence, they would have to get a variance.

Chairman Hawk: We're not talking about the older portion.

Ms. Nghiem: I'm a little confused because I thought we were applying to get the 42" wrought iron to be a wooden, 6' tall fence.

Mr. Thompson: The application was filled out for the wooden portion.

Chairman Hawk: Can you show us?

Mr. Thompson: (*Shows on plan*) You can see the wooden slats that run horizontal are 63 inches tall. With the pergola or whatever is built on top of it, it is a total of 73 inches. They are limited to 48 inches since it's built on top of a retaining wall.

Ms. Nghiem: We're going back to the old grandfathered fence.

Chairman Hawk: We're looking at approval of an existing fence.

Mr. Thompson: That is correct.

Ms. Nghiem: I was putting in an application for a variance for the wrought iron. I'm a little confused.

Chairman Hawk: Did you want to amend your application? Wade has expressed to us that we're looking at the older, existing wood fence.

Ms. Nghiem: We weren't talking about the older wood fence; we were asking for a variance to go along with the corner that has been denied. We were going to wrap it all into one consistent wooden fence. We wouldn't have an iron fence next to a wooden fence. We were going to do it all in one.

Dr. Peppes: Was there a permit for the wooden fence?

Mr. Thompson: No permit.

Dr. Peppes: How old is that fence?

Mr. Thompson: I don't know.

Ms. Nghiem: It's ten years old.

Dr. Peppes: You put that fence up yourself.

Ms. Nghiem: Yes.

Chairman Hawk: It's been there for some period of time.

Mr. Thompson: Correct, but it was still done without a permit.

Dr. Peppes: I think we need some advice. What do we do with this?

Ms. Tomasic: The problem is that you've already denied a variance to go out that far, to build something new there. Really, the first variance included everything they asked for. If they weren't intending to ask for a variance to keep this additional fence, they can withdraw their application, or you can proceed on the application as it is and go through the five factors for what staff's interpretation, which is the remaining fence that is inside the build line. Because the board has already denied the request to have a fence in front of that build line except for what is already there and what is allowed to stay as legal, nonconforming, I don't know that you can go back and grant this additional request because it wasn't part of what they included in their first application. If that's what they were wanting to do, it should have been part of that first application.

Ms. Nghiem: We only had one application, so it was all wrapped into one. We were told because we were dealing with two different issues, it had to become two different variances.

Mr. Thompson: Yes, but you filled out an application for an exception, and that's what turned into the variance. You can only have a 48" fence on top of a wall. That's why that application for an exception turned into a variance.

Ms. Nghiem: I don't understand all the lingo and what is an exception and what is a variance. All I know is in one application, I had to do both. I was told that the way the build line is make it two different topics.

Chairman Hawk: I understand your confusion because we're confused, too. Wade, would you suggest we dismiss this portion? We've already denied the previous case.

Ms. Nghiem: It doesn't make sense to have a hole because of the corner. I would just like some clarity. At this point, if we did a 4' fence not on the retaining wall, do we still have to go through all this? Do we file for a permit? I just would like some guidance?

Mr. Thompson: Because it's legal, nonconforming, they can't change what's there. If they want to build even a 4' privacy fence, it would blend in with the fence that is there and would still require a variance because it's beyond the 35' build line.

Ms. Nghiem: If I leave the retaining wall exposed, which I think is ugly but has been denied, we would leave the section off and build a wooden fence so it all could be cohesive at 4' high. Is that something that is permissible? Do I file for a permit?

Mr. Thompson: Inside the build line, yes.

Ms. Nghiem: We'll have a retaining wall that juts out.

Mr. Thompson: But you can't change the wrought iron.

Ms. Nghiem: I can't change my wrought iron fence to a wooden fence.

Dr. Peppes: Because it's beyond the build line.

Ms. Nghiem: But if we don't go beyond the build line?

Mr. Thompson: But once it's removed, you've removed the legal nonconformity. To place anything back there, you have to have a variance.

Ms. Nghiem: If we cut this portion off and build a fence from that post to the wrought iron and the wrought iron changes to wood, I cannot do that.

Mr. Thompson: Correct.

Ms. Nghiem: Even at 4 feet.

Ms. Tomasic: I think we're getting a little into the weeds. If they want to build a new fence, they would need to go through the permitting process, which they did not do the first or second time. They could sit down and speak with staff on the ins and outs of what can be allowed. I'm not sure that's appropriate for this time. With this second variance, they can either withdraw their application, or the board can vote on the five factors for ultimate approval or denial. They can withdraw; the board cannot just dismiss it.

Ms. Nghiem: We can withdraw from the 6' request, but I would love some clarity on whether we have to go through this all over again.

Mr. Bussing: I understand that. Now is not the time to do that. You need to schedule a time to come in to City Hall and talk to staff so they can lay out all the plans. We're not equipped to do it. Our attorney and Wade aren't equipped to do it tonight.

Mr. Dunn: If any of us were to assure you that if you made X application, we would approve it, our attorney's head would explode probably. That's what you're hearing here. We can't tell you what would be approved if you brought it back.

Ms. Nghiem: I was very confused.

Ms. Tomasic: They have agreed to withdraw. Is the board willing to accept that?

Chairman Hawk: You're withdrawing the application, so you can work with the city to see what your options are.

Case 39-2019 Thi Nghiem/Owner - Request for a variance to the maximum allowable fence height in accordance with the LDO, Section 16-4-9.3(b)1 in an R-1 District for property commonly known as 3900 W. 120th Terrace – withdrawn.

Case 40-2019 Jeff Robinson/Builder; Stephen Bloom/Owner - Request for an exception to the maximum allowable square footage on a lot in accordance with the LDO, Section 16-2-5.3(F) 2a in an R-1 District for property commonly known as 10304 Belinder Road.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The property owner wants to rebuild a home that was destroyed by a fire. The maximum allowable square footage for this lot is 3,555 square feet. The proposed home is 3,920 square feet. An exception for 365 square feet, or 8%, is being requested.

Mr. Dunn: Wade, just so I'm clear, our ordinances say that a variance is up to 20%?

Mr. Thompson: Anything 20% and above requires a variance; anything 19% and below is an exception.

Applicant Presentation:

Jeff Robinson, builder, 8325 Montecello, Shawnee Mission appeared before the Board of Zoning Appeals and made the following comments:

Mr. Robinson: The Bloom family hired us to design a custom home specifically for the lot that they own. The site has some restrictions in terms of the footprint, so they've actually designed a home that has two bedrooms on the main floor and two bedrooms upstairs for the children. We've gone a little bit over on square footage. It's a very nice custom home. During the design, we had certain goals to achieve. One is enough space so that it makes sense to make the investment on the new home. It's a very time-consuming

process helping them get room sizes and so forth at the right size. I wouldn't say we have a very large room count, so to speak, but all of the rooms are adequate in terms of being usable. The main difference is they didn't want to go downstairs; they wanted to go upstairs for the bedrooms. It was a ranch home before on that site. I'm here for questions.

Mr. Munson: Does this meet all the setback requirements?

Mr. Thompson: Yes, sir.

Mr. Bussing: Do you happen to know the square footage on the house on either side?

Mr. Robinson: I don't. I know we're required to give notice to any houses within 200 feet, so we did that.

Mr. Bussing: You said they're ranches on either side?

Mr. Robinson: I don't know for sure. I know this was a ranch at one time.

Dr. Peppes: They've got some other rehabs there.

Mr. Robinson: I'm not sure if it's significant if it's a ranch or a story and a half, but we were contracted to put a house on the lot.

Mr. Dunn: Wade, 3,555 square feet includes the 20% bonus?

Mr. Thompson: It does not.

Mr. Dunn: So, if we allow 20% extra, that's roughly another 700 square feet, which would take it to 4,200. Why isn't 3,920 within that envelope?

Mr. Thompson: It is within that for an exception.

Mr. Robinson: We're 8% over, so we're 12% under the maximum exception without a variance.

Chairman Hawk: They're allowed 20%, but they're only taking 8%. Other interested parties have been advised of the proposal?

Mr. Thompson: Yes, all the letters went out. I did have a chance to speak with two of the neighbors tonight. They may still be here and want to speak.

Chairman Hawk: Any other questions of the applicant? Is there anyone here who wishes to speak for or against the proposal?

Cindy and Dale Parker, 10306 Belinder, appeared before the Board of Zoning Appeals and made the following comments:

Mrs. Parker: Currently, we have a side-entry driveway, and we're concerned about the distance between our driveway and the new footprint. We have a story and a half, and theirs is a story and a half as well. I was just curious that we had not infringed any closer than they were before, and looking at the front sketches, it still looks like it maintains the integrity and appearance of the rest of the neighborhood, so I don't have any other concerns. I just want to verify there is adequate distance between the property lines and the new construction.

Mr. Bussing: You are satisfied that the distances are fine?

Mrs. Parker: I just want to know that it is satisfied. What is the distance between the property line and the outside dimensions of the south end of their property?

Mr. Dunn: As I understand it, we have a formula that says what the build lines are and how far you can build out. Am I correct that they are within the build lines?

Mr. Thompson: Yes, and I was able to share the plans with them to show that they were beyond the 15' side yard setback on the south side.

Mr. Bussing: Mrs. Parker, do you know the approximate square footage of your house?

Mrs. Parker: We're about 2,500.

Chairman Hawk: Any other comments or input from the audience? It looks like a fairly straightforward proposal. This is an exception, so there are no factors to go through.

A motion to approve Case 40-2019 Jeff Robinson/Builder; Stephen Bloom/Owner - Request for an exception to the maximum allowable square footage on a lot in accordance with the LDO, Section 16-2-5.3(F) 2a in an R-1 District for property commonly known as 10304 Belinder Road – was made by Dr. Peppes; seconded by Munson. Motion carried with a unanimous vote of 4-0. For: Munson, Dr. Peppes, Dunn, and Bussing.

Case 41-2019 Schloegel Design Remodel; - **WITHDRAWN** Request for a Variance to the rear build line for the placement of a fence on a through lot in accordance with the LDO, Section 16-4-9.3(D) in an R-1 District for property commonly known as 11908 Mohawk Road.

Case 42-2019 Lina Kushnir Trust/Owner - Request for a Variance that requires a permanently installed generator be placed in the rear yard in accordance with the LDO, Section 16-4-1.3(A) 7, d. in an RP-1 District for property commonly known as 5009 W. 146th Street.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The applicant placed a permanently installed generator without a permit in the side yard, approximately 8 feet from the property line. The LDO requires a permanently installed generator to be placed in the rear yard. A variance to allow the generator to be in the rear side yard is needed for it to remain.

Inaudible comments

Chairman Hawk: Questions from the board? Could we have a little more explanation as to why the generator was placed on the side rather than the rear?

Mr. Thompson: You'll have to ask the applicant because it was done without a permit. It was never inspected. The fuel lines were plastic. Maybe that's what caused this generator to catch on fire.

Chairman Hawk: We're ready for the applicant.

Applicant Presentation:

Phil Klavoon, 10150 North Ambassador Drive, Kansas City, MO, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Klavoon: I have a number of comments to make, some photographs to show, and the permitting record for this property. Let me deal right off the bat with the issue of the permit. This emergency generator, which is about 2 ½ feet tall and about 2 feet wide, was installed in 2009. I assume that the same requirement in 16-4.1.3.7 of the LDO was in effect at that time, which would have required the generator to be within the rear corners of the back of the house. I assume it was in effect at that time. I looked at the ordinance, and there have been a number of changes to that over the years. This goes back to 2009. What we would say about that is Mr. and Mrs. Kushnir hired a qualified, licensed contractor who, at that time, did a substantial job. Basically, it was a finish-out of their basement. They have a beautiful home in Highland Creek subdivision on W. 146th Street. It's a very large home. They hired who they believed was a competent contractor to do that. I think it's fair for residents to assume that a licensed contractor will get the permits that are required. The permit was granted to complete the basement, and it also included the electrical work. I'll show some exhibits of the permit history. We don't know if there wasn't a permit issued. We don't know why there wasn't a permit issued. We hired a competent contractor. That's something they were supposed to do. If they didn't do it and if it was required, that's why we're asking for the variance today. We certainly want it to be in compliance. If we're granted the variance, we'll get a permit and get the inspections.

Let me go into a little bit of what we have here. This emergency generator is located on the west side. You don't see the generator in the photograph because it cannot be seen from 146th Street. (*Shows photos of the generator*) The generator can connect right up to the junction boxes. The reason it is on the side of the house is there is a major underground electrical easement that runs right across the side of the property. The practical difficulty and unnecessary hardship is that because that power line easement

runs along the north-south side of the house, if they put the generator on the back of the house, they would have to run the line from the generator all the way around and then connect it back to the junction boxes for the house. There is a pool house, cabana, and fountain with water going to the fountain. There really isn't anywhere in the section for a temporary generator, even if it could be wired back to the junction box. This was all permitted. We asked the city for copies of the records. This was permitted in 2012, about three years after the generator was put in. The generator being on the side of the house was shown on the plan. We're not saying anybody did anything wrong, but it was shown on the plan that was submitted when it was allowed to put all the constructions on the back of the house. There wasn't anything said at that time. The other side of the house has landscaping, fountain, and construction for a small garden. It would be very difficult to fit anything in there as it exists currently. The wiring to get to those junction boxes would have to go all the way around the sidewalk and come back under to get to the back of the house, if it could even fit in the back of the house with what the city has allowed to be put in the back of the house by permit.

I have some handouts that go into the permitting history briefly (*Hands them out to the board*). The first is the permit application for the pool house, dated July 12, 2012. Page 3 shows the plot plan that was submitted with the application as produced by the city. The permit was issued July 12, 2012. You can see on the plot plan that the generator is shown on the side toward the front of the house. It has the city's land surveyor's seal.

Mr. Bussing: It shows the generator there, but it would have been there for three years already?

Mr. Klavoon: Yes. I'm not saying anything is wrong. This is a permit application for the pool house, but it was submitted to the city, and it was marked for construction, and you can see the generator shown on the plan. Nothing was said, and the pool house was allowed to be built in the rear, which crowded up the back of the house so they couldn't put a generator back there now, particularly with where the power line is.

Mr. Dunn: Not to put words in your mouth, but are you telling us that the city was on notice at that point that the generator was there, and if this issue was brought up at the time, the construction might have been done differently? Is that your point?

Mr. Klavoon: I think that would be well stated. That would be our point. It happened again on March 15, 2013 with the swimming pool itself. We have the same thing. The permit was issued on Page 3. You can see the generator is shown on the side and front of the house on two exhibits. There is a Received stamp on it March 6, 2013 by the City of Leawood Codes Administration. For that very reason, there is a practical difficulty and unnecessary hardship because we were allowed to build, where we might have done it differently in the back. It would have been difficult anyway, considering the location of the utility line because it has to go all the way back around. Then we have the construction of the patio, the walkway, and so on, that have been build since. I just simply wanted to familiarize you with the specs. It says it's 2 ½ feet tall and 2 feet wide. We contacted the HOA for Highlands Creek. I have an affidavit from the secretary of the HOA, Mr. Jim Gardner. Unfortunately, it didn't come in time to make copies of it. He's

aware of the application for a variance. He supports the application for the variance to allow the emergency backup generator located on the side of the home rather than in the back yard. His personal knowledge tells him it's hardly noticeable from the street. He's never heard any complaints about it. He canvassed the other members of the Highlands Creek's HOA board of directors, and they have no objection. Additionally, Mr. Kushnir tells me he received a letter signed by Mr. Alec Sylvestrava, who is the president of the Highlands Creek HOA. They have no objection.

Mr. Munson: Did you verify that this HOA is actually in existence?

Mr. Klavoon: If they're not, they've got two good impersonators. As to the neighbor on the west, we have a letter from Mr. Eric Flotch at 1513 W. 146th Street. They live immediately next door to the west. They say the generator is hardly noticeable, both visually and audibly. They had not noticed it until Mr. Kushnir mentioned it to them. They have no objection to the generator being allowed to remain in the current location. I would state that the generator is not entirely screened. It needs more evergreen trees. If the board sees fit to grant a variance, we will get a permit and get the screening. It's important to the Kushnirs to have this. Mr. Kushnir's mother lives in the neighborhood; his brother lives on the next street over. When the power was out during the recent storm, the whole family came over to his home. It's also important because it serves the public interest to have these generators. If there is an emergency, the folks can get out of the house. If there's a fire, the Fire Department can see easier if there's power and lights are on. As far as the criteria, Uniqueness of the Property is addressed with the location of the utility line, by the permanent improvements, and by the fact that those improvements were permitted by the city when they would have been on record notice that the generator was there and in that location. There is no objection from the neighbors. It's within the spirit of the zoning ordinance, which does allow for emergency generators. The situation was not created through the fault of Mr. and Mrs. Kushnir. They hired a competent contractor who was supposed to get the permit. Apparently, they didn't; there is not a record of it from 2009, but there were subsequent submissions to the city that showed where the generator was and that improved constructions in the rear of the house that would make it a practical difficulty and unnecessary hardship. We don't think they would be able to do it at this point. If they aren't able to have this generator, they're not going to be able to have one. They would lose that investment. At this time, I would like to ask Mr. Kushnir to say a word or two to the board about why they support this application.

Mike Kushnir, 5009 W. 146th Street, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Kushnir: We've had this generator in place for good purpose. We obviously were not aware that this was not permitted work done on our house. We have hired a licensed contractor who does a lot of work in Leawood, whether on his own or part of a company he ran before. He permitted and specified the electrician subcontractor in his permit, who actually did install the generator. It is reasonable to expect that a licensed, respectable contractor with decades of experience would pull all the necessary permits in order to do a particular job. The placement of this particular generator was not decided off the cuff. It

is where KCP&L has terminated or brought their service to. In the basement in this area is where my electric panel is as well. This is where the gas meter is and the electrical meter. It seemed to be the appropriate place. However, at the same time, being conscious about the visibility, the look, and the feel of the neighborhood, I made sure it was in a place that was very well hidden. My neighbors for ten + years had no idea I even had a generator. Neither the visibility nor the noise has ever bothered anybody. Until it began to smoke, nobody even knew I had a generator. My close neighbors knew from seeing the generator kicking in when the lights went out, but other than that, many others who have driven by have never seen it. I made sure it's aesthetically concealed. We could certainly put more bushes in to make sure everything is better. I have approached my HOA and have discussed this with them in great detail. The secretary of the HOA is my neighbor on the other side, and he did not know that I had a generator. He drove past my house for the past twelve years. As far as noise concern and visibility, it doesn't seem to bother anybody in my neighborhood. The positioning was determined by the practicality of it. Because so much construction has been done past that point, it is practically impossible today to relocate that generator to a different location and have to dig up quite a bit of existing landscape and hardscape to achieve that, just to bring the wires all the way to wherever that place may be, which we don't see that it is, and then bring it right back to where it is. It would have to be electrical and gas. The additional hardship in this as well is the easement I have is only about 12 inches from the corner of the walkout. That is where KCP&L has several pipes that feed the electrical service in there as well as gas line and other things in there. There is a lot going on in a very narrow space between my property line and the walkout structure. That is why it was determined to be there. It made much more practical sense to put it where all the connections are. The biggest thing is I was not aware that this was not permitted until it began to smoke and we had to replace it. That's when we went to apply for a permit and were told that the permit was not pulled. I was obviously very disappointed that this was the case. We simply want to replace exactly the same unit that has been there for ten years in exactly the same spot, but permitted properly. We were told we could not permit at that particular spot, even though all other factors have complied: the size, the noise, the capacity, the view from the street. It is just located at the front of the side instead of the back of the side of the house. I would like to thank you for your consideration. I'd be happy to answer questions.

Mr. Munson: What kind of room is in that house closest to your generator in the house to the west?

Mr. Kushnir: It's a master bath, and they have two air conditioners located in nearly the same position as my generator. We have quite the distance between the two: about 50 feet between the houses. The neighbor is the one who provided the letter indicating that he has no issues whatsoever.

Mr. Munson: If this is approved, do we need to make a motion about the landscaping screen, or is that handled by somebody else? In other words, they need to screen it to cut down the noise.

Mr. Thompson: I'm not sure. If you make a motion saying they have to put up some landscaping, then it will be surrounded on four sides by vegetation, and that vegetation might get hot and burn up. I wouldn't want to make that motion saying they need a juniper tree that could catch on fire.

Mr. Munson: I noticed louvres on the front. Is that to exhaust the heat on the generator?

Mr. Kushnir: Yes.

Mr. Munson: So, any screening would have to be X number of feet away from that, or the screening would burn. I read the details about the amount of sound it generates.

Mr. Kushnir: If I may clarify, this generator is connected to gas, but it's not working until it's needed to work. Once a month for about 20 minutes, it kicks in to test itself; that's all.

Mr. Munson: If it does kick in and lights go out, can your neighbors come over?

Mr. Kushnir: Of course they can. I'd be the most popular guy when the lights go out and I have the lights got out with a fridge and microwave. My family is in the neighborhood as well, and I have other family that live nearby. Obviously, all of that would benefit everybody.

Mr. Bussing: Wade, would you explain the staff comment regarding adjacent property owners? You say that per the data sheet, the generator has a sound output of 67 decibels running at normal load, 23 feet from the property line. The ordinance is measured at the property line, so 23 feet from the property line doesn't tell me anything.

Mr. Thompson: That is just the data it provides.

Mr. Bussing: We didn't go out and measure.

Mr. Thompson: Correct. It shouldn't be running. It shouldn't be hooked up. The city requires 60 decibels at the property line. At 23 feet away, it is already 7 decibels over. The property line is only 8-10 feet away.

Chairman Hawk: Would your new generator be quieter?

Mr. Kushnir: I would have to expect so. It's a similar model, but it's newer. We can't connect it to test it, but we could certainly rely on specifications. I think the city has their own specifications, but until it's connected, it's very hard to say.

Mr. Munson: It's not running now?

Mr. Kushnir: It's not connected. It's in place, but we did not connect because we did not receive a permit, and we were clearly told not to do it.

Chairman Hawk: Do you have any concern about a future fire?

Mr. Kushnir: I do not. I really do not understand why we had an issue. It was serviced once a year. I will make sure it's serviced twice a year. A licensed electrician comes out to service it. They clean it and make sure it's properly working. I will definitely do that, but nobody could figure out why it went up.

Mr. Munson: Physically, it's no more obtrusive to me than an air conditioner.

Mr. Kushnir: That's exactly correct.

Mr. Dunn: Wade, if there were no generator there already and they came in to ask for a variance to place a generator in that spot and we approved it, would it then not be staff's job to make sure that it meets all criteria, other than the placement?

Mr. Thompson: Are you talking about the decibels?

Mr. Dunn: Yes.

Mr. Thompson: Yes, we have to go out and verify that it doesn't exceed 60 decibels at the property line. This one is already over at 23 feet away. It will exceed.

Mr. Dunn: What happens, then? If we approve this and it has to meet those criteria and it doesn't, aren't we going to be back here?

Mr. Thompson: No; you would be approving a loud generator to be placed 8-10 feet from the property line. The neighbor to the west may be okay with it now, but the next owner of the property may not.

Mr. Kushnir: If it's not connected and this is a newer model, how do we know?

Mr. Thompson: We're going by the data sheet provided by the maker.

Mr. Klavoon: It would be a new data sheet. That was the one for the existing generator.

Mr. Thompson: No, this data sheet is for the one that's in place. We don't have any documentation of the previous generator.

Mr. Kushnir: This is one of the most common generators being installed around town for houses. If the noise was a really big problem, I'm pretty certain it would not be the most commonly used.

Mr. Munson: When this kicks in, does it stay on until the main power comes back on?

Mr. Kushnir: Yes, sir.

Mr. Munson: So, the noise would be continuous until the power is turned back on.

Mr. Kushnir: Yes, but at the time it's working and I'm the only one who's got the lights, everybody will be coming over and won't care about the noise. During the normal operations, while it's testing, it's only once month for about twenty minutes. When there are no lights, a little bit of noise doesn't really matter.

Mr. Munson: Staff, where would it go if they had to move it?

Mr. Thompson: It would have to go in the rear yard, and the inspector will go out for the final inspection and checks the sound level. The applicant is right; this is a very popular model, but that's why we require it to be in the rear yard. The rear yard setback is 35 feet. It may only be 15 feet from the side yard, depending on where it's placed, but if it didn't pass the decibel level, they would have to come before the board.

Dr. Peppes: This would meet the decibel level with the 35' setback.

Mr. Thompson: It should.

Mr. Kushnir: If we were aware of the permitting before we did any other work in the back yard, we certainly would have complied with all of that. Everything that has been done in my house has been permitted and properly done. Today, it becomes a very difficult, almost impossible task to achieve that.

Mr. Munson: You've been there how long?

Mr. Kushnir: Twelve years.

Chairman Hawk: It took us ten years to determine it was there, and we didn't know about it until there was a fire.

Mr. Kushnir: That is what we said privately but didn't want to say out loud; you did. We also did not know it wasn't permitted. It was really shocking to me when I found out that, as part of the permit, this unit had to have a separate permit.

Chairman Hawk: Is there anyone else who wishes to speak for or against the proposal?

Mr. Klavoon: We did send out about fifteen notices to other property owners, and obviously, not anybody else has come by.

Chairman Hawk: Did staff receive anything else?

Mr. Thompson: Nothing whatsoever.

Neighbor at 5032 W. 147th Street, appeared before the Board of Zoning Appeals and made the following comments:

Neighbor at 5032 W. 147th Street: I received one of the notices, and I wasn't sure exactly what this was about, so I'm here to find out more. Originally, I thought they were installing a new generator, but now it sounds like it was already there. I'm not worried about it at all.

Chairman Hawk: I think we've had a thorough discussion of the process, so I think we're ready to move on unless anyone has more questions or input. The first category is Uniqueness of the Property.

Mr. Dunn: However it came about, the construction at the rear of the house as well as the utility locations are perhaps not unique, but they are important factors that still need to be taken into account. I'm still thinking on this, but I tend to be swayed by the fact that we get these generator requests for placement in other locations on occasion here, and we typically look at factors like that. If this were an application in the first instance, I would be inclined to find that the unique configuration of the house makes placement in the back yard extremely difficult, at the very least.

Chairman Hawk: If it were new construction, they could figure these things in, but that's not what we have here. It's a back yard they certainly could not disturb without creating an expense and hardship.

Mr. Dunn: I was just imagining the generator replacing that fountain in the back. I'm just kidding.

Uniqueness criterion satisfied with a vote of 4-1. For: Munson, Dunn, Hawk, and Bussing. Opposed: Dr. Peppes.

Chairman Hawk: Rights of Adjacent Property Owners.

Mr. Munson: We've had one individual who says it's no problem now, but as Wade points out, that's today. What happens if another person in the future objects? But that's just conjecture. It looks like it's okay.

Mr. Bussing: I'm concerned about the noise. The spec sheets from the generator itself indicates that it would not satisfy our noise ordinances. As our attorney suggested, I don't know about making caveats about adding additional landscaping because it's probably beyond the purview of the board. Maybe they can come back a second time around and demonstrate how the noise can be mitigated with additional landscaping. I'd have to say no right now. The noise issue is probably an issue we need to take seriously.

Mr. Dunn: That's why I asked the question. I'm honestly a little concerned. I've heard Wade say that if we approve this, we're approving it exceeding the noise restriction. If we were approving this to be placed there, anything placed there would have to meet the

noise requirements before it could be placed. That's what I thought would happen if we approve this: it would then be an approved placement of the generator, and it would have to meet the other requirements. I'm not prepared to give a blanket approval for one we already know exceeds the noise requirements. If we knew whatever was placed there had to meet the noise requirements, I wouldn't have that concern.

Chairman Hawk: The only thing about that is these noise requirements are arbitrary, and this generator has been there for ten years.

Mr. Dunn: I know.

Chairman Hawk: It hasn't seemed to be a concern of people. I have a hard time backing out and saying it has to be a certain number if whatever they had there was working.

Mr. Bussing: I would argue the noise requirements are not arbitrary; they're stated in the ordinance as 60 decibels at the property line, and the spec sheet from the generator states that at 23 feet, they are at 67 decibels. I don't think there is anything ambiguous about that at all. Maybe there is a solution to it. If there is, they could come back and see us again. Right now, I'm with Mr. Dunn; I can't approve a blanket "anything goes" with this approval.

Dr. Peppes: Right.

Mr. Dunn: Could we approve this, subject to it meeting the noise restrictions of the ordinance?

Mr. Thompson: Yes, if you think it meets the criteria, you can approve it and place that caveat on it.

Ms. Tomasic: I think I would just be clear in your ultimate approval if you get there that you are approving the location, but not a specific unit, which would maybe also protect if you just approve any generator, but then they replace it with a different one. You have to remember, it runs with the land, so you want to make sure you have those stipulations that you are just approving the variance for the one specific part of the code, which is where it's placed, and not a blanket variance for all the other restrictions that it has to abide by, especially since it runs with the land. If there's another owner after this who wants to upgrade, he could then potentially get one that is twice the size.

Mr. Dunn: If I could restate, approval of the variance is only for the location; all other requirements of the ordinances would have to be met.

Ms. Tomasic: I think you could make that the motion.

Mr. Munson: It would have to be met before it could be turned back on?

Mr. Dunn: Before it could be operated, yes.

Chairman Hawk: Would the board approve Rights of Adjacent Property Owners with the stipulation that we are only approving the replacement, but other requirements based on noise and decibels are not.

Mr. Bussing: Mr. Chairman, I think we need to do that in the motion to approve and not here.

Chairman Hawk: Let's keep it clean, then.

Rights of Adjacent Property Owners criterion satisfied with a vote of 3-1. For: Munson, Dunn, and Bussing. Opposed: Dr. Peppes.

Chairman Hawk: Hardship.

Mr. Bussing: As the property owners indicated, placing the unit in an area that would be consistent with the ordinance would be certainly difficult. As the attorney laid out, the city had three opportunities to identify the improper location of the generator while construction of all the landscaping was going on in the back. I don't feel that the homeowner should be punished for failure of the original electrician to get a permit or the lack of awareness of the city staff at the time that the generator was not where it was supposed to be. I don't think it should be their hardship.

Mr. Dunn: I agree.

Dr. Peppes: I totally disagree. A permit wasn't pulled for this. An inspection was never done for this. A generator has been there for ten years that has not been inspected. I don't think it can be met, and I don't think it's the city's responsibility to make sure everybody has had a permit that should have had a permit to begin with. As we see here night after night after night, people come in with cases that they want to do something with because a permit wasn't pulled the first time. That's the responsibility of the person who lives in the city with the ordinances to be able to abide by them. Even though you can support this, I can't at all.

Mr. Thompson: I'd like to add that we heard on several occasions that a reputable electrician was hired. I don't think a reputable electrician would have run a gas line with plastic wrapped in basically electrical tape.

Mr. Kushnir: I hired a general contractor; he hired the electricians. He was responsible for who he hires and what they do. Them being reputable, they still work in Leawood; they still build homes; they still do a lot of remodels, and they have done that for the past several decades. They permitted this particular electrician in this permit; they specified him. They are responsible for hiring them, not me. I would expect the general contractor to be aware of what is being done. He's got a supervisor who comes in daily or every two days to make sure everything is being properly done. I was not aware. That's not my specialty. I hire specialty people, and they seem to have let me down in this situation. Thank you.

Chairman Hawk: I think we're ready for the question.

Hardship criterion satisfied with a vote of 3-2, including an affirmative vote from the Chair. For: Dunn, Bussing, and Hawk. Opposed: Munson and Dr. Peppes.

Chairman Hawk: Public Safety and General Welfare.

Mr. Bussing: I think my position here would be as long as we're only addressing the location of the generator, it isn't affected. Again, my predicate is that all other aspects of the ordinance have to be complied with: noise, proper electrical connections, proper gas connections, etc.

Mr. Dunn: I agree.

Public Safety and General Welfare criterion satisfied with a unanimous vote of 4-0. For: Munson, Dr. Peppes, Dunn, and Bussing.

Chairman Hawk: Spirit and Intent.

Mr. Munson: According to the ordinance itself, this doesn't meet that because it's supposed to have generators in the rear yard, as far away from neighbors as possible. It doesn't meet those criteria.

Spirit and Intent criterion satisfied with a vote of 3-2, including an affirmative vote from the Chair. For: Dunn, Bussing, and Hawk. Opposed: Munson and Dr. Peppes.

Chairman Hawk: Mr. Dunn, would you like to make the motion with the caveat you suggested since we have voted in the affirmative on all five factors?

A motion to approve Case 42-2019 Lina Kushnir Trust/Owner - Request for a Variance that requires a permanently installed generator be placed in the rear yard in accordance with the LDO, Section 16-4-1.3(A) 7, d. in an RP-1 District for property commonly known as 5009 W. 146th Street – with the additional comment that the variance applies to the location of the generator only; in all other aspects, the generator must meet the standing city requirements with regard to noise, electrical connection, gas connection, permitting, and inspection – was made by Bussing; seconded by Dunn. Motion carried with a vote of 3-2, including an affirmative vote from the Chair. For: Dunn, Bussing, and Hawk. Opposed: Munson and Dr. Peppes.

MEETING ADJOURNED.